IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Montana Democratic Party, Mitch Bohn,

Plaintiffs,

Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe,

Plaintiffs,

Montana Youth Action; Forward Montana Foundation; and Montana Public Interest Research Group

Plaintiffs,

v.

Christi Jacobsen, in her official capacity as Montana Secretary of State,

Defendant.

Consolidated Case No. DV 21-0451

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Montana Democratic Party ("MDP") and Mitch Bohn (together, "MDP Plaintiffs"); Western Native Voice ("WNV"), Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes ("CSKT"), Fort Belknap Indian Community, and Northern Cheyenne Tribe, (together, "WNV Plaintiffs"); and Montana Youth Action ("MYA"), Forward Montana Foundation, and Montana Public Interest Research Group (together, "MYA Plaintiffs") (collectively "Plaintiffs") submit this combined response to the motion for summary judgment filed by Defendant Montana Secretary of State Christi Jacobsen (the "Secretary").[1]

INTRODUCTION

Long before discovery is complete—and before her own witnesses have been deposed—the Secretary moved the Court to find that no genuine dispute of material fact exists in this case. But even though significant discovery remains outstanding, the evidence in this case already establishes numerous disputes of material fact that preclude summary judgment in the Secretary's favor.

In particular, Plaintiffs have adduced overwhelming evidence that the laws challenged in this case (the "Challenged Restrictions") severely burden the fundamental constitutional rights of Montana voters, and in particular, that they disproportionately burden the rights of especially disadvantaged subgroups. Meanwhile, there is scant evidence in the record of *any* genuine state interest, let alone a compelling one, and certainly nothing indicating that any Challenged Restriction is narrowly tailored to further any such interest. Even so, the evidence establishes genuine disputes about the extent, genuineness, and relevance of the asserted interests.

Given the incomplete record, the Secretary's motion is premature. But more importantly, it fails because the Secretary comes nowhere close to meeting her summary judgment burden. Plaintiffs' factual and expert witnesses, combined with substantial documentary evidence, create

[1] In the interest of brevity, Plaintiffs will not retread all the same ground they covered in their briefs in support of their preliminary injunction motions. Plaintiffs incorporate by reference the background sections from those briefs, which provide more context about Montana's long history of secure and accessible elections, election day registration, voter ID, and organized ballot assistance. *See* MDP's PI Br. 1-16; WNV's PI Br. at 1-8; MYA's PI Br. at 2-8. This brief also does not address the Secretary's contentions regarding House Bill 506, which MYA Plaintiffs separately challenge in a cross-motion for summary judgment.

genuine factual disputes that cannot be resolved on summary judgment in favor of the Secretary. For these reasons, and for the reasons set out in Plaintiffs' preliminary injunction briefing, this Court should deny the Secretary's ill-timed motion.

BACKGROUND

I. HB 176 and Election Day Registration

House Bill 176 ("HB 176") eliminated Montana's popular and turnout-driving election day registration ("EDR"), which had been in place since 2006, despite extensive testimony detailing how Native Americans, students, the elderly, and disabled and low-income voters have come to rely on EDR to vote, and even though Montanans firmly rejected elimination of EDR by referendum only seven years ago. *See* MDP's PI Br. at 1-8; WNV's PI Br. at 5-6.

II. SB 169 and Voter Identification.

Senate Bill 169 ("SB 169") ended Montana's two-decade long practice of allowing voters to show out-of-state driver's licenses or Montana college or university IDs at the polls. *Compare* § 13-13-114(1)(a), MCA (2005), *with* § 13-13-114(1)(a), MCA. SB 169 relegated those identification documents to second-tier status: voters can no longer use out-of-state drivers' licenses or Montana college or university ID cards unless they present additional documentary proof of their identity. § 13-13-114(1)(a), MCA. SB 169 simultaneously elevated other forms of ID that young voters are less likely to possess—including Montana concealed-carry permits, which Montana voters can now use to vote without presenting any additional identifying information. *Id*.[2]

III. HB 530 and Organized Ballot Assistance.

House Bill 530 ("HB 530") effectively bans organized absentee ballot assistance efforts by prohibiting ballot assistance performed in exchange for a "pecuniary benefit." MDP Ex. 11. HB 530 specifically prohibits a person who "distribute[s], order[s], request[s], collect[s], or

[2] Although the Secretary states that voters may use their voter registration confirmation in combination with certain photo IDs to prove their identity at the polls, the Legislature affirmatively removed "notice of confirmation of voter registration" from the list of qualifying evidence of identity. *See* MDP Ex. 9.

deliver[s]" ballots from receiving a "pecuniary benefit" and imposes a $100 civil penalty for each violation. Although HB 530 does not define "pecuniary benefit," it carves out from its prohibition certain paid employees—including election officials and mail delivery service employees—who, in the scope of their employment, help voters request or return absentee ballots. *Id*. But it does *not* exclude paid staff members of organizations who, in the scope of their employment, help voters request or return absentee ballots. *Id*. Thus, in addition to banning ballot assistance by individuals hired for that purpose, the lone definition embedded in the ballot assistance ban indicates that even salaried staff members of organizations—including those who comprise Plaintiffs—may not assist voters with their absentee ballots.

LEGAL STANDARD

Summary judgment is proper only where no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). As the party seeking summary judgment, the Secretary "bears the burden of initially establishing the *complete absence* of a genuine issue of material fact." *Prindel v. Ravalli Cnty.*, 2006 MT 62, ¶ 19, 331 Mont. 338, 347, 133 P.3d 165, 173 (emphasis added). To satisfy this burden, the Secretary must make a clear showing, using admissible evidence, "as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact." *Frazer Educ. Ass'n, MEA/FEA v. Bd. of Trs., Valley Cnty. Elementary Sch. Dist. No. 2*, 256 Mont. 223, 225, 846 P.2d 267, 269 (1993); *see also* Mont. R. Civ. P. 56(e)(1).

Summary judgment is an "extreme remedy." *Fulton v. Fulton*, 2004 MT 240, ¶ 6, 322 Mont. 516, 517–18, 97 P.3d 573, 575. Thus, in evaluating such a motion, "the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn therefrom in favor of the party opposing summary judgment." *Montanans for Equal Appl. of Initiative L. v. State ex rel. Johnson*, 2007 MT 75, ¶ 15, 336 Mont. 450, 454, 154 P.3d 1202, 1205 (internal quotation marks omitted); *see also 360 Ranch Corp. v. R & D Holding*, 278 Mont. 487, 491, 926 P.2d 260, 262 (1996) ("[I]f there is any doubt regarding the propriety of the summary judgment motion, it should be denied.").

ARGUMENT

Even without viewing the evidence in the light most favorable to Plaintiffs and drawing all reasonable inferences in their favor, there are genuine disputes of material fact regarding the burdens imposed by the Challenged Restrictions and the interests that the Secretary claims they serve. As a result, the Secretary's motion should be denied.

Specifically, the Secretary's motion fails for at least two reasons. First, the Secretary does not even attempt to meet her burden of showing a lack of genuine dispute about whether the Challenged Restrictions can survive strict scrutiny, as required by the Montana Constitution. By focusing her efforts on arguing for a lower standard of review not supported by Montana authority—and thus presenting no reasoned argument as to how the Challenged Restrictions can survive strict scrutiny—the Secretary tacitly admits that they cannot.

Second, even if the Court were to consider the motion under the standard of review advocated by the Secretary, genuine material factual disputes preclude summary judgment. The Secretary would have the Court discount—or even entirely ignore—the substantial evidence of the burdens the Challenged Restrictions impose on Montana's most vulnerable populations.

I. The Secretary makes no showing that the Challenged Restrictions can survive strict scrutiny or even *Anderson-Burdick*.

As she has throughout this litigation, the Secretary again asks the Court to depart from longstanding Montana precedent establishing that restrictions on the right to vote are strictly scrutinized by Montana courts, arguing instead for the federal *Anderson-Burdick* test. Def. Br. at 14-19. The Secretary is wrong on this point, but at any rate, her motion should be denied regardless of which standard is applied.

The Montana Supreme Court has been clear: laws that implicate fundamental rights, including the right to vote, are subject to strict scrutiny. *See State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 113 P.3d 281 ("A right is 'fundamental' under Montana's Constitution if the right . . . is found in the Declaration of Rights"); *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (statutes that implicate fundamental rights

"must be strictly scrutinized"); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445 (applying strict scrutiny to determine whether law that implicated a fundamental right violated equal protection); *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 23, 314 Mont. 314, 65 P.3d 576 (applying strict scrutiny to voting restriction); *see also Driscoll v. Stapleton* ("*Driscoll I*"), No. DV 20 408, 2020 WL 5441604, at *6 (Mont. Dist. Ct. May 22, 2020) *aff'd in part, vacated in part* by *Driscoll v. Stapleton* ("*Driscoll II*"), 2020 MT 247, 401 Mont. 405, 473 P.3d 386. Laws implicating fundamental rights "can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Mont. Env't Info. Ctr.*, ¶ 63.

The Secretary does not—and cannot—make the case that she is entitled to summary judgment under strict scrutiny. Indeed, she does not even attempt to make the required showing that the record undisputedly shows that the Challenged Restrictions are narrowly tailored to advance a compelling state interest. Consequently, if this Court heeds precedent and applies strict scrutiny, her motion must fail.

Instead, the Secretary argues for application of the federal *Anderson-Burdick* framework. In response to the Secretary's argument for application of *Anderson-Burdick* to right to vote claims less than two years ago, the Montana Supreme Court expressly declined to "set forth a new level of scrutiny." *Driscoll II*, 2020 MT 247, 401 Mont. 405, 416, 473 P.3d 386, 393 ¶ 20. Even so, the *Anderson-Burdick* test "requires strict scrutiny" when, as here, "the burden imposed [by the law] is severe." *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). And even state regulations that do not impose "severe" burdens on the right to vote are subject to exacting forms of scrutiny, requiring the State to "articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is *actually necessary*, meaning it actually addresses, the interest put forth." *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 545 (6th Cir. 2014), *vacated on other grounds*, *Ohio State Conf. of NAACP v. Husted*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) ("*Ohio NAACP*") (emphasis added). Even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 538 (quoting

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008)). For example, in *Guare v. State*, the New Hampshire Supreme Court—which has adopted its own version of the *Anderson-Burdick* balancing test—applied a heightened form of scrutiny to "significant, but not severe" voting restrictions that is similar to the intermediate tier of scrutiny employed by the Montana Supreme Court for certain types of restrictions on constitutional rights. 167 N.H. 658, 665–66 (2015); *see also Snetsinger*, 2004 MT 390, ¶ 18 (applying "middle-tier scrutiny" if the law or policy affects a right conferred by the Montana Constitution that is not found in the Declaration of Rights).

The Secretary omits any mention of these cases, perhaps because they require much more than what she asserts in defense of the Challenged Restrictions; she provides only vague or hypothesized state interests, overbroad generalizations, and post-hoc justifications invented in response to litigation. *Cf. Guare*, 167 N.H. at 667. But to satisfy even the less strict standard she seeks to apply, the Secretary must show that the voting restrictions at issue are "actually necessary" to serve state interests: to do this, she must proffer evidence first, that the specific problem that purportedly justifies the restriction exists, and second, that the restriction "actually addresses" the state's interest by effectively targeting the alleged problem. *See, e.g., Ohio NAACP*, 768 F.3d at 547 (state failed to show its concern about a type of voter fraud was "logically linked" to restrictions on early voting and registration); *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (finding that state's failure to offer evidence that election officials struggled with eliminated early voting period fatally undermining asserted "vague interest" in smooth election administration). The Secretary has not done this here—and indeed, she cannot.

Nor can the Secretary evade scrutiny under a balancing test by attempting to downplay the burdens imposed upon subgroups of marginalized voters. In assessing the severity of a law's burden on voting rights, courts must consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016). A burden is more severe when it disproportionately falls upon populations who already face obstacles to participation and are less likely to overcome the increased costs of participation. *See*

Ohio NAACP, 768 F.3d at 545 (finding significant burden that disproportionately impacted African American, lower-income, and homeless voters). To be unconstitutionally burdensome, a law need not completely prevent citizens from voting. Rather, the focus of the inquiry is on how the affected voters' "ability to cast a ballot is impeded by [the State's] statutory scheme." *Id.* at 541; *see also Obama for Am.*, 697 F. 3d at 433 (burden was not "slight" where challenged practice did not "absolutely prohibit early voters from voting"); *Guare*, 167 N.H. at 665 (confusing language on voter registration form imposed at least unreasonable burden because it "*could* cause an otherwise qualified voter not to register to vote") (emphasis added). Laws that threaten disenfranchisement impose a severe burden even when a relatively small number of voters is affected. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots comprising less than 0.3 percent of total votes inflicted "substantial" burden on voters); *Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding severe burden where 3,141 individuals were unable to register).

The Secretary offers no admissible evidence that the Challenged Restrictions are narrowly tailored to a compelling state interest, nor has she proffered any support to show the restrictions are "actually necessary"—which is to say, that the restrictions actually address Montana's expressed concerns about election integrity, efficiency, and uniformity. The failure to make this showing is fatal to the Secretary's motion.

II. Under any test, the evidence establishes that the Challenged Restrictions burden Plaintiffs' constitutional rights.

Plaintiffs have already produced voluminous evidence demonstrating that they and their members' constitutional rights will be severely burdened by the Challenged Restrictions. This evidence is more than sufficient to establish a genuine dispute that precludes summary judgment.

Even if the Secretary were right that a balancing test (rather than strict scrutiny) applies—and she is not—she would still have to establish the absence of any dispute of fact about the extent of the burden imposed and the state interest furthered by the Challenged Restrictions. Under *Anderson-Burdick*, "a reviewing court weighs the 'character and magnitude' of the plaintiffs'

asserted injury against the 'precise interests' the state puts forward to justify the challenged rule and considers the 'legitimacy and strength' of those interests and the necessity of any burden on the plaintiffs." *Driscoll II*, 2020 MT 247, 401 Mont. 405, 416, 473 P.3d 386, 393 ¶ 19 n.4 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570 (1983)). These are factual issues. *See, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) (declining to assess importance of state interest absent a factual record because the "existence of a state interest… is a matter of proof"); *Feldman v. Az. Secretary of State's Office*, 843 F.3d 366, 387 (9th Cir. 2017) ("whether an election law imposes a severe burden is an intensely factual inquiry") (internal quotations omitted); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 112 (2d Cir. 2008) (concluding, based on factual record "that the state's proffered reasons have such infinitesimal weight that they do not justify the burdens imposed"); *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993) ("The existence of a state interest . . . is a matter of proof."); *One Wis. Inst., Inc. v. Nichol*, 155 F. Supp. 3d 898, 905 (W.D. Wis. 2015) (burden of challenged law on right to vote is question of fact).

A. HB 176 burdens Plaintiffs' constitutional rights.

The record evidence shows that HB 176's elimination of EDR infringes Plaintiffs' and other Montanans' fundamental right to vote. Because those burdens fall disproportionately on Native, low-income, elderly, disabled, and young voters, HB 176 also violates Plaintiffs' and other Montanans' right to equal protection. Accordingly, there are at minimum plainly contested issues of material fact that are fatal to the Secretary's motion for summary judgment.

Since the enactment of EDR in Montana nearly two decades ago, 70,255 Montana voters have registered on election day. Mayer Rep. at 9. In fact, more than 7 percent of currently registered voters have registered to vote on election day at some point since 2008. *Id.* at 13. Election day is the single most popular day for registration: in almost every election since 2006, the number of Montanans who registered on election day nearly matched the number who registered during the 29 other days of late registration combined. *Id.* at 10-11, 13; *see also* Street Rebuttal Rep. at 8 (noting there are "approximately 23 times as many registrations on Election Day as there were during the average pre-election day under [same-day registration]."). And

EDR's popularity has only grown over time: by 2016, over 12,000 Montanans registered to vote on election day, and every county in the state registered voters on election day. Mayer Rep. at 10-11, 13.

EDR isn't just popular—it is "the ultimate failsafe" for voters who might not otherwise be able to vote, at least according to one former Montana Secretary of State.[3] That is because EDR reduces the cost of voting by combining both registration and voting into a single administrative step, and it allows voters who are not activated early in the election period the opportunity to register and vote when attention to the election has peaked. *See* Mayer Rep. at 9; Street Rebuttal Rep. at 6 & n.12. EDR also allows voters to correct errors in their voter registration information of which they may be entirely unaware. *See* Bogle Decl. ¶¶ 3-4; *cf.* Denson Decl. ¶¶ 4-5 (explaining how voter was unable to vote because, through no fault of her own, her registration had not been processed and because EDR had been eliminated). As one senator noted, "story after story" describes instances where Montanans "do everything right" when registering to vote at the DMV, but the DMV clerk failed to transfer the voter's registration form to election officials or failed to do so on time. MDP Ex. 15 (transcript of Senate State Admin. hearing) at 41:15-25. Without the ability to correct those mistakes on election day, those voters cannot cast their ballots and have them counted without facing additional burdens that could further impede their ability to successfully vote. *See* Semerad Decl. ¶¶ 4, 9; Seaman Decl. ¶ 3.

The depressive effects on voter turnout caused by the elimination of EDR are established by decades of political science research and are confirmed by Montanans' use of EDR. Research consistently shows that EDR is uniquely effective at increasing voter turnout, boosting it by 5 percent on average. Mayer Rep. at 10; *see also* Street Rebuttal Rep. at 5 (scholarly findings that "EDR tends to increase turnout, and, correspondingly, that eliminating EDR is likely to reduce turnout . . . are among the more consistent in the political science literature on voting."). In Montana, EDR has boosted turnout by nearly 1.5 percentage points. Mayer Rep. at 10. And its

[3] Lisa Baumann, *Ending Election Day registration sees little support,* Great Falls Tribune, (Oct. 19, 2014, 4:17 PM), https://www.greatfallstribune.com/story/news/local/2014/10/19/ending-election-day-registration-sees-little-support/17583087/.

elimination has *already* disenfranchised dozens of otherwise-eligible voters who attempted to cast their ballots in the 2021 municipal elections: during a low turnout, off-year, local election, which only two-thirds of Montana's counties even held, at least 58 voters were unable to vote because of the elimination of EDR. Miller Decl. ¶¶ 14, 21; *see also* Seaman Decl. ¶ 8; Semerad Decl. ¶ 7; Bertelsen Decl. ¶¶ 7-10; Bogle Decl. ¶ 8; Denson Decl. ¶¶ 4-5; Zaluski Decl. ¶¶ 5-7. During higher turnout elections, the number of voters disenfranchised by the elimination of EDR will undoubtedly be much higher and is likely to be in the thousands. *See* McCool Rep. ¶ 60 & tbl. 28 (noting that 6,547 voters used EDR in 2008, 12,055 voters in 2016, and over 8,000 voters in both 2018 and 2020); *see also* Street Rep. ¶¶ 20-23 & fig.1-2 (same).

Those depressive effects fall heaviest on those who have traditionally faced unique challenges to exercising their right to vote—elderly, disabled, low-income, rural, young, and Native voters. Elderly and disabled voters, for instance, often require special transportation, accessible voting machines, and assistance requesting, completing, and returning their voter registration forms, absentee ballot applications, and ballots. *See* Franks-Ongoy Decl. ¶¶ 9, 11-19; MDP Ex. 15 (transcript of Senate State Admin. Hearing) at 7:17, 9:18. These voters, and the organizations that assist them, rely on EDR to allow voters to register and vote in a single trip. *See* Franks-Ongoy Decl. ¶¶ 22-23; MDP Ex. 15 (transcript of Senate State Admin. Hearing) at 31:1-7. For these reasons, EDR is as a "godsend" for disabled voters. MDP Ex. 15 (transcript of House State Admin. Hearing) at 20: 16-18.

Perhaps no segment of Montana voters is more burdened by the elimination of EDR than Native voters in rural tribal communities. A panoply of socioeconomic factors—including higher poverty and unemployment rates, worse health outcomes, worse educational outcomes, less internet access, less stable housing, higher homelessness rates, and overrepresentation in the criminal justice system—make it more difficult for Native voters in Montana to cast their ballots. McCool Rep. ¶¶ 12-54. Additionally, Native Americans in Montana are more geographically isolated, less likely to have access to a car or gas money, and more likely to live farther away from their registration sites than the general population. Horse Aff. ¶¶ 20-21, Gray Aff. ¶¶ 7, 9-10;

McDonald Aff. ¶ 4; Spotted Elk Aff. ¶ 9; Weichelt Rep. ¶¶ 16, 23, 29, 51; McCool Rep. ¶¶ 160, 165. Because of these obstacles, Native voters living on reservations in Montana disproportionately use EDR compared to non-Native voters, Street Rep. ¶ 4, and consequently will be burdened more greatly by the elimination of EDR.

HB 176's impact also extends to low-income, rural, and working voters who rely on EDR to register and vote in one stop without requiring additional time off work. *See, e.g.*, MDP Ex. 15 (transcript of House State Admin. Hearing) at 32:2-12. Get-out-the-vote efforts on election day provide many of these voters greater access to transportation to the polls. *See* Bolger Decl. ¶ 7. Moreover, while electors can register to vote only during standard working hours on other days, § 13-2-201, MCA, EDR allows voters to register and vote until 8 PM on election day. Those additional hours provide low-income, rural, and working voters a meaningful opportunity to register and vote. *See* Bertelsen Decl. ¶¶ 7-10.

Young voters too would be severely burdened by HB 176. They are more likely to need to register for the first time in advance of any particular election, and more than half of voters who register on election day are likely registering in Montana for the first time. Mayer Rep. at 14. Young people also move frequently. *See, e.g.*, Roche Decl. ¶ 8; Reese-Hansell Decl. ¶¶ 7–8, 16; Denson Decl. ¶¶ 2, 3; MDP Ex 15 (transcript of House State Admin. Hearing) at 21:9-15. For these reasons, young voters disproportionally rely on EDR: voters aged 18-24 make up 10.4 percent of registered voters but account for 31.2 percent of those who have registered on election day. Mayer Rep. at 13. And while the average age of registered voters in Montana is greater than 50 years, the average age of election day registrants is 17 years younger. *Id.*[4]

The Secretary would have the Court ignore the burdens the Challenged Restrictions place on specific groups of Montana voters. But even under the Secretary's preferred *Anderson-Burdick*

[4] HB 176's burdens are not allayed, as the Secretary's affiant Austin James suggests, by failsafe mechanisms, such as provisional ballots. *See* James Aff. ¶¶ 6-16. By requiring voters to make additional in-person trips to perfect their ballots, these alternatives impose their own burdens, rather than mitigating those imposed by the elimination of EDR. *Cf. Priorities USA v. State*, 591 S.W.3d 448, 454 (Mo. 2020) (holding that Missouri's affidavit exception to voter ID law, which required voters to execute an affidavit and present non-photo identification, unconstitutionally burdened the right to vote).

standard, courts are directed to specifically consider the effects of the challenged voting legislation on the voters who are actually affected, not the entire population of voters as a whole. *See, e.g.*, *Driscoll I*, No. DV 20-408, 2020 WL 5441604, at *6; *Anderson*, 460 U.S. at 792-94 (holding that "it is especially difficult for the State to justify a restriction that" imposes disparate burdens on identifiable groups of voters, including those who share an economic status); *Pub. Integrity All.*, 836 F.3d at 1024 n.2 (holding that courts must consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"); *Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 116-18, 121-28 (D.D.C. 2020) (finding postal policy did not survive *Anderson-Burdick* where is "place[d] an especially severe burden on those who have no other reasonable choice than to vote by mail"); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216-1217 (N.D. Fla. 2018) ("Disparate impact matters under *Anderson-Burdick*."). Indeed, courts consider the burden of a challenged restriction to be greater when it disproportionately falls on populations who already face greater hurdles to participation. *See, e.g.*, *Ohio NAACP*, 768 F.3d at 545 (finding significant burden where that burden fell disproportionately on African American, lower-income, and homeless voters likely to use the voting opportunities eliminated by challenged law).

The Secretary glosses over Plaintiffs' evidence of burden, instead focusing her argument on the absence of evidence of a clear discriminatory purpose. *See* Defs.' Br. at 30-33. But this is a distraction: when a law unconstitutionally burdens a fundamental right, and that burden falls disproportionately on certain segments of the population, a discriminatory motive is not required. *See, e.g.*, *Snetsinger*, 2004 MT 390, ¶ 17 (noting that, if alleged differential treatment implicates a fundamental right, challenged provision can only survive if the State can show that law is "narrowly tailored to serve a compelling government interest"). Even if Plaintiffs were required to show that HB 176 was enacted to burden Montana's most vulnerable voters, there is at minimum a genuine factual question about the motive for the bill. The Legislature was aware of the disparate negative burdens of HB 176 when it was enacted. *See* MDP Ex. 15 (transcript of House State Admin. Hearing, Killsback Test.) at 42:9-19 (explaining that EDR alleviates burdens on Native

voters connected to travel costs and distance to polling locations); *id.* (Sunchild Test.) at 17:5-18 (explaining why EDR is so important to Montana's Native voters, including because they have a tradition of voting in person and must overcome long distances to travel); *see also* Rate Aff. ¶ 9. Despite that knowledge, the Legislature intentionally repealed a critical voting failsafe for these discrete groups. The legislative history thus suggests intentional discrimination against Native voters, and to the extent that the Secretary objects to this conclusion, that objection alone precludes summary judgment. *See Prindel*, 2006 MT 62, ¶ 19.

B. SB 169 burdens Plaintiffs' constitutional rights.

Plaintiffs have similarly adduced ample evidence that SB 169's voter ID restrictions burden the fundamental right to vote. Because those burdens fall disproportionately on Montana's youngest voters, the voter ID restrictions also violate equal protection. At minimum, the evidence creates clear disputes of material fact.

For more than two decades, Montana allowed voters to prove their identity with one of several forms of "primary" IDs, including out-of-state driver's licenses and Montana college or university IDs. § 13-13-114(1), MCA (2005). If voters could not provide qualifying photo ID, they could instead provide any one of several categories of "secondary" identifying documents, such as "a current utility bill, bank statement, paycheck, notice of confirmation of voter registration . . . government check, or other government document that shows the elector's name and current address." *Id.*

SB 169 downgraded the use out-of-state drivers' licenses and Montana college or university ID cards for the purpose of casting a regular ballot. § 13-13-114(1), MCA. Now, voters cannot use those forms of ID unless they also present additional proof of their identity. *Id*. SB 169 also removed voter registration confirmations from the list of documentary evidence that can be used as additional proof of identity. *Id.* Simultaneously, SB 169 elevated other forms of ID—including a Montana concealed carry permit—which Montana voters can now use to vote without presenting any additional identifying information. *Id.*

By devaluing out-of-state drivers' licenses and student IDs, the voter ID restrictions unconstitutionally burden the right to vote of Montana's youngest voters, who are less likely to have one of the "primary" forms of identification that SB 169 requires. *See* Dozier Decl. ¶ 3; Reese-Hansell Decl. ¶¶ 7-9; Sinoff Decl. ¶ 5. Only 71.5 percent of Montanans aged 18-24 have a Montana driver's license, compared to 94.7 percent of Montanans aged 18 or older. Mayer Rep. at 15. In fact, in the 2016 election, 21 percent of registered American voters between the ages of 18 and 29 did not vote because they did not have an acceptable form of ID. Bromberg Rep. at 24-25.

Students are also less likely to have one of the additional "secondary" forms of ID. Mayer Rep. at 15; Bromberg Rep. at 25; *see also* Dozier Decl. ¶ 11; Reese-Hansell Decl. ¶ 9; Sinoff Decl. ¶ 5. Students living on-campus or in shared living situations do not receive utility bills, their bank statements are often sent to their permanent addresses, most have no reason to have received a check from the government, and many do not have a job for which they receive paychecks. Mayer Rep. at 15; Bromberg Rep. at 25; *see also* Dozier Decl. ¶ 11.

In contrast, young voters are far more likely to have college or university IDs, which are integral to the student experience. *See* MDP Ex. 20 (transcript of House State Admin. Hearing, Katjanastutzer Test.) at 11:1-14. At MSU, for example, student ID cards serve as meal cards, library cards, and laundry cards, as well as keys to residence halls, academic buildings, recreational and fitness centers, computer and math labs, and student health services. MDP Ex. 22 (MSU Website). Students may even use their ID cards as debit cards at various locations on campus, and for entrance into college football games. *Id.* Student IDs are so ubiquitous for young voters that many rely on them as their sole or primary form of identification. *See* Dozier Decl ¶¶ 7–9; Reese-Hansell Decl. ¶¶ 8–11. Transgender students, in particular, are more likely to rely on student IDs as their primary form of ID because the process for obtaining a gender-affirming driver's license or state ID card is lengthier, more difficult, and more intrusive than the process for obtaining a gender-affirming student ID. Reagor Decl. ¶¶ 6-10, 13.

Contrary to Defendant's unsupported claim that SB 169's burdens would apply to "few qualified voters," Def. Br. at 24, the evidence shows that these restrictions are likely to affect thousands of qualified, young, Montana voters. There are over 10,000 out-of-state college students in Montana, and those students are significantly less likely to have a Montana driver's license and will thus be particularly disadvantaged. Mayer Rep. at 15-16.

Because the voter ID restrictions disproportionately impact Montana's youngest voters, they also violate equal protection. The Secretary claims that Plaintiffs cannot establish unequal treatment of young voters without assigning an age range to that category of voters. Def. Br. at 13, 31. But the first step of the equal protection analysis merely requires "identify[ing] the classes involved and determin[ing] if they are similarly situated." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P. 3d 1211. Thus, the class need only be defined "in a way which will effectively test the statute without truncating the analysis." *Id.* ¶ 34. Here, because the voter ID restrictions disproportionately impact young voters, they "create[] two classes out of similarly situated persons, distinguished only by the[ir] age-based" access to the franchise. *Id.* ¶ 31. Ignoring caselaw to the contrary, the Secretary further argues that the voter ID restrictions present no equal protection issue because they do not facially classify voters by age. Def. Br. at 31-32. But an apparently neutral law may nonetheless violate equal protection if "in reality [it] constitut[es] a device designed to impose different burdens on different classes of persons." *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421. Plaintiffs have shown just that: young Montanans are unduly affected because the voter ID restrictions limit the use of IDs disproportionately used by them.

Once again, the disproportionate impacts of the law were not lost on the Legislature. Legislators knew that the Challenged Restrictions would have disproportionate impacts on young voters. *See* MDP Ex. 15 (transcript of State Admin. Hearing) at 21:9-15 (EDR), MDP Ex. 20 (transcript of Senate State Admin. Hearing) at 13:6-15, (transcript of House State Admin. Hearing) at 19: 6-8 (student IDs), MDP Ex. 29 (transcript of House Judiciary Hearing) at 15:7-11; 16:11-19; 22:16-20, (transcript of Senate State Admin. Hearing) at 12:14-13:13 (ballot collection).

Perhaps most tellingly, Speaker of the House Wylie Galt made the intent of the voter ID restrictions explicit: during a legislative hearing on SB 169, Galt remarked, "[I]f you're a college student in Montana and you don't have a registration, a bank statement, or a W-2, it makes me kind of wonder why you're voting in this election anyway." Mayer Rep. at 15. He concluded that young voters have "little stake in the game." *Id.* While intentional discrimination is not necessary to prove Plaintiffs' claims, this evidence, too, establishes a genuine factual dispute about the Legislature's motive.[5]

C. HB 530 burdens Plaintiffs' constitutional rights.

The evidence also establishes that HB 530 burdens Plaintiffs' constitutional rights to vote, equal protection, and freedom of expression.

Absentee voting has become increasingly popular in Montana, and the vast majority of Montana's voters now vote absentee. MDP Ex. 27. As the number of absentee voters in the state increased, so too did assistance provided by civic and political organizations, including secure and reliable ballot collection and return. *Id.* Ballot assistance programs have helped swaths of voters request and return their ballots. *See* Bohn Decl. ¶ 5; Bolger Decl. ¶ 20; Franks-Ongoy Decl. ¶ 19; Semerad Decl. ¶ 12; McDonald Aff. ¶¶ 6, 12; Horse Aff. ¶¶ 13-14. The Secretary's own Elections Director, Dana Corson, admitted under oath that organized ballot assistance programs are good for democracy because they increase voter turnout. MDP Ex. 28 (*Driscoll* trial transcript) at 537-38.

Organized ballot assistance has been invaluable to Montanans whose work commitments, school schedules, family care responsibilities, mobility impairments, lack of access to mail service, or lack of access to transportation made returning their absentee ballots difficult or even impossible. *See* Bohn Decl. ¶¶ 5-6; Bolger Decl. ¶ 20; Franks-Ongoy Decl. ¶ 19; Gray Aff. ¶¶ 4-15, 22; Street Rep. ¶ 7. Organizations reduced these barriers by allowing voters to give their absentee ballots to representatives of community organizations or campaigns, who then

[5] Notably, the U.S. Supreme Court rejected a virtually indistinguishable rationale offered decades ago by Texas when it attempted to justify restrictions that made it harder for "transient" members of the military to vote in that state. *Carrington v. Rash*, 380 U.S. 89 (1965).

transported sealed ballot envelopes to official drop-off sites. *See generally* MDP Exs. 28 (*Driscoll* trial transcript), 29 (transcript of House Judiciary Hearing on HB 406); *see also* Bohn Decl. ¶ 6; Bolger Decl. ¶¶ 15-18, 20; Franks-Ongoy Decl. ¶ 19; Gray Aff. ¶¶ 11-15; Street Rep. ¶ 7. In 2016 and 2018, organized ballot-return assistance likely helped over 2,500 voters cast their ballots. Mayer Rep. at 17. And helping voters obtain and return absentee ballots allows organizations to express their beliefs in the importance of civic engagement. For example, MDP's ballot assistance "communicates its belief in working together to help all citizens participate in democratic elections, particularly for voters who have experienced historically low turnout rates when compared to the rest of the population, or who for various reasons—disability, advanced age, poverty, or discrimination—would have difficulty voting." Bolger Decl. ¶ 13; *see also id.* ¶¶ 4, 6.

Despite the benefits of these programs, the Legislature previously tried and failed to prohibit organized ballot assistance. In 2017, the Legislature enacted Senate Bill 352, the "Montana Ballot Interference Prevention Act" ("BIPA"). MDP Ex. 32 (legislative history of SB 352). Last year, two Montana district courts held that BIPA violated the Montana Constitution. Among other things, those courts held that BIPA unconstitutionally burdened the right to vote and unconstitutionally infringed on speech and association rights. *See Driscoll I*, No. DV 20-408, 2020 WL 5441604, at *1; Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020).

Before the ink on those decisions dried, the Legislature began drafting a very similar version of the unconstitutional ban, House Bill 406 ("HB 406"). When the Senate did not pass HB 406, the Legislature amended a different bill, HB 530, to include a renewed ballot assistance ban. HB 530 effectively bans organized absentee ballot assistance efforts by prohibiting ballot assistance performed in exchange for a "pecuniary benefit." Ex. 11. Although the Ban does not define "pecuniary benefit," it carves out from its prohibition certain paid employees—including election officials and mail delivery service employees—who, in the scope of their employment, help voters request or return absentee ballots. *Id*. But it does not exclude paid staff members of

organizations who, in the scope of their employment, help voters request or return absentee ballots. *Id*. Thus, the lone definition embedded in HB 530 indicates that paid staff members of MDP and other organizations may not assist voters with their absentee ballots.

Moreover, the Renewed Ban goes even further than its unconstitutional predecessors. While BIPA and HB 406 targeted only ballot *return* assistance, HB 530 outlaws ballot assistance much more broadly, imposing a civil penalty of $100 each time a person receiving a "pecuniary benefit" "distribute[s], order[s], request[s], collect[s], or deliver[s]" ballots. *Id*. In other words, HB 530 does not just apply to assisting a voter with returning their completed ballot, it also applies to assisting a voter with requesting and receiving their ballot in the first place.

1. HB 530 burdens Plaintiffs' fundamental right to vote and equal protection.

The record demonstrates that HB 530 will impose burdens on voters who rely on organized absentee ballot assistance—including Native Americans, seniors, the disabled, students, and low-income, rural, and working voters—who face significant challenges while trying to exercise their right to vote. Just as the court held in *Driscoll*, banning organized ballot collection "eliminat[es] important voting options that make it easier and more convenient for voters to vote," thereby "increasing the costs of voting." *Driscoll v. Stapleton* ("*Driscoll III*"), Cause No. DA 20-0408, Slip op. at 23, ¶ 7, (13th Jud. Dist., Yellowstone Cnty, July 24, 2020).

The Secretary nevertheless argues that "Plaintiffs merely offer generalized testimony regarding the alleged disparate impact of Montana's ballot-collection law on minority voters." Def. Br. at 47. Not so. The unconverted evidence belies the Secretary's contention that Plaintiffs offer only generalized testimony about HB 530's burdens by showing instead that HB 530 severely burdens Native American, senior, disabled, student, low-income, rural, and working citizens' right to vote.

First, the undisputed evidence establishes that HB 530 "will disproportionately affect the right of suffrage for . . . Native Americans." *Driscoll II,* 2020 MT 247, ¶ 21. Because Native American voters already face high costs of voting—both in person and by mail—they rely

disproportionately on third parties to collect and convey their ballots. Factors that contribute to Native American voters' reliance on third party ballot collectors include the mail delivery system on reservations, their dependence on P.O. boxes, housing insecurity, the distance they are required to travel to access voting opportunities, and other socioeconomic factors that exacerbate these barriers to voting. *See* McCool Rep. ¶¶ 18-21, 25-44, 53, 67 & tbl. 32-33, 74-96, 142-43; Weichelt Rep. ¶¶ 5, 16, 23, 29, 38-42, 51-52; Horse Aff. ¶¶ 16, 17, 21; Gray Aff. ¶¶ 4, 7-10; Spotted Elk Aff. ¶¶ 4, 9; McDonald Aff. ¶¶ 4, 7-9; Rate Aff. ¶¶ 3-7; Ex. C-G; *see also* Findings of Fact, Conclusions of Law, and Order ¶ 21.k, *W. Native Voice v. Stapleton*, No. DV 20-0377, 2020 WL 8970685 (Mont. Dist. Ct. Sept. 25, 2020).

Second, many senior and disabled voters rely on organized absentee ballot assistance, and their right to vote would be severely burdened were this option outlawed. Franks-Ongoy Decl. ¶¶ 16-19. These voters' mobility limitations make obtaining and returning absentee ballots challenging, and it can be difficult for them to stand in line at polling locations or elections offices. *Id*. They might not have a family member who can make sure that their absentee ballots make it to the polls on time. *Id*. ¶ 14. As a result, these voters have relied on organized ballot assistance. *Id.* ¶¶ 16-19; Bolger Decl. ¶ 20.

Third, other groups who face additional challenges to voting also rely on ballot assistance. Low-income, rural, and working voters rely on organized absentee ballot assistance for similar reasons. MDP Ex. 29 (transcript of House Judiciary Hearing) 15: 7-11; 16:11-19; 22:16-20, (transcript of Senate State Admin. Hearing) at 12:14-13:13. Additionally, they often do not have access to personal transportation. *See* Ex. 29 (transcript of Senate State Admin. Hearing) at 12:25-13:1, (transcript of House Judiciary Hearing) at 8:21-22; 15:8-11; 23:17-19. Students, too, have come to rely on ballot assistance programs. MDP Ex. 28 (*Driscoll* trial transcript) 10-40; Semerad Decl. ¶ 12. Many young voters must navigate voting for the first time while balancing schoolwork and jobs. MDP Ex. 28 (*Driscoll* trial transcript) at 10-40; Ex. 29 (transcript of House Judiciary Hearing) at 15:7-11; 16:11-19; 22:16-20, (transcript of Senate State Admin. Hearing) at 12:14-13:13. To help mitigate those burdens, organizations have operated ballot return assistance

programs on college campuses to assist college students. MDP Ex. 28 (*Driscoll* trial transcript) at 10-40; Ex. 29 (transcript of House Judiciary Hearing) at 7:11-8:3, (transcript of Senate State Admin. Hearing) at 14:4-7; 18:24-20:11. These groups provide secure lock boxes on campuses where students can drop off their absentee ballots, as well as door to door assistance programs. *Id.*

Recognizing these burdens, just last year, two Montana district courts held that a similar restriction on absentee ballot assistance unconstitutionally violated Montanans' fundamental right to vote. *See Stapleton*, 2020 WL 8970685, at *22; *Driscoll I*, No. DV 20-408, 2020 WL 5441604, at *6. The facts that informed those decisions have not changed. Thousands of voters have relied on ballot collection in Montana elections, Mayer Rep. at 17, and for many, it made the difference between voting and not voting at all.

The record further reflects that the Legislature was aware of the disparate negative burdens of HB 530, and despite this knowledge, intentionally repealed this critical failsafe for these discrete groups. *See* MDP Ex. 29 (transcript of House Judiciary Hearing) at 18:8-11 (burdens to elderly voters and voters with limited mobility), 16:11-19 (burdens to low-income voters); 22:16-20 (burdens to low-income and minority voters); (transcript of Senate State Admin. Hearing) at 12:14-13:13 (burdens to disabled, low-income, rural, and working voters). Following the *Stapleton* and *Driscoll* trials in 2020, the Legislature was plainly on notice of the discriminatory impact of HB 530 and other ballot assistance bans. During the legislative session, Representative Tyson Running Wolf explained that Section 2 of HB 530 "effectively ends the legal practice of ballot collection," which is heavily relied upon by Native voters in Montana and would result in "en masse" disenfranchisement. In his words, "[b]allot collection is a lifeline to democracy for rural indigenous communities" because of social and economic barriers such as long distances to election offices and lack of access to transportation in Indian Country.[6]

[6] *See* House Floor Session - Audio Only (Apr. 27, 2021, 10:04 AM), available at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43525?agendaId=223947 (last accessed Apr. 4, 2022); Keila Szpaller, *Election security bill heads to Gov. Gianforte's desk*, Daily Montanan (Apr. 27, 2021, 7:24 PM), https://dailymontanan.com/2021/04/27/election-security-bill-heads-to-gov-gianfortes-desk/.

Moreover, HB 530's immediate predecessor, HB 406, did not advance in the Legislature following testimony by Plaintiffs' groups and the chief legal counsel for the Office of Commissioner of Political Practices, who identified possible constitutional concerns. Rate Aff. ¶ 13; WNV Ex. M at 4-6. After the failure of HB 406, in the same legislative session in which protections for Native American voting rights were rejected, HB 530 was advanced at the last moment without any committee hearings or opportunity for public comment. This irregular procedure is indicative of discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."). The enactment history of HB 530 suggests intentional discrimination against Native voters, and to the extent that the Secretary objects to this conclusion, there exists a genuine question of material fact that makes summary judgment inappropriate.

2. HB 530 burdens the freedom of speech and due process.

The evidence also demonstrates that HB 530 unconstitutionally impedes the freedom of expression of MDP, WNV, CSKT, and Blackfeet Nation.

The free speech guarantee in Montana's Constitution encompasses "the opportunity to persuade to action, not merely to describe facts." *Mont. Auto Ass'n v. Greely,* 193 Mont. 378, 387, 632 P.2d 300, 305 (1981). This includes communication and coordination with voters for ballot collection purposes. *See Stapleton*, 2020 WL 8970685, at *23 (quoting *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988)); *see also Driscoll III*, Cause No. DA 20-0408, slip op. at 24, ¶ 9.

In an effort to encourage civic engagement, CSKT, WNV, and Blackfeet Nation have all collected ballots for tribal members. *See* Horse Aff. ¶ 14; McDonald Aff. ¶ 14; Gray Aff. ¶¶ 13-15. WNV, a nonpartisan organization that works on all seven reservations in Montana, engages in significant organization to communicate to tribal communities the "importance of civic engagement and encourage them to get involved in the political process." Horse Aff. ¶ 36. CSKT and Blackfeet Nation have also coordinated extensively with WNV for the purpose of ballot

collection in the service of encouraging civic engagement among their members. McDonald Aff. ¶¶ 12, 14-15; Gray Aff. ¶ 12.

Likewise, MDP engages in GOTV efforts, during which its representatives advocate for civic engagement and express MDP's "belief in working together to help all citizens participate in democratic elections," particularly for voters who disproportionately face obstacles to voting. Bolger Decl. ¶¶ 4, 6, 13. These GOTV efforts are part of how MDP accomplishes its mission. *See id.* ¶ 6.

HB 530, as enacted, would burden the ability of these Plaintiffs to engage in protected political activity. HB 530 outlaws WNV's ballot collection efforts because they rely on paid organizers. Horse Aff. ¶ 32. Even if HB 530 falls short of banning all ballot collection efforts, "its terms nonetheless chill [WNV's] efforts due to the risk of substantial fines." *Id.* WNV and similarly situated organizations' free speech rights are burdened because they must either risk substantial fines or scale back GOTV activities by terminating ballot collection operations, burdening their right to organize and engage in protected, political speech. *See id.* ¶ 34. HB 530 would also prevent "MDP staff and volunteers" from "assist[ing] voters in returning their ballots": "because HB 530 carves out from its prohibition certain paid employees. . .but does not exclude paid staff members of the MDP, we are forced to assume that paid staff members, or volunteers who reimbursed for certain expenses, may not assist voters with their absentee ballots." Bolger Decl. ¶ 22. HB 530 burdens the organizations' free speech rights by limiting their ability to communicate their missions and values to voters.

HB 530 is also unconstitutionally vague, and therefore infringes upon Plaintiffs' due process rights. *See City of Whitefish v. O'Shaughnessy,* 216 Mont. 433, 440, 704 P.2d 1021, 1025 (1985). Because "pecuniary benefit" is unclear, so too is whether tribal ballot collection would be permitted to continue under HB 530. For example, CSKT conducted taco feeds where ballot collection occurred, and paid employees staffed the feeds. McDonald Aff. ¶ 14. With "pecuniary benefit" undefined, it is unclear whether these paid employees—whose duties encompassed more than just ballot collection—would be permitted to assist with ballots. And while HB 530 exempts

a "governmental entity," it does not specify that tribal governments are exempt. Nor does it explain whether third-party organizations like WNV that are authorized to conduct ballot collection on behalf of the tribe would fall under the exemption. *See, e.g.*, *id.* ¶¶ 12, 14-15; Gray Aff. ¶ 12; Spotted Elk Aff. ¶¶ 11-12. Indeed, the CSKT tribal council has already explained that "because HB 530 fails to adequately define the scope of its government exemption, CSKT is likely to be confused about who is restricted from picking up and dropping off ballots and the lack of clarity makes it difficult for CSKT to know whether it will run afoul of the law." McDonald Aff. Ex. A. Though the Secretary gestures at the *possibility* of curing infirmities with HB 530 during the rulemaking process, *see* Def. Br. 52-53, she makes no factual showing that the rulemaking process has provided or will provide clarity.

Indeed, in her Motion, the Secretary provides no adequate definition for any of the statutory ambiguities Plaintiffs have raised and acknowledges that the administrative rulemaking process "designed to provide that clarity has yet to occur." *Id*. By her own terms, then, the Secretary acknowledges genuine issues of material fact that remain outstanding as to Plaintiffs' vagueness claim.

* * *

For these reasons, evidence in the record before this Court establishes that the Challenged Restrictions, individually and collectively, burden Plaintiffs' fundamental rights. At bare minimum, the evidence raises a genuine issue about the scope of that burden. For that reason alone, the Secretary's motion should be denied.

III. The Secretary's purported state interests do not pass constitutional muster.

The Secretary's motion should also be denied because there is a genuine dispute about whether and to what extent the Challenged Restrictions further any genuine state interests. The Secretary attempts to justify the burdens imposed by the Challenged Restrictions by pointing to the State's interests in ensuring confidence in elections, preventing voter fraud, intimidation, and coercion, ameliorating administrative burden, and lessening long lines at polling locations. Def. Br. at 1-2, 21-23, 33-34, 44-45, 48-51, 56. At bottom, the Secretary's arguments rely entirely upon

vague state interests in "electoral integrity" and overbroad generalizations about hypothetical risks posed by ballot collection. But to survive even the Secretary's preferred level of constitutional scrutiny, the Secretary must provide competent evidence of the specific problem justifying the restriction. *See, e.g.*, *Ohio NAACP*, 768 F.3d at 547 (finding "a handful of actual examples of voter fraud" and "general testimony regarding the difficulties of verifying voter registration" insufficient to establish voting restriction was actually necessary). And even with evidence of an actual problem, the Secretary must also demonstrate that the Challenged Restrictions are "actually necessary" to resolve it, and that they will do so effectively. *See Obama for Am.*, 697 F.3d at 434 (finding state failed to offer evidence that local election officials actually struggled to cope with period of early voting that the State eliminated, fatally undermining its "vague interest" in smooth election administration); *Ohio NAACP*, 768 F.3d at 547 (finding state failed to show that particular type of voter fraud about which it expressed concern was "logically linked" to restriction on early voting and registration at issue, and further failed to explain how restriction would prevent fraud).

Whether the Challenged Restrictions actually promote the Secretary's purported interests, and whether they will do so effectively, are questions of fact. *See Armstrong v. State*, 1999 MT 261, ¶ 16, 62, 296 Mont. 361, 364, 989 P.2d 364, 368 (relying on extensive factual record to conclude that "the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental . . . right" in case involving constitutional challenge to state statute requiring pre-viability abortions to be performed by physicians); *Duke*, 5 F.3d at 1405 n.6 ("The existence of a state interest . . . is a matter of proof.").

Because the Secretary offers no substantive evidence—let alone evidence that is beyond dispute—that the Challenged Restrictions will actually and effectively address the Secretary's purported interests, she has not demonstrated that she is entitled to judgment as a matter of law.

A. The Challenged Restrictions are not justified by concerns about voter confidence.

The state's asserted interest in preserving public confidence in election integrity cannot justify the severe burdens imposed by the Challenged Restrictions, particularly where any shortage

of public confidence results from misinformation spread for political gain. The Secretary claims a crisis of confidence in Montana's elections. Def. Br. at 1-2. But less than two years ago, the then-Secretary of State's expert witness testified that "Montana's strong election ecosystem encourages and supports voter participation and results in generally high turnout *and high voter confidence*." MDP Ex. 37 (Decl. of Lonna Atkeson) (emphasis added). Overall, voter confidence in Montana has been relatively high, and remarkably stable, over time—74 percent of Montana voters in 2012, 76 percent of Montana voters in 2016, and 72 percent of Montana voters in 2020 were "very confident" that their vote had been counted as intended. *See* Street Rebuttal Rep. at 19-20. This confidence is likely in large part due to the fact that voter fraud in Montana is exceptionally rare. *See infra* Section III.B. Indeed, the previous Montana Secretary of State conducted an audit of the 2020 election and concluded that "[n]o discrepancies were found during the Post-Election Audit that exceeded the statutory limits as set by Sec. 13-17-507 MCA." McCool Rep. ¶ 106.

To the extent there is a problem of voter confidence in Montana, the Challenged Restrictions will not actually and effectively address that problem. The Secretary provides no evidence that Montanans' purported loss of confidence is related to student IDs, paid ballot collection, or EDR. She similarly provides no evidence that the Challenged Restrictions would have any effect on voter confidence. *See* SUF Resp. ¶¶ 1-24. Without a shred of evidence, the Secretary cannot show that the Challenged Restrictions actually serve the state's interest in promoting public confidence in elections.

In fact, research indicates that voter confidence is driven largely by two things that have nothing to do with the Challenged Restrictions: (1) cues from party leaders, and (2) the "winner's effect," wherein people are more likely to express confidence in elections when their preferred candidate wins and less likely when their preferred candidate loses. *See* Street Rebuttal Rep. at 16-19. A recent study demonstrates that voter ID requirements have no impact on voter confidence, and that confidence is instead shaped by partisanship and ideology. *See id.* at 16. Social science research also indicates that voters use voter confidence surveys to "cheerlead for the stance of their preferred party" rather than express their actual beliefs about voter confidence. *Id.* at 18.

Echoing this research, data from Montana and nationwide suggest that the "winner's effect" and political polarization are the main drivers of any changes in voter confidence. After the 2020 election, overall voter confidence remained stable in the United States, but the gap between Republicans and Democrats spiked from 10.9 percent to 51.7 percent. *See id*. In Montana, survey data show that Democrats express much higher levels of voter confidence when a Democrat wins the presidency as opposed to a Republican, and vice versa for Republicans. *See id.* at 19-21. In 2020, the political polarization around voter confidence is so stark principally because of the "Big Lie" propagated by former President Donald Trump and his allies.

Legislative sponsors and other state actors cannot be permitted to manufacture a governmental interest to justify voting restrictions by sowing public doubt through unsubstantiated—and in some cases, demonstrably false—allegations about misconduct committed by people providing ballot collection services. Such tactics create perverse incentives and cannot justify the significant burdens imposed by laws like the Challenged Restrictions. *See, e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 218 (Mo. 2006) ("[I]f this Court were to approve . . . severe restrictions on . . . fundamental rights owing to the mere perception of a problem . . . then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.").

B. The Challenged Restrictions are not necessary to prevent voter fraud in Montana.

Relying on vague and unsubstantiated anecdotes from supporters of the Challenged Restrictions and "expert" testimony about isolated allegations of election fraud in *other states*, the Secretary argues that the hypothetical risk of voter fraud in Montana justifies the Challenged Restrictions. Def. Br. at 22. But voter fraud in Montana is vanishingly rare. *See* Mayer Rep. at 6-8; McCool Rep. ¶¶ 106-08. While the Secretary asserts that "Montana has well-documented and publicized instances of voter fraud," Def. Br. at 22, she provides just *two* examples of any voter fraud convictions in Montana's history, neither of which implicate ballot collection, student IDs, or EDR. *See* SUF Resp. ¶¶ 36-41. Moreover, no fraud was identified in Montana's 2020 post-

election audit. McCool Rep. ¶ 106. And in connection with last year's BIPA litigation, the Cascade County Clerk testified that no counties in Montana have "ever had any cases of voter fraud." *Id.* ¶ 108. As such, the Secretary has failed to show any compelling evidence of voter fraud in Montana, let alone any fraud that any Challenged Restriction would remedy.[7]

The rate of voter fraud is infinitesimally small in the United States. In fact, more fraud exists in states that *ban* ballot assistance than in those that permit ballot assistance. *See* SUF Resp. ¶¶ 36-41; McCool Rep. ¶ 111. According to the conservative Heritage Foundation, voter fraud constitutes "about 0.00006 percent of the total votes cast" in the United States. McCool Rep. ¶ 109. A recent analysis of three states with all vote-by-mail elections calculated that the number of "possible cases" of voter fraud was 0.0025 percent of all votes cast. *Id.* Even the Secretary's own expert appears to agree that voter fraud is exceedingly rare in the United States and Montana. Mr. Trende says he is "not convinced that voter fraud is a substantial problem in Montana." Trende Rep. at 12.

The Secretary insists her failure to provide any proof of substantial voter fraud in Montana or the broader United States is "irrelevant," Def. Br. at 49, and relies on the U.S. Supreme Court's decision in *Crawford*, upholding a challenged law under *Anderson-Burdick* despite the fact that there was limited evidence of voter fraud in Indiana, *id.* at 22. But in *Crawford*, the Court found that the challenged law "imposes only a limited burden on voters' rights," 553 U.S. at 203 (internal quotation marks omitted)—meaning that the state interest did not need to be significant to outweigh the burden on voters. Here, as noted *supra*, Plaintiffs have provided evidence that the Challenged Restrictions create severe burdens for Montana voters. And recent research cited by the Secretary's own expert concluded "contrary to the argument used by the Supreme Court in the 2008 case *Crawford v. Marion County* to uphold the constitutionality of one of the early strict ID laws, we find no significant impact on fraud or public confidence in election integrity. This result

[7] Even some local Republicans groups are now contributing to the effort to fight the myths regarding voter fraud in Montana. *See, e.g.*, Exhibit 26 to the Declaration of Matthew Gordon. Last month, Missoula County's Republican Party spent two days and $5,000 to dispel baseless allegations of fraudulent activities in Missoula County's administration of the 2020 general elections. *Id.*

weakens the case for adopting such laws in the first place." Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018*, 136 Q.J. Econ. 2615, 2653-54 (2021), cited by Gessler Rep. at 19.

More importantly, *Crawford* is not the law in Montana, as Montana courts require evidence of the state's allegedly compelling interest. In 2020, the Montana Supreme Court found that the Secretary could not justify BIPA under *any* standard because "he did not present evidence in the preliminary injunction proceedings of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll II*, 2020 MT 247, ¶ 22. In other words, the Montana Supreme Court has already found that, absent meaningful evidence of voter fraud or voter coercion in Montana, the State cannot justify these laws under *Anderson-Burdick*, let alone strict scrutiny.

Moreover, there is no reason to believe that the Challenged Restrictions will actually serve Montana's interest in preventing voter fraud. In particular, the Secretary presents no evidence that SB 169 is likely to prevent voter fraud, and Montana has no history of any kind of voter fraud related to the use of student IDs. *See* Mayer Rep. at 6-8; Semerad Decl. ¶ 11; Seaman Decl. ¶ 10.; MDP Ex. 20 (transcript of House Judiciary Hearing) at 22:5-21 (Secretary's Election Director admitting to same during legislative hearings on SB 169).

Instead, the Secretary relies on Mr. Trende and Mr. Gessler to support the proposition that "requiring uniform, government-issued ID is directly related to preventing fraud from occurring." Def. Br. at 21. But neither provides any supporting evidence. Mr. Trende references a study that found that information about the existence of voter identification laws may reduce the *perception* of fraud. Trende Rep. at 12; *see also* Street Rebuttal Rep. at 15-17. But Mr. Trende does not claim that SB 169 does anything to protect against *actual* voter fraud, and a study cited by the Secretary's other expert concluded that voter ID laws neither reduce fraud nor improve voter confidence. Cantoni & Pons, *supra* II.B, at 2653-54, *cited by* Gessler Rep. at 19; *see also* Street Rebuttal Rep. at 16 (citing 2016 Stewart et al. study finding "that public perceptions of fraud and confidence in

the integrity of the electoral system are not connected to actual state variation in voter identification requirements").

For his part, Mr. Gessler opines that requiring a government document showing a voter's address, in addition to a student identification card, helps prevent voters from illegally voting in a district in which they are not registered. Gessler Rep. at 21. But he fails to explain how SB 169 ensures compliance with residency requirements. And it doesn't: SB 169 does not require that the address on a voter's primary ID matches his or her registered address. Mayer Rep. at 17. A voter's address is instead documented through the voter registration process, not in reference to the identification he or she brings to the polls. *Id.* at 16. By the time a voter arrives at the polls to vote, he or she has already satisfied the requirement designed to ensure that he or she is registered in the proper district. *Id.* SB 169 is not designed to ensure that voters vote in the proper district, and it is certainly not narrowly tailored to advance this interest.

Nor is there any evidence that HB 530 will effectuate the state's asserted interest in preventing voter fraud. As noted *supra*, the Secretary cites no evidence of voter fraud convictions in Montana related to ballot collection. McCool Rep. ¶ 111. Moreover, states that ban ballot collection have higher rates of voter fraud than states that allow it. *Id.* Nevertheless, Mr. Gessler suggests that paid ballot collection "creates a temptation [for ballot collectors] to cut corners or perhaps blatantly violate the law," because of the financial motive. Gessler Rep. at 26. But Mr. Gessler provides no evidence—empirical or otherwise—to support this contention. *See* Street Rebuttal Rep. at 14. Even setting aside the fact that WNV does not pay its organizers per ballot, Horse Aff. ¶¶ 9-10, HB 530 is wholly unnecessary to address these vague concerns because Montana has a panoply of criminal statutes that penalize the sort of conduct Mr. Gessler envisions. *See* Street Rebuttal Rep. at 14-15. In other words, the conduct Mr. Gessler says HB 530 addresses is already unlawful under Montana law, and there is no evidence that making it *more* unlawful would have any additional deterrent effect.

Lastly, there is no evidence that HB 176 would serve the state's interest in preventing voter fraud. Though the Secretary argues that banning EDR promotes election integrity, she has not

offered evidence of any connection between EDR and fraud. And while the Secretary asserts that HB 176 may prevent mistakes by election staff, Def. Br. at 34, the Secretary has presented no evidence of any mistakes on election day, let alone any connection between those mistakes and EDR.

C. HB 176 is not necessary to ameliorate administrative burdens on election officials.

The Secretary also claims that HB 176 advances state interests by alleviating administrative burdens associated with EDR. But if EDR leads to additional work for election administrators, it is only because it boosts voter turnout: as noted by Audrey McCue, the Elections Department Supervisor in Lewis and Clark County, when she testified in opposition to HB 176, "any time somebody registers and vote[s], it's more work for us." MDP Ex. 15 (transcript of Senate State Admin. Hearing) at 11:2-6. And it is well established that the Secretary's interest in easing administrative burdens on some election officials cannot outweigh the fundamental right to vote. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by [the Secretary of State's] office and other state and local offices involved in elections."); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2018) (finding that administrative, time, and financial burdens on the State are "minor when balanced against the right to vote, a right that is essential to an effective democracy"); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1348 (N.D. Ga. 2015) (granting injunction under Section 2 of Voting Rights Act, even though county board of commissioners face administrative burdens from injunction, because "the harm [plaintiffs] would suffer by way of vote dilution outweighs the harm to the [board].").

Moreover, there is a genuine issue of material fact about whether EDR actually adds to the burdens on election administrators, and whether and to what extent HB 176 would alleviate those burdens. The Secretary submits affidavits from three election administrators who claim that EDR increases their workload on election day. Def. Br. at 25-26. But these election administrators

merely speculate about the effects of ending EDR—only one of them has administered a *single* election prior to the enactment of EDR, *see* Eizenzimer Decl. ¶ 2 (noting that her career in election administration began in 2005, the year before EDR was enacted), and another has handled *only one* election day registration during her time as an administrator, *see* Tucek Decl. ¶ 2 (noting that she worked in Petroleum County from July 2017 through January 2021); *see also* Mont. Sec'y of State, *Total Late Voter Registration Activities*, available at https://sosmt.gov/elections/latereg/ (last accessed Apr. 5, 2022) (showing that only a single voter registered to vote on election day in Petroleum County between 2017 and 2021). In any event, those administrators represent just a small fraction of the total number of counties in Montana, and do not purport to speak for all election administrators in the state. Indeed, two of their counties are extremely small and do not contain a Native American reservation.

By contrast, several election administrators testified that EDR did not impose significant administrative burdens and that ending EDR might actually make things harder for them. Ms. McCue testified that ending election day registration was "not . . . helpful administratively," "will not help [her]" in her job administering elections, and "is certainly more work." Rate Aff. ¶ 9; WNV Ex. J at 9-11. Eric Semerad, the Gallatin County Clerk and Recorder, testified that EDR was "not causing additional burden" in his county, and that it was a "mistake" to repeal EDR because it will disenfranchise voters. Semerad Decl. ¶¶ 5, 9. Similarly, Bradley Seaman, Missoula County Elections Administrator, testified that his staff was "prepared to accommodate Election Day registration" and that EDR "has been an important facet of Montana law that has acted as a failsafe for many voters to cast their vote." Seaman Decl. ¶¶ 3, 7. Rather than introducing errors into Montana's elections, EDR helps ameliorate errors that occur in the registration process before election day. Without the ability to correct those mistakes on election day, those voters cannot cast their ballots and them counted without facing additional burdens that could further impede their ability to successfully vote. *See* Semerad Decl. ¶¶ 4, 9; Seaman Decl. ¶ 3. At the very least, this considerable testimony from election administrators creates a genuine issue of material fact as to

whether or not EDR creates an administrative burden on elections officials, the extent of that burden, and whether HB 176 would alleviate any such burden.

Even if HB 176 reduced these purported administrative burdens on election administrators, the bill is not narrowly tailored to meet this goal. The affidavits the Secretary submitted on behalf of election administrators nowhere suggest that repealing HB 176 is the only way to reduce the administrative burdens facing them and their staff. In fact, there are myriad ways for the State to reduce any administrative burdens on elections officials—including hiring more poll workers on election day and modernizing election equipment. All these options would achieve similar goals without significantly increasing voter costs and decreasing turnout, as repealing EDR would do. The Secretary points to nothing in the legislative record or otherwise to suggest that the Legislature considered these other options, or that they are impossible. As such, even if HB 176 reduced any administrative burdens on election administrators, there is no evidence that it is narrowly tailored to do so.

D. HB 176 will not reduce lines at polling locations.

The Secretary also claims that ending EDR will reduce wait times for voters on election day. But as an initial matter, there is a genuine dispute about whether EDR actually leads to longer lines and wait times at the polls, and whether ending EDR would decrease wait times. In fact, EDR cannot increase lines at most polling locations because EDR typically occurs at county clerk's offices, not at polling locations. *See* Mont. Admin. R. 44.3.215(1)(b)(iv) (EDR occurs at county election administrator's office or central location designated by county election administrator); Mayer Rep. 8-9; Mayer Rebuttal Rep. at 5; Semerad Decl. ¶ 5 (explaining that EDR did not happen at polling location); Street Rebuttal Rep. at 11-13. Moreover, as Ms. McCue testified, repealing EDR and moving the last day to register to vote might simply make lines longer on an earlier date in the early-voting period. Rate Aff. ¶ 10; WNV Ex. J, at 11, 36-39. And again, any reduction in wait times resulting from reduced turnout is hardly salutary.

Notably, voter wait times in Montana are generally low. In the last two general elections—both with EDR in place—very few voters waited in long lines: 100 percent of voters in 2020 and

97.7 percent in 2016 reported waiting in line on election day for less than 30 minutes. Mayer Rep. at 8-9. Only 10 percent of all in-person voters waited more than 10 minutes to vote in 2020. *See* Street Rebuttal Rep. at 12-13 & tbl.2. During the past decade, as EDR has become increasingly popular, wait times at the polls in Montana have *decreased*, likely because of a greater percentage of Montanans vote using absentee ballots. *Id.* at 13.

Because "the data indicate that election day registration is not associated with long wait times in Montana," Mayer Rep. at 9, there is a genuine issue regarding whether the abolition of EDR is necessary to serve the interest of decreasing wait times. The purpose of reducing wait times is to prevent people from dropping out of line and thus being unable to vote. HB 176 is thus completely self-defeating as to its stated purpose, given the overwhelming evidence that HB 176 will increase voter costs and decrease turnout. *See supra* II.A. III; *see generally* Street Rebuttal Rep. at 11. Moreover, there are myriad ways to reduce wait times at polls—including hiring more poll workers, modernizing voting machines, or expanding early voting—that would benefit Montana voters and would not decrease turnout. And there is certainly a genuine issue regarding whether the interest in reducing wait times—which are already almost entirely under 30 minutes—is sufficiently legitimate and weighty to justify HB 176's burdens on voters.

E. HB 530 is not necessary to prevent voter coercion and intimidation.

The Secretary purports that HB 530 furthers an interest in ensuring election integrity and fairness by "regulating the connection between money and ballot collection." Def. Br. at 50. But HB 530 is not necessary to serve that interest. State laws already prohibit voter coercion and intimidation in a broad manner that also covers ballot collection, and there is no evidence that fraud is more likely to occur when a pecuniary benefit for ballot collection is involved.

In *Western Native Voice v. Stapleton*, the court definitively rejected the State's vague and unsupported interest in restricting ballot collection, which was counter to the firsthand experience of election administrators in the State. Findings of Fact, Conclusions of Law, and Order, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020), ¶¶ 98-101.

Once again, the Secretary here fails to identify any evidence of voter coercion or intimidation in Montana, let alone any evidence that links such practices to organized ballot collection, and instead merely relies on the testimony of the bill's sponsor, who failed to present evidence that paid ballot collection threatens election integrity. Def. Br. at 50. Moreover, there is no historical evidence of voter coercion and intimidation related to ballot collection in Montana. Findings of Fact, Conclusions of Law, and Order, *Stapleton,* No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020); *Stapleton,* ¶ 99. Multiple election administrators in Montana's most populous counties testify that they have observed no fraud in ballot collection. Semerad Aff. ¶ 12 (Gallatin County); Seamen Aff. ¶ 11 (Missoula County). And the handful of election administrators who submitted affidavits in support of the Secretary's motion identify no instances of voter coercion, intimidation, or fraud. As discussed *supra*, no voter fraud was identified in Montana's 2020 post-election audit by the former Secretary of State, and the Secretary has identified only two voter fraud convictions in Montana's history, neither of which concerns ballot collection. At the very least, this testimony and the absence of contrary evidence from the Secretary creates a genuine issue of material fact as to whether restricting ballot collection responds to a compelling state interest in election integrity.

Moreover, Montana already has laws on the books that regulate election security and prohibit coercion and intimidation, including the criminalization of election code violations, a clear anti-intimidation law, and strict regulations on political contributions and expenditures. *See, e.g.,* § 13-35-103, MCA; § 27-1-1501, MCA *et seq.*; *see also* Findings of Fact, Conclusions of Law, and Order, *Stapleton,* No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020), ¶ 107 (finding Montana's anti-intimidation law more protective than BIPA because it "would apply to all acts of intimidation when collecting a ballot, whether a ballot was delivered in person or by mail"). For example, using duress or fraud to compel a voter to either vote or refrain from voting is prohibited. Street Rebuttal Rep. at 15 (citing § 13-35-218; MCA), and penalties for violating these laws are substantial, including misdemeanor or felony charges, imprisonment for up to 10 years, or fines up to $50,000. *Id*. The Secretary provides no evidence that the current laws prohibiting intimidation or coercion

with respect to elections are insufficient to ensure election integrity nor any evidence that HB 530 fills in any regulatory gaps created by these laws.

F. There is a genuine dispute regarding whether the state's purported interests in implementing SB 169 are sincere.

Contrary to the Secretary's claims that SB 169 was passed to prevent election fraud and promote public confidence in election security, Def. Br. at 21, there is evidence in the record that these stated justifications are simply rhetorical guise, serving as cover for other motives.[8]

In constitutional challenges to legislation, whether the state's purported interests are sincere is a question of fact. In *Armstrong v. State*, the Montana Supreme Court held that a statute requiring pre-viability abortions to be performed by physicians was not justified by a compelling state interest. 1999 MT 261, ¶ 2, 296 Mont. 361, 364, 989 P.2d 364, 368. Affirming the preliminary enjoinment of the statute, the Court affirmed the district court's factual finding that this law did not advance the State's purported interest in protecting women's health, and importantly, the Court rejected the State's claim that the bill was justified by the reduction of medical risks. *Id.* ¶ 64. Based on evidence relevant to the legislator's motivations in passing this bill, the Court concluded that "the record shows that 'protecting women's health' served as little more than a rhetorical guise," and that the real motivation for this legislation was "prevailing political ideology and the unrelenting pressure from individuals and organizations promoting their own beliefs and values." *Id.* ¶¶ 60, 62, 64.

As in *Armstrong*, the evidence produced so far demonstrates that the Secretary's purported interests are a rhetorical guise and that the Legislature's true interests were based in political ideology and the desire to discourage voter turnout among students. During debate on SB 169, Speaker Galt stated: "[I]f you're a college student in Montana and you don't have a registration, a bank statement or a W-2, it makes me kind of wonder why you're voting in this election anyway." *See* Mayer Rep. at 15. He added that many college students have "little stake in the game." *Id.* Because a prominent backer of the bill suggested that it would be a good thing if the bill decreased

[8] The Legislature's repeated attempts to eliminate ballot collection suggests that the Legislature's purported interests in HB 530 are insincere, too. *See supra* I.II.C.

student voting, a reasonable factfinder could conclude that the legislature passed SB 169 in part to discourage student voting, especially in light of the larger national pattern of states discouraging student voting for political reasons. *Id.*

IV. The key issues in this case are not purely legal.

For the reasons discussed above, the numerous disputes of fact about key issues in this case preclude summary judgment in the Secretary's favor. In a last-ditch attempt to avoid this obvious conclusion, the Secretary asserts that the constitutionality of the Challenged Restrictions is a purely legal question. But that's just not true.

Whether, and the extent to which, the Challenged Restrictions implicate fundamental constitutional rights is a question of fact, to be decided based on the evidentiary record. *See, e.g.*, *Driscoll II*, 2020 MT 247, ¶¶ 21-22, 401 Mont. 405, 416, 473 P.3d 386, 393 (affirming district court's factual finding that challenged statute would burden the right to vote and noting that former Secretary of State "fai[ed] to refute the District Court's finding" because he did not address this evidence about statute's burden); *Mont. Env't Info. Ctr.*, 1999 MT at 296 (relying on evidentiary record to conclude that state action burdened constitutional rights); *see also Crawford*, 553 U.S. at 200 (considering the factual record developed below, and concluding that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified"); *One Wis. Inst., Inc.*, 155 F. Supp. 3d at 905 (burden of challenged law on right to vote is question of fact). This is true even and especially under the Secretary's preferred *Anderson-Burdick* standard. *See Feldman*, 843 F.3d at 387 ("[W]hether an election law imposes a severe burden is an 'intensely factual inquiry.'") (quoting *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007)).

In arguing otherwise, the Secretary relies on inapposite cases and overstates their relevance.

The Secretary's reliance on *Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 48, 403 Mont. 225, 481 P.3d 198 is misplaced because in that case there was *no* dispute of fact. Instead, "[t]he narrow issues presented [in that case were] purely legal issues of

statutory and constitutional construction that [did] not depend upon adjudication of related factual issues." *Id.* ¶ 2. Under those circumstances, where the specific questions were purely legal, the court's conclusion that "[w]hether the challenged statutory provision substantially interfere[d] with a fundamental right . . . [was] a question of law," *id.* ¶ 48, is hardly surprising. But *Clark* does not stand for the proposition that all constitutional challenges to statutes are pure questions of law susceptible to resolution on summary judgment despite factual disputes about the burdens and benefits of the law. Because factual questions inform whether the Challenged Restrictions burden constitutional rights and are narrowly tailored to advance compelling state interests, summary judgment is not appropriate. *See* Mont. R. Civ. P. 56(c)(3).

The Secretary's citation to *State v. Hamilton*, 2018 MT 253, ¶ 22, 393 Mont. 102, 428 P.3d 849, is similarly inapposite because the issue in that case was simply whether a statute was unconstitutionally vague. *Id. Hamilton* is uninformative about whether other kinds of constitutional claims, specifically those at issue here, may be resolved as a matter of law before trial.

Finally, the Secretary cites *Comm'r of Pol. Pracs. for State through Mangan v. Wittich*, 2017 MT 210, ¶ 71, 388 Mont. 347, 400 P.3d 735, but the issue in that case was merely whether the question of the constitutionality of an underlying statute, raised as an affirmative defense, should have been submitted to the jury. *Id.* ¶ 63. The Plaintiffs here agree that the constitutionality of the Challenged Restrictions are issues for the Court, not a jury, to resolve. But it does not follow that the Court will decide those issues without consideration of the extensive factual record about the burden and asserted state interests—indeed, the Secretary's submission of multiple declarations and expert reports addressing those issues indicates that the Secretary acknowledges the factual import on the question of constitutionality. In any event, the *Wittich* court found that the constitutional question was not properly raised or preserved, but that a proper constitutional challenge may involve findings of fact: "Unless and until a party challenges a statute's constitutionality, the grounds relied upon by the Legislature for enacting a statute are not assailable by a trier of fact; it is only under the lens of a constitutional challenge that a court is at liberty to

look behind the law to determine whether the law is constitutional." *Id.* ¶ 71. Unlike the defendant in *Wittich*, Plaintiffs here have properly challenged the constitutionality of the Challenged Restrictions and have properly raised them to the Court—not a jury.

None of the cases the Secretary cites changes things: the facts matter in determining whether the Challenged Restrictions violate Plaintiffs', and all Montanans', constitutional rights. And even the partial record in this case shows that they do by burdening those rights without advancing any state interest, let alone a compelling one. Accordingly, the Court should deny the Secretary's Motion.

CONCLUSION

The Parties in this case have developed, and are continuing to develop, an extensive evidentiary record about the burdens that the Challenged Restrictions place on voters, and the justifications that the Secretary has offered for these burdens. Over three dozen declarants and eight expert reports, combined with substantial documentary evidence, have created a genuine dispute of material fact regarding every issue in this case. The documents that are yet to be produced, and the depositions that are yet to be noticed, will only add to the factual record. For the reasons stated herein, as well as those provided in Plaintiffs' preliminary injunction briefings, this court should deny the Secretary's Motion.

Dated: April 5, 2021

Respectfully submitted,

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