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

MONTANA DEMOCRATIC PARTY AND MITCH BOHN'S OPPOSITION TO DEFENDANT'S MOTION TO SUSPEND PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiffs Montana Democratic Party ("MDP") and Mitch Bohn (together, "MDP Plaintiffs") submit this opposition to Defendant Secretary of State Christi Jacobsen's Motion ("Mot.") to Suspend this Court's May 22, 2022, Order Granting Plaintiffs' Motion for Preliminary Injunction ("Order").

The Secretary's extraordinary request for a stay of this Court's judgment pending appeal should be denied. The Secretary disregards the controlling standard for such relief and does not even attempt to make the required "strong showing" that she is likely to succeed in overturning on appeal this Court's thorough and well-reasoned decision. She also ignores the fundamental constitutional rights that the Court's injunction is meant to preserve and the impairment of those rights a stay would cause. Instead, consistent with her reported public statements characterizing this Court's decision as "chaotic" and suggesting that the Court has been "bought," the Secretary's Motion relies on overheated and unsupported rhetoric about supposed calamities that will befall Montana voters if the Court's decision stands.[1] Preserving the Court's Order would allow Montana voters to register on Election Day—as they have, without chaos ensuing, in every statewide election since 2005—and allow Montana college students to use their student IDs to vote—as they have, without incident, in every statewide election since 2003. If the Secretary's Motion is granted, the direct result will be the disenfranchisement of lawful Montana voters—the precise harm this lawsuit sought to avoid and that this Court's Order will prevent.

LEGAL STANDARD

The Secretary's motion ignores the applicable legal standard and the high bar that stands in her way, instead insisting merely that the district cossurt has "considerable discretion" to suspend or modify an injunction. But discretion "does not mean that no legal standard governs that

[1] Peter Christian, *Montana Secretary of State Plans to Fight Court's Election Decision*, Newstalk KGVO (Apr. 11, 2022), https://newstalkkgvo.com/montana-secretary-of-state-plans-to-fight-courts-election-decision/.

discretion." *Clark Fork Coal. v. Tubbs*, No. BDV-2010-874, 2015 WL 13614529, at *1 (Mont. 1st Jud. Dist. Ct. May 8, 2015). Instead, the court's judgment on such a motion "is to be guided by sound legal principles." *Id.*

The applicable legal principles distill down to four factors that guide the evaluation of a motion to stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *id.*; *Taylor v. Mont. High Sch. Ass'n*, No. CDV-2015-719, 2015 Mont. Dist. LEXIS 68 (Mont. 1st Jud. Dist. Oct. 7, 2015); *BNSF Ry. Co. v. Cringle*, No. BDV-2009-1016, 2010 Mont. Dist. LEXIS 228, at *12-13 (Mont. 1st Jud. Dist. July 12, 2010); *State v. Philip Morris, Inc.*, No. CDV-1997-306, 2007 Mont. Dist. Lexis 600 (Mont. Jud. Dist. Ct. Dec. 11, 2007); *see also State v. Mont. First Judicial Dist. Court*, 361 Mont. 536, 264 P.3d 518 (2011) ("[The] court determines whether to grant a stay by balancing competing interests and considering whether the public welfare or convenience will be benefitted by a stay.") (citing *Henry v. Seventeenth Judicial Dist. Ct.*, 198 Mont. 8, 13, 645 P.2d 1350, 1353 (1982)).

The moving party bears the burden of showing that she is entitled to a stay. *Id.* And because a stay is an "intrusion into the ordinary processes of administration and judicial review . . . [it] is not a matter of right, even if irreparable injury might otherwise result." *Clark Fork Coal.*, 2015 WL 13614529, at *1 (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)).[2]

ARGUMENT

I. The Secretary has not met her burden.

The Secretary's Motion meets none of the four criteria for granting a stay: it makes no showing of a likelihood of success or irreparable injury, and it ignores how a stay would in fact

[2] To determine whether to grant a stay pending appeal, Montana courts look to federal cases interpreting Rule 8 of the Federal Rules of Appellate Procedure. *See Taylor*, No. CDV-2015-719, 2015 Mont. Dist. LEXIS 68 (Mont. 1st Jud. Dist. Oct. 7, 2015); *BNSF Ry. Co.*, 2010 Mont. Dist. LEXIS 228, at *12-13; *Philip Morris, Inc.*, 2007 Mont. Dist. Lexis 600.

substantially and irreparably injure MDP Plaintiffs and many other Montana voters by infringing their constitutional rights, a result directly adverse to the public interest.

A. The Secretary has not made a strong showing that her appeal is likely to succeed on the merits.

First, the Secretary's failure to demonstrate a "strong showing" that her appeal is likely to succeed on the merits requires the denial of her Motion. *See Taylor*, 2015 Mont. Dist. LEXIS 68, at *3. Not only does the Secretary fail to make the necessary "strong showing" of a likelihood of success on the merits, the Secretary does not even argue that she is likely to succeed on appeal at all. That failure alone dooms her motion. *See BNSF Ry. Co.*, 2010 Mont. Dist. LEXIS 228, at *11 (denying motion to stay execution of judgment when moving party failed to show likelihood of success on the merits of appeal).

B. The Secretary has not shown that she will be irreparably injured absent a stay.

Second, the Secretary's Motion should be denied because the Secretary has failed to prove that she or anyone else will be irreparably harmed by the Order. *See in re Matter of Gruenig*, 2001 ML 4604, at *3 (denying motion to stay when moving parties failed to prove that they would be irreparably harmed). Despite the Secretary's cataclysmic prophecies and protestations about the impossibility of guiding election administrators, this Court's preliminary injunction requires only that election officials maintain the familiar rules they have comfortably operated under for years. Moving the registration deadline back to election day and allowing student voters to present student IDs without additional identifying documents are hardly the sort of earth-shattering changes the Secretary's Motion suggests. Moreover, the Secretary's complaints are exceedingly generalized: she notably fails to identify anything particular about the injunction that would actually lead to voter confusion, or that would actually be impossible to provide guidance on.

In search of an injury, the Secretary speculates about supposed calamities if long-existing voting rights are maintained. But her assertions of "chaos," and "widespread voter confusion" do

not support a stay because they are hypothetical, lack evidentiary support, and in any event, are insufficient to prove irreparable harm in the context of a motion to stay. *See, e.g.*, *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 953 (S.D. Miss. 2014) (rejecting argument that the state will be irreparably harmed absent a stay because allegations of "confusion and practical difficulties" of implementing the injunctive relief were "speculative"); *see also Taylor*, 2015 Mont. Dist. LEXIS at * 3 ("The [Montana stay] rule is similar to Federal Rule of Appellate Procedure Rule 8(a), and federal authority is therefore instructive."). Likewise, the administrative burdens the Secretary alleges would not constitute irreparable harm even if they existed. *See Fish v. Kobach*, 2016 U.S. Dist. LEXIS 68727, at *8-*9 (D. Kan. May 25, 2016) ("disagree[ing] that the administrative burdens on the State constitute irreparable harm").

1. The Secretary's arguments about the status quo fail.

The Secretary's claim that the injunction "fundamentally alters the status quo," Mot. at 3, evinces a misguided attempt to reframe the status quo as the state of the law *after* the implementation of these challenged restrictions. As this Court correctly explained, the Montana Supreme Court has defined "status quo" as "the last actual, peaceable, noncontested condition which preceded the pending controversy . . . . '" Order ¶ 2 (quoting *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839 (internal quotations omitted)). Here, that is Montana's election code "prior to the Montana legislature passing HB 176, HB 530, SB 169, and HB 506." *Id.* ¶ 5. Because this Court's Order restored the status quo, the Secretary's arguments against changing election rules immediately prior to an election, Mot. at 2, actually cut in favor of MDP Plaintiffs. This is aptly illustrated by the Secretary's reliance on the Montana Supreme Court's order in *Stapleton v. Thirteenth Judicial District Court*, OP 20-0293 (May 27, 2020). *See id.* In that case, the district court enjoined a provision of the election code that had existed for decades, and in staying that injunction, the Supreme Court *restored* the status quo. *Stapleton*, OP 20-0293 (citing *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350, 440 P.3d 4). Here, the Court's Order

restored the election law landscape as it existed for years before the enactment of the Challenged Restrictions and is thus on all fours with the Montana Supreme Court's decision in *Stapleton*.

The Secretary's suggestion that the U.S. Supreme Court has discouraged state courts from deciding whether state election laws conform with the rights afforded by state constitutions months before an election, Mot. at 6, is similarly unsupported. The Secretary cites *Republican National Committee v. Democratic National Committee* for the proposition that courts should not alter election rules on the eve of an election, Mot. at 2 (citing 140 S. Ct. 1205, 1207 (2020)), but the Supreme Court has applied that limitation only to *federal* courts considering whether state election laws conflict with the federal constitution. *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (holding "lower federal courts" are prohibited from "alter[ing] . . . [State] election rules on the eve of an election"). That doctrine is animated by federalism concerns that simply do not apply when a state court is considering the constitutionality of a state election law under that state's own constitution. *Growe v. Emison*, 507 U.S. 25, 32 (1993). *Cf. Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (noting that "[i]t is one thing for a State on its own to toy with its election laws close to a State's elections"). That distinction is further supported by the U.S. Supreme Court's recent differential treatment of appeals of state-court judgments, on the one hand, and appeals of federal-court judgments, on the other. *Compare Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020), *with Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020). And even if the federal authority were controlling—it is not—it is not applicable here. In *Republican National Committee*, the Supreme Court disapproved of the district court's preliminary injunction because it issued *five days* before an election and articulated a brand-new election administration standard that had never previously been in effect. *Id.* at 1206-07. The Supreme Court's concerns there about upending the long-standing status quo less than one week before an election are not applicable to the Court's *restoration* here of the long-existing status quo two months before the statewide primary.

2. The Secretary's arguments about voter confusion fail.

The Secretary's claims of "indisputabl[e]" voter confusion are similarly under-supported and overwrought. The Secretary contends that election administrators will be confused following this Court's Order, and "voters necessarily will be as well." Mot. at 4-5. But in support, the Secretary points only to a notice from Gallatin County and a screenshot indicating that another county had not updated its "Frequently Asked Questions" page within two days of this Court's Order. Two examples of election administrators apparently failing to update all information within 48 hours of this Court's Order does not come close to establishing that election administrators are confused, let alone that voters are. In any event, there is no suggestion that any immediate confusion from the Court's order—even if it exists—will not be remedied in the coming weeks, and the Secretary's speculation to the contrary is entirely unsupported.

The Secretary's assertion that failing to stay the Court's injunction of SB 169 will cause confusion because the Secretary has distributed new voter registration confirmation cards that inform voters that, to vote in-person on election day, they must bring their registration card and a photo ID displaying the voter's name, Mot. at 5, is similarly sensational. According to the Secretary, because the prior version of the applicable law required a "current and valid" ID, the statement on the new voter registration confirmation cards instructing voters to bring a photo ID is "no longer valid." *Id.* But that statement is, at worst, incomplete, not incorrect, because it is still true that voters must bring a valid photo ID displaying the voter's name to the polling place. Moreover, the omission of the "current and valid" requirement restored by the Court's injunction is not as significant as the Secretary portrays. According to the Secretary's own documents, under the prior version of the law, an "identification card is presumed to be current and valid if it is issued by any motor vehicle agency, regardless of status." Ex. 1 at 84. And the Secretary once again fails to provide any evidence or reasoned argument supporting her counterintuitive claim that voters are likely to be confused by returning to the law that was in effect during the last statewide election—and for more than a dozen years before.

The Secretary also argues that the Order should be stayed because she undertook some effort to educate administrators and voters about the changes effected by HB 176 and SB 169. Mot. at 5. But despite the Secretary's self-congratulatory rhetoric about her "innumerable" and "extraordinary" voter education efforts, Mot. at 4-5, she presents no evidence of any voter whom she actually educated about the changes effected by SB 169 and HB 176 or who would actually be confused by this injunction. Indeed, the only salient evidence in the record about voter understanding is from voters who were not aware of the elimination of EDR and who were disenfranchised as a result. *See* Bogle Decl. ¶ 8; Denson Decl. ¶¶ 4-5. Overlooking that evidence, the Secretary barely even attempts to explain how, in light of any efforts she made to educate voters about the elimination of EDR, the Court's Order would harm voters by restoring it. *See generally* Mot. at 4-7. Her silence on this point makes sense: If a Montana voter understands that EDR has been restored by the Court's Order, or is unaware that EDR was ever eliminated in the first place, and shows up to register and vote on election day, she would be able to register and vote. Or if a Montana voter believes that EDR has been eliminated, and as a result shows up to register and vote before election day, she could still register and vote. In this light, the Court's Order protects confused voters, and the Secretary's newfound concern about disenfranchisement, *see Id.*. at 6-7, rings particularly hollow, especially because she fails to explain how a Montana voter could be disenfranchised if EDR were restored.

3. The Secretary's arguments about chaos and unforeseen consequences are not well founded.

The Secretary's claims of "chaos," Mot. at 7-8, are similarly under supported and overstated. This Court has already decisively rejected the Secretary's claims that an injunction would "undo" anything. *See* Order at ¶¶ 4-6. The Court similarly rejected the Secretary's assertions about the work she has done:

> the Court does not find it persuasive that the Secretary has been taking steps to enact these laws given that is a duty of her job and she has had notice that these laws were contested since before they were signed into law as evidenced in the

> testimony that occurred in hearings at the legislature and notice soon after they were enacted as evidenced by the Plaintiffs' filing of their complaints.

Id. ¶ 92.

The Secretary's attempt to blame the Court for purportedly "impossible to foresee" consequences likewise misses the mark. The Secretary's vague hand-waving at unspecified repealed or promulgated administrative rules, Mot. at 9, ignores the simple solution that follows from this court's Order: "a return to the status quo that existed prior to the Montana legislature passing HB 176, HB 530, SB 169, and HB 506." Order ¶ 5. The Secretary's insistence that Montana election officials are in an "untenable" position of administering an election without administrative guidance is irreconcilable with her claim that she "has already promulgated guidance to election administrators" and "has engaged in extensive training of election administrators." Mot. at 7. But, in any event, any administrative burden that may result from the need to clarify these rules is simply not the kind of irreparable harm that justifies staying a preliminary injunction. *See Fish*, 2016 U.S. Dist. LEXIS 68727, at *8-*9. Nor does the entirely speculative, "likely" delay in the implementation of new election software constitute irreparable harm to the Secretary. Mot. at 8.

Because the Secretary has failed to show harm—let alone irreparable harm—her Motion should be denied.

C. Issuance of the stay will substantially injure MDP Plaintiffs and the public interest at large.

Finally, the stay should be denied because the Secretary's request would substantially injure MDP Plaintiffs and the interests of the public at large. As this Court correctly found, Plaintiffs made a prima facie case that SB 169 and HB 176 unconstitutionally burden the right to vote. Order ¶ 37. Therefore, the Court's Order is strongly in the public interest. *See Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.")).

Moreover, the public interest unquestionably favors enfranchisement of Montana voters, including those Native, elderly, disable, rural, working, and young voters who disproportionately relied on Election Day registration, and student IDs as identification at the polls, and who would have a harder time voting if the Order were stayed. For this additional reason, the Secretary has failed to establish grounds for granting his Motion.

II. MDP Plaintiffs are largely unopposed to narrowing the Court's preliminary injunctions.

MDP Plaintiffs do not oppose Defendant's request that the Court modify its injunction with respect to SB 169, HB 530, and HB 506 to prohibit enforcement of only Section 2 of each bill. *See* Mot. at 10-14. To the extent Defendant seeks modification of the Court's injunction with respect to HB 176, MDP Plaintiffs oppose such request because the Plaintiffs in this matter collectively sought a preliminary injunction of HB 176 in its entirety.[3]

CONCLUSION

For the foregoing reasons, the Secretary's Motion should be denied.

[3] In the section of her motion addressing modification of the injunction, Defendant references HB 176 but makes no argument as to why the injunction of that bill should be modified.

Respectfully submitted,

By: */s/ Matthew P. Gordon*

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