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 Judge Michael G. Moses **Order Re: Defendant's Motion to Suspend Preliminary Injunction Pending Appeal**

Defendant Christi Jacobsen ("the Secretary") submitted a motion and brief in support to suspend the preliminary injunction granted in this matter. (Dkt. 128-129). The Secretary and consolidated Plaintiffs, Montana Democratic Party and Mitch Bohn ("MDP"); Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe ("WNV"); and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group ("MYA") (collectively, "Plaintiffs"), agreed to a briefing schedule and requested expedited consideration of the motion to suspend the preliminary injunction. (Dkt. 131). Plaintiffs have submitted their responses to the motion and the Secretary has submitted her reply. (Dkt. 136-140). No party requested oral argument. This matter is ripe for adjudication.

Memorandum

The Secretary requests the Court suspend the injunction it issued against HB 176 and SB 169 during the pendency of the Secretary's appeal to the Montana Supreme Court pursuant to Mont. R. App. P. 22(1)(a)(iii). That rule provides that "[a] party shall file a motion in the district court for any of the following relief: … (iii) For an order suspending, modifying, restoring, or granting an injunction pending appeal." Mont. R. App. P. 22(1)(a)(iii). The Secretary also cites to Mont. R. Civ. P. 62(c) which states: "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an

injunction on terms for bond or other terms that secure the opposing party's rights." Under Mont. R. App. P. 22(1)(d), "[t]he district court must promptly enter a written order on a motion filed under this rule and include in findings of fact and conclusions of law, or in a supporting rationale, the relevant facts and legal authority on which the district court's order is based." The Court thus submits its order in the latter form.

I. Legal Standard

Plaintiffs and the Secretary dispute the applicable legal standard to be applied concerning a motion suspending an injunction. The Secretary cited to a federal district court case in southern California to support her argument for the applicable standard to be applied. Specifically, in the case cited by the Secretary, *Strobel v. Witter*, the federal district court described "[t]he standard for granting a stay pending appeal is similar to that employed for deciding whether to grant a preliminary injunction. "*Strobel v. Witter* No. 04CV1069 BEN (BLM)(S.D. Cal. Apr. 24, 2007), 2007 U.S. Dist. LEXIS 30407, at *2. Further that "[t]he Ninth Circuit uses two interrelated tests, which represent 'the outer reaches of a single continuum.'" *Id*. (quoting *Los Angeles Memorial Coliseum Commission v. National Football League,* 634 F.2d 1197, 1201 (9th Cir. 1980)). According to the Secretary's standard, "[t]he moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id*. at *2-3. The Secretary also argues that the Court has considerable discretion in determining whether a stay of an injunction should be granted. *See Henry v. Dist. Court* (1982), 198

Mont. 8, 13, 645 P.2d 1350, 1353; *Intermountain Tel. & Power Co. v. Mid-Rivers Tel. Coop.* (1982), 201 Mont. 448, 453, 655 P.2d 491, 494.

Plaintiffs cite to cases in Montana district courts applying a strict federal standard. Specifically, Plaintiffs describe that because Rule 62(c) "is based on, and virtually identical in substance to 62(c), Fed. R. Civ. P." that the Court should examine:

> 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.
> 4. Where the public interest lies.

Pinnacle Gas Res. v. Diamond Cross Properties, 2008 Mont. Dist. LEXIS 240, *2 (citing Manual of Federal Practice 5th §7.89); *see also State ex rel. McGrath v. Philip Morris*, 2007 Mont. Dist. LEXIS 600, *3 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)).

The Court finds the Secretary has failed to meet her burden under either standard as discussed below.

II. Discussion

A. Status Quo

The Secretary first argues that this Court incorrectly evaluated the status quo. The Secretary contends that the status quo should be evaluated as of the date the Plaintiffs sought injunctive relief. The cases the Secretary cites to in support of this contention are inapposite because in both cases, the act that was requested to be

enjoined had already occurred, thus there was no status quo available to return to and an injunction was not an appropriate remedy. In this case, the acts are ongoing.

Specifically, in *State v. BNSF Ry. Co.*, the Montana Supreme Court stated, "this case is not suitable for issuance of a preliminary injunction" and described that in that case, with the issuance of its preliminary injunction, the district court had effectively "ordered specific performance of the 1984 Agreement under new terms substantially different than the prior agreed upon terms. The new terms severely limit termination of the new interchange agreement and were never part of the 1984 or 1986 Agreements." *State v. BNSF Ry. Co.*, 2011 MT 108, ¶¶ 22-24, 360 Mont. 361, ¶¶ 22-24, 254 P.3d 561, ¶¶ 22-24. In *Mustang Holdings v. Zaveta*, the Montana Supreme Court describes "although the ditch was already completely destroyed by the time Zaveta sought the injunction, the District Court nonetheless granted Zaveta's request for a preliminary injunction and imposed an order requiring Mustang to restore the ditch." *Mustang Holdings, LLC v. Zaveta*, 2006 MT 234, ¶ 13, 333 Mont. 471, ¶ 13, 143 P.3d 456, ¶ 13. In *Zaveta*, a return to the status quo was impossible, because the enjoined act had already been completed.

In this case, while the Court recognizes that local elections have already been held, Plaintiffs are not requesting the laws be enjoined retroactively as to those elections but rather are requesting that the application of these laws be enjoined as to future elections pending the determination on the merits of whether these laws are constitutional. The Court evaluated the status quo as that of "the last actual, peaceable,

noncontested condition which preceded the pending controversy." *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350, ¶ 26, 440 P.3d 4, ¶ 26 (quoting *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839)(internal quotations omitted). Moreover, "[t]hat a statute has been on the books for some time is not the relevant inquiry when entertaining a request to enjoin it." *Weems*, at ¶ 26. Thus, the Court finds that this argument does not support the Secretary's request for suspension of the preliminary injunction.

B. Voter Confusion & Work

The Secretary contends that the rationale in *S n v. Thirteenth Judicial District Court* concerning staying an injunction is appl here. In *Stapleton*, "[t]he District Court entered its preliminary injunctio ays before the June 2, 2020 primary election and two weeks after elect ministrators mailed ballots to all Montana voters." Order at 2, *Stapleto irteenth Judicial District Court*, OP 20–0293 (May 27, 2020)("*Stapleton* Order"). The Montana Supreme Court in *Stapleton* ultimately decided "there [was] good cause to maintain the election-day deadline for [the] primary election in order to avoid voter confusion and disruption of election administration." *Stapleton* Order at 3.

In this case, the Court's preliminary injunction entered on April 6, 2022, more than two months before the June 7, 2022 election. The rationale in *Stapleton*, while

relevant, is not the same given the two months that the Secretary has to manage the enjoining of these laws.

In that same vein, the Secretary's arguments concerning voter confusion are mystifying to the Court. Specifically, regarding the enjoining of HB 176, voters will now be able to register to vote on Election Day as they have been for the last 15 years. If voters function under the theory that they are no longer able to register on election day they will likely register prior to that day, and no harm will come to them. On the other hand, if voters function under the theory that they can register to vote on election day—but HB 176 was not enjoined—they would be harmed because they would be unable to cast their vote. Thus, voter confusion does not support a suspension of the Court's preliminary injunction as to HB 176. Not to mention, the Secretary complains about the additional work required to "train" election officials regarding the enjoining of HB 176. However, the Court does not see the massive effort alleged by the Secretary that is required to let election officials and workers know that voters can now register to vote on election day the same as they have been for the last fifteen years.

Regarding SB 169 the Secretary makes the same arguments concerning voter confusion and extra work for the Secretary and election workers. However, these concerns are more than outweighed by the constitutional rights of Montana voters—which the Court has previously found that Plaintiffs made a prima facie case that constitutional rights are burdened by SB 169 and HB 176.

According to the Secretary's standard, she must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. Regarding the serious legal questions raised the Secretary describes "the injunction is predicated on a novel question of law."(Dkt. 140 at 8). The Court agrees that at issue are serious legal questions however the second part of the Secretary's standard, that the balance of hardships tips sharply in her favor, does not weigh in favor of suspending the preliminary injunction. More specifically, while a legal question concerning constitutional rights is of the upmost seriousness, these issues are not novel. These are classic constitutional matters whereby the Montana Supreme Court will either agree with the level of scrutiny applied by the court, disagree with it and educate the court on the proper level to apply, or not address the appropriate level of scrutiny at all. Nonetheless, the hardships suffered by the Secretary essentially boil down to having to engage in additional work whereas the hardships suffered by Plaintiffs are potentially the burden on or loss of the ability to exercise their constitutional rights.

This Court finds that the potential burden on or loss of the ability to exercise of a constitutional right suffered by Plaintiffs significantly tips the balance of hardships in their favor. The Secretary has ample time to get her work done and by doing so, will preserve the constitutional rights of Plaintiffs and Montana voters pending a determination of the constitutionality of the laws that she has worked to implement.

In sum, the Court finds that the Secretary has not met her burden under the standard she proposes for the Court to suspend its injunction as to SB 169 and HB 176.

Under the standard proposed by Plaintiffs, "the standard for suspending an injunction pending appeal is essentially the same as the standard for granting the injunction in the first place." *Pinnacle Gas Res. v. Diamond Cross Properties*, 2008 Mont. Dist. LEXIS 240, *2. Apart from alleging hard work and voter confusion which the Court has previously addressed, the only new facts raised by the Secretary concern depositions that have occurred in the interim. The Court does not find that these undermine the case made by the Plaintiffs in their motions for preliminary injunctions at this point but are relevant to a determination on the merits.

The Secretary argues Montana voters will suffer irreparable harm in the absence of a stay because, while SB 169 is enjoined, voters will have to present a "current and valid" ID, when the voter registration confirmation cards issued after the enactment of SB 169 instruct voters to bring a photo ID. However, as described by MDP in their response, "[a]ccording 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.'" (Dkt. 138 at 6 (citing Decl. of Matthew Gordon, No. DV 21-451, Ex. 1 at 84, Apr. 14, 2022)). The Secretary further alleges harm to election administrators given the work they will have to do. The Court recognizes this fact and appreciates all that election administrators do. The

constitutional injuries that Plaintiffs and Montana voters would suffer, if these laws are ultimately found to be unconstitutional, however, are too significant to be outweighed by the harm suffered by election administrators.

Lastly, as to the public interest, the Secretary again cites to the work that will be required to comply with this Court's order. While the Court recognizes the necessity of that work, it is clear to this Court, given the significant question of whether these laws are constitutional, that the public interest lies in these laws remaining enjoined pending a determination on the merits.

Thus, the Court finds the Secretary has not met her burden under the standard proposed by Plaintiffs.

C. Modification of the Preliminary Injunction Order

The Secretary additionally requests the Court modify the injunction granted on April 6, 2022, against the provisions of SB 169, HB 506, and HB 530 that were not challenged by the Plaintiffs in this matter. Plaintiffs do not oppose. This Court did not intend for its preliminary injunction to be read as enjoining SB 169, HB 506, and HB 530 beyond that requested by Plaintiffs as evidenced by the first part of its order stating "1. Plaintiffs' Motions for a Preliminary Injunction are **GRANTED;**" however the Court recognizes the second part of its order could be read to enjoin the laws in their entirety. Therefore, the Court will modify part 2 of its Order Granting Plaintiffs' Motions for Preliminary Injunctions (Dkt. 124) to state the following: "2. The Secretary and her

agents, officers, employees, successors, and all persons acting in concert with each or any of them are IMMEDIATELY restrained and prohibited from enforcing Section 2 of HB 530, Section 2 of HB 506, Section 2 of SB 169, and any aspect of HB 176, according to the prayer of the Plaintiffs' motions for preliminary injunctions pending resolution of the Plaintiffs' request that the Secretary be permanently enjoined from enforcing the statutes cited above;".

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

IT IS HEREBY ORDERED:

1. The Secretary's motion to suspend preliminary injunction pending appeal is **DENIED**;
2. The Secretary's request that the scope of the Court's preliminary injunction order be modified is **GRANTED**; specifically, part 2 of the Court's Order Granting Plaintiffs' Motions for Preliminary Injunctions is modified to state "2. The Secretary and her agents, officers, employees, successors, and all persons acting in concert with each or any of them are IMMEDIATELY restrained and prohibited from enforcing Section 2 of HB 530, Section 2 of HB 506, Section 2 of SB 169, and any aspect of HB 176, according to the prayer of the Plaintiffs' motions for preliminary

injunctions pending resolution of the Plaintiffs' request that the Secretary be permanently enjoined from enforcing the statutes cited above;".

DATED April 22, 2022

/s/ Michael G. Moses
District Court Judge

cc: Dale Schowengerdt
David M.S. Dewhirst
Austin James
Peter M. Meloy
Matthew Gordon
John Heenan
Alex Rate
Ryan Ward Aikin
Rylee Sommers-Flanagan
David Knobel
Jonathan Topaz
Kathleen Smithgall
Ian McIntosh
Clayton Gregersen
Alora Thomas-Lundborg
Akilah Lane
Jacqueline De León
Matthew Campbell
Samantha Kelty
Theresa J. Lee
Jonathan Hawley
William Morris
E. Lars Phillips
Leonard H. Smith
John M. Semmens
Henry Brewster

Electronically Signed By:
Hon. Judge Michael Moses
Fri, Apr 22 2022 02:12:14 PM