

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 22-0172

---

MONTANA DEMOCRATIC PARTY and MITCH BOHN, WESTERN  
NATIVE  
VOICE et al., MONTANA YOUTH ACTION, et al.,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of  
State,

Defendant and Appellant.

---

APPELLEES MONTANA YOUTH ACTION, FORWARD MONTANA  
FOUNDATION, AND MONTANA PUBLIC INTEREST RESEARCH  
GROUP'S BRIEF IN OPPOSITION TO APPELLANT'S RULE 22(2)  
MOTION TO STAY

---

On Appeal from the Montana Thirteenth Judicial District  
Yellowstone County  
Cause No. DV-21-0451  
Honorable Judge Michael G. Moses

---

**APPEARANCES:**

DALE SCHOWENGERDT  
JOHN M. SEMMENS  
Crowley Fleck, PLLP  
P.O. Box 797  
Helena, MT 59624-0797  
dale@crowleyfleck.com

LEONARD H. SMITH  
DAVID F. KNOBEL  
Crowley Fleck, PLLP  
P.O. Box 2529  
Billings, MT 59103

IAN MCINTOSH  
WILLIAM MCINTOSH MORRIS  
E. LARS PHILLIPS  
Crowley Fleck, PLLP  
1915 S. 19th Ave.  
Bozeman MT, 59719

DAVID M.S. DEWHIRST  
KATHLEEN LYNN  
SMITHGALL  
Office of the Attorney General  
P.O. Box 201401  
Helena, MT 59620-1401

AUSTIN MARKUS JAMES  
Office of the Secretary of State  
P.O. Box 202801  
Helena, MT 59620-2801

*Attorneys for  
Defendant/Appellant Christi  
Jacobsen*

RYLEE SOMMERS-FLANAGAN  
Upper Seven Law  
P.O. Box 31  
Helena, MT 59624  
(406) 396-3373  
rylee@uppersevenlaw.com

RYAN AIKIN  
Aikin Law Office, PLLC  
P.O. Box 7277  
Missoula, MT 59807

*Attorneys for Youth  
Plaintiffs/Appellees*

ALEX RATE  
AKILAH LANE  
ACLU of Montana  
P.O. Box 1968  
Missoula, MT 59806  
ratea@aclumontana.org

ALORA THOMAS-LUNBORG\*  
JONATHAN TOPAZ\*  
DALE HO\*  
ACLU  
125 Broad ST.  
New York, NY 10004

SAMANTHA KELTY\*  
Native American Rights Fund  
1514 P St. NW, Suite D  
Washington, D.C. 20005

JACQUELINE DE LEON\*  
MATTHEW CAMPBELL\*  
Native American Rights Fund

1506 Broadway  
Boulder, CO 80302-6296

THERESA J. LEE\*  
HLS Election Law Clinic  
6 Everett St., Suite 5112  
Cambridge, MA 02138

*Attorneys for Plaintiffs/Appellees  
Western Native Voice, et al.*

*\* Admitted pro hac vice*

MATTHEW GORDON  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
(206) 359-9000  
mgordon@perkinscoie.com

PETER M. MELOY  
Meloy Law Firm  
P.O. Box 1241  
Helena, MT 59624  
mike@meloylawfirm.com

JOHN HEENAN  
Heenan & Cook PLLC  
1631 Zimmerman Trail  
Billings, MT 59102

HENRY J. BREWSTER  
JONATHAN P. HAWLEY  
Elias Law Group LLP  
10 G St. NE Suite 600  
Washington, DC 20002

*Attorneys for Plaintiffs/Appellees  
Montana Democratic Party  
and Mitch Bohn*

**TABLE OF CONTENTS**

Table of Authorities ..... ii

Introduction ..... 1

Standard ..... 2

Argument ..... 3

    I.    The injunction maintains the status quo ..... 4

    II.   Plaintiffs are likely to succeed on the merits and the Secretary  
          has made no contrary showing ..... 6

    III.  The Secretary will suffer no irreparable injury absent a stay,  
          but a stay will substantially and irreparably injure Plaintiffs  
          and the public ..... 8

Conclusion ..... 10

RETRIEVED FROM DEMOCRACYDOCKET.COM

## TABLE OF AUTHORITIES

### Cases

<i>BAM Ventures, LLC v. Schifferman</i> , 2019 MT 67.....	2
<i>Caldwell v. Sabo</i> , 2013 MT 240 .....	9, 10
<i>Driscoll v. Stapleton</i> , 2020 MT 247 .....	4, 5
<i>Fla. Businessmen for Free Enterprise v. City of Hollywood</i> , 648 F.2d 956 (5th Cir. 1981) .....	9
<i>Flying T Ranch, LLC v. Catlin Ranch, LP</i> , 2020 MT 99.....	2
<i>Lair v. Bullock</i> , 697 F.3d 1200 (9th Cir. 2012) .....	10
<i>Leiva-Perez v. Holder</i> , 640 F.3d 962 (9th Cir. 2011) .....	6
<i>Scott v. Roberts</i> , 612 F.3d 1279 (11th Cir. 2010) .....	9
<i>Stapleton v. Thirteenth Judicial Dist. Ct.</i> , OP 20-0293 (May 27, 2020) .....	3, 5
<i>The Clark Fork Coal. v. Tubbs</i> , No. BDV-2010-874, 2015 WL 13614529 (Mont. 1st Jud. Dist. Ct. May 8, 2015) .....	3
<i>Weems v. State</i> , 2019 MT 98.....	5

### Statutes

MCA § 13-13-205.....	4
----------------------	---

## INTRODUCTION

Defendant Secretary of State Christi Jacobsen asks this Court to stay the District Court’s Order enjoining enforcement of two election laws that make it more difficult for Montanans—especially young Montanans—to vote. But the preliminary injunction, entered on April 6, 2022, was issued for good reason: the Secretary cannot rebut the robust evidence that the challenged laws unduly burden Montanans’ exercise of their fundamental rights of suffrage and to equal protection under the law.

Whether to stay a preliminary injunction is soundly within the District Court’s discretion, but even if it were not, there is simply no justification for staying the preliminary injunction of House Bill 176 (“HB 176”), which eliminates election day registration (“EDR”) and Senate Bill 169 (“SB 169”), which complicates the set of identifications allowed for voting. If implemented, these laws will irreparably injure Montana voters. With the fundamental right to vote in the balance, the Secretary offers no evidence of voter fraud in the state—and only minute, conflicted evidence of administrative burden associated with election day registration.

Consolidated Plaintiffs represent Montanans from many backgrounds with varying, sometimes divergent, interests. Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group (hereinafter “Youth Plaintiffs”) join common interest Plaintiffs Western Native Voice et al. (“WNV”) and Montana Democratic Party et al. (“MDP”) in opposing the Secretary’s motion to stay the Order enjoining HB 176 and SB 169 and request the Court deny the same.

### STANDARD

“[A] district court’s order on a motion to stay proceedings [is reviewed] for an abuse of discretion.” *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 7, 400 Mont. 1, 462 P.3d 218. A district court’s decision “to grant or deny preliminary injunctions” will not be overturned “absent a manifest abuse of discretion.” *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 7, 395 Mont. 160, 437 P.3d 142. Montana courts have sometimes relied on federal law and assessed four factors to determine whether to grant a stay. These are: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether, absent a stay, the applicant will be irreparably

injured; (3) whether a stay will substantially injure the other parties; and (4) where the public interest lies. *The Clark Fork Coal. v. Tubbs*, No. BDV-2010-874, 2015 WL 13614529, at \*1 (Mont. 1st Jud. Dist. Ct. May 8, 2015). This Court has also recently stayed an injunction where doing so would “maintain the status quo pending consideration of the issues.” Order, *Stapleton v. Thirteenth Judicial Dist. Ct.*, OP 20-0293, at 3 (May 27, 2020) (“Stapleton Order”). Under either the four-factor test or simply by assessing the status quo, the injunction entered below is proper and should remain unstayed.

## ARGUMENT

The Secretary centers her request around two arguments. First, she claims a preliminary injunction issued two months before primary election day—which requires election officials to conduct the election in the same way that elections have been conducted for the last nearly two decades—does not allow enough time to comply. Second, she repeats her theory that Plaintiffs have not shown that these laws harm voters, despite record evidence to the contrary. Both arguments are disputes with reality. There was and remains time enough for election officials to adhere to the process of conducting elections that long predates the



2021 changes that are the subject of this litigation. The District Court granted Plaintiffs' request for preliminary relief after considering substantial evidence of harm in the form of declarations and affidavits from individual Montanans, statistical evidence showing demographic impact, and legislative evidence attesting the same. *See* App. 048–385 (including Dkt. 54, 69, 70, and 74).

**I. The injunction maintains the status quo.**

The Secretary's first argument relies on the dual premises that enjoining HB 176 and SB 169 upends the status quo and that election officials lack the time to implement the injunction without causing voter confusion. In fact, the District Court's Order restores the status quo. Moreover, the injunction was issued two months before election day and a little over a month before absentee ballots are generally sent out. *See* §§ 13-13-205(1)(a)(i)–(iii). In other words, there has been and remains ample time to implement the injunction.

In *Driscoll v. Stapleton*, 2020 MT 247, 401 Mont. 405, 473 P.3d 386, the lower court “entered its preliminary injunction ten days before the June 2, 2020 primary election and two weeks *after election administrators mailed ballots* to all Montana voters,” which instructed

voters “in three separate places that ballots must be *received* by the election office by 8:00 p.m. on Election Day, June 2.” Stapleton Order at 2 (first emphasis added). Explaining that the status quo means “the last actual, peaceable, noncontested condition which preceded the pending controversy,” *id.* at 3 (quoting *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 250, 440 P.3d 4), this Court reasoned that the receipt deadline had been “in place for many years,” that election officials had “responded swiftly to ensure that ballots were timely mailed,” and the mailed ballots included an “express directive” that they would not count “unless received by the 8 p.m. election day deadline,” *id.* Accordingly, the Court found “good cause to maintain the election-day deadline . . . to avoid voter confusion and disruption of election administration.” *Id.*<sup>1</sup>

Here, by contrast, the enjoined laws would require a break with norms that have been nearly two decades in the making. HB 176 and SB 169 alter election laws that have been in place for eight and nine statewide election cycles respectively. App. 013, 016–17; *see also* App.

---

<sup>1</sup> The Secretary appears to misquote the Stapleton Order, reframing certain phrases to sound more like a test than they appear to be. App. 514–15. Youth Plaintiffs’ best reading of the Stapleton Order is that it turned on the timing of the injunction and the fact that it disrupted existing practices that had been “in place for many years,” and did so *after* ballots had been sent out to voters. Stapleton Order at 2–3.

499:24–501:19 (election administrator in Broadwater County noting that he has never administered a poll election without EDR). And some election officials have begun issuing instructions to voters consistent with the preliminary injunction. App. 494:15–496:10 (election administrator in Petroleum County has already issued guidance consistent with the District Court’s preliminary injunction). Staying the injunction would mean requiring a third change in advance of the June 2022 primary election, far likelier to promote confusion, not least because the laws in question are new and unfamiliar to Montana voters. The Court should deny the Secretary’s motion to stay.

**II. Plaintiffs are likely to succeed on the merits and the Secretary has made no contrary showing.**

Whether the Secretary raises “serious legal questions” or not, she must also show a likelihood of success on the merits. *See Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (describing “many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a ‘reasonable probability’ or ‘fair prospect,’” or “‘a substantial case on the merits’” or that “‘serious legal questions are raised’” and concluding that “these formulations are essentially interchangeable” and that to justify a stay, a petitioner must have “a substantial case for

relief on the merits”) (citations omitted). But the Secretary does not grapple with the District Court’s findings, instead making the conclusory statement SB 169 would survive under federal law, App. 515–16, and that the Montana Constitution delegates would have been perfectly happy to see EDR reversed after fifteen years of its use without mishap and despite Montanans’ rejection of a referendum attempting to eliminate it, *id.* at 516; *see* App. 028–29.

As to SB 169, the District Court found Youth Plaintiffs’ and MDP’s expert testimony showed that SB 169 increases the cost of voting for students. App. 457. Further, the District Court concluded that there have been “no instances of student ID-related election fraud,” and that to the extent the law was meant “to clear up confusion among election workers,” there “are likely less burdensome means than removing student IDs as a primary form of ID to clear up confusion amongst election staff.” *Id.* at 457–58. The Secretary does not respond to these factual findings and legal conclusions.

As to HB 176, the Court concluded that, among other things, Plaintiffs had rebutted the Secretary’s claims of voter fraud related to EDR. *Id.* at 468. And Plaintiffs showed that young voters specifically

rely on EDR, accounting for 31.2% of voters registered on Election Day. *Id.* at 466–67; *cf.* App. 247, ¶ 6 (documenting that at least 266 Montanans who attempted to use EDR were turned away in 12 counties during the 2021 municipal election). Moreover, the Court found that moving the registration deadline back does little to reduce the administrative burden on election officials because it only changes the date of that burden. App. 468. Again, the Secretary does not respond.

**III. The Secretary will suffer no irreparable injury absent a stay, but a stay will substantially and irreparably injure Plaintiffs and the public.**

The Secretary gives three reasons that she will suffer harm absent a stay. Youth Plaintiffs take each in turn.

First, the Secretary argues that time spent implementing the laws will be lost. App. 516–17. But the question is whether these laws are constitutional and “the public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law.” *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010). If the Secretary were to prevail on the merits, time spent educating and engaging with election officials would not be lost—its usefulness would only be delayed. If Plaintiffs prevail—an outcome they have proven is more likely—the Secretary cannot

claim an interest in enforcing an unconstitutional law for one election simply because she trained election workers and expended resources to implement the law. *See Fla. Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956 (5th Cir. 1981) (“Given appellants’ substantial likelihood of success on the merits, however, the harm to the city from delaying enforcement is slight.”); *see also Caldwell v. Sabo*, 2013 MT 240, ¶ 29, 371 Mont. 328, 308 P.3d 81 (“[M]oney damages are not considered irreparable harm.”).

Second, the Secretary argues that without a stay, election officials will “conduct rapidly-approaching elections without sufficient training.” App. 517. And third, the Secretary argues that voters will be confused, and their confidence shaken, without a stay. *Id.* But, as the District Court observed with respect to the Secretary’s voter confusion claims, both of these arguments are “mystifying.” *See* App. 487. Like voters, election officials have either been administering EDR for 15 years or are entirely familiar with the process. *See id.* The same is true of acceptable forms of identification under SB 169. Although the Secretary claims that SB 169 was meant to reduce confusion, the law created a class system for forms of identification that did not exist

before. Under prior law—and thus under the injunction—voters only need one form of identification that shows either a name and photograph or a name and current address within the precinct.

The Secretary cites *Lair v. Bullock*, for the proposition that a stay will avoid throwing “a previously stable system into chaos,” 697 F.3d 1200, 1214 (9th Cir. 2012), but the stability of Montana’s election system is based on the prior legal regime that the injunction reinstates—that is, the status quo to which Montanans and election officials alike are accustomed. Operating elections consistently under constitutional, nondiscriminatory laws is within the public interest.

## CONCLUSION

Youth Plaintiffs thus respectfully request that the Court deny Defendant Secretary Jacobsen’s motion to stay the preliminary injunctions of HB 176 and SB 169.

Respectfully submitted this 9th day of May, 2022.

/s/ Rylee Sommers-Flanagan

Rylee Sommers-Flanagan

MT Bar No. 42343246

Upper Seven Law

Ryan Aikin

Aikin Law Office, PLLC

*Attorneys for Youth Plaintiffs*

## CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Century typeface of 14 points, is double spaced, and is within the 10-page limit provided under Rule of Appellate Procedure 22.

/s/ Rylee Sommers-Flanagan

RETRIEVED FROM DEMOCRACYDOCKET.COM



## CERTIFICATE OF SERVICE

I, Rylee Sommers-Flanagan, hereby certify that I have served true and accurate copies of the foregoing brief in opposition by method of e-service to the following on May 9, 2022.

/s/ Rylee Sommers-Flanagan

DALE SCHOWENGERDT  
JOHN M. SEMMENS  
Crowley Fleck, PLLP  
P.O. Box 797  
Helena, MT 59624-0797  
dale@crowleyfleck.com

LEONARD H. SMITH  
DAVID F. KNOBEL  
Crowley Fleck, PLLP  
P.O. Box 2529  
Billings, MT 59103

IAN MCINTOSH  
WILLIAM MCINTOSH MORRIS  
E. LARS PHILLIPS  
Crowley Fleck, PLLP  
1915 S. 19th Ave.  
Bozeman MT, 59719

DAVID M.S. DEWHIRST  
KATHLEEN LYNN SMITHGALL  
Office of the Attorney General  
P.O. Box 201401  
Helena, MT 59620-1401

AUSTIN MARKUS JAMES  
Office of the Secretary of State  
P.O. Box 202801  
Helena, MT 59620-2801

*Attorneys for Defendant/Appellant Christi Jacobsen*

ALEX RATE  
AKILAH LANE  
ACLU of Montana  
P.O. Box 1968  
Missoula, MT 59806  
ratea@aclumontana.org

ALORA THOMAS-LUNBORG\*  
JONATHAN TOPAZ\*  
DALE HO\*  
ACLU  
125 Broad ST.  
New York, NY 10004

SAMANTHA KELTY\*  
Native American Rights Fund  
1514 P St. NW, Suite D  
Washington, D.C. 20005

JACQUELINE DE LEON\*  
MATTHEW CAMPBELL\*  
Native American Rights Fund  
1506 Broadway  
Boulder, CO 80302-6296

THERESA J. LEE\*  
HLS Election Law Clinic  
6 Everett St., Suite 5112  
Cambridge, MA 02138

*Attorneys for Plaintiffs/Appellees Western Native Voice, et al.*

MATTHEW GORDON  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
(206) 359-9000  
mgordon@perkinscoie.com

PETER M. MELOY  
Meloy Law Firm  
P.O. Box 1241  
Helena, MT 59624  
mike@meloylawfirm.com

JOHN HEENAN  
Heenan & Cook PLLC  
1631 Zimmerman Trail  
Billings, MT 59102

HENRY J. BREWSTER  
JONATHAN P. HAWLEY  
Elias Law Group LLP  
10 G St. NE Suite 600  
Washington, DC 20002

*Attorneys for Plaintiffs/Appellees  
Montana Democratic Party and Mitch Bohn*

RETRIEVED FROM DEMOCRACYDOCKET.COM

## CERTIFICATE OF SERVICE

I, Rylee Sommers-Flanagan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-09-2022:

Matthew Prairie Gordon (Attorney)  
1201 Third Ave  
Seattle WA 98101  
Representing: Bohn, Mitch, Montana Democratic Party  
Service Method: eService

Peter M. Meloy (Attorney)  
2601 E. Broadway  
2601 E. Broadway, P.O. Box 1241  
Helena MT 59624  
Representing: Bohn, Mitch, Montana Democratic Party  
Service Method: eService

John C. Heenan (Attorney)  
1631 Zimmerman Trail, Suite 1  
Billings MT 59102  
Representing: Bohn, Mitch, Montana Democratic Party  
Service Method: eService

Jonathan Patrick Hawley (Attorney)  
1700 Seventh Avenue  
Suite 2100  
Seattle WA 98101  
Representing: Bohn, Mitch, Montana Democratic Party  
Service Method: eService

Ryan Ward Aikin (Attorney)  
1018 Hawthorne St.  
Missoula MT 59802  
Representing: Forward Montana Foundation  
Service Method: eService

Clayton H. Gregersen (Attorney)  
P.O. Box 2529  
Billings MT 59101  
Representing: Christi Jacobsen

Service Method: eService

David Francis Knobel (Attorney)  
490 N. 31st St., Ste 500  
Billings MT 59101  
Representing: Christi Jacobsen  
Service Method: eService

John Mark Semmens (Attorney)  
900 N. Last Chance Gulch  
Suite 200  
Helena MT 59601  
Representing: Christi Jacobsen  
Service Method: eService

E. Lars Phillips (Attorney)  
1915 S. 19th Ave  
Bozeman MT 59718  
Representing: Christi Jacobsen  
Service Method: eService

William McIntosh Morris (Attorney)  
1915 S. 19th Ave.  
P.O. Box 10969  
Bozeman MT 59719  
Representing: Christi Jacobsen  
Service Method: eService

Leonard Hudson Smith (Attorney)  
P.O. Box 2529  
Billings MT 59103  
Representing: Christi Jacobsen  
Service Method: eService

Austin Markus James (Attorney)  
1301 E 6th Ave  
Helena MT 59601  
Representing: Christi Jacobsen  
Service Method: eService

Ian McIntosh (Attorney)  
1915 S. 19th Ave  
P.O. Box 10969  
Bozeman MT 59719  
Representing: Christi Jacobsen  
Service Method: eService

Dale Schowengerdt (Attorney)  
900 N. Last Chance Gulch

RETRIEVED FROM DEMOCRACYDOCKET.COM

Suite 200  
Helena MT 59624  
Representing: Christi Jacobsen  
Service Method: eService

David M.S. Dewhirst (Govt Attorney)  
215 N Sanders  
Helena MT 59601  
Representing: Christi Jacobsen  
Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)  
215 N. Sanders St.  
Helena MT 59601  
Representing: Christi Jacobsen  
Service Method: eService

Alexander H. Rate (Attorney)  
713 Loch Leven Drive  
Livingston MT 59047  
Representing: Western Native Voice  
Service Method: eService

Henry James Brewster (Attorney)  
10 G St NE Ste 600  
Washington DC 20002-4253  
Representing: Bohn, Mitch, Montana Democratic Party  
Service Method: E-mail Delivery

RETRIEVED FROM DEMOCRACYDOCKET.COM

Electronically Signed By: Rylee Sommers-Flanagan  
Dated: 05-09-2022