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

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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.



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# APPELLEES MONTANA YOUTH ACTION, FORWARD MONTANA FOUNDATION, AND MONTPIRG'S BRIEF IN OPPOSITION TO THE APPEAL OF THE PRELIMINARY INJUNCTIONS

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

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Was the district court's preliminary injunction of two unconstitutionally restrictive election laws proper?

## STATEMENT OF THE CASE

During the 2021 legislative session, the Montana Legislature passed an assortment of laws raising barriers between Montanans and their ballots. Cases challenging various of these laws have proliferated in the last year. Because several of the bills at issue in this case make voting more difficult for broad sections of the Montana voting population, four distinct plaintiff groups challenged House Bill 176 ("HB 176"), which eliminates election day registration, and two challenged the complicated changes that Senate Bill 169 ("SB 169") makes to voter ID requirements. Three of the four groups' cases were filed in the Thirteenth Judicial District and consolidated below.



The district court preliminarily enjoined four laws, including SB 169 and HB 176, on April 6, 2022. Two days later, Defendant/ Appellant Secretary of State ("the Secretary") filed a notice of appeal and moved to stay the preliminary injunction as to SB 169 and HB 176. The district court denied the stay on April 22. The Secretary appealed, and

this Court reversed, finding that the district court had misidentified the relevant status quo as the time prior to the enactment of SB 169 and HB 176. This Court also relied on the Secretary's representation that 337,000 Montanans had voted under the 2021 statutory provisions to conclude that "the status quo for the electorate" was "best maintained by staying the preliminary injunction." App'x 007.

Plaintiff/Appellees Montana Youth Action, Forward Montana Foundation, and MontPIRG (collectively "Youth Voters") herein respond to the Secretary's Opening Brief appealing the district court's order granting a preliminary injunction of the challenged laws.[1]



## STATEMENT OF FACTS

First among the fundamental rights expressly guaranteed in the Montana Constitution are popular sovereignty and self-government. Mont. Const., art. II, §§ 1, 2. These rights are secured and realized through the right to vote—an independent protection provided in Article II, § 13. The right to vote is unequivocal, affirmative, and

[1] Instead of repeating points well-argued in consolidated Plaintiffs' briefs in opposition, Youth Voters in some places refer the Court to specific sections of Western Native Voice Plaintiffs' ("Native Voters") brief and the Montana Democratic Party and Bohn Plaintiffs' ("Bohn") brief.

adamantly opposed to interference, legislative or otherwise: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *Id.*, § 13.

Suffrage makes a second, separate appearance in the Montana Constitution. Article IV is dedicated to "Suffrage and Elections" and, in addition to setting out certain requirements and definitions, Article IV obligates the legislature to "provide by law the requirements for residence, registration, absentee voting, and administration of elections," and to "insure the purity of elections and guard against abuses of the electoral process." Mont. Const., art. IV, § 3. The legislature is bound by these provisions, each of which is particular to the Montana Constitution and distinct from the U.S. Constitution.



## I. SB 169 makes complicated changes to identification requirements.

The Secretary incorrectly describes the changes that SB 169 makes to voter identification requirements.[2] Between 2003 and 2021, voter

[2] The Secretary states that "Montana's voter identification laws (both before and after SB 169) split acceptable forms of ID into two categories, primary and non-primary," that "non-primary IDs are acceptable when presented with another document showing name and address," and that SB 169 moved student IDs from the primary to non-primary ID category. App'x 021. This is simply incorrect.

identification in Montana was split into categories, but no category required voters to show more than a single form of identification. App'x 128 (SB 169 Section 1(4)(ii)(A), deleted the word "or," replacing it with the word "and" while Sections 2(1)(A) and (1)(B) require, for the first time in Montana history, the need for a secondary form of identification). In other words, between 2003 and 2021, Montana voters needed only one document to prove their identity. They could have used any one of the following: a current and valid photo identification or a current utility bill or a bank statement or a paycheck or any government document showing their name and current address. *Id.* SB 169 changed this system, imposing a hierarchy and expressly excluding student identification from the newly created category of standalone identification.



The Secretary also incorrectly states the reason justifying the specific list of photo identifications in the standalone identification category, contending, without citation, that the legislature meant to include only "government-issued federal or Montana" identification. App'x 021–22. But SB 169's standalone category includes a Montana

concealed carry permit,[3] a form of identification issued not by the state or federal governments but instead on a county-by-county basis.[4] Meanwhile, state-run institutions are largely responsible for issuing postsecondary student identifications in Montana. App'x 161 (calculating that Montana University System schools necessarily issue more than 90 percent of postsecondary student identification in Montana because the sixteen public universities and colleges that comprise the Montana University System have just over 41,000 enrolled students compared to around 3,000 students enrolled in three Montana-based private colleges and universities). And, like a concealed carry permit, procuring student identification from a state school requires showing a form of government-issued identification. *See, e.g.*, App'x 040 & n.6.



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[3] SB 169 allows the following forms of standalone identification: Montana driver's license, Montana state identification card, the last four digits of a social security number (if registering to vote before the late registration period), a military identification card, a tribal photo identification card, a U.S. passport, and a Montana concealed carry permit. Section 13-13-114(i), MCA.

[4] *Compare* Concealed Carry Information, Jefferson County, MT, *available at* https://www.jeffersoncounty-mt.gov/concealed_carry.html (accessed June 8, 2022) *with* Concealed Weapon Permit Applications, Sheriff's Services, Gallatin County, MT (accessed June 8, 2022) *available at* *https://gallatincomt.virtualtownhall.net/sheriffs-services/pages/concealed-weapon-permit-applications*.

No non-discriminatory justification for excluding student identification from the standalone category exists in SB 169's legislative record—particularly given the inclusion of concealed carry permits in the standalone category. App'x 491. Indeed, while student identification was excluded from the standalone category in the first version of SB 169, a later version of the bill included "a photo identification card issued by a Montana college or university" as a form of standalone identification, before student identification was excluded from the standalone category in the final bill without explanation. App'x 494 (comparing SB169, Version 3, §§ 1(4)(a)(I), 2(1)(a)(I) (adding Montana University System identification as standalone), with SB 169, Version 4, §§ 1(4)(a)(I), 2(1)(a)(I) (removing Montana University System identification as standalone), and SB 169, Final Version, §§ 1(3)–(4), 2(1)(a)). Speaker of the House Wylie Galt's explained his thinking on this final reversal, however, revealing that student voters were specifically targeted for discriminatory treatment: "[I]f you are 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 anyways. So this just clears it up that they have a little stake in the game." App'x 511.

Finally, the Secretary claims that SB 169 makes it easier to comply with Montana's voter identification requirements. *Id.* at 4. This is also inaccurate. Although SB 169 introduces the Declaration of Impediment Form, it is a solution to a problem that the bill itself created when it significantly complicated the existing identification scheme. *See id.* at 5. Regardless, SB 169 and the Impediment Form make complying with identification requirements more complicated than it was pre-2021. First, the Impediment Form can only be used in conjunction with documents that were formerly enough—on their own—to establish identity. Section 13-15-107(3), MCA ("If a legally registered individual casts a provisional ballot but is unable to provide the identification information pursuant to the requirements of 13-13-114, the elector may verify the elector's identity by: (a) presenting a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address; and (2) executing a declaration pursuant to subsection (4) that states that the elector has a reasonable impediment to meeting the identification requirements.") (emphasis added). Second, individuals who use the Impediment Form may cast only provisional ballots. *See id.* Third, when a voter uses the

Impediment Form, election officials must "verif[y] the individual's identity or eligibility," § 13-15-107(5), MCA, and "shall provide an individual who cast a provisional ballot but whose ballot was or was not counted with the reasons why the ballot was or was not counted," § 13-15-107(6), MCA. It is difficult to see how the changes in fact "make[] it easier for election administrators and workers to administer and understand what constitutes proper voter ID." *See* App'x 22.

The Secretary also mentions Polling Place Elector Identification Forms as an alternative to the reasonable impediment process. *Id.* at 5. But the Polling Place Elector Identification Form has been around since 2010. App'x 136–37. And, before 2021, the Identification Form was an acceptable "government document" that would suffice to establish identity at the polls so long as the information provided matched the voter registration on file. *Id.* With the passage of SB 169, the Identification Form can only suffice in conjunction with photo identification. App'x 138. Like the Impediment Form, the Identification Form requires election officials to verify that the information presented matches the voter's registration on file. *Id.* With respect to either form,

this verification procedure must be completed on a tight timeline to ensure votes are counted. *See* §§ 13-15-107(5)–(8).

## II. HB 176 eliminates election day registration and bars registration after noon the day before election day.

Although the concept of election day registration was unusual in 1972, delegates to Montana's constitutional convention wanted to see "poll booth registration"—another term for election day registration—implemented in Montana. Many advocated guaranteeing it in the new Constitution, while others worried that a relatively untested practice should not be the first constitutional imperative of its kind. *See, e.g.*, Mont. Const. Convention, III Tr., at 403 (Feb. 17, 1972) (Delegate Habedank) ("[I]f we lock [poll booth registration] into the Constitution . . . and for some reason or other it does not work out in Montana, we are stuck with it because of the Constitution."); *see generally id.* at 400–413, 428–452.



The hesitancy made sense—technology in 1972 was less advanced and the machinery of voting was literally heavier, bulkier, and slower. And, at the time, only North Dakota used poll booth registration, implemented by statute. *See id.* at 405 (Delegate Berg) ("[I]f it has not been included in North Dakota's Constitution, where it is the only state

to employ it, it seems to me very risky to undertake it in constitutional reform here.").

Most of Montana's convention delegates who spoke on the issue took the view that the question centered on how best to implement poll booth registration, not whether to do so. *See, e.g.*, Mont. Const. Convention, III Tr., at 401 (Delegate Vermillion) ("[V]oting is not a privilege that the state merely hands out, but it is a basic right . . . that in no way should be infringed unless for very good reasons. . . . We feel that you can have poll booth registration, which is, in essence, registering at the time and place of election, and still prevents frauds."); *id.* at 437 (Delegate Choate) ("[T]he question is . . . whether the Legislature shall have the right to adopt something like poll booth registration or whether we direct them to do so, and I think that they'll take enough note of these debates today so that they'll take it as a clear mandate that they better do something about it.").[5] No one imagined that a future legislature



[5] The Secretary reports that "a slim majority (52 in favor, 46 opposed) voted to adopt" the proposal that would have made poll booth registration a constitutional mandate and then states that after lunch "that slim majority abruptly collapsed." App'x 054. In fact, when the decision reversed, the majority was equally slim with 49 in favor and 51 opposed. Mont. Const. Convention, III Tr., at 449.

might seek to eliminate election day registration despite clear evidence of its utility and popularity and the complete absence of evidence of associated harm to election purity.

In 2005, Montana lawmakers passed Senate Bill 302, which expanded access to the franchise by ensuring that all Montanans would be able to register and vote on election day in Montana. The bill passed by an extraordinary margin—a final vote of 46 to 4 in the Senate and 89 to 8 in the House. App'x 164. Supporters included an array of nonpartisan groups. *Id.*

Senator Jon Ellingson, sponsor of the bill, later described the law's bipartisan nature: "We believed then, that it is better for our democracy if more of our citizens vote, and not less. We believed in that legislative session that our government can better serve all of us when more of us are heard through the exercise of the most fundamental of our political rights: The right to cast a meaningful and effective vote." App'x 167.

The eventual bipartisan passage of election day registration in 2005 reflected the Montana's constitutional convention delegates' view that "[i]t is not a privilege to vote. It is a fundamental, basic right inherent in the quality of citizenship in a free society." Mont. Const. Convention, III

Tr., at 406 (Delegate Dahood). Even in 1972, even lacking certainty about the logistical challenges election day registration might present, the debate reflected the view that it was no failure for people "perhaps that have forgotten to register or perhaps did not have sufficient interest . . . [to later] find that they want to participate" because "if more people can participate in this particular function of citizenship . . . the lesser the dissatisfaction is with the governmental process." *Id.*

HB 176 is only the most recent of several failed attempts to eliminate election day registration. First, in 2011, the legislature tried to eliminate election day registration by passing a bill that was vetoed by then Governor Schweitzer.

Next, in 2014, the legislature referred Legislative Referendum No. 126, an act "protecting the integrity of Montana elections by ending late voter registration on the Friday before Election Day and eliminating Election Day registration," for Montanans' consideration. Voters roundly rejected the referendum by a vote of 206,584 to 155,153. App'x 167. That is, 57% of the more than 361,000 voting Montanans rejected the legislature's attempt to eliminate election day registration.

When Representative Sharon Greef introduced HB 176, she claimed that the right to vote comes with "the responsibility of registering to vote," and that "to assure good clean elections, election officials should concentrate on one thing the day of the election, and that is the election." App'x 168. She gave no evidence of mistakes or other administrative problems in Montana on election day, let alone resulting from election day registration. When asked, she stated, "When I talked about voter fraud, I wasn't talking about Montana specifically." *Id.* at 168–169. Indeed, the legislature had no evidence of voter fraud in Montana before it.

In the fifteen years since its implementation, election day registration has a proven record of exceptional democratic success. Tens of thousands of Montanans have registered and voted on the same day in the election years that followed its passage. App'x 166. Between 2006 and 2018, more than 51,000 Montana voters registered to vote on election day. *Id.* In 2020, more than 8,000 Montanans used election day registration. *Id.*

Election day registration is increasingly common nationwide. *Id.* at 169. Between 2013 and 2020, the number of states providing for

election day registration rose from 13 to 20 (including Montana), plus Washington, D.C. *Id.*

Despite the Secretary's claim to the contrary, App'x 25, both anecdotal and statistical evidence supports the conclusion that election day registration increases turnout. App'x 169–170 (informational testimony of Regina Plettenberg, Clerk & Recorder of Ravalli Cty. (explaining that eliminating registration on election day and the Monday before "would have meant that about 200 people would not have voted in Ravalli County"); Barry C. Burden et al., *The Effects & Costs of Early Voting, Election Day Registration, & Same Day Registration in the 2008 Elections*, Report to the Pew Charitable Trusts, at 3 (Dec. 21, 2009) ("Research consistently shows that [election day registration] boosts turnout. . . . Careful analyses of the causal effects of [election day registration] produce estimates that range from three to seven percentage points.")); *see also Same Day Voter Registration*, Nat'l Conf. of State Legislatures ("There is strong evidence that same-day and

Election Day registration increases voter turnout, but the extent of the impact is difficult to conclude.").[6]

Despite the Secretary's repeated assertion that no individuals that SB 169 and HB 176 prevented from voting have been identified, Youth Voters put forth evidence of at least 58 individuals in 10 counties who attempted to register to vote in the 2021 municipal elections on election day or the afternoon before, and who consequently did not cast a ballot in the 2021 elections. App'x 386–87. These numbers are the most conservative possible accounting of Montanans whom HB 176 prevents from voting as turnout during off-year elections (those without state district, statewide, or federal candidates on the ballot) is generally significantly reduced. App'x 388–89; *see also ibid.* at 446 (showing turnout in Montana elections and reflecting a turnout of roughly 55% in 2017 for a special election, compared to turnout around 74% in 2016 and around 73% in 2018). Moreover, Plaintiffs have identified many



[6] Of course, expert testimony diverges on this point in this case and it falls within the province of the district court to make initial determinations as to its relevancy and admissibility. *See, e.g.*, *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶ 18, 362 Mont. 53, 261 P.3d 984 (rulings on admissibility of expert testimony reviewed for abuse of discretion; district courts have "broad discretion in determining whether evidence is relevant and admissible").

individuals who have relied on election day voter registration in the past, as well as individuals with limited identification options available to them, *see generally* App'x 197, indicating that significantly more evidence of the effects of both SB 169 and HB 176, which were enforced during the June 7 primary election, will be available during the merits trial scheduled for August 15.

## STANDARD OF REVIEW

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. To be "manifest," an abuse of discretion is "obvious, evident, or unmistakable." *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4. Questions of law are reviewed for correctness. *Id.* Factual findings are reviewed for clear error and should only be overturned "if they are not supported by substantial credible evidence, if the trial court has misapprehended the effect of the evidence, or if review of the record leaves this Court with the definitive and firm conviction that a mistake

has been made." *AWIN Real Estate, LLC v. Whitehead Homes, Inc.*, 2020 MT 225, ¶ 11, 401 Mont. 218, 472 P.3 165.

When considering a preliminary injunction, "neither the [d]istrict [c]ourt nor this Court will determine the underlying merits of the case giving rise to the preliminary injunction, as such an inquiry is reserved for a trial on the merits." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386.

## SUMMARY OF ARGUMENT



Unhappy with existing precedent, the Secretary nearly asks outright for this Court to render an advisory opinion "to provide needed clarity . . . on the constitutional standards governing this case." App'x 030. Although the Secretary disputes the applicable constitutional standard, as in *Driscoll*, the applicable merits standard does not change the preliminary injunction analysis. And the framing of the Secretary's request for "clarity" belies the truth: neither the Montana Constitution nor existing case law endorses the Secretary's position that the federal *Anderson-Burdick* framework should apply to Montanans' fundamental right to suffrage—not to mention to their right to equal protection. Even if seeking to impose a new standard applicable to the merits at the

preliminary injunction stage were proper—and it is not—the answer to the Secretary's question is no: the Montana Constitution and the fundamental rights it guarantees should not be subject to federal precedent that was not developed based on the plain text of the Montana Constitution and, if applied, would weaken the mandate of the Montana Constitution.

The Secretary also impliedly asks this Court to remake Montana's preliminary relief standard in the image of the federal standard, arguing that the district court should have analyzed the claims for likelihood of success on the merits and by considering the public interest. Quite simply, the Secretary wishes this Court would reverse the preliminary injunction for failing to engage in analysis that is not required under the Montana standard. The Court should not grant this wish.



Finally, the district court did not manifestly abuse its discretion when it preliminarily enjoined SB 169 and HB 176. Rather, it properly concluded that Plaintiffs established a prima facie case of entitlement to preliminary relief and, separately, of undeniable irreparable injury absent an injunction. Because the preliminary relief standard is disjunctive, either conclusion provides an independent basis for affirming

the decision. Moreover, the decision reflects the district court's careful appraisal of the factual record.

This Court should refuse both invitations to write new standards and affirm the district court's grant of a preliminary injunction, especially now that the Secretary has ample time to communicate the change to election officials.

## ARGUMENT

### I. The Court should not impose a new standard for assessing fundamental rights, and particularly not on an appeal from a preliminary injunction where the standard was not determinative.

#### A. The district court correctly applied strict scrutiny.

This Court has repeated time and again that "[s]trict scrutiny applies if a suspect class or fundamental right is affected." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17; *see generally Driscoll*, ¶ 18 ("[S]trict scrutiny[ is] used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights."); *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 16 ("Legislation that implicates a fundamental constitutional right is evaluated under a strict scrutiny standard, whereby the government must show that the law is narrowly tailored to serve a compelling government interest.") (*Mont.*

*Cannabis I*); *Mont. Envtl. Info. Ctr v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 60 ("[T[he most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right or discriminates against a suspect class." (quoting *Wadsworth v. State*, 275 Mont. 287, 302 (1996))).

Claiming that strict scrutiny would "eviscerate Montana's election laws," the Secretary appears to forget that 1) strict scrutiny, while more onerous, is a standard that legislating bodies routinely satisfy; 2) strict scrutiny applies to interference with all fundamental rights set forth in Article II of the Montana Constitution—why would the right of suffrage be different?—and 3) most election laws in Montana expand Montanans' access to the ballot, rather than interfering with it. *See* Native Voters Br., Section I(A); Bohn Br., Section II(A).



Nor is Montana a lone holdout in applying strict scrutiny to laws that burden the right to vote. *See Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160, 184–85 (Ida. 2021) (affirming proposition from *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 127, 15 P.3d 1129 (Ida. 2000) that the basic right to vote is a fundamental right subject to strict scrutiny and noting that "strict scrutiny is a well-established

standard where fundamental rights are concerned"); *Graves v. Cook Cty. Republican Party*, 166 N.E.3d 155, ¶¶ 52–53 (Ill. App. Ct. 2020) (applying *Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996), for proposition that "the right to vote is constitutionally protected in Illinois" and subject to "strict scrutiny analysis"); *see also* Native Voters Br., Section I(A).

**B. *Anderson-Burdick* is a poor fit for Montana.**

Despite the poor timing and the crush of established state law weighing heavily against it, the Secretary asks this Court to import the federal *Anderson-Burdick* framework to analyze Plaintiffs' suffrage claims arising under the Montana Constitution. The Court should not take up the merits standard question at this stage, however, because the standard in question does not change the preliminary injunction analysis. *See infra* § II. And because SB 169 and HB 176 are unconstitutional under either standard, this case presents a poor vehicle for making that determination. *See infra* § I(C).



Specifically, the Court should not engage this attempt to seek guidance on this issue before it is warranted and without a complete record. *See Driscoll*, ¶ 20 ("We conclude that, for purposes of resolving the instant preliminary injunction dispute, the level of scrutiny is not

dispositive to the issues presented on appeal."); *cf. Sweet Grass Farms, Ltd. v. Bd. of Cty. Com'rs of Sweet Grass Cty.*, 2000 MT 147, ¶ 39, 300 Mont. 66, 2 P.3d 825 (declining preliminary injunction applicant's "invitation to anticipate the determination of issues currently pending before the district court").

Even if this Court does consider the applicable merits standard at this stage, it should still reject the *Anderson-Burdick* framework and the Secretary's invitation to incorporate federal law where it is unnecessary and unhelpful. *Anderson-Burdick* is unworkable, inconsistent, and ill-suited to the Montana Constitution's commitment to fundamental rights.



The *Anderson-Burdick* framework originates from a pair of cases where plaintiffs challenged state laws under the First and Fourteenth Amendments to the U.S. Constitution. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Its lack of utility, particularly since 2008, is illustrated by the difficulty federal courts have had in applying it. *See, e.g.*, *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181 (2008) (a challenge to photo identification requirements resulted in four separate opinions, each joined by three or fewer of the nine Justices); *compare Fish v. Schwab*, 957 F.3d 1105, 1111

(10th Cir. 2020) (invalidating a Kansas law requiring documentary proof of citizenship with voter registration application) *with Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009) (upholding statute that requires photo identification for in-person voting); *see also Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020) ("It's unclear whether the Supreme Court ever intended *Anderson-Burdick* to apply to Equal Protection claims.").

Importantly, *Anderson-Burdick* does not fit well with Montana's jurisprudence of fundamental rights. *See, e.g.*, *City of Missoula v. Duane*, 2015 MT 232, ¶ 16, 380 Mont. 290, 355 P.3d 729 ("It is well-established that in some respects the Montana Constitution provides greater protections than the [U.S.] Constitution."); *see also supra* § II(A). The Montana Constitution is a modern document drafted to "stand on its own footing and . . . provide individuals with fundamental rights and protections far broader than those available through the federal system" and "to meet the changing circumstances of contemporary life." *Dorwart v. Caraway*, 2002 MT 240, ¶ 94, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring) (quoting Dahood, Amicus Br.; Mont. Const. Convention, II Trans., *Bill of Rights Comm. Proposal*, 619 (Feb. 22, 1972)); *State v.*

*Guillaume*, 1999 MT 29, ¶ 16, 293 Mont. 224, 975 P.2d 312 ("[W]e again refuse to march lock-step with the United States Supreme Court" and hold that "Article II, Section 25 of the Montana Constitution affords greater protection . . . than does the Fifth Amendment."); *see* Native Voters Br., Section I(A); Bohn Br., Section II(A).

C. Both laws are unconstitutional under either standard.

Neither law does more than remotely gesture at the reasons the Secretary proffers for their passage—they cannot survive even *Anderson-Burdick*'s least scrutinizing, "means-end fit framework." *See Soltysik v. Padilla*, 910 F.3d 438, 448 (9th Cir. 2018). Indeed, though the Secretary assures the Court that SB 169 "impose[s] a minimal burden that advances the State's important (indeed, compelling) interests," App'x 039, she can cite nothing to show that the legislature in fact considered whether student identification is easily falsified or otherwise considered less reliable than a Montana concealed carry permit, for example. Nor can she explain why the legislature rejected a non-discriminatory version of SB 169 that included Montana University System issued identification in the standalone category.

Finally, the Secretary fails to support the reasons she proffers to justify these laws—namely, fraud and election integrity—with any evidence. *See* Bohn Br., Section III (neither law survives *Anderson-Burdick*); Native Voters Br., Section I(D) (HB 176 cannot survive either merits standard); *see also* Native Voters Br., Section I(C) (debunking the Secretary's claim that HB 176 simply moves a deadline in a routine way).

## II. This Court should not revise Montana's preliminary relief standard.

### A. The district court correctly applied established law.

Under § 27-19-201, MCA, a preliminary injunction may be granted when any one of five enumerated grounds is met. *Driscoll*, ¶ 13. Here, the district court ruled that Plaintiffs were entitled to relief under two statutory subsections, App'x 104, 120, which provide relief when 1) "it appears that the applicant is entitled to the relief demanded," or 2) "it appears that the commission or continuance of some act during the litigation would produce great or irreparable injury," §§ 27-19-201(1), (2), MCA. To satisfy either subsection, applicants need "only establish a prima facie case, not entitlement to final judgment." *Weems*, ¶ 18. Montana courts do "not determine the underlying merits of the case" at the preliminary injunction stage, *id.*, because "it is not the province of

either the [d]istrict [c]ourt or the Supreme Court on appeal to determine finally the matters that may arise upon a trial on the merits." *City of Whitefish v. Bd. of Cty. Com'rs of Flathead Cty.*, 2008 MT 436, ¶ 18, 357 Mont. 490, 199 P.3d 201.

Plaintiffs have satisfied the prima facie and irreparable injury standards, and so the Secretary asks this Court to require additional and different showings—likelihood of success on the merits and the public interest—pursuant to the federal standard. Neither showing is required in Montana.[7] The Court should reject this request.

The district court correctly concluded that Plaintiffs made a "prima facie showing" that both laws are unconstitutional. App'x 104. And even



[7] *M.H. v. Montana High School Association* (1996) counsels no different result. Despite using the language of the federal *Winter* factors, the *M.H.* Court twice stated that "[a]n applicant for a preliminary injunction must . . . establish a prima facie case on the underlying claim." 280 Mont. 123, 129, 929 P.2d 239, 243. In more than two decades since, no law has changed, and this Court has reiterated the prima facie standard time and again. *See, e.g.*, *BAM Ventures*, ¶ 7; *Weems*, ¶ 18 & n.4; *Driscoll*, ¶ 16.

The only time when "likelihood of success" enters preliminary injunction analysis is when the applicant seeks non-compensable financial harm. *See A.C. v. Borkholder*, 2019 MT 222N, ¶ 19, 397 Mont. 554, 455 P.3d 449 (affirming that the *Van Loan v. Van Loan* (1995), 271 Mont. 176, 895 P.2d 614, test applies only where injunctive relief "requested pertain[s] to a monetary judgment that could be rendered ineffectual by [the other party's] actions").

if Montana's preliminary injunction framework required showing likely success on the merits, consistent with the decision below, Plaintiffs would still prevail. *See, e.g.*, *id.* at 103 (evidence before the court showed SB 169 "will raise the cost of voting" and the resulting "difficulties" establish that "SB 169 implicates the fundamental right to vote"); *ibid.* at 104 ("HB 176 eliminates an important voting option for Native Americans and will make it harder, if not impossible, for some Montanans to vote.").

The district court's conclusions as to Plaintiffs' prima facie case that both laws are unconstitutional did not depend on the strict scrutiny standard as the Secretary claims, App'x 031–32, and were not tentative conclusions contingent on the prima facie nature of the standard. *See* App'x 090 ("In any event, even if a mandatory injunction is proper, the Court finds that based on the evidence presented, Plaintiffs would meet the 'higher standard' necessary for a mandatory injunction."). Indeed, the opinion reflected that Plaintiffs alleged constitutional violations were well supported by the factual record and compelled by precedent.



The district court separately ruled that "Plaintiffs have established they will suffer a great or irreparable injury if these laws are not preliminarily enjoined." App'x 121 (emphasis added). Diminishing

opportunities to vote and reducing access to the ballot necessarily causes irreparable injury—there is no redo for voting. And the record shows that Plaintiffs established that injury would occur absent an injunction. *Id.* at 121–22. As a result, the district court's ruling as to both subsections went beyond observing that Plaintiffs made a prima facie case and effectively found that a preliminary injunction would be proper even under the Secretary's preferred standard.

The Secretary likewise argues that the district court failed to consider the public interest. App'x 034–35. But the public interest and equities always weigh in favor of protecting fundamental rights. *See, e.g.*, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("[B]y establishing a likelihood that Defendant's policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction."). And while expressly balancing the equities is not a required feature of issuing a preliminary injunction under Montana law, the court did in fact balance the equities, acknowledging interests on both sides and determining that the balance tipped in favor of Plaintiffs. *See, e.g.*, App'x 120 (noting that laws "enjoy the presumption of constitutionality,"

but concluding that Plaintiffs nonetheless demonstrated that the laws should be "temporarily enjoined to preserve the status quo . . . and prevent constitutional injury to the parties and the voters they represent until the constitutionality of these laws can be thoroughly investigated.") (emphasis added); *see also Driscoll*, ¶ 14 (Montana courts should issue preliminary injunctions only "to preserve the status quo and minimize the harm to all parties pending final resolution on the merits.").

Additionally, as both Native Voters and Bohn point out, the "principles upon which mandatory and prohibitory injunctions are granted do not materially differ." *City of Whitefish v. Troy Town Pump*, 2001 MT 58, ¶ 21, 304 Mont. 346, 21 P.3d 1026. Even if this injunction is mandatory, the opinion below supports its issuance. *See Snavely v. St. John*, 2006 MT 175, ¶ 11, 333 Mont. 16, 140 P.3d 492 ("[I]f a district court's findings and conclusions are clear to this Court, failure to state them in the recommended form is not substantial error.").



### B. The status quo and balance of hardship analysis now favors Plaintiffs.

When this Court granted the Secretary's request for a stay of the preliminary injunction, it reserved judgment on "the merits of the preliminary injunction" to follow "full consideration of the issues on

appeal." App'x 004. Noting that "[t]he purpose of equitable injunctive relief is to preserve the status quo and minimize the harm to all parties pending final resolution on the merits," this Court found that "staying the preliminary injunction would cause less voter confusion and disruption of election administration" for the June 3, 2022 primary election. App'x 004, 007 (citing *BAM Ventures*, ¶ 18).

The Court now has before it a more complete picture of the preliminary injunction record.[8] Lifting the stay and allowing two unconstitutional laws to remain enjoined until the case has been tried will not prejudice the Secretary in the same manner as was asserted with



[8] Both sides could attempt to persuade this Court using evidence that has come to light since the district court issued the preliminary injunction motion—indeed, Plaintiffs are confident that such evidence would add significantly to their already strong cases—but doing so is improper. *See Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 25, 333 Mont. 331, 142 P.3d 864 ("[T]his Court may not rely on facts outside the record in resolving an issue before it."); *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982) (review of district court's findings, on a motion for preliminary judgment is "restricted to the limited record available to the district court when it granted or denied the motion."); *cf. Hobble Diamond Ranch, LLC v. Mont. Dep't of Transp.*, 2012 MT 10, ¶ 28, 363 Mont. 310, 268 P.3d 31 ("review of an agency action is generally limited to the record before the agency at the time of its decision" and information relating to "matters that occurred before the agency"). Pointing to depositions that have occurred since the district court issued its preliminary injunction ruling is therefore improper. *See, e.g.*, App'x 041–42.

respect to the June primary election. *Cf. Weems*, ¶ 26 ("That a statute has been on the books for some time is not the relevant inquiry when entertaining a request to enjoin it."). In fact, the status quo and balance of hardship analysis now favors Plaintiffs for two concrete reasons.

First, for general election voters—as opposed to primary and local election voters—the absence of election day registration and the presence of complicated voter identification requirements will be strongly felt. A significant portion of these voters will not have voted in any election under SB 169 and HB 176 because primary elections—like school board and other municipal elections—turn out significantly fewer voters than do general elections. *See* App'x 446 (reflecting a turnout of roughly 283,000 in the 2018 primary compared to 509,000 in the general and roughly 382,000 in the 2020 primary compared to 612,000 in the general).[9] Accordingly, the June primary was very like the 2021 municipal elections, while the November general is distinct from both. As the Secretary's website, *id.*, and the expert reports reflect, more



[9] This Court relied on the Secretary's representation that "more than 337,000 Montanans successfully voted in three elections in 2021." App'x 020. That 337,000 is likely a count of votes cast, not of unique Montana voters. *See id.* at 446 (reflecting a turnout of roughly 283,000 in the 2018 primary and roughly 382,000 in the 2020 primary).

Montanans vote in general elections by a large margin, App'x 446. General election voters also represent a less engaged, but more robust segment of the population. *Cf. Utah Republican Party v. Cox*, 892 F.3d 1066, 1108 (10th Cir. 2018) (Tymkovich, C.J., concurring and dissenting in part) (observing that the express purpose of challenged legislation was to "change the Party's nomination practices so that nominees would be more representative of the majority of general election voters"). Changes to their status quo will cause greater injury.[10]

Second, compared to implementing the preliminary injunction in advance of the primary election, the challenges of implementation for election administrators in advance of the general election are now reduced. This is because general election ballots are more streamlined and, more importantly, because election administrators will have greater lead time to implement and adhere to the injunction before the November general election.



[10] Both repeat general election voters and first-time voters will experience this injury, albeit differently. For repeat general election voters, the injury is confusion and inconsistency. For first time voters, it's that the process itself is more complicated, even if they had no prior experience with that process. *See* App'x 509–10 ("The more roadblocks presented, the more difficult it will be for first-time voters to participate.").

The injury now before the Court has grown in magnitude. *Cf. Rose v. State*, 2018 MT 224N, ¶ 5, 393 Mont. 540,425 P.3d 713 ("An injunction will not restrain an act already done."). The only way to minimize harm adequately is to affirm the preliminary injunction and prevent the Secretary from actively pursuing implementation of these laws in the general election. The district court's grant of the preliminary injunction should be affirmed.

## CONCLUSION

Youth Voters thus respectfully request that the Court deny Secretary Jacobsen's appeal of the preliminary injunctions of SB 169 and HB 176.

Respectfully submitted this 15th day of June, 2022.



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I certify that this brief complies with the requirements of Montana Rule of Appellate Procedure 11, is double spaced except for footnotes, quotes, and indented material, and is proportionally spaced utilizing a 14-point Century typeface. The total word count for this document is 6,705 words, as calculated by my word processing program.

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