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.

APPELLEE SECRETARY OF STATE'S REPLY BRIEF

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
(406) 449-4165
dale@crowleyfleck.com

Leonard H. Smith
David F. Knobel
CROWLEY FLECK PLLP
P.O. Box 2529
Billings MT 59103

Matthew Gordon
Perkins Coie LLP
1201 Third Avenue
Suite 4900
Seattle, Washington 98101-3099
(206)359-9000
mgordon@perkinscoie.com

Peter M. Meloy
Meloy Law Firm
P.O. Box 1241
Helena, Montana 59624

Ian McIntosh
William McIntosh Morris
E. Lars Phillips
CROWLEY FLECK PLLP
1915 S. 19th Ave
Bozeman MT 59719

David M.S. Dewhirst
Solicitor General
Kathleen Lynn Smithgall
Office of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Austin Markus James
Chief Legal Counsel
Office of the Secretary of State
P.O. Box 202801
Helena, MT 59620-2801
Telephone: (406) 444-6197

Attorneys for Defendant and Appellant Christi Jacobsen

(406)442-8670
mike@meloylawfirm.com

John Heenan
Heenan & Cook PLLC
1631 Zimmerman Trail
Billings, MT 59102
(406)839-9091
john@lawmontana.com

Henry J. Brewster
Jonathan P. Hawley
Elias Law Group LLP
10 G Street NE Suite 600
Washington, DC 20002
(202)-968-4596
hbrewster@elias.law

Attorneys for Plaintiffs and Appellees Montana Democratic Party and Mitch Bohn

Rylee Sommers-Flanagan
Upper Seven Law
P.O. Box 31
Helena, MT 59624
Phone: (406) 396-3373
rylee@uppersevenlaw.com

Ryan Aikin
Aikin Law Office, PLLC
P.O. Box 7277
Missoula, MT 59807
Phone: (406) 840-4080
ryan@aikinlawoffice.com

Attorneys for Plaintiffs and Appellees Montana Youth Action, et al.

Alex Rate
Akilah Lane
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806
406-224-1447
ratea@aclumontana.org

Alora Thomas-Lundborg*
Jonathan Topaz*
ACLU
125 Broad Street
New York, NY 10004
(212) 519-7866

Samantha Kelty*
Native American Rights Fund
1514 P Street N.W. (Rear) Suite D
Washington, D.C. 20005
(202) 785-4166

Jacqueline De León*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302-6296
(303) 447-8760

Theresa J. Lee*
Election law Clinic
Harvard Law School
6 Everett Street, Suite 5112
Cambridge, MA 02138
(617) 998-1010

Attorneys for Plaintiffs and Appellees
Western Native Voice, et al.
*Admitted *pro hac vice*

Table of Contents

Table of Authorities

Cases

Other Authorities

Constitutional Provisions

Introduction

Appellees' arguments against both HB 176 and SB 169 are not new. Similar arguments have been rejected by state and federal courts across the country. Appellees nearly concede that point, asking this Court to "walk alone" in interpreting the Montana Constitution to apply strict scrutiny to both laws. Yet they spend precious little space analyzing the Montana Constitution or the Con-Con debates. There is no way to read the Constitution as a consistent whole and get to Appellees' position. The Delegates made clear that the Legislature must regulate elections so that they are secure, fair, and efficient (interests this Court already recognizes as compelling), and that the Legislature had discretion to enact or modify EDR.

This Court has long recognized it must balance the Legislature's constitutionally grounded regulatory authority and fundamental rights. That is just what the *Anderson-Burdick* balancing test does. And any reasonable application of a balancing test leads to the inexorable conclusion that SB 169 and HB 176 are constitutional. While Appellees strain a gnat to try to find a burden, they do so based on exaggerations and mischaracterizations of the laws, which is why they still can identify no voters alleging concrete harm. As courts *en masse* have recognized, laws like HB 176 and SB 169 do not impose a severe burden, or even anything beyond the

usual burdens of voting. The State's well-recognized and well-grounded interests fully satisfy constitutional scrutiny.

This Court should reverse the District Court's preliminary injunction order, which was based entirely on its fundamental legal error.

I. The District Court's legal analysis of the preliminary injunction standard is flawed.

A. Evaluation of the preliminary injunction requires this Court to determine whether the District Court's constitutional analysis was correct.

Appellees are wrong that the District Court's preliminary injunction order should be viewed under the abuse of discretion standard. MDP concedes the Order is premised on constitutional analysis: "Plaintiffs' claims are themselves rooted in the loss of constitutional rights," and "[b]ecause the loss of constitutional rights amounts to an injury or harm" it argues the District Court correctly entered a preliminary injunction after concluding HB 176 and SB 169 were unconstitutional. MDP Br., 24-25, n. 4. But to "determine if a constitutional right has been lost, a court must first determine which of the established levels of scrutiny is appropriately applied." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶18, 366 Mont. 24, 286 P.3d 1161. Regardless of whether it relied on the "'likelihood of success on merits' basis [or] the 'irreparable injury' basis as set forth in §§ 27–19–201(1) and

(2), MCA," the District Court's conclusion that HB 176 and SB 169 will harm voting rights necessarily turned on its holding that these laws are subject to heightened scrutiny and thus unconstitutional. *M.H. v. Mont. High Sch. Ass'n*, 280 Mont. 123, 135, 929 P.2d 239, 247 (1996).

If this Court concludes the District Court erred by applying strict scrutiny to both HB 176 and SB 169, the core justification for an injunction—i.e., preventing constitutional harm—fails. And the Court evaluates that threshold legal conclusion for correctness before application of the "manifest abuse of discretion" standard. *M.H.* 280 Mont. at 130; *City of Whitefish v. Bd. of Cty. Com'rs of Flathead Cty.*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201.

B. Plaintiffs' delay required the District Court to enter a mandatory injunction, a remedy disfavored by Montana law that damaged the public interest.

The District Court acknowledged complying with its Order required multiple affirmative acts to unwind efforts to implement HB 176 and SB 169.[1] Order, p. 10. That is the very definition of a mandatory injunction because it "compel[s]" action.

[1] Although Appellees and the District Court criticize the Secretary for implementing these statutes while litigation was pending, neither articulate a legal basis for Defendant declining to implement duly enacted legislation. The District Court recognized the Secretary's duty ("the Secretary has been taking steps to enact these laws given that is a duty of her job"), but nonetheless declined to give the change in the status quo weight in its analysis.

Davis v. Westphal, 2017 MT 276, ¶ 31, 389 Mont. 251, 405 P.3d 73. Appellees suggest mandatory and prohibitory injunctions somehow are equivalent because they are governed by the same appellate standard of review. *City of Whitefish v. Troy Town Pump, Inc.*, 2001 MT 58, ¶ 21, 304 Mont. 346, 21 P.3d 1026. They are wrong.

Mandatory injunctions are disfavored, and require a unique factual showing:

> Courts are more reluctant to grant a mandatory injunction than a prohibitory one and . . . generally an injunction will not lie except in prohibitory form. Such mandatory injunctions, however, are not granted unless extreme or very serious damage will result and are not issued in doubtful cases[.]

Anderson v. U.S., 612 F.2d 1112, 1114–15 (9th Cir. 1979); *see also Grosfield v. Johnson*, 98 Mont. 412, 39 P.2d 660, 663–64 (1935) (courts are "more reluctant" to enter mandatory injunctions); *Davis*, ¶ 31 (mandatory injunctions are an "extraordinary remedy").

The District Court erred by not requiring the "stronger showing" necessary to obtain a mandatory injunction. *Paradise Rainbows v. Fish & Game Comm'n*, 148 Mont. 412, 420, 421 P.2d 717, 721–22 (1966). Although it did summarily conclude—in a two-sentence footnote—that Plaintiffs also were entitled to a mandatory injunction, the District Court did not identify the factual basis for its conclusion. Order, p. 22 n.2. At a minimum, it should have paid more attention to the public interest, i.e., the resulting confusion—both to Montana voters and election

administrators—of requiring last-minute changes to Montana election law after HB 176 and SB 169 already had successfully governed elections. *See BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 18, 395 Mont. 160, 437 P.3d 142 (preliminary injunction only appropriate if it "preserve[s] the status quo and minimize the harm to all partie[s]"). Failure to do so was error.

II. Plaintiffs misinterpret this Court's decisions to argue that election regulations must be subject to strict scrutiny.

This Court has never held that election laws are always subject to strict scrutiny because they involve the right to vote, regardless of the burdens imposed. In arguing they are, Appellees ignore Article IV, §§ 2 and 3's requirement that the Legislature regulate elections and guard against fraud, this Court's precedent, and the overwhelming consensus of state and federal courts across the country.

The argument that strict scrutiny applies here makes no constitutional sense given Article IV, § 3's affirmative command. *See also* Article IV, § 2 (requiring Legislature to set registration requirements). The Constitution cannot obligate the Legislature to establish requirements for registration and administration of elections, and to "insure the purity of elections and guard against abuses of the electoral process" (Art. IV, § 3), but then subject—in every case—those very actions to strict scrutiny, which is "seldom satisfied." *Butte Cmty. Union v. Lewis*, 219 Mont. 426,

431, 712 P.2d 1309 (1986). This Court has long warned against such selective interpretation of Article II, § 13:

> If other parts of Montana's Constitution were also interpreted without regard for and independent of the structure of Montana's Constitution, we would have surprising results . . . Individuals could read the phrase 'shall [not] at any time interfere' [in Article II, § 13] to provide that they are free to vote whenever their consciences dictate, in November or in August, and at any time of the day or night. I submit that Montana's Constitution must be construed as a coherent integrated structure[.]

Order, *In re Selection of A Fifth Member to Montana Districting and Apportionment Commission*, 1999 WL 608661, at *18 (Mont. Aug. 3, 1999) (J., Regnier, Leaphart, Gray, and CJ Turnage, concurring and dissenting) (unpublished). That warning is grounded in the well-established principle that the Constitution must be read as a consistent whole. *Howell v. State*, 263 Mont. 275, 286-87, 868 P.2d 568 (Mont. 1994) Sec. Br., 34-35.

That is precisely what the Michigan Supreme Court recognized in rejecting that strict scrutiny must always apply to right-to-vote claims, instead adopting the *Anderson-Burdick* balancing test. *In re Request for Advisory Op.*, 479 Mich. 1, 34-35, 740 N.W.2d 444 (2007) (upholding voter ID law). The decision is particularly persuasive because Michigan is one of the few states with a constitutional provision almost identical to Montana's Article IV, § 3, requiring Michigan's Legislature to "enact laws to preserve the purity of elections" and "guard against abuses of the

elective franchise." *Id.* at 34-35 (citing Mich. Const. Art. 2, § 4). The court concluded that applying strict scrutiny to all voting rights cases impermissibly would mean one constitutional provision could "trump the other." *Id.* It held that applying a flexible test was the only logical way to balance those competing constitutional interests: "Given that the appropriate standard by which to evaluate election laws must be compatible with our *entire* Constitution, and must not nullify or impair any other constitutional provision, we adopt the 'flexible test' articulated in *Burdick* . . . The *Burdick* test strikes the appropriate balance between protecting a citizen's right to vote under art. 1, § 2 and protecting against fraudulent voting under art. 2, § 4." *Id.*

Appellees claim that this Court's voting rights cases nonetheless require strict scrutiny, citing *Johnson v. Killingsworth*, 271 Mont. 1, 894 P.2d 272 (1995) and *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576; *see* WNV Br., 12. Not so. Both cases undermine Appellees' position.

Neither involved a time, place, and manner regulation like the statutes at issue here. Rather, both cases analyzed whether the State may *explicitly limit* the franchise to certain groups. Reasonable election regulation has never been viewed under the same lens. That is why this Court in *Johnson* did not mention *Anderson-Burdick*, even though the plaintiffs' raised *only* a *federal* claim. 271 Mont. at 3. There, the Court

analyzed whether the requirement that an irrigation district commissioner own land within a district under § 85-7-1501, MCA, violated the right to vote. The Court recognized that while strict scrutiny is sometimes appropriate, rational basis scrutiny applied to voting rights cases that limited the franchise in "special interest" elections. *Id.* at 4, 8 (surveying opinions applying rational basis).

The Court's decision in *Finke* illustrates when strict scrutiny does apply in the context of explicit franchise limitations. "Taking its lead from the U.S. Supreme Court," the Court held that "statutes which selectively distribute the franchise" in "general interest" rather than "special interest" elections are subject to strict scrutiny. *Finke*, ¶¶ 18-19. A law that, *on its face*, completely disenfranchises entire classes is a far cry from facially neutral laws like SB 169 and HB 176 that regulate the time, place, and manner of elections for *all voters*.

Time, place, and manner regulations are different because "common sense, as well as constitutional law" compels deference to a State's authority to regulate elections, even though "[e]lection laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) *Storer v. Brown*, 415 U.S. 724, 730 (1974) (states have authority to substantially regulate elections to ensure they are fair, honest, and orderly). As a result, no state or federal court has mandated strict scrutiny in all voting rights cases. *See Dudum v. Arntz*, 640 F.3d

1098, 1106 (9th Cir. 2011) ("voting regulations are rarely subject to strict scrutiny."); *See also* Sec. Br., 17-21; Amicus Brief of RITE, App A (cataloguing cases adopting *Anderson-Burdick*).

In short, while this Court, like the U.S. Supreme Court, has indicated that laws burdening fundamental rights *may be* subject to heightened scrutiny, neither has applied the analysis in the talismanic way Appellees' advocate. Instead, this Court only applies strict scrutiny to statutes that "substantially" or "impermissibly" burden fundamental rights. *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165 (1996) ("Strict scrutiny of a statute is required only when the classification **impermissibly interferes** with the exercise of a fundamental right" and the level of scrutiny "depends **both** on the nature of the interest **and the degree to which it is infringed**.") (emphasis added); *see also Mont. Cannabis Indus. Ass'n*¶¶ 17-24 (reversing district court's conclusion that law "substantially interferes" with fundamental right).

This Court has always balanced competing constitutional interests, weighing the State's important, constitutionally compelled regulatory interests with fundamental right claims. *See* Sec. Br., 20; *see also U.S. Term Limits v. Thornton*, 514 U.S. 779, 834 (1995) (regulation of elections is "necessary in order to enforce the fundamental right involved."). To that, Appellees have little answer.

Aside from nullifying Article IV, §§2-3, Appellees' argument is also unworkable. Appling strict scrutiny to all election regulations would invariably lead to one of two undesirable results: Either strict scrutiny's application would become negligible or the State's constitutional obligation to regulate elections would. Appellees have no answer to the necessary conclusion that such a standard would apply to laws they ostensibly favor, like political contribution limits and disclosure laws.

Nonetheless, Appellees attempted to cite a few cases they say support their argument for across-the-board strict scrutiny, none of which does. For example, Appellees cite *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000), as an example of a state adopting strict scrutiny and rejecting *Anderson-Burdick*'s balancing test. WNV, 13-14; MYA, 20-21. It is not. *Van Valkenburgh* was a challenge to an Idaho statute that required a ballot legend indicating whether candidates had signed a term limit pledge. The Court declined to apply a balancing test because, "unlike the statute in *Burdick*, [the statute] is not simply a time, place or manner voting restriction to which a more deferential standard of review might be applied." 15 P.3d at 1134. Rather, the State gave its imprimatur to certain candidates, which infringed on the "very basic right of a voter to express support for a candidate within the sanctity of the voting booth." *Id.* In other words, it was not simply a

"regulation[] of the electoral process," and it is unremarkable that such a provision would be subject to heightened scrutiny. *Id.* But there is no analogy to HB 176 or SB 169, which are unquestionably time, place, and manner regulations.[2]

Appellees' other cases are distinguishable for similar reasons. *See Tully v. Edgar*, 664 N.E.2d 43, 48-49 (Ill. 1996) (statute converting elected positions into appointed positions shortly after vote was subject to strict scrutiny because it "establishe[d] a mechanism for *total* disregard of *all* votes case by citizens in a particular election"); *Harper v. Hall*, 380 N.C. 317, ¶¶ 150, 181, 868 S.E.2d 499, 544, 553 (N.C. 2022) (partisan gerrymandering subject to strict scrutiny for "impermissibly interfering" with fundamental right because it "classif[ies] voters on the basis of partisan affiliation" and diluted votes on that basis); *see also Madison v. State*, 61 Wash. 2d 85, ¶ 21, 163 P.3d 757, 765-766 (Wash. 2007) (concluding state constitution does not offer more protection than federal constitution to felon's right to vote); *Moore v. Shanahan*, 207 Kan. 645, 486 P.2d 506 (Kan. 1971) (evaluating right to vote on separate constitutional amendments, not election regulation).

[2] Appellees do not contest that SB 169 and HB 176 are time, place, and manner regulations. The phrase "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (citation omitted).

While this Court has not had occasion to explicitly adopt the *Anderson-Burdick* balancing test for challenges to neutral, evenly applied election regulations, it has done so in all but name. *Wadsworth*, 275 Mont. at 302; Sec. Br., 20. If the Constitution is to be read as a consistent whole, Appellees' claim to strict scrutiny must fail.

III. Appellees entirely ignore *Crawford*'s conclusion that voter ID laws like SB 169 impose a minimal burden and are fully justified by the State's compelling regulatory interests.

Appellees, like the District Court, make no effort to distinguish the U.S. Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) upholding a more restrictive voter ID law than Montana's. That is not surprising because Appellees' arguments are identical to the *Crawford* plaintiffs' and the Court rejected them all: 1) the law did not impose a substantial burden, "or even represent a significant increase over the usual burdens of voting." *Id.* at 198; 2) it served the state's well-settled interests in modernizing its voting requirements, protecting the integrity and reliability of the electoral process, deterring voter fraud, and safeguarding public confidence in elections. *Id.* at 191, 197; and 3) the state does not have the burden to first prove actual instances of fraud. *Id.* at 194. *Crawford* is on all fours with this case, and Appellees do not contend otherwise.

Appellees nonetheless claim SB 169 imposes a substantial burden on voting

rights, even though—like the plaintiffs in *Crawford*—they have "not introduced evidence of a single, individual [Montana] resident who will be unable to vote" as a result of SB 169. *Id.* at 187. Worse, they fail to identify any voter (student or otherwise) actually burdened by the law. When they tried, the allegation fell apart. Sec. Br., 23-24 (citing Hailey Sinoff Deposition).[3]

And in response, all Appellees can muster is more abstract academic theorizing from Professor Mayer, using college students as a proxy for young voters. *See, e.g.,* MDP Br., 5-6, 24. But they cite no authority supporting the premise that they can establish a burden (much less a severe burden) from mere academic speculation. The U.S. Supreme Court refused to credit similar speculation in *Crawford*, noting that the record evidence did not even provide "the number of registered voters without photo identification" (*Id.* at 200), evidence Professor Mayer similarly lacks. MDP App. 15 (Mayer conceded he does not "have authoritative data on how many secondary or post-secondary students will use (or attempt to use) a student ID to vote."). If there truly were a burden, Appellees should be able to identify at least one student actually burdened by the statute. Their

[3] Appellees only answer is to falsely claim Sinoff's deposition is outside the record. The Secretary submitted the deposition with her motion to stay and to modify the preliminary injunction, which is included in this appeal. *See* Amended Notice of Appeal.

failure to do so establishes that, as a matter of law, they cannot meet their burden and their claims fail.[4]

Appellees nonetheless assert case law supports that they can "demonstrate a burden on the right to vote without identifying specific voters who are disenfranchised," citing *Fish v. Schwab*, 957 F.3d 1105, 11-27-1133 (10th Cir. 2020) and *League of Women Voters of Florida, Inc. v. Detzner*, 314 F.Supp.3d 1205 (N.D. Fla. 2018). MDP Br., 33. Appellees are wrong. Both cases identified actual voters alleging concrete harm. In *Fish*, the Tenth Circuit analyzed a strict "proof of citizenship" law requiring voters to present a birth certificate or other evidence of citizenship. 957 F.3d at 1114. Rather than abstract testimony about potential impacts, the plaintiffs identified eligible voters who "actually were disenfranchised" by the unusually strict law, in addition to concrete evidence that over 31,000 eligible voters were actually prohibited from voting. *Id.* at 1128. Moreover, the statute there, unlike here and in *Crawford*, had no "safety valve" that allowed voters to cast provisional ballots. *Id.*; *cf.* Sec. Br., 5 (describing safeguards). Likewise, in *Detzner*, "individual plaintiffs assert[ed] various burdens to their own and their peers' voting rights" from a rule

[4] As in *Crawford*, Appellees' claims are facial, which requires them to meet the "heavy burden" to show that the statute is unconstitutional in all its applications. *Crawford*, 553 U.S. at 200; *Mont. Cannabis*, ¶14.

that "*categorically prohibited* [students] from on-campus early voting." 314 F.Supp.3d at 1211, 1216.

And Appellees continue to theorize that SB 169 will burden students with out-of-state driver's licenses who do not want to drive in Montana or transgender students who cannot obtain a gender-affirming ID. MDP Br. 5-6. It is unsurprising that Appellees cannot identify an actual student in that situation, since the law allows use of a photo ID (including student ID) paired with another qualifying document (like a voter confirmation card, which all voters have).

Lacking actual voters, Appellees attempt to concoct a burden by arguing SB 169 prohibits use of a voter registration card as secondary ID (MDP Br., 7), even though registration cards explicitly state otherwise. Sec.App. 682 ("This card paired with a photo ID containing your name may be used as identification when you vote."); Sec.App. 658-60, 662. While SB 169 eliminated specific reference to voter registration cards, it did so to eliminate a redundancy. Because a notice of voter registration card *is* a "government document that shows the elector's name and current address," it obviously qualifies as valid form of identification under § 13-13-114, MCA. Appellees' consistent refusal to acknowledge that indisputable fact highlights the problem with their claim that SB 169 "imposes significant burdens" on students. Even if a student does not have a qualifying government-issued ID

(improbable, given that they had to register for school with one), student voters will have a student ID and voter confirmation card. Thus, SB 169 poses less burden than the mere "inconvenience" *Crawford* identified in "making a trip to the [MVD]." *Crawford*, 553 U.S. at 198.

Appellees' burden claims are also undermined by the ways SB 169 made voting easier. Sec. Br., 5. But Appellees even criticize those efforts, and again try to concoct a burden by mischaracterizing the law. First, MDP claims that removing the requirement that an ID be "current" was unnecessary because a previous administrative rule presumed licenses were current and valid.[5] MDP Br., 36 (citing ARM 44.3.2102(6)(c)). But that presumption could not make an expired license "current." The administrative rule did not, and could not, authorize use of expired licenses, which would directly conflict with the previous version of the voter ID statute requiring that licenses be current. § 13-13-114(1)(a), MCA (2005). The uncontroverted evidence establishes that change was made to remove potential barriers for Native American, elderly, and disabled voters. Sec. Br., 4. Second, MDP and MYA claim the Declaration of Impediment Form still requires secondary ID that

[5] MDP correctly notes the previous law required that a license be "current," not "current and valid." The "current and valid" language was amended as part of registration. Nonetheless, the difference is not material. The Secretary's point was that expired licenses, after SB 169, may be used.

a voter may not have, such as a utility bill or "other government document." Sec.App. 688 (sample form). But a Polling Place Elector Identification Form "is permitted to be used by an elector at the polling place as a government document." ARM 44.3.2102(7)(c). Appellees' argument that the process requires to return the next day with ID is also wrong. *See* § 13-15-107(2)(a) (providing that elector may return *or* follow the Declaration of Impediment process).

Finally, Appellees baselessly argue the State must show actual fraud to support SB 169, but they make no attempt to reconcile their argument with Article IV, § 3, which imposes upon the Legislature the duty to "guard against abuses of the electoral process." *See In re Request for Advisory Op.*, 479 Mich. at 26 (recognizing Michigan's similar provision "permitted prophylactic action" to prevent fraud and the state was "not required to provide *any* proof, much less 'significant proof' of in-person voter fraud before it may permissibly take steps to prevent it.") (emphasis original).

Whether there is actual fraud connected to student IDs in Montana is irrelevant to the State's interests in preventing fraud and promoting voter confidence, and Appellees fail to contend with any of the cases holding just that. *Crawford*, 553 U.S. at 194; Sec. Br., 29-30. There have been no reported instances of fraud connected to use of Costco cards or gym memberships, but Appellees do not

question the Legislature's decision not to allow those as primary ID.[6] Limiting primary voter ID to government-issued ID is a manifestly reasonable line for the Legislature to draw, just like virtually every other facet of life requiring similar ID, from boarding a plane to registering for college. Sec.Br., 22, 28. If SB 169 imposes any burden on voters, it is no different than similar burdens they routinely meet because "for the overwhelming majority of registered voters" in Montana, "the statute merely requires presentation of photo identification that the voter already possesses." *In re Request for Advisory Op.*, 479 Mich. at 23.

Voter confidence is at a particularly low ebb in Montana and elsewhere. Sec. Br., 28. It is reasonable for the Legislature to conclude that strengthening voter ID laws promotes voter confidence. Sec. Br., 30; *see also* Sec.App. 395 (randomized study finding that voter ID "can reduce perceptions of voter fraud."); Sec.App. 276 (Carter-Baker report recommending voter ID because "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."). Given the data supporting them, it is not surprising

[6] MYA raises the point that prior to SB 169, primary and secondary IDs were sufficient to prove identification for voting, and that is true. The change SB 169 made was to treat six categories of government ID that, by themselves, are sufficient to prove identification for voting. The effect was that all other non-government IDs, including student IDs, are treated similarly as secondary, all of which must be paired with another qualifying document showing name and current address, which undermines any claim that the Legislature was targeting students.

that thirty-five states have voter ID laws, very few of which allow student IDs without additional safeguards.[7] *See* Amicus Brief of RITE, 14. Indeed, courts have repeatedly recognized these interests as valid and compelling. *See Frank v. Walker*, 768 F.3d 744, 750 (7th. Cir. 2014) (voter ID "deters fraud (so that a low frequency stays low); it promotes accurate record keeping (so that people who have moved after the date of registration do not vote in the wrong precinct); it promotes voter confidence."); *In re Request for Advisory Op.*, 479 Mich. at 25 (voter ID is supported by state's "compelling regulatory interests in preventing voter fraud as well as enforcement of the constitutional directive . . . to 'preserve the purity of elections' and 'to guard against abuses of the elective franchise.'").

The District Court nonetheless dismissed the State's compelling interests and uncritically accepted Appellees' unsupported allegations that the law unconstitutionally burdens the right to vote. That was significant legal error and this Court should reverse.

IV. The Legislature's authority to modify the registration deadline is well-established in the Constitution, the Con-Con debates, and the unanimous view of cases from across the country.

Appellees make no serious effort to grapple with Article IV, § 3, the Delegates' statements confirming the clause was intended to provide "flexibility"

[7] https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

to modify EDR if problems surfaced, or the legion of cases affirming a legislature's authority to set registration deadlines *far* shorter than Montana's. Moreover, their claim that HB 176 burdens voters is based on explicit mischaracterizations of the law, like their experts' (and the District Court's) misunderstanding that registering and voting requires two trips to the election office during the early voting period.

Appellees' primary argument appears to be that once the State allows EDR, that policy decision is essentially set in stone and cannot be modified without meeting strict scrutiny. But that argument flies in the face of precisely why the Delegates refused to put EDR in the Constitution in the first place. Constitutional Convention, Verbatim Transcript, Feb. 17, 1972, Vol. III, pp. 400-452. The Delegates purposefully chose not to "constitutionalize" EDR so that if the Legislature chose to enact EDR, it had "flexibility there to adjust for problems," *id.* at 437-38, so that the Legislature was not "locked in," *id.* at 450. Sec. Br., 36-37. The constitutional text and the Framers' intent control. *Nelson v. City of Billings*, 2018 MT 36, ¶14, 390 Mont. 290, 412 P.3d 1058. Yet Appellees ignore both. If they were sincere in their arguments about independent interpretation of the Constitution, they would engage with the Constitution's text and the debates surrounding its passage. Their failure to do so is enough to resolve the issue in the Secretary's favor.

But even if the Court goes beyond that, Appellees' theory that the Legislature is locked in to EDR has no support in case law. The cases they cite stand only for the proposition that a plaintiff may challenge the Legislature's modification of laws based on "arbitrary and discriminatory treatment," which is the routine test for all Legislative acts and not alleged here. *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256 109 P.3d 219; WNV Br., 26 (citing cases involving discrimination). Appellees cite no case to support their argument that once a state allows EDR, it cannot later modify it. That fact was of no constitutional concern to the Ninth Circuit when it upheld Oregon's elimination of EDR and imposition of a 20-day registration requirement. *Barilla v. Ervin*, 886 F.2d 1514, 1516 (9th Cir. 1989).

Such a rule is both bad constitutional theory and bad policy because it would "create a 'one-way ratchet' that would discourage states from ever increasing early voting opportunities, lest they be prohibited by [courts] from later modifying their election procedures in response to changing circumstances." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016). For example, the State recently allowed an all-mail vote in response to the pandemic. But Appellees' proposed one-way ratchet rule surely would have discouraged that accommodation, if it meant that returning to the previous rule would have to meet strict scrutiny.

Appellees' attempt to concoct a burden imposed by HB 176 fares no better and is based on two fundamental factual fallacies. First, Appellees (and the District Court) inaccurately stated the number of people who have registered to vote on election day in past elections, based on Appellees' persistently inflated numbers. Order, p. 8 (incorrectly concluding EDR was used by 7,547 voters in 2008, 12,055 voters in 2016, and over 8,000 voters in 2018 and 2019); MDP Br. 9; WNV Br. 3. Those numbers include *all registration activity* on election day, including changes to precinct, corrections, address changes, and registration reactivations, which are allowed under HB 176. Sec.App. 665-666.[8] While there is no way to segregate only new registrations or county changes on election day, Appellees' representations of the number of voters purportedly impacted by elimination of EDR is likely greatly inflated. *Id.*; Sec.App. 654-55. Moreover, even if there is an error with a voter's registration that cannot be reconciled on election day, the voter must be given a provisional ballot, which is counted as soon as the error is reconciled. Sec.App. 656.

Second, Appellees' primary claim to burden is based on their experts' misconception of Montana election law as prohibiting what is referred to as "same-day registration." Same day registration (as contrasted with election day

[8] The Secretary's website, from which Appellees culled the data, makes this fact clear. *See* https://sosmt.gov/elections/latereg/.

registration), allows a voter to register and vote at the same time during the early voting period. Sec.App. 731. As the Secretary noted in her opening brief—and Appellees do not contest—Montana allows voters to register and vote on the same day during the unusually long 30-day early voting period. Sec.Br., 7 (citing § 13-2-304(d)(i), MCA).

Despite that, Appellees continue to claim a burden based on their experts' erroneous assumption that eliminating EDR requires two trips to the election office, one to register and another to vote. MDP Br., 10; WNV Br., 22 (citing expert report of Daniel McCool, who incorrectly claimed that eliminating EDR required Natives and other voters to make multiple trips to register and vote.); *see also* WNV App. 111 ("EDR is especially appealing to voters who have to travel long distances, have limited transportation options, do not have reliable internet, and have an income level that inhibits multiple trips to a distant location."); *Id.* ("The reason why EDR directly affects voter costs, and thus turnout, is because it converts two processes—registration and voting—into one act: "registration and voting can be one essentially continuous act.' Otherwise, participation in an American election requires two actions that are separate in time and space."). The District Court concluded that eliminating EDR burdened voters based on that same error. *See,* Order, p. 8 (EDR saves costs by "combining both registration and voting into a single administrative

step."); *Id.*, p.10 (socioeconomic factors make it more difficult to travel to election offices because "Native Americans are less likely to have a working vehicle, money for gasoline, or car insurance."). In short, the primary reason Appellees' claim EDR burdens voting is based on their experts' incorrect legal conclusions that Montana does not allow registration and voting on the same day.

That fact also distinguishes this Court's decision in *Driscoll v. Stapleton*, 2020 MT 247, 401 Mont. 405, 473 P.3d 386. WNV relies heavily on *Driscoll*, arguing that HB 176 makes it more burdensome for Native Americans to vote because of socioeconomic factors, distances from county election offices, and limited transportation. WNV Br. 22. But, again, that argument is based on its experts' flawed premise that eliminating EDR prohibits Native Americans from simultaneously registering and voting. *See, e.g.*, WNV App. 111. In *Driscoll* the Court concluded a prohibition on all ballot collection imposed *new burdens* on voting. An across-the-board ban on ballot collection harmed Native Americans, some of whom could not afford to travel to a polling place or lacked access to mail service. *Driscoll*, ¶ 6. HB 176 does not impose new burdens. If a voter wants to register (and vote) in person, the burden is essentially the same before and after HB 176. That voter must still travel the same distance to the election office. Eliminating EDR merely shifted the same burdens to the new late registration period. Sec.App. 735 (Secretary's expert

noting "the convenience provided by EDR is only slightly greater than the convenience afforded by Montana's SDR deadline the day before the election." *Id.* at 736 (noting SDR has much greater impact on voter turnout than EDR).[9] WNV's analogy to *Driscoll* is simply false, yet the District Court adopted it wholesale. Order, p. 8; p. 10.

And while Appellees claim that wait times in voting lines are not a problem in Montana, that is inconsistent with the evidence and experience of election administrators. Indeed, while WNV can point to no concrete evidence or actual Native voters unable to vote because of HB 176, the evidence it does have shows Native voters did not vote because of long wait times caused by EDR. Sec.App. 651 (noting 3 hour wait caused by EDR, which prevented some Native Americans from voting).[10]

Moreover, any burden imposed by HB 176 is mitigated by Montana's 30-day early voting deadline, which is one of the longest early voting windows in the

[9] Indeed, several appellees including WNV, Forward Montana, and Mont Pirg PIRG demonstrate how easy the process is with an online portal allowing voters to fill out an online registration form, after which the organizations mail the completed form with an addressed and stamped envelope, so the voter can sign and send it to the Secretary of State. https://www.mtvr.org/wnv.

[10] Appellees' claim that registration only impacts lines at the county election office is beside the point. WNV Br., 8. In many locations, the election office and polling place is the same, especially in smaller counties, but even in larger counties like Yellowstone.

country. App. 764; *see also Husted*, 834 F.3d at 623 (recognizing Ohio as a "national leader when it comes to early voting opportunities" because of its 29 day early voting period). That long early voting window, combined with same-day registration, undermines virtually all of Appellees' purported burdens. Montana also makes it easy to register by mail or at the MVD, and broadly allows no-excuse absentee voting. Sec.App. 757 (expert testifying that "voting remains easy in Montana.").

Appellees also argue that eliminating EDR disparately burdens some populations like young voters and Native Americans who may use EDR at somewhat higher rates. As WNV's expert affirmed, at least approximately ninety-eight percent of Native Americans do not register on election day. WNV App. 265. The same expert also admitted even that estimate is likely inflated because it includes activity not prohibited by HB 176, like corrections, precinct changes, or registration reactivation. WNV App. 260, n.32. In any event, courts have repeatedly recognized that no election law will have an absolutely equal burden on all voters. Sec. Br., 26, 32. Simply because a "somewhat heavier burden may be placed on a limited number of people" is not enough to subject an election law to heightened scrutiny. *Crawford*, 553 U.S. at 199-203.

While individual impacts may be relevant in as-applied challenges, a facial challenge considers the application to all voters. *Crawford*, 553 U.S. at 204; *see also*

supra, n. 4 (facial challenge must prove law is unconstitutional in all its applications). WNV cites *Public Integrity Alliance, Inc. v. Tucson*, 836 F.3d 1019, 1024, n.2 (9th Cir. 2016), to suggest that courts assess the impact on subgroups as part of the *Anderson-Burdick* analysis, but that raises two important points. First, the Ninth Circuit was referring to restrictions that "block access to the ballot or impede individual voters" who "receive different treatment from rules." (upholding evenly-applied election regulation). Second, even where a plaintiff alleges a particular burden on a subgroup, a plaintiff must produce "quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of those provisions." *Democratic Nat'l Committee v. Reagan*, 904 F.3d 686, 703 (9th Cir. 2018). In short, even where impact on certain subgroups may be relevant, that claim must be based on "concrete evidence of the burden imposed on voters," which Appellees fail to provide. *Crawford*, 553 U.S. at 201.

Appellees also cite a declaration surmising that 58 people out of the 337,581 votes cast in the three elections since HB 176 passed were not able to vote because, for reasons unknown, they (apparently) missed the registration deadline. MDP, Br. 12 (citing SA256). That statement is difficult to parse because it was based on speculation culled from the state voter files and other data, without identifying any

specific individuals or information explaining why they did not vote. Eight of those individuals were evidently changing their registration to reflect a new precinct, which is not prohibited under HB 176. Sec.App 654-656. Because Appellees' evidence is a compilation of data, the record is unclear as to why these individuals did not vote. Regardless, that extraordinarily small percentage (0.02%) belies Appellees' claim that HB 176's burden is severe, and Appellees do not claim that any of those voters were Native Americans or young voters in any event.

Even if those individuals did not vote because they were not registered on election day, their inability to vote was not caused by SB 169, but by "their willful or negligent failure to register on time." *Barilla*, 886 F.2d at 1524; Sec. Br., 41-42 (collecting cases holding the same). The same can be said of voters who show up after polls close. Voting requires reasonable action by the voter, and failure to do so does not call into question reasonable voting regulations. *Id.* Montana's registration period is longer than most states, and courts across the country, including the U.S. Supreme Court, have approved deadlines that precede election day by much longer than Montana's. Many states have registration deadlines that precede election day by 20 days or more. Sec. Br., n.2, 38-41.

Finally, Appellees' claim that the Secretary did not submit evidence supporting the State's interests is baffling. See WNV 28. The law was supported by

testimony that EDR causes unnecessary chaos on election day and that ending EDR furthers the State's interest in ensuring the integrity, reliability, and efficiency of the election process on election day. Sec. Br., 6-7, 43-45. The problems created by EDR—especially in rural counties—were well documented in the legislative hearing on HB 176 and confirmed by election administrators. They included unnecessary chaos and delays, longer polling lines, counting and reporting votes in a timely manner, and preventing election administrators from being able to help disabled or ill voters. *See, e.g.,* Sec.App. 830-832; 850; 854 (legislative testimony); Sec. App. 772-776;777-781;782-786 (election administrator declarations); Sec.App. 789 (Sen. Fitzpatrick decl.); Sec.App. 796-97 (Rep. Hertz decl.). Those interests are well-supported and well-recognized, and easily sufficient to pass constitutional review. *See* Sec. Br., 39-41.

Appellees' arguments are fine for a policy debate, but that is where they belong. *ACORN v. Bysiewicz,* 413 F.Supp.2d 119, 124 (D.Conn. 2005) (court refused to "re-weigh the competing public interest . . . and impose election day registration by fiat" because a registration deadline "is quintessentially a legislative judgment") (citation omitted). WNV's attorney acknowledged as much after repeatedly failing to force Plaintiffs' preferred policy changes through litigation in other jurisdictions: "Rather, the failure of lawsuits challenging registration deadlines thus far likely

speaks to the practical limitations of courts as vehicles for affirmative reform, and counsels a strategy that focuses primarily on legislative efforts to establish EDR…." Dale E. Ho, *Election Day Registration and the Limits of Litigation*, The Yale Law Journal Forum, p. 194. (November 18, 2019). Exactly. This question, just like the Legislature's requirement that primary ID be government-issued, is a quintessential policy decision that does not impose a substantial burden on Appellees' constitutional rights and is amply justified by the State's compelling regulatory interests. *Burdick*, 504 U.S. at 434.

V. Appellees' equal protection claims fail at the outset because they do not allege intentional or invidious discrimination.

Disparate impact, standing alone, is not enough to trigger equal protection scrutiny of either SB 169 or HB 176. As an initial matter, WNV is wrong that the Secretary did not raise this issue in her opening brief. *See* Sec. Br., 31-32, 37-38. As the Secretary explained, Montana law does not recognize a disparate impact claim absent proof of legislative intent to discriminate. *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (1981); *see also Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 121, 402 Mont. 277, 477 P.3d 1065 (for "facially neutral" law to violate equal protection clause, it must have "a discriminatory purpose and effect on otherwise similarly situated classes") (Sandefur, Gustafson, and Fehr, JJ., dissenting).

WNV also criticizes the Secretary for not citing a case it claims establishes that disparate impact alone is sufficient in its argument against HB 176, even though it had nothing to do with EDR, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014). WNV Br., 27. That case analyzed elimination of same-day registration, not election day registration. As already discussed, Montana retains same-day registration (i.e., the ability to register and vote on the same day). More importantly, the plaintiffs' claims there were based on Section 2 of the Voting Rights Act ("VRA"), not the Equal Protection Clause. Under the VRA, "showing intentional discrimination is unnecessary" because concrete evidence of "discriminatory results alone" is relevant, among other factors. *Id.* at 238. But even under the VRA, a bare claim that a particular voting method "tends to be used most heavily" by a particular group (precisely Appellees' claim here) is not enough. *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321, 2343, 2347 (2021).

Another Fourth Circuit decision, which *did* involve an equal protection claim, highlights WNV's misplaced reliance on *League of Women Voters*. In *North Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020), the court rejected an equal protection challenge to a voter ID law because the plaintiffs failed to meet their burden to prove intentional discrimination was a "substantial or motivating factor behind enactment of the law." The Court also recognized that the

legislature is entitled to a presumption of good faith, which plaintiffs have the burden to overcome with substantial and concrete evidence of discriminatory intent. *Id.* Without that, a disparate impact claim goes no further. That is entirely consistent with how this Court has applied its equal protection analysis. *Fitzpatrick*, 194 Mont. at 323; Sec. Br., 31-32.

There is no indication or even allegation that either HB 176 or SB 169 was the product of intentional discrimination, and the District Court found none. Order, pp. 42-46 (analyzing only disparate impact). As a result, Appellees' equal protection claims fail at the outset.

Conclusion

This Court should reverse the District Court's preliminary injunction order and the erroneous legal conclusions upon which it is based.

Respectfully submitted June 29, 2022.

CROWLEY FLECK, PLLP

s/ *Dale Schowengerdt*

Certificate of Compliance

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 7,452 words including footnotes. Rule 11(4).

/s/Dale Schowengerdt

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-29-2022:

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

Henry James Brewster (Attorney)
46 S Street NW
Washington DC 20001
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

Rylee Sommers-Flanagan (Attorney)
40 W. Lawrence Street
Helena MT 59601

Representing: Forward Montana Foundation, Montana Public Interest Research Group, Montana Youth Action
Service Method: eService

Ryan Ward Aikin (Attorney)
1018 Hawthorne St.
Missoula MT 59802
Representing: Forward Montana Foundation, Montana Public Interest Research Group, Montana Youth Action
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

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

Robert Cameron (Attorney)
203 N. Ewing St
Helena MT 59601
Representing: Restoring Integrity & Trust in Elections
Service Method: eService

Akilah Maya Lane (Attorney)
2248 Deerfield Ln
Apt B
Helena MT 59601
Representing: Western Native Voice
Service Method: eService

Electronically signed by Regina Grimsley on behalf of Dale Schowengerdt
Dated: 06-29-2022