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.

BRIEF OF *AMICUS CURIAE* RESTORING INTEGRITY & TRUST IN ELECTIONS IN SUPPORT OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTOHRITIES

CASES **Page(s)**

INTEREST OF THE AMICUS CURIAE

Restoring Integrity and Trust in Elections, Inc. ("RITE") respectfully submits this brief as Amicus Curiae in support of Defendant-Appellant, Christi Jacobsen, the Montana Secretary of State ("Appellant"). RITE is a 501(c)(4) non-profit organization committed to ensuring the rule of law in voting and election administration. Recognizing that Article I, Section 4 of the United States Constitution vests authority over the "Times, Places and Manner of Holding Elections for Senators and Representatives" in the legislatures of the States, RITE has a particular interest in defending the election laws duly enacted by state legislatures. RITE is also dedicated to supporting laws and policies that promote secure elections and enhance voter confidence. RITE's expertise and national perspective on voting and election law will assist the Court in reaching a decision that ensures that Montana does not become an outlier either in the approach it takes to judicial review of election laws or in the substantive standards it applies for ensuring safe and secure elections.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents fundamental questions about the extent to which Montana courts may adopt standards for judicial review that strip the Legislature of the ability to make policy choices regulating the time, place, and manner of holding elections in all but the most extreme circumstances. The rulings below put the Legislature in

a lawmaking straightjacket by declaring that strict scrutiny applies to *every* law regulating voting, thereby demanding an extraordinary justification and robust evidentiary record to sustain the Legislature's policy choices—even those that place minimal burdens on voting. That is not the law in Montana.

Even the trial court tacitly conceded that the blanket strict scrutiny rule it announced was indefensible, as it failed to apply that rule to one of the provisions at issue. After declaring that strict scrutiny *always* applies, the trial court evaluated only three of four challenged voting provisions under that standard. According to the trial court, statutes eliminating Election Day Registration (EDR) (HB 176), banning paid ballot harvesting (HB 530 § 2), and prohibiting the mailing of ballots to electors who do not meet residence and age requirements (HB 506) are unenforceable because they do not satisfy strict scrutiny, the most demanding test known to the law. But when analyzing and striking down the Legislature's determination that student photo IDs cannot count as primary identification under Montana's Voter ID Law (SB 169), the court, without any explanation, abandoned strict scrutiny and applied rational basis review.

As explained in the Secretary of State's brief, a host of errors warrant reversing the trial court's decisions in full. This brief highlights two particularly alarming legal errors that warrant this Court's clear and unequivocal correction.

First, this Court should reject the trial court's extreme theory that *every* voting regulation demands strict scrutiny. That approach conflicts with this Court's longstanding precedent. Where fundamental rights are not substantially burdened, this Court has not applied strict scrutiny. And rightly so. Applying strict scrutiny across the board would produce irrational results. It would create a one-way ratchet that converts the current status quo into an irreversible constitutional baseline and would preclude the Legislature from exploring legitimate policy options (including reversing a prior voting rule), even if such options would have only a minimal impact on voting and would align with similar voting laws across the country. Affirming the decisions below would permanently impair the Legislature's constitutional authority to manage elections. As Justice Rice has observed, adopting the trial court's "strict scrutiny only" approach would usurp the authority expressly assigned to the Legislature to regulate elections under Article IV, § 3 of the Montana Constitution. To avoid similar problems raised by applying strict scrutiny across the board, the U.S. Supreme Court and the majority of States have adopted a test that (consistent with this Court's own precedents concerning other fundamental rights) considers whether or how substantially a law burdens the right to vote to determine whether strict scrutiny is appropriate. The Court should join the majority of courts that have addressed the question and adopt the standard of review from *Anderson v.*

Celebrezze, 460 U.S. 780, 788 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), or a similarly flexible standard for reviewing voting regulations.

Second, the trial court wrongly demanded an exacting level of evidentiary support for the Legislature's policy judgments, treating the Legislature as if it were an agency that cannot regulate in the absence of substantial evidence of a problem. But under the proper standard of review, it is not the role of the judiciary to re-weigh evidence to second guess the Legislature's policy decisions. That approach fails to respect the separation of powers under the Montana Constitution, and in addressing similar voting laws, the U.S. Supreme Court has flatly rejected it.

For all of these reasons, the Court should reverse the judgment below.

ARGUMENT

I. The Trial Court Erred in Holding That Every Law Touching Upon a Fundamental Right—and Thus Every Statute Affecting Voting—Must Satisfy Strict Scrutiny.

The Court should reject the trial court's blanket assertion that strict scrutiny applies to any law that touches on the right to vote. That approach conflicts with this Court's precedents, produces illogical results, and improperly impinges on the authority specifically granted to the Legislature under Article IV, § 3 of the Montana Constitution to regulate elections. The Court should reverse the decision below and adopt the standard of review from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and

Burdick v. Takushi, 504 U.S. 428 (1992), which subjects an election law to higher scrutiny only if it imposes a severe burden on voting rights. Under the correct standard, HB 506, HB 176, and HB 530, § 2 all easily survive review.

A. The Decision Below Conflicts with this Court's Precedents, which Apply Strict Scrutiny Only to Laws that Substantially Burden Fundamental Rights.

The trial court erred first and foremost by misapplying this Court's precedent. Under the trial court's view, "unbroken Montana Supreme Court precedent" requires that *every* statute placing any "burdens on fundamental rights, such as the right to vote, trigger[s] strict scrutiny." Trial Court Op. ¶ 547–48. That misstates the law. This Court has long correctly recognized that strict scrutiny is appropriate only where a provision *substantially interferes* with a fundamental constitutional right.

As this Court explained in *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165 (1996), "'[t]he extent to which the Court's scrutiny is heightened depends *both* on the nature of the interest *and the degree to which it is infringed.*'" *Id.* at 1173 (quotation omitted, emphases added). Thus, "[s]trict scrutiny of a statute is required only when the classification *impermissibly* interferes with the exercise of a fundamental right." *Id.* at 1174 (emphasis added). Or as the Court recently put it, "the challenging party has the initial burden of showing that [a] disputed statutory provision *substantially interferes* with the subject fundamental right," and "[o]nly

upon satisfaction of that threshold burden does strict scrutiny apply." *Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, ¶ 48, 403 Mont. 225, 264-65, 481 P.3d 198, 218 (emphasis added). Notably, in *Clark Fork*, the Court specifically cited U.S. Supreme Court cases addressing challenges to election laws to support this approach on the standard of review. *See id.* ¶ 48 (citing *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017), and *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800-01 (2017)).

The Court has repeatedly applied the same approach. In *Oberg v. City of Billings*, 207 Mont. 277, 280-281, 674 P.2d 494, 495-496 (1983), it acknowledged that there is a fundamental right to privacy, but expressly rejected the view that, "because a right of privacy violation was alleged, a strict scrutiny analysis was required." *Id.* at 495. The right to privacy, like the right to vote, is recognized in the Montana Constitution's declaration of rights. Mont. Const. Art. II, § 10. But, as the Court explained, "a mere allegation that a fundamental right is burdened is insufficient to trigger a strict scrutiny analysis." *Oberg,* 674 P.2d at 495. Instead, where the "plaintiff has failed to show that any fundamental right was *substantially abridged* by the statute," it is "unnecessary to apply the strict scrutiny analysis." *Id.* at 496. The Court reaffirmed this approach in *Hamlin Constr. & Dev. Co. Inc. v. Montana Dep't of Transportation*, 2022 MT 190, 410 Mont. 187, 521 P.3d 9 (, which

involved the fundamental right in "acquiring, possessing and protecting property" recognized by the Montana Constitution. *Id.* ¶ 38 Although the Court noted that "[l]egislation that interferes with a fundamental constitutional right is evaluated under a strict-scrutiny standard," it clarified that "not every law that results in some incidental restriction or effect upon the use of private property implicates property rights to a constitutional magnitude." *Id.* ¶¶ 36-38 (citing cases). Ultimately, the Court decided that "the challenged statutory section does not impinge upon [property rights] *to a degree* sufficient to review the statute under strict scrutiny." *Id.* ¶ 38 (emphasis added).

As these cases show, the trial court was simply wrong in asserting that there is "unbroken Montana Supreme Court precedent finding that 'strict scrutiny [is] used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights.'" *See* Op. ¶ 548 (citing cases). Nor do the cases the trial court cited support its categorical approach. In *Driscoll v. Stapleton*, 2020 MT 247, 401 Mont. 405, 473 P.3d 386, for example, the Court expressly *declined* to decide whether strict scrutiny was required because, "for purposes of resolving the instant preliminary injunction dispute, the level of scrutiny is not dispositive." *Driscoll*, ¶ 20.

Other cases cited by the trial court are equally off point. They either (i) hold that strict scrutiny does *not* apply when a fundamental right is *not* at issue, (ii) restate the definition of a fundamental right without any holding on the standard of review, or (iii) note in dicta that an equal protection challenge involving a suspect classification or fundamental right generally triggers strict scrutiny. *See Montana Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 59, 382 Mont. 256, 278-279, 368 P.3d 1131, 1149 ((declining strict scrutiny for commercial speech restriction); *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 206-07, 113 P.3d 281, 288 (explaining, without reference to strict scrutiny, that "the right to appear and defend in person . . . is a fundamental right"); *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶¶ 17-31, 325 Mont. 148, 154-158, 104 P.3d 445, 450-452 (noting in dicta that strict scrutiny applies to an equal protection challenge involving a suspect class or fundamental right, but applying rational basis review); *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 431, 712 P.2d 1309, 1312 (1986) (strict scrutiny does not apply where a fundamental right is not implicated).

B. Subjecting *Every* Law Related to Voting to Strict Scrutiny Would Produce Irrational Results.

Applying strict scrutiny to *every* law related to voting would also produce irrational results. By demanding a compelling government interest (and narrow tailoring) to justify *any* deviation from current laws, the trial court would create a

one-way ratchet under which the Legislature could loosen regulations related to voting, but could almost never justify changes tightening them—no matter how minor such changes might be. Such a one-way ratchet would divorce constitutional analysis from any objective assessment of the actual burdens the overall system of election laws places on voting. Instead, it assumes any departure from the status quo inflicts a constitutional harm that demands strict scrutiny. Under this approach, changes to voting laws are instantly set in stone unless the Legislature can compile an evidentiary record proving that a change is *necessary*—and the least burdensome approach—to achieve a government interest of the highest order. For example, if the Legislature permits 30 days of early voting one year, it would never be able to recalibrate and decide that 25 days would be more efficient. Even assuming a compelling need to reduce costs and utilize election officials' time on other tasks—or merely to expend resources on state priorities other than voting, of which there are many—it would be almost impossible for the State to establish that such a change was the least onerous path to address the problem at hand.

The opinion below illustrates precisely how this approach produces illogical results. For example, in striking down the elimination of EDR—a matter that falls directly within the Legislature's constitutionally assigned authority to regulate elections—the trial court refused to consider cases from other jurisdictions holding

that there was no need to allow EDR to protect the right to vote. Its reason: those cases did not address the question of *eliminating* EDR after it had been permitted. Op. ¶ 568. In other words, by experimenting with EDR, the Legislature had fallen into a trap. According to the trial court, enacting EDR was not an act of legislative judgment that the Legislature could take while retaining discretion to later reverse course and eliminate EDR. Instead, it was an expansion of the constitutional right to vote itself, establishing a new constitutional requirement—a new constitutional baseline from which any future deviations must be measured and justified under strict scrutiny. Needless to say, that conclusion is flatly contrary to the plain terms of the Montana Constitution, which makes it express that whether or not to allow EDR is—and must remain—a matter of legislative discretion and not a constitutional requirement.

Along similar lines, the trial court illogically declared that eliminating EDR was unconstitutional because it would "den[y] Montanans their right to vote for one and a half days during each election cycle." Op. ¶ 574. The trial court compared that "denial" to eliminating the right to free exercise of religion or other fundamental rights for one and a half days each year. *See id.* But that, too, is obviously wrong. Unlike rights such as the right to free exercise of religion, the right to vote does not provide a right to engage in particular activity every day throughout the year; instead,

it is necessarily tied entirely to a particular, time-limited event: an election. And a citizen's right to vote is not "denied" if he or she cannot vote on a particular day or time of his choosing, as long as, overall, there are alternative avenues permitting constitutionally sufficient opportunities to vote in that election. Whether a change in election law "denies" anyone their right to vote must be analyzed by looking at *all* the opportunities a citizen will have to vote in an election. Analysis cannot be sliced up to focus solely on a purported right to vote *on a particular day or hour*. Such wrong-headed analysis ignores the fundamental truth that there are always limitations on voting inherent in conducting elections and the Legislature cannot be expected to remove all burdens from the process. As the U.S. Supreme Court has recognized, voting is not a burdenless activity, and citizens will always need to incur the "usual burdens of voting." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2346.

C. Applying Strict Scrutiny to Every Law Affecting Voting Conflicts with the Express Constitutional Grant of Authority to the Legislature To Provide for the Administration of Elections.

Applying strict scrutiny to every election law also conflicts with the Montana Constitution. The trial court's one-way ratchet results in the judiciary usurping the Legislature's constitutionally assigned authority to make policy judgments required to regulate elections. Article IV, § 3 of the Montana Constitution unambiguously

provides that "[t]he legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections" and "[i]t may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process." *Id.* These provisions plainly assign the Legislature the authority to make policy decisions concerning the regulations needed to conduct orderly elections, balanced against the right to vote provided for in Article II, § 13. And this Court has long recognized as a general matter that the Court lacks authority to impede the Legislature from acting within the sphere of its constitutional mandate. *See, e.g., Meech v. Hillhaven W., Inc.*, 238 Mont. 21, 42, 776 P.2d 488, 501 (1989) (noting that the doctrine of separation of powers is enshrined in Article III, Section 1, of the Montana Constitution) (quotation omitted); *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 20, 354 Mont. 133, 139, 227 P.3d 42, 47 ("This Court's role is not to determine the prudence of a legislative decision. It is for the legislature to pass upon the wisdom of a statute.") (citations omitted).

Applying strict scrutiny to *every* law affecting voting would strip the Legislature of the ability to make legitimate policy choices, because once the Legislature has adopted a provision expanding access to voting, it cannot go back. Using such a standard of review (one that can be "seldom satisfied") does not afford the proper respect for the Legislature's constitutionally assigned role. *Butte Cmty.*

Union, 712 P.2d at 1312. As Justice Rice recognized, "a universal application of strict scrutiny review to laws implicating the fundamental right to vote . . . would not properly account for the Legislature's constitutional authority and could well 'tie the hands' of the Legislature in fulfilling its constitutional mandate to secure elections." *Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 46, 410 Mont. 114, 140, 518 P.3d 58, 73 (Rice, J., dissenting) (quotation omitted).

The trial court's approach yielded precisely this impermissible result by invading the sphere of legitimate policy choices permitted to the Legislature under Article IV, Section 3. That is most clear with respect to the holding that eliminating EDR violates the Montana Constitution. Article IV, § 3 clearly states that the Legislature "*may* provide for a system of poll booth registration." *Id.* (emphasis added). The use of the permissive "may" necessarily means that the Framers also granted the Legislature the policy discretion *not* to permit such registration. Indeed, the drafting history of the Constitution confirms that much. *See* Montana Const'l Convention, Verbatim Tr., Feb. 17, 1972, Vol III, at 400 (committee used "permissive" language because it was "extremely reluctant to freeze for all time the schedule and administrative process of elections"). The plain text and drafting history of the Constitution thus make clear that *there is no constitutional right to register on election day.*

Here, however, the trial court has created such a right and stripped the Legislature of the very discretion the Framers granted in Article IV, § 3. It has impermissibly accomplished what the Framers sought to avoid: freezing EDR into the election law "for all time" by treating EDR as a new constitutional baseline that cannot be changed without a compelling government interest.

The Legislature's constitutionally authorized discretion to regulate elections was similarly cast aside by the trial court's decisions to strike down HB 506, SB 169, and HB 530 § 2. Under the proper test, the state should have ample flexibility to allocate its resources to early voting, other aspects of election administration, or even non-election related needs. Courts should not disrupt the Legislature's policy choices unless doing so is necessary to avert a severe burden on citizens' fundamental rights.

D. The U.S. Supreme Court and Other States Have Rightly Rejected Blanket Use of Strict Scrutiny on Election Laws.

Recognizing the distortions caused by applying strict scrutiny to every election law, the U.S. Supreme Court has rejected that approach under federal law. Instead, federal law increases the level of scrutiny based on the degree to which the right to vote is burdened. The U.S. Supreme Court grounded this approach on the understanding that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos,

is to accompany the democratic processes." *Anderson*, 460 U.S. at (quotation omitted). And every provision of an election code "inevitably affects—at least to some degree—the individual's right to vote." *Burdick* , 504 U.S. at 433 (quotation omitted). But requiring a showing that every such regulation is "narrowly tailored" to advance a "compelling government interest" would make every run-of-the-mill policy judgment inherent in establishing an election code subject to challenge under such a demanding standard that it would allow the judiciary to substitute its own judgment for that of the Legislature in regulating elections.

In rejecting that approach, the Court explained that, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. As the Supreme Court explained in rejecting a strict "necessity" requirement under Section 2 of the Voting Rights Act, "[d]emanding such a tight fit would have the effect of invalidating a great many neutral voting regulations" and "would also transfer much of the authority to regulate election procedures from States to the federal courts." *Brnovich*, 141 S. Ct. at 2341. If this Court were to adopt strict scrutiny for every election law, it would effect the same transfer of authority from the Legislature to Montana courts. As Justice Rice correctly pointed out: "If all

election laws that simply bear upon a fundamental right are subject to strict scrutiny review, the Legislature would be constrained from enacting even minor changes." *See Montana Dem. Party v. Jacobsen*, 2022 MT 184, ¶ 46, 410, Mont. 140, 518 P.3d 58, 74 (Rice, J., dissenting) (quotation omitted).

Accordingly, the U.S. Supreme Court held in *Anderson* and *Burdick* that strict scrutiny applies only when voting rights "are subjected to 'severe' restrictions," but not "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions,'" in which case "the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick,* 504 U.S. at 434 (quotations omitted).

This common-sense approach has also been adopted by the majority of States, and no state high court has embraced the trial court's approach. At least thirty-two States have expressly followed *Anderson* and *Burdick* or adopted a similar approach that subjects an election law to more heightened scrutiny only if it substantially burdens voting rights. *See* Appendix A. Indeed, pointing to constitutional provisions similar to Article IV, Section 3 of the Montana Constitution, the high courts in some States have explained that such an approach is *necessary* for the judiciary to respect the constitutional authority of the state legislature to regulate elections. *See, e.g., Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100

N.E.3d 326, 333 (Mass. 2018) ("'sliding scale'" standard of review "reflects" the "grant of police power to the Legislature, which . . . authorizes the Legislature to regulate" elections). Parallel reasoning applies here. This Court should avoid becoming a national outlier and follow a similar approach.

II. The District Court Erred By Failing To Afford Any Deference to the Legislature's Judgments and By Demanding Exacting Evidentiary Support for Policy Judgments.

The trial court also erred by demanding empirical evidence to support the Legislature's policy judgments in the challenged laws. Under every level of scrutiny—when it erroneously applied strict scrutiny (for HB 176 and HB 530), when it purported to analyze claims under the *Anderson-Burdick* test (for HB 176, HB 530, and HB 506), and when it purported to apply rational basis review (for SB 169)—the trial court demanded exacting evidence to justify the State's interests and to show that the laws would address that interest.[1] In effect, the trial court afforded the Legislature no more deference than it would have given to an administrative agency whose actions are reviewed for "substantial record evidence." *Clark Fork Coalition*, 2021 MT 44, ¶ 33 n.64.

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[1] *See, e.g.* Op. ¶ 571 ("EDR has not been implicated in a single instance of voter fraud in Montana since its inception."); *id.* ¶ 572 (no evidence of "impact on voter confidence"); *id.* ¶ 603 (small rate of voter fraud means the "Secretary has no valid state interest in HB 530, § 2"); *id.* ¶ 665 ("There have been no instances of voter fraud concerning the use of student IDs in Montana.").

That was plainly error. This Court has made clear that "respect for the role of the policymaking body in our system of government" demands that the "fact finding process and motivation" of the Legislature be afforded "deferential review by the judiciary." *Rohlfs*, 2009 MT 440, ¶ 18. In particular, "[i]t is not for this Court to review the quantity and quality of information that moved the Legislature to act." *Id.* ¶ 32. The trial court's demand for specific evidence to support the Legislature's decisions flatly contradicts this Court's longstanding admonition that "[i]t is not the function of the courts to second-guess and substitute their judgment at every turn of the road for the judgment of the legislature in matters of legislation." *State Bar of Montana v. Kravet*, 193 Mont. 477, 481, 632 P.2d 707, 710 (1981).

The trial court particularly erred in rejecting the Legislature's view that the laws at issue would prevent fraud, improve the security and integrity of elections, and enhance voter confidence. As the U.S. Supreme Court has explained, under the proper standard of review, no proof of actual fraud is required to justify regulations addressing potential fraud. Instead, "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders," *Brnovich*, 141 S. Ct. at 2348, "[n]or do we require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); *see also id.*

("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively . . . ."); *In re Request for Advisory Opinion*, 740 N.W.2d 444, 459 (Mich. 2007) ("[T]he state is 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 in original). Indeed, determining what will enhance voter confidence is a *predictive* judgment, and the courts are in no position to reject the Legislature's predictive policy judgments on such matters. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 16 (D.C. Cir. 2009); *accord Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality) (noting that "courts must accord substantial deference to the predictive judgments of Congress"). The laws at issue self-evidently bear a rational relationship to accurately identifying voters and enhancing voter confidence and, where they do not place a severe burden on voting rights, that is all that is required to survive review.

The trial court's demands for evidence were especially mistaken on rational basis review of SB 169, which made student IDs insufficient for primary identification. The trial court found fault because there was no evidence of fraud using student IDs. *See* Op. ¶¶ 665-666. But that approach misunderstands rational basis review, as *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), shows. In reviewing Indiana's law requiring photo ID to vote, *Crawford* explained

that, even though the record "contain[ed] no evidence" of in-person voter fraud "occurring in Indiana at any time in its history," *id.* at 194, there was a legitimate state interest in "counting only the votes of eligible voters" and an interest in "orderly administration and recordkeeping" which alone "provides a sufficient justification for carefully identifying all voters." *Id.* at 196. In addition, the Court credited Indiana's interest in promoting "public confidence in the integrity of the electoral process." *Id.* at 197. The same interests support SB 169, and the trial court cannot ignore such legitimate government interests simply because there is no record evidence of fraud. Moreover, there is even less evidence of any burden on voting here than in *Crawford*. Here, the record showed that "no witness testified that they had ever used a student ID to vote or would need to use a student ID to vote," Op. ¶ 406, that plaintiffs "have not identified a single individual who was unable to vote due to SB 169," *id.* ¶ 417, and that under SB 169, all a person would need to vote is a student ID and the voter registration card that is provided upon registering to vote. ¶ 398. The law also permits exceptions to the identification requirements if a citizen has a "reasonable impediment" that would prevent obtaining ID. *See* 2021 Montana S.B. No. 169. On that record, SB 169 imposes only trivial burdens and is plainly rationally related to legitimate government interests in the integrity of elections.

III. All the Challenged Provisions Survive the Proper Standard of Review.

The trial court effectively doomed HB 506, HB 176, and HB 530 when it invoked strict scrutiny. Under the proper standard of review, all the challenged provisions survive. As explained above, SB 169 readily survives rational basis review when it is properly applied. *See supra* p. 20–21. And under *Anderson/Burdick*, neither HB 506, HB 176, nor HB 530 imposes a severe burden on voting, and each thus survives the standard of review under which "the State's important regulatory interests" will "generally … justify" such laws. *Burdick,* 504 U.S. at 434 (quotation omitted). Each provision advances the interest in preventing fraud and ensuring the efficiency of elections. Tellingly, the trial court rested its analysis of HB 176 and HB 530 on the absence of empirical evidence of specific events of fraud. *See* Op. ¶¶ 571-572 (HB 176); *id.* ¶ 609 (HB 530, § 2); *id.* That was error, because no such evidence is required. The Legislature may adopt prophylactic measures to *prevent* fraud (and ensure voter confidence in elections) rather than waiting for fraud to occur. *See supra* p. 18–20.

CONCLUSION

The Court should reverse the judgment below.

Dated this 8th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4,994 words, excluding certificate of service and certificate of compliance.

DATED: May 8, 2023.

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TABLE OF APPENDICES

APPENDIX A

STATES APPLYING SLIDING SCRUTINY TO VOTING LAW CHALLENGES

State	Case Citation	Description
Alaska	*Kohlhaas v. State*, 518 P.3d 1095, 1123 (Alaska 2022)	The court noted that election laws "will invariably impose some burden upon individual voters, " and held that "[s]o long as the burden is modest, important State regulatory interests are typically sufficient to uphold a reasonable, nondiscriminatory state election law."
Arizona	*Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n,* 211 Ariz. 337, 346 (Ct. App. 2005)	The court held that the Arizona Constitution's equal protection clause is coextensive with the clause in the United States Constitution and applied Burdick to find that rational basis review applied to a non-discriminatory election law.
California	*Edelstein v. City & Cty. of S.F.*, 56 P.3d 1029, 1035 (Cal. 2002)	The court noted that California closely follows the United States Supreme Court's practices when analyzing election law and adopted *Anderson* and *Burdick.*
Colorado	*Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *4 (Colo. Dist. Ct. Oct. 18, 2004)	The court adopted *Anderson* and *Burdick*, noting that "our appellate courts, like the federal courts, have also recognized that elections need structure, and therefore that the state's reasonable, nondiscriminatory regulation of elections must be upheld despite the fac that such regulation necessarily impedes the right to vote."
Connecticut	*Fay v. Merrill*, 338 Conn. 1, 50 (2021)	Upheld voting regulations without applying strict scrutiny, instead noting: "Given the reasonable policy concerns that support the parties' respective state constitutional arguments, in interpreting our state's constitution, we must defer to the legislature's primary responsibility in pronouncing the public policy of our state."
Delaware	*League of Women Voters of Delaware, Inc. v. Department of Elections*, 250 A.3d 922, 936 (Del. Ch. 2020)	The court adopted *Burdick* and held that the level of scrutiny "depends on the extent to which a challenged law burdens" the right to vote. The court noted that reasonable, nondiscriminatory restrictions are generally justified by the State's important regulatory interests.

State	Case Citation	Description
Florida	*Libertarian Party of Florida v. Smith*, 687 So.2d 1292, 1294 (Fla. 1996)	The court found election laws are subject to a "flexible standard of scrutiny which ranges from strict scrutiny to a rational basis analysis, depending on the circumstances."
Georgia	*Rhoden v. Athens-Clarke County Board of Elections*, 310 Ga. 266, 271, 274, 278 (2020)	The Court applied *Anderson* and *Burdick* and noted that because "the burden associated with [the challenged law] is slight, the [state] need not establish a compelling interest."
Illinois	*Orr v. Edgar*, 298 Ill. App. 3d 432, 438 (1998)	The court noted that it is "well established that the legislature has the right to reasonable regulate the time, place and manner in which the citizens exercise their right to vote," and applied rational basis analysis to a law eliminating straight-ticket voting.
Indiana	*League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758, 767 (Ind. 2010)	Upheld a Voter ID law after determining that it was an election regulation that would be upheld if it was "reasonable" and "uniform."
Iowa	*League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 209 (Iowa 2020)	The court applied *Anderson* and *Burdick* and held that strict scrutiny only applies to "laws that create severe restrictions on the right to vote," while a deferential standard applies to election laws that impose only "reasonable, nondiscriminatory restrictions."
Maine	*Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45, 54 (Me. 2020)	The court adopted *Burdick* and applied its "flexible" test to uphold a voting law that establishing a ballot receipt deadline.
Maryland	*Burruss v. Board of County Commissioners of Frederick County*, 427 Md. 231, 265–66 (2012)	The court applied the rational basis test to a voting law challenge after finding that the law imposed a minimal burden. Citing *Burdick*, the court noted that its analysis was "guided by whether the challenged enactments are reasonable, nondiscriminatory measures."
Massachusetts	*Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 333–34 (Mass. 2018)	The court applied the rational basis test applied to a challenge to the plaintiff's challenge to a law imposing a voter registration deadline. The court held that rational basis review was appropriate because the law did not substantially interfere with the right to vote.
Michigan	*In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 35–36 (2007)	Adopting *Burdick* and holding: "[W]here an election law subjects the right to vote to 'severe restrictions,' strict scrutiny review is applicable, and the regulation must be narrowly drawn to advance a compelling state interest. However,

State	Case Citation	Description
		when an election law imposes only 'reasonable, nondiscriminatory restrictions' on the right to vote, the law is upheld as advancing the important regulatory interest identified by the state."
Minnesota	*DSCC v. Simon*, 950 N.W.2d 280, 294–95 (Minn. 2020)	The court adopted *Anderson* and *Burdick* and balancing the "character and magnitude of the asserted injury" against the State's interests. In so doing, the court noted that "reasonable, nondiscriminatory restrictions are subject to less exacting review."
Missouri	*Priorities USA v. State*, 591 S.W.3d 448, 452 (Mo. 2020)	"To determine the level of scrutiny that should be applied to evaluate a statute addressing the right to vote, Missouri courts first evaluate the extent of the burden imposed by the statute. If a statute severely burdens the right to vote, strict scrutiny applies . . . . Conversely, when the law does not impose a heavy burden on the right to vote, it is subject to the less stringent rational basis review."
Nebraska	*Pick v. Nelson*, 247 Neb. 487, 495–97 (1995)	Adopting *Anderson* and *Burdick* and weighing "the character and magnitude of the asserted injury" against the state's interests.
Nevada	*Election Integrity Project of Nevada, LLC v. Eighth Judicial District Court, Clark County*, 473 P.3d 1021, at *2 (Nev. 2020)	In *Election Integrity Project of Nevada*, the court cited *Burdick* and upheld a lower court's application of the rational basis test to a voting law challenge.
New Hampshire	*Gaure v. State*, 167 N.H. 658, 663 (2015)	Adopting *Anderson* and *Burdick* and weighing "the character and magnitude of the asserted injury" against the state's interests. The court noted that, in cases involving "reasonable, nondiscriminatory restrictions," the state's interests are generally sufficient to justify the restrictions.
New Jersey	*Rutgers University Student Assembly v. Middlesex Cnty. Bd. Of Elections*, 446 N.J. Super. 221, 234–35 (2016)	Adopting *Burdick* and finding that a twenty-one day registration cutoff was a "reasonable, non-discriminatory burden" on the right to vote that was justified by the state's regulatory interests.
New Mexico	*Montano v. Los Alamos County*, 122 N.M. 454, 457 (1996)	The court cited *Burdick* and then applied a rational basis standard to a voting law challenge because the law did not impose a "severe restriction" on voters.

State	Case Citation	Description
New York	*Walsh v. Katz*, 17 N.Y.3d 336, 343 (2011)	Declining to apply strict scrutiny to a voting law challenge and citing *Anderson* to hold that " a court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury" against the state's interests.
Ohio	*State ex rel. Maras v. LaRose*, 2022 WL 15654420, at *3 (Ohio 2022)	The court applied the rational basis test to a election law.
Oklahoma	*Gentges v. State Election Bd.*, 2018 OK 39, ¶¶ 19, 24, 25	The court cited *Burdick* and upheld a voter ID law because it was a "procedural regulation" that did not impose an "undue burden."
Pennsylvania	*Banfield v. Cortes*, 631 Pa. 229, 265 (2015)	The court cited *Burdick* and noted that "the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest 177 and fair elections that proceed in an orderly and efficient manner." The court then upheld the challenged election law without engaging in a strict scrutiny review.
Tennessee	*Fisher v. Hargett*, 604 S.W.3d 381, 400–05 (Tenn. 2020)	The court applied sliding scrutiny and upheld voting laws that imposed a "moderate" burden because the state had sufficient interests in "the efficacy and integrity of the elections process" to justify that burden.
Texas	*Abbott v. Anti-Defamation League Austin, Southwest, and Texoma Regions*, 610 S.W.3d 911, 919–22 (Tex. 2020)	The court noted that Texas had "borrowed" the *Anderson-Burdick* standard and held that the challenged voting rules did not impose a severe burden and applied rational basis review.
Virginia	*Wilkins v. West*, 264 Va. 447, 468 (2002)	The court held that an election law would be subject to strict scrutiny review if the plaintiff could show racial discrimination but would otherwise be subjected to rational basis review.
Washington	*Carlson v. San Juan County*, 183 Wash. App. 354, 375–76 (2014)	Applying *Burdick* and applying "less exacting review" after determining that law did not interfere with right to vote.
West Virginia	*State ex rel. Blankenship v. Warner*, 241 W. Va. 362, 372 (2018)	The court upheld a election law after noting that that the state's interests are generally sufficient to uphold "reasonable, nondiscriminatory restrictions" on the right to vote.
Wisconsin	*Milwaukee Branch of NAACP v. Walker*, 357	The court cited *Anderson* and *Burdick* applied the rational basis test in a challenge to a voter

State	Case Citation	Description
	Wis. 2d 469, 485–90 (2014)	ID law after finding that it did not place a "severe" burden on the right to vote.

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