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IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

WESTERN NATIVE VOICE, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe, Plaintiffs, vs. CHRISTIE JACOBSEN, in her official capacity as Montana Secretary of State, Defendant.	Cause No.: DV 21-0560 Judge: Gregory R. Todd **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR CONSOLIDATION**

INTRODUCTION

The plaintiffs in *Western Native Voice et al. v. Jacobsen*, Cause No. DV-21-0560 (Thirteenth Judicial District Court, Hon. Gregory R. Todd) (the "*WNV* Action") have moved to consolidate their case with the pending case of *Montana Democratic Party et al. v. Jacobsen*, Cause No. DV-21-0451 (Thirteenth Judicial District Court, Hon. Michael Moses) (the "*MDP* Action") under Mont.R.Civ.P. Rule 42(a). Defendant Christi Jacobsen ("Jacobsen") objects to this motion as premature. There is a pending motion to dismiss in the *MDP* Action, Defendant Jacobsen has not submitted a responsive pleading (which will likely include a motion to dismiss) in the *WNV* Action, and the claims in each case, while facially related, raise distinct legal and factual issues that require development before the Court can realistically determine whether consolidation is appropriate. *WNV* Plaintiffs note Jacobsen's objection, but offer no argument addressing the objection, contending only that the requirements for consolidation are met without regard to *when* consolidation should occur. Regardless of whether it may eventually be appropriate to consolidate the *WNV* and *MDP* Actions, the issue before the Court is whether consolidation is *currently* appropriate. It is not.

It is well established that pending and imminent dispositive motions render requests for consolidation premature. Before determining what the relevant issues of law and fact will be, the Court cannot effectively undertake the necessary consolidation analysis, and there is no basis to believe that consolidation would serve judicial economy by avoiding unnecessary costs and delays, rather than overcomplicate the litigation. Accordingly, the proper course is to allow for these preliminary matters to be resolved and for an initial factual development of each action before determining whether consolidation is advisable.

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ARGUMENT

Rule 42(a) provides that "[i]f actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Mont.R.Civ.P. Rule 42(a). Trial courts have considerable discretion in considering motions to consolidate. *See e.g., In re Estate of McDermott,* 2002 MT 164, 51 P.3d 486, 489; *Tribby v. Nw. Bank of Great Falls*, 217 Mont. 196, 704 P.2d 409, 417 (Mont. 1985). This discretion necessarily includes determining both whether to consolidate, as well as *when* to do so.

The purpose of consolidation is to permit convenience and economy by avoiding unnecessary costs or delay. *Means v. Mont. Power Co.*, 191 Mont. 395, 625 P.2d 32, 36 (Mont. 1981). Rule 42(a) requires that the potentially combined proceedings involve common questions of law or fact. However, even if such commonalities exist, the court may deny consolidation "if other factors convince the court not to consolidate." *In re E. Bench Irrigation Dist.,* 2009 MT 135, 207 P.3d 1097, 1103 (citing *Ass'n of Unit Owners v. Big Sky of Mont.*, 245 Mont. 64, 798 P.2d 1018, 1031–32 (Mont. 1990)). Such factors include those leading to "inefficiency, inconvenience, or unfair prejudice to a party." *E.E.O.C. v. HBE Corp.,* 135 F.3d 543, 551 (8th Cir. 1998).[1] Here, and specifically due to the pending motion to dismiss in the *MDP* Action, consolidation at this time would not benefit judicial economy, but only lead to potential inefficiency, inconvenience, and confusion.

I. Jacobsen's Pending and Imminent Motions to Dismiss Render Consolidation Inappropriate.

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[1] In applying Rule 42(a), the Supreme Court of Montana has noted that it is identical to the corresponding federal rule, and therefore appropriate to look to federal courts for guidance in interpreting and applying Rule 42. *Park Cnty. Stockgrowers Ass'n Inc. v. Mont. Dep't of Livestock*, 2014 MT 64, 320 P.3d 467, 470 (citing *Yellowstone Co. v. Drew*, 2007 MT 130, 160 P.3d 557).

Jacobsen's Motion to Dismiss is pending in the *MDP* Action. If granted, this motion would eliminate all the claims in the *MDP* Action related to both HB 176 and SB 169, leaving only claims related to HB 530. Similarly, Jacobsen's answer in the *WNV* Action is not yet due, and Jacobsen anticipates filing a motion to dismiss related to at least some of the claims asserted in that matter.

Courts considering consolidation have consistently held that, regardless of common facts and legal issues, a motion to consolidate is premature when a dispositive motion is pending. *E.g., Vickers v. Green Tree Serv., LLC*, Case No. 15-1290, 2015 WL 7776880, at *2 (D. Kan. Dec. 2, 2015) (finding consolidation premature and that judicial efficiency would not be served when motions to dismiss were pending); *Thompson v. City of St. Peters*, 2016 WL 1625373, at *2 (E.D. Mo. April 21, 2016) (judicial efficiency is best served by deciding pending motions for judgment on the pleadings and summary judgment before consolidation); *Osman v. Weyker*, 2016 WL 10402791, at *3 (D. Minn. Nov. 21, 2016) (denying as premature a motion to consolidate given an anticipated motion to dismiss under Rule 12(b)(6)); *Sprint Commc'ns, L.P. v. Cox Commc'ns, Inc.*, 2012 WL 1825222, at *1 (D. Kan. May 18, 2012) (finding motion to consolidate premature in light of pending motions to dismiss); *Evans v. Int'l Paper Co.*, 2011 WL 2559791, at *6 (W.D. La. June 28, 2011) (same).

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The reason for this is simple. With dispositive motions pending, "it is too soon to ascertain the claims and parties which may remain in each case once those motions are resolved." *Vickers*, 2015 WL 7776880, at *2. In other words, when pending motions make it unclear as to what parties and claims may proceed in each case, a court cannot effectively consider whether common issues of fact or law render consolidation appropriate. In fact, consolidating cases prior to resolving and clarifying the claims asserted by each party would lead to potential confusion and inconvenience by injecting new parties into issues and proceedings that don't involve them. *Id.*; *In re E. Bench*

Irrigation Dist., 207 P.3d at 1103-04. Accordingly, consolidation at this time provides no advantage to the Court or parties. Instead, "deciding the pending dispositive motions prior to any consolidation would be most efficient" and would impose no prejudice on any party. *Vickers*, 2015 WL 7776880, at *2; *In re E. Bench Irrigation Dist.*, 207 P.3d at 1103-04.

II. Further Development is Needed to Determine Whether Issues of Law and Fact Support Consolidation.

Along with the procedural posture making consolidation inappropriate, what little that is known about the facts and legal issues suggests that the issues of law and fact may be materially different, and *WNV* Plaintiffs have not met their burden to show that consolidation is presently appropriate. *See Ulibarri v. Novartis Pharms. Corp.*, 303 F.R.D. 402, 404 (D.N.M. 2014) ("[t]he party moving for consolidation bears the burden of proving that consolidation is desirable").

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WNV Plaintiffs primarily argue "factual" commonalities, citing the dual challenges to HB 176 and HB 530 as restricting the voting rights of specific subsets of Montana's population and risking duplicative discovery. While there is some facial overlap, the legal claims in the cases are distinct, and even contradicting.[2] The *MDP* claims focus on the impacts to young voters, whereas the *WNV* Action is based upon impacts specific to Montana's Native American populations. Therefore, while both focus on resulting impacts, each action pertains to distinct populations and would involve very little, if any, factual overlap. As to discovery, there is no need for immediate consolidation to allow the parties to share written discovery or conduct simultaneous depositions, and clearly the consolidation analysis would benefit from some of this discovery, which would shed light on the extent of any common issues between the two actions.

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[2] Specifically, *WNV* Plaintiffs allege that the challenged laws were enacted to target and burden Native American's from voting, whereas *MDP* Plaintiffs argue that these same law were enacted to target and discourage young voters.

As to issues of law, *WNV* Plaintiffs provide a suspiciously scant argument, summarily relying on the fact that both actions challenge HB 176 and HB 530 on grounds of equal protection, the right to vote, free speech and due process. Omitted from this argument, however, is the fact that the actions are fundamentally different as to the classification of the impacted groups (Native Americans vs. young Montanans), and the fact that the *WNV* action evidently presents an as-applied challenge to the disputed laws, whereas the *MDP* Action presents a "facial" challenge—all of which can significantly impact the legal analysis.[3] *See e.g., Davis v. Union Pac. R. Co.*, 282 Mont. 233, 241, 937 P.2d 27, 31 (Mont. 1997) (noting that the applicable level of scrutiny applied under equal protection claims depends upon finding either an infringement on a fundamental right or discrimination "against a suspect class, such as race or national origin"); *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, 368 P.3d 1131, 1138 (describing the differences between facial and as-applied challenges, and noting that facial challenges require the more difficult showing of "no set of circumstances exists under which the [challenged sections] would be valid"). What's more, the legal issues presently before the Court in the *MDP* Action are those specific to the *MDP* Plaintiffs (e.g., standing) and consolidation at this time would improperly inject the *MNV* Plaintiffs into proceedings that do not involve them or implicate their claims.[4]

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CONCLUSION

It is not Jacobsen's position that consolidation may never be appropriate but simply that it is not appropriate at this time. Given the infancy of these proceedings and the pending (or imminent) motions for dismissal, the parties and the Court are not able to evaluate whether

[3] Importantly, and aside from the request to dismiss this claim, the parties in the *MDP* Action expressly dispute the standard of review and applicable level of scrutiny to be applied to the equal protection claim.

[4] The same is true for the *WNV* Action and the imminent filing of Defendant's motion to dismiss. Consolidation at this point would only serve to inject the plaintiffs in each action into proceedings and legal issues that do not concern them, thereby defeating the very purpose of consolidation.

consolidation would benefit the parties, the Court or judicial economy. For this reason, Jacobsen requests the Court deny the present motion for consolidation, without prejudice, so that pending motions may be resolved and relevant issues of law and fact may be more adequately developed and addressed before any decision to consolidate is made.

DATED this 12th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2021, I mailed a true and correct copy of the foregoing document, by the means designated below, to the following:

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