

No. 22-125084-A

---

**IN THE COURT OF APPEALS  
OF THE STATE OF KANSAS**

---

**LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS  
APPLESEED CENTER FOR LAW AND JUSTICE, INC., and TOPEKA  
INDEPENDENT LIVING RESOURCE CENTER, CHARLEY CRABTREE, FAYE  
HUELSMANN, and PATRICIA LEWTER,**

Plaintiffs-Appellants,

vs.

**SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and  
DEREK SCHMIDT, in his official capacity as Kansas Attorney General,**

Defendants-Appellees.

---

**NOTICE OF ADDITIONAL AUTHORITY**

To the Court:

Plaintiffs submit notice of a relevant decision issued after oral argument, and a development in a case identified in a previous notice.

First, *Montana Democratic Party v. Jacobsen*, No. DA 21-0451 (Mont. Dist. Ct. Sept. 30, 2022) (Ex. A), permanently enjoined a law prohibiting ballot collection. The court held that because Montana's Constitution explicitly guarantees the right to vote, laws burdening that right are subject to strict scrutiny, *id.* at ¶¶ 547-59, and, separately, ballot collection implicates "core political speech," subject to "the broadest judicial protection," *id.* ¶¶ 617-31. This holding contradicts Defendants' assertion at oral argument that ballot collection is not protected speech.

Second, the Fifth Circuit reversed *Texas State LULAC v. Elfant*, No. 1:21-CV-546-LY (W.D. Tex. Aug. 2, 2022), previously identified as persuasive support. That Order (Ex. B) does not address member or constituent-based standing. Even as to organizational standing, it does not apply here. Kansas courts only require plaintiffs allege a cognizable injury caused by the challenged law. *See Kan. Bldg. Indus. Workers Comp. Fund. v. State*, 302 Kan. 656, 678, 680, 359 P.3d 33 (2015) (rejecting Article III standing test). Further, in announcing a brand-new requirement that organizations asserting diversion-of-resources show they "diverted resources as a direct result of the challenged law—not as a result of the challenged law *and others like it*," Ex. B at \*4, it abandons the fundamental underpinnings of Article III's injury-in-fact requirement, which is understood to impose a "low threshold" to ensure plaintiffs have a personal stake in the litigation. *John v. Whole*

*Foods Market Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (quotations and citations omitted). Nor do Kansas (or most federal) courts require that organizations identify “specific projects” they “had to put on hold or otherwise curtail,” Ex. B at \*3, but if they did, Plaintiffs’ allegations are more than sufficient at this stage. *See, e.g.*, R. II, 238-39, 242, 246; *Matter of Adoption T.M.M.H.*, 307 Kan. 902, 915, 416 P.3d 999, 1008 (2018); *see also* Ex. B at \*5 n.4; *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F. 4th 867, 879, 880 (9th Cir. 2022).

Respectfully submitted, this 31st day of October, 2022.

/s/ Pedro L. Irigonegaray

Pedro L. Irigonegaray (#08079)  
Nicole Revenaugh (#25482)  
Jason Zavadil (#26808)  
J. Bo Turney (#26375)  
**IRIGONEGARAY, TURNEY,  
& REVENAUGH LLP**  
1535 S.W. 29<sup>th</sup> Street  
Topeka, KS 66611  
(785) 267-6115  
[pedro@itrlaw.com](mailto:pedro@itrlaw.com)  
[nicole@itrlaw.com](mailto:nicole@itrlaw.com)  
[jason@itrlaw.com](mailto:jason@itrlaw.com)  
[bo@itrlaw.com](mailto:bo@itrlaw.com)

*Counsel for Plaintiffs*

Elisabeth C. Frost\*  
Henry J. Brewster\*  
Mollie A. DiBrell\*  
Marisa A. O’Gara\*  
**ELIAS LAW GROUP LLP**  
10 G Street NE, Suite 600  
Washington, DC 20002  
(202) 968-4513  
[efrost@elias.law](mailto:efrost@elias.law)  
[hbrewster@elias.law](mailto:hbrewster@elias.law)  
[mdibrell@elias.law](mailto:mdibrell@elias.law)  
[mogara@elias.law](mailto:mogara@elias.law)

*Counsel for Loud Light, Kansas  
Appleseed Center for Law and Justice,  
and Topeka Independent Living*

*Resource Center, Charley Crabtree,  
Faye Huelsmann, and Patricia Lewter*

David Anstaett\*

**PERKINS COIE LLP**

35 East Main Street, Suite 201

Madison, WI 53703

(608) 663-5408

[danstaett@perkinscoie.com](mailto:danstaett@perkinscoie.com)

*Counsel for League of Women Voters of  
Kansas*

*\*Appearing Pro Hac Vice*

RETRIEVED FROM DEMOCRACYDOCKET.COM

# Exhibit A

RETRIEVED FROM DEMOCRACYDOCKET.COM

**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
YELLOWSTONE COUNTY**

Montana Democratic Party, Mitch Bohn,

Plaintiffs,

WESTERN NATIVE VOICE, Montana  
Native Vote, Blackfeet Nation,  
Confederated Salish and Kootenai Tribes,  
Fort Belknap Indian Community, and  
Northern Cheyenne Tribe,

Plaintiffs,

Montana Youth Action, Forward Montana  
Foundation, and Montana Public Interest  
Research Group,

Plaintiffs,

v.

Christi Jacobsen, in her official capacity as  
Montana Secretary of State,

Defendant.

Consolidated Case No.: DV 21-0451

Judge Michael G. Moses

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER**

This matter came before the Court on a non-jury trial beginning on August 15, 2022 and concluding on August 25, 2022. (Dkt. 248, Dkt. 244, Dkt. 243, Dkt. 242, Dkt. 240, Dkt. 238, Dkt. 237, Dkt. 235, Dkt. 233). Plaintiffs Montana Democratic Party and Mitch Bohn (“MDP Plaintiffs”); Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe (“WNV Plaintiffs”); and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group (“Youth Plaintiffs”) (collectively, “Consolidated Plaintiffs”) filed Complaints on April 20, 2021 (Dkt. 1), May 17, 2021 (Dkt. 1 DV 21-0560), and September 9, 2021 (Dkt. 1 DV 21-1097) requesting declaratory judgments concerning laws passed by the Montana Legislature during its 2021 session.

Plaintiffs Montana Democratic Party and Mitch Bohn appeared and were represented by Matthew Gordon, Stephanie Command, and Jessica Frenkel of Perkins Coie, LLP, Peter M. Meloy of the Meloy Law Firm, and Henry J. Brewster and Marilyn Robb of Elias Law Group, LLP. Plaintiffs Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Northern Cheyenne Tribe and Fort Belknap Indian Community appeared and were represented by Jacqueline De León and Samantha Kelty of the Native American Rights Fund, Alora Thomas and Jonathan Topaz of ACLU’s Voting Rights Project, Theresa J. Lee of Harvard Law School’s Election Law Clinic, and Alex Rate and Akilah Lane of the ACLU of Montana.

Plaintiffs Montana Youth Action, Forward Montana Foundation and Montana Public Interest Research Group appeared and were represented by Rylee Sommers-Flanagan and Niki Zupanic of Upper Seven Law.

Defendant Christi Jacobsen appeared and was represented by William “Mac” Morris, Dale Schowengerdt, David Knobel, Lars Phillips, and Leonard H. Smith of Crowley Fleck, PLLP and David Dewhirst with the State of Montana’s Office of the Attorney General. Numerous exhibits were offered and admitted.

All parties have submitted proposed findings of fact and conclusions of law. The issues at trial were the following:

- 1) Whether House Bill 176 (“HB 176”) violates Consolidated Plaintiffs’ and other Montanans’ constitutional right to vote and right to equal protection;
- 2) Whether Senate Bill 169 (“SB 169”) violates MDP and Youth Plaintiffs’ and other Montanans’ right to vote and right to equal protection;
- 3) Whether House Bill 530 (“HB 530”), § 2, violates the MDP and WNV Plaintiffs’ and other Montanans’ constitutional right to vote, right to freedom of speech, right to equal protection and right to due process;
- 4) Whether HB 530, § 2 is an unconstitutional delegation of power.

The Court has considered the evidence presented, arguments of counsel, and the proposed findings of fact and conclusions of law of all parties. The Court hereby makes the following:

### **Findings of Fact**

#### **I. Parties**

**A. Montana Democratic Party**

1. Plaintiff Montana Democratic Party (“MDP”) is a political party established pursuant to § 13-38-101, MCA *et seq.*

2. Plaintiff MDP’s mission and purpose are to elect Democratic Party candidates in local, county, state, and federal elections. It works to accomplish that mission by educating, mobilizing, assisting, and turning out voters throughout the state. Aug. 19, 2022, Trial Tr. 1182:2-14 (Hopkins); MDP 30(b)(6) Dep.<sup>1</sup> 11:22-14:3. These activities include supporting Democratic Party candidates in national, state, and local elections through fundraising and organizing; protecting the legal rights of voters; monitoring and educating voters about election laws; and ensuring that all Montana voters have a meaningful opportunity to exercise their right to vote. Aug. 19, 2022, Trial Tr. 1181:20-1182:14 (Hopkins); MDP 30(b)(6) Dep. 48:24-49:19.

3. MDP has a large number of members and constituents from across the state, including Montanans who regularly support candidates affiliated with the Democratic Party, legislators, members of the central committee, volunteers, and people affiliated with specific outside political organizations such as a labor movement. Aug. 19, 2022, Trial Tr. 1195:22-1196:5 (Hopkins); MDP 30(b)(6) Dep. 64:24-65:17.

---

<sup>1</sup> Defendant’s Deposition Designations with Associated Exhibits (Aug. 11, 2022), Ex. 7 (Deposition of Jacob Hopkins as 30(b)(6) designee for the Montana Democratic Party) (“MDP 30(b)(6) Dep.”).



4. MDP also has a platform that describes MDP's position as it relates to voting rights. Aug. 19, 2022, Trial Tr. 1182:15-1183:2 (Hopkins). Specifically, in the preamble, the platform discusses MDP's "commitment to making sure that everyone in Montana can have their voice heard, including those with little influence, money[,] or acceptance." Aug. 19, 2022, Trial Tr. 1183:3-12 (Hopkins). MDP supports organized outreach to all Montanans, and particularly to Montana's Native Americans, on issues central to the advancement of Native Americans in Montana. MDP supports and advocates for equitable access for Native Americans registering to vote and voting. Aug. 19, 2022, Trial Tr. 1183:13-23 (Hopkins). MDP also works to support the assurance of voting rights to all citizens and supports expanded participation in voting, especially among historically disenfranchised populations. *Id.*

5. To advance this platform, MDP has "a voter protection hotline" that individuals can call into and ask questions concerning "Montana's voting regulations and what [those] mean[] for their life." Aug. 19, 2022, Trial Tr. 1183:24-1184:8 (Hopkins). Moreover, MDP helps voters with issues encountered with their ballots such as curing a rejected ballot or requesting a new ballot. Aug. 19, 2022, Trial Tr. 1184:9-12 (Hopkins). MDP "offer[s] ballot collection services to Montanans who want to take advantage of those services, who might not otherwise be able to cast their ballot in an election without assistance from the [MDP] to turn in that ballot to the county elections office." Aug. 19, 2022, Trial Tr. 1184:13-17 (Hopkins).

6. A key part of MDP's mission is its extensive get-out-the-vote ("GOTV") efforts. Together, MDP's employees, members, organizers, and volunteers reach out to voters through text messages, phone calls, and door-to-door canvassing to encourage Montanans to vote and provide them with information about how to successfully cast their ballots. Aug. 19, 2022, Trial Tr. 1185:12-20 (Hopkins); PTX048; PTX051; PTX055. MDP's employees, members, organizers, and volunteers encourage unregistered voters to go to their county election administrator's office or other designated location to register to vote and vote. MDP 30(b)(6) Dep. 113:12-114:3; PTX048; PTX051; PTX055. They encourage registered voters to go to their polling location to cast their ballots, and they ensure that those voters know exactly what they need to bring with them to do so. *Id.* They also encourage absentee voters to return their absentee ballots. And when absentee voters are unable to return their ballots on their own, MDP's employees, members, organizers, and volunteers offer to return that person's ballot promptly to the county election office. MDP 30(b)(6) Dep. 27:13-28:13; PTX048; PTX051; PTX055.

7. In 2020, MDP hired several staffers whose primary job was to collect ballots on reservations during the GOTV period. Aug. 19, 2022, Trial Tr. 1201:14-1202:7 (Hopkins); PTX050. Each staff member or volunteer collecting ballots had to sign MDP's Ballot Collection Pledge, which indicates that they have completed the party's training, read the party's guidance on commonly asked questions, and committed to certain security protocols about the retention and return of ballots. *Id.* at 1202:8-15, 1205:16-

1207:9 (Hopkins); PTX051. MDP maintains records of every individual hired to collect ballots. *Id.* at 1203:7-9. MDP also attempts to hire ballot collectors from within the communities they are collecting ballots, especially on reservations, to help ensure community members' familiarity with the people they are entrusting with their ballots. *Id.* at 1202:16-1203:6 (Hopkins); PTX055. MDP additionally receives and responds to specific voter requests for absentee ballot assistance. *See, e.g.*, PTX054.

8. Ballot collection allows MDP and its members to express their values of increasing voter participation in historically disenfranchised communities such as Native American reservations. Aug. 19, 2022, Trial Tr. 1219:11-24, 1231:23-1232:3, 1268:12-22 (Hopkins).

9. Plaintiff MDP has made substantial expenditures in each election cycle to mobilize voters through its voter education, registration, and ballot collection initiatives. Aug. 19, 2022, Trial Tr. 1186:10-1187:4 (Hopkins). MDP intends to make additional expenditures to support Democratic candidates and mobilize and educate voters in the 2022 general election and in future elections. *Id.*; MDP 30(b)(6) Dep. 114:12-115:2.

10. Because HB 176 ended Election Day Registration ("EDR"), MDP can no longer encourage unregistered voters to register and vote on Election Day. Instead, it must expend additional resources to contact unregistered voters earlier in the election cycle and encourage them to register earlier when voters are less activated. MDP

30(b)(6) Dep. 31:16-32:17. Conducting a turnout program in advance of Election Day requires more resources. *Id.* Because the election is not at the forefront of voters' minds, MDP must contact each voter more frequently in order to motivate them to register, and then must contact that voter again to encourage them to turn out and vote. Aug. 19, 2022, Trial Tr. 1196:25-1197:13 (Hopkins).

11. Additionally, because HB 176 also prohibits voters from changing their address to a new county on Election Day, MDP must now inform voters that they may not be able to update their voter registration information and vote on Election Day. MDP 30(b)(6) Dep. 96:3-21. And because HB 176 eliminated the failsafe EDR provided for voters who encountered problems with their registration, MDP must now inform voters of the potential that any problems with their registration may not be fixable on Election Day in a manner that will allow them to vote that same day. Aug. 19, 2022, Trial Tr. 1197:2-13 (Hopkins); MDP 30(b)(6) Dep. 113:18-114:3.

12. Because of SB 169, MDP will "have to have more conversations with students earlier and help them plan ahead if they're planning to vote [at] the polls on Election Day." Aug. 19, 2022, Trial Tr. 1198:24-1199:5 (Hopkins). Students that were planning to use a student ID to vote will need to provide additional documentation, such as a utility bill, which may be difficult to provide if they live in the dormitories. *Id.* 1199:6-14.

13. Because of both HB 176 and SB 169, MDP has to expend significant resources on an information campaign to help ensure that its members and constituents understand the changes in the law and have access to sufficient information in order to avoid disenfranchisement, which requires MDP to reallocate resources from other efforts, such as hosting events for Democratic candidates to better inform the electorate about their candidacy and help them raise the resources to be competitive. Aug. 19, 2022, Trial Tr. 1196:6-1200:4 (Hopkins); MDP 30(b)(6) Dep. 114:12-115:2.

14. Because of HB 530, § 2, MDP and other civic organizations will no longer be able to engage paid employees or others who receive a pecuniary benefit to help voters request, receive, and return their absentee ballots. Aug. 19, 2022, Trial Tr. 1220:5-1221:14, 1222:7-12 (Hopkins).

15. MDP has incurred, and will continue to incur, distinct injuries directly traceable to HB 176, SB 169, and HB 530, § 2. These laws directly harm MDP by limiting the effectiveness of its GOTV program, making it harder for Montanans who would vote for MDP candidates to successfully register to vote or return their ballots, and thereby making it more difficult for MDP to accomplish its mission of electing members of the Democratic Party in Montana. *Id.* at 1200:5-1197:13 (Hopkins). Because of SB 169, HB 176, and HB 530, § 2, MDP will be forced to expend more resources, and divert more funds from its other critical priorities, in order to educate and turn out voters. *Id.*

**B. Mitchell Bohn**

16. Plaintiff Mitchell Bohn is a Montana citizen and voter who resides in Billings. Aug. 15, 2022, Trial Tr. 174:12; 177:9-16 (Bohn).

17. Mr. Bohn was born with spina bifida, which confines him to a wheelchair and causes him to endure numerous health complications. *Id.* at 176:3-11 (Bohn). Mr. Bohn has been hospitalized frequently because of his disability, sometimes for months on end, and he cannot predict when he will be hospitalized. *Id.* at 179:7-12 (Bohn). He lives with his parents because his spina bifida can make everyday tasks difficult for him. *Id.* at 176:12-24 (Bohn).

18. Mr. Bohn registered to vote sometime around his 18th birthday. *Id.* at 177:1-3 (Bohn). He has voted in almost every election since then. *Id.* at 177:10-179:2 (Bohn). Voting is extremely important to Mr. Bohn. *Id.* at 177:5-8 (Bohn).

19. Mr. Bohn votes by absentee ballot because his spina bifida and attendant complications makes it difficult to get to the polling place. *Id.* at 179:3-20 (Bohn). He also votes by absentee ballot because doing so would allow him to vote before going to the hospital if he needed to be hospitalized close to an election. *Id.*

20. Although voting by absentee ballot provides Mr. Bohn flexibility in when he returns his ballot, he is unable to cast his ballot without assistance. *Id.* at 179:21-180:13 (Bohn). He is physically unable to reach the mailbox at his house, and his parents must put his ballot in the mailbox for him. *Id.* at 179:23-180:4 (Bohn). On the one occasion Mr. Bohn did not mail in his absentee ballot, his parents dropped off his ballot

at the courthouse for him in part because it is difficult for Mr. Bohn to find accessible parking near the courthouse. *Id.* at 180:6-14 (Bohn).

21. Mr. Bohn has not yet had to rely on third-party ballot assistance to return his ballot, but only because his parents are currently able and willing to help him do so. *Id.* at 180:17-181:15 (Bohn). But Mr. Bohn's parents are getting older and when his parents are no longer able to assist him in returning his ballot, he will likely need to rely on third party ballot assistance in order to vote. *Id.* (Bohn). Although Mr. Bohn typically—though not always—returns his absentee ballot shortly after receiving it, it is uncertain whether he will be able to do so in all future elections. *Id.* at 179:22-180:9, 193:20-25 (Bohn).

22. Mr. Bohn strongly believes that third-party ballot assistance should remain available to ensure that people with disabilities can vote. *Id.* at 181:5-15 (Bohn).

23. Mr. Bohn has never availed himself of EDR nor does he know anyone who used EDR to register to vote in Montana. Aug. 15, 2022, Trial Tr. 185:8-14 (Bohn).

24. Even though Mr. Bohn votes by absentee ballot, he has personally witnessed long lines in Yellowstone County on Election Day at the Metra. Aug. 15, 2022, Trial Tr. 187:4-13 (Bohn).

25. Mr. Bohn believes that he used his driver's license to vote and has had one since he was 18 years old. Aug. 15, 2022, Trial Tr. 187:17-19; 186:15-17 (Bohn). Mr. Bohn

does not know any Montana adults over the age of 18 who do not have a Montana Driver's license. Aug. 15, 2022, Trial Tr. 187:20-24 (Bohn).

26. While Mr. Bohn was attending college at Montana State University, Billings (MSU Billings), he used his student ID to get into basketball games and to use the dorm meal plan. Aug. 15, 2022, Trial Tr. 188:24-189:2 (Bohn). Mr. Bohn never used his MSU Billings student ID to vote. Aug. 15, 2022, Trial Tr. 189:10-11 (Bohn).

**C. Western Native Voice**

27. Western Native Voice ("WNV") is a Native American-led organization that organizes and advocates in order to build Native American leadership within Montana. PTX262; Aug. 17, 2022, Trial Tr. 818:1-16 (Horse).

28. WNV is a domestic non-profit, non-partisan organization in good standing with the Montana Secretary of State with Yellowstone County as its primary place of business. PTX257; Aug. 17, 2022, Trial Tr. 818:1-16 (Horse).

29. WNV is a membership organization. WNV has approximately 10,000 members across the state of Montana. Aug. 17, 2022, Trial Tr. 819:14-20 (Horse). Its members are majority-Native American. *Id.* at 819:21-820:2 (Horse).

30. WNV is not a partisan organization. Its mission is not to promote one party or another, but rather to increase Native American participation and engagement in voting and self-determination. PTX262; Aug. 17, 2022, Trial Tr. 815:15-18 (Horse).



31. Civic engagement is a crucial part of WNV's activities, especially its GOTV programs. Aug. 17, 2022, Trial Tr. 813:9-12 (Horse); PTX271; PTX273. It conducts GOTV efforts on all seven reservations and in the Native American community in the three urban centers in Montana. PTX262; Aug. 17, 2022, Trial Tr. 835:14-18 (Horse). WNV's GOTV efforts include canvassing reservations and urban Indian centers and discussing the importance of voting and civic participation and how and why to engage in the civic process. PTX271; PTX273. Voter education and facilitation of voter registration are core to WNV's GOTV work and are vital to voter turnout in the Native American community. PTX262; Aug. 17, 2022, Trial Tr. 818:25-819:13, 834:3-11 (Horse).

32. WNV is able to engage in this work by hiring organizers living on reservations to work in each community. PTX261. Each organizer participates in several days of training before they begin their GOTV program. Aug. 17, 2022, Trial Tr. 823:7-12, 840:6-12 (Horse); PTX267; PTX269. This training enables the organizers to be effective once out in the field. The training discusses the history of the Native American vote and the importance of the Native vote. Aug. 17, 2022, Trial Tr. 823:7-12, 15-18 (Horse).

33. WNV engages in robust Election Day activities, including door knocking, ballot collection and providing rides to the county seat for EDR and voting. Aug. 17, 2022, Trial Tr. 856:8-18 (Horse); Perez Dep.<sup>2</sup> 99:3-15, 136:14-20, 137:13-25, 138:3-22.

34. WNV pays its organizers an hourly wage that is not contingent on how many ballots they collect or rides they provide. Aug. 17, 2022, Trial Tr. 855:1-8 (Horse).

35. In prior election cycles, WNV hired dozens of individuals to work as community organizers, including on Election Day. PTX261; Aug. 17, 2022, Trial Tr. 821:19-823:6 (Horse); Perez Dep. 136:14-20. WNV has driven hundreds of voters to county election offices in order for those individuals to register and vote on Election Day. Perez Dep. 166:24-167:3.

36. For example, in 2020, WNV organizer Lauri Kindness drove over 150 people from the Crow Reservation to register to vote at the Big Horn County elections office. Aug. 17, 2022, Trial Tr. 856:19-25 (Horse); *see also* PTX070 at 37:13-39:3.

37. Providing rides to the county seat is a key component of GOTV activities. Aug. 18, 2022, Trial Tr. 874:12-15 (Horse).

38. WNV estimates that it has transported hundreds of voters to the polls to vote. Aug. 17, 2022, Trial Tr. 857:3-8 (Horse).

---

<sup>2</sup> Defendant's Deposition Designations with Associated Exhibits (Aug. 11, 2022), Ex. 13 (Deposition of Ta'jin Perez as 30(b)(6) designee for Western Native Voice) ("Perez Dep.").

39. Providing rides to the county seat on Election Day is particularly important on rural reservations where numerous obstacles make it difficult for Native Americans to vote. PTX262. Those obstacles include distances to the elections offices, experiences of discrimination in border towns, low-quality vehicles, inclement weather, and socioeconomic problems. *Id.*; Aug. 17, 2022, Trial Tr. 859:12-23 (Horse); *see also* Aug. 15, 2022, Trial Tr. 91:12-92:9, 120:10-121:9 (McCool). Moreover, Election Day itself is an important organizing day for WNV because it is when Native American communities “pay the most attention.” Aug. 17, 2022, Trial Tr. 857:15-20 (Horse).

40. HB 176 is impacting WNV’s operations. WNV is no longer able to only employ organizers on Election Day, as the opportunity for EDR has been eliminated. Instead, it must spend additional resources to hire organizers earlier in the election cycle in order to mobilize turnout. Aug. 17, 2022, Trial Tr. 860:19-25 (Horse).

41. HB 176 eliminates an important tool for WNV to increase voter turnout among Native American voters. Aug. 17, 2022, Trial Tr. 857:9-17 (Horse). Election Day registration and voting provides “possibly a really high benefit and relatively low cost” to voting which is “potentially pretty important for turnout.” Aug. 16, 2022, Trial Tr. 332:7-10 (Street). Research concerning Election Day registration “quite consistently shows positive effects of Election Day registration on turnout in the range of a few percentage points.” Aug. 16, 2022, Trial Tr. 332:11-15 (Street).

42. WNV collects ballots on all seven reservations in Montana, as well as in urban Indian centers such as Missoula, Great Falls, and Billings. PTX262; Aug. 17, 2022, Trial Tr. 935:14-25 (Horse); Perez Dep. 37:15-38:11. WNV hires local organizers and pays them to collect voted ballots and deliver them to election offices. Aug. 17, 2022, Trial Tr. 821:2-5, 833:15-834:2 (Horse). In 2018, WNV and its then-sister organization, Montana Native Vote (“MNV”) collected and conveyed at least 853 ballots. Perez Dep. 240:10-21. In the 2020 general election, after the Montana Ballot Interference Prevention Act (“BIPA”) was permanently enjoined by two Yellowstone County district court judges, WNV and MNV paid organizers to collect and convey several hundred ballots. PTX276; Aug. 17, 2022, Trial Tr. 833:10-14, 844:3-5 (Horse); PTX273.

43. Since WNV relies on paid organizers to collect ballots, § 2 of HB 530 outlaws all ballot collection efforts by WNV. Perez Dep. 250:24-251:18. These efforts are core to its GOTV work and could not be replaced by other measures. Volunteer ballot collection cannot substitute for the work that WNV does. WNV specifically hires organizers from the communities in which they do their work—*i.e.*, from the on-reservation Native American population who face poverty at much higher rates—and would be unable to undertake its work if it was forced to rely only upon those who are able to forego wages. Aug. 17, 2022, Trial Tr. 853:10-23 (Horse); Perez Dep. 141:2-9, 189:9-11, 191:8-192:2, 211:10-21; Aug. 15, 2022, Trial Tr. 88:10-15, 93:3-7 (McCool). To the extent HB 530, § 2 does not ban all ballot collection efforts by WNV, its terms

nonetheless are already chilling any such efforts by WNV due to the risk of substantial fines. Aug. 17, 2022, Trial Tr. 852:12-22, 854:6-14 (Horse); Perez Dep. 250:24-251:18; *see also* Aug. 16, 2022, Trial Tr. 437:11-18 (Street).

44. WNV collected hundreds of ballots using paid ballot collectors in 2020, and paid ballot collectors collected more than 800 ballots in the 2018 election. Aug. 15, 2022, Trial Tr. 142:17-143:3 (McCool).

45. WNV's ballot collection practices have never been the subject of a complaint, investigation, or prosecution. Aug. 17, 2022, Trial Tr. 859:24-860:18 (Horse); Aug. 24, 2022, Trial Tr. 2093:17-25 (Rutherford).

46. WNV has incurred, and will continue to incur, distinct injuries directly traceable to HB 176 and HB 530, § 2. HB 176 forces WNV to spend additional resources to hire organizers earlier in the election cycle in order to mobilize turnout, and HB 530, § 2 effectively ends its ballot collection and assistance work, which is central to its GOTV work and cannot be replaced by other measures. Aug. 17, 2022, Trial Tr. 860:19-25, 861:6-9 (Horse); Perez Dep. 250:24-251:18.

47. HB 530 and HB 176 have impacted WNV's mission by creating more barriers to voting for Native Americans, which WNV actively works to attempt to alleviate. Aug. 17, 2022, Trial Tr. 861:6-9 (Horse).

48. WNV's members include Native Americans who are disproportionately affected by HB 176's ban of EDR and HB 530, § 2's limitation on ballot collection. Native

Americans in Montana disproportionately rely on ballot collection and EDR because of the disproportionate and severe voter burdens they face. PTX262; Aug. 15, 2022, Trial Tr. 78:1-25 (McCool); PTX196-199; PTX299; PTX307; PTX314; PTX228.1; PTX228.2; PTX228.3; PTX228.4; PTX228.5; Aug. 16, 2022, Trial Tr. 345:23-346:8, 351:2-15, 355:6-23, 356:6-358:3 (Street).

**D. Montana Native Vote**

49. Montana Native Vote (“MNV”) is a Native American led organization that organizes and advocates in order to build Native American leadership in Montana.

50. MNV is a 501(c)(4) organization. Aug. 17, 2022, Trial Tr. 841:10-12 (Horse); Perez Dep. 219:22-23. In prior years, MNV and WNV had a cost sharing agreement. Aug. 17, 2022, Trial Tr. 841:7-9 (Horse).

51. MNV has about a thousand members. Aug. 17, 2022, Trial Tr. 841:13-15 (Horse).

52. MNV has historically engaged in GOTV activities that are substantially similar to those conducted by WNV. Aug. 17, 2022, Trial Tr. 842:1-7 (Horse). In addition, MNV has historically collected ballots during primary elections. Aug. 18, 2022, Trial Tr. 896:8-13 (Horse); DTX534.

53. HB 176 and HB 530, § 2 will significantly restrict MNV’s GOTV efforts and will effectively frustrate it from fulfilling its organizational mission.

**E. Blackfeet Nation**

54. Blackfeet Nation is a federally recognized tribe with approximately 17,500 enrolled members. Aug. 16, 2022, Trial Tr. 518:6-13 (Gray); Agreed Fact No. 21.

55. Blackfeet Nation has approximately 8,000 members living on the reservation. Aug. 16, 2022, Trial Tr. 519:3-8 (Gray). Over 6,000 members residing on the Blackfeet Reservation are 18 years of age or older. *Id.* at 519:9-10 (Gray).

56. Blackfeet Nation's headquarters are in Browning, Montana. *Id.* at 519:11-12 (Gray).

57. The Blackfeet reservation is located in northwestern Montana and covers approximately 1.5 million acres. *Id.* at 518:21-519:2 (Gray); *see also* Agreed Fact No. 22. The reservation is intersected by Glacier and Pondera counties. Aug. 16, 2022, Trial Tr. 519:13-16 (Gray). The county seat for Glacier is in Cut Bank and the county seat for Pondera is in Conrad. Aug. 16, 2022, Trial Tr. 519:17-19 (Gray).

58. Blackfeet Nation cares for the health and welfare of its tribal citizens and has an interest in protecting the economic and physical health and well-being of those tribal citizens. *Id.* at 552:8-16 (Gray).

59. Blackfeet Nation encourages civic participation of its tribal members, including voting in state and federal elections. For Blackfeet Nation, voting is critical to protect tribal sovereignty and ensure representation on issues affecting the tribe. *Id.* at 552:1-9 (Gray).

60. Blackfeet tribal members are less likely to go to county seats to conduct their election related business because they experience racism in border towns where the county seats are located. *Id.* at 548:6-549:10 (Gray).

61. Blackfeet Nation has a strained relationship with the county election officers that provide election services to their members. The relationship with Pondera County is “nonexistent.” *Id.* at 546:11-13 (Gray). The county administrator in Glacier refused to take calls from Blackfeet leadership. Aug. 17, 2022, Trial Tr. 617:10-15 (Gray). Election administrators in both counties are described as “[h]ostile. Pushback. No communication.” Aug. 16, 2022, Trial Tr. 545:22-546:1 (Gray). In 2020, Blackfeet Nation had disagreements with both Pondera and Glacier County administrators about the election services provided. Blackfeet Nation sued Pondera County for satellite services, and Blackfeet Nation had to threaten legal action for Glacier County to provide services. *Id.* at 546:2-547:1 (Gray).

62. WNV and MNV pick up and drop off ballots on the Blackfeet Reservation. PTX262; Aug. 16, 2022, Trial Tr. 537:19-25 (Gray); Aug. 17, 2022, Trial Tr. 842:1-7 (Horse). WNV’s ability to pick up and drop off ballots for Blackfeet tribal members would be severely compromised by HB 530, § 2, to the detriment of Blackfeet tribal members. Aug. 16, 2022, Trial Tr. 537:21-539:1 (Gray).

63. WNV ballot collectors provide a “comforting atmosphere” and mitigate the need to go to a county election office and encounter potential border town racism



because the voter only needs to interact with a people who are “invested in making sure people have access to a vote.” Aug. 16, 2022, Trial Tr. 550:25-551:13 (Gray).

64. Blackfeet members rely on EDR. *Id.* at 543:7-23, 545:6-8 (Gray). HB 176 takes away the ability for Blackfeet tribal members to register and vote on Election Day. *Id.* at 545:9-21 (Gray).

65. HB 176 and HB 530, § 2 make it more difficult for Blackfeet tribal members to register and vote, and Blackfeet tribal members’ attempts to vote are less likely to be successful. *Id.* at 538:9-20, 539:10-19 (Gray). By taking away same day registration and ballot collection, “you basically shut the door on their opportunity to vote.” *Id.* at 551:21-25 (Gray).

66. HB 176 and HB 530, § 2 disproportionately burden Blackfeet voters compared to non-Native voters due to inequities in mail delivery service, access to post offices and post office boxes, distance to county seats, and increased burdens on Blackfeet voters due to disproportionate rates of poverty and lack of vehicle access, internet access, and stable housing. Aug. 15, 2022, Trial Tr. 91:12-92:9, 93:17-94:1, 107:12-108:22, 120:10-121:9, 122:8-123:4, 124:18-125:6 (McCool); PTX228.1; PTX228.2; PTX228.3; PTX228.4; PTX228.5; Aug. 16, 2022, Trial Tr. 520:20-522:3, 522:13-525:14, 528:4-13, 529:18-530:3, 530:23-531:3 (Gray); Aug. 15, 2022, Trial Tr. 230:21-231:22 (Weichelt) (post office open average of 7 hours on weekdays); *id.* at 233:2-13 (Weichelt) (longest distance to post office, 15.7 miles); *id.* at 241:9-242:1 (Weichelt) (longest distance to county seat, 69.6

miles); *id.* at 248:8-20 (Weichelt) (average distance to Department of Motor Vehicles (“DMV”), 38.27 miles).

67. Blackfeet Nation is confused as to the precise meaning of “pecuniary benefit” found in HB 530, § 2. Aug. 16, 2022, Trial Tr. 539:22-25 (Gray).

68. Blackfeet Nation does not know if tribes will be interpreted to fall under the “governmental entity” exception found in HB 530, § 2, especially because “there’s always been something in the legislation that refers specially to tribes.” *Id.* at 540:1-18 (Gray).

69. Blackfeet Nation is unsure whether the governmental entity exception would permit them to pay third parties to collect ballots on their behalf. *Id.* at 540:20-541:1 (Gray).

70. Blackfeet Nation is not confident the rulemaking process required under HB 530, § 2 will result in their ability to collect ballots because there has been a lack of consultation. *Id.* at 541:14-18 (Gray).

#### **F. Confederated Salish and Kootenai Tribes**

71. The Confederated Salish and Kootenai Tribes of the Flathead Reservation (“CSKT”) is a sovereign, federally recognized tribe. (Agreed Fact No. 23). The Flathead Reservation is located in western Montana. (Agreed Fact No. 24). CSKT has approximately 8,000 enrolled members with approximately 5,500 members living on the

Flathead Reservation. CSKT 30(b)(6) Dep.<sup>3</sup> 78:15-18, 79:2-3. There are also numerous other Native Americans that are members of other tribes living on the reservation.

CSKT 30(b)(6) Dep. 92:22-24; McDonald Dep.<sup>4</sup> 19:7-13.

72. CSKT cares for the health and welfare of its tribal citizens and has an interest in protecting the economic and physical health and well-being of those tribal citizens. McDonald Dep. 53:21-55:21.

73. CSKT encourages civic participation of its tribal members, including voting in state and federal elections. CSKT 30(b)(6) Dep. 121:9-13; McDonald Dep. 18:19-21:24.

74. WNV and MNV pick up and drop off ballots on the Flathead reservation, including for CSKT tribal members. PTX262; Aug. 17, 2022, Trial Tr. 835:14-18, 842:1-7 (Horse). WNV and MNV's ability to pick up and drop off ballots for CSKT tribal members would be severely compromised by HB 530, § 2, to the detriment of CSKT tribal members. CSKT 30(b)(6) Dep. 30:22-31:8, 32:15-23, 75:4-7.

75. CSKT encourages its tribal members to vote and yearly conducts GOTV efforts with expenditures of approximately \$5,000 per year. These efforts include ballot

---

<sup>3</sup> Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. I-1 (Deposition of Robert McDonald as 30(b)(6) designee for the Confederated Salish and Kootenai Tribes) ("CSKT 30(b)(6) Dep.").

<sup>4</sup> Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. H-1 (Deposition of Robert McDonald) ("McDonald Dep.").

collection, including ballot collection that took place at taco feeds. CSKT 30(b)(6) Dep. 121:22-122:4, 131:22-132:3.

76. CSKT members rely on EDR. HB 176 takes away the ability for CSKT tribal members to register and vote on Election Day. CSKT 30(b)(6) Dep. 173:3-5, 192:13-193:11.

77. CSKT's GOTV efforts also include driving CSKT members to the county seat to register and vote on Election Day. CSKT 30(b)(6) Dep. 129:4-9, 134:7-24; *see also* McDonald Dep. 27:13-28:16. HB 176 prevents CSKT from engaging in this GOTV service for those who need to register or update their registration.

78. HB 176 and HB 530, § 2 make it more difficult for CSKT tribal members to register and vote, and CSKT tribal members' attempts to vote are less likely to be successful.

79. HB 176 and HB 530, § 2 disproportionately burden CSKT voters compared to non-Native voters due to increased burdens on CSKT voters due to disproportionate rates of poverty and lack of vehicle access and stable housing. McDonald Dep. 53:21-55:21, 62:15-63:25, 65:13-22.

80. CSKT believes CSKT is a governmental entity but does not know if tribes will be interpreted to fall under the "governmental entity" exception found in HB 530, § 2. CSKT 30(b)(6) Dep. 18:22-24, 105:23-106:9.

81. CSKT is unsure whether they will be permitted to continue their ballot collection activities, especially related to ballot collection that occurred in conjunction with third parties. CSKT 30(b)(6) Dep. 108:19-109:8.

**G. Fort Belknap Indian Community**

82. The Fort Belknap Indian Community is a sovereign, federally recognized tribe. (Agreed Fact No. 25). The Fort Belknap Indian Community ("FBIC") is a federally recognized tribe with approximately 4,481 enrolled members living on the reservation with approximately 2,000 residents over 18. FBIC 30(b)(6) Dep.<sup>5</sup> 29:20-30:5.

83. FBIC cares for the health and welfare of its tribal citizens and has an interest in protecting the economic and physical health and well-being of those tribal citizens. FBIC 30(b)(6) Dep. 10:10-11:9.

84. FBIC encourages civic participation of its tribal members, including voting in state and federal elections. FBIC 30(b)(6) Dep. 215:11-20.

85. WNV and MNV pick up and drop off ballots on the Fort Belknap reservation. PTX262; Aug. 17, 2022, Trial Tr. 835:14-18, 842:1-7 (Horse). WNV and MNV's ability to pick up and drop off ballots for Fort Belknap tribal members would be severely compromised by HB 530, § 2, to the detriment of Fort Belknap tribal members. FBIC 30(b)(6) Dep. 152:12-23.

---

<sup>5</sup> Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. E-1 (Deposition of Delina Cuts the Rope as the 30(b)(6) designee for the Fort Belknap Indian Community) ("FBIC 30(b)(6) Dep.>").

86. Fort Belknap tribal members rely on EDR. HB 176 takes away the ability for Fort Belknap tribal members to register and vote on Election Day. FBIC 30(b)(6) Dep. 215:11-216:12.

87. HB 176 and HB 530, § 2 make it more difficult for Fort Belknap tribal members to register and vote, and Fort Belknap tribal members' attempts to vote are less likely to be successful. FBIC 30(b)(6) Dep. 215:11-216:4, 227:10-25, 228:11-17.

88. HB 176 and HB 530, § 2 disproportionately burden Fort Belknap voters compared to non-Native voters due to inequities in mail delivery service, access to post offices and post office boxes, distance to county seats, and increased burdens on Fort Belknap voters due to disproportionate rates of poverty and lack of vehicle access and stable housing. FBIC 30(b)(6) Dep. 181:3-14, 187:14-191:19, 232:15-233:12; Aug. 15, 2022, Trial Tr. 230:21-231:21 (Weichelt) (post office open average of 7 hours on weekdays); *id.* at 233:2-13 (Weichelt) (longest distance to post office, 12.4 miles); *id.* at 241:9-23 (Weichelt) (average distance to county seat, 42.68 miles; longest distance to county seat, 64.1 miles); *id.* at 248:8-17 (Weichelt) (average distance to DMV, 45.4 miles; longest distance to DMV, 60.1 miles).

89. FBIC is confused as to the precise meaning of "pecuniary benefit" found in HB 530, § 2. FBIC 30(b)(6) Dep. 198:5-21.

90. FBIC believes FBIC is a governmental entity but does not know if tribes will be interpreted to fall under the “governmental entity” exception found in HB 530, § 2. FBIC 30(b)(6) Dep. 5:22-25, 10:13-20, 197:17-24, 219:3-11, 232:23-25.

91. FBIC is unsure whether the governmental entity exception found in HB 530, § 2(b) would permit them to pay third parties to collect ballots on their behalf. FBIC 30(b)(6) Dep.198:5-21.

#### **H. Northern Cheyenne Tribe**

92. The Northern Cheyenne Tribe is a federally recognized tribe with approximately 12,000 enrolled members with approximately 6,000 members living on the Northern Cheyenne Reservation. Aug. 17, 2022, Trial Tr. 709:23-24, 710:10-13 (Spotted Elk).

93. The reservation is located in southeastern Montana and covers approximately 440,000 acres. *Id.* at 709:25-710:9 (Spotted Elk). The reservation is intersected by Rosebud and Big Horn counties. *Id.* at 710:21-23 (Spotted Elk).

94. The Northern Cheyenne Tribe cares for the health and welfare of its tribal citizens and has an interest in protecting the economic and physical health and well-being of those tribal citizens. *Id.* at 731:13-732:9 (Spotted Elk).

95. The Northern Cheyenne Tribe encourages civic participation of its tribal members including voting in state and federal elections. *Id.* at 721:17-20, 731:13-18, 732:1-3 (Spotted Elk).

96. Northern Cheyenne members are less likely to go to county seats to conduct their election related business because they experience racism in border towns where the county seats are located. *Id.* at 729:13-730:14 (Spotted Elk).

97. Satellite voting locations on Northern Cheyenne are open for a very limited number of days. *Id.* at 723:5-7 (Spotted Elk).

98. WNV and MNV pick up and drop off ballots on the Northern Cheyenne reservation. PTX262; Aug. 17, 2022, Trial Tr. 721:22-722:2, 722:16-17 (Spotted Elk); *id.* at 835:14-18, 842:1-7 (Horse). WNV's ability to pick up and drop off ballots for Northern Cheyenne tribal members would be severely compromised by HB 530, § 2, to the detriment of Northern Cheyenne tribal members. *Id.* at 724:22-725:1, 731:11-23 (Spotted Elk).

99. WNV hires Northern Cheyenne community members to conduct ballot collection. Because WNV ballot collectors are tribal members, this helps mitigate the need to go to a county election office and encounter potential border town racism because the voter only needs to interact with a "familiar face." *Id.* at 730:15-731:10 (Spotted Elk).

100. Northern Cheyenne members rely on Election Day voter registration. There are many impediments to registration on Northern Cheyenne such as "distance . . . to the county seats [that] make it challenging." *Id.* at 727:20-25 (Spotted Elk). Additionally, Northern Cheyenne people "want to vote on Election Day." *Id.* at 723:23-



724:1 (Spotted Elk). HB 176 takes away the ability for Northern Cheyenne tribal members to register and vote on Election Day. *Id.* at 727:15-25, 728:9-13, 731:11-23 (Spotted Elk).

101. HB 176 and HB 530, § 2 make it more difficult for Northern Cheyenne tribal members to register and vote, and Northern Cheyenne tribal members' attempts to vote are less likely to be successful. *Id.* at 731:19-23 (Spotted Elk).

102. HB 176 and HB 530, § 2 disproportionately burden Northern Cheyenne voters compared to non-Native voters due to inequities in mail delivery service, access to post offices and post office boxes, distance to county seats, and increased burdens on Northern Cheyenne voters due to disproportionate rates of poverty and lack of vehicle access, internet access and stable housing. *Id.* at 712:14-15, 713:2-17, 713:21-719:8, 719:12-14, 719:16-20, 719:25-720:24 (Spotted Elk); Aug. 15, 2022, Trial Tr. 230:21-231:17 (Weichelt) (post office open average of 6.5 hours on weekdays); *id.* at 233:2-11 (Weichelt) (longest distance to post office, 9.1 miles); *id.* at 241:9-19 (Weichelt) (average distance to county seat, 53.33 miles; longest distance to county seat, 63.4 miles); *id.* at 248:8-17 (Weichelt) (average distance to DMV, 27.28 miles; longest distance to DMV, 39.4 miles).

103. Northern Cheyenne believes Northern Cheyenne is a governmental entity but does not know if tribes will be interpreted to fall under the "governmental entity" exception found in HB 530, § 2(b), especially because typically when tribes are included

in State legislation they are referred to as “Tribal governments” or “Tribal nations.” *Id.* at 725:14-726:7 (Spotted Elk).

104. Northern Cheyenne is unfamiliar with the rulemaking process required under HB 530, § 2(1), and is unsure whether it will resolve whether or not Northern Cheyenne will be considered a governmental entity. *Id.* at 726:17-21 (Spotted Elk).

### **I. Montana Youth Action**

105. Montana Youth Action (“MYA”) is a nonpartisan, under-18, student-run 501(c)(3) organization in Montana. Aug. 18, 2022, Trial Tr. 1109:12-16, 1110:3-9 (Nehring). Isaac Nehring founded MYA in 2019. *Id.* at 1109:20-24 (Nehring).

106. MYA’s mission is to promote civic engagement opportunities and to educate young people about getting involved in political systems, with a particular focus on voter registration. *Id.* at 1110:10-1111:5 (Nehring).

107. MYA is a membership organization currently run by a 17-member board of high school students. *Id.* at 1109:25-1110:2 (Nehring); *see id.* at 1112:1 (“[W]e’re all high schoolers. And it takes time out of our day, our weeks, our months to learn all these different processes ourselves.”).

108. Most MYA members are middle and high school students. *Id.* at 1109:25-1110:9 (Nehring). The organization prioritizes participation in civic life and works to prepare members and other young people to become active voters. *Id.* at 1110:10-1111:5 (Nehring).

109. As a result, voter registration is a central mission and core program of MYA. *Id.* at 1110:18-1111:5 (Nehring). MYA registers new voters in advance of elections and plans to continue doing so. *Id.* at 1131:17-1132: 1 (Nehring). MYA trains its board and members on how to conduct voter registration and educate young people about election processes. *Id.* at 1111:22-1112:19, 1132:10-12 (Nehring).

110. HB 176 and SB 169 harm MYA because both laws require navigating new information and make voting and registering to vote more complicated than it was before—and especially “harder for young people to understand.” *Id.* at 1112:4-8 (Nehring). Fundamentally, the challenged laws “make[] it more difficult for [MYA] to fulfill [its] mission.” *Id.* at 1112:9-10 (Nehring).

111. In particular, HB 176 makes it more difficult for MYA because it eliminates an important “fallback” voting option that has long been available. *Id.* at 1112:11-19 (Nehring). Without EDR, MYA has a more difficult time “help[ing] young people formulate a plan” to register and vote. *Id.* at 1112:18-19 (Nehring). This is compounded for MYA by the fact that “there’s certainly a lack of knowledge [about voting and registering to vote] among a lot of young people that isn’t necessarily covered in school.” *Id.* at 1116:8-10 (Nehring). And, without EDR, when some first-time voters—including MYA members—inevitably make mistakes in the registration process, they will be prevented from voting. *Id.* at 1121:22-1122:22 (Nehring). Thus,

eliminating EDR directly harms MYA members. *Id.* at 1115:1-6, 1115:19-1116:10 (Nehring).

112. Because young and first-time voters need and rely on EDR, *id.* at 1112:11-19 (Nehring), MYA has an express interest in preserving its availability. And because of the natural difficulties of beginning a new activity, MYA has a similar interest in maintaining voting requirements in the simplest possible form. *Id.* at 1115:1-6, 1115:19-1116:10 (Nehring).

113. SB 169 harms MYA and its members by compromising this latter interest and by complicating voter ID requirements. *Id.* at 1112:4-10 (Nehring). MYA members do not always have access to driver's licenses or other forms of standalone ID that SB 169 permits. *Id.* at 1136:25-1137:12 (Nehring).

114. At least one MYA board member intends to rely on Montana University System-issued student ID to vote. *Id.* at 1136:15-17, 1141:2-5 (Nehring). Moreover, MYA has a broader interest in maintaining the availability of student ID as a standalone form of voter ID because it is less burdensome than the combination forms of ID that SB 169 requires of individuals using a student ID. *Id.* at 1111:22-1112:19 (Nehring).

115. As MYA members transition to adulthood, they become first-time voters, and must necessarily navigate the process of registering to vote and voting for the first time. *Id.* at 1120:23-1121:12 (Nehring). MYA is dedicated to educating young people to

make that process as straightforward as it can be; the challenged laws undermine their work. *Id.* at 1120:25-1121:12 (Nehring).

**J. Forward Montana Foundation**

116. Forward Montana Foundation (“FMF”) is a nonpartisan, not-for-profit organization headquartered in Missoula. The organization received 501(c)(3) charitable status in 2011. Aug. 17, 2022, Trial Tr. 665:24-666:1, 666:12-14, 667:23-25 (Iwai).

117. FMF is dedicated to educating, engaging, and organizing young Montanans to become engaged in democracy. *Id.* at 666:15-21 (Iwai).

118. FMF was established by a group of students at the University of Montana who found there were many barriers to getting young people involved in civic life in Montana. *Id.* at 667:16-22 (Iwai). FMF has since grown into a youth civic engagement organization in Montana, with year round staff in Kalispell, Billings, Bozeman, and Missoula. *Id.* at 668:4-13 (Iwai).

119. At the heart of FMF’s work is empowering young Montanans to exercise their civic rights through voting. As a result, FMF dedicates itself in significant part to voter registration and GOTV efforts. *Id.* at 669:19-670:18 (Iwai).

120. Since 2011, FMF has registered over 45,000 voters. The organization has mobilized hundreds of thousands of voters through direct phone calls, text messages, social media posts and ads, and other forms of engagement. *Id.* at 671:21-672:12 (Iwai).

121. FMF faces harm under SB 169 and HB 176 because these laws will require FMF to expend significant resources in developing and distributing new voter education materials, engaging in campaigns to educate young voters, and conducting expanded GOTV efforts. *Id.* at 681:3-20, 682:9-683:1 (Iwai); FMF 30(b)(6) Dep.<sup>6</sup> 80:13-24, 129:23-130:3.

**K. Montana Public Interest Research Group**

122. The Montana Public Interest Research Group (“MontPIRG”) is a nonpartisan, student directed and funded organization. MontPIRG 30(b)(6) Dep.<sup>7</sup> 18:9-15.

123. MontPIRG is a membership organization with approximately 5,000 members. MontPIRG members are students attending the University of Montana. *Id.* at 28:3-12.

124. MontPIRG is dedicated to effecting change through educating and empowering the next generation of civic leaders. *Id.* at 22:25-23:4.

125. Protecting and expanding voting rights is one of MontPIRG’s priority issues. *Id.* at 53:6-12. MontPIRG works to increase the share of youth voter turnout in

---

<sup>6</sup> Defendant’s Deposition Designations with Associated Exhibits (Aug. 11, 2022), Ex. 3 (Deposition of Kiersten Iwai as 30(b)(6) designee for Forward Montana Foundation) (“FMF 30(b)(6) Dep.”).

<sup>7</sup> Plaintiffs’ Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. G-1 (Deposition of Hunter Losing as 30(b)(6) designee for MontPIRG) (“MontPIRG 30(b)(6) Dep.”).

each election by registering voters and conducting GOTV efforts. *Id.* at 68:17-69:5, 123:6-124:8.

126. In 2016, MontPIRG knocked on over 23,000 doors, registered over 3,500 voters, distributed 3,000 voter guides, and made over 10,000 calls to voters for its Youth 12K campaign. *Id.* at 129:24-130:4.

127. MontPIRG is harmed by SB 169 and HB 176 because these laws require MontPIRG to expend significant resources in developing new voter education materials, engaging in campaigns to reeducate young voters with whom they've engaged previously, conducting expanded GOTV efforts, and training volunteers and interns. *Id.* at 85:25-86:3, 86:25-87:10, 94:3-24, 135:22-137:8, 150:13-151:4, 198:12-24.

128. MontPIRG members are also harmed by SB 169's limitations on voter identification and HB 176's limitations on registration. Some young voters lack the forms of standalone identification required by SB 169 and will have a more difficult time using their student IDs to vote. *Id.* at 95:15-24, 151:5-10. And some student voters, like MontPIRG's members, face particular time constraints that make Election Day the only day available to them to register to vote. *Id.* at 95:25-96:4.

**L. Christi Jacobsen**

129. Defendant Christi Jacobsen is the Secretary of State of the State of Montana. (Agreed Fact No. 18).

130. The Secretary of State is the chief election officer of the State. § 13-1-201, MCA. The Secretary of State tries to make election practices uniform throughout Montana. Aug. 23, 2022, Trial Tr. 1552:24-1553:3 (Custer).

131. The Secretary's office was intimately involved in the legislative process for SB169 and HB176. The Legislature passed both SB 169 and HB 176 at the Secretary's request. Aug. 25, 2022, Trial Tr. 2234:22-2235:6, 2258:12-14 (James). Mr. James personally wrote the first draft of SB 169, and he was the primary drafter of HB 176. *Id.* at 2235:12-2236:7, 2258:15-17 (James). The Secretary and her staff met with legislators and lobbied on behalf of both bills. *Id.* at 2236:8-18, 2258:18-25 (James). Dana Corson, the Director of the Elections Division at the Secretary of State, even wrote talking points for the primary sponsor of HB 176, identifying for her the purported justification for the bill and the purported "common voter problems" that would be resolved by the bill—but were counterfactual and incoherent. *Id.* at 2236:19-2242:4 (James); PTX066.

132. The Secretary of State's Office was a proponent of HB 176 and testified in favor of it at the legislative hearings. Aug. 25, 2022, Trial Tr. 2242:5-2243:7; PTX070 at 4:18-6:22; PTX091 at 4:2-6:5. The Secretary herself appeared in person to express her support for the bill. PTX070 at 4:18-5:4; Aug. 23, 2022, Trial Tr. 1558:12-13, 1561:25-1562:7 (Custer). Statewide elected officials rarely if ever personally appear as bill proponents before the Legislature. Aug. 23, 2022, Trial Tr. 1562:9-15 (Custer).



133. The Secretary's Office repeatedly solicited people to testify in favor of HB 176 at legislative hearings. Aug. 25, 2022, Trial Tr. 2236:16-18 (James). The only election administrator who testified in support of HB 176 at the January 21, 2021, hearing did so only because the Secretary's Office personally solicited him the night before the hearing. *Id.* at 2242:17-2248:12, 2251:11-15 (James); PTX068; PTX069; PTX070.

134. The Secretary has not undertaken any surveys of public support for EDR. *Id.* at 2233:20-23 (James).

135. The Secretary of State's Office was a proponent of SB 169 and testified in favor of it at legislative hearings. Agreed Fact No. 11; PTX082 at 4:24-5:15; PTX094 at 5:8-6:1. As she had for HB 176, the Secretary again testified in person as a bill proponent, showing an unusual level of investment in its passage. PTX082 at 4:24-5:15; Aug. 23, 2022, Trial Tr. 1558:6-14, 1562:4-15 (Custer).

136. The Secretary of State's Office did not request the amendment to HB 530 that added Section 2 and did not support a renewed ban on ballot collection. Aug. 25, 2022, Trial Tr. 2216:23-2217:3 (James).

137. Mr. James admitted that the Secretary has no evidence:

- a. Of voter fraud or intimidation related to the practices addressed by HB 176, SB 169, or HB 530, § 2. *Id.* at 2210:4-8, 2262:18-20 (James).
- b. That eliminating EDR will deter potential voter fraud. *Id.* at 2254:4-7 (James).

- c. That EDR decreased public confidence in the security and legitimacy of Montana's elections. *Id.* at 2254:8-11 (James).
- d. Of any unlawful conduct in Montana related to the use of school district or postsecondary education photo ID for the purpose of voting. *Id.* at 2262:25-2263:7 (James).
- e. That using student IDs to vote has negatively affected public confidence in Montana's elections. *Id.* at 2263:15-18 (James).
- f. That using student IDs or out-of-state drivers' licenses to vote in Montana resulted in less efficient or orderly elections. *Id.* at 2263:19-22 (James).

## II. Witnesses

### A. Daniel McCool, Ph.D.

138. Daniel McCool, Ph.D., was a tenured professor of political science at the University of Utah for decades, and currently is a professor emeritus of political science at the University. Aug. 15, 2022, Trial Tr. 47:24-48:5 (McCool). He provided expert testimony on behalf of Plaintiffs. In his career, Dr. McCool's primary area of academic research has been "the political relationship between Native Americans and the larger Anglo community," and he has researched in the area of Native American voting rights for forty years. *Id.* at 48:12-22 (McCool). He has published about 20 articles in peer-reviewed journals and 7 to 8 books that have gone through the University Press process, including articles, books, and book chapters about Native American voting rights. *Id.* at

49:13-53:13 (McCool). Dr. McCool has served as an expert witness in over 20 voting rights cases. *Id.* at 53:18-23 (McCool). His testimony was credited in two Montana cases concerning Native American voting rights—*United States v. Blaine County* and *Western Native Voice v. Stapleton* (“WNV I”). *Id.* at 53:24-55:2 (McCool). In the latter case, Dr. McCool “used the frame of the cost of voting to analyze the impact of BIPA on Native American voters.” *Id.* at 48:16-24, 54:19-21 (McCool). The qualitative methodology Dr. McCool used in evaluating BIPA in *WNV I*, and HB 176 and HB 530 in this case, is “the same” methodology he uses in his published peer-reviewed work. *Id.* at 61:16-19 (McCool).

139. In coming to his conclusions in this case, Dr. McCool relied upon 336 sources. *Id.* at 138:9-10 (McCool). These sources include census and ACS data; other federal, state, and county data, including data from the Montana Secretary of State’s Office; interviews; secondary sources such as books and articles; legislative history. *Id.* at 62:6-66:16 (McCool).

140. Dr. McCool arrived at three central conclusions related to the costs and benefits of HB 176 and HB 530, § 2. First, Dr. McCool determined that Native Americans in Montana face disproportionate voter costs as compared to their non-Native counterparts because of a slew of preexisting socioeconomic disparities. *Id.* at 78:3-17 (McCool). Dr. McCool found that, in Montana, Native Americans face dramatic disparities in the following areas: income levels; poverty levels; child poverty levels;

food stamp usage; vehicle availability; homelessness; home ownership; rates of housing discrimination; rates of substandard housing; a wide array of health outcomes; high school and college graduation rates; internet access; computer ownership; incarceration rates; experiencing discrimination, including voter discrimination; and experiencing violence. *Id.* at 81:11-113:22, 150:13-151:2 (McCool). The dramatic disparities in income and poverty also mean that Native Americans have less money for gas, car insurance, car maintenance, and getting a license plate—all of which increase travel costs. *Id.* at 120:25-121:9 (McCool). Dr. McCool explained that these socioeconomic disparities are the result of centuries of violence, racism, and discrimination against Native Americans in Montana, including the theft of land and resources. *Id.* at 113:23-114:17 (McCool).

141. Second, Dr. McCool determined that HB 176 and HB 530 would have a disproportionate negative impact on Native American voters in Montana. *Id.* at 78:18-25, 121:10-21, 125:7-21 (McCool). Dr. McCool explained that the political science literature is “very consistent” that EDR increases turnout. *Id.* at 115:8-116:4 (McCool). He further determined that—because Native Americans face socioeconomic disparities and disproportionate travel costs, which includes the fact that many Native Americans in Montana live extremely far away from their county seat, *id.* at 120:4-24 (McCool)—repealing EDR will disproportionately harm Native Americans, *id.* at 131:11-21 (McCool). Dr. McCool detailed the significant problems with mail service on Native American reservations in Montana, all of which make it harder to vote by mail or

register to vote by mail. *Id.* at 122:8-123:12, 124:3-24 (McCool). He concluded that these mail service issues, combined with the other disproportionate socioeconomic and travel costs, makes HB 530 particularly burdensome on Native American voters. *Id.* at 125:7-21 (McCool).

142. Third, Dr. McCool determined that HB 176 and HB 530 have “no discernable [public] benefit” in terms of election integrity and voter fraud. *Id.* at 127:13-16 (McCool). Dr. McCool found that voter fraud rates in Montana and the United States are exceptionally low, *Id.* at 127:20-137:23 (McCool), and that there is no connection between voter fraud and either EDR or third-party ballot collection, *Id.* at 137:18-23 (McCool). Indeed, voter fraud—while extremely rare everywhere—is actually more common in states that *ban* ballot collection than those that *allow* it. *Id.* at 133:2-137:14 (McCool).

143. Dr. McCool’s conclusions are well supported by sources, analyzed through the methods of his field, and the Secretary fails to contest the vast majority, if not all, of the data and facts on which he relies. His analyses and ultimate conclusions are entitled to substantial weight.

**B. Ryan Weichelt, Ph.D.**

144. Ryan Weichelt, Ph.D., is a tenured professor of geography at the University of Wisconsin-Eau Claire, Aug. 15, 2022, Trial Tr. 195:11-18 (Weichelt), and he provided expert testimony on behalf of Plaintiffs. He has published peer-reviewed

academic articles, chapters, and two books, a 2016 and 2020 Atlas of Elections. *Id.* at 199:14-200:3 (Weichelt). Both books are commonly used in university courses, and his 2016 Atlas of Elections was rated as the best reference book by the Library Journal. *Id.* at 200:4-14 (Weichelt). Dr. Weichelt provided expert testimony in *WNV I* regarding distances people in Montana have to travel to post offices, and there the court relied upon his analysis twice. *Id.* at 202:20-203:8 (Weichelt).

145. Dr. Weichelt regularly uses maps and GIS to investigate spatial implications and do spatial comparisons; he used those same methods in this case to analyze voter access, specifically distance as a voter cost, *id.* at 204:24-208:23 (Weichelt), and how that is impacted by HB 176 and HB 530, § 2. *Id.* at 204:20-23 (Weichelt). His analysis was particularly important in this case because the voter costs of distance and time have consistently been identified, used, and “vetted through numerous studies in political science and political geography.” *Id.* at 256:2-13 (Weichelt). In conducting his analyses, Dr. Weichelt used numerous data sources that he typically uses in his peer reviewed work, including the addresses of post offices from postallocations.com; locations of DMVs and county seats from the State of Montana; Google Maps to understand driving times and driving distances; and demographic data from the 2020 United States Census Bureau Redistricting PL-94 datafile and 2019 and 2010 ACS data. *Id.* at 211:21-213:25 (Weichelt).

146. After investigating spatial implications regarding voting access under HB 530 and HB 176 and doing spatial comparisons between voters who live on-reservation and voters who live off-reservation, Dr. Weichelt concluded that Native American and non-Native American voters encounter differential obstacles to electoral participation. Aug. 15-16, 2022, Trial Tr. 194:9-309:2 (Weichelt). He specifically analyzed the distances to post offices, the hours of operation of post offices, and the density of populations post offices serve; the distances to county seats; and the distances to DMVs. *Id.* Dr. Weichelt concluded that the average distance to these three places is farther for voters on-reservation and “that incurs a larger voter cost on them.” Aug. 15, 2022, Trial Tr. 249:9-19 (Weichelt). This is true even taking into account the off-reservation locations that Dr. Weichelt did not include in some of his averages, since he also provided the average distance including those locations. Aug. 16, 2022, Trial Tr. 284:2-12 (Weichelt). Even with those inclusions, the distances for on-reservation voters were still farther away. *Compare id.* with Aug. 15, 2022, Trial Tr. 228:2-10 (Weichelt).

147. Dr. Weichelt’s analysis and ultimate conclusions are entitled to substantial weight, and, indeed, his testimony was credited by this Court during the trial. Aug. 16, 2022, Trial Tr. 528:22-25.

**C. Alex Street, Ph.D.**

148. Alex Street, Ph.D., is a tenured professor of political science and international relations at Carroll College in Helena, Montana, *id.* at 311:25-312:21

(Street), and he provided expert testimony on behalf of Plaintiffs. He has published peer-reviewed academic articles in the field of political science, often in the area of political behavior, including a peer-reviewed article related to EDR. PTX231; Aug. 16, 2022, Trial Tr. 314:5-16, 315:13-316:14 (Street). Beyond his work in this case and in *WNV I*, Dr. Street has examined other elections in Montana and has even worked as an election judge in Helena. Aug. 16, 2022, Trial Tr. 313:15-314:4, 318:2-10, 406:15-18 (Street). He regularly uses methods of statistical analysis in his published research and used those same methods here to assess the likely impacts of HB 176 and HB 530, § 2, on Native Americans living on reservations in Montana. *Id.* at 316:3-5, 317:10-318:1, 323:4-15, 325:25-326:7, 338:6-8 (Street). He also assessed HB 176 and HB 530, § 2, through three commonly used and complementary frameworks in political science of voting as rational, habitual, and social. *Id.* at 327:2-332:15, 332:24-338:5 (Street).

149. In conducting his statistical analyses, Dr. Street used numerous data sources, many of which came directly from the Secretary of State's Office. *Id.* at 338:9-342:21, 343:9-345:15 (Street). He made use of shapefiles of the seven reservations in Montana, obtained from the Montana State Library, as well as files from the 2020 Census in order to identify impacts by race. *Id.* Using these data sources, Dr. Street conducted statistical analysis of the primary and general elections in 2014, 2016, 2018, and 2020, and concluded that individuals living on reservation in Montana were



particularly reliant on EDR, to a statistically significant degree, and that the more Native parts of reservations were those most reliant on EDR. *Id.* at 345:23-355:23 (Street).

150. While there is no data source reflecting quantitative use of ballot assistance, Dr. Street undertook a number of analyses regarding third-party ballot assistance. Using the same data sources, Dr. Street conducted statistical analysis of the primary and general elections in 2014, 2016, 2018, and 2020, and concluded that individuals living on reservation in Montana were particularly likely to request their absentee ballots in the late registration period, after the date in which absentee ballots are mailed out en masse, 25 days before the election, to a statistically significant degree. *Id.* at 356:6-362:5 (Street). Similar to reliance on EDR, the patterns were driven by the more Native parts of the reservations. *Id.* at 357:23-358:3 (Street). To offer additional analysis regarding HB 530, Dr. Street compared turnout for absentee voters between the 2016 and 2020 primaries, as BIPA had prevented almost all organized ballot collection on reservation for the 2020 primary, finding a statistically significant differential difference in turnout on- and off-reservation. *Id.* at 362:6-368:16 (Street). Similarly, an analysis of the 2016 and 2018 primaries compared to the 2020 primary showed greater degrees of ballot rejection on-reservation for reasons that organizers who conduct ballot assistance on reservation help voters avoid. *Id.* at 368:18-371:14 (Street). The Secretary's argument that Dr. Street's analyses were based on a faulty assumption is unfounded, as testimony from both *WNV I* and in this case indicates that MNV did conduct ballot

collection during primary elections. *See* Aug. 18, 2022, Trial Tr. 896:8-13 (Horse); DTX534. Moreover, even were the Court to credit the Secretary's argument as to the last two pieces of Dr. Street's analysis, his ultimate conclusion regarding HB 530, § 2, is supported by substantial other analysis. *See, e.g.*, Aug. 16, 2022, Trial Tr. 333:1-334:14, 334:17-335:6, 335:14-17, 337:9-338:5, 355:24-362:5, 371:13-372:20, 397:15-398:2, 437:19-438:23 (Street).

151. From these analyses, Dr. Street concluded that "HB 176 and HB 530 are likely to have a differential negative impact on voter registration and voting for Native Americans living on Indian Reservations in Montana." *Id.* at 371:15-372:20 (Street). Dr. Street conducted rigorous and meticulous analyses, using a wide variety of data sources (many provided by the State) and the methods of his field. His conclusions are well supported and credible. His analyses and ultimate conclusions are entitled to substantial weight.

152. Dr. Street also conducted analysis on the comparative reliance on EDR versus other days in the late registration period, again using data supplied by the Secretary of State, demonstrating that Election Day is the most used day of the late registration period. *Id.* at 374:2-381:8 (Street). He also conducted analysis on wait times to vote in Montana, *id.* at 381:9-385:23 (Street), using a survey conducted nationwide, with a "much better" sample for Montana than is typically seen, *id.* at 383:8-16 (Street). The Secretary's own expert agrees that the survey used by Dr. Street for this analysis is

considered reliable and it is run by a well-respected political scientist. Aug. 24, 2022, Trial Tr. 1996:3-17 (Trende). Dr. Street's analysis showed that wait times in Montana are consistently below 10 minutes, have been decreasing across time, and are well below the national average. Aug. 16, 2022, Trial Tr. 384:2-385:23 (Street). He also assessed voter confidence in Montana and assessed the factors that actually influence voter confidence. That analysis—using the same survey that the Secretary's expert believes is considered reliable—demonstrated that voter confidence in Montana is quite stable and relatively high over time. *Id.* at 393:3-395:25 (Street). And the factors that influence voter confidence are cues from party leaders and whether someone's preferred candidate won the previous election—the so-called winner's effect—not the specifics of the legal regime governing election administration. *Id.* at 390:19-395:25 (Street). These opinions are well supported and credible. Indeed, the Secretary's own expert witness testified that voter confidence is not influenced by the specific legal regime governing elections, Aug. 24, 2022, Trial Tr. 2024:11-2025:23 (Trende), as well as acknowledging the impact of partisan cues and the winner's effect, *id.* at 2030:21-2031:4 (Trende).

**D. Kenneth Mayer, Ph.D.**

153. Kenneth Mayer, Ph.D., is a full professor of political science at the University of Wisconsin, Madison, and the authoritative faculty of La Follette School of Public Affairs at UW-Madison. Aug. 22, 2022, Trial Tr. 1285:8-18 (Mayer). He provided expert testimony on behalf of Plaintiffs. He received a Ph.D. in political science from

Yale University. *Id.* at 1285:5-7 (Mayer). At the University of Wisconsin, Dr. Mayer teaches courses about election administration, election law, voting, and voting behavior. *Id.* at 1285:21-1286:3 (Mayer). He also conducts academic research about election administration and voting. *Id.* at 1286:4-9 (Mayer). Dr. Mayer has received numerous awards for both his teaching and his academic scholarship. *Id.* at 1286:10-1287:9 (Mayer); PTX215.001-002. These recognitions include an award for the best journal article published in the American Journal of Political Science in 2014, an award for the best application of quantitative methods to a paper at the 2013 conference of the Midwest Political Science Association, and an award from the American Political Science Association for the best book written on the presidency in 2001. Aug. 22, 2022, Trial Tr. 1286:10-1287:9 (Mayer). Dr. Mayer has published nine books, seven monographs, and ten book chapters. PTX215.004-007. He has published over 25 peer-reviewed articles, most of which have involved the application of quantitative methods, and a number of which concern election administration, voting behavior, voter turnout, and factors that affect voter turnout. Aug. 22, 2022, Trial Tr. 1288:2-22 (Mayer). Dr. Mayer also serves as the chair of a County Commission on Election Security. *Id.* at 1289:14-16 (Mayer).

154. In assessing the effects of SB 169, HB 176, and HB 530, Dr. Mayer relied on voter files and voter turnout data from the Secretary of State's Office, data published by the Montana State University system about student demographics, the American

Community Survey produced by the U.S. Census, the 2020 and 2016 Survey on the Performance of American Elections by the MIT Election Data and Science Lab, and peer-reviewed literature. *Id.* at 1293:6-1294:1 (Mayer). He also applied the calculus of voting model, a framework widely used in the field of political science to evaluate and hypothesize about how changes in election administration will affect voting practices and voter turnout. *Id.* at 1294:6-19 (Mayer).

155. The calculus of voting paradigm shows that the decision whether to vote reflects the relative costs and benefits of voting. *Id.* at 1294:6-1295:4 (Mayer). The costs of voting include informational and administrative costs such as unexpected changes to voting processes, burdens associated with overcoming bureaucratic requirements, compliance costs, opportunity costs, time costs, travel costs, administrative hurdles, and actual monetary costs. *Id.* at 1294:23-1296:9 (Mayer). In broad terms, Dr. Mayer testified that as the costs of voting increase, the likelihood that an individual votes decreases. *Id.* at 1294:23-1295:4 (Mayer). Applying that model to the facts of this case, Dr. Mayer concluded that SB 169, HB 530, and HB 176 all “increase the cost of voting and will result in otherwise eligible voters not being able to vote.” *Id.* at 1305:11-12 (Mayer). Dr. Mayer further concluded that the cumulative effect of SB 169, HB 176, and HB 530, § 2 will, working in combination, result in greater disenfranchisement than each would on its own. *Id.* at 1385:23-1386:19 (Mayer).

156. He also explained that the burdens of SB 169 and HB 176 will fall disproportionately on students and young people. Relying on academic literature, as well as Montana-specific data about the number and ages of Montanans who use EDR, Dr. Mayer determined that HB 176 is a particular burden on young people because younger voters are far more likely to rely on EDR than older voters. *See id.* at 1305:25-1306:2, 1328:18-1329:18 (Mayer) (explaining that younger and first-time voters disproportionately rely on EDR because they tend to move more frequently and are less familiar with voting requirements and processes). Dr. Mayer also determined that SB 169 is likely to burden students because Montana's youngest voters are less likely to have one of the primary forms of identification under SB 169. *Id.* at 1305:25-1306:4, 1358:16-1359:20 (Mayer).

157. Dr. Mayer further concluded that SB 169, HB 530, and HB 176 do nothing to advance the Secretary's purported state interests. They are all "what the public administration literature would call pure dead weight," and they "do nothing but make it harder to vote." *Id.* at 1305:12-21 (Mayer) (explaining that the laws "have nothing to do with the integrity of the election process," and "don't increase administrative efficiency or decrease the burden on election officials"). Relying on comprehensive data, academic literature, and his expertise in election administration, Dr. Mayer concluded that there is no evidence of any connection between HB 176, SB 169, or HB 530, § 2 and the state's purported interests in increasing voter confidence, preventing voter fraud,

decreasing wait times for voters, or enhancing election integrity. *Id.* at 1363:21-1364:2, 1371:24-1372:11, 1379:2-1380:20, 1385:23-1386:9, 1386:23-1387:5 (Mayer). Specifically, Dr. Mayer explained Montana does not have a voter confidence problem, and if it did, none of these laws would address it. Montana ranks among the highest in the nation in terms of voter confidence. *Id.* at 1384:19 -1385:22 (Mayer) (relying on the Survey on Performance of American Elections, which was relied on by one of the Secretary's experts in the BIPA litigation and credited by the Secretary's expert in this case). The factor that most influences voter confidence in elections is whether their preferred candidates win. *Id.* 1371:16-19 (Mayer). There is little relationship, for example, between voter confidence and voter ID laws. *Id.* at 1371:15-16 (Mayer).

158. Dr. Mayer's conclusions are credible and well-supported. In fact, the Secretary's expert does not dispute any of the factual findings in Dr. Mayer's rebuttal report. Aug. 24, 2022, Trial Tr. 1995:3-8 (Trende). Dr. Mayer's analyses and conclusions are entitled to substantial weight. The Secretary's expert provided no grounds to dispute Dr. Mayer's analysis, as Mr. Trende did not review the computer code Dr. Mayer used in conducting his analysis in this case, nor did he independently run any of the analysis performed by Dr. Mayer. *Id.* at 1995:9-15 (Trende). Mr. Trende further testified that he had no basis to disagree with Dr. Mayer's conclusions that younger voters and college students are more reliant on EDR, *id.* at 2013:11-15 (Trende), and less

likely to have a driver's license as a form of primary ID under SB 169, *id.* at 2020:8-16 (Trende).

**E. Sean Trende**

159. Sean Trende is a doctoral student in political science at the Ohio State University, and he provided expert testimony on behalf of the Secretary. Mr. Trende has never published a peer reviewed article concerning EDR, voter ID, absentee ballot assistance, voting by Native Americans, whether voting laws have an effect on turnout of voters of different racial groups, or whether voting laws have an effect on voter turnout; nor could he recall ever writing an article of any kind on these topics relevant to the current matter. Aug. 24, 2022, Trial Tr. 1990:11-1991:9 (Trende). At the time he formed his opinions in this case, he had never published a peer-reviewed article or even submitted an article to a peer-reviewed political science journal, having just recently published (as the third author) his first such article, in an area unrelated to the matters in this case. *Id.* at 1991:10-1992:8 (Trende).

160. Mr. Trende's opinions are entitled to little, if any, weight for a number of reasons. He has provided no specific analysis of the issues in this case. *Id.* at 1997:9-11, 1999:16-2000:1, 2013:5-10, 2036:13-2037:14, 2040:18-20, 2041:3-7 (Trende). The article on which he seeks to hang much of his criticism of the findings of political science related to EDR excludes racial minorities from its analysis and, for its assertion that EDR has not had a positive impact on voter turnout in Montana, cites to a book that expressly



notes that it did not study the impact of EDR in Montana because it lacked the data to do so. *Id.* at 2007:5-2009:10 (Trende). He admits that the laws of other states have no impact on Montanans' ability to vote, *id.* at 2035:23-2036:1 (Trende), but offers a comparison among states, with questionable factual underpinning, *id.* at 2033:14-2034:4 (Trende). And the "context" he purports to provide, *id.* at 1950:8-17 (Trende), was already well-provided to the Court through the testimony of the political scientists who testified in this case, *see, e.g.*, Aug. 16, 2022, Trial Tr. 319:1-321:17 (Street) (testifying regarding observational data and political science). Mr. Trende offers no testimony contrary to Plaintiffs' experts regarding the costs of voting, and he agrees that "small changes in costs can cause significant changes in individuals' decisions," that "there is little doubt that there's a relationship between the cost of voting and the decision to turn out," and that these sorts of voting costs "can impact those who are already marginalized." Aug. 24, 2022, Trial Tr. 2003:7-25 (Trende).

#### **F. Fact Witnesses**

161. Mr. Bohn testified about the challenges he faces in returning his ballot as a person with a disability and the need for people with disabilities to have access to ballot return assistance. Aug. 15, 2022, Trial Tr. 179:3-182:2 (Bohn). Mr. Bohn testified competently and credibly.

162. Thomas Bogle testified about his experience attempting to register at the DMV and vote in person on Election Day in November 2021, only to be told that the

DMV had not processed his registration and he would be unable to vote because HB 176 ended EDR. See Aug. 16, 2022, Trial Tr. 483:24-486:5 (Bogle). Mr. Bogle testified competently and credibly.

163. Dawn Gray, the managing attorney and party representative for Blackfeet Nation, testified about the extreme difficulties accessing the franchise on the Blackfeet reservation. Aug. 16, 2022, Trial Tr. 517:8-10, 519:13-534:5 (Gray). She testified about the way in which conditions on the reservation impact the ability of members of Blackfeet Nation to vote and the importance of ballot assistance and EDR in mitigating the barriers to the franchise. *Id.* at 534:6-553:9 (Gray). Ms. Gray testified competently and credibly, and gave the Court a compelling picture of the difficulties facing Native Americans living on reservations in Montana.

164. Sarah Denson testified about her experiences attempting to vote in the November 2021 municipal election after attempting to update her registration on the U.S. Postal Service website several months earlier. Aug. 17, 2022, Trial Tr. 630:25-631:16 (Denson). When she arrived at the Gallatin County courthouse on Election Day, she found the registration update had not gone through, and she was unable to vote because of the change in law from HB 176. *Id.* at 634:22-639:13 (Denson). Ms. Denson testified competently and credibly.

165. Kiersten Iwai, the executive director of FMF, testified about the challenges young voters face in registering to vote and casting a ballot. Aug. 17, 2022, Trial Tr.

676:2-24, 679:13-680:1 (Iwai). She testified about the impact of HB 176 and SB 169 on young voters. *Id.* at 682:9-17, 684:5-686:25 (Iwai). Ms. Iwai testified competently and credibly.

166. Lane Spotted Elk, Tribal Council member and party representative of the Northern Cheyenne Tribe, testified about the extreme difficulties accessing the franchise on the Northern Cheyenne reservation. Aug. 17, 2022, Trial Tr. 708:10-17, 710:21-720:16 (Spotted Elk). He testified about the way in which conditions on the reservation impact the ability of members of the Northern Cheyenne Tribe to vote and the importance of ballot assistance and EDR in mitigating the barriers to the franchise. *Id.* at 720:17-732:9 (Spotted Elk). Councilman Spotted Elk testified competently and credibly and provided the Court with insight into the difficulties that Native Americans living on reservations in Montana face.

167. Kendra Miller testified about her analysis of the number of people who were disenfranchised by HB 176 in the November 2021 municipal elections based on her review of public records from county elections offices and the Secretary of State's website. Ms. Miller was competent and credible. *See* Aug. 17, 2022, Trial Tr. 760:7-770:6 (Miller). Upon reviewing these public records, the Court accepts her findings that "at least 59 Montanans were prevented from voting due to House Bill 176" in the November 2021 municipal elections alone. Aug. 17, 2022, Trial Tr. 786:19-23 (Miller).

168. Ronnie Jo Horse, WNV's executive director, testified extensively about the organization's mission (fostering Native American civic education, civic engagement, and leadership development), Aug. 17, 2022, Trial Tr. 813:8-12, 815:8-14 (Horse), and the ways that WNV effectuates that mission (through various GOTV strategies, including providing rides to the county elections office on Election Day and providing ballot assistance), *id.* at 827:19-23 (Horse). Ms. Horse testified that WNV's GOTV activities are especially important on rural reservations because of the various challenges Native American voters have historically had to surmount. *Id.* at 835:19-25, 857:21-858:17 (Horse); PTX262. Ms. Horse demonstrated that WNV's GOTV activities are safe and secure, and that WNV has never been the subject of a complaint or investigation. Aug. 17, 2022, Trial Tr. 859:24-860:18 (Horse). Finally, Ms. Horse testified that WNV's work is crucial to ensure that Native American voices are "heard in the electoral process." *Id.* at 864:7-11 (Horse). Ms. Horse testified competently and credibly.

169. Bradley Seaman, the elections administrator of Missoula County, has helped administer Missoula County's elections since 2006. *See* August 18, 2022, Trial Tr. 898:1-899:1 (Seaman). He served as an election judge for ten years, and then served as the election supervisor between 2016 to 2020. *Id.* Mr. Seaman began working as the County's election administrator in March 2020. *Id.* at 898:16-17 (Seaman). Mr. Seaman testified about the impact of HB 176 and SB 169 on the services Missoula County provides to its voters. *Id.* at 897-1107 (Seaman). Mr. Seaman also testified about the

security and integrity of elections in Missoula County, despite conspiracy theories that have born challenges to them. *Id.* Mr. Seaman described the impact such misinformation has had on Missoula County's voters and the administration of Missoula County's elections. *Id.* Mr. Seaman does not have any political affiliations and serves in a non-partisan, appointed position. *Id.* at 900:9-13 (Seaman). Mr. Seaman testified competently and credibly.

170. Mr. Nehring, founder, former executive director, and board co-chair of MYA, testified about the experiences of first-time voters and the impact of HB 176 and SB 169 on young voters. Aug. 18, 2022, Trial Tr. 1111:9-1112:19, 1120:23-1123:20 (Nehring). He provided a detailed account of several first-time voters navigating the registration and voting process days before the June 3, 2022, primary election. *Id.* at 1117:10-1122:22 (Nehring). Mr. Nehring also testified to his experience interacting with legislators during the 2021 legislative session. *Id.* at 1125:24-1129:6 (Nehring). Mr. Nehring testified competently and credibly.

171. Shawn Reagor is the Director of Equality and Economic Justice at the Montana Human Rights Network. Aug. 19, 2022, Trial Tr. 1155:18-1157:11 (Reagor). Mr. Reagor testified about the particular processes that transgender individuals must go through to acquire a Montana driver's license and the comparatively easier process they have in acquiring gender affirming student identification. *Id.* at 1158:14-1169:12 (Reagor). Through his testimony, Mr. Reagor demonstrated the particularized burdens

SB 169 places on transgender individuals. *Id.* Mr. Reagor testified competently and credibly.

172. Jacob Hopkins is the data director of MDP. Aug. 19, 2022, Trial Tr. 1179:16-17 (Hopkins). Mr. Hopkins testified regarding the impacts the challenged restrictions have had, and will continue to have, on the operations of MDP. *Id.* at 1180:3-5 (Hopkins). As data director, Mr. Hopkins analyzes data to enable MDP to run efficient campaigns. *Id.* at 1180:19-22 (Hopkins). Mr. Hopkins's familiarity with voter data gives him more insight than a typical campaign staffer. *Id.* at 1193:25-1195:2 (Hopkins). He has insight into how different counties process ballots, *see, e.g., id.* at 1194:25-1195:2 (Hopkins), certain voter behaviors, *see e.g., id.* at 1195:7-11 (Hopkins), and voter demographics, *see, e.g., id.* at 1195:17-21 (Hopkins). In his role as data director, Mr. Hopkins also has familiarity with MDP's election-related activities, as well as MPD's general mission. *Id.* at 1181:14-18 (Hopkins). Prior to becoming the data director of MDP, Mr. Hopkins worked as a field organizer for various democratic campaigns. *Id.* at 1181:7-13 (Hopkins). Mr. Hopkins testified competently and reliably.

173. Bernadette Franks-Ongoy, is the Executive Director of Disability Rights Montana ("DRM"), Montana's designated Protection and Advocacy Agency and a non-profit, non-partisan organization with responsibilities for overseeing facilities and providing services to people with disabilities in the state. Aug. 22, 2022, Trial. Tr. 1443:2-6, 1445:2-1446:21 (Franks-Ongoy). Ms. Franks-Ongoy is an attorney who has

worked in the disability rights field for more than 20 years. *Id.* at 1442:20-21, 1443:2-1444:20 (Franks-Ongoy). Ms. Franks-Ongoy has been helping people with disabilities vote since she was eight years old. *Id.* at 1447:18-23 (Franks-Ongoy). Ms. Franks-Ongoy testified about the barriers persons with disabilities face in registering to vote and casting their ballots, how EDR and organized ballot assistance are crucial in enabling persons with disabilities to overcome those barriers, and about the work DRM does to help Montanans with disabilities access the franchise. *Id.* at 1450:5-1466:18 (Franks-Ongoy). Ms. Franks-Ongoy testified competently and credibly.

174. Regina Plettenberg is the Clerk and Recorder-Election Administrator for Ravalli County, a position she has held since 2007. Aug. 22, 2022, Trial Tr. 1485:19-23 (Plettenberg). Ms. Plettenberg is also the legislative chair of the Montana Association of Clerks and Recorders and Elections Administrators (MACR). *Id.* at 1486:2-25 (Plettenberg). She testified about a straw poll of election administrators regarding support for HB 176 and that MACR remained neutral on HB 176 during the 2021 legislative session. *Id.* at 1504:12-1505:1 (Plettenberg). She also testified about lines at polling places, noting that they are never very long in Ravalli County, *id.* at 1507:6-24, 1527:24-1528:2 (Plettenberg), including the 2018 general election, where only people using EDR had to wait and only for a maximum of 20 minutes, *id.* at 1505:21-1507:4 (Plettenberg). She testified in agreement with her own prior statement that the election security bills passed by the 2021 Legislature were “a solution in search of a problem.”

*Id.* at 1525:13-16 (Plettenberg). When asked about additional funding for Election Day, Ms. Plettenberg responded that she had been “raked over the coals” for accepting grant money to support election activities in the past. *Id.* at 1513:11-23 (Plettenberg). Ms. Plettenberg testified competently and credibly.

175. Geraldine Custer is a Republican member of the Montana House of Representatives and the former Clerk and Recorder for Rosebud County, a position she held for thirty-six years. *See* Aug. 23, 2022, Trial Tr. 1546:4-1547:2, 1556:25-1557:3 (Custer). Representative Custer testified about her view of the passage of HB 176, HB 530, and SB 169 through the lens of her role as a state legislator and former elections official.

176. Representative Custer also testified about her 36 years of experience administering elections as the Clerk and Recorder of Rosebud County, including her view that elections in Montana are thoroughly secure. Aug. 23, 2022, Trial Tr. 1546:14-1547:22 (Custer). During her time as the Rosebud County Clerk and Recorder, Geraldine Custer served as the chief financial officer for the county and the clerk for the County Commissioners, in addition to handling payroll, retirement, health insurance, human resources, recording documents, and running elections. *Id.* at 1546:11-25 (Custer).

177. Representative Custer described the development of conspiracy theories related to elections, *id.* at 1548:3-1549:11, 1554:1-1556:4 (Custer), and testified that she



only began to hear about election fraud when Secretary of State Corey Stapleton was running for election, *id.* at 1547:6-12 (Custer). She also testified to her experience as an election administrator before and after the passage and implementation of EDR in Montana, explaining that although she did not at first support it, she came to see EDR as an essential service because Montanans voted against its repeal by a large margin, because elections technology improved dramatically and made it easier for county election administrators to administer EDR, and because 70,000 Montanans have relied on it to vote. *Id.* at 1562:16-1565:15 (Custer).

178. Representative Custer also testified to her view that her Republican caucus was motivated to pass HB 176 and SB 169 by the perception that students tend to be liberal, *see, e.g., id.* at 1577:21-1581:15 (Custer), and that this motivation was particularly evident in the floor amendment to SB 169 that excluded Montana University System-issued student ID from the standalone ID category, *id.* at 1581:12-15 (Custer).

179. Representative Custer also testified that HB 530 was “hijack[ed]” at the last minute and that she understood it to be a ploy to pass a bill that has not been well vetted by public debate. *Id.* at 1558:19-1561:16 (Custer). Representative Custer testified competently and credibly.

180. Doug Ellis, the former elections administrator in Broadwater County, also testified about his experience administering elections. *See* Aug. 23, 2022, Trial Tr. 1650-

1779 (Ellis). While serving as an elections administrator, Mr. Ellis also served as the Broadwater County Clerk and Recorder, County treasurer, and superintendent of schools. Aug. 23, 2022, Trial Tr. 1652:15-1653:4 (Ellis). As County treasurer, Mr. Ellis was tasked with running the motor vehicle department, registering vehicles, issuing licenses, handing out license plates, printing tax bills, collecting taxes, and collecting other revenue. *Id.* at 1653:5-4. As the superintendent of schools, Mr. Ellis was tasked with registering homeschool families, maintaining student information, issuing financial reports, and handling bus transportation. *Id.* at 1654:8-22. Of all the positions he held, running elections was the most challenging. *Id.* at 1656:12-15.

181. Mr. Ellis has always opposed EDR—including before he had any experience as an election administrator. *Id.* at 1726:2-7 (Ellis).

182. Although Mr. Ellis testified in support of HB 176 at a legislative hearing, while testifying under oath at trial, Mr. Ellis admitted that he testified before the Legislature because someone from the Secretary's Office asked him to. *Id.* at 1724:6-12 (Ellis). Mr. Ellis's testimony regarding the unique burdens placed on rural counties—whose staff handles other responsibilities in addition to elections—must be weighed in light of Mr. Ellis's further testimony that, in addition to himself, he had 5 full-time staff members, two of whom are dedicated exclusively to EDR. *Id.* at 1707:7-12 (Ellis).

183. Mr. Ellis also testified that staff spend 70% of their time in the month leading up to an election preparing for that election, and 100% of their time on Election

Day working the election. *Id.* at 1700:1-8 (Ellis). Similarly, Mr. Ellis's testimony that "budgetary constraints" limited the staff he could have assist him with elections should be considered in light of Mr. Ellis's admission that, during the 2020 election, Broadwater County spent only 53% of the amount it budgeted for election salaries and wages, 57% of the amount it budgeted for election judge stipends, and only 5% of the \$24,000 it budgeted for office supplies and materials. *Id.* at 1708:11-1709:15 (Ellis).

184. Mr. Ellis also testified that he always administered well-organized elections, *id.* at 1717:8-19 (Ellis), he always successfully tabulated the votes, *id.* at 1717:4-7 (Ellis), he was never criticized for any delays, *id.* at 1717:13-15 (Ellis), and he is unaware of any material errors in any of the elections that he administered, *id.* at 1718:6-8 (Ellis).

185. The credibility of Mr. Ellis's testimony regarding administrative burdens is diminished by his personal beliefs. Mr. Ellis testified that a voter who appeared to register and vote two minutes before the deadline should not have been permitted to do so, even prior to the enactment of HB 176, regardless of any circumstances that may have contributed to the voter's late arrival. *Id.* at 1725:4-1726:1 (Ellis). Mr. Ellis admitted that he is not concerned that HB 176 may disenfranchise voters. *Id.* at 1726:14-24 (Ellis). When asked whether his lack of concern extended to disabled voters, Mr. Ellis stated, "Did they finally become disabled on Election Day? What changed? . . . [Y]ou have 364 days to come in and register. Why did they wait until the last day?" *Id.* at 1726:25-1727:9

(Ellis). Mr. Ellis testified that he believes voting is not only a right, but also a privilege and a responsibility. *Id.* at 1727:24-1728:1 (Ellis). And Mr. Ellis's testimony regarding EDR appears to be influenced by his belief that "Society has gotten to the point where everybody has a right and nobody has a responsibility." *Id.* at 1729:3-11 (Ellis).

186. Janel Tucek, elections administrator in Fergus County and former elections administrator in Petroleum County, testified about her job responsibilities administering elections in those counties. While her testimony was credible, Ms. Tucek's testimony regarding supposed administrative burdens of EDR is entitled to limited weight—both because she has minimal relevant experience and because her testimony is not probative of significant burdens on election administrators. Ms. Tucek has never administered an in-person election in Fergus County where there has been EDR, Aug. 23, 2022, Trial Tr. 1766:16-23 (Tucek) and has only ever registered one or two individuals in-person on Election Day using EDR in her entire career, *id.* at 1767:15-20 (Tucek). If anything, Ms. Tucek's testimony confirmed that HB 176 will not alleviate any administrative burdens. She testified that "it's confusing to constantly try to keep up with new laws passed by the Montana legislature." *Id.* at 1779:7-10 (Tucek). She further testified that it "usually" takes her less than five minutes to register a new voter, *id.* at 1768:24-1769:1 (Tucek), and that prior to HB 176 EDR occurred only at her county elections office, meaning that there are 16 precincts in Fergus County where only

already registered voters can cast a ballot on Election Day, *id.* at 1767:24-1768:11 (Tucek).

187. While administering the 2020 federal general election, Ms. Tucek stopped working on Petroleum County elections work at 9 p.m. and sent her election judges home at that time. *Id.* at 1769:21-1770:9 (Tucek). The election office in Fergus County has more than four times the number of staff members per registered voter, and the Petroleum County elections office has about 92 times the number of staff members per registered voter, than does Missoula County, *id.* at 1770:10-1775:4 (Tucek), whose election administrator testified against HB 176. Ms. Tucek offered no evidence of voter fraud or long lines to vote in either of her two counties, *id.* at 1769:2-12, 1775:9-1777:2 (Tucek), and she has had no professional experience involving Native American voters in Montana, *id.* at 1777:25-1778:19 (Tucek).

188. Gregory Hertz is a state senator representing Senate District 6. Aug. 24, 2022, Trial Tr. 1801:6-9 (Hertz). Senator Hertz characterized the enactments of HB 176, SB 169, and HB 530 as “preventative measures.” *Id.* at 1824:18-22 (Hertz). However, Senator Hertz also testified that Montana has a long history of secure and transparent elections. *Id.* at 1828:14-16 (Hertz). Senator Hertz believes that the best legislation is “thought out, vetted and has input from all stakeholders.” *Id.* at 1833:3-9 (Hertz).

189. However, when considering elections-related legislation, Senator Hertz never consulted with any elections administrators, *id.* at 1841:2-8 (Hertz), does not recall

if any constituents contacted him to raise concerns about voter fraud, *id.* at 1842:9-13 (Hertz), and did not conduct any surveys or polls of his constituents regarding the challenged laws, *id.* at 1842:23-1843:5 (Hertz). HB 530, § 2, in particular, received zero input from stakeholders because, with Senator Hertz' support, it was blasted to the Senate floor where there was no opportunity for public input. PTX126; Aug. 24, 2022, Trial Tr. 1887:17-24 (Hertz).

190. Senator Hertz believes HB 530, § 2 is a "good bill" but has never read any of the court opinions holding that a prior restriction on ballot collection was unconstitutional. *Id.* at 1909:4-12 (Hertz). In supporting HB 176 and SB 169, Senator Hertz disregarded overwhelming public opposition to those bills. *Id.* at 1850:8-11, 1852:5-12 (Hertz). Senator Hertz testified that he believes that student identifications are inadequate for purposes of demonstrating that a voter lives in a particular voting district in Montana. *Id.* at 1864:16-1866:2 (Hertz). However, he acknowledged that multiple other forms of primary identification likewise do not contain a voter's address. *Id.* at 1866:3-1868:2 (Hertz).

191. Senator Hertz testified that he supported HB 530, § 2 out of concern that payment for ballot collection might incentivize individuals to collect more ballots. *Id.* at 1873:24-1874:3 (Hertz). But, Senator Hertz admitted that he was unaware that the Plaintiff organizations do not pay ballot collectors per ballot. *Id.* at 1874:9-15 (Hertz). Senator Hertz also believes that a salaried employee collecting ballots, or a volunteer

who collects ballots but receives a gas card to cover expenses, is engaging in ballot collection in exchange for a pecuniary benefit. *Id.* at 1888:19-1889:3 (Hertz). Senator Hertz' testimony is neither competent nor credible: while he has publicly proclaimed that court cases should be decided on "facts, not feelings," *id.* at 1899:3-5 (Hertz), he admits that his support for the challenged laws is based on "just [his] feelings." *Id.* at 1899:9-15 (Hertz).

192. Bret Rutherford is the election administrator for Yellowstone County. Aug. 24, 2022, Trial Tr. 2047:19-22 (Rutherford). Although Mr. Rutherford testified that Yellowstone County has periodically seen long lines of voters on Election Day, he also asserted that there is a separate line at the centralized voting location (Metra Park) that services new voter registrations on Election Day. *Id.* at 2083:8-11 (Rutherford). He also testified that the primary cause of lines on Election Day is not EDR, but rather voter turnout. *Id.* at 2088:3-7 (Rutherford). Indeed, Mr. Rutherford testified that despite having "triple the amount of late registrations" in the 2016 general election as his county did in the 2012 general election, the lines in that 2016 general election were significantly shorter than they were in 2012. *Id.* at 2060:18-2066:11 (Rutherford).

193. During the June 2022 primary election, Yellowstone County was forced to turn away voters who were seeking to register and vote on Election Day. *Id.* at 2088:17-20 (Rutherford). Mr. Rutherford testified that he was unaware of any evidence of voter fraud or voter intimidation in Yellowstone County. *Id.* at 2091:10-23 (Rutherford). He

further testified that Yellowstone County elections are safe and secure. *Id.* at 2091:24-2092:1 (Rutherford). Mr. Rutherford testified competently and credibly.

194. Mr. James, Chief Counsel to the Secretary of State, testified on behalf of her Office. Mr. James testified that one of the Secretary's goals is to increase voter turnout. *Id.* at 2204:11-13 (James). Mr. James testified that one purpose of showing ID at the polls is to verify eligibility, *id.* at 2168:12-13, 20-22 (James), but the Secretary's own Election Judge Handbook expressly directs election workers to look at ID only to verify that the person is who they say they are and not to check any address on the ID. DTX599.091. And despite the Secretary's claim that SB 169 makes government issued ID primary and all other photo ID, including student ID, secondary, *see, e.g.*, Aug. 15, 2022, Trial Tr. 38:2-4, Mr. James, the drafter of the bill, admitted that even after SB 169 was enacted, he did not know whether Montana University System student IDs constitute government ID and that out-of-state driver's licenses are government-issued IDs. Aug. 25, 2022, Trial Tr. 2261:24-2262:17 (James).

195. Likewise, despite referring to provisional ballots as the "last failsafe," *id.* at 2184:2-8 (James), Mr. James acknowledged that provisional ballots are insufficient to safeguard an otherwise eligible voter's right to vote because provisional ballots are not always counted, *id.* at 2255:20-2256:2 (James).

196. The Secretary believes that Montana's elections are "secure" and "always will be." *Id.* at 2207:1-3 (James). Nevertheless, Mr. James researched historical examples



of voter fraud and intimidation at the Montana Historical Society dating back more than 100 years in an attempt to provide post hoc justification for the challenged laws. *Id.* at 2209:16-2210:13 (James). Mr. James did not dispute the testimony of five current or former election administrators that Montana's elections are free of voter fraud. *Id.* at 2213:14-2216:20 (James).

### **III. Voting on Indian Reservations in Montana**

197. Montana is home to seven Indian reservations: the Blackfeet Indian Reservation, the Crow Reservation, the Flathead Reservation, the Fort Belknap Reservation, the Fort Peck Indian Reservation, the Northern Cheyenne Indian Reservation, and the Rocky Boy's Reservation. These reservations intersect with sixteen counties: Glacier and Pondera Counties (the Blackfeet Indian Reservation), Big Horn and Yellowstone Counties (the Crow Reservation), Lake, Sanders, and Missoula Counties (the Flathead Reservation), Blaine and Phillips Counties (the Fort Belknap Reservation), Valley, Daniels, Roosevelt, and Sheridan Counties (the Fort Peck Indian Reservation), Big Horn and Rosebud Counties (the Northern Cheyenne Indian Reservation), and Hill and Chouteau Counties (the Rocky Boy's Reservation). Agreed Facts Nos. 19, 20.

198. In 2020, the counties with the highest proportion of Native Americans (Big Horn County, Roosevelt County, Blaine County, and Glacier County) had the lowest voter turnout. *Id.* at 220:19-221:7 (Weichelt). Voter turnout in Big Horn County was 65%,

Roosevelt County was 68%, Glacier County was 69%, Rosebud was 75%, and Blaine County was 76%. *Id.* The turnout in counties with larger Native American populations was lower compared to other counties. *Id.* at 221:5-7 (Weichelt). As the proportion of Native Americans increase, voter turnout decreases. *Id.* at 221:9-11 (Weichelt).

199. There is a long history of state and local governments disenfranchising Native American voters in Montana. *Id.* at 113:23-114:17 (McCool).

200. The reservations are home to thousands of Montana voters who lack equal access to registration and voting opportunities, and who experience greater barriers to casting mail ballots (both absentee and ballots in mail-only elections) than do other Montanans. Those barriers include:

1. Mail Service

201. There are limited mail routes and drop-off mail locations on rural reservations. Mail service is poor and/or non-existent on many reservations. *Id.* at 122:10-13 (McCool). A significant percentage of the Native Americans living on rural reservations have non-traditional mailing addresses, and many reservation homes do not have physical addresses, meaning the postal service does not deliver mail to their homes. *Id.* at 122:13-16 (McCool). Many Native Americans living on reservations do not have home mail delivery, and instead must use a P.O. box that is often a considerable distance from their home. *Id.* at 122:16-123:4 (McCool); *id.* at 218:16-20, 238:1-2 (Weichelt); Aug. 16, 2022, Trial Tr. 528:4-13 (Gray).

202. Postal delivery on reservations is often convoluted and inefficient due to limited mail routes and rural mail carriers. Aug. 15, 2022, Trial Tr. 122:12-18, 124:18-24 (McCool). Because of the large degree of absentee voting in Montana, the post office is an important site. *Id.* at 234:4-16 (Weichelt).

203. On average, voters on reservations must travel nearly twice as far as voters off reservation to access post offices. *Id.* at 228:6-229:14 (Weichelt). For example, on the Blackfeet Reservation, some members have to travel over 30 miles roundtrip to access their P.O. box. *Id.* at 233:2-13 (Weichelt). Post offices located in rural areas outside of reservations service fewer people than do post offices on reservations. *Id.* at 237:1-13 (Weichelt). On reservations, approximately 20 people per square mile are served by a post office, but in off-reservation rural areas, approximately 7.5 people per square mile were served by a post office. *Id.* at 237:8-13 (Weichelt).

204. Poor mail service also makes it more difficult for Native Americans in Montana to register to vote. *Id.* at 124:18-24 (McCool).

205. Post office hours on reservations are often limited. *Id.* at 230:21-232:17 (Weichelt). P.O. boxes are often shared and are not regularly checked. Many tribal members check their mail between once per week and once per month. When mail is collected from a P.O. box, it is not uncommon for it to be pooled among individuals. For example, on the Blackfeet Reservation, many members share post office boxes. Aug. 16, 2022, Trial Tr. 529:4-5 (Gray). There are not enough P.O. boxes to service the entire

population of tribal members. *Id.* at 529:11-12 (Gray). Additionally, “a lot of tribal members that cannot establish a residence cannot get their own post office box.” *Id.* at 529:4-13 (Gray). Blackfeet and Northern Cheyenne tribal members also have difficulty accessing their P.O. boxes because they are not accessible 24 hours a day. *Id.* at 530:1-2 (Gray); Aug. 17, 2022, Trial Tr. 718:2-18 (Spotted Elk). Saturday hours are “very limited” and “if you work, you’re not going to make the post office deadline.” Aug. 16, 2022, Trial Tr. 530:10-13 (Gray).

206. Challenging weather can also limit mail service. On Blackfeet Reservation, post office trucks regularly come in late during the wintertime. *Id.* at 530:23-531:2 (Gray); Aug. 17, 2022, Trial Tr. 859:16-23 (Horse). Senator Hertz, a resident of the Flathead Reservation, acknowledged that “when we have a bad storm, some people just don’t get to vote.” Aug. 24, 2022, Trial Tr. 1861:12-25 (Hertz).

207. Mail service on the Northern Cheyenne Reservation is very limited. There is only one mail route. Some tribal members share P.O. boxes, and access to P.O. boxes is only available during the limited hours that the post office is open. Aug. 17, 2022, Trial Tr. 717:9-23 (Spotted Elk).

208. Native Americans report low levels of trust in the Postal Service. Aug. 15, 2022, Trial Tr. 123:5-12 (McCool); Perez Dep. 113:4-9.

## 2. Income and Poverty

209. Native Americans consistently experience higher poverty rates than the rest of Montana's population. Aug. 15, 2022, Trial Tr. 93:3-7 (McCool).

210. 34% of Native Americans in Montana live in poverty, as compared to 10% of white Montanans. *Id.* at 88:10-15 (McCool). The child poverty rate for Native Americans in Montana is 42%, which is 29 percentage points higher than the overall child poverty rate in Montana (13%). *Id.* at 88:2-9 (McCool).

211. The overall poverty rate in Montana, 12.5%, is dwarfed by poverty rates on all reservations in Montana: 27.5% on the Blackfeet Indian Reservation, 24.1% on the Crow Reservation, 39.3% on the Fort Belknap Reservation, 28.5% on the Fort Peck Indian Reservation, 23.6% on the Northern Cheyenne Indian Reservation, 13.7% on the Flathead Reservation,<sup>8</sup> 37.5% on the Rocky Boy's Reservation, and 25.6% on the Turtle Mountain Reservation. PTX228.1; Aug. 15, 2022, Trial Tr. 85:9-87:2 (McCool).

212. Montana's unemployment rate is 3.5%, significantly lower than that on all reservations in Montana: 9.1% on the Blackfeet Indian Reservation, 16.3% on the Crow Reservation, 33.2% on the Fort Belknap Reservation, 14.2% on the Fort Peck Indian Reservation, 13.7% on the Northern Cheyenne Indian Reservation, 7.4% on the Flathead

---

<sup>8</sup> As multiple experts explained, *see* Aug. 15, 2022, Trial Tr. 85:20-22, 87:17-23 (McCool); *id.* at 223:5-17 (Weichert); Aug. 16, 2022, Trial Tr. 344:1-20 (Street), Flathead is a majority-white reservation. This large white population on Flathead Reservation inflates the reservation's socioeconomic indicators; if the reservation reported only its Native American population, the disparities between the reservation and the state would be more pronounced. *See* Aug. 15, 2022, Trial Tr. 87:17-23 (McCool). All data comparing Native Americans to the state of Montana as a whole also undersells the disparities between Native Americans and non-Native Americans in the state because Native Americans are included in the statistics for the state of Montana. *See id.* at 87:13-16 (McCool).

Reservation, 9.8% on the Rocky Boy's Reservation, and 9.9% on the Turtle Mountain Reservation. PTX228.1; Aug. 15, 2022, Trial Tr. 85:9-87:12 (McCool).

213. 12.4% of Montanans rely on food stamps, significantly fewer than on all reservations in Montana: 19.8% on the Blackfeet Indian Reservation, 20.5% on the Crow Reservation, 34.6% on the Fort Belknap Reservation, 18.3% on the Fort Peck Indian Reservation, 33% on the Northern Cheyenne Indian Reservation, 18.1% on the Flathead Reservation, and 48.6% on the Rocky Boy's Reservation. PTX228.2; Aug. 15, 2022, Trial Tr. 89:19-90:1 (McCool).

214. The extreme poverty and disparities in income facing Native Americans in Montana has "remained quite consistent" over time. Aug. 15, 2022, Trial Tr. 92:24-93:7 (McCool).

215. Approximately 80% of Blackfeet Reservation residents rely on at least one form of public assistance. Aug. 16, 2022, Trial Tr. 521:10-12 (Gray).

216. There is high unemployment, high poverty, and limited access to vehicles on the Northern Cheyenne Reservation. Aug. 17, 2022, Trial Tr. 713:2-10 (Spotted Elk).

217. One-third of Native Americans have reported that they were personally discriminated against in terms of being paid or promoted equally at work, and 31% report that they were personally discriminated in job applications—discrimination that harms Native Americans' economic well-being. Aug. 15, 2022, Trial Tr. 111:18-25 (McCool).

218. “The poorer you are, the less likely you are to participate and vote.” *Id.* at 81:15-21 (McCool). “The political science literature is quite clear that level of poverty is definitely a significant cost of voting and it tends to decrease turnout and political participation[.]” *Id.* at 93:8-13 (McCool); see also Aug. 22, 2022, Trial Tr. 1303:9-20 (Mayer).

3. Housing

219. Native American communities and homes often lack basic infrastructure commonly found off-reservation. Native American households in the United States are 19 times more likely than white households to lack running water. Aug. 15, 2022, Trial Tr. 96:2-9 (McCool). Almost half the homes on Native American reservations in the United States lack access to reliable water sources. *Id.* at 96:9-11 (McCool).

220. On reservations throughout Montana, some Native Americans live in poverty. Homes may lack indoor plumbing, electricity, heat, and running water. *Id.* at 93:18-19, 96:2-11 (McCool).

221. Racial disparities in home ownership in Montana are “very dramatic.” *Id.* at 95:2-4 (McCool). Native Americans in Montana have a home ownership rate of slightly more than 35%—about half the home ownership of white Montanans and less than the home ownership of Hispanics in Montana. *Id.* at 95:10-15 (McCool). The home ownership rate for Native Americans in Montana is far lower than that of the lowest-ranked counties in Montana and the broader United States. *Id.* at 95:16-19 (McCool).

222. One out of every five of homeless people in Montana is Native American, even though Native Americans comprise less than 7% of the state's total population. *Id.* at 87:13-14, 93:23-25 (McCool).

223. Native Americans face a higher rate of housing discrimination than any other ethnic minority in the United States. *Id.* at 96:12-97:2 (McCool).

224. 17% of Native Americans report that they have personally been discriminated against in trying to rent or buy housing. *Id.* at 112:7-8 (McCool).

225. Native Americans in Montana have a high rate of mobility, in large part due to housing shortages and lack of money for rent. Aug. 16, 2022, Trial Tr. 524:2-14 (Gray); Aug. 17, 2022, Trial Tr. 715:22-716:13 (Spotted Elk). There is also a housing shortage on reservation, contributing to the high mobility rate.

226. Homes on reservations are often overcrowded with multigenerational and extended families living under one roof. Aug. 15, 2022, Trial Tr. 93:18-20 (McCool); Aug. 16, 2022, Trial Tr. 526:15-527:5 (Gray); Aug. 17, 2022, Trial Tr. 715:24-716:1 (Spotted Elk); FBIC 30(b)(6) Dep. 191:12-14.

227. On Blackfeet Reservation, housing is "very limited and substandard." Aug. 16, 2022, Trial Tr. 524:2-4 (Gray). Many of the houses are below substandard by HUD regulations. *Id.* at 524:7-9 (Gray). "Substandard" conditions may include broken windows, broken doors, no functional plumbing, and mold. *Id.* at 524:15-22 (Gray).



228. Blackfeet Nation has a “housing waitlist of over a hundred on a regular basis.” *Id.* at 524:6-7 (Gray). Blackfeet Reservation also has a homeless population that struggles accessing basic needs including “clean water, place to sleep, food.” *Id.* at 525:17-22 (Gray).

229. On the Northern Cheyenne Reservation, there is a “need” for housing. Homelessness is an issue on the reservation. It is not uncommon for 10-15 people to share a home. Housing insecurity is also common on the reservation. Aug. 17, 2022, Trial Tr. 715:22-716:13 (Spotted Elk).

230. Being homeless or insecurely housed or having to move frequently increases the burden on voters to participate politically and stay registered to vote. Aug. 15, 2022, Trial Tr. 93:14-94:1 (McCool).

4. Health

231. Native Americans in Montana have much worse health outcomes than the general population. *Id.* at 97:14-25, 100:21-101:8 (McCool).

232. Native Americans in Montana are less healthy than even the least healthy county in the state. *Id.* at 100:17-101:2, 101:9-13 (McCool).

233. Native Americans in Montana have much worse health outcomes than any other racial group in the state. *Id.* at 101:3-8 (McCool). “There is a stunning difference in the length and quality of life between Native Americans and every other group.” *Id.* at 101:3-8 (McCool).

234. The three Montana counties with the highest Native American population—Big Horn, Glacier, and Roosevelt—report much worse health outcomes than the state as a whole. *Id.* at 98:17-100:9 (McCool).

235. In terms of premature death—measured in years lost through premature death per 100,000 population—Roosevelt (21,000), Big Horn (21,300), and Glacier (16,400) Counties perform much worse than Montana as a whole (7,100). *Id.* at 99:10-17 (McCool).

236. In terms of reported poor or fair health, Roosevelt (25%), Big Horn (26%), and Glacier (27%) Counties perform much worse than Montana as a whole (14%). *Id.* at 99:18-22 (McCool).

237. In terms of poor physical health days per 30 days, Roosevelt (5.6), Big Horn (5.2), and Glacier (5.9) Counties perform much worse than Montana as a whole (3.6). *Id.* at 99:23-100:2 (McCool).

238. In terms of poor mental health days per 30 days, Roosevelt (5.2), Big Horn (5.1), and Glacier (5.9) Counties perform much worse than Montana as a whole (3.9). *Id.* at 100:3-6 (McCool).

239. In terms of rates of low birthweight, Roosevelt (8%), Big Horn (8%), and Glacier (9%) Counties perform worse than Montana as a whole (7%). *Id.* at 100:7-9 (McCool).

240. Native Americans have the highest disability rate for any ethnic or racial group in the United States. *Id.* at 101:16-21 (McCool).

241. Nearly one in four Native Americans report that they have been personally discriminated against in a health care setting—which affects their health and well-being. *Id.* at 112:4-6 (McCool).

242. Being in poor physical or mental health makes it harder to participate politically and increases voter costs. *Id.* at 97:3-13 (McCool).

5. Education

243. Native Americans in Montana have “significantly lower” levels of educational attainment than white Montanans. *Id.* at 102:3-8 (McCool). These disparities have been fairly stable over time. *Id.* at 104:25-105:5 (McCool).

244. In Montana, 93.6% of residents have a high school degree. PTX228.4; Aug. 15, 2022, Trial Tr. 104:3-5 (McCool). That figure is higher than the percentage on every Native American reservation in the state—Blackfeet (89.6%), Crow (89.3%), Flathead (91%), Fort Belknap (87.6%), Fort Peck (86.4%), Northern Cheyenne (90.3%), Rocky Boy (82.7%), and Turtle Mountain (85.7%). PTX228.4; Aug. 15, 2022, Trial Tr. 104:6-21 (McCool).

245. In Montana, 32% of residents have a college degree. PTX228.4; Aug. 15, 2022, Trial Tr. 104:14-15 (McCool). That figure is higher than the percentage on every Native American reservation in the state—Blackfeet (21.4%), Crow (15.7%), Flathead

(26.8%), Fort Belknap (14.6%), Fort Peck (16.7%), Northern Cheyenne (15.4%), Rocky Boy (10.1%), and Turtle Mountain (17.4%). PTX228.4; Aug. 15, 2022, Trial Tr. 104:6-21 (McCool).

246. 13% of Native Americans report that they have been personally discriminated against in either applying to or attending college—which directly affects Native Americans’ ability to get an education. Aug. 15, 2022, Trial Tr. 112:9-12 (McCool).

247. Education is one of the best predictors of political participation. Those who are better educated are more likely to participate politically than those who are not. *Id.* at 101:22-102:2 (McCool); Aug. 22, 2022, Trial Tr. 1301:19-1302:12 (Mayer).

6. Internet Access

248. Native Americans living on reservations in Montana have limited access to computers and broadband internet, which further reduces their ability to obtain information about voting opportunities and deadlines. Aug. 15, 2022, Trial Tr. 107:23-108:3 (McCool).

249. In Montana, 88.9% of households have a computer, far more than in every Native American reservation in the state—Blackfeet (65.4%), Crow (71.9%), Flathead (86.8%), Fort Belknap (74.2%), Fort Peck (74%), Northern Cheyenne (71.7%), Rocky Boy’s (58.8%), and Turtle Mountain (77.3%). PTX228.5; Aug. 15, 2022, Trial Tr. 107:23-108:22 (McCool).

250. In Montana, 80.7% of households have an internet subscription, far more than in every Native American reservation in the state—Blackfeet (60.3%), Crow (59.3%), Flathead (75%), Fort Belknap (62.7%), Fort Peck (60.6%), Northern Cheyenne (52.8%), Rocky Boy's (47.9%), and Turtle Mountain (65.6%). PTX228.5; Aug. 15, 2022, Trial Tr. 107:23-108:22 (McCool).

251. Nationally, the internet subscription rate for Native Americans is 67%, compared to 82% for non-Native American households. Aug. 15, 2022, Trial Tr. 106:16-19 (McCool).

252. 35% of households on Native American reservations in the United States do not have broadband service, compared to just 8% of the nation as a whole. *Id.* at 106:14-16 (McCool).

253. On Blackfeet Reservation, internet access is "very poor and spotty." Aug. 16, 2022, Trial Tr. 522:13-15 (Gray). Many tribal members do not have access to personal computers for internet use. *Id.* at 523:18-524:1 (Gray). Some places on Blackfeet Reservation "simply don't have an infrastructure for internet." *Id.* at 522:20 (Gray). Areas without infrastructure for internet access include Heart Butte, Babb, St. Mary, and East Glacier. *Id.* at 523:2-11 (Gray). In areas with infrastructure for internet, access is expensive. *Id.* at 522:21-22 (Gray).

254. There is very limited internet access on the Northern Cheyenne Reservation. Aug. 17, 2022, Trial Tr. 714:15-19 (Spotted Elk).

255. Lack of access to the internet makes it harder to access information on elections and political participation, which increases information costs and voter costs. Aug. 15, 2022, Trial Tr. 105:6-15, 149:21-25 (McCool); Aug. 17, 2022, Trial Tr. 858:7-17 (Horse); PTX262.

7. *Criminal Justice*

256. Native Americans are overrepresented in the criminal justice system. In 2010, Native Americans comprised 22% of Montana's population in jails and prisons, despite making up only 6% of the state's population at that time. Aug. 15, 2022, Trial Tr. 110:1-6 (McCool).

257. Today, Native Americans comprise 18% of Montana's population in jails and prisons—still more than twice as high as their statewide population. *Id.* at 87:13-14, 110:7-11 (McCool).

258. Incarcerated individuals cannot vote in Montana, meaning that Native Americans are disproportionately disenfranchised in the state. *Id.* at 109:5-6 (McCool). Incarceration also negatively impacts future employment and one's earning potential; "there's a very close correlation between income levels and incarceration rates." *Id.* at 109:7-16 (McCool).

259. Twenty-nine percent of Native Americans report that they have been personally discriminated against when interacting with police—which has an impact on arrest and incarceration rates. *Id.* at 112:1-3 (McCool).

260. Native Americans in Montana are disproportionately the victims of crime. *Id.* at 150:17-151:2 (McCool). There are exceptionally high rates of violence against Native American women in particular—84% of Native American women report that they have been the victim of a violent crime, and the rate of rape of Native American women is ten times the national average. *Id.* at 150:17-151:2 (McCool). This rate of violence, and the reasonable fear that accompanies it, is an additional voter cost for Native Americans in Montana. *Id.* at 150:20-23 (McCool).

8. Traveling to Vote and Registering to Vote

261. Higher poverty levels result in a lack of working vehicles and money for gasoline, car insurance, a driver's license, and maintaining a working vehicle, all of which means that Native Americans in Montana have disproportionate travel costs. *Id.* at 120:25-121:6 (McCool); *id.* at 217:13-218:11 (Weichelt).

262. "There are dramatic differences between Native American vehicle availability and Anglo vehicle availability." *Id.* at 91:12-16 (McCool). In three Montana counties for which data is available, Native American households were far likelier to report lacking access to a vehicle, as compared to white Montanans in the same counties. These counties were Big Horn (6.5% of Native American residents lacking a vehicle, compared to 1.9% of white residents), Blaine (14.2% to 4.1%), and Rosebud (8.8% to 4%). PTX228.3; Aug. 15, 2022, Trial Tr. 91:12-92:3, 120:25-121:6 (McCool).

263. On the Blackfeet Reservation, access to reliable vehicles is “very limited.” Aug. 16, 2022, Trial Tr. 521:13-16 (Gray). Roads on Blackfeet Reservation are “not very well maintained.” *Id.* at 533:6-10 (Gray). Those living on the reservation must “drive two hours just to shop for a reliable vehicle.” *Id.* at 521:13-19 (Gray).

264. Four-wheel drive or all-wheel drive vehicles are preferred for driving on the reservation roads, and they’re expensive. *Id.* at 533:19-534:4 (Gray). “If you don’t have a job or credit, you’re going to get into one of the deals where there’s maybe high interest rates and a low performing car, a used car.” *Id.* at 521:19-22 (Gray). It is also expensive to repair vehicles or access a new line of credit when cars break down. *Id.* at 521:23-25 (Gray). Access to finances for gasoline for vehicles is also a problem on Blackfeet Reservation. *Id.* at 522:1-3 (Gray).

265. Challenging weather also makes travel difficult, particularly in the election month of November. Aug. 17, 2022, Trial Tr. 859:16-20 (Horse). On the Blackfeet Reservation, there is snowfall 8 to 9 months of the year. Snow, ice, and wind create hazardous road conditions that make travel difficult or impossible. Aug. 16, 2022, Trial Tr. 532:4-533:5 (Gray). Likewise on the Northern Cheyenne Reservation, tribal members must navigate ice and snow on roads in November. Aug. 17, 2022, Trial Tr. 719:16-720:2 (Spotted Elk).

266. For many Native Americans living on rural reservations, vehicles are scarce and often shared among overcrowded homes. Aug. 16, 2022, Trial Tr. 521:13-25



(Gray). As a result, households often rely on a single vehicle for getting to and from work, to all social engagements, doctor's office visits, as well as any mail runs or ballot drop offs. In winter months, only the most reliable vehicles, if any, can traverse the poor roads from homes to the main roads. Aug. 17, 2022, Trial Tr. 713:16-714:8 (Spotted Elk).

267. On the Blackfeet Reservation, limited public transportation is available through Blackfeet transit buses. Aug. 16, 2022, Trial Tr. 522:4-9 (Gray). Six buses run daily during the week, and each bus seats about six people. Id. at 522:7-12 (Gray).

Similarly, on the Northern Cheyenne Reservation, public transportation is available; however, the transit service runs only certain days of the week. Aug. 17, 2022, Trial Tr. 714:9-14 (Spotted Elk).

268. Thus, many Native Americans living on rural reservations without home mail access, or who utilize P.O. boxes because they are moving from home to home because they lack a permanent address, may have serious difficulties getting to their P.O. box due to distance, socioeconomic conditions, lack of reliable transportation, and weather. Aug. 15, 2022, Trial Tr. 92:4-12, 121:3-9, 153:18-20 (McCool); id. at 228:18-25 (Weichelt); Aug. 16, 2022, Trial Tr. 534:20-535:4 (Gray).

269. Ballots and registration applications may be dropped off at county election offices during the full early voting period. Agreed Fact No. 29. County election offices are generally open from 8 a.m. or 9 a.m. to 5 p.m., five days per week. The county election offices are only located in county seats. § 13-2-201, MCA. With the

exception of Lake and Roosevelt Counties, all county seats are located outside reservations. *See* Perez Dep. 140:14-18, 141:2-9 (Mr. Perez also testified that some reservations do have satellite elections offices that provide voter services. *Id.* at 140:11-22).

270. Native Americans living on-reservation in Montana, on average, must travel longer distances to visit the post office, the DMV, and the county seats where voter registration occurs. Aug. 15, 2022, Trial Tr. 228:11-17, 240:5-8, 247:16-19, 256:2-13 (Weichelt).

271. The average distance of all reservations (excluding the Flathead Reservation, which is majority white so does not provide information regarding the distances Native American voters must travel) is 36.8 miles to the county seat, or 73.6 miles roundtrip. *Id.* at 241:4-8 (Weichelt). And, within each reservation community, there are people who have to travel significantly farther. For example, the longest distance a person on Fort Belknap has to travel to the county seat is 64.1 miles or 128.2 miles roundtrip, on Blackfeet: 69.6 miles or 139.2 miles roundtrip, on Fort Peck: 55 miles or 110 miles roundtrip, on the Crow Reservation: 60.4 miles or 120.8 miles roundtrip. *Id.* at 241:15-23, 242:1-2 (Weichelt); see also *id.* at 120:18-20 (McCool); Aug. 16, 2022, Trial Tr. 520:13-19 (Gray). For some locations on the Northern Cheyenne Reservation, it can be 120 miles round-trip to get to the county seat. Aug. 17, 2022, Trial Tr. 710:24-711:3 (Spotted Elk); see also Aug. 15, 2022, Trial Tr. 120:20-22 (McCool) (for one town on

Northern Cheyenne, the round-trip distance to the county seat is 157 miles). These distances are “extreme costs.” Aug. 15, 2022, Trial Tr. 242:23-243:3 (Weichelt).

272. Further, “border towns,” or towns that border reservations, are notorious for their racism and discrimination toward Native Americans. *Id.* at 112:18-113:6, 113:13-22 (McCool); Aug. 16, 2022, Trial Tr. 548:6-21 (Gray); Aug. 17, 2022, Trial Tr. 730:10-14 (Spotted Elk); Perez Dep. 142:4-15, 144:3-16, 145:15-146:14; PTX262; PTX240; PTX320. For example, white nationalist and neo-Nazi signs are present in Flathead County. Aug. 24, 2022, Trial Tr. 1905:13-16 (Hertz). This is significant because border towns are where Native Americans often register to vote, pick up election materials, and cast in-person absentee ballots. Aug. 15, 2022, Trial Tr. 75:22-76:3, 113:7-15 (McCool); Aug. 16, 2022, Trial Tr. 548:22-549:10 (Gray); Perez Dep. 142:4-15, 144:3-16.

273. Ten percent of Native Americans have experienced discrimination when attempting to vote or participate in political activities. Aug. 15, 2022, Trial Tr. 111:11-14, 112:13-14 (McCool).

274. Thus, Native American voters experience an additional burden when voting outside of a reservation.

9. *Satellite Polling Locations*

275. In-person early voting and late registration starts 30 days prior to Election Day. §§ 13-13-205(1)(a)(i); 13-2-301, MCA. Some counties have opened satellite election offices on reservations, but generally those satellite locations are open for only a few of

the days (and for limited hours) of the early voting period. Aug. 15, 2022, Trial Tr. 244:3-19, 262:7-11 (Weichelt); Aug. 17, 2022, Trial Tr. 854:15-22 (Horse); PTX184; PTX185.

276. Unlike on other reservations, on Blackfeet, a year-round satellite election office with voter registration services is available in Browning, Montana. Aug. 25, 2022, Trial Tr. 2289:7-13. However, the availability of those services is not well known among Blackfeet residents, and there “has been no information on it” circulated on the reservation. Aug. 17, 2022, Trial Tr. 574:6-9, 577:9-15 (Gray). The managing attorney of the Blackfeet Tribe was unaware that registration was available at that site and was surprised that it was available. *Id.* at 573:23-574:7 (Gray).

277. Only on the Blackfeet Indian Reservation was there a satellite location on reservation where, prior to enactment of HB 176, voters could access EDR. Aug. 16, 2022, Trial Tr. 542:11-21 (Gray); PTX184; PTX185.

278. The fact that on-reservation satellite offices are open for only a fraction of the early voting and late registration periods—“not . . . very often, maybe a handful of days. Their hours are very short,” Aug. 15, 2022, Trial Tr. 244:3-7 (Weichelt)—means that Native American voters living on rural reservations have reduced access to early voting and late registration even when they are able to make it to the satellite office. *Id.* at 244:3-16 (Weichelt). On Blackfeet Reservation, there were long lines at the satellite location in November 2020 since it allowed “three or four people at a time inside.” Aug. 16, 2022, Trial Tr. 544:19-545:5 (Gray).

279. Strained relationships between tribes and county officials can make requesting, negotiating, and securing satellite offices difficult. For example, Blackfeet Nation had to sue Pondera County over their refusal to provide on reservation voter services for the 2020 election, despite providing in person voter services at the county seat. Blackfeet Nation also had to threaten legal action to have the Glacier County clerk provide ballot drop boxes for the 2020 election. Aug. 16, 2022, Trial Tr. 546:2-547:1 (Gray).

10. Native American Reliance on EDR and Ballot Collection

280. Given the inaccessibility of mail service and polling locations, many tribal members register and/or change their registration on the same day as the day that they vote. Aug. 16, 2022, Trial Tr. 543:7-23 (Gray).

281. On reservations without EDR, organizations like WNV and MNV provide rides to the county seat for EDR and voting. In 2020, a WNV organizer drove 150 people from the Crow Reservation to register to vote at the Big Horn County elections office. Perez Dep. 166:24-167:3; Aug. 17, 2022, Trial Tr. 856:19-25 (Horse); Aug. 18, 2022, Trial Tr. 874:12-15 (Horse). Recognizing the need to provide access for its unregistered members, CSKT has also historically provided rides to register and vote on Election Day. McDonald Dep. 19:17-21, 27:19-28:16.

282. Native Americans living on-reservation in Montana use EDR at consistently higher rates than the rest of the population, in both primary and general

elections. Aug. 16, 2022, Trial Tr. 350:24-351:15, 353:16-23, 355:16-23 (Street). This is especially true on the Blackfeet Reservation, where there is generally a satellite location allowing for registration and voting on Election Day. PTX184; PTX185.

283. Because of the many socioeconomic barriers, Native American voters in rural reservation communities also disproportionately rely on third parties' collection and conveyance of their ballots to cast their votes. Aug. 17, 2022, Trial Tr. 720:17-723:4 (Spotted Elk); Aug. 16, 2022, Trial Tr. 534:6-538:20 (Gray); Aug. 15, 2022, Trial Tr. 242:19-243:3 (Weichelt); Aug. 16, 2022, Trial Tr. 333:1-334:14, 334:17-335:6, 335:14-17, 337:9-338:5, 355:24-362:5, 371:15-372:20, 397:15-398:2, 437:19-438:23 (Street). Groups like WNV and MNV play an integral role in facilitating voting access for tribal community members, by providing a range of services from hosting voter registration drives to collecting and conveying their absentee ballots. Aug. 17, 2022, Trial Tr. 821:2-5, 833:15-834:2, 835:14-25 (Horse); Perez Dep. 37:15-38:11, 240:10-21; PTX276.

284. WNV and MNV typically hire dozens of community organizers to collect and convey ballots for Native American voters on reservations. PTX261; Aug. 17, 2022, Trial Tr. 821:19-823:6 (Horse); Perez Dep. 136:14-20.

285. In the 2020 general election, after BIPA was permanently enjoined by two Yellowstone County district court judges, WNV and MNV paid organizers to collect and convey hundreds of ballots. PTX261; Aug. 17, 2022, Trial Tr. 821:19-823:6 (Horse); Perez Dep. 136:14-20.

286. WNV and MNV's ballot collection activities have never been the subject of a complaint or investigation by Montana's Commissioner of Political Practices. Aug. 17, 2022, Trial Tr. 859:24-860:18 (Horse); *see generally* Aug. 24, 2022, Trial Tr. 2093:17-25 (Rutherford).

287. To evaluate HB 530, § 2's disproportionate effect on Native American voters, it is instructive to look at Montana's 2020 primary election. Just days before that election, BIPA—a substantially similar law to HB 530, § 2—was enjoined. However, the law was on the books leading up to the election, preventing groups like MNV from providing ballot collection. In that primary election, the turnout rate for absentee voters living off-reservation dropped only by 0.2%, while the turnout rate for absentee voters living on-reservation dropped by 3.5%. This finding indicates that BIPA, which prohibited MNV's and other groups' ballot collection work in the same way HB 530, § 2 does, had a disproportionate negative effect on Native American voters living on-reservation. Aug. 16, 2022, Trial Tr. 363:16-366:14 (Street).

288. Similarly, the rejection rate of absentee ballots in that primary election for problems that ballot collectors could help fix was higher than in prior elections on Native American reservations, but not off-reservation. *Id.* at 368:17-371:5 (Street).

289. Montanans on Native American reservations are also likelier in both primary and general elections to request absentee ballots in the late registration period, making them “considerably more” reliant on absentee voting. *Id.* at 357:18-359:21

(Street). This pattern is driven by the more Native parts of the reservations. *Id.* at 357:23-358:3 (Street).

#### **IV. Youth Voting in Montana**

290. Over the last decade, youth voter turnout in Montana has increased dramatically. Aug. 17, 2022, Trial Tr. 675:18-25 (Iwai); FMF 30(b)(6) Dep. 107:18-23.

291. Young people tend to move more frequently than older people. *See* Aug. 22, 2022, Trial Tr. 1329:13-15 (Mayer); *see also, e.g.*, Aug. 16, 2022, Trial Tr. 473:13-18 (Bogle) (explaining that he moved to Montana from another state with his wife and infant daughter); Aug. 17, 2022, Trial Tr. 630:2-24 (Denson) (explaining that she moved twice in the summer of 2021).

292. Younger voters are far more likely to rely on EDR than older voters. *See* Aug. 22, 2022, Trial Tr. 1305:25-1306:2, 1328:18-1329:18 (Mayer). Because younger and first-time voters tend to move more frequently, and are less familiar with voting requirements and processes, eliminating EDR burdens them more heavily than it does older adults. *See id.*

293. Just over 10% of Montana voters are youth aged 18 to 24, but since 2008, more than 30% of voters registering on Election Day are aged 18 to 24. *See id.* at 1325:13-1329:1 (Mayer); PTX222.



294. In Montana, only 71.5% of 18- to 24-year-olds have a Montana driver's license, while nearly 95% of the over-18 population possesses one. Aug. 22, 2022, Trial Tr. 1358:16-25 (Mayer).

295. Over 10,000 students attend public universities in Montana from out of state. *Id.* at 1361:16-21 (Mayer). For those who register to vote in Montana, being unable to use student ID or an out-of-state driver's license to vote without additional documents poses a particular burden. *Id.* at 1362:12-1363:2 (Mayer).

## **V. Election Practices**

296. In most counties, the Clerk and Recorder is also the Elections Administrator. *See* Aug. 22, 2022, Trial Tr. 1486:4-7 (Plettenberg). Bradley Seaman described that being the elections administrator for Missoula County is "more than [a] full-time" position. Aug. 18, 2022, Trial Tr. 1032:3-5 (Seaman).

297. In rural counties, Election Administrators can hold multiple positions at once. *See e.g.*, Aug. 23, 2022, Trial Tr. 1546:11-25 (Custer). Some larger counties have the financial ability to appoint an election administrator because there are elections happening all the time in larger counties—not just primary and general elections. *Id.* at 1572:2-8 (Custer).

298. Montana has long had two registration periods. During regular registration, which lasts until 30 days before an election, voters can register in person, by mail, by fax, or by sending a clear digital image of their signed registration

application to their election official via email. § 13-2-301, MCA; Mont. Admin. R. 44.3.2003; Aug. 18, 2022, Trial Tr. 904:16-23 (Seaman). For the “late registration” period, voters may only register in-person at their election official’s office. §§ 13-2-301, 13-2-304, MCA; Mont. Admin. R. 44.3.2015.

299. As a matter of election administration, the processes for registering voters during the regularly registration period and the late registration period are nearly identical. Aug. 18, 2022, Trial Tr. 909:17-910-1 (Seaman). The only difference is that, during the late registration period, election officials simultaneously issue registration applications and absentee ballots for the upcoming election. *Id.* at 909:24-910:08 (Seaman). Montana allows voters to register to vote and vote on the same day at any time during the late registration period. Aug. 19, 2022, Trial Tr. 1238:5-11 (Seaman).

300. Election Administrators’ estimates as to how long it takes to register a person to vote vary: Doug Ellis estimated it takes approximately twenty minutes to complete the process, Aug. 23, 2022, Trial Tr. 1682:23-1683:20 (Ellis); Rep. Custer estimated it takes between two and ten minutes, Aug. 23, 2022, Trial Tr. 1571:7-16 (Custer); Bradley Seaman estimated it takes between three to five minutes to register a person to vote. Aug. 18, 2022, Trial Tr. 909:8-12 (Seaman). And, Bret Rutherford testified it can take up to fifteen minutes. Aug. 24, 2022, Trial Tr. 2063:17-2065:4 (Rutherford).

301. County election officials do not confirm the eligibility information on voter registration forms because Montana is a self-affirming state. Aug. 18, 2022, Trial

Tr. 907:19-23 (Seaman). When registering, registrants sign an affirmation on the bottom of the registration form, stating that under penalty of perjury, they meet Montana's eligibility requirements. *Id.* at 907:24-908:2 (Seaman). The only verification county election officials do is confirm that the check boxes on the registration form are checked. *Id.* at 908:3-5 (Seaman).

302. Voter confirmation cards are provided in person or by mail to all newly registered voters. Aug. 18, 2022, Trial Tr. 1033:8-20 (Seaman). A voter confirmation card is a gender affirming form of identification as long as it reflects the voter's correct name. Aug. 19, 2022, Trial Tr. 1178:5-12 (Reagor).

303. Prior to Election Day, election administrators must conduct voter list maintenance, absentee voter maintenance, process petition signatures, order supplies and prepare equipment. Aug. 18, 2022, Trial Tr. 930:18-931:11 (Seaman).

304. During the month before an election, election administrators recruit aides and assistants, mail out ballots, receive ballots, track ballots, verify signatures, certify and test equipment, prepare equipment for polling places, and certify ballots. Aug. 18, 2022, Trial Tr. 931:12-933:9 (Seaman).

305. Prior to running an election, election administrators hire additional staff to assist with running the election and staff polling locations. *See* Aug. 23, 2022, Trial Tr. 1661:7-13 (Ellis). It can be difficult to find poll workers for election day. Aug. 24, 2022, Trial Tr. 2048:12-24 (Rutherford).

306. On Election Day, election administrators typically start their day early because they are in charge of all the polling places and need to deliver voting machines to the precincts, test the machines, set the machines up, and swear in poll workers. Aug. 23, 2022, Trial Tr. 1674:9-1675:13 (Ellis); Aug. 18, 2022, Trial Tr. 936:4-937:17 (Seaman). Additionally, the election administrator has to be available to answer questions and run various election-related errands. Aug. 23, 2022, Trial Tr. 1566:2-1568:3 (Custer).

307. To register a new voter on Election Day, staff must check their ID, give them a voter registration card, input their information into the database, determine which precinct they are in, issue a ballot for that precinct and then distribute and receive that ballot. Aug. 23, 2022, Trial Tr. 1682:1-22 (Ellis).

308. To register a voter from a different county as a new registrant on Election Day requires staff identify the voter in the database, check to see if they have been issued a ballot by the other county. If the ballot has been issued, staff must call the issuing county to determine whether the ballot has been voted or not. If the ballot has not been voted, the issuing county will cancel the ballot and the voter, and the new county will issue the voter a ballot for their precinct. Aug. 23, 2022, Trial Tr. 1683:3-21 (Ellis). Mr. Rutherford noted it can take up to fifteen minutes to void a ballot when processing a person who has moved from one county to another as a new registrant on Election Day. Aug. 24, 2022, Trial Tr. 2064:20-2065:4 (Rutherford).

309. Bringing in temporary employees to work on Election Day does not alleviate the burdens posed by Election Day Registration because it takes a while for workers to be trained and understand all of the processes. Aug. 23, 2022, Trial Tr. 1634:12-19 (Custer).

310. Election Day is the busiest day in the Clerk and Recorder's office. Aug. 24, 2022, Trial Tr. 2053:10-12 (Rutherford).

311. Yellowstone County moved elections operations to the Metra Park partially due to the amount of people showing up at the election's office at the courthouse to take advantage of Election Day Registration. Aug. 24, 2022, Trial Tr. 2056:17-2057:7 (Rutherford).

312. In 2016, Yellowstone County received three times as many late registrations as they did in 2012. Aug. 24, 2022, Trial Tr. 2065:9-14 (Rutherford). To handle that many election day registrations, Yellowstone County election staff issued provisional ballots to election day registrants and processed their registrations during the four days after the election. *Id.* at 2065:15-2066:17 (Rutherford). Of all the ballots issued Yellowstone County at the Metra on Election Day in 2020, two-thirds were late registrations. *Id.* at 2069:1-3 (Rutherford).

313. Election Administrators work long hours on Election Day. Representative Custer testified that if she got home at 2 a.m. it was a good day. Aug. 23, 2022, Trial Tr. 1568:4-7 (Custer). Mr. Ellis testified that, during his first election, he worked from 5 a.m.

until 4 a.m. the next morning. Aug. 23, 2022, Trial Tr. 1674:1-3 (Ellis). Ms. Tucek testified that on Election Day in 2020, she had completed her responsibilities as the election administrator for Petroleum County by 8:30 p.m. but had to remain at the office until after 11 p.m. because other counties were reporting that they had long lines of voters waiting to register and she needed to be able to void a ballot if a voter from Petroleum County attempted to register in a new county. Aug. 23, 2022, Trial Tr. 1739:3-1740:7 (Tucek). Mr. Seaman generally works from 5 a.m. to midnight on federal general election days. Aug. 17, 2022, Trial Tr. 1039:17-21 (Seaman).

## **VI. The Contested Laws**

### **A. HB 176**

314. In 2005, the Montana Legislature passed EDR into law. PTX013; Agreed Fact No. 28. EDR's enactment meant that the late registration period included Election Day. § 13-2-301, MCA (2021); Mont. Admin. R. 44.3.2015 (2021). As even the Secretary admits, EDR was an improvement in Montana's election processes. Aug. 25, 2022, Trial Tr. 2232:5-15 (James).

315. Montana's Constitutional Convention Delegates stated that "if the Legislature provides for a system of poll booth registration, they're not locked in...but the Legislature is mandated, also, that they shall insure the purity of elections, and...with that language, we've avoided the objectionable parts of the minority report,

still give the people the idea that we are for liberalization of the voting procedure and make it workable.” Mont. Const. Convention Tr., at 450 (Feb. 17, 1972).

316. EDR has helped boost voter turnout in Montana. Representative Custer testified that election administrators “were just overwhelmed at how many people used it.” Aug. 23, 2022, Trial Tr. 1564:10-11 (Custer). Lines at Metra Park in Yellowstone County specifically for EDR voters indicate that many voters rely on EDR. Aug. 24, 2022, Trial Tr. 2087:20-24 (Rutherford). In 2000, only 59.9 percent of registered voters in Montana voted. PTX188. By 2016, that number had jumped to 74.4 percent, and in 2020, 81.3 percent of registered voters participated in the election. PTX188.

317. Since 2006, when EDR first became available, and the enactment of HB 176, more than 70,000 Montanans relied on EDR to successfully cast a ballot. Aug. 22, 2022, Trial Tr. 1314:6-8 (Mayer); Aug. 23, 2022, Trial Tr. 1565:6-11 (Custer); Aug. 15, 2022, Trial Tr. 119:12-19 (McCool); PTX219.

318. Election Day has become the most utilized day for late voter registration. Aug. 22, 2022, Trial Tr. 1314:11-16 (Mayer). In the 2020 general election, for example, half of all late registrants registered to vote on Election Day. PTX219; Aug. 16, 2022, Trial Tr. 379:24-380:7 (Street). This is a consistent pattern across years. *Id.* at 380:8-21 (Street). In almost every election since 2006, the number of Montanans who registered on Election Day nearly matched the number who registered during the other 29 days of late registration combined. Aug. 22, 2022, Trial Tr. 1314:9-16 (Mayer); PTX219. Indeed,

23 times as many people used EDR as made use of late registration on the average pre-election day of the late registration period. Aug. 16, 2022, Trial Tr. 379:4-9 (Street). In 2018, for example, an average of 515 Montanans registered to vote each day during the late registration period before the general election, but 8,053 registered on Election Day. *See* PTX219.

319. EDR's popularity has only grown over time: in 2006, 4,351 Montanans registered on Election Day as compared to more than 12,000 in 2016. PTX219; PTX220. Indeed, Mr. Rutherford testified that Yellowstone County was forced to move centralized elections services from the county building to Metra Park because there were so many voters utilizing EDR. Aug. 24, 2022, Trial Tr. 2081:4-11 (Rutherford).

320. "EDR has the largest effect on increasing turnout" than any other singular elections administrative practice. Aug. 22, 2022, Trial Tr. 1307:10-12 (Mayer). EDR has been repeatedly shown to increase voter turnout. Aug. 16, 2022, Trial Tr. 374:1-10, 377:1-7 (Street). Nationally, studies have shown that EDR boosts voter participation between two and seven percentage points. Aug. 22, 2022, Trial Tr. 1307:3-6 (Mayer); *see also* Aug. 16, 2022, Trial Tr. 377:1-7 (Street). There is a clear consensus in the empirical political science literature that EDR is likely to increase voter turnout, and repealing EDR is likely to reduce voter turnout. Aug. 15, 2022, Trial Tr. 115:8-12 (McCool); Aug. 16, 2022, Trial Tr. 374:1-10, 377:1-7 (Street). EDR's causal effect on turnout is "one of . . . the more



widely agreed [upon] patterns in the study of American elections.” Aug. 16, 2022, Trial Tr. 377:18-22 (Street).

321. Montana-specific studies have shown that EDR has boosted turnout by 1.5 percentage points. Aug. 22, 2022, Trial Tr. 1308:12-19 (Mayer). EDR increases voter turnout more than any other single voting procedure because it reduces the cost of voting by combining both registration and voting into a single administrative step, and it allows voters who are not activated early in the election period the opportunity to register and vote when attention to the election has peaked on Election Day. Aug. 15, 2022, Trial Tr. 115:13-116:8 (McCool); Aug. 16, 2022, Trial Tr. 330:25-331:17 (Street); Aug. 22, 2022, Trial Tr. 1308:15-1309:9 (Mayer), *id.* at 1455:11-1458:16 (Franks-Ongoy).

322. As a result, EDR is particularly popular with young voters and in areas with high student and military populations. Young voters in Montana have used EDR at much higher rates than older voters. *See* Aug. 22, 2022, Trial Tr. 1328:18-1329:1 (Mayer). The precincts with the highest number of voters who have used EDR are in Great Falls, home to Malstrom Air Force base, Missoula, home to the University of Montana, and Bozeman, home to Montana State University. Aug. 22, 2022, Trial Tr. 1336:21-1337:20 (Mayer); *see also* Aug. 18, 2022, Trial Tr. 927:24-928:2 (Seaman) (noting that “Missoula is pretty transitory, so we have a lot of voters who moved out, graduated college and moved”).

323. And Montanans living on-reservation make disproportionate use of EDR compared to those living off-reservation, with the prevalence of EDR increasing in on-reservation precincts with greater Native American populations. Aug. 16, 2022, Trial Tr. 355:6-23 (Street).

324. Voters provide the same information on Election Day as they do during the regular registration period. At both times, voters must provide three things: (1) identifying information, including the voter's name, current address, birth date, and either their driver's license number or social security number; (2) eligibility information, including that the voter will be at least 18 years old by the time of the next election and has been a resident of Montana for at least 30 days; (3) an affirmation, under the penalty of perjury, that the information provided is correct. Aug. 18, 2022, Trial Tr. 906:8-908:8 (Seaman).

325. In Montana, voters self-affirm their eligibility to vote. *Id.* at 907:23 (Seaman); Aug. 23, 2022, Trial Tr. 1610:20-23 (Custer). Accordingly, the only verification election officials do of voter eligibility is ensuring that voters provided the required eligibility information on their voter registration form and signed an affirmation under the penalty of perjury. Aug. 18, 2022, Trial Tr. 907:23-908:17 (Seaman); Aug. 23, 2022, Trial Tr. 1608:21-24 (Custer).

326. Unlike eligibility, a registering voter's identity is checked against external information. Aug. 18, 2022, Trial Tr. 911:16-912:5 (Seaman). Election officials enter the

identifying information from a registration application into the statewide voter database, which automatically verifies that information against the Social Security Administration's database and DMV information. *Id.*; Aug. 23, 2022, Trial Tr. 1585:7-21 (Custer)

327. EDR is more secure than registration outside the late registration period, as voters using EDR must affirm in person before an election official and under penalty of perjury that the information on their application is true. Aug. 18, 2022, Trial Tr. 909:18-21 (Seaman); *see also* Aug. 22, 2022, Trial Tr. 1508:5-1510:22 (Plettenberg) (noting many safeguards in place for ensuring the integrity of votes cast using EDR). That face-to-face interaction that is itself a barrier to fraud. PTX070 at 47:16-48:8, 51:13-52:3.

328. Additionally, only during the late registration period, including on Election Day, the statewide registration system flags whether an in-person applicant is registered elsewhere or has already received an absentee ballot. PTX070 at 51:21-52:3, 76:8-24. As a result, voters who were registered elsewhere previously or had already received an absentee ballot are prevented from casting more than one ballot. Aug. 18, 2022, Trial Tr. 912:19-913:3 (Seaman). But they are not disenfranchised either. On Election Day, election officials issue such voters a provisional ballot, which is counted only when election officials have been able to confirm it is the voter's only cast ballot. *Id.* at 912:19-23 (Seaman). That Election Day process ensured that when a voter "may have

had the opportunity to vote,” their ballot was “not counted until [election officials] confirm that [the voter] got to vote once.” *Id.* at 912:24-913:3 (Seaman).

329. On Election Day, voters may only register at their county election office, or another location designated by the county election administrator. *See, e.g., id.* at 913:17-24 (Seaman) (noting that voters in Missoula County may register at the main election center or the Confederated Salish and Kootenai Tribe satellite office); Aug. 23, 2022, Trial Tr. 1692:1-11, 1710:7-23 (Ellis); *id.* at 1767:24-1768:7 (Tucek); Eisenzimer Dep.<sup>9</sup> 28:18-29:5.

330. While voters seeking to register to vote on Election Day may have to wait in line to do so in counties where EDR is most popular, those lines do not impact voters who are already registered. *See generally id.*; *see also* Aug. 18, 2022, Trial Tr. 919:9-21 (Seaman); Aug. 23, 2022, Trial Tr. 1572:19-1573:2 (Custer). When EDR lines do form, election administrators take steps to mitigate them. Aug. 18, 2022, Trial Tr. 915:6-916:21 (Seaman). And the voters waiting in those lines embraced the experience. *Id.* at 917:15-918:8 (Seaman). Mr. Seaman testified that, when he checked on voters waiting in line to register during the 2020 general election, he saw voters who “had a boombox with them.” *Id.* at 917:15-16 (Seaman). He said that he heard from voters, “I knew I would be here. I knew this would be a long time. But it is important.” *Id.* at 917:18-20 (Seaman).

---

<sup>9</sup> Plaintiffs’ Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. F-1 (Deposition of Monica Eisenzimer) (“Eisenzimer Dep.”).

According to Mr. Seaman, that was “a unique experience because it felt like . . . community involvement in the election process.” *Id.* at 918:4-6 (Seaman). Mr. Seaman saw voters who “had the opportunity to [register and vote on Election Day] and were appreciative of that opportunity.” *Id.* at 918:7-8 (Seaman).

331. Further, when EDR lines have occurred, it has not impacted the ability of election administrators to administer elections. *Id.* at 920:6-19 (Seaman) (noting that lines do not impact his staff’s ability to perform Election Day tasks in a timely manner); *id.* 921:25-922:13 (Seaman) (noting that lines do not cause his staff to make more mistakes on Election Day); *id.* 922:14-17 (Seaman) (noting that lines do not create opportunities for voter fraud); *see also* PTX070 at 86:10-18, 96:10-19 (Ms. Plettenberg testifying that EDR does not cause election officials to make mistakes); Aug. 23, 2022, Trial Tr. 1573:3-11 (Custer).

332. Montanans have directly demonstrated their support for EDR. In the 2014 election, Montanans rejected a ballot measure intended to repeal EDR. PTX180; Aug. 23, 2022, Trial Tr. 1563:14-22 (Custer) (describing 2014 legislative referendum to end EDR that was “soundly defeated”). The measure failed by more than 14 percentage points. PTX180; Aug. 18, 2022, Trial Tr. 899:24-900:6 (Seaman).

333. Since its enactment, EDR has served as voters’ “final safeguard.” Aug. 18, 2022, Trial Tr. 903:6-7 (Seaman).

334. HB 176 was a priority bill for Secretary Jacobsen and her Office. Aug. 25, 2022, Trial Tr. 2229:19-22 (James); PTX062. It was among her three highest priorities in the 2021 Legislative Session. *Id.*; *see also* Aug. 23, 2022, Trial Tr. 1558:10-14, 1561:24-1562:7 (Custer) (“I noticed that [Secretary Jacobsen] came and she testified on them and told us . . . in person, herself which was great, that you know, those were her . . . babies.”).

335. The Secretary’s Office was the primary drafter of HB 176. Aug. 25, 2022, Trial Tr. 2235:12-2236:7 (James).

336. HB 176 changed the close of the late registration period from 8 p.m. on Election Day to noon the day before the election. Dkt. 207, Final Pretrial Order ¶ 6.

337. HB 176 was introduced by Representative Sharon Greef in Montana’s House of Representatives at the Secretary’s request on January 15, 2021. *Id.* at 2234:25-2235:6, 2237:25-2238:3 (James); PTX015; PTX001.

338. The Secretary’s Office drafted talking points for Representative Greef, identifying for the bill sponsor the supposed interests served by HB 176. PTX066; Aug. 25, 2022, Trial Tr. 2237:1-2242:4 (James). Those talking points also listed supposed “common voter problems” that HB 176 would purportedly resolve, but at least some of those problems would not, in fact, be affected by eliminating EDR. *Id.* at 2239:6-2240:17 (James). The night before a critical hearing on HB 176, Representative Greef implored

the Secretary and her staff to text or email each member of her committee to help push the bill through executive committee. PTX077.

339. The Secretary's Office attempted to recruit people to testify in support of HB 176. Aug. 25, 2022, Trial Tr. 2243:15-24, 2246:23-2247:5 (James); PTX068.

340. On January 21, 2021, the House's State Administrative Committee held a hearing on the bill. PTX070. At the hearing, Secretary Jacobsen and Mr. Corson spoke in favor of the bill. *Id.* at 4:15-6:22. Most speakers vociferously opposed the bill. *See generally* PTX070; *see also* PTX068; PTX069; Aug. 25, 2022, Trial Tr. 2246:23-2248:5 (James). Mr. Ellis spoke in favor of the bill—but only because the Secretary of State's Office solicited his involvement the night before the hearing. Aug. 25, 2022, Trial Tr. 2248:2-18 (James); Aug. 23, 2022, Trial Tr. 1724:6-12 (Ellis). Mr. Ellis was the only election administrator who spoke in favor of HB 176 at the hearing. Aug. 25, 2022, Trial Tr. 2251:11-15 (James).

341. The Legislature pointed to college students in reasoning that HB 176 was necessary. Representative Custer recalled Representative Hinkle's testimony in favor of House Bill 176, where he described seeing long lines at the county courthouse and commented "that there were some nonprofits working the line, and that wasn't in our favor, meaning the Republican Party favor." Aug. 23, 2022, Trial Tr. 1576:20-24 (Custer).

342. This is consistent with the general sentiment of the majority caucus in the Montana Legislature: "the general feeling in the caucus is that college students are—

tend to be liberal. So that's the concern with them voting, having all of them vote here."

*Id.* at 1581:12-15 (Custer); *cf.* Aug. 19, 2022, Trial Tr. 1196:14-18 (Hopkins) (noting that voting data suggests precincts on college campuses disproportionately include voters who support Democratic candidates and values).

343. While the proponents of HB 176 gave fuzzy rationale for its supposed necessity, including invocations of "election integrity," the opponents clearly outlined the specific dangers to electoral participation of repealing EDR, including the disproportionate impacts on indigenous and youth voters. *See generally* PTX070.

344. In particular, Jordan Thompson, Keaton Sunchild, Danielle Vazquez, Lauri Kindness, and Daliyah Killsback all spoke in opposition to HB 176. PTX069; PTX070.

345. Mr. Thompson spoke on behalf of CSKT, stating that the tribe opposed the bill because it wanted to keep elections accessible to all Montanans and noting the 2014 referendum in which more than 57% of Montanans rejected repealing EDR. PTX070 at 15:24-16:23.

346. Mr. Sunchild, Political Director of WNV, testified to the factual predicates that make EDR so important to Montana's Native American voters including the large reservations that require traveling long distances to vote and register in person. Further, he testified that there was a tradition of voting in person in Indian Country and that first time voters would register and vote on Election Day. *Id.* at 17:1-18.



347. Ms. Kindness detailed her own work as a WNV organizer on the Crow Reservation. She testified that in the past election her team set up a mobile location across from the Big Horn County Courthouse, the only location where voters could register to vote on Election Day. Western Native Vote had registration cards at the location and assisted voters with their registrations. Her team also picked up voters from their homes and drove them to the courthouse to vote and register. Her team assisted more than 150 voters with their registration on Election Day. Ms. Kindness also discussed how difficult voting already is for so many Native voters and that taking away EDR would add another barrier to a system that already disenfranchises Native voters. *Id.* at 37:13-39:3.

348. Ms. Vazquez and Ms. KILLSBACK also testified to how Native American voters would be disproportionately hurt by the EDR repeal. *Id.* at 31:23-32:12, 41:24-42:19.

349. Opponents testified that Native American voters rely on EDR given the other barriers to voting, including distance to voter registration locations and the cost of travel. Many other opponents, like Ruthie Barbour of Forward Montana, testified that HB 176 would have a particularly damaging effect on Montana's Native American voters. *Id.* at 39:9-41:19.

350. Opponents also testified that young voters would be negatively impacted by ending EDR, explaining to the Legislature that young voters move more frequently

(as they are less likely to own homes) and when voters move, they must update their registration information before they can cast their ballot and have it counted. *Id.* at 21:5-23.

351. Ms. Plettenberg testified on behalf of the Montana Association of Clerks and Recorders and Election Administrators. *Id.* at 45:4-12. She testified that EDR's repeal would result in fewer people being able to vote, noting that about 200 people had used EDR in her county (Ravalli) alone on Election Day, and those people would not have been able to vote with HB176 in place. *Id.* at 55:1-12, 86:22-87:8. She flagged that even those who still could vote under HB 176 might be faced with potentially far distances to travel. *Id.* at 55:7-12. She also testified that the same safeguards that exist before Election Day were in place for verification of a voter's registration and identity on Election Day. *Id.* at 62:11-14, 76:12-24, 87:19-88:15. Mr. Corson corroborated Ms. Plettenberg's testimony that the same safeguards exist pre-Election Day as on Election Day. *Id.* at 46:22-48:8, 76:12-17. However, from an administrative perspective, Ms. Plettenberg supported closing the late registration period at noon on the Friday before Election Day. Aug. 22, 2022, Trial Tr. 1495:17-1496:2 (Plettenberg).

352. Ultimately, the Montana Association of Clerk and Recorders and Election Administrators remained neutral on HB 176. Aug. 22, 2022, Trial Tr. 1488:1-5 (Plettenberg). Ms. Plettenberg surveyed the members of the Montana Association of Clerks and Recorders as to whether they supported, opposed, or were neutral towards

closing the late registration period at noon the Friday before Election Day. *Id.* at 1488:14-1489:15 (Plettenberg). Twenty-five counties supported closing the late registration period on the Friday before Election Day. *Id.* at 1494:12-16 (Plettenberg). Twenty-two counties were neutral as to whether to close the late registration period at noon the Friday before Election Day. *Id.* at 1494:17-20 (Plettenberg). Eight counties opposed moving the close of the late registration period to noon the Friday before Election Day. *Id.* at 1494:21-24 (Plettenberg).

353. At the Senate State Administration hearing on February 15, 2021, Representative Greef testified that: "Elections don't just pop up out of the blue and surprise us. If we are a responsible voter, we study the ballot ahead of time and we also know if we need to register to vote . . . They wait to register to vote because they can." *Id.*

354. Senator Greg Hertz testified he voted in favor of HB 176 because he had heard from election administrators that they were having difficulty administering elections on Election Day. Aug. 24, 2022, Trial Tr. 1802:17-23 (Hertz).

355. Senator Hertz testified that he voted in favor of HB 176 to give election administrators more time to tabulate results on Election Day because any time there is a delay in counting the public grows concerned and that hinders the integrity of Montana's election process. Aug. 24, 2022, Trial Tr. 1804:23-1805:16 (Hertz).

356. Representative Custer, who had been the election administrator for Rosebud County for 36 years, testified that if she had voted on HB 176 based on her experience as an election administrator in a small county without much help, she would have voted in favor of it. Aug. 23, 2022, Trial Tr. 1616:4-20 (Custer).

357. One of the claimed interests addressed by ending EDR with the passage of HB 176 related to concerns about long lines on election day. However, as described by Dr. Street, “Election Day registration has been in Montana[,] an option that people have[,] at the county elections office. Most in person ballots on Election Day are cast at precincts, polling places. So[,] if there is a line at the county elections office, that doesn’t necessarily affect wait times or lines at all at the places where most Montanans are actually voting.” Aug. 16, 2022, Trial Tr. 382:3-13 (Street). Moreover, “if there is a line at the county elections office, many of them are likely to be trying to use Election Day registration.” *Id.* at 382:14-16 (Street). According to an elections administrator, Election Day registration must be at the Election Official’s office, election center, or a satellite office, but voters cannot register to vote at a polling place. Aug. 18, 2022, Trial Tr. 914:16-21 (Seaman). Mr. Seaman described that lines do form at the election center on Election Day but these are voters who know they are in that line to partake in Election Day Registration. *Id.* at 914:22-915:5 (Seaman). Mr. Seaman described that, while there is a line for those registering at the election office, “[a]t the polling place, there is not a wait time.” *Id.* at 919:9-24 (Seaman). Also that, “the voters who want to utilize same day

voter registration, they're the ones that are choosing to utilize that opportunity, and they're the ones that are impacted by longer wait times." *Id.* at 920:1-4 (Seaman).

358. Ms. Plettenberg described that when there are lines at the Ravalli County elections office, the people in that line are there to late register because "if they're already registered, then [they] send them out to the polls so they don't have to wait in line." Aug. 22, 2022, Trial Tr. 1506:11-1507:2 (Plettenberg). Moreover, if there were lines at polling places in Ravalli County, EDR would not impact them because Election Day registrants are not registering at polling places. *Id.* at 1507:25-1508:4 (Plettenberg).

359. Mr. Rutherford described that when voting in Yellowstone County in person at the Metra, "there is a dedicated line for new registrations on Election Day[.]" Aug. 24, 2022, Trial Tr. 2083:8-11 (Rutherford).

360. There is empirical data "suggest[ing] that Montana actually does very, very well in managing voter wait times, and that voters in Montana don't wait in line for very long, and that their wait times are lower than wait times nationwide." Aug. 22, 2022, Trial Tr. 1350:6-19 (Mayer). Dr. Mayer concluded, concerning reducing lines at polling locations on Election Day, that eliminating EDR is "unlikely to have an effect for two reasons, one is, that there is evidence that people—that wait times are already not a problem. And if we think about the shifting of the administrative burden, if that burden exists, it means it's just going to be moved from Election Day to the day before or the day before that." *Id.* at 1351:23-1352:8 (Mayer). Further that, "[t]here really shouldn't be

a relationship between polling place voting wait times and election [] registration wait times. Those are two separate processes.” *Id.* at 1352:19-22.

361. HB 176 was passed by the Montana Legislature and signed into law by the Governor on April 19, 2021. It was effective upon enactment. Dkt. 207, Final Pretrial Order ¶ 1.

**B. SB 169**

362. Montana adopted voter identification laws in 2003 to comply with federal mandates requirement all states to enact voter identification laws. 2003 Montana Laws Ch. 475 (HB 190). The law, as it existed for nearly two decades, allowed voters to prove their identity with many forms of ID, including out-of-state driver’s licenses and student IDs. § 13-13-114(1)(a), MCA (2005) (requiring voters to provide a photo ID, including but not limited to “a valid driver’s license, a school district or postsecondary education photo identification, or a tribal photo identification”). Moreover, pre-SB 169 regulations specified that all photo IDs were “presumed to be current and valid.” ARM 44.3.2102(6)(c) (2021); Aug. 23, 2022, Trial Tr. 1587:24-1588:15 (Custer) (describing practices pre-SB 169 and explaining that election officials did not check expiration dates on any identification documents presented to them).

363. Under the previous law, if a voter could not provide photo ID, they could instead provide any one of several categories of identifying documents, such as “a current utility bill, bank statement, paycheck, notice of confirmation of voter

registration . . . government check, or other government document that shows the elector's name and current address." § 13-13-114(1)(a), MCA (2005).

364. If a voter lacked a photo ID, they could use a Polling Place Elector Identification Form (the "pink sheet"). Aug. 18, 2022, Trial Tr. 983:2-14, 984:16-23 (Seaman). Mr. Seaman described the pink sheet: on it, "the voter will provide us with their name, their current address, and then their identifying information, so that driver's license number or Social Security number. And . . . we . . . call into the office and using that same system we used before to verify that identifying information, we can verify that voter." *Id.* at 983:2-11 (Seaman). The pre-SB 169 Polling Place Elector Identification Form was a true failsafe for voters lacking identification because it was, on its own, sufficient identification at the polls once verified by election officials, and thus allowed the voters to cast a regular ballot. *See id.* at 983:2-14, 984:16-23 (Seaman); *see also* ARM §§ 44.3.2110(2)(b) (2013), 44.3.2102(9) (2010).

365. Students are generally less likely to have a drivers' license or state ID. Aug. 22, 2022, Trial Tr. 1358:16-25, 1359:17-20 (Mayer). Moreover, students living on-campus or in shared living situations often do not receive utility bills, have bank statements addressed to their school addresses, have any reason to have a government issued check, or have a job for which they receive paychecks. FMF 30(b)(6) Dep. 155:8-

25; MontPIRG 30(b)(6) Dep. 95:15-24; Reese-Hansell Dep.<sup>10</sup> 51:7-13, 51:18-52:9, 59:10-60:9; PTX094 at 12:22-13:13.

366. The Montana youth voting rate steadily increased in recent years, with record-breaking youth turnout in recent elections. FMF 30(b)(6) Dep. 107:18-23.

367. Following the historically high turnout of young voters in the 2020 general election, the Montana Legislature passed SB 169, which imposes additional requirements on Montana voters who seek to use a student ID or out-of-state driver's license to vote. § 13-13-114, MCA (2021).

368. On January 28, 2021, Senator Mike Cuffe introduced SB 169. Dkt. 207, Final Pretrial Order ¶ 8.

369. On February 3, 2021, the Senate Committee on State Administration conducted a hearing to consider SB 169. Dkt. 207, Final Pretrial Order ¶ 9.

370. On February 19, 2021, the House Committee on State Administration conducted a hearing to consider SB 169. Dkt. 207, Final Pretrial Order ¶ 10.

371. SB 169 was the Secretary's top priority for the 2021 legislative session. *See* Aug. 23, 2022, Trial Tr. 1561:20-1562:7 (Custer) (describing the effort to revise voter ID law as one of Secretary Jacobsen's "babies"); Aug. 25, 2022, Trial Tr. 2227:22-2229:15

---

<sup>10</sup> Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. J-1 (Deposition of Amara Reese-Hansell) ("Reese-Hansell Dep.").



(James); PTX062; PTX094 at 5:9-12 (Secretary Jacobsen stating “Voter ID is my number one priority this legislative session”).

372. The Secretary felt that student identification needed to be demoted from a primary to a secondary form of identification for purposes of voting. Aug. 24, 2022, Trial Tr. 1865:25-1866:2 (Hertz).

373. The Secretary’s Office was actively involved in getting SB 169 passed. Aug. 25, 2022, Trial Tr. 2258:12-25 (James). The Secretary’s Office drafted the initial draft of SB 169 and was involved in subsequent revisions. *Id.* at 2258:15-17 (James); Aug. 23, 2022, Trial Tr. 1586:11-20 (Custer).

374. The Secretary supported SB 169 because it brought consistency among identification requirements. Trial Tr. 2158:4-14.

375. The Secretary had heard concerns from voters regarding the lack of regulations governing voter ID requirements; for example, the Secretary had heard concerns that the identification required to obtain a library card was more strict than the identification required to vote. Trial Tr. 2161:6-9.

376. When first introduced, SB 169 was “not very well thought out.” Aug. 23, 2022, Trial Tr. 1582:1-5 (Custer); *see* PTX330. Representative Custer identified several problems with the bill, but the most jarring was that the initial draft placed non-verifiable forms of photo identification before driver’s licenses and Social Security numbers. Aug. 23, 2022, Trial Tr. 1584:4-16 (Custer). Verifiable forms of ID can be run

against an existing database. *Id.* at 1585:7-21 (Custer). ID numbers on driver's licenses and Social Security numbers are quicker and easier to verify than other forms of ID. *Id.*

377. The initial draft of SB 169 also created two classes of identification and excluded student ID from the standalone photo ID category. PTX330; Aug. 23, 2022, Trial Tr. 1592:14-21 (Custer). A bipartisan group including Representative Custer, the Secretary of State's Office, an attorney from the Governor's Office, and Senate and House leadership, worked for nearly a month to significantly revise the bill. Aug. 23, 2022, Trial Tr. 1585:25-1588:5 (Custer); PTX331. Representative Custer also described pressure to move the bill forward quickly saying, "They were on us," and describing a push to "hurry up and get this ID law in." Aug. 23, 2022, Trial Tr. 1589:10-17 (Custer).

378. The amended version removed reference to the word "valid" that used to modify the term "photo identification." *Id.* at 1587:24-1588:5 (Custer). This change incorporated usual practices among poll workers, who did not check whether photo or other forms of ID were valid. *Id.* at 1587:24-1588:15 (Custer). Deleting the word "valid" brought the law into conformance with election workers' normal conduct. *Id.* The amended version also intentionally included Montana University System-issued student ID in the standalone category of photo ID. *Id.* at 1585:24-1586:10 (Custer). The goal was "to make the best ID law in the land" and to "make it fair and workable." *Id.* at 1586:18-20 (Custer). That amended version passed out of committee. *Id.* at 1590:6 (Custer).

379. The Speaker of the House then carried an amendment on the House floor to make student IDs a secondary form of voter ID. *Id.* at 1590:2-1592:13 (Custer) (explaining that it is “highly unusual” for the Speaker to carry an amendment on the House floor); PTX332.

380. Representative Custer was “appalled” by the floor amendment to SB 169. Aug. 23, 2022, Trial Tr. 1592:22-24 (Custer). The prior version was the result of hard work and was meant to be “the best photo ID law in the nation without . . . discriminating against anybody.” *Id.* at 1593:1-2 (Custer). In her view, moving Montana student ID—a form of ID that may be a person’s “only form of ID when they’re a first-time voter”—was clear discrimination. *Id.* at 1593:4-5 (Custer). Indeed, Representative Custer predicted that SB 169 would “probably go to court” as a result. *Id.* at 1593:6-8 (Custer).

381. Speaking in favor of the amendment, Speaker Galt remarked, “[I]f you’re a college student in Montana and you don’t have a registration, a bank statement, or a W-2, it makes me kind of wonder why you’re voting in this election anyway.” He concluded that young voters have “little stake in the game.” Aug. 22, 2022, Trial Tr. 1365:18-1366:7 (Mayer); Aug. 23, 2022, Trial Tr. 1595:15-1596:7 (Custer).

382. Senator Hertz testified that he voted in favor of SB 169 because he believed it helped election administrators understand the different forms of

identification that individuals could use to vote. Aug. 24, 2022, Trial Tr. 1810:8-17 (Hertz).

383. Senator Hertz testified that constituents told him they supported strong voter ID laws in advance of his vote on SB 169. Aug. 24, 2022, Trial Tr. 1811:24-1812:4 (Hertz).

384. Senator Hertz testified that SB 169 increases public confidence in Montana's elections because it helps ensure that the individuals who are voting are actually the people who are supposed to be voting, and they are voting in the correct state and district. Aug. 24, 2022, Trial Tr. 1913:18-24 (Hertz).

385. SB 169 amended the primary ID requirement by making government-issued federal or Montana ID primary, and all other ID non-primary. Currently, a voter must show an election judge: a Montana driver's license, Montana state identification card issued pursuant to 61-12-501, military identification card, tribal photo identification card, United States passport, or Montana concealed carry permit; or (A) a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address; and (B) photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification. § 13-13-114 (i-ii), MCA.

386. SB 169 removed conditional language that resulted in people being able to use expired versions of documents for identification purposes. Aug. 25, 2022, Trial Tr. 2159:6-22 (James).

387. Under SB 169, voters can no longer use out-of-state driver's licenses or Montana college or university IDs to vote unless they also present additional documentary proof, such as: "a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address." § 13-13-114(1)(ii)(A), MCA.

388. The purpose of showing ID at the polls is so election judges can tell who you are. Aug. 23, 2022, Trial Tr. 1591:8-18 (Custer).

389. The purpose of requiring an ID when you vote is to identify the voter specifically to the voter roll and increase the likelihood that the person is entitled to vote and eligible to vote. Aug. 25, 2022, Trial Tr. 2168:12-25 (James).

390. Election judges appreciated the changes made by SB 169. Aug. 23, 2022, Trial Tr. 1763:24-1764:2 (Tucek).

391. The drafting process for SB 169 was bipartisan and the intent was to make the best ID law in the land and one that was fair and workable. Aug. 23, 2022, Trial Tr. 1586:11-20 (Custer).

392. Many witnesses testified that they have only voted absentee in Montana elections and, as a result, have never had to show any identification to vote in Montana

elections. Ms. Sinoff has always voted by absentee ballot since she registered to vote in 2018. Sinoff Dep. 62:7-63:25. Ms. Dozier has always voted absentee. Dozier Dep. 24:2-25:8, 41:11-13. Ms. Reese-Hansell has always voted absentee. Reese-Hansell Dep. 20:17-21:6.

393. A student ID is not indicative of a student's residency. Aug. 19, 2022, Trial Tr. 1242:11-13 (Hopkins).

394. Ms. Sinoff began attending Montana State University and obtained a student ID in the fall of 2017 but did not consider Montana to be her residence at that time. Sinoff Dep. 34:1-8. Ms. Sinoff obtained a Montana driver's license, and registered her vehicle in Montana, in order to gain residency for the purposes of obtaining in-state tuition. Sinoff Dep. 33:1-13. Prior to 2019, Ms. Sinoff considered California to be her home state. Sinoff Dep. 33:14-17.

395. A student who resides in Montana and drives is required to obtain a Montana driver's license. Aug. 19, 2022, Trial Tr. 1242:14-17 (Hopkins).

396. There are many activities that college students must do that require a form of ID other than a student ID. Aug. 19, 2022, Trial Tr. 1244:10-13 (Hopkins).

397. Ms. Sinoff testified that she has never seen anyone use their student ID as an acceptable form of identification for something serious. Sinoff Dep. 53:8-10. She never believed her student ID was an acceptable form of identification for anything other than getting into the gym. Sinoff Dep. 52:15-19.

398. Student identification cards can be used with the voter registration card the Secretary's office sends to each registered voter.

399. Montana voter registration cards explicitly state: "This card paired with a photo ID containing your name may be used as identification when you vote."

400. A driver's license is an indicator of residency. Trial Tr. 1242:11-13.

401. After SB 169, a person may use an expired or void Montana driver's license to vote. Trial Tr. 1087:18-1088:6.

402. A student ID card with a federal application for student aid would be acceptable ID at the polls. Trial Tr. 1089:16-25.

403. Any document with a name and photo along with the Polling Place Elector ID form is sufficient ID to vote. Trial Tr. 1090:5-9.

404. Isaac Nehring voted early, in person, the day he turned 18. Trial Tr. 1113:16-17, 1116:20-24. He had a driver's license, a passport, had a bank account, and received a paycheck, all before he turned 18. 1129:15-1130:8.

405. Mitch Bohn testified that he has had a Montana driver's license since he was 18 and that he does not know any Montana adults over the age of 18 who do not have a Montana driver's license. Trial Tr. 187:17-24. Mr. Bohn never used his college ID to vote. Trial Tr. 189:10-11. Mr. Bohn affirmed that it would be weird if a college student did not have a driver's license and that "[f]or the most part, anyone over 18 has one." Trial Tr. 189: 12-18.

406. No witness testified in this case that they have ever used a student ID to vote or would need to use a student ID to vote.

407. Mr. Bohn testified that he has no personal experience on which to challenge the constitutionality of SB 169. Trial Tr. 190:3-5.

408. Shawn Reagor has never had a problem voting with gender-affirming identification, and has no knowledge of any specific transgender individual being unable to vote because of identification. Trial Tr. 1171:16-18. Mr. Reagor votes absentee and does not have to present any identification in order to do so. Trial Tr. 1174:4-11.

409. Gender affirming identification has three components: the person's correct name, an accurate picture, and an accurate gender marker. Trial Tr. 1158:18-23, 1177:18-24.

410. Obtaining a gender affirming ID can be as simple as updating the photo on a photo ID. Trial Tr. 1177:6-9.

411. Some legislators enacted SB 169 to prevent illegal voting, increase voter confidence in elections, and make it easier for election administrators to administer elections. Trial Tr. 1245:9-20.

412. Election experts have concluded that voter identification laws increase voter confidence in elections. Trial Tr. 1960:3-6.

413. SB 169 makes it easier for Native Americans to vote. Trial Tr. 1244:17-1245:4.



414. Before SB 169, a tribal member could not use an expired tribal ID to vote. Trial Tr. 743:20-22.

415. Plaintiff's claim that student identification cards are easier to forge than government issued identification such as a passport or Montana driver's license.

416. Individuals that come to Montana from other states for college can be misled to believe that they can vote in Montana elections even if they do not consider Montana their home state. Sinoff Dep. 60:12-22.

417. Plaintiffs have not identified a single individual who was unable to vote due to SB 169. Trial Tr. 1245:21-24.

**C. HB 530, § 2**

418. Before HB 530, § 2, an individual voter in Montana could, at their discretion, opt to have someone collect their ballot and deliver it to a mailbox or polling place. Thus, it was a voluntary act on the part of each voter as to whether they want to accept the services of a ballot collector. *See generally* Aug. 15, 2022, Trial Tr. 152:8-16 (McCool). If a voter chooses to have their ballot collected by another person, they do not have to travel to a mailbox or polling site. Ballot collection eliminates travel time and costs—which is crucial for those who lack the time and financial resources to travel to a polling place, elections office, or post office, those who live far away from those locations, those who lack access to a vehicle or gas money, and those who do not receive home mail delivery. *Id.* at 121:25-122:7, 124:18-125:8 (McCool); *id.* at 229:1-14 (Weichelt);

Aug. 16, 2022, Trial Tr. 534:6-538:20 (Gray); *id.* at 333:1-334:14, 334:17-335:6, 335:14-17, 337:9-338:5, 355:24-362:5, 371:15-372:20, 397:15-398:2, 437:19-438:23 (Street); Aug. 17, 2022, Trial Tr. 720:17-723:4 (Spotted Elk).

419. Organizations like WNV, MNV, and MDP have engaged in organized paid ballot collection for multiple election cycles over many years. PTX262; Aug. 17, 2022, Trial Tr. 835:8-13 (Horse); Perez Dep. 240:10-21; Aug. 15, 2022, Trial Tr. 142:17-143:3 (McCool); Aug. 19, 2022, Trial Tr. 1182:9-14 (Hopkins). These organizations pay their organizers an hourly wage to engage in numerous forms of GOTV work, including ballot collection and delivery. Aug. 17, 2022, Trial Tr. 855:1-8 (Horse); Aug. 19, 2022, Trial Tr. 1202:1-7 (Hopkins).

420. There has never been a formal complaint lodged against any paid ballot collector or organization engaging in paid ballot collection based on fraud, coercion, or intimidation. Aug. 16, 2022, Trial Tr. 541:24-542:4 (Gray); Aug. 17, 2022, Trial Tr. 727:4-7 (Spotted Elk); *id.* at 859:24-860:18 (Horse); Aug. 19, 2022, Trial Tr. 1258:13-17 (Hopkins); Aug. 24, 2022, Trial Tr. 2093:17-22 (Rutherford). Indeed, the co-sponsor of HB 530, Senator Hertz, is not aware of any misconduct related to ballot collection on Native American reservations in Montana or of any voter interference occurring on Native American reservations in Montana. Aug. 24, 2022, Trial Tr. 1906:22-1907:18 (Hertz).

421. In fact, the rate of voter fraud is actually higher in states that ban ballot assistance, rather than those that permit ballot assistance. Aug. 15, 2022, Trial Tr. 137:4-10 (McCool).

422. Nevertheless, in recent history there have been numerous attempts to ban or restrict ballot collection in Montana. *See* PTX003; PTX010; PTX014. These efforts operate to suppress the voting rights of certain segments of the population—most particularly, Native Americans, voters with disabilities, and young people. *See, e.g.,* Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Stapleton* (“WNV I”), No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020).

423. In 2017, the Montana Legislature placed BIPA—which severely restricted ballot collection—on the 2018 ballot. PTX014. BIPA prohibited the knowing collection of a ballot, unless the collector was the voter’s acquaintance, family member, caregiver, household member, Postal Service worker, or election official. Only Postal Service workers or election officials could collect more than six ballots. §§ 13-35-703, MCA; 13-35-704, MCA. BIPA included a per-ballot fine for any ballots collected outside of the proscriptions of the law. *Id.*

424. At several legislative hearings on BIPA, the Legislature heard testimony that BIPA would be extremely burdensome for Montana’s Native American voters. For example, at the Senate State Administration Committee hearing held on March 22, 2017, Plaintiff CSKT testified that BIPA did “not align with how many of us in my

community vote [given the] barriers to voting for tribal people . . . [and BIPA's] limit to who can pick up a ballot . . . creates even more obstacles to voting for us." PTX038 at 13:13-21. Plaintiff CSKT further testified that "[g]roups like Western Native Voice goes out and collects ballots for Natives [and that BIPA] could eliminate that vital service for Native people." *Id.* at 13:24-14:2.

425. Ms. McCue also testified against BIPA on behalf of the Montana Association of Clerk and Recorders at the same Senate hearing. *Id.* at 6:15-20. She testified that BIPA was unnecessary to prevent unsolicited ballot collection and undelivered ballots. *Id.* at 7:5-8 (noting that "election administrators generally do not find there to be any problems with ballot interference in Montana"). She further testified that BIPA targets voters who "would do things right rather than those who would do things wrong." *Id.* at 7:15-16.

426. Voters can track their ballots by going online or calling local election officials to make sure collected ballots were in fact delivered. Agreed Fact No. 30. To the extent others perceived a problem with unlawful ballot interference, including failure to deliver a collected and voted ballot or other harassment of voters in an effort to collect a ballot, Montana's laws already punished individuals for coercing voters or for preventing other voters from casting their ballots. PTX038 at 9:24-10:2; *see also, e.g.,* § 27-1-1501, MCA *et seq.*

427. At the April 6, 2017, House Judiciary Committee hearing, WNV testified that “ballot collection is one of the main components of our GOTV program. It ensures that everyone who wants to vote has that ability. In election years, we hired ten community organizers across the state, that includes all seven reservations and three major urban areas. Each organizer participates in a total of five days of training before they begin our Get Out to Vote program. So, they are well-trained and do a great job of collecting ballots.” PTX040 at 17:7-16. The Montana Association of Clerk and Recorders again testified against BIPA before the House Judiciary Committee, further underscoring that the clerks did not support prohibitions on ballot collection and did not believe that organized ballot collection was a problem in Montana. *Id.* at 7:15-10:7.

428. On November 6, 2018, voters approved BIPA. On March 12, 2020, a group of plaintiffs representing a cohort of Montana’s tribal nations and organizations that serve Montana’s tribal nations filed suit challenging BIPA in Yellowstone County based on the harm to Native American voters. After a three-day trial, Judge Fehr found that BIPA violated the plaintiffs’ right to vote, freedom of association, and due process, and permanently enjoined BIPA’s enforcement. Judge Fehr’s 61-page order meticulously detailed how BIPA’s restriction on ballot collection “disproportionately harms . . . Native Americans in rural tribal communities” because “Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections,” in large part “due to lack of traditional mailing addresses, irregular mail services, and the

geographic isolation and poverty that makes travel difficult” for these Native American voters. *WNV I*, at 48, ¶ 20.

429. Likewise, in an action filed by MDP and others, Judge Donald Harris found that BIPA’s restriction on ballot collection “burden[ed] the right to vote” for Native Americans and those living in rural tribal communities “by eliminating important voting options that make it easier and more convenient for voters to vote,” thereby “increasing the costs of voting.” *Driscoll v. Stapleton* (“*Driscoll I*”), No. DV 20 408, 2020 WL 5441604 (Mont. Dist. Ct. May 22, 2020); *see also* *Driscoll v. Stapleton* (“*Driscoll II*”), No. DV 20 408, slip op. (Mont. Dist. Ct. Sept. 25, 2020).

430. The Montana Supreme Court upheld the preliminary injunction against BIPA that MDP obtained in the *Driscoll* case, finding that restricting ballot collection “will disproportionately affect the right of suffrage for . . . Native Americans.” *Driscoll v. Stapleton* (“*Driscoll III*”), 2020 MT 247, ¶ 21, 401 Mont. 405, 473 P.3d 386.

431. Following these District Court orders holding BIPA unconstitutional, the Secretary presented no evidence that the Legislature considered what was unconstitutional about BIPA or made any effort to craft HB 530 to remediate the access issues identified by the courts. To the contrary, the one legislator that the Secretary called to testify at trial stated that he did not study impediments on Native American voters’ access to the franchise, did not consider the impact on Native American voters when ballot collection is restricted, did not read the opinions finding BIPA

unconstitutional, made no effort to learn why BIPA was held unconstitutional, but nonetheless supported HB 530, § 2, and advocated for its passage on the Senate floor. Aug. 24, 2022, Trial Tr. 1903:18-1904:7, 1906:14-1911:19 (Hertz).

432. On February 12, 2021—less than six months after BIPA was permanently enjoined—a new ballot collection ban was introduced in the Montana House. PTX003. This bill, HB 406, would have effectively revived BIPA, with minor modifications that did not correct its constitutional infirmities. *Compare* PTX003 *with* PTX014.

433. Numerous groups testified against HB 406, including Ms. Plettenberg on behalf of the Montana Association of Clerks and Recorders and representatives of Plaintiffs' groups. PTX096 at 16:24-18:4; PTX107 at 33:16-22. Further, the chief legal counsel for the Office of Commissioner of Political Practices testified against the bill, motivated by her position that HB 406 was, like BIPA, unconstitutional. PTX096 at 4:7-6:11.

434. Although HB 406 ultimately did not pass, an amendment to a separate election bill—HB 530, § 2—constituted a third attempt to revive BIPA. *Compare* PTX009 *with* PTX014; *see also* PTX016; PTX018. The text of this amendment came directly from Spenser Merwin, then-Executive Director of the Montana Republican Party, who emailed nearly identical language to Senator Greg Hertz on Friday, April 23, 2021. PTX124; Aug. 24, 2022, Trial Tr. 1875:6-1876:5 (Hertz). Senator Hertz forwarded that email and its attachments to Senator Steve Fitzpatrick, one of the primary sponsors of

HB 530, that afternoon. Aug. 24, 2022, Trial Tr. 1876:12-14 (Hertz); PTX124. That same day, the Senate “blasted” the bill to the Senate floor so that it did not have to go through committee and was passed without the opportunity for public testimony. Aug. 24, 2022, Trial Tr. 1886:6-1887:4 (Hertz); PTX126; PTX018; Aug. 23, 2022, Trial Tr. 1559:2-6 (Custer) (explaining that the amendment that became § 2 of HB 530 was “jammed in at the last minute,” and was not added to the bill until after it was out of committee and had been debated by the House). Senator Fitzpatrick introduced the amendment on Monday, April 26, and the full Legislature passed the bill as amended the next day, April 27, 2021. Aug. 24, 2022, Trial Tr 1886:9-20 (Hertz); PTX018.

435. When debating the amendment to HB 530 on the floor of the Senate, Senator Hertz referred to the legislation as a “good bill” without considering its constitutionality in light of past legal challenges to ballot collection laws. Aug. 24, 2022, Trial Tr. 1908:25-1910:7 (Hertz). Senator Hertz did not consider the reliance of Montana’s Native American populations on ballot collection nor the disproportionate effect a ballot collection ban would have on those communities before voting to approve the legislation. *Id.* at 1910:8-1911:19 (Hertz).

436. The amendment to HB 530, which became HB 530, § 2, included another ballot collection restriction. PTX010.

437. The amendment provided:



- a. (1) On or before July 1, 2022, the secretary of state shall adopt an administrative rule in substantially the following form:
- i. (a) For the purposes of enhancing election security, a person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots.
  - ii. (b) "Person" does not include a government entity, a state agency as defined in 1-2-116, a local government as defined in 2-6-1002, an election administrator, an election judge, a person authorized by an election administrator to prepare or distribute ballots, or a public or private mail service or its employees acting in the course and scope of the mail service's duties to carry and deliver mail.
- b. (2) A person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of \$100 for each ballot distributed, ordered, requested, collected, or delivered in violation of the rule.

PTX009; PTX010.

438. Since the amendment was added after the committee process, there was no ability for the public to provide testimony regarding the amendment. Aug. 23, 2022, Trial Tr. 1560:13-17 (Custer); Aug. 24, 2022, Trial Tr. 1887:3-1888:2 (Hertz).

439. During the April 26, 2021, Senate floor session, Senator Fitzpatrick conceded that the amendment was added “late.” PTX129 at 3:19-20. The sole piece of evidence cited by the sponsor for the amendment was an instance of alleged fraud that occurred in North Carolina several years ago, *id.* at 3:24-4:2—the same incident was cited by the State as a reason for BIPA and found unpersuasive by Judge Fehr and Judge Harris given the long and unproblematic history of ballot collection in Montana and the absence of fraud in the state. Aug. 24, 2022, Trial Tr. 1821:8-9 (Hertz); *WNV I; Driscoll II*.

440. Senator Bryce Bennett spoke in opposition to the amendment, noting that the amendment to HB 530, § 2 was an “attempt to try and hijack a bill” and that it provided “no definitions.” PTX129 at 4:15-6:4; *see also* Aug. 23, 2022, Trial Tr. 1561:11-16 (Custer). He further noted that the amendment was bringing back a policy found unconstitutional by the Montana courts and already rejected by the Legislature in the current session. PTX129 at 4:21-25.

441. In response to Senator Bennett’s concerns that the policy was unconstitutional, Senator Hertz responded, claiming that the issues with ballot collection were “tightened up,” *id.* at 6:6-8, but Senator Hertz had done no investigation into why BIPA was found unconstitutional, Aug. 24, 2022, Trial Tr. 1911:12-19 (Hertz), demonstrating that his assertion was unfounded.

442. The very next day, April 27, 2021, the House held a floor session during which Representative Wendy McKamey, the original sponsor of HB 530, conceded that she had not requested the amendment adding a ballot collection ban. PTX133 at 2:12-15. Representative McKamey failed to provide any anecdotal or statistical evidence to support a need for a new ballot collection ban and even misrepresented the state of the law in Montana (testifying incorrectly that “for years we’ve allowed up to six ballots to be collected by an individual”). *Id.* at 2:12-4:12.

443. In opposition, Representative Denise Hayman testified that the amendment is “a backdoor version” of BIPA, and that reinstituting such restrictions would increase voter confusion, as well as increase the workload of election officials. *Id.* at 4:16-23.

444. Representative Tyson Running Wolf also testified in opposition to the HB 530, § 2 amendment, indicating that he had supported HB 530 without the newly offered amendment. *Id.* at 5:17-21. He explained that the new Section 2 of HB 530 “effectively ends the legal practice of ballot collection,” which is heavily relied upon by Native American voters in Montana and would result in “en masse” disenfranchisement. *Id.* at 5:23-6:3. In his words, “[b]allot collection is a lifeline to democracy for rural indigenous communities” because of social and economic barriers such as long distances to election offices and lack of access to transportation in Indian Country. *Id.* at 6:16-18.

445. Representative McKamey failed to rebut or even acknowledge these impacts in her closing remarks on the legislation before it went to a vote. *Id.* at 7:10-8:19.

446. Representative Running Wolf's testimony on the impact of ballot collection prohibitions on Native Americans in Montana was highly consistent with both the legislative testimony the Legislature heard during BIPA and the multiple court decisions striking down BIPA as unconstitutional. *Compare Id.* at 5:23-6:18 *with* PTX038-PTX041; *WNV I*; *Driscoll II*.

447. HB 530, § 2 is, in fact, even more restrictive than BIPA. Not only does it restrict paid ballot collection, but it also restricts distribution, ordering, requesting, and delivering ballots. PTX010; *see also* Aug. 16, 2022, Trial Tr. 333:13-19, 356:8-24, 388:2-7 (Street).

448. HB 530—including the amendment prohibiting paid ballot collection that became § 2—was signed into law by the Governor on May 14, 2021. PTX018.

449. Under HB 530, § 2, the Secretary of State is charged with engaging in the administrative rulemaking process and implementing a rule in accordance with HB 530, § 2 by July 1, 2022. PTX010.

450. There is no identifiable policy, standard, or rule in HB 530 § 2 that informs the administrative rule regarding the meaning of “pecuniary benefit.” Aug. 25, 2022, Trial Tr. 2225:1-17 (James) (indicating the Secretary is unable to identify any policy,

standard, or rule in HB 530 § 2 that informs the administrative rule regarding the meaning of pecuniary benefits).

451. The Secretary's designee confirmed that the administrative rule corresponding to HB 530, § 2 would be required to be within the confines of the statute. *Id.* at 2217:11-17 (James).

452. Regardless of any administrative rule that the Secretary might adopt, payment of a pecuniary benefit for collecting ballots would directly contradict the language of HB 530, § 2. *Id.* at 2220:20-25 (James). Moreover, paid ballot collection could violate HB 530, § 2, prior to the issuance of any administrative rule. *Id.* at 2221:1-4.

453. The Secretary's designee confirmed that the Secretary's Office had not analyzed whether HB 530, § 2 would have any particularized impact on some groups versus others. *Id.* at 2221:25-2222:3 (James). He also confirmed that the Secretary's Office had not conducted any analysis on the impact of HB 530, § 2 on voter turnout. *Id.* at 2221:21-24 (James).

454. Even though the Secretary has not yet drafted the rules required by HB530, § 2, the text of the statute itself makes mandatory a rule that does not allow anyone to "provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots." PTX009. The statute requires that the administrative rule the Secretary ultimately adopts must be "in substantially the same form" as HB 530, § 2. *Id.*

455. Upon enactment, HB 530, § 2 had an immediate chilling effect on certain Plaintiffs' plans for the upcoming election cycle, stopping their ability to offer ballot collection as a service to the communities that they serve. Aug. 17, 2022, Trial Tr. 852:12-22, 854:6-14 (Horse); Perez Dep. 250:24-251:18; *see also* Aug. 16, 2022, Trial Tr. 437:11-18 (Street).

456. The elimination of paid ballot collection increases voter costs for voters residing on reservations because they live farther from post offices, which are an important part of the election process in Montana. Aug. 15, 2022, Trial Tr. 120:10-24, 121:25-122:7, 125:7-21 (McCool); *Id.* at 228:18-229:10 (Weichelt).

457. WNV and MDP have both conducted GOTV activities throughout the state of Montana, and both groups have previously relied on paid staff to offer ballot assistance to Montana voters. PTX262; Aug. 17, 2022, Trial Tr. 833:15-20 (Horse); Aug. 19, 2022, Trial Tr. 1201:10-1203:2 (Hopkins). Both organizations intend to continue to engage paid staff to offer ballot assistance to Montana voters if the practice remains legal. Aug. 17, 2022, Trial Tr. 849:9-25 (Horse); Aug. 19, 2022, Trial Tr. 1221:4-1222:6 (Hopkins).

458. The passage of HB 530, § 2 caused WNV to stop its ballot collection activity, a critical component of its work. Perez Dep. 250:24-251:18; Aug. 17, 2022, Trial Tr. 851:15-24 (Horse).

459. While certain people or groups might be able to conduct ballot collection without payment, WNV, which conducts a large amount of the ballot collection on reservations in Montana, relies specifically on paid organizers to conduct this work. Aug. 17, 2022, Trial Tr. 853:10-23 (Horse); Perez Dep. 189:9-11, 191:8-192:2.

460. WNV specifically hires organizers from the communities in which they do their work, Aug. 17, 2022, Trial Tr. 730:20-731:3 (Spotted Elk); *id.* at 821:2-12 (Horse)—*i.e.*, from the on-reservation Native American population who have much lower income levels and higher poverty rates than the rest of the state, Aug. 15, 2022, Trial Tr. 93:3-7 (McCool). WNV would be unable to undertake its work if it was forced to rely only upon those who are able to forgo wages. Aug. 17, 2022, Trial Tr. 821:2-12 (Horse), Perez Dep. 191:8-192:2.

461. WNV considers paid ballot collection to be a political statement because it is a critical way for Native American voters to have their voices heard in the electoral process. Aug. 17, 2022, Trial Tr. 834:12-22 (Horse). Ballot collection is central to WNV's mission. *Id.* at 834:23-25.

462. Likewise, if HB 530, § 2 had not been enjoined, it would have prevented MDP from engaging in ballot collection activity, a key part of its GOTV activities. Aug. 19, 2022, Trial Tr. 1221:4-1222:6 (Hopkins). MDP relies upon paid employees and volunteers who are reimbursed for certain expenses. For example, in 2020, MDP hired

several staffers from tribal communities to offer ballot collection services on reservations. *Id.* at 1201:15-20, 1203:3-6 (Hopkins).

463. HB 530, § 2 does not only burden Plaintiffs or the voters they serve. Other groups of voters rely on organized ballot collection, too. For example, Montanans with disabilities, including those in congregate care, often need assistance with registering to vote, requesting an absentee ballot, and returning an absentee ballot. Aug. 22, 2022, Trial Tr. 1450:5-1453:24 (Franks-Ongoy). Voters with disabilities may not be able to rely on caregivers or family members to assist them in obtaining and returning their ballots, and they may lack the ability to leave a congregate care facility—either because they are committed or because they lack accessible transportation—as well as the ability to mail ballots themselves. *Id.* at 1462:10-1463:12 (Franks-Ongoy).

464. DRM helps voters with disabilities both in and outside of congregate care vote by distributing, ordering, requesting, collecting, and delivering ballots by helping voters complete absentee ballot request forms and collecting and returning completed absentee ballots. *Id.* at 1460:6-21 (Franks-Ongoy). When DRM engages in these assistance activities, it sometimes does so as a voter's agent, as permitted by Montana law. *Id.* at 1459:17-1460:25 (Franks-Ongoy); *see also* § 13-1-116(4)(a), MCA (allowing voters unable to provide a signature to designate an agent to assist them “throughout the registering and voting process”); § 13-13-213(2), MCA (permitting agent designated under § 13-1-116 or other third party to collect and return elector's absentee ballot



application). DRM also engages in these activities at times when it has not been appointed the voter's agent. Aug. 22, 2022, Trial Tr. 1459:22-1460:5 (Franks-Ongoy). DRM's staff members assist voters as part of their salaried jobs. *Id.* at 1464:14-1465:7 (Franks-Ongoy). Additionally, DRM receives a grant specifically to assist voters with disabilities in the voting process—including in obtaining and returning absentee ballots. *See id.* at 1464:12-1465:14 (Franks-Ongoy). DRM is concerned that its ballot assistance activities are prohibited by HB 530, § 2. *Id.* And without DRM's ballot assistance activities, many of the voters with disabilities that DRM otherwise would have assisted in voting would not vote at all. *Id.* at 1464:2-6 (Franks-Ongoy).

## **VII. State's Interests**

465. There is no evidence of significant or widespread voter fraud in Montana, let alone any fraud that HB 176, SB 169, or HB 530, § 2 would remedy. Aug. 15, 2022, Trial Tr. 127:20-131:21 (McCool); Aug. 24, 2022, Trial Tr. 2026:10-14, 2027:16-2028:16, 2029:6-2030:11 (Trende); Aug. 23, 2022, Trial Tr. 1547:1-22 (Custer) (after seeing Secretary Stapleton's ad referencing election fraud after 36 years serving as Rosebud County's top election official, "I felt like I had been punched in the gut"); *id.* at 1547:9-14, 1549:12-1553:24 (Custer) (listing and describing election security protocols).

466. Voter fraud in Montana is vanishingly rare. A comprehensive database from the conservative thinktank the Heritage Foundation—which has "a very expansive definition of voter fraud," Aug. 15, 2022, Trial Tr. 128:11-129:14 (McCool); *see*

also Aug. 22, 2022, Trial Tr. 1379:20-1380:8 (Mayer) (explaining that the Heritage Foundation database “establishes an upper band of the potential cases of voter fraud”)—found just one voter fraud conviction in Montana out of millions of votes in Montana cast in the past four decades. Aug. 15, 2022, Trial Tr. 129:18-130:6 (McCool). That case had nothing to do with EDR, third-party ballot assistance, or student IDs. *Id.*; Aug. 22, 2022, Trial Tr. 1380:25-1381:2, 1382:6-1383:23 (Mayer); *see also* Aug. 24, 2022, Trial Tr. 2029:13-19 (Trende).

467. In 2020, the then-Montana Secretary of State completed a post-election audit and identified no problems. Aug. 15, 2022, Trial Tr. 130:11-16 (McCool).

468. In connection with the BIPA litigation, two county election administrators—at least one of whom was speaking about the entire state of Montana—said that they knew of no instances of voter fraud. *Id.* at 130:17-131:4 (McCool).

469. Neither the sponsors of the challenged laws, nor any proponents of the bill, provided any evidence of voter fraud in Montana. Aug. 15, 2022, Trial Tr. 131:5-13, 131:18-20 (McCool). Indeed, Senator Hertz agreed that Montana has a long history of secure and transparent elections, including before the three challenged bills were passed into law. Aug. 24, 2022, Trial Tr. 1828:14-24 (Hertz); *see also* Aug 23, 2022, Trial Tr. 1602:7-17 (Custer) (asked whether the challenged laws promote election security, Representative Custer answered: “I don’t think [the challenged laws] did anything. . . .

Because we didn't have a problem in the first place. Not that we can't look at things and make improvements, but I don't see that these did a thing.").

470. There is no evidence of any voter fraud in Montana associated with EDR, student IDs, or third-party ballot assistance, and not even the Secretary's own witnesses believe voter fraud is a problem in Montana. Aug. 18, 2022, Trial Tr. 922:14-17 (Seaman); Aug. 22, 2022, Trial Tr. 1380:12-20 (Mayer) (explaining that there is no causal connection between photo ID and voter fraud in Montana); Aug. 23, 2022, Trial Tr. 1549:7-11, 1574:4-7 (Custer); *id.* at 1718:20-24, 1721:2-5, 1721:16-20 (Ellis); *id.* at 1775:9-1777:2 (Tucek); Aug. 24, 2022, Trial Tr. 1889:24-1890:7, 1891:4-7 (Hertz); *id.* at 2091:10-2092:1 (Rutherford); Aug. 25, 2022, Trial Tr. 2210:4-8, 2213:14-2216:20, 2262:18-20 (James); Eisenzimer Dep. 83:20-22; PTX094 at 22:5-21 (Secretary's Election Director admitting to same during legislative hearings on SB 169).

471. The Secretary's own expert witness agrees that voter fraud is not a substantial problem in Montana. Aug. 24, 2022, Trial Tr. 2027:22-2028:16 (Trende).

472. The Secretary has provided no evidence that voter fraud is a substantial problem in Montana, nor that there exists any connection between voter fraud and the voting restrictions at issue in this case. And indeed, all evidence presented in this case is to the contrary. *See, e.g.*, Aug. 15, 2022, Trial Tr. 126:14-137:23 (McCool); Aug. 22, 2022, Trial Tr. 1368:2-5, 1372:6-11, 1379:2-1380:20 (Mayer); Aug. 23, 2022, Trial Tr. 1720:19-

1721:5 (Ellis); Aug. 23, 2022, Trial Tr. 1775:9-1777:2 (Tucek); Aug. 24, 2022, Trial Tr. 2027:22-2028:16 (Trende); Eisenzimer Dep. 83:20-22.

473. Even if there were any evidence of voter fraud or coercion—which there is not, related to EDR, ballot collection, student identification, or otherwise—the challenged laws are not necessary because Montana has several other existing statutes that already criminalize such activity. Aug. 16, 2022, Trial Tr. 387:11-390:16 (Street); *see also* § 13-35-201 *et seq.*

474. Montana makes it a crime to: “knowingly violate[] a provision of the election laws” of Montana, § 13-35-103, MCA; show another individual a marked ballot or solicit a voter to show them their marked ballot, § 13-35-201(1), (3), MCA; to use “force, coercion . . . or undue influence” or “duress” to interfere with another’s vote, § 13-35-218, MCA; to destroy anyone’s ballot, § 13-35-206(4), MCA; to use “deceptive election practices” such as knowingly causing a false statement to be made or voting someone else’s ballot, § 13-35-207, MCA; or vote more than once in an election, § 13-35-210(1), MCA. *See* Aug. 16, 2022, Trial Tr. 390:11-16 (Court taking judicial notice of these laws).

475. The criminal penalties for violating these laws are substantial, including misdemeanor or felony charges, imprisonment for up to 10 years, or fines up to \$50,000. § 13-35-201 *et seq.*; § 45-7-208, MCA.

476. The Secretary provides no evidence that the existing laws are somehow insufficient to protect against voter fraud or coercion.

477. The rate of voter fraud is also infinitesimally small in the United States more broadly. Aug. 15, 2022, Trial Tr. 131:22-133:1 (McCool).

478. According to the conservative Heritage Foundation, which has “a very expansive definition of voter fraud,” *id.* at 128:11-129:14 (McCool), voter fraud constitutes about 0.00006% of the total votes cast in the United States, *id.* at 131:22-132:12 (McCool).

479. A recent analysis of three states with all vote-by-mail elections calculated that the number of “possible cases” of voter fraud—a figure which includes allegations, not just convictions or confirmed cases—was 0.0025 percent of all votes cast. *Id.* at 132:13-133:1 (McCool).

480. Montana has not had any student ID-related election fraud in the nearly two decades since such IDs have been permitted as voter identification. Aug. 18, 2022, Trial Tr. 983:15-19 (Seaman); Aug. 22, 2022, Trial Tr. 1380:12-20 (Mayer); Aug. 23, 2022, Trial Tr. 1776:4-19 (Tucek); Aug. 24, 2022, Trial Tr. 1891:4-7 (Hertz); *id.* at 2091:21-23 (Rutherford); Aug. 25, 2022, Trial Tr. 2262:25-2263:7 (James).

481. Missoula County, home to the University of Montana, has had no problems with voters using student IDs at the polls, Aug. 18, 2022, Trial Tr. 982:9-13 (Seaman), and Mr. Seaman is unaware of any instances of voter fraud in Missoula

County, let alone any fraud associated with the voter ID process, *id.* at 983:15-19 (Seaman). There is no evidence of any problems with the use of student IDs at the polls anywhere in Montana.

482. Numerous election administrators testified that they did not have any knowledge of fraud related to voter ID. *Id.*; Aug. 23, 2022, Trial Tr. 1776:4-19 (Tucek); Aug. 24, 2022, Trial Tr. 2091:21-23 (Rutherford).

483. There is no evidence that SB 169 will protect against voter fraud. Aug. 22, 2022, Trial Tr. 2026:10-14 (Trende). And legislators who supported the bill can cite no evidence beyond their own feelings. Aug. 24, 2022, Trial Tr. 1865:1-6 (Hertz).

484. The record supports the conclusion that voter ID laws neither reduce fraud nor improve voter confidence. Aug. 16, 2022, Trial Tr. 392:5-18 (Street); Aug. 22, 2022, Trial Tr. 1371:24-1372:11 (Mayer) (explaining that evidence relied upon by the Secretary's expert even finds no relationship between voter ID laws and curbing voter fraud); Aug. 24, 2022, Trial Tr. 2024:15-2025:23 (Trende) (Secretary's own expert agreeing with these conclusions); *id.* at 1889:21-23 (Hertz) (Senator Hertz agreeing that he has no data on voter confidence in Montana).

485. There is no evidence that student IDs or out-of-state driver's licenses are less secure or more susceptible to forgery than the primary forms of ID under SB 169, and in any event, there is no evidence that anybody has ever forged a student ID or an

out-of-state driver's license to vote in Montana. Aug. 25, 2022, Trial Tr. 2262:18-2263:14 (James).

486. Nor is there any evidence that HB 530, § 2 will effectuate the state's asserted interest in preventing voter fraud. Aug. 15, 2022, Trial Tr. 137:21-23 (testifying that "[t]here is no connection" between third-party ballot collection and voter fraud) (McCool).

487. In *Driscoll*, the Secretary at that time "did not present evidence in the preliminary injunction proceedings of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll III*, ¶ 22. The same is true here.

488. The Secretary cites no evidence of any connection between ballot assistance and voter fraud in Montana.

489. Although the Secretary argues that banning EDR promotes election integrity, she presented no evidence of any connection between EDR and fraud. "There is no connection" between EDR and voter fraud. Aug. 15, 2022, Trial Tr. 137:18-20 (McCool); *see also* Aug. 24, 2022, Trial Tr. 2029:9-12 (Trende). Mr. Seaman testified that he is "unaware of any instances of voter fraud in Missoula County." Aug. 18, 2022, Trial Tr. 983:18-19 (Seaman). He also testified that voters waiting in line to register, at the election center on Election Day, does not create additional opportunities for voter fraud. *Id.* at 922:14-17 (Seaman). The lack of connection between fraud and EDR was echoed in

the testimony of other election administrators. *See* Aug. 23, 2022, Trial Tr. 1549:7-11, 1574:4-7 (Custer); *id.* at 1718:20-23 (Ellis); *id.* at 1775:9-20 (Tucek); Aug. 24, 2022, Trial Tr. 2091:14-17 (Rutherford).

490. In fact, while voter fraud is extraordinarily rare, the rate of voter fraud is actually higher in states that *ban* third-party ballot collection than it is in states that permit it. Aug. 15, 2022, Trial Tr. 136:14-137:14 (McCool).

491. Ms. Tucek testified that she was unaware of any voter fraud in either of those counties related to absentee ballots, and that the absentee balloting process throughout the state of Montana is “secure.” Aug. 23, 2022, Trial Tr. 1775:21-1776:3, 1776:20-1777:2 (Tucek).

492. Mr. Ellis testified that he is not aware of any instance of a voter intimidation or coercion, nor any instances of voter fraud involving absentee ballots generally. *Id.* at 1720:19-1721:5 (Ellis).

493. Mr. Seaman testified that he is unaware of any ballot tampering or fraudulent interference with mail ballots in Missoula County. Aug. 18, 2022, Trial Tr. 1005:17-21 (Seaman).

494. Mr. Rutherford testified that he was not aware of any evidence of fraud or intimidation related to ballot assistance. Aug. 24, 2022, Trial Tr. 2091:18-20 (Rutherford).

495. There is no evidence to suggest that paid ballot collection would lead ballot collectors to tamper with ballots. Aug. 16, 2022, Trial Tr. 387:11-390:16 (Street).



496. The Secretary's claim that HB 176 furthers a compelling state interest by easing administrative burdens is not supported by the evidence.

497. The process of registering a new voter is not itself burdensome, though it does necessarily take time and require know-how. Even so, election administrators estimate that registering a new voter takes a short amount of time. Aug. 18, 2022, Trial Tr. 909:8-12 (Seaman) (registering a voter in person takes three to five minutes); Aug. 23, 2022, Trial Tr. 1768:24-1769:1 (Tucek) (registering new voter "[u]sually" takes "less than five minutes"); *id.* at 1571:7-13 (Custer) (registering voter takes two to ten minutes depending on the experience of person handling the registration); *id.* at 1713:17-1714:9 (Ellis) (registering a voter takes 10-15 minutes); Aug. 24, 2022, Trial Tr. 2098:2-23 (Rutherford) ("worst case scenario" takes up to 15 minutes to register a voter, but typically less); Eisenzimer Dep. 50:5-7 (registering a new voter on Election Day "takes between five to ten minutes"); *see also* Aug. 24, 2022, Trial Tr. 1840:13-1841:8 (Hertz).

498. If EDR leads to additional work for election administrators, it is only because it boosts voter turnout. Aug. 24, 2022, Trial Tr. 1901:7-10 (Hertz). As noted by Ms. McCue when she testified in opposition to HB 176, "any time someone registers and vote[s], it's more work for us." PTX091 at 11:5-6; *see also* Aug. 23, 2022, Trial Tr. 1574:16-21 (Custer) (recalling her testimony about HB 176: "I just, in my good conscience, can't vote for something that I know really isn't going to make elections more secure. It might make a little less work for the people in the offices on Election

Day, but that's what they signed up for"). Ms. McCue also testified that ending EDR was "not . . . helpful administratively" and "will not help [her]" in her job administering elections. PTX091 at 10:10, 11:1-2.

499. Mr. Seaman testified that his staff was "prepared to accommodate Election Day registration" and that EDR "is the final safeguard" and a "critical part of our democracy" to ensure that everyone is able to cast their vote. Aug. 18, 2022, Trial Tr. 903:4-13 (Seaman).

500. Mr. Seaman has far fewer full-time staff per voter than rural counties. There are five full-time staff in Missoula County, including Mr. Seaman himself, *id.* at 900:24-25 (Seaman), serving 88,848 registered voters, PTX190.001. Accordingly, Missoula County has more than 17,769 registered voters per staff member. *See id.*; *see also* Aug. 23, 2022, Trial Tr. 1774:23-1775:4 (Tucek). In Broadwater County, Mr. Ellis had six full-time staff members, Aug. 23, 2022, Trial Tr. 1707:7-9 (Ellis), serving 5,017 registered voters, *id.* at 1692:16-21, which means that, under his reign, Broadwater County had 836 registered voters per staff member, *see id.*—more than 21 times fewer than in Missoula County. Fergus County has 7,480 registered voters and two staff members, PTX190.001; Aug. 23, 2022, Trial Tr. 1773:7-10 (Tucek), meaning that the county has 3,740 registered voters per staff member, Aug. 23, 2022, Trial Tr. 1773:11-14 (Tucek)—more than four times fewer than in Missoula County. And Petroleum County has just 382 registered voters with two staff members, PTX190.001, meaning that

Petroleum County has only 191 registered voters per staff member, Aug. 23, 2022, Trial Tr. 1770:10-17 (Tucek)—more than 93 times fewer than in Missoula County.

501. Further, there is no evidence of any errors resulting from registering voters on Election Day. Aug. 23, 2022, Trial Tr. 1575:6-10 (Custer); Aug. 22, 2022, Trial Tr. 1515:24-1516:2 (Plettenberg); PTX070 at 86:10-18, 96:10-19 (Ms. Plettenberg testifying on behalf of the Montana Association of Clerks and Records regarding HB 176).

502. There are, however, errors that occur with voter registration *before* Election Day. EDR gives voters and election administrators the opportunity to fix any mistakes up to the last minute. It is a failsafe against disenfranchisement. Aug. 17, 2022, Trial Tr. 679:5-680:1 (Iwai); *id.* at 661:3-9 (Denson); Aug. 18, 2022, Trial Tr. 898:4-7 (Seaman); *id.* at 1115:1-6 (Nehring) (EDR is an important fallback option).

503. Specifically, EDR allows voters to update their registration without complicated rules about which subset of changes are permissible and which are not.

504. EDR also ameliorates any technical glitches the State may experience in transmitting registration information because it allows Montanans to register and vote even if their registration was not finalized.

505. On Election Day, Montanans may only register and vote at the offices of county election administrators or a centrally designated location—not at polling locations. Mont. Admin. R. 44.3.2015(1)(b)(iv); Aug. 16, 2022, Trial Tr. 382:5-20 (Street); Aug. 23, 2022, Trial Tr. 1767:24-1768:11 (Tucek); Aug. 25, 2022, Trial Tr. 2239:17-21

(James); Eisenzimer Dep. 28:18-29:5. And in the few instances where EDR has occurred at a polling place, election administrators set up different lines for individuals who needed to register. Aug. 24, 2022, Trial Tr. 2081:21-25, 2083:3-20, 2084:3-7 (Rutherford); Aug. 25, 2022, Trial Tr. 2239:22-2240:6 (James).

506. The same safeguards for verifying a voter's registration and identity that exist before Election Day remain available to election administrators on Election Day through the MT Votes system. Aug. 22, 2022, Trial Tr. 1508:6-21 (Plettenberg).

507. Eliminating EDR and moving the deadline for voter registration to noon the day before Election Day will not eliminate any administrative burdens associated with EDR but rather just shift them to an earlier date. On the days leading up to the election, election administrators are "really busy." Aug. 23, 2022, Trial Tr. 1702:9-12 (Ellis). During the days leading up to the election, election administrators are sending out and receiving back absentee ballots, handling spoiled ballots, and recruiting and training election judges. *Id.* at 1700:12-1701:1 (Ellis). In fact, this administrative work has already been completed by Election Day—"the bird has flown out of the nest." Aug. 18, 2022, Trial Tr. 947:24-948:22 (Seaman) (noting that "the planning and prep work is the critical part of the election").

508. This shift in time will only reduce the burden on election officials if it results in fewer Montanans voting. *See* Aug. 24, 2022, Trial Tr. 2089:19-25 (Rutherford); Aug. 18, 2022, Trial Tr. 1011:9-12 (Seaman); PTX091 at 11:4-6 (Ms. McCue testifying

about HB 176 that “any time someone registers and vote[s], it’s more work for us. That’s the job.”).

509. Representative Custer testified that for her, in rural Rosebud County, the implementation of EDR had no ultimate impact on her Election Day schedule. Aug. 23, 2022, Trial Tr. 1570:24:1571:1 (Custer). Both before and after EDR, she generally got home around 2 a.m. during major elections, *id.* at 1568:4-12 (Custer), which happened “[t]wice a year, every other year,” *id.* at 1568:18 (Custer). From her perspective, it was just “part of [the] job. It was expected,” *id.* at 1568:21 (Custer), and it was like “[a]ny big event . . . like a wedding. . . . You plan, plan, plan everything goes off like clockwork and then you are exhausted,” *id.* at 1569:7-9 (Custer). Variables that could really impact Election Day included “turnout,” “whether it’s a two-page ballot because you can only run one sheet of paper through the counter at a time,” “breakdowns on your machine,” and other similar things. *Id.* at 1569:19-1570:5 (Custer).

510. There are myriad ways for the State to reduce administrative burdens on elections officials without the disenfranchising effects of ending EDR, including hiring more poll workers on Election Day, offering simpler or more frequent training to election administrators, and modernizing election equipment. *See, e.g., id.* at 1573:25-1574:2 (Custer) (listing “better training, better equipment, those kind of things and streamlining some of the . . . protocols” as ways to make Election Day more efficient). Mr. Ellis testified that adding additional resources and/or staff would alleviate his

concerns about any administrative burdens stemming from EDR. *Id.* at 1708:6-10 (Ellis); *see also* Aug. 24, 2022, Trial Tr. 2090:2 (Rutherford) (describing administrative burdens as “a resource thing”).

511. There is no evidence that the Legislature or the Secretary considered any of these options as an alternative to ending EDR. Aug. 25, 2022, Trial Tr. 2256:3-10 (James).

512. EDR has not resulted in delays in tabulating election results. *See* Aug. 18, 2022, Trial Tr. 944:20-945:8 (Seaman) (testifying that EDR doesn’t impact tabulating votes); Aug. 23, 2022, Trial Tr. 1717:4-1718:8 (Ellis) (testifying that Broadwater County always tabulated results on the night of Election Day and was never criticized for producing late election results). Mr. Rutherford testified that, even in elections with widespread late registration, Yellowstone County has always met its statutory deadlines for finalizing election results. Aug. 24, 2022, Trial Tr. 2078:20-2079:2 (Rutherford). In fact, Mr. Rutherford also testified that during the June 2022 primary, he would not have had to stay at his office any later had EDR been in place. *Id.* at 2089:14-18 (Rutherford). The Secretary cannot point to a single instance where an election administrator was unable to report election results in a timely fashion due to EDR.

513. If anything, HB 176 might create further administrative burdens for election administrators—as Ms. Tucek testified, “it’s confusing to constantly try to keep up with new laws passed by the Montana legislature.” Aug. 23, 2022, Trial Tr. 1779:7-10

(Tucek); *see also see* Aug. 23, 2022, Trial Tr. 1565:10-15 (Custer) (noting that voters have relied on EDR for years, “[a]nd all of a sudden one day they wake up and it’s changed and they can’t”). And elections officials in many counties have already had to spend time turning away individuals looking to register and vote on Election Day. *See* Aug. 18, 2022, Trial Tr. 973:2-19 (Seaman); Aug. 22, 2022, Trial Tr. 1459:7-13 (Franks-Ongoy); Aug. 23, 2022, Trial Tr. 1766:24-1767:14, 1768:12-21 (Tucek); Aug. 24, 2022, Trial Tr. 2088:8-2089:3 (Rutherford).

514. The Secretary’s claim that HB 176 furthers a compelling state interest by reducing lines at polling locations is not supported by the evidence.

515. EDR does not and cannot increase lines at most polling locations because EDR occurs at a centrally designated location, often county clerk’s offices, not at polling places. *See* Mont. Admin. R. 44.3.2015(1)(b)(iv); Aug. 16, 2022, Trial Tr. 382:5-20 (Street); Aug. 23, 2022, Trial Tr. 1767:24-1768:7 (Tucek); Eisenzimer Dep. 28:18-29:5. Any lines at a county elections office do not affect the wait times for the polling locations where most Montanans vote. *See id.* In the few instances where EDR occurs at a polling place, there are separate lines for voters who wish to register on Election Day and those who are already registered and just wish to cast their ballot. Aug. 24, 2022, Trial Tr. 2081:21-25, 2083:3-20, 2084:3-7 (Rutherford).

516. Voters who are not trying to make use of EDR do not typically wait in line to vote on Election Day. Aug. 22, 2022, Trial Tr. 1507:6-24 (Plettenberg); Aug. 23, 2022, Trial Tr. 1572:15-1573:11 (Custer); *id.* at 1686:8-11, 1710:16-18 (Ellis).

517. Multiple current and former election administrators testified that any lines at the county election office largely affect EDR voters, who would be unable to vote absent the ability to register on Election Day, and that EDR has no effect on lines at polling places, where the vast majority of in-person voting occurs. Aug. 18, 2022, Trial Tr. 919:9-21 (Seaman); Aug. 22, 2022, Trial Tr. 1505:5-1508:5 (Plettenberg); Aug. 23, 2022, Trial Tr. 1572:15-1573:11 (Custer); *id.* at 1686:8-11, 1710:16-18 (Ellis), *id.* at 1767:24-1768:11 (Tucek); Aug. 24, 2022, Trial Tr. 2083:8-11, 2084:3-7 (Rutherford).

518. It was known to the Legislature that repealing EDR and moving the last day to register to vote would not reduce lines, but simply make them longer on an earlier date in the early-voting period. The Lewis and Clark County Elections Supervisor testified before the Legislature that HB 176 “doesn’t get rid” of any long lines, but “just moves them” to the new, earlier late registrant deadline. PTX091 at 36:17-22.

519. Moving the deadline for late registration simply shifts the burdens associated with registering voters to an earlier date, which will force election administrators to contend with voters who arrive moments before noon on the Monday before Election Day, to attempt to draw lines about who is in line at noon on Monday as



well as at 8 pm on Tuesday, and to simultaneously manage the voter confusion that will arise as a result of a noon deadline, instead of one at the end of the day that coincides with the polls closing.

520. The Secretary provided no evidence that EDR itself causes long lines, even at the county seat. Registering a voter at any time, including on Election Day, does not take a long time. Aug. 23, 2022, Trial Tr. 1768:24-1 (Tucek) (registering new voter “[u]sually” takes “less than five minutes”); Aug. 23, 2022, Trial Tr. 1571:7-13 (Custer) (registering voter takes two to ten minutes depending on the experience of person handling the registration); Aug. 24, 2022, Trial Tr. 2098:2-23 (Rutherford) (“worst case scenario” takes up to 15 minutes to register a voter, but typically less); Eisenzimer Dep. 50:5-7 (registering a new voter on Election Day “takes between five to ten minutes”). And Mr. Rutherford testified that despite having “triple the amount of late registrations” in the 2016 general election as his county did in the 2012 general election, the lines in that 2016 general election were significantly shorter than they were in 2012, Trial Tr. 2060:18-2066:11 (Rutherford).

521. Voter wait times in Montana are low: 100 percent of voters in 2020 reported waiting in line on Election Day for less than 30 minutes, and in 2016, only 2.3% reported waiting in line for more than 30 minutes. Aug. 22, 2022, Trial Tr. 1351:5-22 (Mayer); *see also* Aug. 23, 2022, Trial Tr. 1573:5-22 (Custer) (describing an instance when 8 people arrived on a bus as memorable but ultimately still quick and uneventful); *id.* at

1769:2-12 (Tucek) (lack of evidence of long lines in two Montana counties); *id.* at 1685:10-15 (Ellis) (defining a long line as 6 to 10 voters). Montana's wait times are far lower than the national average. Aug. 16, 2022, Trial Tr. 384:25-385:1 (Street).

522. Indeed, in 2020, only 10% of all in-person voters in Montana waited more than ten minutes to vote in 2020. *Id.* at 384:18-20 (Street). Only 1% of all Montana voters waited more than ten minutes to vote in 2020. *Id.* at 384:20-24 (Street).

523. Over the last decade, while EDR grew in popularity, wait times at the polls in Montana have *decreased*. *Id.* at 385:6-7 (Street).

524. All data indicate that EDR is not associated with long wait times in Montana. Aug. 22, 2022, Trial Tr. 1351:23-1352:22 (Mayer).

525. The purpose of reducing wait times is to prevent people from dropping out of line and thus being unable to vote. HB 176 is thus completely self-defeating as to its stated purpose, since the people actually waiting in any lines at issue need to make use of EDR in order to be able to vote. Aug. 23, 2022, Trial Tr. 1686:8-11, 1710:16-18 (Ellis); Aug. 24, 2022, Trial Tr. 2081:21-25, 2083:3-20, 2084:3-7 (Rutherford).

526. The Secretary's invocation of lines in Indian Country is likewise self-defeating. The lines discussed by WNV were lines at the county election office, PTX317, necessary for those people to be able to register to vote and vote *at all*. In other words, that line does not affect non-EDR voters.

*From the foregoing Findings of Fact, the Court hereby makes the following:*

### **Conclusions of Law**

527. To the extent the foregoing Findings of Fact are more properly considered Conclusions of Law, they are incorporated by reference herein as such. To the extent that these Conclusions of Law are more appropriately considered Findings of Fact, they are incorporated as such.

#### ***I. The Elections Clause of the United States Constitution***

528. The Secretary's argument that this Court may not review the Challenged Laws relies on an incorrect reading of the Elections Clause of the federal Constitution that would unmoor any legislative action related to voting from the very Constitution that even creates the Montana Legislature.

529. The Secretary's attempt to insulate the Legislature's actions from judicial review violates nearly a century of Supreme Court precedent. *See Ariz. State Legis. V. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964) ("[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state [election] laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction."); *Smiley v. Holm*, 285 U.S. 355, 368 (1932) (holding that the Elections Clause does not "endow the Legislature

of the state with power to enact laws in any manner other than that in which the *Constitution of the state* has provided”) (emphasis added).

530. The Secretary’s argument also disregards the fundamental separation of powers. *See Brown v. Gianforte*, 2021 MT 149, ¶ 24, 404 Mont. 269, 281, 488 P.3d 548, 556 (“Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial branch.”); *Powder River Cnty. V. State*, 2002 MT 259, ¶ 112, 312 Mont. 198, 231, 60 P.3d 357, 380 (“Each branch of government is made *equal*, coordinate, and independent.” (emphasis added)); *In re License Revocation of Gildersleeve* (1997), 283 Mont. 479, 484, 942 P.2d 705, 708 (finding Montana’s “Constitution vests in the courts the *exclusive* power to construe and interpret legislative Acts”).

531. The Court rejects the Secretary’s argument that the Elections Clause of the United States Constitution shields the challenged laws from judicial scrutiny. Even if this Court were to adopt the Secretary’s interpretation, the challenged laws apply equally to state and local elections, where the Elections Clause does not apply.

## ***II. Article IV, § 3***

532. Article IV, § 3 of the Montana Constitution does not shield the challenged laws from judicial scrutiny.

533. Pursuant to Article IV, § 3, the Legislature “shall provide by law the requirements for residence, registration, absentee voting, and administration of

elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process.”

534. While the Legislature has authority to provide for a system of poll booth registration, the laws passed by the Legislature in order to provide that system are still subject to judicial review. The delegates considered the Legislature should not be “locked in” upon providing “a system of poll booth registration” and thus changed the language from “shall provide for a system of poll booth registration” to “may provide ...” Mont. Const. Convention, 450. However, that does not mean the Legislature has power to take away EDR without that power being subject to judicial review and interpreted in conjunction with the fundamental rights guaranteed to Montanans in the Constitution. Specifically, the Legislature’s authority under Article IV, § 3 “cannot logically be read to nullify the fundamental right to vote in free and open elections separately and principally enshrined in Article II, Section 13.” *Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 36. As described by the Montana Supreme Court:

Indeed, first among the fundamental rights expressly guaranteed in the Montana Constitution are popular sovereignty and self-government. Mont. Const. art. II, § 1 (“All political power is vested in and derived from the people.”); Mont. Const. art. II, § 2 (“The people have the exclusive right of governing themselves as a free, sovereign, and independent state.”). These provisions establish that government originates from the people and is founded on their will only. Protection of our Article II fundamental rights ensures that, among other things, government is indeed founded upon the will of the people only.

*Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 36.

535. “Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial branch. It is circular logic to suggest that a court cannot consider whether a statute complies with a particular constitutional provision because the same constitutional provision forecloses such consideration.” *Gianforte*, ¶ 24.

536. The State’s authority to regulate elections must be exercised “within constitutional limits.” *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 21, 394 Mont. 167, 184, 434 P.3d 241, 253; *see also Wheat v. Brown*, 2004 MT 33, ¶ 27, 320 Mont. 15, 22-23, 85 P.3d 765, 770 (“[T]he people, through the legislature, have plenary power, except in so far as inhibited by the Constitution.”) (internal quotation marks and citations omitted); *State v. Savaria* (1997), 284 Mont. 216, 223, 945 P.2d 24, 29 (The Legislature may only exercise whatever discretion it has “subject . . . to constitutional limitations.”).

537. Indeed, “Montana’s Constitution is a prohibition upon legislative power, rather than a grant of power.” *Bd. Of Regents of Higher Educ. V. State by & through Knudsen*, 2022 MT 128, ¶ 11, 409 Mont. 96, 103, 512 P.3d 748, 751.

538. Further, the same constitutional provision the Secretary cites also gives the Legislature the right to regulate absentee ballots, *see* Mont. Const. art. IV, § 3, yet the Montana Supreme Court found that the State could not exercise this right in a way that infringes on the constitutional right to vote, *Driscoll III*, ¶ 23 (holding that the State’s regulation of absentee ballot collection “may unconstitutionally burden the right of

suffrage, particularly with respect to Native American[s] . . .”). Under the Secretary’s reading, the Legislature had the same discretion to pass BIPA as it did HB 176 and HB 530, § 2. Yet in *Driscoll*, the Montana Supreme Court upheld the preliminary injunction enjoining BIPA, declining to “set forth a new level of scrutiny” for right-to-vote claims, assessing the law’s burden on Native American voters, and then assessing the State’s interest in the law. *Id.* ¶ 20.

539. Moreover, “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 325 Mont. 256, 261, 109 P.3d 219, 222 (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)); *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 665 (1966) (finding that while “the right to vote in state elections is nowhere expressly mentioned . . . once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”).

540. The Court holds that Article IV, § 3 of the Montana Constitution does not shield the challenged laws from judicial review.

### ***III. Standing***

541. The Secretary raised—in the Final Pretrial Order, in many depositions, and many times throughout the duration of the litigation in this matter—the issue of standing. The Secretary “contends Plaintiffs lack standing to challenge the laws

challenged in this lawsuit.” (Final Pretrial Order, ¶ 23). The Secretary did not address the issue of standing in her proposed findings and conclusions. Plaintiffs addressed, in great depth, the reasons why they do have standing in their proposed findings and conclusions. The Court agrees, as evidenced by its previous rulings, with Plaintiffs arguments and analysis as outlined in ¶¶ 572-614 of their proposed findings of fact and conclusions of law. As the Court has repeatedly held, upon receipt of the same standing arguments made by the Secretary throughout the duration of this case, each Plaintiff has standing to pursue their claims. (See Dkt. 32, Dkt. 124).

#### ***IV. Legal Standards***

542. “Statutes enjoy a presumption of constitutionality, and the party challenging a statute's constitutionality bears the burden of proving it unconstitutional beyond a reasonable doubt.” *Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, ¶ 10, 409 Mont. 96, ¶ 10, 512 P.3d 748, ¶ 10 (citing *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, 174 P.3d 469). The question of the “constitutionality of a statute is a question of law.” *State v. Knudson*, 2007 MT 324, ¶ 12, 340 Mont. 167, ¶ 12, 174 P.3d 469, ¶ 12 (citing *State v. Stanko*, 1998 MT 321, P 14, 292 Mont. 192, P 14, 974 P.2d 1132, P 14). “The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action...” *Powder River Cty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, ¶ 73, 60 P.3d 357, ¶ 73 (citations omitted).



543. “When interpreting constitutional provisions, we apply the same rules as those used in construing statutes.” *Brown v. Gianforte*, 2021 MT 149, ¶ 33, 404 Mont. 269, ¶ 33, 488 P.3d 548, ¶ 33 (citing *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058). Additionally, “a fundamental rule of constitutional construction is that we must determine the meaning and intent of constitutional provisions from the plain meaning of the language used without resort to extrinsic aids except when the language is vague or ambiguous or extrinsic aids clearly manifest an intent not apparent from the express language.” *Nelson*, 2018 MT 36, ¶ 16, 390 Mont. 290, ¶ 16, 412 P.3d 1058, ¶ 16. Moreover, “[t]he intent of the Framers controls the Court’s interpretation of a constitutional provision.” *Nelson*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058.

544. Plaintiffs bring facial challenges to HB 176, SB 169, and HB 530.

545. A facial challenge “to a legislative act is of course the most difficult challenge to mount successfully” because the challenger “must show that ‘no set of circumstances exists under which the [challenged sections] would be valid, i.e., that the law is unconstitutional in all of its applications.’” *Mont. Cannabis Indus. Ass’n v. State (MCIA II)*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

546. To prevail on a facial challenge, Plaintiffs must prove that “either that no set of circumstances exists under which the statute would be valid or that the statute

lacks a plainly legitimate sweep.’’ *State v. Smith*, 2021 MT 148, ¶ 56, 488 P.3d 531 (citations omitted).

547. The Court has already held in this matter that burdens on fundamental rights, such as the right to vote, trigger strict scrutiny, and the Court reiterates that holding here.

548. The Court’s ruling is consistent with 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.” *Driscoll III*, ¶ 18; *see also Mont. Cannabis Indus. Ass’n v. State (“MCIA”)*, 2016 MT 44, ¶ 16, 382 Mont. 256, 263, 368 P.3d 1131, 1139 (similar); *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 207, 113 P.3d 281, 288; *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 154, 104 P.3d 445, 449-50; *Butte Cmty. Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311.

549. The right to vote is enshrined under the Montana Constitution’s Declaration of Rights and provides that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Mont. Const. art. II, § 13.

550. Since the right to vote is found within the Declaration of Rights, it is a fundamental right. *Riggs*, ¶ 47; *see also Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 352, 325 P.3d 1204, 1210; *see also WNV I*, at 44, ¶ 2 (noting that the right to vote is a fundamental right); *Driscoll II*, at 23, ¶ 5 (same).

551. The Secretary concedes that the right to vote is fundamental under the Montana Constitution. Def's Br. in Supp. of Renewed Mot. Summ. J. at 15 (Dkt. 155); *see also Willems*, ¶ 32; *Oberg v. Billings* (1983), 207 Mont. 277, 280, 674 P.2d 494, 495.

552. The Secretary provides no binding authority supporting her argument that the right to vote should be treated differently than other constitutionally enumerated rights. Rather, she urges the Court to instead rely on federal cases: *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to adopt the flexible federal "balancing test," known as *Anderson-Burdick*.

553. Yet the Montana Supreme Court has long applied strict scrutiny to right-to-vote challenges, including in those cases decided after federal courts adopted *Anderson-Burdick*. *See Finke*, ¶ 15; *Johnson v. Killingsworth* (1995), 271 Mont. 1, 4, 894 P.2d 272, 243-74.

554. As recently as two years ago, the Montana Supreme Court expressly declined the Secretary's request to "set forth a new level of scrutiny" and apply the federal *Anderson-Burdick* framework to right to vote claims. *Driscoll III*, ¶ 20.

555. "In interpreting the Montana Constitution, the Montana Supreme Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart." *State v. Guillaume*, 1999 MT 29, ¶ 15, 293 Mont. 224, 231, 975 P.2d 312, 316. The Montana Supreme Court has never been afraid to "walk alone" in terms of its

divergence from federal constitutional interpretation. *State v. Long* (1985), 216 Mont. 65, 69, 700 P.2d 153, 156; *City of Missoula v. Duane*, 2015 MT 232, ¶ 16, 380 Mont. 290, 294, 355 P.3d 729, 732 (collecting cases where Montana Supreme Court declined to subject constitutional rights to a relaxed federal standard). This is in part because the Montana Supreme Court has recognized that “the rights and guarantees afforded by the United States Constitution are minimal, and that states may interpret provisions of their own constitutions to afford greater protection than the United States Constitution.”

*Guillaume*, ¶ 15.

556. And in fact, Montana is not “walking alone” in applying strict scrutiny, rather than *Anderson-Burdick*, to laws that implicate the right to vote. Many states around the country apply strict scrutiny to laws that implicate or burden their respective states’ constitutional right to vote. For example, in *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000), the Idaho Supreme Court rejected *Anderson-Burdick* and held that “[b]ecause the right of suffrage is a fundamental right, strict scrutiny applies.” The Court distinguished *Anderson-Burdick* because “*Burdick* did not deal with the Idaho Constitution and instead was decided under the United States Constitution.” *Id.*

557. The supreme courts in other states—including Illinois, North Carolina, Washington, and Kansas—have done likewise. See *Tully v. Edgar*, 664 N.E.2d 43, 47 (Ill. 1996) (“Where challenged legislation implicates a fundamental constitutional right,

however, such as the right to vote, the presumption of constitutionality is lessened and . . . the court will examine the statute under the strict scrutiny standard.”); *see also* *Harper v. Hall*, 868 S.E.2d 499, 543 (N.C. 2022); *Madison v. State*, 163 P.3d 757, 767 (Wash. 2007); *Moore v. Shanahan*, 486 P.2d 506, 511 (Kan. 1971).

558. The right to vote is foundational. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Larson*, ¶ 81 (McKinnon, J., dissenting) (citations omitted). The Secretary’s suggestion that this Court break from precedent and afford lesser protections for this fundamental right is antithetical to Montana’s Constitution.

559. Strict scrutiny review of a statute “requires the government to show a compelling state interest for its action.” *Mont. Env’t Info. Ctr.*, ¶ 61 (quoting *Wadsworth v. State* (1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174). “In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective.” *Id.* (quoting *Wadsworth*, 275 Mont. at 302).

560. Even if the Court were to apply *Anderson-Burdick*, that test “requires strict scrutiny” when, as here, “the burden imposed [by the law] is severe.” *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). Even when a challenged law constitutes a less-than-

severe burden, the *Anderson-Burdick* balancing test does not convert to ordinary rational-basis review. See *Soltysik v. Padilla*, 910 F.3d 438, 448-49 (9th Cir. 2018). Voting laws that impose a less-than-severe but more-than-minimal burden “require an assessment of whether alternative methods would advance the proffered governmental interests.” *Id.* at 445 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1114 n.27 (9th Cir. 2011)). “[W]hether an election law imposes a severe burden is an intensely factual inquiry.” *Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366, 387 (9th Cir. 2016) (internal quotation marks omitted).

561. *Anderson-Burdick* is a “sliding scale test, where the more severe the burden, the more compelling the state’s interest must be, such that ‘a state may justify election regulations imposing a lesser burden by demonstrating the state has important regulatory interests.’” *Soltysik*, 910 at 444 (quoting *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016)).

562. When evaluating the state’s regulatory interest, *Anderson-Burdick* serves as a “means-end fit framework” that requires the state’s purported interest in the challenged law to be more than “speculative concern.” See *Soltysik*, 910 F.3d at 448-49; see also *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016).

563. At the second step of the *Anderson-Burdick* inquiry, even regulations that impose less than “severe” burdens on the right to vote require more than a speculative state interest and are still subject to a more exacting level of scrutiny than rational basis

review. Even a “minimal” burden “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Ohio NAACP*, 768 F.3d at 538 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)); *Soltysik*, 910 F.3d at 449; *Pub. Integrity All.*, 836 F.3d at 1025 (rejecting the notion that *Anderson-Burdick* calls for “rational basis review”).

564. Regardless of the extent of the burden, the state must “articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses the interest put forth.” *Ohio NAACP*, 768 F.3d at 545; *see also Anderson*, 460 U.S. at 789.

565. Moreover, courts applying *Anderson-Burdick* must consider not only the impacts on the electorate as a whole, but also on the discrete subgroups of voters who are most impacted. *See Crawford*, 553 U.S. at 198, 201 (controlling op.) (“The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID].”); *see also Pub. Integrity All.*, 836 F.3d at 1024 n.2 (noting courts should consider “not only a given law’s impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe”). The severity of the burden is greater when it disproportionately falls upon populations who already face greater barriers to participation and are less likely to be able to overcome those increased costs. *See Ohio NAACP*, 768 F.3d at 545 (finding significant burden that fell disproportionately on

African American, lower-income, and homeless voters likely to use the voting opportunities eliminated by challenged law).

**A. HB 176**

**i. *Right to Vote***

566. By eliminating EDR, HB 176 severely burdens the right to vote of Montana voters, particularly Native American voters, students, the elderly, and voters with disabilities.

567. The uncontested factual record shows that: (1) EDR has been widespread in Montana; (2) Native Americans face disproportionate and severe voter costs due to dramatic socioeconomic and logistical disparities; (3) in part due to the higher voter costs they face, Native American voters disproportionately rely on EDR and thus will be burdened disproportionately by its elimination; and that (4) young voters in Montana also disproportionately rely on EDR.

568. The Secretary's appeal to non-binding, out-of-state cases about late registration is unavailing in part because those cases concerned whether a state that has *never before* offered EDR has an affirmative obligation to provide EDR. None of those non-binding cases involved the question presented here—namely, whether under Montana's Constitution, the state may, without constitutional constraints, *eliminate* EDR where a significant number of historically disenfranchised voters have come to rely upon it over the past 15 years.



569. Once the state decides to offer a voting opportunity, the elimination of that voting opportunity is subject to constitutional limitations. *See Big Spring*, ¶ 18.

570. The burdens imposed by the elimination of EDR are not justified by any compelling—or even legitimate—state interests. Removal of EDR does not enhance election integrity because the verification process applied to late registration applications differs from that applied to regular registration applications only in that it includes *additional* security measures.

571. HB 176 also does not combat voter fraud. EDR has not been implicated in a single instance of voter fraud in Montana since its inception.

572. The Secretary has failed to provide any evidence that HB 176 will have any impact on voter confidence, and all available data suggests it will not.

573. HB 176 does not reduce administrative burdens or wait times, and even if it did, it is not narrowly tailored.

574. Removing one and half days during which Montanans could register to vote and cast their vote is a severe burden on the right to vote. HB 176 denies Montanans their right to vote for one and a half days during each election cycle. It would be unconstitutional to deny Montanans the right to bear arms for one and a half days. *See* Mont. Const., Art. II § 12. It would be unconstitutional to deny Montanans the right to freedom of religion for one and a half days. *See* Mont. Const., Art. II § 5. It would be unconstitutional to deny Montanans the rights of the accused for one and a

half days. *See* Mont. Const., Art. II § 24. And it would be unconstitutional to deny Montanans their right of privacy for one and a half days. *See* Mont. Const., Art. II § 10.

575. Because HB 176 burdens the right to vote and does not further a compelling state interest through the least onerous path, it is unconstitutional and must be permanently enjoined.

576. Were the Court to accept the Secretary's invitation to import the *Anderson-Burdick* standard, the outcome would be the same, as that test "requires strict scrutiny" when, as here, "the burden imposed [by the law] is severe." *Short*, 893 F.3d at 677.

577. And even were the Court to determine the burden is less than severe, under *Anderson-Burdick*, the State must still demonstrate a fit between the legitimate government interest and the law in question.

578. For reasons discussed above, the Secretary here has failed to demonstrate why the elimination of EDR is actually necessary to serve the interests she articulates. As a result, even if the Court applied the *Anderson-Burdick* test, HB 176 would fail.

***ii. Equal Protection***

579. HB 176 violates Plaintiffs' right to Equal Protection. Article II, § 4 of the Montana Constitution guarantees that no person shall be denied the equal protection of the laws. Mont. Const. art. II, § 4. Notably, Montana's equal protection guarantee "provides for even more individual protection" than the federal Constitution. *Cottrill v. Cottrill Sodding Serv.* (1987), 229 Mont. 40, 42, 744 P.2d 895, 897.

580. “When presented with an equal protection challenge, we first identify the classes involved and determine whether they are similarly situated.” *MCIA*, ¶ 15 (quoting *Rohlf v. Klemenhausen, LLC*, 2009 MT 440, ¶ 23, 354 Mont. 133, 139, 227 P.3d 42, 48) (internal quotation marks omitted). Similarly situated classes are identified by “isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated.” *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 19, 402 Mont. 277, 291, 477 P.3d 1065, 1073. If it is determined that “the challenged statute creates classes of similarly situated persons, we next decide whether the law treats the classes in an unequal manner.” *MCIA*, ¶ 15.

581. A facially neutral classification may still constitute an equal protection violation where “in reality it constitutes a device designed to impose different burdens on different classes of persons.” *Snetsinger*, ¶¶ 16-17 (internal citations and alterations omitted); *Gazelka v. St. Peter’s Hosp.*, 2018 MT 152, ¶ 16, 392 Mont. 1, 9-10, 420 P.3d 528, 535. As such, Plaintiffs are *not* required to make a showing of discriminatory purpose to establish an equal protection violation.

582. When evaluating whether a facially neutral statute violates equal protection, the Montana Supreme Court has established a two-part test. First, courts “identify the classes involved and determine whether they are similarly situated” despite differing burdens. *Snetsinger*, ¶ 16 (internal citation omitted). Second, courts “determine the appropriate level of scrutiny” to apply to the challenged law. *Id.* ¶ 17.

583. As to the first step of the analysis, Native American voters and non-Native American voters are otherwise similarly situated, but HB 176 levies disproportionate burdens on Native American voters compared to non-Native American voters. *See Snetsinger*, ¶ 16. EDR is disproportionately utilized by Native Americans to mitigate high poverty rates; lack of residential mail; poor roads; long distances to post offices and county seats; lack of access to vehicles, gasoline, and car insurance; housing instability; and poor internet access. Native American voters on-reservation also use EDR at higher rates than the general population. Removal of EDR disproportionately and detrimentally impacts Native Americans ability to vote compared to non-Natives.

584. Similarly, young voters, who rely on EDR at much higher rates because they are more likely to be first-time voters and move more often, are treated differently from similarly situated voters, as HB 176 levies disproportionate burdens on young voters.

585. Even if discriminatory purpose were required—and it is not—the evidence indicates that the Legislature enacted HB 176 to reduce voting by young people for perceived political benefit and that the Legislature was well aware that HB 176 would have a disproportionate negative impact on Native American voters and young voters, and nonetheless intentionally repealed a critical method for accessing voting relied upon by those groups.

586. As to the second step, strict scrutiny applies when a suspect class or fundamental right is affected. *Snetsinger*, ¶ 17. Here, as noted above, HB 176 implicates the fundamental right to vote and cannot satisfy strict scrutiny.

**B. HB 530**

***i. Ripeness***

587. Even though the Secretary has not yet adopted an administrative rule as directed in HB 530, § 2, the statute is ripe for review.

588. “The basic purpose of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 54, 365 Mont. 92, 116, 278 P.3d 455, 472.

589. “Ripeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication. . . .” *Id.* ¶ 54.

590. The issue presented by HB 530, § 2 is not an abstract disagreement. It is clear that the statute forbids and imposes a civil penalty for numerous types of ballot assistance.

591. Plaintiffs have established that they have already been injured by HB 530, § 2 given that they have already determined that they cannot continue with activities their organizations have previously engaged in because those activities may be subject

to civil penalties, and they have to spend limited resources to educate voters, staff, and volunteers about the change in the law.

592. Further, the statute requires that the Secretary adopt an administrative rule “in substantially” the same form as the statutory text. As such, Plaintiffs and this Court have every reason to believe that the administrative rule will prohibit paid staff from engaging in ballot assistance activities and impose a civil penalty for violation of that rule.

593. The effects of HB 530, § 2 on Plaintiffs are in no way speculative. The statute in fact has already harmed Plaintiffs, as discussed above, and will do so in the future unless permanently enjoined.

*ii. Right to Vote*

594. HB 530, § 2 disproportionately and severely burdens the fundamental right to vote for Plaintiffs in violation of the Montana Constitution.

595. Recently, multiple Montana district courts held that a similar restriction on ballot collection and conveyance unconstitutionally violated the fundamental right to vote as guaranteed by the Montana Constitution. *WNV I*, at 47-48, ¶¶ 14-21; *Driscoll II*, at 24, ¶ 8.

596. The evidence establishes that HB 530, § 2 “will disproportionately affect the right of suffrage for . . . Native Americans.” *Driscoll III*, ¶ 21. Less than two years ago, the Montana Supreme Court determined that “the importance of absentee ballots

and ballot-collection efforts is more significant for Native American voters than for any other group.” *Id.* ¶ 6. The Court found that even before considering any prohibition on ballot collection, “Native American voters as a group face significant barriers to voting” —including “higher rates of poverty,” distances “from county elections offices and postal centers,” “limited access to transportation,” “limited access to postal services,” and “lack [of] a uniform and consistent addressing system.” *Id.*

597. Little has changed in the intervening two years. Plaintiffs’ unrebutted testimony reveals that a panoply of socioeconomic factors—the result of centuries of discrimination against Native Americans—make it more difficult for Native Americans living on reservations to register and vote. These include higher poverty and unemployment rates, worse health outcomes, worse educational outcomes, including much lower high school and college graduation rates, less internet access, lack of home mail delivery, less stable housing, higher homelessness rates, and overrepresentation in the criminal justice system.

598. Native Americans living on reservation live, on average, farther away from the post office, DMV office, and county seats as compared to the general Montana population. Native Americans are also less likely to have access to working vehicles or money for gas to travel those distances. And Native Americans are disproportionately less likely to have home mail delivery.

599. Because Native American voters already face these high costs to voting—both in person and by mail—they rely more heavily on organizations to collect and convey their ballots than the general population. Consequently, restricting ballot collection “disproportionately harms . . . Native Americans in rural tribal communities” because “Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections,” in large part “due to lack of traditional mailing addresses, irregular mail services, and the geographic isolation and poverty that makes travel difficult” for these Native American voters. *WNV I*, at 48, ¶ 20.

600. The factual record regarding the burdens on voters in this case is essentially identical to the one the Montana Supreme Court and two district courts had before them when they invalidated BIPA, a less onerous prohibition that targeted only ballot collection, not other forms of ballot assistance. And just as the Montana Supreme Court found fatal in *Driscoll*, the un rebutted evidence shows that “unequal access to the polls for Native American voters would be exacerbated by” a restriction on ballot collection. *Driscoll III*, ¶ 21. And once again, the Secretary “does not address [Plaintiffs’] evidence that the burden on Native American communities is disproportionate,” and she “pointed to no evidence in the . . . record that would rebut the . . . finding of a disproportionate impact on Native American voters.” *Id.*, ¶ 22.



601. HB 530, § 2 also severely burdens the right to vote for groups other than Native Americans. Indeed, thousands of voters have relied on ballot collection in Montana elections.

602. Many voters with disabilities rely on organized absentee ballot assistance, and their right to vote would be severely burdened were this option outlawed. These voters' mobility limitations make obtaining and returning absentee ballots challenging, and it can be difficult for them to stand in line at polling locations or elections offices. As a result, these voters have relied on organized ballot assistance.

603. The Secretary cannot justify HB 530, § 2 under any standard because she "did not present evidence . . . of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana." *Driscoll III*, ¶ 22. The Secretary has not contested that the rate of voter fraud in Montana is infinitesimally small; that only one or two people in Montana have ever been convicted of voter fraud, and none in connection with ballot collection; and that while barely any voter fraud exists in the United States, more fraud exists in states that ban ballot assistance than in those that permit ballot assistance. The Secretary has no valid state interest in HB 530, § 2.

604. HB 530, § 2 is a solution in search of a problem. It furthers no legitimate, let alone compelling, state interest, and constitutes a disproportionate, severe, and unconstitutional burden on Plaintiffs' constitutional right to vote.

605. Even if this Court applied the federal *Anderson-Burdick* standard, HB 530, § 2 would still fail, as *Anderson-Burdick* “requires strict scrutiny” when “the burden imposed [by the law] is severe.” *Short*, 893 F.3d at 677.

606. And even were the Court to determine the burden is less than severe, under *Anderson-Burdick*, the state must still demonstrate a fit between the legitimate government interest and the law in question.

607. As the evidence establishes no genuine state interest for HB 530, § 2, it fails under any level of scrutiny under the *Anderson-Burdick* balancing test.

608. The Secretary contests none of the substantial evidence of increased voter costs, nor offers any evidence to even suggest the supposed state interests are advanced by HB 530, § 2. *cf. Driscoll III*, ¶ 21.

609. In *Driscoll*, the Montana Supreme Court found that the Secretary could not justify BIPA under any standard because the Secretary “did not present evidence . . . of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana.” *Driscoll III*, ¶ 22. So too here, the Secretary cannot justify this most recent iteration of ballot collection restrictions under any standard because she has failed to provide any evidence that Montana has a problem of voter fraud or voter confidence related to ballot collection, or that HB 530, § 2 would improve those purported problems.

610. HB 530, § 2 thus constitutes a disproportionate and unconstitutional burden on Plaintiffs' constitutional right to vote under any standard.

*iii. Equal Protection*

611. As with the other challenged laws, HB 530, § 2 violates Plaintiffs' right to Equal Protection.

612. The same two-step analysis applies to HB 530, § 2. As to the first prong, Native American voters and non-Native voters are otherwise similarly situated, but HB 530, § 2 levies disproportionate burdens on Native American voters compared to other voters. *Snetsinger*, ¶ 16.

613. As to the second, HB 530, § 2 implicates the fundamental right to vote and cannot satisfy strict scrutiny. *Snetsinger*, ¶ 17.

614. Even if discriminatory purpose were required—which it is not—there is significant evidence of discriminatory purpose. Following the *Western Native Voice* and *Driscoll* litigation in 2020, the Legislature was plainly on notice of the discriminatory impact of HB 530, § 2 and other ballot assistance bans.

615. Moreover, HB 530, § 2's immediate predecessor in the 2021 legislative session, HB 406, did not advance in the Legislature following testimony by certain Plaintiffs, PTX096 at 8:9-9:7, 9:12-10:14, 12:8-14, 13:4-14:24, 15:4-16:7, and by the chief legal counsel for the Office of Commissioner of Political Practices, who warned of its unconstitutionality, *id.* at 4:9-5:4.

616. After the failure of HB 406, and in the same legislative session in which protections for Native American voting rights were rejected, HB 530, § 2 was advanced at the last moment without any committee hearings or opportunity for public testimony. This irregular procedure is itself indicative of discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (“Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.”).

*iv. Freedom of Speech*

617. HB 530, § 2 violates the fundamental right to freedom of speech of WNV, MNV, Blackfeet Nation, CSKT, FBIC, and MDP.

618. Article II, Section 7 of Montana’s Constitution protects Plaintiffs’ freedom of speech. Mont. Const. art. II, § 7; *see also Mont. Auto. Ass’n v. Greely* (1982), 193 Mont. 378, 388, 632 P.2d 300, 305.

619. Freedom of speech is a “fundamental” right and is “essential to the common quest for truth and the vitality of society as a whole.” *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 44, 303 P.3d 755, 761 (citations omitted).

620. Core political speech is accorded “the broadest protection.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995).

621. Like the circulation of an initiative petition for signatures, ballot collection activity is “the type of interactive communication concerning political change that is

appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988); *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (citing *Meyer* for this same proposition).

622. Multiple Montana courts have recently found that the right to free speech includes communication and coordination with voters for ballot collection purposes. *WNV I*, at 49, ¶ 27 (quoting *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988)); *Driscoll II*, at 24, ¶ 9.

623. “The constitutional guaranty [sic] of free speech provides for the opportunity to persuade to action, not merely to describe facts.” *Greely*, 193 Mont. at 387, 632 P.2d at 305.

624. WNV, MNV, and Tribal Plaintiffs’ public endeavors to collect and convey ballots for individual Native American voters living on rural reservations are an integral part of their message that the Native American vote should be encouraged and protected, and that voting is important as a manner of civic engagement.

625. MDP’s public endeavors to collect and convey ballots for voters are an integral part of its message that individual engagement in democracy and access to the ballot should be encouraged and protected and that voting is important as a manner of civic engagement.

626. By collecting and conveying ballots, WNV, MNV, Tribal Plaintiffs, and MDP are engaged in the “unfettered interchange of ideas for the bringing about of

political and social changes desired by the people,” which is at the heart of freedom of expression protections. *Dorn v. Bd. of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

627. Whether individuals should submit their ballots and ultimately participate in an election is a “matter of societal concern that [Plaintiffs] have a right to discuss publicly without risking [] sanctions.” *Meyer*, 486 U.S. at 421; *see also Buckley*, 525 U.S. at 186 (quoting *Meyer*, 486 U.S. at 422).

628. Prohibiting payment to individuals who undertake ballot collection restricts expression in multiple ways. “First, it limits the number of voices who will convey [Plaintiffs’] message and the hours they can speak and, therefore, limits the size of the audience they can reach.” *Meyer*, 486 U.S. at 422-23. It also limits speech to the wealthy, that is, those who are able to forgo remuneration for hours of work.

629. Like petition gathering, day-to-day community organizing, which for Plaintiffs includes ballot collection and assistance, “is time-consuming and it is tiresome so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.” *Id.* at 423-24.

630. That Plaintiffs “remain free to employ other means to disseminate their ideas does not take their speech” through ballot assistance outside of constitutional protection. *Id.* at 424. The Montana guarantee of freedom of speech “protects [Plaintiffs’]

right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Id.*

631. Thus, the efforts of WNV, MNV, Blackfeet Nation, CSKT, FBIC, and MDP must be afforded the broadest judicial protection, and HB 530, § 2 is an unconstitutional burden on these Plaintiffs’ speech rights.

*v. Due Process*

632. HB 530, § 2 violates Plaintiffs’ fundamental right to due process.

633. The Montana Constitution provides that “[n]o person shall be deprived of life, liberty, or property without due process of law.” Mont. Const. art. II, § 17.

634. A statute is unconstitutionally vague and void on its face if it fails to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *State v. Dugan*, ¶ 66 (quoting *City of Whitefish v. O’Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025). “Vague laws may trap the innocent by not providing fair warning.” *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025.

635. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Dugan*, ¶ 66 (quoting *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025).

636. When a vague law “abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings

inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025-26.

637. HB 530, § 2 prohibits a person from “provid[ing] or offer[ing] to provide, [or accepting], a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots.”

638. The statutory text of HB 530, § 2 is unclear in at least three different ways.

639. First, “pecuniary benefit” has not been defined in the statute at all. And the dictionary definition of “pecuniary” is unclear. *See Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/pecuniary> (last visited Aug. 6, 2022) (defining “pecuniary” as 1. “consisting of or measured in money” and 2. “of or relating to money”). It is entirely unclear whether the prohibition applies only to collectors who are paid per ballot or also to anyone who is not paid per ballot but whose paid employment includes ballot collection or assistance among other tasks. It is also unclear whether the prohibition extends to individuals who receive non-monetary benefits, such as gift cards, gas, or food in exchange for providing ballot assistance.

640. Because the definition of “pecuniary benefit” is unclear, so too is whether Plaintiffs’ activities would be permitted to continue under HB 530, § 2. For example, CSKT conducted taco feeds where ballot collection occurred, and paid employees staffed the feeds. With “pecuniary benefit” undefined, it is unclear whether these paid



employees—whose duties encompassed more than just ballot collection—would be permitted to assist with ballots.

641. Second, the statute leaves unclear whether, if an individual “distribut[es],” “request[s],” “collect[s],” and “deliver[s]” a single ballot for pecuniary gain, that individual would be subject to multiple fines or just one.

642. Third, while HB 530, § 2 explicitly exempts from its prohibitions “a government entity,” the statute does not define what constitutes an exempt “government entity.” It may or may not include the sovereign tribal governments and organizers paid to engage in ballot collection efforts by those tribes.

643. The CSKT tribal council has already explained that because HB 530 fails to adequately define the scope of its government exemption, “CSKT is likely to be confused about who is restricted from picking up and dropping off ballots and the lack of clarity makes it difficult for CSKT to know whether it would run afoul of the law.” CSKT 30(b)(6) Dep. Ex. 58<sup>11</sup> (Resolution of the Governing Body of CSKT (Ex. A to McDonald Affidavit)); CSKT 30(b)(6) Dep. 105:16-19.

644. Without clear definitions and the imposition of a \$100 per ballot fine, without the preliminary injunction in place, WNV had to cease all its paid ballot

---

<sup>11</sup> Plaintiffs’ Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. I-2 (Designated Exhibits to the Deposition of Robert McDonald as 30(b)(6) designee for the Confederated Salish and Kootenai Tribes).

collection operations. Aug. 17, 2022, Trial Tr. 851:15-24 (Horse); Perez Dep. 250:24-251:18.

645. MDP similarly would not engage in ballot collection if HB 530 is in place because it is not clear to them if the law prohibits their ballot collection activity, and they will not do it if there is “any kind of risk of legal liability.” Aug. 19, 2022, Trial Tr. 1220:1-13 (Hopkins).

646. Notably, the Secretary has had countless opportunities throughout this litigation to provide clarity as to the many statutory ambiguities Plaintiffs have raised. She has failed to clarify *any* of them, including at trial stating only that the administrative rulemaking process might provide the necessary clarity and that Plaintiffs’ claims are speculative until administrative rules are in place. By her own terms, then, the Secretary concedes that the plain text of HB 530, § 2—a statute that is currently and actively chilling Plaintiffs from participating in constitutionally protected activity—is ambiguous.

647. Thus, HB 530, § 2’s prohibition on ballot collection violates due process and is void for vagueness.

*vi. Article V, § 1*

648. In the alternative, if the Secretary is correct that HB 530, § 2 is not ripe for review because the substance of the final rule is “speculation,” then it would constitute an unlawful delegation of legislative power. *See* Mont. Const. art. V, § 1.

649. Pursuant to Article V, Section 1, of the Montana Constitution, “[t]he legislative power is vested in a legislature consisting of a senate and a house of representatives.” The Montana Supreme Court has outlined that “[w]hen the Legislature confers authority upon an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency.” *Douglas v. Judge* (1977), 174 Mont. 32, 38, 568 P.2d 530, 533 (citing *Bacus v. Lake County*, 138 Mont. 69, 354 P.2d 1056). These policies, reasons, standards, or guides, must be “sufficiently clear, definite, and certain to enable the agency to know its rights and obligations.” *White v. State* (1988), 233 Mont. 81, 88, 759 P.2d 971, 975. The law must leave “nothing with respect to a determination of what is the law” in order to be a proper delegation. *Id.* If the Legislature fails to do so, “its attempt to delegate is a nullity.” *Bacus*, 138 Mont. at 79, 354 P.2d at 1061.

650. The only guidance provided in HB 530, § 2 by the Legislature is that the rule adopted by the Secretary must be “in substantially” the same form as the version proffered by the Legislature and the Legislature provided a definition for “person.”

651. The Secretary failed to identify any policy, standard, or rule to guide the regulations implementing HB 530, § 2. Aug. 25, 2022, Trial Tr. 2225:1-17 (James).

652. Additionally, by providing no definition, let alone a policy, standard, or rule for the term “pecuniary benefit,” HB 530, § 2 leaves the Secretary to determine

what the law is. The Secretary must decide whether “pecuniary benefit” includes, for example, an organizer’s regular base salary, and whether HB 530, § 2 prevents someone like an aide or nurse, who is paid to assist elderly or disabled voters, from helping their patients request, receive, or return their absentee ballots.

653. Without an objective standard for the Secretary to follow, the Secretary must decide the scope of HB 530, § 2’s prohibition without the required policy, standard, or rule to use for guidance. Such a delegation violates Article V, Section 1 of the Montana Constitution, and HB 530, § 2 is therefore void.

**C. SB 169**

***i. Right to Vote***

654. Plaintiffs allege SB 169 impermissibly interferes with the right to vote guaranteed by Article II, § 13, of Montana’s Constitution.

655. Plaintiffs contend Article II, § 13, prohibits the Legislature from determining that student identification cards cannot be used as stand-alone forms of identification sufficient, by themselves, to allow an individual to prove their identity at a polling location and cast a ballot.

656. Article IV, § 3, of Montana’s Constitution explicitly requires the Legislature to pass laws governing the requirements for voter registration and the administration of elections.

657. Further, Article IV, § 3, of Montana's Constitution also mandates that the Legislature must "insure the purity of elections and guard against abuses of the electoral process."

658. The language of Article II, § 13, which states "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage" must be interpreted in conjunction with the provisions of Article IV, § 3. *Howell v. State*, 263 Mont. 275, 286, 868 P.2d 568, 575 (Mont. 1994).

659. Thus, when read together with the provisions of Article IV, Article II, § 13 cannot be interpreted to prohibit the Legislature from restricting primary ID to government-issued Montana or federal ID to prove their identity at a polling place and cast a ballot.

660. For this reason, SB 169 does not impermissibly interfere with any right granted by Article II, § 13.

**ii. Equal Protection**

661. As described above, under Article II, § 4 of the Montana Constitution, "no person shall be denied equal protection of the laws." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, ¶ 28, 325 P.3d 1211, ¶ 28. "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment." *Goble*, ¶ 28 (quoting *Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, ¶ 18, 114 P.3d 192, ¶ 18)(internal quotations omitted).

The three-step process undertaken when analyzing an equal protection claim begins first with identifying “the classes involved and determin[ing] if they are similarly situated[.]” *Goble*, ¶ 28. “The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination.” *Id.* at ¶ 29.

662. The Secretary contends that “young voters” is not an adequately defined class. This is incorrect. MDP and Youth Plaintiffs have defined the class “in a way which will effectively test the statute without truncating the analysis.” *Goble*, ¶ 34. Young voters and voters in all other age groups are otherwise similarly situated, but SB 169’s prohibition on out-of-state driver’s licenses or Montana college or university IDs—two forms of ID which had been accepted for years without resulting in a single known instance of fraud or any other problem—disproportionately and disparately burdens young voters. Plaintiffs presented significant evidence as described above showing that young voters are less likely to possess the primary forms of identification made primary with the passage of SB 169 and are additionally less likely, due to their mobility, to have the secondary forms of identification required to be presented in conjunction with a student ID or out-of-state driver’s license.

663. The second step in the equal protection analysis is to “determine the appropriate level of scrutiny to apply to the challenged legislation[.]” *Goble*, ¶ 28. As described above, the Court does not find that SB 169 burdens Plaintiffs fundamental

right to vote. Because no fundamental right or suspect class is affected, the appropriate level of scrutiny to apply to SB 169 is the rational basis test. *Snetsinger*, ¶ 17.

664. The third step in the equal protection analysis “is to apply the appropriate level of scrutiny to evaluate the constitutional challenge.” *Goble*, ¶ 36. “Under the rational basis test, the law or policy must be rationally related to a legitimate government interest.” *Snetsinger*, ¶ 19 (citing *McDermott v. State Dep’t of Corr.*, 2001 MT 134, ¶ 32, 305 Mont. 462, ¶ 32, 29 P.3d 992, ¶ 32).

665. The “interests” the Secretary and the Legislature had in the implementation of SB 169 include an interest in addressing voter fraud. There have been no instances of voter fraud concerning the use of student IDs in Montana. Additionally, there is no evidence that SB 169 will protect against future voter fraud. Experts testified in this case that there is no relationship between voter ID laws and reducing or stopping voter fraud.

666. The Secretary and the Legislature were interested in improving voter confidence with the passage of SB 169. Experts testified in this case that voter ID laws do not improve voter confidence. SB 169 is not rationally related to this interest given that at the same time the Legislature demoted two forms of identification with photo identification, the Legislature promoted concealed-carry permits. “Concealed-carry permits in Montana are neither uniform nor strict photographic identification. Rather, they are administered on a county-by-county basis and are not required by Montana

statute to bear a photograph with the permit-holder's likeness." *Montana Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 30.

667. The Secretary and the Legislature were interested in ensuring the reliability, integrity, and fairness of Montana's election processes. SB 169 is not rationally related to this interest given its targeting of young voters and does not enhance Montana's election processes given the testimony of Mr. Seaman describing that SB 169 significantly complicated the process of determining whether the voters are presenting adequate identification to cast their vote.

668. Plaintiffs have presented evidence concerning the significance of having the option to use a student ID as a primary form of voter identification for young voters due to the likelihood that young voters will not have access to the other forms of primary or secondary identification as now required by SB 169.

669. SB 169 unconstitutionally burdens Plaintiffs' right to equal protection of the laws by treating similarly situated groups unequally. SB 169 violates the Equal Protection Clause by imposing heightened and unequal burdens on Montana's youngest voters.

670. It is no accident that the Legislature passed SB 169 just months after Montana's youngest voters turned out to vote at record rates. Montana's legislators passed the bill to prevent some young Montanans from exercising their right to vote, in direct contravention of Montana's Equal Protection Clause. One of the drafters of SB 169



even testified against the amendment to SB 169 relegating student IDs to a secondary form of identification describing that she was not going to support it “because it’s discriminatory.” Aug. 23, 2022, Trial Tr. 1593:17-21 (Custer). Additionally, by requiring a student ID be presented in conjunction with other documents the Legislature essentially required that young voters “have to have a job or have been paying taxes in order to...vote. That went out in the 60s when...you used to have to own personal property in order to vote...” Aug. 23, 2022, Trial Tr. 1596:8-12 (Custer).

671. The Court finds that SB 169 does not meet the rational basis test because and SB 169 is not rationally related to the alleged government interests.

672. The Montana Legislature passed SB 169 with the intent and effect of placing increased barriers on young Montana voters. The law is, in other words, a “device designed to impose different burdens on different classes of persons.” *Spina*, ¶ 85.

673. Thus, the Court finds that SB 169 unconstitutionally violates Plaintiff’s constitutional right to equal protection.

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

## **ORDER**

**IT IS HEREBY ORDERED:**

1. Judgment is hereby found in favor of the Consolidated Plaintiffs that HB 176 violates their constitutional right to vote.
2. Judgment is hereby found in favor of the Consolidated Plaintiffs that HB 176 violates their constitutional right to equal protection.
3. HB 176 is unconstitutional and is hereby permanently enjoined.
4. Judgment is hereby found in favor of the MDP Plaintiffs and WNV Plaintiffs that HB 530, § 2 violates their constitutional right to vote.
5. Judgment is hereby found in favor of the MDP Plaintiffs and WNV Plaintiffs that HB 530, § 2 violates their constitutional right to equal protection.
6. Judgment is hereby found in favor of the MDP Plaintiffs and WNV Plaintiffs that HB 530, § 2 violates their constitutional right to freedom of speech.
7. Judgment is hereby found in favor of the MDP Plaintiffs and WNV Plaintiffs that HB 530, § 2 violates their constitutional right to due process.
8. In the alternative, judgment is hereby found in favor of the MDP Plaintiffs that HB 530, § 2 violates Article V, Section 1 of the Montana Constitution and is therefore void.
9. HB 530, § 2 is unconstitutional and is hereby permanently enjoined.
10. Judgment is hereby found in favor of MDP Plaintiffs and Youth Plaintiffs that SB 169 violates their constitutional right to equal protection.
11. SB 169 is unconstitutional and is hereby permanently enjoined.

12. With the entry of the permanent injunction concerning HB 530, § 2, HB 176, and SB 169, the preliminary injunction entered by the Court on April 6, 2022 (Dkt. 124) and modified on April 22, 2022 (Dkt. 142) is hereby vacated.

**DATED** September 30, 2022

/s/ Michael G. Moses  
District Court Judge

cc: David Dewhirst  
Leonard Smith  
Dale Schowengerdt  
Ian McIntosh  
William Morris  
E. Lars Phillips  
David Knobel  
Stephanie Command  
Jessica Frenkel  
Henry Brewster  
Jonathan Hawley  
Peter Meloy  
Matt Gordon  
Marilyn Robb  
John Heenan  
Alex Rate  
Akilah Lane  
Jonathan Topaz  
Jacqueline De Leon  
Samantha Kelty  
Theresa Lee  
Rylee Sommers-Flanagan  
Ryan Aikin  
Niki Zupanic

RETRIEVED FROM DEMOCRACYDOCKET.COM

# Exhibit B

RETRIEVED FROM DEMOCRACYDOCKET.COM

2022 WL 14782530

Only the Westlaw citation is currently available.  
United States Court of Appeals, Fifth Circuit,  
for the Fifth Circuit.

TEXAS STATE LULAC; Voto  
Latino, Plaintiffs—Appellees,  
v.

Bruce ELFANT, et al., Defendants,  
v.

Lupe C. Torres, in her Official Capacity as the Medina  
County Elections Administrator; Terrie Pendley,  
in her Official Capacity as the Real County Tax  
Assessor-Collector; Ken Paxton, Texas Attorney  
General, Intervenor Defendants—Appellants.

No. 22-50690

|

FILED October 26, 2022

Appeal from the United States District Court for the Western  
District of Texas, USDC No. 1:21-CV-546, Lee Yeakel, U.S.  
District Judge

#### Attorneys and Law Firms

Uzoma Nkem Nkwonta, Christopher D. Dodge, Melinda K.  
Johnson, Michael Brandon Jones, Graham White, Elias Law  
Group, L.L.P., Washington, DC, Luis Roberto Vera, Jr., Esq.,  
Law Offices of Luis Roberto Vera, Jr. & Associates, San  
Antonio, TX, for Plaintiffs-Appellees.

Autumn Hamit Patterson, Robert E. Henneke, Chance  
Weldon, Texas Public Policy Foundation, Austin, TX, for  
Intervenor Defendants-Appellants Lupe C. Torres, Terrie  
Pendley.

Lanora Christine Pettit, Benjamin D. Wilson, Office of the  
Attorney General of Texas, Office of the Solicitor General,  
Kathleen Theresa Hunker, Office of the Attorney General  
of Texas, Special Litigation Unit, Beth Ellen Klusmann,  
Esq., Office of the Texas Attorney General, Austin, TX, for  
Intervenor Defendant-Appellant Ken Paxton.

Kathleen R. Hartnett, Cooley, L.L.P., San Francisco, CA,  
for Amicus Curiae Lisa Wise, El Paso County Elections  
Administrator.

Jonathan Gabriel Chaim Fombonne, Harris County Attorney's  
Office, Houston, TX, for Amicus Curiae Clifford Tatum,  
Harris County Elections Administrator.

Before Clement, Duncan, and Wilson, Circuit Judges.

#### Opinion

Stuart Kyle Duncan, Circuit Judge:

\*1 Plaintiffs are two voter registration organizations who challenged Texas's recently revised requirements for voter residency. The district court concluded Plaintiffs had organizational standing because the new laws caused them to divert resources from other projects and also chilled their ability to advise and register voters. On the merits, the district court ruled that the challenged laws, in large part, impermissibly burdened the right to vote. Texas appealed.

We agree with Texas that Plaintiffs lack organizational standing. So, without reaching the merits, we reverse the district court's judgment and render judgment dismissing Plaintiffs' claims.

#### I.

During its 2021 regular session, the Texas Legislature enacted over a dozen laws related to election integrity.<sup>1</sup> Among them was S.B. 1111, which became effective on September 1, 2021. *See* Act of May 27, 2021, 87th Leg., R.S., ch. 869, 2021 Tex. Sess. Law Serv. 2142. S.B. 1111 made three relevant changes to the Texas Election Code's residency provisions. *First*, voters whose address on their registration form does not correspond to a physical residence, such as a commercial post-office box, must provide the registrar with documentation of a residential address. *See* TEX. ELEC. CODE §§ 15.051(a), 15.052(a), 15.054 (“P.O. Box Provision”). *Second*, voters are prohibited from establishing or maintaining a residence “for the purpose of influencing the outcome of a certain election.” *Id.* § 1.015(b) (“Residence Provision”). *Third*, voters may not “establish a residence at any place the person has not inhabited” or “designate a previous residence as a home and fixed place of habitation unless the person inhabits the place at the time of designation and intends to remain.” *Id.* § 1.015(f) (“Temporary Relocation Provision”). What links these provisions, according to Texas, is the “fundamental state policy ... that people should vote where they live.”

Months before S.B. 1111 took effect, two voter registration organizations, LULAC and Voto Latino (“Plaintiffs”), sued various county election officials in federal court, seeking to enjoin enforcement of the three provisions. They alleged that (1) the Residence Provision violates the First Amendment by chilling political speech, and (2) all three provisions violate the First, Fourteenth, and Twenty-Sixth Amendments by unduly burdening the right to vote. Texas Attorney General Ken Paxton and other county officials (collectively, “Texas”) intervened to defend S.B. 1111.

\*2 Following discovery, the parties cross-moved for summary judgment. The district court ruled largely for the Plaintiffs. Addressing standing first, the court ruled Plaintiffs had organizational standing because S.B. 1111 both chilled their speech and caused them to divert resources to counteract the law’s effects on their voter registration activities. The court also ruled Plaintiffs had statutory standing under 42 U.S.C. § 1983 given the direct injuries to their pocketbooks and First Amendment rights.

The court then turned to the merits. Addressing the P.O. Box Provision first, the court concluded that the measure “help[ed] the State prevent voter-registration fraud” and that requiring voters to sign and mail a prepaid, preaddressed form confirming a residential address scarcely burdened their right to vote. It therefore upheld the provision, but “with one exception.” The court invalidated the provision to the extent it required voters who confirmed a residential address also to include a photocopy of their identification. In such instances, the court thought the prepaid form should serve as a change of address with no further proof of residence needed.

Turning to the Residence Provision, the court found it unconstitutionally vague and overbroad. The court rejected the narrowing interpretation proffered by the Texas Secretary of State and concluded that the provision facially prohibited establishing a residence for “obviously permitted purposes such as voting, volunteering with a political campaign, or running for an elected office.” Accordingly, the court held the provision severely burdened the right to vote and “fail[ed] any degree of constitutional scrutiny.”

Finally, the court also found the Temporary Relocation Provision unconstitutional. The court believed the provision “creates a ‘man without a country,’ ” meaning someone unable to establish residence anywhere in order to vote. For instance, the court read the provision to bar college students

from registering either in their college town (because they do not intend to remain there) or in their hometowns (because they are not physically present there). The court thus ruled the provision impermissibly burdened the right to vote.

As a result, the court permanently enjoined enforcement of the Residence Provision and the Temporary Relocation Provision in full, and enforcement of the P.O. Box Provision in part. Texas appealed and we granted its motion for a temporary administrative stay. We now reverse. As explained below, the district court erred in concluding the Plaintiffs have organizational standing to challenge S.B. 1111.

## II.

We review summary judgments *de novo*, applying the same standards as the district court. *Guerrero v. Occidental Petroleum Corp.*, 35 F.4th 730, 732 (5th Cir. 2022); FED. R. CIV. P. 56(a). We also review standing *de novo*. *Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin*, 37 F.4th 1078, 1083 (5th Cir. 2022).

## III.

Texas argues that Plaintiffs lack organizational standing and, alternatively, that the challenged parts of S.B. 1111 do not unconstitutionally burden the right to vote. Because we agree that Plaintiffs lack organizational standing, we do not address the merits.

“An individual has standing to sue if his injury is traceable to the defendant and a ruling would likely redress it.” *Students for Fair Admissions*, 37 F.4th at 1084 n.5 (citing U.S. CONST. art. III, § 2; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). An association may have standing either by showing it can sue on behalf of its members (“associational” standing) or sue in its own right (“organizational” standing). *See id.* at 1084 & n.6; *Tenth St. Residential Ass’n v. City of Dallas*, 968 F.3d 492, 500 (5th Cir. 2020). The district court found Plaintiffs lack associational standing because they failed to identify any members affected by the challenged provisions. However, it found Plaintiffs have organizational standing based on two theories—diversion of resources and chilled speech. We address each in turn.

A.

\*3 “The Supreme Court has recognized that when an organization's ability to pursue its mission is ‘perceptibly impaired’ because it has ‘diverted significant resources to counteract the defendant's conduct,’ it has suffered an injury under Article III.” *Tenth St. Residential Ass'n*, 968 F.3d at 500 (quoting *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010)); see *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Such an injury must be “concrete and demonstrable.” *City of Kyle*, 626 F.3d at 238 (quoting *Havens Realty*, 455 U.S. at 379, 102 S.Ct. 1114). An organization can show standing via diversionary injury by identifying “specific projects that [it] had to put on hold or otherwise curtail in order to respond to the [challenged laws].” *Ibid.* (citing *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000)).

According to the district court, Plaintiffs identified “specific projects” curtailed due to Plaintiffs' spending money to counteract S.B. 1111: namely, certain of LULAC's scholarship and law-reform programs, as well as Voto Latino's voter-registration efforts outside Texas. The court noted that 2022 was “the first year since 2010 that Voto Latino will be unable to run a voter-registration drive in Colorado.” The court also observed that “LULAC is, for the first time, ‘spending over maybe \$1 million to \$2 million in Texas’ to counteract election laws like S.B. 1111.” Texas responds that the evidence fails to link Plaintiffs' claimed diversion of resources to S.B. 1111. We agree with Texas.

Testimony from LULAC and Voto Latino representatives consistently attributed their diversion of resources, not to S.B. 1111 specifically, but to a broader group of election-related laws enacted in Texas and other states. Emblematic is this exchange between Texas's counsel and a Voto Latino representative. When asked “[h]ow is Voto Latino injured by SB 1111,” the response was, in relevant part:

*As a result of SB 1111 and all the other laws that came into effect post-January, we had to reallocate our funding and lower our goals to concentrate on voter education.*

And so we lowered our goals in voter registration roughly about 25 percent and for voter outreach roughly at one point for 1.3 million to 500,000 so that's roughly about 62 percent

—60 percent. And then we also had *because there—the laws that were passed in the state of Texas and others, we actually had to shut down our Colorado program.*

It'll be the very first time that we are not doing voter registration and education in Colorado since 2010. And because of the things that I think we can all appreciate is that there is not infinite amount of money or time. And so I've also—we've also had to retool and teach our volunteers, educate them, *provide information around primaries specifically to SB 1111 and the other—the other laws as well*, and spent time on my counsel filing this lawsuit and the list goes on. [ 2 ]

ROA.1258–59 (emphases added). Similarly, LULAC's representative was asked whether the organization had to divert funds from immigration and criminal justice reform projects “on account of SB 1111 specifically.” The witness avoided giving a definite answer. Instead, he responded: “We're going to reduce those efforts, and it's not only SB 1111, but SB 1, it's both.”<sup>3</sup>

\*4 Even assuming this evidence adequately shows a diversionary injury under Article III, it fails to link any diversion of resources specifically to S.B. 1111. It is not enough merely to claim the organizations have spent money to counteract “S.B. 1111 and all the other [election] laws” passed in Texas and in other states around the same time. An organizational plaintiff must show it diverted resources “as a direct result of” the challenged law—not as a result of the challenged law and others like it. *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) [*“ACORN”*]; see also *City of Kyle*, 626 F.3d at 238 (explaining the diversion of resources must be made “in order to respond to the [challenged law]”). Plaintiffs have not done so here. Therefore, they fail to satisfy the traceability and redressability prongs of Article III standing. See, e.g., *Inclusive Cmty's. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019) (“‘Th[at] triad of injury-in-fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement[.]’” (first alteration in original) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1983))).

Contrast Plaintiffs' meager showing on this point with the concrete showing our court required to prove organizational standing in *ACORN*. There, the organizational plaintiff

challenged Louisiana's alleged lack of compliance with the National Voter Registration Act ("NVRA"), which required the state to facilitate voter registration at public aid offices. *ACORN*, 178 F.3d at 360. The organization presented specific evidence that it regularly conducted voter registration drives in Louisiana, registering people at "welfare waiting rooms, unemployment offices, and on Food Stamp lines," and concentrating its efforts in areas where households receiving food stamps had low rates of voter registration. *Id.* at 361. We found that this detailed showing was sufficient evidence that the organization had "expended resources registering voters in low registration areas who would have already been registered if [Louisiana] had complied with the [public aid] requirement under the NVRA[.]" *Ibid.* In other words, concrete evidence showed the organization's diversion of resources was a direct response to the defendant's challenged actions and, as such, satisfied the injury, traceability, and redressability prongs of Article III standing. Here, by contrast, Plaintiffs have merely made vague assertions that they diverted resources in response to "S.B. 1111 and all the other laws," both inside and outside Texas.<sup>4</sup>

We therefore cannot agree with the district court that Plaintiffs showed they curtailed "specific projects" in order to counteract S.B. 1111. For instance, the district court noted that "[t]his is the first year since 2010 that Voto Latino will be unable to run a voter-registration drive in Colorado." But the evidence did not show that the Colorado program was suspended because of money Voto Latino had to spend on S.B. 1111. Rather, the testimony was that "because [of] ... the laws that were passed in the state of Texas and others, we actually had to shut down our Colorado program." ROA.1259 (emphasis added).<sup>5</sup> The court also observed that LULAC was spending "\$1 million to \$2 million in Texas, to counteract election laws like S.B. 1111." ROA.1914 (emphasis added). Again, this is not sufficient. Plaintiffs sued to enjoin S.B. 1111—not "laws like S.B. 1111."

\*5 In sum, Plaintiffs failed to demonstrate their own standing to challenge S.B. 1111 based on diversion of resources. We can assume without deciding that Plaintiffs' testimony about diverted funding adequately shows an injury-in-fact. See *Inclusive Cmty. Project*, 946 F.3d at 656 n.9 (assuming injury-in-fact). Even so, Plaintiffs did not show that the diversion was a direct response to S.B. 1111 specifically, as opposed to an undifferentiated group of recent election laws in Texas and elsewhere. Plaintiffs thus failed

to show that their claimed injury was traceable to S.B. 1111. See *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (standing requires injury to be "fairly traceable to the challenged actions of the defendant"); *ACORN*, 178 F.3d at 359 (holding diversion of resources must be "fairly traceable" to the "conduct ... that [plaintiff] claims in its complaint is illegal"). For similar reasons, Plaintiffs also failed to show redressability. See *Larson v. Valente*, 456 U.S. 228, 243 n.15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (redressability requires that "a favorable decision will relieve a discrete injury to [the plaintiff]") (emphasis added). If Plaintiffs' injury arose from various election laws in Texas and elsewhere, as the testimony at most suggests, enjoining S.B. 1111 would not likely redress the drain on their resources. See *Leal v. Becerra*, No. 21-10302, 2022 WL 2981427, at \*2 (5th Cir. July 27, 2022) (unpublished) ("Redressability is also a problem when declaring one law unenforceable may not provide relief because a different law independently causes the same injury.").

In sum, the district court erred in concluding Plaintiffs had standing based on a diversion-of-resources theory.

## B.

We turn to Plaintiffs' second theory of organizational standing, namely that the threatened enforcement of S.B. 1111 chills their speech. A plaintiff suffers an Article III injury if the credible threat of a law's enforcement chills his speech or causes self-censorship. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014); *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021). The chilling effect must have an objective basis; "[a]llegations of a subjective 'chill' are not an adequate substitute ...." *Laird v. Tatum*, 408 U.S. 1, 13–14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). To assess standing on this basis, we ask (1) whether the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest; (2) whether that conduct is arguably proscribed by the challenged policy; and (3) whether the threat of future enforcement is substantial. *Barilla*, 13 F.4th at 431–432 (citing *Speech First, Inc. v. Penves*, 979 F.3d 319, 330 (5th Cir. 2020)).

The district court held that Texas's threatened enforcement of S.B. 1111 objectively chills Plaintiffs' First Amendment right to conduct voter registration drives and engage with



prospective voters. It credited Plaintiffs' fear of being prosecuted if they gave advice to voters that conflicted with S.B. 1111. This fear was credible, the court reasoned, because helping someone commit voter fraud is a crime and because of Texas's avowed priority of combatting voter fraud. We disagree.

Plaintiffs fail prongs two and three of the governing test. While Plaintiffs may have a constitutional interest in conducting voter registration drives, they have not shown under prong two that this conduct is “arguably proscribed” by S.B. 1111. *Barilla*, 13 F.4th at 431 (quoting *Speech First*, 979 F.3d at 330) (cleaned up). Plaintiffs must “establish a serious intention to engage in conduct proscribed by law,” *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018), but neither S.B. 1111 nor any other law cited by Plaintiffs arguably prohibits Plaintiffs' activities.

Plaintiffs argue that it is “a crime under Texas law to help someone to register to vote in violation of [S.B. 1111's] confusing new requirements.” But Texas law does not criminalize giving good faith but mistaken advice to prospective voters. Rather, the statute on which Plaintiffs rely applies only “if the person *knowingly or intentionally*” “requests, commands, coerces, or attempts to induce another person to make a false statement on a [voter] registration application.” TEX. ELEC. CODE § 13.007(a) (emphasis added). See also TEX. PENAL CODE § 7.02(a)(2) (making a party criminally liable for another's offense only if he “act[s] with intent to promote or assist the commission of the offense”). Plaintiffs do not assert that they plan to “knowingly or intentionally” encourage people to register who are ineligible under S.B. 1111. Plaintiffs' argument turns on the “confusion and uncertainty” S.B. 1111 supposedly injects into their voter outreach efforts. Uncertainty is not the same as intent, however. Accordingly, Plaintiffs have not shown a serious intention to engage in protected activity arguably proscribed by the challenged law.

\*6 Plaintiffs also lack standing under prong three because there is no credible threat they will be prosecuted. *Barilla*, 13 F.4th at 432. The fanciful notion that Plaintiffs will be charged under S.B. 1111 depends on a “highly attenuated chain of possibilities.” *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). Consider all the dominoes that would have to fall:

1. Plaintiffs “knowingly or intentionally” encourage or induce someone to vote or register to vote in violation of S.B. 1111.
2. That person intentionally votes illegally or intentionally submits a false registration form.
3. The voter registrar discovers the violation and refers it to a prosecutor.
4. The prosecutor unearths the initial connection between the offender and Plaintiffs.
5. The prosecutor determines Plaintiffs intentionally violated S.B. 1111.
6. The prosecutor exercises his discretion to bring charges against Plaintiffs.

This does not add up to a credible threat of Plaintiffs' being prosecuted for inducing a prospective voter to violate S.B.

1111. See *Zimmerman*, 881 F.3d at 390 (no credible risk of enforcement where the circumstances leading to prosecution were “speculative and depend[ed] in large part on the action of third-part[ies]”).

In response, citing our *Barilla* decision, Plaintiffs argue that we must presume a credible threat of prosecution because this is a pre-enforcement challenge. See *Barilla*, 13 F.4th at 432. They are mistaken. The presumption Plaintiffs rely on applies to “pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs.” *Ibid.*

(quoting *Speech First*, 979 F.3d at 335). But S.B. 1111 does not facially restrict any of Plaintiffs' expressive activities. S.B. 1111 applies to voters, not organizations like Plaintiffs who advise and register voters. S.B. 1111 therefore does not facially restrict Plaintiffs' ability to engage in their expressive conduct, and the presumption of a credible threat of prosecution does not apply.<sup>6</sup>

In sum, the district court erred in concluding Plaintiffs had organizational standing based on a chilled-speech theory.

#### IV.

Because Plaintiffs lack standing, the district court lacked subject matter jurisdiction. We therefore REVERSE the

district court's judgment and RENDER judgment dismissing  
Plaintiffs' claims.

#### All Citations

REVERSED and RENDERED.

--- F.4th ---, 2022 WL 14782530

#### Footnotes

- 1 *See generally* Keith Ingram, *Election Advisory No. 2021-09*, Tex. Sec'y of State (July 30, 2021), <https://www.sos.state.tx.us/elections/laws/advisory2021-09.shtml>; *see also, e.g.*, Act of June 4, 2021, 87th Leg., R.S., ch. 241, 2021 Tex. Sess. Law Serv. (H.B. 1264) (requiring registrars to send monthly abstract of death certificates of voting-age decedents to voter registrars and Secretary of State); Act of June 14, 2021, 87th Leg., R.S., ch. 573, 2021 Tex. Sess. Law Serv. (S.B. 598) (requiring a risk-limiting audit of certain statewide elections within twenty-four hours of the ballots being counted).
- 2 To the extent Plaintiffs rely on the assertion that they “spent time on ... counsel filing this lawsuit,” our precedents squarely reject the notion that a diversionary injury can be shown by “the mere fact that an organization redirects some of its resources to litigation and legal counseling.” *La. ACORN*, 211 F.3d at 305 (cleaned up).
- 3 S.B. 1 is a wide-ranging election integrity law recently enacted in Texas. Among other things, it imposes criminal penalties for certain forms of intentional voter fraud and requires the Secretary of State to carry out periodic, randomized audits of election results. *See* Texas Election Integrity Act of 2021, 87th Leg., 2d C.S., ch. 1, 2021 Tex. Sess. Law Serv. 3783. LULAC has separately challenged parts of S.B. 1. *See La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-844 (W.D. Tex.).
- 4 While “general factual allegations of injury resulting from the defendant’s conduct may suffice” at the pleadings stage, more is required to survive summary judgment, as here. *ACORN*, 178 F.3d at 354 (citation omitted). To demonstrate standing at this stage, Plaintiffs “must point to specific summary judgment evidence showing that it was ‘directly affected’ by [Texas’s] alleged ... violations.” *Ibid.* (citation omitted).
- 5 Later in her deposition, the same witness suggested that “shutting down the Colorado program” was “specifically” due to S.B. 1111. But the witness did not try to explain why spending money on S.B. 1111, in contrast to all the other election laws in Texas and elsewhere, caused suspension of the Colorado program. More specificity is needed to show that resources were diverted “as a direct result” of the challenged law. *ACORN*, 178 F.3d at 360. In any event, a few pages earlier, the same witness attributed suspension of the Colorado program, not specifically to S.B. 1111, but to “the laws that were passed in the state of Texas and others.”
- 6 Even if the presumption applied, it can be rebutted by “compelling contrary evidence.” *See Barilla*, 13 F.4th at 432 (noting that “courts will assume a credible threat of prosecution in the absence of compelling contrary evidence”) (citing *Speech First*, 979 F.3d at 335). Such evidence abounds here, given the number of stars that would have to align before Plaintiffs could be prosecuted for violating S.B. 1111. *See supra*.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing was electronically transmitted via the Court's electronic filing system, to the following:

Brad Schlozman  
Hinkle Law Firm  
1617 North Waterfront Parkway, Suite 400  
Wichita, KS 67206-6639

Scott Schillings  
Hinkle Law Firm  
1617 North Waterfront Parkway, Suite 400  
Wichita, KS 67206-6639

Krystle Dalke  
Hinkle Law Firm  
1617 North Waterfront Parkway, Suite 400  
Wichita, KS 67206-6639

/s/ Jason A. Zavadil

Jason A. Zavadil

RETRIEVED FROM DEMOCRACYDOCKET.COM