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

MONTANA DEMOCRATIC PARTY and MITCH BOHN, WESTERN NATIVE VOICE et al., MONTANA YOUTH ACTION, et al.,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,

Defendant and Appellant.

APPELLEES WESTERN NATIVE VOICE, MONTANA NATIVE VOTE, BLACKFEET NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES, FORT BELKNAP INDIAN COMMUNITY AND NORTHERN CHEYENNE TRIBE'S BRIEF IN OPPOSITION TO APPELLANT'S RULE 22(2) MOTION TO STAY

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

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INTRODUCTION[1]

This Court recently upheld a preliminary injunction of the Montana Ballot Interference Prevention Act ("BIPA") because it constituted a "disproportionate burden to Native American voters' . . . right of suffrage.'" *Driscoll v. Stapleton*, 2020 MT 247, ¶ 23, 401 Mont. 405, 417, 473 P.3d 386, 393 (quoting Mont. Const. art. II, § 13)). Less than two years later, Plaintiffs once again have demonstrated that "unequal access to the polls for Native American voters would be exacerbated by" a recently passed law, HB 176. *Id.* ¶ 21. Once again, "the Secretary has pointed to no evidence in the preliminary injunction record that would rebut . . . a disproportionate impact on Native American voters." *Id.*, ¶ 22. And once again, a preliminary injunction is necessary to "maintain the status quo pending final resolution on the merits" and prevent "a possibility of irreparable injury" to Plaintiffs ahead of an upcoming statewide election. *Id.* ¶ 24.

Unable or unwilling to argue the merits of her case—which alone is fatal to her application—the Secretary resorts to mischaracterizing the record before the District Court and appealing to vague and speculative administrative concerns about upcoming elections. Even if administrative burdens could trump Plaintiffs' fundamental constitutional rights—which they cannot—those burdens do not exist

[1] Appellees Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community and Northern Cheyenne Tribe challenged only HB 176, so this brief does not address the stay sought with respect to SB 169.

here. Election Day Registration ("EDR") has been widely used by Montana voters and implemented without issue by Montana election officials since 2006. The District Court's preliminary injunction maintains the status quo by allowing Montana voters to use the system that has been in place for years and which preserves their constitutional right to free and fair access to the ballot box.

ARGUMENT

I. The District Court Did Not Abuse its Discretion in Denying the Motion

"[D]istrict courts are afforded a high degree of discretion to grant or deny preliminary injunctions." *Flying T Ranch, LLC. v. Catlin Ranch, LP.*, 2020 MT 99, ¶ 7, 400 Mont. 1, 5, 462 P.3d 218, 221. A district court's grant of a preliminary injunction is reviewed "for a manifest abuse of discretion," which is defined as "one that is 'obvious, evident, or unmistakable.'" *Driscoll*, ¶ 12 (quoting *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 355, 440 P.3d 4, 8). The party requesting a stay bears the burden of proof. *The Clark Fork Coal. v. Tubbs*, No. BDV-2010-874, 2015 WL 13614529, at *1 (Mont. 1st Jud. Dist. Ct. May 8, 2015). Four factors guide a motion to stay analysis under Montana and federal law: "(1) whether the *stay applicant* has made a strong showing that he is likely to succeed on the merits; (2) whether the *applicant* will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (emphasis added).

A. The Secretary failed to make a strong showing on the merits.

As an initial matter, the Secretary argues she must show only that "serious legal questions are raised" in this case. App. 11 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011)). Yet in the case she cites, the Ninth Circuit noted that a stay applicant must make a "strong showing that [s]he is likely to succeed on the merits" and held that "in order to justify a stay, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits." *Leiva-Perez,* 640 F.3d at 968. This is consistent with other Ninth Circuit cases stating appellants must demonstrate "a reasonable probability" or "fair prospect of success." *Fed. Trade Comm'n v. Qualcomm Inc.*, 935 F.3d 752, 755 (9th Cir. 2019).

The Secretary does not contest any of the District Court's detailed factual findings on the merits. The District Court found that "the percentage of voters using [EDR] is consistently higher for people living on-reservation in Montana." App. 28 (quoting Street Aff. ¶ 4 (Dkt. No. 44)). It also determined that "Native Americans have further to travel to register to vote, have less access to vehicles, [and] have less access to money for gas and car insurance." App. 62. The District Court thus held that "HB 176 eliminates an important voting option for Native Americans and will make it harder, if not impossible, for some Montanans to vote." App. 54; *see also* App. 64. The District Court's findings are remarkably similar to this Court's analysis in *Driscoll*, where the Court upheld a preliminary

injunction enjoining BIPA because "[t]he District Court found that the evidence of various factors contributing to unequal access to the polls for Native American voters would be exacerbated by [the challenged law], burdening this subgroup's constitutional right to vote." *Driscoll*, ¶ 21.

The District Court also found that "Plaintiffs have rebutted the State's interests" in HB 176. App. 64. It found that "testimony from experts and election staff describ[e] there has been no voter fraud in Montana pertaining to EDR." App. 64; *see also* App. 54 ("Voter fraud in general is rare in Montana."); App. 157-167 (Dkt. No. 45); App. 381 (county elections administrator testifying, "I don't believe there's voter fraud in any of [Montana's] counties.").[2] The District Court also determined that "EDR is not a significant burden" on election administrators and that, to the extent it is, HB 176 simply "moves the burden" by a day rather than eliminating it. App. 64. And to the extent the Secretary claims HB 176 is necessary to reduce voter wait times, she ignores the fact that EDR occurs only at county election offices and not polling locations, and that wait times are extremely low, with the vast majority of voters not even having to wait ten minutes to vote. *See* App. 472-75. The District Court's analysis on the state's interest is again consistent with *Driscoll*, where the Secretary could not justify BIPA under any standard

[2] As Defendant has cited materials that were not before the lower court in its grant of the preliminary injunction, Appellees do the same throughout to provide this Court with the most accurate factual picture possible. Even if the Court were to disregard this additional evidence, the material only in the record makes clear that the stay should be denied.

because she failed to "present evidence" of those alleged interests, such as "voter fraud or ballot coercion . . . occurring in Montana." *Driscoll*, ¶ 22.

In her application, the Secretary ignores this detailed factual record and argues only that the Montana Constitution "grants the Legislature discretion on whether to enact election day registration." App. 12. To the extent this is true, however, the Legislature may only exercise that discretion "subject . . . to constitutional limitations." *State v. Savaria* (1997), 284 Mont. 216, 223, 945 P.2d 24, 29; *see also Wheat v. Brown*, 2004 MT 33, ¶ 27, 320 Mont. 15, 22-23, 85 P.3d 765, 770. As this Court recently found, "[i]t 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." *Brown v. Gianforte*, 2021 MT 149, ¶ 24, 404 Mont. 269, ¶ 24, 488 P.3d 548, 556; *see also* App. 54. The Legislature cannot use whatever discretion it has to trample Montanans' fundamental rights.

B. The Secretary failed to show she will be irreparably injured absent a stay.

The preliminary injunction's sole function is to revert the operation of EDR in Montana to the way it has functioned for the past 15 years. This cannot possibly constitute irreparable injury. In her application, the Secretary points to three possible injuries. First, the Secretary states that the injunction "void[s] the significant time and resources implementing [HB 176] and educating election

officials and voters." App. 12-13. Yet the Secretary cannot be irreparably harmed by "taking steps to enact [HB 176] given that is a duty of her job." App. 73; *see also Am. Music Co. v. Higbee*, 1998 MT 150, ¶ 15, 289 Mont. 278, 283, 961 P.2d 109, 112 (monetary outlays do not constitute irreparable harm). Regardless, the time and resources at issue are sunk costs already incurred by the Secretary, and staying the injunction will do nothing to return them to her.

Second, the Secretary argues the injunction will "forc[e] election officials to conduct . . . elections without sufficient training or other resources." App. 13. Yet these same election officials have administered elections with EDR without incident for the past 15 years, and in fact some have never administered a poll election in Montana *without* EDR. *See* App. 386. The Secretary provides no evidence that election officials are unprepared to conduct elections with EDR.

Third, the Secretary argues the injunction reduces voter confidence and causes voter confusion. App. 13. The Secretary's claim about voter confidence is pure conjecture. Nothing in the record indicates that HB 176 will have any effect on voter confidence; in fact, all data and scholarship in the record show that voter confidence in Montana is high, remarkably stable, and driven by factors that have nothing to do with HB 176. *See* App. 478-82. The District Court found "the Secretary's arguments concerning voter confusion . . . mystifying" because, as noted *supra*, the injunction simply allows voters to use EDR "as they have been for

the last 15 years." App. 498. To the extent the injunction causes any confusion for voters, "no harm will come to them," because they will still be able to register and vote on Election Day. App. 498. By contrast, voters confused by a stay "would be harmed because they would be unable to cast their vote" if they were unregistered on Election Day. App. 498. In this way, it is only the resulting confusion *from a stay of the injunction* that could possibly harm voters.

Finally, the Secretary claims "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." App. 12 (quoting *Coal. For Econ. Equity v. Wilson*, 122 F. 3d 718, 719 (9th Cir. 1997)). However, the Ninth Circuit has since emphasized that this proposition was dicta and explicitly "reject[ed] the . . . suggestion that, merely by enjoining a state legislative act, we create a per se harm trumping all other harms." *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009), *vacated on other grounds, Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012). Regardless, HB 176 cannot be considered a more representative enactment of the people than the Montana Constitution, which itself was "produced by a democratic process." *Id.*; *see Montana Auto. Ass'n v. Greely* (1981), 193 Mont. 378, 302-03 632 P.2d 300, 382-83.

C. The issuance of a stay substantially injures Plaintiffs.

"For the purposes of a preliminary injunction, the loss of a constitutional

right constitutes an irreparable injury." *Driscoll*, ¶ 15. "A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citation omitted); *see also Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); App. 72.

It is untrue that Plaintiffs failed to show that HB 176 "prevented Montanans from voting in 2021," App. 13; the District Court cited testimony from individual voters and election administrators finding that many otherwise eligible voters were turned away on Election Day in 2021 because they were not registered to vote, App. 43. Further, by focusing only on individual voters, the Secretary ignores the harms to organizational Plaintiffs, whose operations have already been negatively impacted by HB 176 and who would suffer harm by having to spend additional resources to counter HB 176's disenfranchising effects. *See* App. 72. Regardless, Plaintiffs do not need to prove that HB 176 "prevented Montanans from voting," App. 13, only that HB 176 unconstitutionally burdens fundamental rights, *see Driscoll*, ¶ 24 (finding plaintiffs would suffer irreparable injury even where BIPA "ha[d] not yet been in effect for a statewide general election.").

Finally, the Secretary argues that Plaintiffs unduly delayed in seeking a preliminary injunction, thus undermining any claim of irreparable injury. As the District Court has already found, no such delay occurred. App. 73-74. Further,

there has not been a single statewide election held since HB 176 was passed. By contrast, in the case the Secretary cites, *Benisek v. Lamone*, plaintiffs sought a preliminary injunction only after *six years* and three statewide general elections had elapsed. 138 S. Ct. 1942, 1944 (2018).

D. The public interest does not favor a stay.

The injunction serves the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted). The Secretary appeals only to vague "administrative burdens," App. 14, even though she has provided no evidence that returning to the system in place for the past 15 years would harm election administrators. Regardless, it is axiomatic that administrative burdens cannot trump constitutional rights. *See, e.g.*, *Fish*, 840 F.3d at 755; *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012).

The preliminary injunction is also in the public interest because it preserves the status quo. *See* App. 495-97. This Court has consistently held that the status quo is the "last actual, peaceable, non[-]contested condition which preceded the pending controversy." *Driscoll*, ¶ 14 (internal quotation marks omitted); *Weems*, ¶ 26. As such, "the remedy [Plaintiffs] seek is a return to the status quo that existed prior to the Montana legislature passing HB 176," App. 40—particularly given that the Secretary "had notice that these laws were contested since before they were

signed into law," App. 73.

Finally, the Secretary's vague allusion to *Purcell v. Gonzalez*, 549 U.S. 1 (2006), as potentially foreclosing preliminary relief is misplaced. The so-called *Purcell* principle has not been adopted under Montana law and does not control here. Even if it did, the injunction in this case did not go into effect "on the eve of an election," App. 14, but instead more than two months before the upcoming June 7, 2022 primary. Furthermore, *Purcell* warns only against changes to election laws that risk the sort of confusion that provides voters an "incentive to remain away from the polls." *Purcell,* 549 U.S. at 5. Here, Defendant provides no evidence that returning to the EDR system that governed for 15 years will cause confusion, let alone confusion that will keep voters away from the polls, as EDR makes it *easier* to vote and rewards Montanans who show up on Election Day. If anything, *Purcell* weighs in Plaintiffs' favor, given that it urges that "deference" is owed to the District Court's "factual findings" and cautions against issuing "conflicting [court] orders," which would occur were this Court to issue a stay. *Id.* at 4-5.[3]

CONCLUSION

The motion to stay the preliminary injunction of HB 176 should be denied.

[3] Indeed, at least one elections administrator has already issued new guidance for voters to account for the District Court's preliminary injunction—guidance that would become misleading and potentially confuse voters if this Court issues a stay. App. 618-20.

DATED THIS 9th day of May, 2022.

Respectfully submitted,

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double- spaced except for footnotes and for quoted and indented material; and is under the page limit.

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