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 MONTANA YOUTH ACTION, FORWARD MONTANA FOUNDATION, AND MONTANA PUBLIC INTEREST RESEARCH GROUP'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

Defendant Secretary of State Christi Jacobsen asks this Court to stay the District Court's Order enjoining enforcement of two election laws that make it more difficult for Montanans—especially young Montanans—to vote. But the preliminary injunction, entered on April 6, 2022, was issued for good reason: the Secretary cannot rebut the robust evidence that the challenged laws unduly burden Montanans' exercise of their fundamental rights of suffrage and to equal protection under the law.

Whether to stay a preliminary injunction is soundly within the District Court's discretion, but even if it were not, there is simply no justification for staying the preliminary injunction of House Bill 176 ("HB 176"), which eliminates election day registration ("EDR") and Senate Bill 169 ("SB 169"), which complicates the set of identifications allowed for voting. If implemented, these laws will irreparably injure Montana voters. With the fundamental right to vote in the balance, the Secretary offers no evidence of voter fraud in the state—and only minute, conflicted evidence of administrative burden associated with election day registration.

Consolidated Plaintiffs represent Montanans from many backgrounds with varying, sometimes divergent, interests. Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group (hereinafter "Youth Plaintiffs") join common interest Plaintiffs Western Native Voice et al. ("WNV") and Montana Democratic Party et al. ("MDP") in opposing the Secretary's motion to stay the Order enjoining HB 176 and SB 169 and request the Court deny the same.

STANDARD

"[A] district court's order on a motion to stay proceedings [is reviewed] for an abuse of discretion." *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 7, 400 Mont. 1, 462 P.3d 218. A district court's decision "to grant or deny preliminary injunctions" will not be overturned "absent a manifest abuse of discretion." *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 7, 395 Mont. 160, 437 P.3d 142. Montana courts have sometimes relied on federal law and assessed four factors to determine whether to grant a stay. These are: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether, absent a stay, the applicant will be irreparably

injured; (3) whether a stay will substantially injure the other parties; and (4) where the public interest lies. *The Clark Fork Coal. v. Tubbs*, No. BDV-2010-874, 2015 WL 13614529, at *1 (Mont. 1st Jud. Dist. Ct. May 8, 2015). This Court has also recently stayed an injunction where doing so would "maintain the status quo pending consideration of the issues." Order, *Stapleton v. Thirteenth Judicial Dist. Ct.*, OP 20-0293, at 3 (May 27, 2020) ("Stapleton Order"). Under either the four-factor test or simply by assessing the status quo, the injunction entered below is proper and should remain unstayed.

ARGUMENT

The Secretary centers her request around two arguments. First, she claims a preliminary injunction issued two months before primary election day—which requires election officials to conduct the election in the same way that elections have been conducted for the last nearly two decades—does not allow enough time to comply. Second, she repeats her theory that Plaintiffs have not shown that these laws harm voters, despite record evidence to the contrary. Both arguments are disputes with reality. There was and remains time enough for election officials to adhere to the process of conducting elections that long predates the

2021 changes that are the subject of this litigation. The District Court granted Plaintiffs' request for preliminary relief after considering substantial evidence of harm in the form of declarations and affidavits from individual Montanans, statistical evidence showing demographic impact, and legislative evidence attesting the same. *See* App. 048–385 (including Dkt. 54, 69, 70, and 74).

I. The injunction maintains the status quo.

The Secretary's first argument relies on the dual premises that enjoining HB 176 and SB 169 upends the status quo and that election officials lack the time to implement the injunction without causing voter confusion. In fact, the District Court's Order restores the status quo. Moreover, the injunction was issued two months before election day and a little over a month before absentee ballots are generally sent out. *See* §§ 13-13-205(1)(a)(i)–(iii). In other words, there has been and remains ample time to implement the injunction.

In *Driscoll v. Stapleton*, 2020 MT 247, 401 Mont. 405, 473 P.3d 386, the lower court "entered its preliminary injunction ten days before the June 2, 2020 primary election and two weeks *after election administrators mailed ballots* to all Montana voters," which instructed

voters "in three separate places that ballots must be *received* by the election office by 8:00 p.m. on Election Day, June 2." Stapleton Order at 2 (first emphasis added). Explaining that the status quo means "the last actual, peaceable, noncontested condition which preceded the pending controversy," *id.* at 3 (quoting *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 250, 440 P.3d 4), this Court reasoned that the receipt deadline had been "in place for many years," that election officials had "responded swiftly to ensure that ballots were timely mailed," and the mailed ballots included an "express directive" that they would not count "unless received by the 8 p.m. election-day deadline," *id.* Accordingly, the Court found "good cause to maintain the election-day deadline . . . to avoid voter confusion and disruption of election administration." *Id.* [1]

Here, by contrast, the enjoined laws would require a break with norms that have been nearly two decades in the making. HB 176 and SB 169 alter election laws that have been in place for eight and nine statewide election cycles respectively. App. 013, 016–17; *see also* App.

[1] The Secretary appears to misquote the Stapleton Order, reframing certain phrases to sound more like a test than they appear to be. App. 514–15. Youth Plaintiffs' best reading of the Stapleton Order is that it turned on the timing of the injunction and the fact that it disrupted existing practices that had been "in place for many years," and did so *after* ballots had been sent out to voters. Stapleton Order at 2–3.

499:24–501:19 (election administrator in Broadwater County noting that he has never administered a poll election without EDR). And some election officials have begun issuing instructions to voters consistent with the preliminary injunction. App. 494:15–496:10 (election administrator in Petroleum County has already issued guidance consistent with the District Court's preliminary injunction). Staying the injunction would mean requiring a third change in advance of the June 2022 primary election, far likelier to promote confusion, not least because the laws in question are new and unfamiliar to Montana voters. The Court should deny the Secretary's motion to stay.

II. Plaintiffs are likely to succeed on the merits and the Secretary has made no contrary showing.

Whether the Secretary raises "serious legal questions" or not, she must also show a likelihood of success on the merits. *See Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (describing "many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect,'" or "'a substantial case on the merits'" or that "'serious legal questions are raised'" and concluding that "these formulations are essentially interchangeable" and that to justify a stay, a petitioner must have "a substantial case for

relief on the merits") (citations omitted). But the Secretary does not grapple with the District Court's findings, instead making the conclusory statement SB 169 would survive under federal law, App. 515–16, and that the Montana Constitution delegates would have been perfectly happy to see EDR reversed after fifteen years of its use without mishap and despite Montanans' rejection of a referendum attempting to eliminate it, *id.* at 516; *see* App. 028–29.

As to SB 169, the District Court found Youth Plaintiffs' and MDP's expert testimony showed that SB 169 increases the cost of voting for students. App. 457. Further, the District Court concluded that there have been "no instances of student ID-related election fraud," and that to the extent the law was meant "to clear up confusion among election workers," there "are likely less burdensome means than removing student IDs as a primary form of ID to clear up confusion amongst election staff." *Id.* at 457–58. The Secretary does not respond to these factual findings and legal conclusions.

As to HB 176, the Court concluded that, among other things, Plaintiffs had rebutted the Secretary's claims of voter fraud related to EDR. *Id.* at 468. And Plaintiffs showed that young voters specifically

rely on EDR, accounting for 31.2% of voters registered on Election Day. *Id.* at 466–67; *cf.* App. 247, ¶ 6 (documenting that at least 266 Montanans who attempted to use EDR were turned away in 12 counties during the 2021 municipal election). Moreover, the Court found that moving the registration deadline back does little to reduce the administrative burden on election officials because it only changes the date of that burden. App. 468. Again, the Secretary does not respond.

III. The Secretary will suffer no irreparable injury absent a stay, but a stay will substantially and irreparably injure Plaintiffs and the public.

The Secretary gives three reasons that she will suffer harm absent a stay. Youth Plaintiffs take each in turn.

First, the Secretary argues that time spent implementing the laws will be lost. App. 516–17. But the question is whether these laws are constitutional and "the public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010). If the Secretary were to prevail on the merits, time spent educating and engaging with election officials would not be lost—its usefulness would only be delayed. If Plaintiffs prevail—an outcome they have proven is more likely—the Secretary cannot

claim an interest in enforcing an unconstitutional law for one election simply because she trained election workers and expended resources to implement the law. *See Fla. Businessmen for Free Enterprise v. City of* Hollywood, 648 F.2d 956 (5th Cir. 1981) ("Given appellants' substantial likelihood of success on the merits, however, the harm to the city from delaying enforcement is slight."); *see also Caldwell v. Sabo*, 2013 MT 240, ¶ 29, 371 Mont. 328, 308 P.3d 81 ("[M]oney damages are not considered irreparable harm.").

Second, the Secretary argues that without a stay, election officials will "conduct rapidly-approaching elections without sufficient training." App. 517. And third, the Secretary argues that voters will be confused, and their confidence shaken, without a stay. *Id.* But, as the District Court observed with respect to the Secretary's voter confusion claims, both of these arguments are "mystifying." *See* App. 487. Like voters, election officials have either been administering EDR for 15 years or are entirely familiar with the process. *See id.* The same is true of acceptable forms of identification under SB 169. Although the Secretary claims that SB 169 was meant to reduce confusion, the law created a class system for forms of identification that did not exist

before. Under prior law—and thus under the injunction—voters only need one form of identification that shows either a name and photograph or a name and current address within the precinct.

The Secretary cites *Lair v. Bullock*, for the proposition that a stay will avoid throwing "a previously stable system into chaos," 697 F.3d 1200, 1214 (9th Cir. 2012), but the stability of Montana's election system is based on the prior legal regime that the injunction reinstates—that is, the status quo to which Montanans and election officials alike are accustomed. Operating elections consistently under constitutional, nondiscriminatory laws is within the public interest.

CONCLUSION

Youth Plaintiffs thus respectfully request that the Court deny Defendant Secretary Jacobsen's motion to stay the preliminary injunctions of HB 176 and SB 169.

Respectfully submitted this 9th day of May, 2022.

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I certify that this Brief is printed with a proportionately spaced Century typeface of 14 points, is double spaced, and is within the 10-page limit provided under Rule of Appellate Procedure 22.

/s/ *Rylee Sommers-Flanagan*

CERTIFICATE OF SERVICE

I, Rylee Sommers-Flanagan, hereby certify that I have served true and accurate copies of the foregoing brief in opposition by method of e-service to the following on May 9, 2022.

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