IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7 MODERATE PARTY and RICHARD A. WOLFE, Appellants, v. TAHESHA WAY, SECRETARY OF STATE, et al., Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
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"A Place on the Ballot": Fusion Politics and Antifusion Laws

PETER H. ARGERSINGER

ONLY IN RECENT YEARS have historians seriously investigated the institutional framework of the American electoral system and begun to examine the political effects of ballot forms, voting systems, and suffrage requirements. In particular, some scholars have sought to explain the dramatic changes in political behavior that occurred around the turn of this century as "unintended consequences" of reforms in the structural properties of the electoral system rather than as a reflection of any larger development. While illuminating the political results of such institutional changes, these scholars have largely ignored the political context within which the changes evolved. Thus, they have regarded those structural modifications as essentially apolitical or nonpartisan and have sharply rejected any view that change stemmed from an "antidemocratic conspiracy" to control the political system.[1] Yet, at least one little-known development in the

A preliminary version of this article was presented at the annual meeting of the American Historical Association in Dallas, December 28–30, 1977. I wish to thank the principal commentator at that time, Howard W. Allen, for his helpful criticism. I also wish to express my appreciation to Jo Ann E. Argersinger for advice and assistance.

[1] For present purposes, this "legal-institutionalist" school is best approached in terms of the reaction to Walter Dean Burnham's "The Changing Shape of the American Political Universe," *American Political Science Review*, 59 (1965): 7–28. Burnham argued that sharp declines in turnout and increases in split-ticket voting and other indexes of partisan volatility and voter marginality reflected the establishment of corporate political hegemony in the realignment of 1896 and a consequent breakdown in party organization and competition coupled with a rise in voter alienation. For major rejoinders, see Jerrold G. Rusk, "The Effect of the Australian Ballot Reform on Split Ticket Voting, 1876–1908," *ibid.*, 64 (1970): 1220–38; and Philip E. Converse, "Change in the American Electorate," in Angus Campbell and Philip E. Converse, eds., *The Human Meaning of Social Change* (New York, 1972), 263–337. For the continuing controversy, see Burnham, *Critical Elections and the Mainsprings of American Politics* (New York, 1970); Burnham and Rusk, letters in *American Political Science Review*, 65 (1971): 1149–57; Burnham, "Theory and Voting Research: Some Reflections on Converse's 'Change in the American Electorate,' " *ibid.*, 68 (1974): 1002–23; Converse, "Comment on Burnham's 'Theory and Voting Research,' " *ibid.*, 1024–27; Rusk, "Comment: The American Electoral Universe: Speculation and Evidence," *ibid.*, 1028–49; and Burnham, "Rejoinder to 'Comments' by Philip Converse and Jerrold Rusk," *ibid.*, 1050–57. John J. Stucker, like Rusk a former student of Converse at the University of Michigan, has joined Rusk in two further contributions to the legal-institutional theory of electoral change: "The Effect of the Southern System of Election Laws on Voting Participation: A Reply to V. O. Key, Jr.," in Joel H. Silbey *et al.*, eds., *The History of American Electoral Behavior* (Princeton, 1978), 198–250; and "Legal-Institutional Factors in American Voting," in Walter Dean Burnham *et al.*, eds., *A Behavioral Guide to the Study of American Electoral History* (Cambridge, Mass., forthcoming). For Burnham's most recent and developed statement, see his "The System of 1896: An Analysis," in Paul Kleppner *et al.*, eds., *The Evolution of American Electoral Systems* (Westport, Conn., forthcoming). Finally, for an evaluation of the behavioral and legal-institutional positions in light of the decline in voter turnout in the early twentieth century, see Paul Kleppner and Stephen C. Baker, "The Impact of Registration Requirements on Electoral Turnout, 1900–1916: Multiple Tests of Competing Theories," paper delivered at

electoral reform of the 1890s involved a conscious effort to shape the political arena by disrupting opposition parties, revising traditional campaign and voting practices, and ensuring Republican hegemony—all under the mild cover of procedural reform. This development was the adoption of so-called antifusion laws, which also altered the political behavior characteristic of the Gilded Age, with varying effects on the role of third parties, modes of political participation, and the electoral process itself.

FUSION, OR THE ELECTORAL SUPPORT OF A SINGLE SET of candidates by two or more parties, constituted a significant feature of late nineteenth-century politics, particularly in the Midwest and West, where full or partial fusion occurred in nearly every election. Such fusions customarily involved a temporary alliance between third parties and the weaker of the two major parties, usually the Democrats in the Midwest and West. In the 1878 congressional elections, however, Indiana Greenbackers fused in one district with Democrats and in another with Republicans. That fusion often seemed to have a life of its own was evident in the Greenback effort of 1884 to arrange fusions in each state with whatever party was in the minority.[2] Fusion plans were generally undertaken, nevertheless, to promote the needs of the major party and were generally initiated or avoided according to the calculations of its politicians rather than those of the leaders of the evanescent third parties. Thus, the Republicans sometimes arranged fusions in the South but retreated whenever their participation in such a campaign might work against the Democratic divisiveness they sought to exploit. Similarly, in the West, Democrats repeatedly fused *on* third party tickets even over the bitter opposition of independents—that is, any third party followers in the nineteenth-century usage—who feared absorption by the major party or accusations of ideological betrayal. But, if fusion sometimes helped destroy individual third parties, it helped maintain a significant third party tradition by guaranteeing that dissenters' votes could be more than symbolic protest, that

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the annual meeting of the American Political Science Association, Washington, D.C., August 1979. Converse has noted that Burnham's "conspiratorial interpretation" prompted his own work; "Comment on Burnham's 'Theory and Voting Research,' " 1024. Much of Rusk's work seems similarly motivated; see his "Comment: The American Electoral Universe," 1045–46. In 1974 Burnham backed away from suggestions of a conspiracy; "Theory and Voting Research," 1022. In one prominent exception to the "nonpartisan" thesis of the legal-institutionalist school, however, J. Morgan Kousser has argued that "the cross-fertilization and coordination" between Democratic movements to quash political opposition legally in the South "amounted to a public conspiracy"; see Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven, 1974), 39. Rusk was prepared to "find a conspiracy which used legal means to control the system" within the Democratic South but strongly denied that one existed among Republicans in the North. He quite rightly recognized that the "paramount" issue in determining the nature of electoral change is that of "legislative intent"—"*who* urged the passage of these laws and *why*?" See his "Comment: The American Electoral Universe," 1045–46. The present essay will concentrate on those two questions in explaining one particular Northern electoral development.

[2] *Appleton's Annual Cyclopedia, 1878* (New York, 1879), 443; *Chicago Daily Tribune*, September 4, 1884; and Fred E. Haynes, *Third Party Movements since the Civil War* (1916; reprint ed., New York, 1966). An extreme example of the complexity of fusion politics came in North Dakota in 1890 when the Independents fused with the Prohibitionists to nominate candidates for governor and auditor, after which this coalition fused *on* Republican nominees for lieutenant governor and congressman and Democratic nominees for secretary of state and attorney general. *Appleton's Annual Cyclopedia, 1890* (New York, 1891), 629.

their leaders could gain office, and that their demands might be heard. Most of the election victories normally attributed to the Grangers, Independents, or Greenbackers in the 1870s and 1880s were a result of fusion between those third party groups and Democrats. That some politicians regarded fusion as a mechanism for proportional representation is not surprising.[3]

Fusion was a particularly appropriate tactic given the period's political culture. Voter turnout was at a historic high, rigid party allegiance was standard, and straight-ticket voting was the norm. Partisanship was intense, rooted not only in shared values but in hatreds engendered by cultural and sectional conflict. Changes in party control resulted less from voter conversion than from differential rates of partisan turnout or from the effect of third parties. Although the Republicans continued to win most elections, moreover, the era of Republican dominance had ended in the older Northwest by 1874 and had been considerably eroded in the states farther west by the 1880s, so that elections were bitterly contested campaigns in which neither major party consistently attracted a majority of the voters.[4] Minor parties regularly captured a significant share of the popular vote and received at least 20 percent in one or more elections from 1874 to 1892 in more than half of the non-Southern states. Even where their share was smaller, it represented a critically important proportion of that electorate. Between 1878 and 1892 minor parties held the balance of power at least once in every state but Vermont, and from the mid-1880s they held that power in a majority of states in nearly every election, culminating in 1892 when neither major party secured a majority of the electorate in nearly three-quarters of the states.[5] By offering additional votes in a closely divided electorate, fusion became a continuing objective not only of third party leaders seeking personal advancement or limited, tangible goals but also of Democratic politicians inter-

[3] *New York Herald*, March 12, August 13, 1892; *Chicago Daily Tribune*, September 2, 1884; and Haynes, *Third Party Movements*. Also see Lee A. Dew, "Populist Fusion Movements as an Instrument of Political Reform, 1890–1900" (M.A. thesis, Kansas State Teachers College, Pittsburg, 1957). Fusion was not, of course, always successful, but it did offer the best chance of overcoming the Republicans. As one South Dakota Republican observed, "No fusion means Republican victory"; *Brookings County* (S.D.) *Press*, September 29, 1892. Even when defeated the policy of fusion caused a great deal of uncertainty within Republican ranks. In 1884, for instance, Republican Senator William B. Allison of Iowa warned party "managers in the East that this fusion of the Democrats with [Benjamin F.] Butler's forces in the West would require some attention and that we could not afford to rest on our oars with the field combined against us"; *Chicago Daily Tribune*, September 7, 1884.

[4] For general discussions of the period's political culture, see Burnham, "Changing Shape of the American Political Universe"; Paul Kleppner, *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850–1900* (New York, 1970) and *The Third Electoral System, 1853–1892: Parties, Voters, and Political Cultures* (Chapel Hill, 1979); and Melvyn Hammarberg, *The Indiana Voter: The Historical Dynamics of Party Allegiance during the 1870s* (Chicago, 1977).

[5] These conclusions as to the political importance of minor parties are derived from data that Paul T. David recorded for gubernatorial and presidential elections in the thirty non-Southern states; see his *Party Strength in the United States, 1872–1970* (Charlottesville, Va., 1972), 102–286. Even these statements underestimate the role of minor parties, because David systematically adjusted his data to discount the minor parties precisely when they engaged in fusion. I have made allowances for this adjustment only in a few obvious instances, as in the 1892 presidential returns for North Dakota or Wyoming. I have focused on state elections here, because electoral laws were a function of individual state legislatures. Paul Kleppner emphasized the same point from a wider perspective when he wrote, "The mean vote cast for minor parties in both the 1876–88 and 1876–92 sequences of biennial elections exceeded the major-party mean partisan lead in the Midatlantic, the East North Central, the West North Central, and the Western regions of the country, as well as in the United States as a whole"; *The Third Electoral System*, 239.

ested in immediate partisan advantage. The tactic of fusion enabled Democrats to secure the votes of independents or disaffected Republicans who never considered voting directly for the Democracy they hated; it permitted such voters to register their discontent effectively without directly supporting a party that represented negative reference groups and rarely offered acceptable policy alternatives.

The use of separate party ballots constituted another feature of the political culture of the Gilded Age that facilitated fusion. Each party printed and distributed its own ballot, without the necessary involvement of either state officials or the candidates themselves. The ballots, or tickets, were strips of paper on which only the names of the candidates of that party appeared. The individual voter could remain ignorant of the nominees of other parties; he merely had to deposit his party ticket in the ballot box, without studying or, in some states, even marking it. This election system allowed partisans of fusing parties to cast their votes without explicitly acknowledging their shared behavior or its significance, and it enabled a party to pursue fusion with an unwilling partner.

Given their vulnerability to fusion politics, Republicans continually sought to prevent cooperation among their opponents. Repeatedly, they pointed out the contradictions in the platforms of the different groups contemplating fusion and urged members of each to adhere to their own principles rather than to fuse with groups holding obviously different aims. Although the Republican motive was transparent, the argument held considerable force, particularly for conservative Democrats, for those Democrats and third party followers who believed in the representative nature of parties and nominations (not uncommon among minority political groups), and for those third party supporters who were interested in the development of their party and realized their reform goals required more than just immediate and perhaps counterproductive electoral victories.[6] At times Republicans tried to encourage these antifusion elements among their opponents by going beyond such attempts to incite partisan prejudice and actually subsidizing their activities and party newspapers. In 1878 Indiana Republicans even underwrote a separate campaign by the Greenbackers, hoping thereby to draw votes from the Democrats. One final, if perhaps unofficial, tactic to sabotage fusion was demonstrated in Michigan's legislative elections of 1884, when Republicans distributed "bogus tickets calculated to deceive the greenbackers and democrats" by substituting the names of the Republican nominees for the fusion candidates on what otherwise appeared as a regular, fusion-party ballot.[7]

The effectiveness of this type of ballot trickery in disrupting fusion was easily surpassed by the possibilities inherent in the Australian ballot system. The presidential election of 1888, with its widespread incidents of bribery, intimidation,

[6] For examples of such Republican appeals, see the *Portland Morning Oregonian*, October 25, 26, 27, 28, 1892; and the *Minneapolis Tribune*, October 12, 20, 21, 1892. For an examination of the issue of representativeness in parties, see Austin Ranney, *Curing the Mischiefs of Faction: Party Reform in America* (Berkeley and Los Angeles, 1975).

[7] *Detroit Evening News*, November 1, 1884. Morton Keller, *Affairs of State: Public Life in Late Nineteenth-Century America* (Cambridge, Mass., 1977), 282; and Des Moines *Farmers Tribune*, August 18, 1897.

and fraudulent voting, provoked a reaction against the partisan excesses possible in the party-ballot system of voting and helped spur most states toward adopting the Australian ballot, long advocated by a number of disparate groups. This system did more than merely ensure secrecy for the voter. It also provided for an official ballot printed at public expense and distributed only by public election officers at the polling place. The system featured a blanket ballot, moreover, which contained the names of all of the candidates legally nominated by any party. The candidates' names were arranged on the ballot in one of two general patterns, the office-bloc or the party-column format. On the office-bloc ballot, candidates were grouped under the name of the office sought and their partisan affiliations were shown. The voter made his choice for each office by marking a square corresponding to the appropriate candidate. On the party-column ballot, candidates were grouped by party and listed in parallel columns. In some states the ballot laws even placed emblems or vignettes at the head of the columns to enable the voter to distinguish more easily the separate parties. Finally, lawmakers frequently added to the ballot a device to facilitate straight-ticket voting, a party circle, which, when marked, constituted a vote for the entire party ticket. These developments represented legislative efforts to retain some of the familiar, partisan features of the old ballot system while providing the secret and official characteristics of the new.[8]

By providing for public rather than partisan control over the ballots and by featuring a blanket ballot, the Australian system opened to Republicans, given their dominance in state governments, the opportunity to use the power of the state to eliminate fusion politics and thereby alter political behavior.[9] The Republicans' modifications of the Australian ballot were designed to take advantage of the attitudes and prejudices of their opponents and were based on a simple prohibition against listing a candidate's name more than once on the official ballot. This stipulation, Republicans believed, would either split the potential fusion vote by causing each party to nominate separate candidates or undermine the efficacy of any fusion that did occur, for in this time of intense partisanship many Democrats would refuse to vote for a fusion candiate desig-

[8] The scholarly literature on the development of the Australian ballot is surprisingly thin and analytically unsophisticated. But see L. E. Fredman, *The Australian Ballot: The Story of an American Reform* (East Lansing, Mich., 1968); and Eldon C. Evans, *A History of the Australian Ballot System in the United States* (Chicago, 1917).

[9] It is not asserted here that Republicans enacted the Australian ballot in the first place for such partisan purposes, and Rusk's attempt to deny the partisan effect of the Australian ballot by noting that both Democrats and Republicans voted for the initial reform in state legislatures is unsatisfactory. Rusk, "Comment: The American Electoral Universe," 1045. The law itself and its basic provisions for a secret, public ballot did not become the object of contention (except in rare cases as in New York) so much as the modifications of the Australian ballot system and the use that could be made of them did. As one opponent of subsequent Republican ballot changes in South Dakota said, "The real trouble is the change from the law as it originally stood." Another Dakota correspondent noted that each legislature after the one that had enacted the Australian ballot "has been tinkering at the law, and . . . wrapped the ballot in technicalities." After a Populist governor urged "that the old safe-guards which have been one-by-one repealed since the passage of the original law be reinstated," a Populist legislature adopted a law providing "for a return to the method when the Australian system was first adopted." Sioux Falls (S.D.) *Argus-Leader*, January 11, 1895; *Chicago Daily Tribune*, January 4, 1897; *South Dakota Senate Journal* (Pierre, 1897), 43–44; and Yankton (S.D.) *Press & Dakotan*, February 11, 1897. For opposition in New York to the Australian ballot itself on practical, ideological, and partisan grounds, see the discussion in Herbert J. Bass, *"I Am a Democrat": The Political Career of David Bennett Hill* (Syracuse, 1961), 96–101, 128–30, 133–35, 147–48, 151–53.

nated "Populist" and many Populists would feel equally reluctant to vote for a "Democrat."[10] Related regulations could restrict straight-ticket voting by fusionists or even eliminate one of the fusing parties, antagonizing its partisans and causing them either to oppose the fusion arrangements or to drop out of the electorate altogether. Given the closely balanced elections of the late nineteenth century, the elimination of even a small faction of their political opponents because of ideology, partisanship, or social prejudice would help guarantee Republican ascendancy. Although other ballot adjustments increased its effectiveness, this simple prohibition against double listing became the basic feature of what the Nebraska supreme court described as a Republican effort to use the Australian ballot as a "scheme to put the voters in a straight jacket."[11]

Publicly, Republicans defended this prohibition as necessary for achieving equal treatment, efficiency, and an end to political corruption, and they insisted that technically it did not interfere with nominations or voting. But, given what one Wisconsin judge called "the strength of party ties" and the reality that "political rights are universally exercised through party organizations," the logic of the law lay in his conclusion that "its only purpose is to prevent fusion." The law, he continued, "will prevent no illegal vote from being cast, nor will it stop any corrupt practice, nor in any way preserve the purity of the ballot." It was designed, instead, to interfere with "the freedom of action of the party . . . [and] of the citizens who compose that party." The Republican judicial rejoinder, of course, was that "mere party fealty and party sentiment, which influences men to desire to be known as members of a particular [political] organization, are not the subjects of constitutional care."[12] The law, then, was intended to promote the dissolution of party ties while giving Republicans the residual benefits of them.

THE POSSIBILITIES OF ADJUSTING THE BALLOT SYSTEM in this direction became evident during the 1892 presidential campaign, the first held under the original Australian ballot system. That campaign marked as well the initial national appearance of the most important third party of the late nineteenth century, the People's Party, which had its greatest appeal to economically distressed farmers in the Western states, traditionally controlled by Republicans. In an effort to increase the electoral chances of its presidential candidate, Grover Cleveland, the Democratic National Committee urged party officials in several Western states to withdraw their nominees for the electoral college and fuse on the Populist nominees, thereby denying Republicans the electoral votes that Cleveland would be unable to capture for himself.

[10] It was "well known," one newspaper observed, that many voters would not vote for a candidate unless he were listed on their ticket. "This may be a prejudice, but it is not an unworthy one in a community where party government is recognized." *Detroit Free Press*, March 15, 1895. An Ohio Greenbacker had made the same point earlier and more graphically: "Men would as soon cut off their right hands almost as vote a Democratic ticket." *Cincinnati Enquirer*, August 22, 1877, as quoted in R. C. McGrane, "Ohio and the Greenback Movement," *Mississippi Valley Historical Review*, 11 (1925): 535.

[11] *State* v. *Stein* (Neb.), 53 N.W. Rep. 999.

[12] *State* v. *Anderson* (Wisc.), 76 N.W. Rep. 482.

The responses in Oregon and Minnesota proved most significant. Both states were controlled by Republicans although the GOP represented only a minority of voters in each. Hoping to arrange a successful fusion, Democratic officials withdrew one of their four nominees in Oregon and four of their nine nominees in Minnesota, replacing them with candidates nominated by the Populists. In both states many Populists denounced the Democratic maneuver, worrying that, as one Minnesota Populist elector said, the tactic "will hurt the People's Party rather than help it, as a great many in that party were formerly Republicans, and . . . will have a tendency to drive them back to the old party." Many Democrats also complained of the arrangement, but gradually most concluded that, although fusion with the Populists was distasteful, "in the present case, the end justifies the means," as the Oregon state chairman observed.[13] The initial Republican reaction to these fusion arrangements also followed the customary pattern. To their own partisans Republican leaders stressed two contradictory conclusions: fusion was a confession of Democratic weakness, but Republicans would have to turn out in greater numbers to vote it down. To Democratic and Populist voters, the Republican leaders appealed separately, insisting that fusion required their party to subordinate its own sacred principles and able candidates to those of the other party.[14]

These fusion campaigns differed from previous ones, however, because of the Republicans' partisan implementation of the Australian ballot law, which both states had enacted in 1891. In adopting the office-bloc form of ballot, the Oregon legislature had also prohibited the name of any candidate from appearing more than once on the ballot. Perhaps this provision had seemed a logical corollary to the ballot type, for it excited no comment at the time. When in 1892 Democratic officials recognized the implications of that clause for their fusion plans, they argued that another provision, which permitted the names of electoral college candidates to be grouped by parties, allowed the fusionist elector, Nathan Pierce, to be listed with Democrats as well as with Populists on the ballot. Republicans countered that Pierce's name could be listed only once and identified as a "Populist" or at most "Populist-Democrat," expecting that the word "Democrat" would be a signal to Republican-Populists to scratch the name and that the Populist designation would alienate some Democratic voters: "a very pretty jungle," in the words of one Republican editor.[15]

The question of ballot form appeared so late in the campaign that there was no time to secure a legal decision, and county clerks turned to party leaders for guidance in printing the official ballots. The ballot devised by the Democratic state committee and subsequently copied by Democratic county clerks listed Pierce's name in both the Democratic and Populist groupings, while those county clerks who followed the instructions of the Republican state chairman

[13] *Minneapolis Tribune*, October 13, 19, 24, 1892; and *Portland Morning Oregonian*, October 28, November 2, 1892.

[14] *Portland Morning Oregonian*, October 25, 26, 27, 28, November 2, 1892; and *Minneapolis Tribune*, October 12, 20, 21, 1892.

[15] *Portland Morning Oregonian*, October 27, 28, 30, 1892.

listed Pierce only among the Populist nominees, though designating him with both party affiliations.[16]

Because of this singular ballot situation, Oregon's election results revealed both the value of fusion and the effect of ballot format in shaping electoral outcomes and disrupting fusion coalitions. The Republicans won three of the four electoral votes, averaging 35,000 votes for their candidates. The straight Populist candidates averaged 27,000 and the straight Democrats 14,000. Had Pierce received the full vote of both parties he would have been an easy victor with approximately 41,000 votes, but he squeaked through with only 35,811. Regression analysis indicates that in those counties in which his name was listed under both Democratic and Populist groupings virtually all Populists voted for their fellow partisan, while 92 percent of the Democrats also supported Pierce, an indication of some hostility to fusion but also of a general willingness to vote the Democratic ticket and all who were designated on it. But, in those counties in which Pierce's name was listed on the ballot only once (under the Populist group), 9 percent of the Populist voters refused to support a Populist who was also labeled a Democrat, although he was identified as a Populist and listed with the other Populist electors. And 29 percent of the Democrats refused to vote for a Democratic candidate who was also listed as a Populist.[17] Republican expectations as to voter behavior had proved accurate.

While Oregon provides the most revealing evidence of the effect of ballot format on voting behavior and fusion politics, events in Minnesota proved more immediately influential for electoral reform. Like that in Oregon, the ballot law in Minnesota also established the office-bloc format, but without the restriction on listing candidates' names more than once. In preparing the official ballot for 1892, however, the Republican secretary of state simply proceeded as though that were a legal requirement, grouping the five straight Democratic electors separately and scattering the four endorsed Populists among the five other Populists, though designating them as both Populist and Democratic. Democratic officials charged that the Republican ballot design was constructed to "render it more difficult for the voter to cast his vote according to his preference" and sought a court order to compel the double listing of fusion electors. Democratic lawyers argued that, as drawn up, the official ballot would disfranchise twenty thousand voters. But, since the ballots were already printed, the court was confronted with a Republican *fait accompli*, the reversal of which would have required a postponement of the election itself, and accordingly the court judiciously ruled that it had no jurisdiction in the matter.[18]

Ignoring their own structural revolution, Republicans crowed that "the court

[16] *Ibid.*, October 28, 30, 1892.

[17] *Appleton's Annual Cyclopedia, 1892* (New York, 1893), 615; and *Portland Morning Oregonian*, November 11, 1892, January 6, 1893. Estimates of voter behavior were derived from ecological regressions calculated for those twenty-seven (of thirty-two total) counties for which firm evidence exists as to the ballot format employed. For the best introduction to this technique, see J. Morgan Kousser, "Ecological Regression and the Analysis of Past Politics," *Journal of Interdisciplinary History*, 4 (1973): 237–62; and W. P. Shively, " 'Ecological Inference': The Use of Aggregate Data to Study Individuals," *American Political Science Review*, 63 (1969): 1183–96.

[18] *Minneapolis Tribune*, October 16, 18, 19, 1892.

and secretary of state do not propose to become the cat's paws of the fusion schemers and turn the ballot upside down to suit their political ends." Democrats found consolation in the publicity their court case had engendered: it called voter attention to the structure of the ballot and indicated how Democrats would have to vote. Indeed, even Republicans argued that repeated instruction in "the science and art of casting a ballot under the Australian system" would be more valuable than "profound dissertations on the tariff and the currency." The election results validated that estimate of the importance of the ballot. The straight Democratic electors averaged 101,000 votes and the straight Populists 29,000; their combined total would have easily defeated the Republicans' 113,000. Yet the four fusion electors received only 110,000 votes, the drop of 20,000 that Democratic officials had predicted, which allowed the minority Republicans to sweep to complete victory.[19]

The massive vote differentials in these states were largely a function of institutional change in the voting system, but they also involved a behavioral component, for the ballot arrangements were advertised and explained extensively, and voters could have selected the fusion candidates if they had been willing to vote with a different party. That some voters were obviously unwilling to ally themselves even symbolically with another party testifies again to the nature and strength of partisan affiliation in the political culture of the time. In evaluating the decline in the fusionists' votes, one Minnesota election judge observed, "It matters not whether this was the result of sharp practice or not, the fact remains . . . they were cheated out of their votes" by the "system of voting."[20] But, significantly, the decline was not an "unintended consequence" of ballot change but rather resulted from "sharp practice." The institutional change had been purposely designed to exploit the observed behavioral patterns in the political culture and did not represent some abstract or disinterested impulse toward "reform."

This basic reality became increasingly obvious from the reactions in other states to the Minnesota experience. Neighboring Wisconsin, traditionally Republican, had gone Democratic in 1892 because of local circumstances. Fusion had occurred at several levels and, as one Republican editor complained, "the labor party, or people's party, or Farmers' Alliance, assisted to place in power" the Democrats, and "without those voters the democratic party is in a minority in the state." To protect these voters and their own new position, Democratic legislators amended the election law in 1893 specifically to provide for dual ballot listings in the event of fusion nominations.[21]

By 1893, Michigan had perhaps experienced more consistent fusion politics than any other state, and the new, Republican legislature decided to revise the Australian ballot law that had been enacted by its Democratic predecessor. Although there was considerable discussion about the need "to purify elections

[19] *Ibid.*, October 10, 19, 1892. John D. Hicks, "The People's Party in Minnesota," *Minnesota History Bulletin*, 5 (1924): 545.

[20] *Minneapolis Tribune*, November 17, October 19, 1892.

[21] Madison *Wisconsin State Journal*, January 3, 1893; and *The Registry and Election Laws of the State of Wisconsin* (Madison, Wisc., 1894), 26.

and prevent fraud thereat," the GOP's objective clearly was, as one Democrat observed, to "purify elections according to the Republican idea of purity, and prevent frauds by all other parties." One Republican legislator, at least, was candid: "We don't propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation."[22] The Republicans' solution was ballot manipulation, a tactic they first applied retroactively by unseating non-GOP legislators whose names had been listed upon more than one ticket. The presiding officer refused even to entertain Democratic protests against this "revolutionary action," but the state supreme court partially restrained the Republican majority by upholding the legality of ballots with dual listings. The Republicans then countered by moving to amend the state's election law by prohibiting double listing of candidates' names on the ballot. This effort also failed, but by only three votes. All forty-eight votes in favor of the bill were Republican; all Democrats and Populists voting opposed the measure.[23]

This Republican attempt to unseat legislators reveals an important aspect of the movement for the legal disruption of fusion politics. Fusion occurred most often in local and state-legislative contests, where the candidates' personal popularity was more likely to displace partisan issues in determining voters' preferences. In Michigan, for example, fusion did not materialize in the presidential race of 1892, and the Populists made a negligible showing. But Populist strength was regional and often proved decisive in local contests. In the legislature of 1893, which first debated the issue, twenty-one of the thirty-one Democratic and Populist state representatives had been elected through fusion, while twenty-six Republican representatives had been elected over fusion opponents. At least twenty more Republicans were elected only by plurality votes and would have been defeated if their opponents had successfully fused. Thus, a major object of antifusion legislation was at times local, not national, politics. When Michigan did, in fact, later enact an antifusion law, its passage owed some of its immediate support to a pending special congressional election in southwestern Michigan, where Populists were strongest and where the Republican candidate, the presiding officer of the state senate, was opposed by the fusion nominee of Populists, Prohibitionists, Silverites, and Democrats. This local nature of fusion was what prompted interest in antifusion legislation in those states where, at the aggregate level, it did not seem necessary or important. But a focus on the small total number of Populists in large industrial states like Michigan or Wisconsin is misleading in other ways as well. While Michigan Populists polled only 4.3 percent of the total state vote in 1892, that proportion gave them the balance of power in the closely contested electorate; when delivered to Democratic can-

[22] *Detroit Free Press*, February 1, January 5, 1893.

[23] *Ibid.*, January 4, 19, February 15, 16, 25, 1893; *Journal of the House of the State of Michigan, 1893* (Lansing, 1893), 697, 1031; and *Official Directory and Legislative Manual of the State of Michigan, 1893–4* (Lansing, 1893), 706–11.

didates through fusion, as in the contest for attorney general, it sufficed to bring about the only Republican losses on the state ticket.[24]

South Dakota succeeded where Michigan failed in 1893 in passing the first explicitly antifusion law.[25] Constituting only a minority of the voters, the state's Republicans had apprehensively watched developments in Minnesota and devoted their own 1892 campaign "almost exclusively to the business of preventing a fusion" between Populists and Democrats. In 1893 they carried this objective into the legislature and enacted a number of changes in election laws. The most important simply provided that "the name of no candidate shall appear more than once on the ballot for the same office." Related changes similarly designed to frustrate fusion included a prohibition against the withdrawal of candidates shortly before elections, called "the Minnesota plan" of fusion; a provision to treat fusing parties as a single party when appointing election judges; and the replacement of the office-bloc with the party-column format, containing a party circle provision for straight-ticket voting.[26] This last modification made more effective the prohibition against double listing, for by requiring party columns a candidate could be identified with only one party affiliation, unlike candidates on the Oregon and Minnesota ballots, and the second party to nominate a candidate would appear on the ballot as having no nominee for that office at all. Those wishing to fuse would thus lose the symbolic protection of voting for their own party and be required to vote as members of another party. When fusion did not involve whole tickets, which was the usual case, fusion voters would also lose the advantage of the party circle and have to check each individual name—a provision that was certain to complicate voting and lead to the invalidation of ballots through improper marking.[27]

The effects of these new ballot provisions were felt in the state's elections in 1893 and 1894, when, as Republicans observed, they served as a "stumbling block" to their opponents. Populists and Democrats named separate state tickets in order to maintain their parties' organization and independence, though each party conceded that such separation would lead to a Republican victory. The weaker Democrats, in particular, feared that under the new law cooperation with Populists would be "not fusion but absorption." Although fusionist leaders made some local efforts at fusion, they predicted that at least 20 percent of the

[24] Richard Harvey Barton, "The Agrarian Revolt in Michigan, 1865–1900" (Ph.D. dissertation, Michigan State University, 1958), 125–51; *Kalamazoo Weekly Telegraph*, October 19, 1892, March 20, 1895; *Official Directory and Legislative Manual of Michigan, 1893–4*, 593–625; and *Appleton's Annual Cyclopedia, 1892*, 467.

[25] The Oregon law of 1891 cannot be so considered for it was passed without apparent recognition of its significance, was still open to contrasting interpretations, and preceded a formal antifusion law enacted in 1895. Both Kentucky and Indiana had early laws that contained provisions resembling those characteristic of antifusion laws but that were really designed to deal with the possibility of nonpartisan nominations by petition rather than with party action. In practice, moreover, their election laws were not interpreted in a fashion to prevent fusion. For a discussion of the local political context surrounding the development of antifusion legislation in South Dakota, consult my " 'Confusion to Democracy': Ballot Laws and Politics, 1890–1902," paper delivered at the thirteenth annual Northern Great Plains History Conference, Fargo, N.D., October 27, 1978, pp. 2–6.

[26] *New York Times*, October 21, 1892; *South Dakota House Journal* (Pierre, 1893), 862; *South Dakota Senate Journal* (Pierre, 1893), 58, 283–86, 1006; and Yankton (S.D.) *Press & Dakotan*, March 9, 23, 1893.

[27] See Sioux Falls (S.D.) *Argus-Leader*, November 4, 1893; Yankton (S.D.) *Press & Dakotan*, November 24, December 8, 1892; and *DeSmet Independent*, as quoted in *Brookings County* (S.D.) *Press*, November 2, 1893.

Democrats would refuse to vote outside their party name, a fall-off that spelled defeat in a close election. After the expected Republican victory, one Democratic party official observed, "Under the present system of voting as arranged by the Republican party, fusion results in confusion to Democracy."[28]

Nationally, the Republican success in 1894 led to the passage of antifusion laws by other states in 1895. Oregon Republicans, who had captured a majority in the legislature with only a minority of the popular vote, formally enacted an antifusion statute.[29] In neighboring Washington, after successfully campaigning against "fusion schemes," the Republicans applied the force of the one-listing provision in the party-column format to the office-bloc ballot by stipulating that only one party affiliation could be designated for any candidate.[30] Michigan Republicans, now in complete control of the legislature, reintroduced their antifusion bill of the previous session and pushed it into law. Although some judges described it as "unconstitutional" and "revolutionary," the state supreme court upheld the measure in the same partisan spirit in which it had been enacted—four Republican judges in the affirmative, one Democrat in dissent.[31] The Ohio legislature, meeting in 1896, concluded this first legislative flurry with the so-called Dana law, an elaborate measure based upon the customary antifusion ballot requirement. In Ohio, the local focus of antifusion legislation seemed particularly evident, at least initially. In the recent Cincinnati mayoral election, the Republican machine of "Boss" George Cox and Joseph B. Foraker had been challenged by a fusion coalition of Populists, Socialists, laborites, and dissident Republicans that had nearly received the Democratic endorsement as well. The regular Republicans had reacted "as if civilization were at stake." Some legislative observers regarded the subsequent Dana bill, prepared by a Foraker Republican, as primarily designed to prevent just such unified popular revolts against machine rule in municipal elections. Indeed, the Republican legislative majority, so large as to be "dangerous," according to one editor, voted down a proposed amendment to exclude municipal elections from the antifusion provisions.[32]

THE LARGER POLITICAL IMPORTANCE of these new antifusion laws was promptly demonstrated in the presidential election of 1896, the pre-eminent fusion cam-

[28] *Brookings County* (S.D.) *Press*, October 19, 1893; and Sioux Falls (S.D.) *Argus-Leader*, August 3, 29, September 5, 6, November 13, 1894.

[29] *Appleton's Annual Cyclopedia, 1894* (New York, 1895), 636; *Appleton's Annual Cyclopedia, 1895* (New York, 1896), 632; *Oregon House Journal* (Salem, Oreg., 1895), 1007–08; and *Oregon Senate Journal* (Salem, Oreg., 1895), 631, 640.

[30] *Spokane Spokesman-Review*, November 1, 10, 1894; *House Journal of the State of Washington, 1895* (Olympia, Wash., 1895), 667–72; and *Senate Journal of the State of Washington, 1895* (Olympia, Wash., 1895), 709. Republican legislators backed this "reform" by a vote of 68 to 1, while Populists opposed it by a margin of 17 to 3.

[31] *Journal of the Senate of the State of Michigan, 1895* (Lansing, 1895), 112, 373–74, 457, 775–78; *Journal of the House of the State of Michigan, 1895* (Lansing, 1895), 961; *Kalamazoo Weekly Telegraph*, March 20, 1895; *Detroit Free Press*, March 26, 1895; and *Todd* v. *Election Commissioners*, 104 Mich. 474, 486 (1895).

[32] Zane L. Miller, *Boss Cox's Cincinnati: Urban Politics in the Progressive Era* (New York, 1968), 89; *Cincinnati Enquirer*, November 7, 1895; *Cleveland Plain-Dealer*, April 9, 1896; *The Journal of the Senate of the State of Ohio, 1896* (Norwalk, Ohio , 1896), 399–400; and *The Journal of the House of the State of Ohio, 1896* (Norwalk, Ohio, 1896), 689.

paign of the late nineteenth century, when Democrats, Populists, and Silver Republicans fused on the candidacy of William Jennings Bryan. In those antifusion states, like Ohio, in which Democrats constituted by far the major portion of Bryan's supporters, the Populists were sacrificed in a way that not even middle-of-the-road Southerners anticipated when they opposed the Populist endorsement of Bryan.[33] Ohio state election officials announced that the Dana law would eliminate a Populist national ticket from the ballot and, through its party-column and marking procedures, might invalidate ballots that tried to combine support for Bryan with a state or local Populist ticket. To avoid that outcome, Democratic and Populist leaders reluctantly also agreed to fuse on complete state and local tickets. The Democratic state committee withdrew the Democratic nominees for several offices and substituted Populist nominees in exchange for Populist acceptance of the remaining Democratic candidates. All candidates were listed on the ballot only under the Democratic heading. Many Populists, however, were loath to become even nominal Democrats and objected to these arrangements in which their party "was left without a place on the ballot." Defiance County Populists even advocated rescinding Bryan's nomination in order to protect their own party, while other Populists refused to withdraw their nominations. Ultimately, in addition to the designated Democratic ticket, composed of both Democrats and Populists, the official ballot *did* list a severely truncated Populist ticket after all, so that a Populist could not easily vote a straight ticket.[34]

A second antifusion provision of the Dana law threatened even the Democrats' ability to cast a straight ticket by prohibiting the entry of nominees on one party's ticket when they were certified as members of another party. Accordingly, the secretary of state prepared to split the arduously constructed composite ticket into separate columns after all. Thus, Populist nominees had to declare themselves as Democrats, causing still more disaffection, for the Populists announced that they had "already gone much further than they had wished in order to effect the fusion agreement" and were reluctant "to declare that they are Democrats and thereby destroy absolutely the individuality of the party organization they have been striving to represent." Finally, the Populist state chairman ignominiously had to assert that the Populists had not really made any nominations and to withdraw their certificates; election officials then placed the fusion slate on the ballot as the Democratic ticket.[35] Though the fusionists' troubled campaign ended in defeat, the straight Populists fared even worse with the election law. Their officially disavowed ticket failed to attract enough votes

[33] The following discussion involves only those developments that stemmed from antifusion legislation and does not cover any of the quite different difficulties with respect to fusion that Robert Durden has already described well; see his *The Climax of Populism: The Election of 1896* (Lexington, Ky., 1966). The phrase "mid-road," or "middle-of-the-road," referred to those Populists who opposed fusion or cooperation with either major party, which they regarded as being in the gutters of the political system—on each side of those who kept clean and pure in the middle of the road.

[34] *Bowling Green* (Ohio) *Daily Sentinel*, July 17, 28, August 28, September 16, 23, 1896; *Cincinnati Commercial Tribune*, August 8, 12, October 21, 1896; and Columbus *Ohio State Journal*, October 20, 24, 1896.

[35] *Cincinnati Commercial Tribune*, October 3, 4, 6, 7, 8, 1896.

to entitle the party to be on the Australian ballot in the future, except by petition. As one Populist disconsolately wrote his national chairman, "We have now in Ohio no People's party, but simply scattered organizations here and there."[36]

In antifusion states where Populists constituted the majority of Bryan's supporters, roles were reversed but the same difficulties developed. In Oregon, Democrats had to withdraw their electors and accept the Populist ticket as their own. The Populist state chairman explained the result: "Under our statute they surrendered their legal autonomy by this act, so that we have but two parties in this state." The further consequence was that, whereas the Populists and Democrats running separate tickets had together captured 53 percent of the votes in the June state election on much the same issues, Democratic fall-off permitted them to attract only 48 percent of the vote in November under this rankling arrangement.[37] In Washington as well, after a committee of lawyers examined the "cunningly devised" election law, the Democrats felt forced to accept the Populist name for the fusion ticket. The outcry against sacrificing the party name was so great, however, that, to the end of the negotiations, it seemed likely that the

[36] Hugo Preyer to Marion Butler, March 19, 1897, Marion Butler Papers, Southern Historical Collection, University of North Carolina Library; and *Bowling Green* (Ohio) *Daily Sentinel*, November 10, 1896. This dissolution of Ohio's Populist party demonstrates the destructive effect on smaller parties of the interaction between the antifusion law and another standard provision of the Australian ballot system. The adoption of the Australian ballot meant of course that disgruntled citizens could no longer simply organize themselves spontaneously and enter the political arena independently by issuing their own party ticket. The use of an official, blanket ballot required the state to establish procedures to regulate the appearance of parties and their candidates on the ballot. This regulation usually involved, *inter alia*, defining a party that could appear on the ballot in terms of its percentage of the total vote in the preceding election. Manipulation of the minimum required percentage often reduced the number of minor parties by directly limiting their ability to present themselves for voter consideration. Petitioning provided an alternative method for gaining party access to the ballot. But, again, some states required unreasonably large numbers of signatures—or even specified a particular geographical distribution of the petitioners—so that, in practice, the candidates would be confined to the larger parties. Once parties were stricken from the ballot (through their candidates) by the operation of the antifusion law, they legally ceased to exist until their partisans successfully petitioned to secure ballot consideration again. Even the Democratic Party had no standing in those states where it fell victim to antifusion regulations; see pages 300–01, below. But small and poor or loosely organized parties faced particular difficulty in regaining an opportunity to appear on the ballot. Members of all political parties were extremely sensitive to this possible consequence of the interaction of the antifusion and other ballot provisions of the electoral law. Unfortunately, not even some of the Populists themselves could resist this legal opportunity to obstruct possible opponents by keeping them off the ballot in the first place. In Kansas, for instance, the regular Populists, after being troubled by a radical (middle-of-the-road) Populist separate ticket in 1896, amended the state's Australian ballot law in the 1897 legislature to quintuple the number of signatures required to gain a ballot position through petition and thereby keep "small bodies of reformers out of politics." Only rarely, of course, were Populists in a position to manipulate the legal parameters of politics, a point perhaps underlined by this same legislature's simultaneous ability to *defeat* an antifusion bill—on a strict party vote, all Republicans in favor, all Populists and Democrats opposed. *Dubuque* (Iowa) *Herald*, February 17, 1897; and *Senate Journal: Proceedings of the Senate of the State of Kansas* (Topeka, 1897), 787, 884–85, 1111, 1201. For examples of the more typical major party effort to obstruct new parties through the requirement of an extraordinary number of petition signatures, see Erik Falk Petersen, "The Struggle for the Australian Ballot in California," *California Historical Quarterly*, 51 (1972): 239; and Charles Chauncey Binney, "Merits and Defects of the Pennsylvania Ballot Law of 1891," *Annals of the American Academy of Political and Social Science*, 2 (1892): 751–71, esp. 757n, 758n. Beyond mandating procedures for securing a position on the ballot, the "infamous" Missouri election law required a party to receive one-third of the total votes cast or be "disbarred from all privileges and representation" in the appointment of election judges and clerks. *Kalamazoo Weekly Telegraph*, April 15, 1891. For a striking example of the local exclusion of small parties through legal regulations, see *Bowling Green* (Ohio) *Daily Sentinel*, March 27, 1896.

[37] John C. Young to Marion Butler, March 22, 1897, Butler Papers; and *Appleton's Annual Cyclopedia, 1896* (New York, 1897), 628.

Democrats would repudiate the plan, thereby defeating Bryan in a state where victory would have been easy under previous electoral rules.[38]

Similarly in South Dakota, Democrats recognized that under the ballot law they had to sacrifice their party's organization to secure the state's electoral votes for their party's nominee. Accordingly, they canceled their state convention and adopted the ticket and the name of the People's Party. At the county level, however, Democratic opposition to voting under the Populist name frequently led to a compromise name of "Free Silver" for the local fusion ticket. But this ran afoul of the party-column and party-circle provisions of the ballot law and made it difficult for fusionists to cast a straight ticket for both state and local offices. The likely result under the ballot law, one newspaper predicted dryly, was "the loss of numerous votes for one ticket or the other or . . . loss of both tickets."[39]

Michigan, with its fusion tradition and moderately strong third parties, furnished the final experience among antifusion states in 1896. Both Populists and Democrats objected to accepting the others' name and, unable to fuse in the customary fashion, therefore dropped all old party names to adopt a new collective one for the purpose of the ballot: the Democratic-People's-Silver Union. But even this stratagem had a weakness, for the state supreme court ruled that by entering the DPSU the regular Democratic organization had abandoned the name "Democrat." The court therefore awarded that designation on the ballot to a ticket named by bolting anti-Bryan gold Democrats, a decision that the Democratic state chairman understandably denounced as "an attempt to mislead the people."[40]

The Michigan and Ohio experiences were not lost on Republicans in Indiana, the state in which Mark Hanna feared fusion most.[41] Hoosier Republicans made two unsuccessful efforts during the campaign to secure the effects of antifusion legislation without actually having such a law. When the Populists and Democrats agreed on a common electoral ticket to appear on the ballot under both the Democratic rooster and the Populist plow and hammer vignettes, the Republicans sought to enjoin the fusionists from filing dual nomination papers. Populists were alarmed that, if this tactic succeeded, "a large proportion of our voters will be practically disfranchised." One Populist, who wrote his national chairman seeking legal assistance, expressed his fear that they would "have trouble in Ind. & perhaps all other states that have accepted the Australian system of ballots to get our fusion tickets on the official ballot." The Republican state chairman also instructed Republican election judges to separate fusion votes into Democratic and Populist totals, as though the parties had different candidates. Though both of these maneuvers failed, after the election the Republicans made immediately clear, as the *Chicago Tribune* reported, their in-

[38] *Spokane Spokesman-Review*, August 15, 18, 22, 1896; and Winston B. Thorson, "Washington State Nominating Conventions," *Pacific Northwest Quarterly*, 35 (1944): 104–05.

[39] *Sioux City* (Iowa) *Journal*, October 17, 1896; and *Appleton's Annual Cyclopedia, 1896*, 707–08.

[40] *Detroit Free Press*, November 1, 1896; *Kalamazoo Weekly Telegraph*, August 26, September 2, 1896; and *Baker* v. *Board of Election Commissioners* (Mich.), 68 N.W. Rep. 752.

[41] James S. Clarkson to H. G. McMillan, October 5, 1896, James S. Clarkson Papers, Library of Congress.

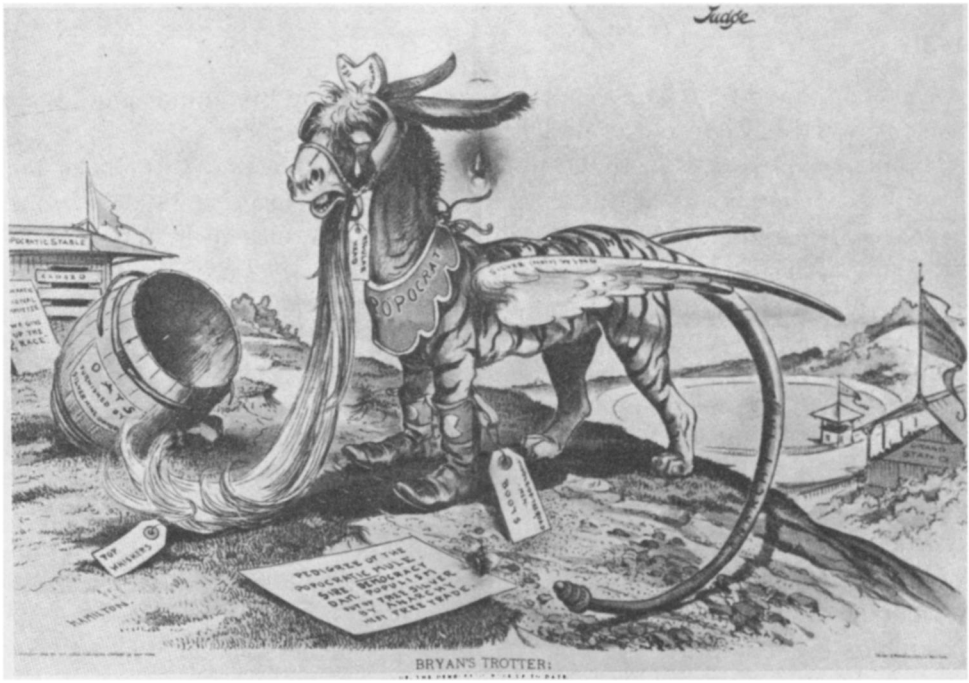

Figure 1: The "Popogriff," a hostile depiction of the combination of political parties and factions fusing on the Bryan candidacy of 1896: the Democratic donkey with its "regular head," Populist whiskers, middle-of-the-road (Populist) boots, Silver Party wing, Tammany tiger body, and anarchistic tail. "Pedigree of the Popocratic Mule: Sire—Democracy, Dam—Populism, Out of Free Silver by Anarchy"; *Judge*, October 24, 1896.

tention "to amend the election law, so as to prevent fusion like that perpetrated in the last campaign."[42] The bill, involving the customary prohibition against double listing, was drawn up by the Republican state committee and then passed in the legislature by a vote of 83 to 58, all Republicans in favor, all Democrats and Populists opposed.[43]

The lessons learned in, and the opportunity presented by, the sweeping 1896 Republican victory led Republican-dominated legislatures in many more states to enact antifusion laws quickly. Republican legislatures passed antifusion laws in 1897 in Illinois, Iowa, North Dakota, Pennsylvania, Wisconsin, and Wyoming as well as in Indiana. As Republicans gained sufficient legislative control elsewhere, the law spread still further: California and Nebraska in 1899; Kansas, Minnesota, and South Dakota in 1901; Idaho in 1903; and Montana in 1907.[44]

[42] Lew W. Hubbell to Marion Butler, September 13, 1896, Butler Papers; *Chicago Daily Tribune*, January 4, 27, 1897; and *Cincinnati Commercial Tribune*, October 28, 29, 1896.

[43] *Indianapolis Journal*, January 15, 1897; *Journal of the Indiana State Senate, 1897* (Indianapolis, 1897), 592; and *Journal of the Indiana House of Representatives, 1897* (Indianapolis, 1897), 967–68.

[44] *Appleton's Annual Cyclopedia, 1897* (New York, 1898), 395, 419, 574, 664; New York State Library Bulletin, *Summary of Legislation* (Albany, 1897), 519; *Appleton's Annual Cyclopedia, 1901* (New York, 1902), 702; and Arthur C. Luddington, *American Ballot Laws* (Albany, 1911), 15, 39, 43, 78. South Dakota's law of 1901 followed the Populists' repeal in 1897 of the original antifusion legislation of 1893. Republican legislators had passed an antifusion bill in 1899, only to have it vetoed by the Populist governor. This pattern of ballot legislation suggests the partisan motivation involved and indicates the common conviction of the law's political effects. See

ENDING THE EFFECTIVE COOPERATION of Democrats and third party groups was both the primary goal and the major result of these efforts. As the attorney general of one state noted, the antifusion law should have been renamed "an act to keep the populists in the middle of the road." Any cooperation that did take place under the new electoral rules involved a sacrifice of voters that rendered the whole less than the sum of its parts. If forced to vote for fusion as Democrats, many Populists declared, they would prefer to return to the GOP or simply not vote at all.[45] Analysis of the Kansas election returns of 1902 confirms this. Under the 1901 antifusion law, the fusion vote declined drastically from that of 1900. Those Populists who had voted for a fusion ticket under their own heading in 1900 proved little more likely to vote for a fusion ticket under a Democratic heading in 1902 (45 percent) than actually to vote Republican (40 percent), and, when confronted with that choice, a sizable minority either voted for a symbolic third party or dropped out of the electorate altogether.[46] This last course proved even more agreeable to South Dakota Populists. The proportion of original Populists willing to support fusion fell by two-thirds between 1900, when they could vote under their own heading, and 1902, when they were required to vote as Democrats following the Republican enactment of the antifusion law in 1901. And three-fourths of that shift was accounted for by a huge increase in those who simply refused to vote at all.[47]

By preventing effective fusion, antifusion laws also brought an end to another major characteristic of late nineteenth-century politics—the importance and even existence of significant third parties.[48] Whether such legislation split the

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Argersinger, " 'Confusion to Democracy,' " 11. In addition, the Democratic legislatures of three Southern states also enacted antifusion legislation in the early 1900s, and controversy over the law actually provoked a riot in the Kentucky legislature. Thus, while the focus here has been on Northern Republicans, the law was obviously regarded as serving the interests of the dominant party wherever it was enacted. Antifusion legislation was of minor importance in the South because the passage of more blatantly partisan electoral legislation obviated the need for subtler controls; see Kousser, *The Shaping of Southern Politics*. Antifusion laws were more appropriate to the more closely balanced North, where slight alterations in the electorate were sufficient to guarantee partisan control. Some Northern Republicans, however, likened their antifusion legislation to the South's repressive legislation. See, for example, Des Moines *Iowa State Register*, February 19, 1897.

[45] *Detroit Evening News*, March 16, 1895; *New York Times*, April 6, 1900; and Des Moines *Farmers Tribune*, August 3, 1897.

[46] Based on an ecological regression calculated over those sixty-nine counties for which 1900 fusion votes were separately returned according to their Populist and Democratic components. This 1902 election, moreover, finally marked an approximate return to the state's pre-Populist political alignments: the Republican vote correlated significantly with the Republican vote of the 1880s for the first time in more than a decade and the Democratic vote correlated significantly with the Democratic vote of the 1880s (as the fusion votes of 1896, 1898, and 1900 had not).

[47] Based on ecological regression involving 1890, 1900, and 1902 South Dakota voting results; also see Sioux Falls (S.D.) *Argus-Leader*, November 6, 7, 8, 1902. Original Populists are here defined as those who voted the Independent ticket in 1890. Clearly, this is an incomplete measurement, for it provides no information concerning those who joined the People's Party in, say, 1894. This is only part of the difficulty in trying to measure the effect of antifusion legislation. The general question is the counterfactual one: how would things have been different if they had not been as they were? One major consequence of antifusion legislation of course could be what did *not* happen, as in those instances in which fusion was avoided. The common failure of election boards to report disaggregated partisan votes for fusion candidates, except for the partial Kansas case analyzed above, prevents a careful calculation of effects when fusion did take place. Ideally, that determination also requires consecutive fusion elections with low issue-salience, a condition that did not obtain in the 1890s. The 1892 Oregon contest thus assumes great significance in establishing the political importance of an antifusion ballot.

[48] Third parties did, of course, appear in subsequent years, but with the exception of the Socialists they were

GOP's opponents or encouraged attenuated new combinations, the same result obtained: the non-viability of third parties. A Populist explained the dynamics involved with these words: the law "practically disfranchises every citizen who does not happen to be a member of the party in power. . . . They are thus compelled to either lose their vote (as that expression is usually understood), or else unite in one organization. It would mean that there could be only two parties at one time."[49] Political realities, moreover, dictated that those two parties would be the existing major ones. Because the adoption of a new composite name left the Democratic name, with all of its appeal and tradition, to be used by minority factions as in Michigan in 1896, because of even more grotesque ballot complications under the laws of some states,[50] or merely because their greater national strength gave them an advantage in all electoral contests, the Democrats were ultimately able to insist successfully that the name "Democrat" be adopted by all fusionists. In Michigan, for example, the charade of maintaining three separate conventions ended in 1899, and in 1901 the DPSU became simply the Democratic Party. Similarly, in Washington the fusionists joined in a union convention in 1900 and agreed to the Democratic name. A Detroit newspaper alluded to this logical tendency of the antifusion law when it renamed the legislation "the law providing for the extinction and effacement of all parties but the Democratic and Republican."[51]

Antifusion legislation also undermined the People's Party by exacerbating the existing fratricidal split within the party between the middle-of-the-roaders and fusionists. As one Indiana Populist immediately recognized of the antifusion law, "an element of discord has been introduced by the dominant party which is expected to rend the populists' ranks and remove all doubts from future con-

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generally expressive rather than instrumental. Those with any great support were short-lived and often based on the appeal of a dominant personality, like the Roosevelt Progressives of 1912 or the La Follette Progressives of 1924. Certainly, such parties rarely had, over time, the characteristics of late nineteenth-century third parties: local organization, voter identification, mass support in some areas and generalized regional strength, and especially tangible electoral success.

[49] *Kalamazoo Weekly Telegraph*, March 20, 1895.

[50] Following the passage of North Dakota's antifusion law in 1897, Independents (Populists) and Democrats, each opposing incorporation under the other's banner, combined into a new organization and adopted the title Independent-Democratic Party "as a party name . . . under which both Democrats and Populists can fight." But the imaginative Republican secretary of state interfered with this new-style fusion by ruling that the candidates of the Independent-Democratic Party could not be permitted on the Australian ballot at all, for such a party had not received the legal minimum of 5 percent of the vote in the preceding election—when, of course, it had not yet existed. Furthermore, he ruled, since the separate Independent and Democratic Parties had formed a new party, they had ceased to exist themselves and therefore could not *regain* a ballot position, leaving the Republicans the only party on the ballot. See *Winterset* (Iowa) *Review*, March 31, 1897; *Bismarck* (N.D.) *Daily Tribune*, October 28, 31, November 2, 1898; and *State* v. *Falley* (N.D.), 76 N.W. Rep. 996. This action seemed to answer an earlier Populist who wondered, after the passage of an antifusion law, "why [the legislature] did not go on a little further and say there shall be but one ticket allowed on the ballot, and that must be the Republican ticket." Des Moines *Farmers Tribune*, March 17, 1897. For similar comments, see *Kalamazoo Weekly Telegraph*, March 20, 1895; and *Spokane Spokesman-Review*, August 18, 1896. Wyoming simply prevented the creation of any new-style fusions such as the DPSU or the Independent-Democratic Party by adding to its antifusion ballot amendment a requirement that the names of political parties not exceed *one* word. New York State Library Bulletin, *Summary of Legislation*, 519.

[51] *Detroit Evening News*, March 20, 1895; Arthur Millspaugh, *Party Organization and Machinery in Michigan since 1890* (Baltimore, 1917), 19, 55; *Spokane Spokesman-Review*, August 30, 1900; and Des Moines *Iowa State Register*, May 13, June 24, 1897.

tests."[52] The usual mid-road arguments against fusion, based on the necessity of maintaining the party's identity and organization, acquired new and intense meaning in a legal situation that, as one judge phrased it, "says to the party, and through the party to the electors composing it: 'You shall not endorse candidates of any other party, except on condition that you surrender your existence as a party and lose your right of representation upon the official ballot in the future.' "[53] Antifusion legislation thus required those Populists interested in preserving their party's integrity to attack fusion ever more vigorously. As one Minnesota mid-roader noted, such laws would otherwise eliminate the Populists in every state where they did not outnumber the Democrats and thereby end any semblance of a national People's Party. But fusionist Populists countered that the mid-road position, in combination with the Republican "ballot law plot," would itself "divide and disfranchise populists and aid the monopoly and gold standard power." They argued that third parties had had their practical importance primarily as members of fusion coalitions and that "fusion, in the manner it has been had before on the official ballot, is no longer a possibility."[54] The logic of their position, then, required fusionists to merge the People's Party into the Democratic ranks. Limited to a ballot choice between Democrats and Republicans, some Populists voted Republican while others dropped out. The mid-roaders, though legally a bolting minority, issued their own Populist ticket, which after lengthy court battles between the two Populist factions invariably failed to attract enough support to guarantee the party a position on the ballot in the future.[55] In either case the People's Party ceased to exist.

IN SOME MEASURE, THEN, the People's Party died not only from prosperity and psychic collapse but also from ballot restrictions deliberately imposed by partisan legislatures in a movement that cannot accurately be said to have "scrupulously" preserved "all the forms of political democracy."[56] Some Populists vigorously attempted to amend the ballot laws, but others, recognizing that the Australian ballot itself had opened politics to "the dictation of state authority," argued for its repeal. "If 'amendment' is insisted upon," wrote one Iowa Populist, "let it be in the style of the farmer who amended his worthless dog's tail by letting the cleaver fall just behind the cur's ears."[57] Other Populists in antifusion

[52] Quoted in Des Moines *Farmers Tribune*, March 17, 1897.

[53] *State* v. *Anderson* (Wisc.), 76 N.W. Rep. 482.

[54] Des Moines *Farmers Tribune*, March 17, June 23, 1897. Also see O. D. Jones to Marion Butler, April 21, 1897, Butler Papers.

[55] In particular, see the Iowa experience in the *Winterset* (Iowa) *Review*, July 28, September 9, 1897; Des Moines *Farmers Tribune*, June 30, September 15, November 10, 1897; Des Moines *Iowa State Register*, August 19, 20, September 4, 8, 1897; and *Dubuque* (Iowa) *Herald*, October 17, 22, 28, 1897.

[56] Also see Burnham's larger statement that it "is difficult to avoid the impression that while all the forms of political democracy were more or less scrupulously preserved, the functional result of the 'system of 1896' was the conversion of a fairly democratic regime into a rather broadly based oligarchy." Burnham, "Changing Shape of the American Political Universe," 23.

[57] *Sioux City* (Iowa) *Journal*, May 26, 1897; and Des Moines *Farmers Tribune*, February 17, 1897, January 5, 1898.

states began to push for electoral change to protect the existence of third parties: proportional representation.[58] That those efforts failed is hardly surprising.

Nor did the effects of antifusion legislation end with the destruction of the People's Party. Obviously, these laws contributed to the widely observed decline in party competition in the "system of 1896." It is reasonable to assume, moreover, that demoralized former Populists, whether they were forced into the Democratic or Republican Party, became more "peripheral" than "core" supporters of their new parties and were less likely to vote and, when they did, were more likely to engage in the split-ticket, drop-off, and roll-off tendencies characteristic of the electorate after the crisis of the 1890s.

Certainly, antifusion laws were not solely or even primarily responsible for those tendencies, which appeared throughout the political system. But the time has surely come to discard the notion that political effects were "unintended consequences" of nonpartisan institutional reforms. Such alterations in electoral law must be viewed within a larger political context and not treated as "uncaused causes" of the transformation of voting behavior.[59] These laws were enacted by politicians who deliberately sought to protect or advance their own interests by manipulating the rules of the game. That their interests corresponded in some respects to decreased political participation, particularly by the more democratic elements of the population, and a consequent circumscription of public policy only adds to the poignancy of the process. Obviously, it is not true that electoral "reform," as one political scientist has claimed, "ended the earlier party practice of using the institutional framework for its own benefit."[60] Indeed, antifusion laws, as one dissident observed in 1895, were "a step toward making the Australian ballot system a means for the repression instead of the expression of the will of the people."[61] As for whether there was a "conspiracy," the Populists, who have often been charged with paranoia and conspiracy-mindedness, might have appreciated today's graffiti—"even paranoids have real enemies."

[58] William E. Lyons, "Populism in Pennsylvania, 1892–1901," *Pennsylvania History*, 32 (1965): 55; and *Bowling Green* (Ohio) *Daily Sentinel*, August 12, 1897.

[59] Burnham, "Rejoinder to 'Comments' by Converse and Rusk," 1054.

[60] Rusk, "Comment: The American Electoral Universe," 1049.

[61] *Kalamazoo Weekly Telegraph*, March 20, 1895.

RALPH SIMPSON BOOTS, THE DIRECT PRIMARY IN NEW JERSEY (1917) (relevant pages)

THE Direct Primary IN New Jersey

By RALPH SIMPSON BOOTS, A.M.

Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in the Faculty of Political Science, Columbia University

NEW YORK
1917

the following provisions in regard to primary meetings: "No person having voted at any primary meeting held by any political party or organization to nominate candidates or elect delegates to nominate candidates, to be voted for at any election shall vote or offer to vote at the primary meeting of any other political party." Certain offenses of the primary election officers of a party were specifically forbidden as follows: Rejecting the vote of any person entitled to vote under the rules of the party; receiving the vote of an unqualified person; fraud committed by destroying or defacing ballots, adding ballots to the poll, by false counting, by making false returns. The enumeration of these particular offenses would seem to indicate that the party regulations which the primary election officers were under oath to enforce were not very specific in their expression of how the primary should be conducted.

THE ACT OF 1903

The next step in primary legislature was taken in the passage of the act of April 14, 1903, (a) which provides for the first time in New Jersey for the direct primary. The first New Jersey act regulative of the party primaries had been passed in 1878, twelve years after the first similar act of any state. The direct primary law of 1903, however, followed the first mandatory law of any state on the same subject within four years. It is to be noted that the 1903 statute created the direct primary before any very extensive or radical regulation of the old primary existed.

Under the new act the primary election still was used mainly for the selection of delegates to conventions. Only ward and township officers were nominated directly. The primary election was conducted at public expense. It was held at the same time and place for all parties on the first registry day, the second Tuesday of September, conducted by the boards of registry and election substantially as general elections with official ballots, ballot-boxes, registry lists and polling booths; but the Republican election officers had sole charge of the Re-

(a) Chapter 248.

publican ballot-box and the Democrats of theirs, also the sole right to challenge voters offering to vote the ticket of their party. Ten signers, residents of the same election district, were sufficient to endorse by a petition any member of their party as a candidate for the nomination for public office or for the position of delegate. If the party votes for governor in the district at the last election did not exceed twenty-five, one signer was sufficient. The petition must be verified by the oath or affirmation of one or more of the signers thereof. At the primary the voters already registered, or who thereupon registered, for the ensuing general election, were qualified to vote.

The voter was given the ballot of the party he preferred on condition that if challenged he should make oath that he was a member of the party and that at the last election for members of assembly (chosen each year) at which he voted, he voted for a majority of the party's candidates and intended to support the candidates of the party at the ensuing election. Any voter who voted in the box of one party at any primary was forbidden to vote in the box of another party at the next succeeding primary. The record of participation in the primary was kept by placing the first letter of the voter's party in a column of the registry book opposite his name.

Each candidate for delegate was permitted to have printed on the ballot opposite his name his choice for the nomination to office to be made at the ensuing convention. If several candidates for delegate named the same choice for nomination their names might be grouped on the ballot. This provision introduced to a degree the principle of the direct primary—the pledged delegates acting as registers for the voters' choice expressed in reality for the candidate for the office to be nominated at the convention. Aside from this grouping, candidates names were to be arranged alphabetically under the name of the office or party position. The number of delegates to conventions was fixed as follows: For state conventions one delegate from each district for every two hundred votes cast by the political party for its candidate for governor at the last gubernatorial election and one delegate for each fraction thereof over

100; for any other convention one delegate for each hundred votes, and one for each fraction thereof over forty; but each election district was entitled at any rate to one delegate to each convention, who should have such vote or fraction thereof as the official party call for the convention determined.

On the resolution of any county or city committee its members were to be chosen at the primary. The chairman of the county committee of each political party was authorized to appoint two agents for each election district in his county who might challenge the right of any person to vote. Every person whose name was printed on the primary ballot was also given the privilege of challenging.

In one respect, by the terms of the bill as originally introduced, the method of conducting the primary was an improvement over that in force for the general election. For the latter any duly qualified voter by making proper application could secure, four days before election, fifty or more of the official ballots which could be voted just as those furnished at the polls by the election officers. Ballots could be handed to ignorant and purchased voters at will. This distribution of ballots outside the polling places was not provided for in the primary bill as introduced but an amendment incorporated a section of the 1898 law in order to permit it.

From the foregoing description it will be seen that the direct primary feature of the 1903 act was one of its minor provisions. It was really the first state regulation of the primary which was in any way effective. Certainly the opportunity of voting directly for candidates for nomination for township or ward officers could not have offered any great inducement to voters who had previously been indifferent in attending the primaries.

The great improvement made was in the manner of the conduct of the primary—regular election officers were provided, publicly printed ballots furnished, a definite day and fixed hours established, an orderly procedure assured and an honest count made probable. In the main the convention system was preserved, all nominations of any importance were still made by convention, and whatever increased interest was manifested on the part of the voters was due

to the possibility, then for the first time afforded in any adequate degree, of determining somewhat effectively the selection of delegates to these conventions.

The files of two of the leading newspapers of New Jersey have been carefully consulted to ascertain the primary conditions existent in 1903 and the background of the passage of this first direct primary law which constituted in fact the first real regulation of primaries in the state.

The Jersey Journal in an editorial of September 13th, says: "The history of the movement dates from the inaugural message of the Governor (Mr. Franklin Murphy)."

No reference to election law is found in either party platform of 1898 nor in the inaugural message of Governor Voorhes, 1899. The Republican platform of 1901 is silent; the Democratic platform charges the Republicans with having consolidated city elections with the general elections for the purpose of obtaining or maintaining Republican majorities. In Governor Murphy's inaugural (1902) this statement is found: "The last legislature authorized the appointment of a commission to consider an amendment to the election law which should provide for the regulation of the primary elections. That commission was appointed. They have given much study to the question, and as a result of their investigation they have prepared a bill which I commend to the favorable consideration of the legislature. No single act will conduce more fully to the confidence and satisfaction of the people in our form of government than the passage of a law providing for the regulation of primary elections. The present condition is bad. It might possibly be worse, but in some counties of our state not much worse. It should be improved, and that without delay. It is of the highest importance that means should be provided by which the voter can express his individual opinion without undue influence from anyone."

The Jersey Journal in an editorial (a) refers to two statutes as the most important of the remarkable session of the legislature, but does not mention the primary law. However, numerous editorials on the bill

(a) April 2d.

and its features appeared during the session. "This plan (a) will do away with padded enrollments and partisan trickery. It will allow the people some say in the selection of candidates and delegates, and it will insure an honest count. The plan has everything to commend and nothing to find fault with, so far as it is explained." "There (b) is nothing partisan about the desire for a change in the primary election methods practiced in the state. Many men in every county are willing to admit that any change will be an improvement, and it may be that this is true, though it is possible to have decent elections under existing laws and in some places decent primaries are frequent." A shadow of doubt appears in this sentence: "There would be little use for the bosses to do the thinking of the people if the people were allowed to select the candidates, though it is barely possible that the bosses would still exercise some influence in the selection of candidates."

"The primary bill (c) is drawing the fire of politicians of the heeler class of both political parties. The decent element in both parties, realizing that our present primary systems are a disgrace to nineteenth century civilization, is heartily in favor of the reform."

The commission spoken of in Governor Murphy's message above consisted of Mr. Edward C. Stokes, the succeeding governor, Mr. George L. Record and Mr. Joseph L. Munn. The Newark Evening News of November 8, 1902, states that the "chairman is hopeful that the primary law will be enacted that will relieve the state of the odium that now attaches to so many of these nominating contests. Under the present system it is quite common for good Republicans and good Democrats from the political viewpoint to take part in the primaries of the other party while the floating element makes it a business to be present on all such occasions, touring the cities and disposing of their votes."

No official records were kept of the public hearings held by the commission in various parts of the state, nor of the hearing before the assembly committee on elections on March 30, 1903.

Another issue (d) of the News speaks of the pri-

(a) January 6th.
(b) February 4th.
(c) February 9th.
(d) February 24th.

Fort in his annual message, 1910, had recommended an enrollment of party voters.

The Republican platform of 1910 made no radical suggestions for changes in the primary law of the state. Enrollment of party voters was advised to confine the primaries of each party to the members thereof, and the election of all delegates under the primary laws of the state was favored. The Democrats came out strongly for "an explicit and effective corrupt practices act," defining legitimate campaign expenditures, compelling publicity in detail, "such simplification of the electoral machinery of the state as will make possible the effective exercise of the right of direct nomination for all electoral offices." The Democrats elected Woodrow Wilson governor and a majority of the general assembly, but the senate remained in the control of their rivals. Their platform proposals were put into effect through the Geran law (a) and a corrupt practice act. (b)

The nominee for governor in his speech of acceptance had mentioned corrupt practices in elections as a great issue, putting it in a group of three issues, of secondary importance to three others.

THE GERAN ACT (1911)

Although the primary reform bill was introduced by Assemblyman Geran, it seems to have been prepared under the supervision of Governor Wilson, and after conferences with various men interested in good government and pure elections. (c) The Jersey Journal (d) credited Mr. George L. Record with being the father of the bill and insisted that it was of Republican origin, and was, in fact, a progressive Republican measure, backed by a progressive Democratic governor and a part of the Democratic party. The Democrats in caucus voted 27—11 to support the bill, and it passed the house as a Democratic administration measure, with the Republicans in almost solid opposition. This took place after a long delay in committee. (e) When the bill went to the senate, where more serious and successful resistance from the Republican majority might

(a) Chapter 183.
(b) Ibid. 188.
(c) Newark News, February 7th.
(d) April 6th.
(e) Jersey Journal, April 6th.

have been expected, it passed without a dissenting vote, after being considerably improved by amendments. The same unanimity favored the bill on its return to the house for concurrence in the amendments.

The governor referred to it in a speech (a) as the "fundamental bill of the session," and asserted (b) that it would "break up the private and secret management of party machines." In a speech at Indianapolis, Governor Wilson said: "The passage of the direct primary bill by the Republican senate of the New Jersey legislature is the result of a popular uprising in which the voice of the people made their demand so clear that there was no escape. The men who are fighting me in the legislature are not Republicans or Democrats. They are merely a body of men banded together for selfish interest. One of the hiding places of those seeking special privilege is in the old state convention." (c) "No bill has been before the legislature in years in regard to which public opinion has been so explicitly and so generally expressed" runs an editorial in the Jersey Journal. (d)

At a public hearing given by the Senate Committee on Elections, hardly any antagonism to the bill developed. The only opposition came from representatives of the two Essex County party organizations. That the previous laws had done little to improve conditions, despite the laudatory comment of the newspapers at the time, when the slightest evidence was seized on as a sign of improvement, is shown by the remarks of public men and newspaper comment during the legislature's consideration of the Geran bill. "Political candidates in Hudson County have for twenty years or more been selected in secret by one man or a few men at the head of the machine. The man in the street has nothing to say about it (party organization)" (e), although for two years county and city committees had been elected at the primaries. "In almost every election in recent years somewhere in the state scandals have arisen in connection with crooked work at the polls or with the use of money to influence or purchase voters." (f) "These party organizations are

(a) Jersey Journal, March 3rd.
(b) Ibid., March 8th.
(c) Newark News, April 14th.
(d) Jersey Journal, March 27th.
(e) Ibid., April 5th.
(f) Ibid., April 17th.

things apart from the masses of Democratic and Republican voters—machines controlled by a selected few who are responsible in each party. If these bosses had been duly elected by a popular majority or if they in any fair sense represented the people, there could be no fault to find. Under the corrupt system which the state is now trying to get rid of, money has been the controlling factor in politics, and that is why a hue and cry has been raised against the old methods." (a) "Who are interested in party organizations as they now exist? Only a handful of office holders, grafters and dependents. So far as the people are concerned nine men in ten who are worth their salt and who have any conscience in politics have only contempt for the party organizations as at present managed." (b)

Mr. Geran, in speaking on the bill, said: "The time has arrived when we must place in the hands of the people the power to control their own destinies. This bill gives the people the control of the election machinery and places in their hands the power to administer government." (c)

"The thought below the Geran bill may be expressed somewhat as follows: The degree to which administrative or legislative public officials will be really representative of their constituents will be the degree to which those officials are compelled to rely for choice, nomination and election on their own merits and competence, as expressed in their service, past or promised, to the people and not merely their usefulness to some artificially and disproportionately powerful clique thereof. The Geran bill is a part of the movement to make the people take an active competent interest in their own affairs by putting the responsibility up to them so hard that they cannot escape it." (d)

In regard to the exact content of the Geran act there is apparently a considerable degree of popular misunderstanding. It is frequently referred to as if it had established the principle of the direct primary and consequently as if a criticism of the Geran act in any particular is equivalent to a defense of the old convention system. Many people are doubtless convinced that popular elections did not exist in New Jersey until the

(a) Jersey Journal, March 21st.
(b) March 13th, editorial, Jersey Journal.
(c) Jersey Journal, March 22nd.
(d) Newark News, February 21st, editorial.

passage of this act, and out of respect for the facts it must be admitted that there is more truth in such a conviction than is creditable to the reputation of the state. New Jersey has never experienced a properly regulated and safeguarded convention system, but moved in 1903 from a very loosely governed general election scheme and a primary system barely affected by legal protection (1898 Revision) to a limited direct primary, and to a more extended direct primary in 1907 without purifying the registration and protecting the ballot. The result was to prevent an entirely satisfactory trial of the mixed direct primary and convention system.

The direct primary feature of the Geran act is one of its less important provisions, and alone would have amounted to little. To many minds the direct primary is associated with orderly elections, honest voting and reliable counting, but these are entirely separable from any direct primary principle and may exist altogether without it.

By far the most important part of the Geran act is that which provides for a thoroughly regulated system of registration, and this will be briefly discussed first, although it is section eleven of the law. Personal registration was required in all municipalities exceeding 5,000 inhabitants. Prior to 1911 personal registration was required only in cities exceeding 30,000 inhabitants and consisted only in giving the name and address. Besides, registration by affidavit of a voter residing in the same election district was permitted. No provision was made for verifying the registration lists, and so about all that prevented false registration, to the extent of all who wished to register falsely, was the activity of the agents of an opposing party. The registration provisions of the Geran law are taken practically verbatim from the election law of New York. The information which the voter must give is name, residence, floor or room number, householder with whom the voter resides, age, length of residence in the state, and so on to thirteen questions, then the voter must sign his name, or if unable to do so, must answer four additional questions on an identification statement. On election day the voter must sign his name in a poll book and his signature is compared with the original for identification; if challenged he must answer to the

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The New Jersey State Constitution

Second Edition

Robert F. Williams

THE OXFORD COMMENTARIES ON THE STATE
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Oxford University Press, Inc., publishes works that further Oxford University's objective of excellence in research, scholarship, and education.

Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi Kuala Lumpur Madrid Melbourne Mexico City Nairobi New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece Guatemala Hungary Italy Japan Poland Portugal Singapore South Korea Switzerland Thailand Turkey Ukraine Vietnam

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

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Oxford University Press is a registered trademark of Oxford University Press, Inc.

Library of Congress Cataloging-in-Publication Data

Williams, Robert F. (Robert Forrest), 1945-
The New Jersey State Constitution / Robert F. Williams.—2nd ed.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-19-977827-0 ((hardback) : alk. paper)
1. New Jersey. Constitution (1947) 2. Constitutions—New Jersey.
3. Constitutional law—New Jersey. 4. Constitutional history—New Jersey. I. Title.
KFN22011947.A6 W55 2012
342.74902'9—dc23

2012003179

For Alaine, Sarah, and Tyler

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■ SERIES FOREWORD

In 1776, following the declaration of independence from England, the former colonies began to draft their own constitutions. Their handiwork attracted widespread interest, and draft constitutions circulated up and down the Atlantic seaboard, as constitution makers sought to benefit from the insights of their counterparts in sister states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. Even the delegates to the constitutional convention of 1787, despite their reservations about the course of political developments in the states during the decade after independence, found much that was useful in the newly adopted constitutions. And when James Madison, fulfilling a pledge given during the ratification debates, drafted the federal Bill of Rights, he found his model in the famous Declaration of Rights of the Virginia Constitution.

By the 1900s, however, few people would have looked to state constitutions for enlightenment. Instead, a familiar litany of complaints was heard whenever state constitutions were mentioned. State constitutions were too long and too detailed, combining basic principles with policy prescriptions and prohibitions that had no place in the fundamental law of a state. By including such provisions, it was argued, state constitutions deprived state governments of the flexibility they needed to respond effectively in changing circumstances. This—among other factors—encouraged political reformers to look to the federal government, which was not plagued by such constitutional constraints, thereby shifting the locus of political initiative away from the states. Meanwhile, civil libertarians concluded that state bills of rights, at least as interpreted by state courts, did not adequately protect rights and therefore looked to the federal courts and the federal Bill of Rights for redress. As power and responsibility shifted from the states to Washington, so too did the attention of scholars, the legal community, and the general public.

During the early 1970s, however, state constitutions were "rediscovered." The immediate impetus for this rediscovery was former President Richard Nixon's appointment of Warren Burger to succeed Earl Warren as Chief Justice of the U.S. Supreme Court. To civil libertarians, this appointment seemed to signal a decisive shift in the Supreme Court's jurisprudence, because Burger was expected to lead the Court away from the liberal activism that had characterized the Warren Court. They therefore sought ways to safeguard the gains they had achieved for defendants, racial minorities, and the poor during Warren's tenure from erosion by the Burger Court. In particular, they began to look to state bills

Preamble

We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution.

This preamble is identical to that preceding the 1844 constitution. The preamble is not actually a part of the constitution itself. As one New Jersey court said in 1910: "It is impossible to so construe the preamble as to write something into the constitution that its framers did not write into it" (*Booth v. McGuinness*). Still, the preamble makes it readily apparent that the source of authority for New Jersey's government is and continues to be the people of the state.

Article I

Rights and Privileges

Although the 1776 constitution did not contain a declaration of rights, it provided in Article XXII that the common law of England "shall still remain in force," which many believed carried forward most of the "Rights of Englishmen" into New Jersey law. A separate article containing a declaration of rights appeared for the first time in New Jersey in 1844.

The 1947 version of the bill of rights was described by Governor Alfred E. Driscoll soon after its adoption as expressing "the social, political and economic ideals of the present day in a broader way than ever before in American constitutional history."[10] The New Jersey courts, on a number of occasions since the early 1970s, have interpreted the state bill of rights more broadly in order to provide more rights to citizens than are provided under the Federal Constitution as interpreted by the U.S. Supreme Court.[11]

The current picture concerning constitutional rights in New Jersey reflects a complex interrelationship of federal and state guaranteed rights. This twenty-first-century constitutional rights landscape has evolved over the more than two

[10] Governor's Annual Message to the Legislature, January 11, 1949, quoted in Leon S. Milmed, *The New Jersey Constitution of 1947*, *in* 1 NEW JERSEY STATUTES ANNOTATED 1, 15 (St. Paul, Minn.: West Publishing Co. 2008).

[11] José Fernandez, Note, *The New Jersey Supreme Court's Interpretation and Application of the State Constitution*, 15 RUTGERS L.J. 491 (1984).

centuries since Independence. There were, in fact, important pre-Independence, colonial rights as well.[12] Those matters, however, are beyond the scope of this book. We will begin at the point where New Jersey adopted its first state constitution.

New Jersey had ratified the proposed Federal Constitution in December 1787, with virtually no opposition.[13] Anti-Federalists had opposed its adoption in other states, using, among other criticisms, the argument that it did not include a bill of rights. This argument concerning the necessity for a bill of rights arose from the examples of a number of the other states' early constitutions, which did contain such declarations or bills of rights. Obviously, that was not an argument that would be likely to surface in New Jersey because it was one of the few states where the constitution did not contain a separate bill of rights.

New Jersey then became the first state to ratify the ten amendments to the Federal Constitution, presented as the Bill of Rights, in November 1789. Once again, there was no discernable opposition.[14] The Federal Bill of Rights, of course, had been copied mainly from the rights guaranteed in state constitutions that had separate bills of rights, together with rights provisions suggested by the states during the process of ratifying the Federal Constitution itself.[15] Here again, of course, New Jersey's first constitution could not serve as a model because of the absence of a separate declaration of rights.

According to the basic political and legal understanding of that time, the Federal Bill of Rights limited only the *federal* government. In other words, people in the states could not invoke the federal rights guarantees against actions of their *state* or *local* governments. Therefore, in a state that did not have a separate declaration of rights, such as New Jersey, it would seem as though there were, literally, *no constitutional rights* against state or local government! In fact, however, recent research has indicated that many state courts, including New Jersey's, did in fact apply the Federal Bill of Rights in litigation where state and local actions were challenged in court.[16] Further, as noted earlier, there were a few rights embedded in the body of the New Jersey Constitution of 1776, and these were enforced by the courts.[17]

[12] SCOTT D. GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787, at 225–45 (2011).

[13] Eugene R. Sheridan, *A Study in Paradox: New Jersey and the Bill of Rights*, *in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 247–73 (Patrick T. Conley & John P. Kaminski eds., 1992).

[14] *Id.*

[15] BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 53–54, 85–86, 90–91 (1977); Donald S. Lutz, *The States and the Bill of Rights*, 16 SO. ILL. L.J. 251 (1992).

[16] Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 40–41, 55 (2007) (New Jersey cases).

[17] CHARLES ERDMAN, JR., THE NEW JERSEY CONSTITUTION OF 1776, at 4 (1929).

After many decades of agitation for a new state constitution in New Jersey, the legislature acted in 1844 without any specific constitutional authorization to call a constitutional convention and permit the people to vote for delegates. This constitutional convention led to the adoption of the New Jersey Constitution of 1844, which did contain a separate declaration of rights. This catalog of rights forms the basis of the New Jersey state constitutional declaration of rights today.

Interestingly, however, it did not guarantee the right to bear arms or provide protection against self-incrimination. It did include an "unenumerated rights clause," often referred to as a "savings clause." This currently reads: "This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."[18]

After 1844, a very important year in the constitutional history of New Jersey, the state constitution's declaration of rights was available for people in New Jersey to rely upon directly in litigation. Still, according to the common understanding of the function of the Federal Constitution, the Federal Bill of Rights was not available directly to protect state citizens from their state and local governments; it was thought only to provide a shield against *federal* deprivation of rights.

In 1868, the states ratified the Fourteenth Amendment to the U.S. Constitution. This extremely important post–Civil War step accomplished a fundamental rearrangement of the relationship between the federal government and the states. Of particular importance was the Due Process clause of the Fourteenth Amendment: "No *State*... shall... deprive any person of life, liberty, or property, without due process of law..." This clause provided a direct, textual guarantee of constitutional rights for people against their own states. This, it must be remembered, was not the original understanding of the Federal Bill of Rights. Soon questions began to arise as to what constituted "due process of law." Was it just up to the federal and state judges who enforced the U.S. Constitution to figure out on their own what was required? Against this possibility, the U.S. Supreme Court began to engage in a process of "selective incorporation" of the Federal Bill of Rights against the states. In other words, the U.S. Supreme Court began to fill in the definition of due process of law by relying on what was already in the Federal Bill of Rights. After a long period of years, virtually all of the rights guaranteed in the Federal Bill of Rights have now been deemed to apply to the states and to local government. The only exception to this date is the Seventh Amendment right to jury trial in civil courts.

A number of famous cases in the U.S. Supreme Court under the Federal Bill of Rights have come from New Jersey. They have ruled both for and against

[18] N.J. CONST. art. I § 21.

rights. One of the most important cases was the 1939 decision in *Hague v. CIO*.[19] In this decision, the U.S. Supreme Court struck down a ban imposed by the famous Mayor Frank Hague of Jersey City against union informational picketing as an arbitrary suppression of free speech in violation of the First Amendment.

In 1947, the U.S. Supreme Court ruled, in *Everson v. Board of Education of Ewing Township*,[20] that providing school bus transportation to Catholic schools was not a violation of the First Amendment's clause barring government establishment of religion.[21] In 1976, the U.S. Supreme Court upheld a ban on antiwar picketing on a military base in New Jersey by the famous baby doctor, Benjamin Spock.[22] In 1981, the Court made clear that the First Amendment's freedom of expression guarantee permitted topless dancing in Mount Ephraim.[23] Then, in 1984, it ruled that it was not an unconstitutional search and seizure under the Fourth Amendment for school officials to search a student's pocketbook without "probable cause."[24]

In 2000, the Court ruled that the Boy Scouts of America's First Amendment freedom of association rights permitted them to discriminate against gay scout officials.[25] That same year, the Court made a very important ruling that any enhanced sentence to be imposed in a criminal case based on facts (such as hate crimes) had to be included in the criminal charge, and found beyond a reasonable doubt by a jury.[26]

A number of other important federal constitutional law cases, based on the Bill of Rights to the U.S. Constitution, have come from New Jersey. Those listed, however, give a flavor of the kinds of cases that have both won and lost at the national level, thereby providing building blocks for the body of federal constitutional law applicable everywhere in our country.

The 1947 constitutional convention produced a thoroughly updated constitution for the state. Not only did it provide reformed and modernized judicial and executive branches, but it further updated the state constitution's declaration of rights. First, the wording of Article I, paragraph 1, was revised to change the reference to the inalienable rights of all "men," to all "persons."[27]

[19] 307 U.S. 496 (1939); Benjamin Kaplan, *The Great Civil Rights Case of* Hague v. CIO*: Notes of a Survivor*, 25 SUFFOLK U.L. REV. 913 (1991).

[20] Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947).

[21] This led to the 1947 provision in the New Jersey Constitution specifically authorizing such public support of private and religious school transportation. N.J. CONST. art. VIII, § IV, ¶ 3.

[22] Greer v. Spock, 424 U.S. 828 (1976).

[23] Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

[24] New Jersey v. T.L.O., 468 U.S. 1214 (1984).

[25] Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[26] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[27] Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 WOMEN'S RTS. L. REP. 69 (1994); Maxine Lurie, *The Twisted Path to Gender Equality: Women and the 1947 Constitution*, 117 N.J. HIST. 39 (Spring/Summer 1990).

This provision, which has been acknowledged by the New Jersey Supreme Court to be a state constitutional equal rights amendment,[28] although not commonly recognized, put New Jersey among the earliest states to adopt such an amendment.[29]

Further, through the efforts of Oliver Randolph, the single African-American delegate to the 1947 constitutional convention, Article I, paragraph 5, was adopted barring segregation in public education and the militia.[30] This clause, of course, predated by seven years the famous U.S. Supreme Court ruling in *Brown v. Board of Education*, outlawing segregated public education in the United States.

Finally, the convention proposed, and the voters accepted, the new Article I, paragraph 19, which guaranteed the right to collective bargaining for persons in private employment and the right to collective negotiation by public employees. This provision has been enforced by the courts in litigation by private employees even in the absence of implementing legislation.[31] These new state constitutional rights have been supplemented by another modern rights provision—a 1991 guarantee of victims' rights.[32] This provision has also had an important influence on state constitutional law in New Jersey.[33]

In the 1950s, beginning with *Brown v. Board of Education*, the U.S. Supreme Court, under the direction of Chief Justice Earl Warren, aggressively continued the selective incorporation of the rights contained in the Federal Bill of Rights into the Due Process clause of the Fourteenth Amendment, thereby making them applicable to the states. This period of the "liberal" U.S. Supreme Court lasted well into the 1960s, and resulted in a "nationalization" or "federalization" of rights litigation.[34] Almost all advocates of constitutional rights were mesmerized by, and relied upon, the expanding federal constitutional rights guaranteed by the Supreme Court. One scholar at the beginning of this era said, "If our liberties are not protected in Des Moines the only hope is in Washington."[35]

[28] Peper v. Princeton University, 77 N.J. 55, 389 A.2d 465 (1978).

[29] Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202 (2005).

[30] Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267 (2004).

[31] Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729 (1987).

[32] N.J. CONST. art. I, ¶ 22.

[33] State v. Muhammad, 145 N.J. 23 (1996) (Victims' Rights Amendment supports use of victim impact evidence at sentencing and avoids an argument that state constitution prohibits such evidence).

[34] RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES (1981).

[35] Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951).

In the 1968 presidential campaign, Republican candidate Richard Nixon based part of his platform on a promise to change the direction of the U.S. Supreme Court. Upon winning, he moved in this direction by appointing Chief Justice Warren Burger. This perceived conservative redirection of the U.S. Supreme Court led rights advocates to begin to look to their state constitutions as possible sources of protection beyond the national minimum (and likely reduced) standards guaranteed by the Supreme Court's interpretations of the Federal Constitution.[36] State courts could, literally, disagree with the U.S. Supreme Court if their rulings provided rights that were *more protective* than the national minimum standards or "floor." Justice William J. Brennan, Jr., formerly of the New Jersey Supreme Court, wrote an influential 1977 article in the *Harvard Law Review*[37] urging state courts to take their state constitutions seriously and not necessarily to follow the increasingly conservative direction of the U.S. Supreme Court. Justice Brennan (as well as Justice Thurgood Marshall) also expressed this view in dissenting opinions during that era.[38]

Importantly, New Jersey has been a leader in this reemergence of state constitutional law.[39] A few of the many examples of the New Jersey Supreme Court's cases interpreting the state constitution to provide rights beyond the national minimum were the "Mount Laurel" exclusionary zoning decisions,[40] adequate funding for education of poor public school students,[41] death with dignity,[42] abortion funding for poor women,[43] search and seizure protections,[44] free speech on privately owned regional shopping mall premises,[45] and rejection of required parental notification for minors' abortions.[46] Interestingly, however, there are instances where the New Jersey Supreme Court determines that a particular rights guarantee is "coextensive" with the identical or similar federal constitutional guarantee as interpreted by the U.S. Supreme Court. Examples of this

[36] WILLIAMS, *supra* note 2, at 113–232. *See also* John Kincaid, Foreword, *The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 915 (1995).

[37] William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977). On Justice Brennan's involvement with the state constitution in New Jersey, *see* Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763 (1998).

[38] *E.g.*, Michigan v. Mosley, 423 U.S. 96 (1976) (Brennan, J., dissenting).

[39] John B. Wefing, *The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701 (1998); Deborah T. Poritz, *The New Jersey Supreme Court: A Leadership Court on Individual Rights*, 60 RUTGERS L. REV. 705 (2008).

[40] Southern Burlington Co. NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713(1975).

[41] Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990).

[42] In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

[43] Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982).

[44] State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982).

[45] N.J. Coalition Against the War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 650 A.2d 757 (1994).

[46] Planned Parenthood of Central New Jersey v. Farmer, 165 N.J. 609, 762 A.2d 620 (2000).

approach appear, for example, under Article I, paragraph 11 (double jeopardy), and paragraph 20 (taking of property without just compensation).[47] This form of "lockstepping" is unusual for New Jersey and raises questions such as whether such a pronouncement is binding on future courts.[48]

Decisions in New Jersey going beyond federal minimum standards, as well as similar rulings in virtually all of the other states, have truly reflected a "*New* Judicial Federalism." Well into this important jurisprudential development in which state courts are achieving parity with federal courts in rights protection, another scholar aptly noted: "For if our liberties are not protected in Washington, the only hope is in Des Moines."[49]

Another important feature of the New Judicial Federalism was the recognition that state court decisions based on state constitutions could be overruled by the electorate voting to adopt a proposed amendment to the constitution.[50] In New Jersey, to date, there has only been one example of an amendment to the state constitution that was adopted to overturn a decision of the New Jersey Supreme Court recognizing rights above the federal, minimum standards. In 1988, the New Jersey Supreme Court had ruled in *State v. Gerald*[51] that capital punishment could not be imposed on a defendant for felony murder unless there was evidence of intent to kill. In 1992, Article I, paragraph 12, of the New Jersey Constitution was amended to permit the imposition of capital punishment in such circumstances.

State court decisions that are based on "adequate and independent" state law grounds cannot be reviewed by the U.S. Supreme Court. Quite simply, where such a state law basis for the decision exists there is no *federal* question of law to be reviewed. Under these circumstances, it is very important that such state court decisions clearly indicate that they are based on state-law grounds. Where this is not made clear, the U.S. Supreme Court has indicated that it has the ability to exercise its jurisdiction because federal and state law are intertwined in a way that makes it impossible to determine which was the basis for the decision. In 1983, the Supreme Court stated in *Michigan v. Long*:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state

[47] Other provisions are viewed as *less* protective than federal guarantees. This is the case with the speedy trial guarantee under Article I, paragraph 10, and the ban on establishment of religion under Article I, paragraph 4.

[48] WILLIAMS, *supra* note 2, at ch. 7.

[49] Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press: Article I, Section 7 of the Iowa Constitution*, 38 DRAKE L. REV. 9, 29 (1988–1989).

[50] WILLIAMS, *supra* note 2, at 29, 128.

[51] 113 N.J. 40, 549 A.2d 792 (1988).

court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[52]

Based on this approach, the U.S. Supreme Court did accept, and reverse, the New Jersey Supreme Court's decision holding that school officials could not search a student's pocketbook without probable cause.[53] Had the New Jersey Supreme Court indicated clearly that its decision was based on the *state* constitution, the U.S. Supreme Court would not have had jurisdiction over the case. The New Jersey Court, however, based its decision on the *Federal* Constitution, thereby opening the way for U.S. Supreme Court review and reversal.

On the other hand, the New Jersey Supreme Court's decision holding that the Boy Scouts had violated the New Jersey *statute* (not constitution) banning discrimination, and therefore seemingly based on a state law ground, was reviewable by the U.S. Supreme Court, and reversed, because the Boy Scouts themselves asserted that their *federal* constitutional rights to freedom of association had been violated.[54]

After this brief sketch of the evolution of both state and federal constitutional rights in New Jersey, together with the interesting and somewhat complex interrelationship between these two sources of constitutional protections, it is clear that our federal system results in a rather complicated and not particularly efficient landscape of rights guarantees for the people in the states. However, a basic understanding of the evolution, and interdependence, of these sources of rights is not beyond the understanding of New Jersey citizens.

In civil liberties matters where there are both federal and state constitutional guarantees that are relevant to analyzing the issue, but the litigant claims more extensive protection under the state provision, the Supreme Court of New Jersey has taken several points of view. First, where there is no definitive U.S. Supreme Court precedent, the New Jersey Supreme Court may rule on the federal interpretation issue in a "predictive" way (*State v. Hartley*). Second, where there is a clear U.S. Supreme Court precedent on the federal issue, the New Jersey Supreme Court in the 1980s seems to have adopted the "factor," or "criteria," approach. Under this approach, the U.S. Supreme Court's interpretation of the analogous federal constitutional provision is the starting point for analysis. The U.S. Supreme Court's interpretation will be adopted as the interpretation of the related New Jersey constitutional provision unless there is some identifiable

[52] 463 U.S. 1032, 1040 (1983).

[53] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[54] Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

factor that would justify the New Jersey Supreme Court's interpretation of the state provision to provide broader protections than those available under the federal provision. This technique first appeared in Justice Alan Handler's concurring opinion in *State v. Hunt* in 1982 and was endorsed by the full Court the next year in *State v. Williams*. Justice Handler listed seven criteria or standards that would justify a result different from the U.S. Supreme Court's: (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the U.S. Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state. He concluded that reliance on such criteria demonstrates that a divergent state constitutional interpretation "does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."

Justice Handler denied that his analysis created a presumption in favor of the U.S. Supreme Court result, but Justice Morris Pashman, in a separate concurrence, disagreed.[55] Importantly, Justice Pashman observed that such a presumption limits a state court's authority to interpret its own constitution.

The New Jersey Supreme Court thus appeared to require some objectively verifiable difference between state and federal constitutional analysis—whether textual, decisional, or historical—to justify a state court embracing a different interpretation. This view implies that in the absence of one or more of the criteria identified, it is illegitimate for a state court to reject the reasoning or result of a U.S. Supreme Court decision.

It is certainly possible to criticize the use of the criteria or factor approach,[56] and, in fact, the Supreme Court of New Jersey does not always adhere to its announced approach.[57] There are a number of alternative ways for state courts to address state constitutional protections that are analogous to federal constitutional protections.[58] Nevertheless, the New Jersey Court's endorsement of the factor or criteria approach suggests an important and useful set of techniques for addressing state constitutional civil liberties claims in areas where there are

[55] 91 N.J. at 367 n. 3, 450 A.2d at 967 n. 3. *See also* Alan B. Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 202, 206 n.29 (1983).

[56] WILLIAMS, *supra* note 2, at 169.

[57] Fernandez, *supra* note 11 at 499–509. In more recent times the Court does not seem to refer to the criteria approach. *See* State v. Eckel, 185 N.J. 523, 538–41, 888 A.2d 1266, 1275–77 (2006).

[58] *See, e.g.*, Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Hans A. Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985); Ronald K. L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 16 PUBLIUS: THE J. FEDERALISM 111 (1986), reprinted in 55 U. CINCINNATI L. REV. 317 (1986).

analogous federal rights. Several justices of the Supreme Court of New Jersey have written law review articles about their views on interpreting state constitutional rights provisions.[59]

The New Jersey Supreme Court has held, as a general matter, the rights guaranteed in the state constitution are enforceable in court even in the absence of implementing legislation or a *statutorily* created cause of action, that is, a law passed by the legislature specifically authorizing court suits to enforce constitutional provisions.[60] In the words of Chief Justice Richard Hughes in *King v. South Jersey National Bank*, "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country."

Natural and Unalienable Rights

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

This broad provision, similar to the initial provisions contained in Virginia's famous 1776 declaration of rights and the 1780 Massachusetts declaration of rights, forms the textual basis for the rights of due process of law, equal protection of the law, privacy, the "right to die," vested rights in property, and several other important New Jersey constitutional doctrines. Many of these rights are protected under more specific provisions of the Federal Constitution. An extremely important revision of the original 1844 language was adopted at the 1947 constitutional convention: The words "all *persons*" were substituted for "all *men*" in an explicit move to secure equal rights for women.[61]

Equal Protection

Among the most important, but also most difficult to apply, constitutional rights are those requiring equal protection under the law. These are, generally

[59] *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L.J. 707 (1983); Handler, *supra* note 55; Virginia A. Long, *The Purple Thread: Social Justice as a Recurring Theme in the Decisions of the Poritz Court*, 59 RUTGERS L. REV. 533 (2007); Poritz, *supra* note 39.

[60] Peper v. Princeton University, 77 N.J. 55, 76–77, 389 A.2d 465, 476 (1978).

[61] The history of this change is detailed in Karen J. Kruger, Note, *Rediscovering the New Jersey E.R.A.: The Key to Successful Sex Discrimination Litigation*, 17 RUTGERS L.J. 253, 270–75 (1986); Maxine Lurie, *The Twisted Path to Gender Equality: Women and the 1947 Constitution*, 117 N.J. HIST. 39 (Spring/Summer 1990).

speaking, aimed at keeping the government from singling out certain groups for either better or worse treatment than others without good reason.

The New Jersey Constitution, like most state constitutions, does not contain an equal protection clause like that found in the Fourteenth Amendment to the Federal Constitution.[62] New Jersey courts have, however, held that Article I, paragraph 1, implicitly includes a "concept of equal protection" (*McKenney v. Byrne*; *Washington Nat'l Ins. Co. v. Bd. of Review*). The courts have often equated the state doctrine with the equal protection clause of the Fourteenth Amendment to the Federal Constitution (*McKenney v. Byrne*), but it is clear that New Jersey's equal protection doctrine is not "coterminous" with federal doctrine (*Planned Parenthood of N.Y.C. v. State*) and may, in fact, provide broader protections for persons in New Jersey than provided under federal equal protection doctrine (*Peper v. Princeton University Board of Trustees*).[63] Sometimes, however, the courts have tended to follow federal equal protection analysis (*Barone v. Dept. of Human Services*; *Sykes v. Propane Power Corp.*).

Federal equal protection analysis, as articulated by the U.S. Supreme Court, has evolved into a relatively limited view of enforcement based on the nature of the classification, that is, race, gender, and so forth, or the importance of the right involved, such as voting, marriage, and reproduction. Equal protection in New Jersey is frequently analyzed under a more flexible approach than at the federal level, allowing the court to apply a balancing test in appropriate cases. Chief Justice Joseph Weintraub enunciated this test in *Robinson v. Cahill* (1973):

> [W]e have not found helpful the concept of a "fundamental" right. No one has successfully defined the term for this purpose . . . if a right is somehow found to be "fundamental," there remains the question as to what State interest is "compelling" and there, too, we find little, if any, light. Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert the court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary.

Under this approach, a right need not be labeled "fundamental" to trigger searching judicial review, which will balance the need for the legislative or executive action against the infringement of the right at issue (see also *Abbott v. Burke*; *Greenberg v. Kimmelman*).

[62] WILLIAMS, *supra* note 2, at 209.

[63] For a detailed analysis of New Jersey's "equal protection" jurisprudence, *see* David M. Strauss, Note, *The End or Just the Beginning for Gay Rights under the New Jersey Constitution? The New Jersey Domestic Partnership Act, Lewis v. Harris, and The Future of Gay Rights in New Jersey*, 36 RUTGERS L.J. 289 (2004).

The Supreme Court also recognized that a standard or statute that is not specifically based on a discrimination-generating classification or right may nevertheless be discriminatory because of the means employed to achieve the objective. This component of New Jersey equal protection was established by the "means-focused" test developed in *Borough of Collingswood v. Ringgold*. This test emphasizes the fitness of the means chosen to further a valid purpose. The Court in *Ringgold* found the means employed in a local ordinance (the disparate registration of solicitors) reasonable and, thus, not violative of equal protection. The Court ruled that Collingswood's interests in not unduly burdening local community solicitation efforts (church, civic, and charity groups in particular) justified the differing requirements of the ordinance.

New Jersey courts may, therefore, use either a balancing test or a means-focused approach. A leading example is *Right to Choose v. Byrne*.[64] In this 1982 decision, the New Jersey Supreme Court rejected the U.S. Supreme Court's 1980 decision in *Harris v. McRae* and held that terminating medical assistance funding for abortions that were necessary to protect the health of the mother violated Article I, paragraph 1, of the New Jersey Constitution. The Court concluded that "in balancing the protection of a woman's health and her fundamental right to privacy against the asserted state interest in protecting potential life, we conclude that the governmental interference is unreasonable." The Court has continued to apply its own balancing test instead of the federal multitiered equal protection analysis (*Gardner v. New Jersey Pinelands Comm.*; *State v. Chun*; *Sojourner A. v. Dept. of Human Services*). The Supreme Court applied this balancing test and, relying on the *Right to Choose* decision, struck down a statute requiring minors to notify their parents prior to abortion when no other pregnancy-related medical treatment required such notification (*Planned Parenthood v. Farmer*). In 2006, the Court ruled that although same-sex couples do not have a fundamental right to marry under paragraph 1, they could not be denied benefits on an equal basis with those granted to opposite-sex, married couples (*Lewis v. Harris*). The legislature responded by enacting the Civil Union Act (N.J.S.A. 37:1-28 to -36), giving equal treatment in most respects to committed same-sex couples. Thereafter the attorney general issued Formal Opinion No. 3-2007, specifying that legal same-sex relationships from other jurisdictions, including marriages, would be treated as civil unions or domestic partnerships under New Jersey law (*Quarto v. Adams*). In July 2010, the New Jersey Supreme Court, on a 3–3 vote, declined to hear an action challenging the Civil Union Act as an inadequate response to the claims in *Lewis v. Harris*, and remanded the matter for development of a trial record.

[64] *See generally* Jane M. Hanson, Note, *New Jersey Constitutional Law: Medicaid Funding for Abortion After* Right to Choose v. Byrne, 36 RUTGERS L. REV. 665 (1984); Comment, *Right to Choose v. Byrne*, 14 RUTGERS L.J. 217, 229 (1982).

There are several other provisions in the New Jersey Constitution that reflect equality concerns, such as Article I, paragraph 5, and Article IV, Section VII, paragraphs 7, 8, and 9, and sometimes the New Jersey courts refer to them together (*Planned Parenthood of N.Y.C. v. State*). However, each has its distinctive history, text, and specific judicial interpretation and therefore warrants separate analysis.[65]

Privacy

The contours of New Jersey's right to privacy, implicit in Article I, paragraph 1, were neatly captured by Justice Sidney Schreiber in *State v. Saunders*:

> We have hitherto recognized that this provision encompasses an individual right of privacy. *In re Quinlan*, 70 N.J. 10, 40 *cert, den sub nom. Garger* v. *New Jersey*, 429 U.S. 922, 97 S. Ct. 319, 50 L. Ed.2d 289 (1976). Article I, par. 1 is almost a copy of the comparable provision in the 1844 Constitution. In a monograph prepared for the 1947 New Jersey Constitutional Convention, Dean Heckel stated that "among the rights included" in Article 1, par. 1 of the 1844 Constitution is a "right of privacy." Heckel, "The Bill of Rights," in II *Constitutional Convention of* 1947, 1336 at 1339. He relied upon *McGovern* v. *Van Riper*, 137 N.J. Eq. 24, 33 (Ch. 1945), in which the court wrote that the right of privacy "is one of the 'natural and inalienable rights' recognized in article 1, section 1 of the constitution of this state." No language change made in Article I, par. 1 by the 1947 Constitutional Convention would affect this construction.

The *Saunders* decision found certain adult sexual activities to be protected by the right to privacy. Also within this broad right are matters such as the "right to die" (*In re Quinlan*; *In re Jobes*) and rights of unrelated persons to live in one household despite zoning restrictions to the contrary (*State v. Baker*; *Borough of Glassboro v. Vallorosi*).

In *Hennessey v. Coastal Eagle Point Oil Co.*, the Supreme Court relied on the state constitutional privacy doctrine in the private employment random drug testing context but permitted the testing because of safety concerns associated with the particular job. Privacy claims were rejected, however, in the mandatory registration for convicted sex offenders under Megan's Law (*Doe v. Poritz*).

Due Process of Law

The right to due process of law is also implied in Article I, paragraph 1 (*Nicoletta v. North Jersey District Water Supply Commission*; *Pasqua v. Council*). There are two separate components of the right to due process: (1) the requirement of

[65] WILLIAMS, *supra* note 2, at 210.

than federal constitutional doctrine, to be a matter to be treated under the common law and the rules of evidence (*State v. Hartley; In re Martin; State v. Deatore; In re Grand Jury Proceedings of Guarino*).

In 1993, the Supreme Court reiterated its view that "the right against self-incrimination is founded on a common-law and statutory—rather than a constitutional—basis" (*State v. Reed*).

Victims' Rights

22. A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

This new paragraph was added by amendment in 1991.[79] The Supreme Court placed partial reliance on this amendment in upholding the use of "victim impact evidence" in death penalty cases, whereby the jury is permitted to hear of the impact of the death on surviving family members. This had been challenged under the paragraph 12 restriction on cruel and unusual punishment (*State v. Muhammad*). The Court upheld a trial court's reconsideration of its order changing the venue of a notorious murder case based on pretrial publicity because such a change would be inconvenient for the victim's parents in violation of the Victims' Rights Amendment. The trial court, instead, ordered a jury brought in from the other county (*State v. Timmendequas*). The Court held that the amendment would not be interpreted to permit a victim's hypnotically refreshed testimony to be admitted in evidence against a defendant and that in a conflict between victims' and defendants' rights, the benefit had to go to the defendant "whose liberty interest is at stake" (*State v. Moore*).

[79] Richard E. Wegryn, Note, *New Jersey Constitutional Amendment for Victims' Rights: Symbolic Victory?*, 25 RUTGERS L.J. 183 (1993).

Article II

Elections and Suffrage

Section I. Elections and Suffrage

General Elections

1. General elections shall be held annually on the first Tuesday after the first Monday in November; but the time of holding such elections may be altered by law. The Governor, Lieutenant Governor, and members of the Legislature shall be chosen at general elections. Local elective officers shall be chosen at general elections or at such other times as shall be provided by law.

This article on elections and suffrage has its origins in the constitution of 1776, although it was an 1875 amendment that first established the November date for elections. It was amended in 2006 to include the lieutenant governor.

This current provision maintains the format of setting a date for general elections in the constitution, but permitting alteration by the legislature. It mandates that members of the legislature and the governor and lieutenant governor be chosen at general elections and that local officials may be chosen at general elections or otherwise as provided by the legislature.

When a question arose as to whether the legislature could regulate *primary* elections, to choose the nominees of the political parties, the Supreme Court upheld such legislative regulation, noting: "The same public interest is advanced in the regulation of the selective mechanism as in the protection of general elections" (*Wene v. Meyner*).

Public Questions; General Election; Publication

2. All questions submitted to the people of the entire State shall be voted upon at the general election next occurring at least 70 days following the final action of the Governor or the Legislature, as appropriate, necessary to submit the questions. The text of any such question shall be published at least once in one or more newspapers of each county, if any newspapers be published therein, at least 60 days before the election at which it is to be submitted to the people, and the results of the vote upon a question shall be void unless the text thereof shall have been so published.

This paragraph makes the policy choice that "ballot propositions" or referenda of various types must be voted on at general rather than primary or special elections. Such referenda would include those on proposed state constitutional amendments, authorizing certain borrowing, approval of forms of gambling, and so forth. The 1844 constitution, in its cumbersome amendment procedure, required that proposed constitutional amendments be voted on "at a special election to be held for that purpose only." Under the 1844 document, voting on debts in excess of $100,000 was to be at general elections.

This paragraph must be read in conjunction with paragraphs 3, 4, and 5 of Article IX, relating to the submission of proposed constitutional amendments to the electorate.

Prior to 1988, this paragraph contained only the requirement of a general election vote. The additional requirements were added in 1988 to make certain that adequate time and public notice were required prior to the general election vote. These requirements are backed up by the sanction of invalidating the vote when the requirements are not followed.

Entitlement to Vote; Registration

3. (a) Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the country in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people; and

(b) (Deleted by amendment, effective December 5, 1974.)

This paragraph governs the extremely important matter of qualifications for the constitutional right to vote, placing them "beyond legislative curtailment" (*Strothers v. Martini*).[80] The right to vote is one of the most fundamental of all constitutional rights. In the words of the Supreme Court in *Asbury Park Press, Inc. v. Wolley*:

> Ours is a representative form of government. It can remain such in the true sense only if the vote of each citizen has equality with that of his neighbor in the other counties of the State, according to the prescription of the organic law.... No man can boast of a higher privilege than the right granted to the citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land. Under our *Constitution* that right is absolute. It is one of which he cannot be deprived, either deliberately or by inaction on the part of a Legislature.

[80] *See generally* RICHARD MCCORMICK, THE HISTORY OF VOTING IN NEW JERSEY—A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY (1664–1911) (1953).

Article IV of the 1776 constitution provided that "all inhabitants of this Colony, of full age, who are worth fifty pounds" and met a twelve-month residency test could vote. It was this provision that supported voting by women and African Americans in New Jersey, long before any other state, from 1790 until 1807. The 1844 constitution, however, restricted the vote to "white male citizen[s]."

The word "white" was deleted from the paragraph in an 1875 amendment. The current provision reflects a series of further amendments over the years reducing the required residency period and, in 1974, recognizing voting for eighteen-year-olds. The phrase "shall be entitled to vote for all officers that now are or hereafter may be elective by the people" has been held to bar a statutory provision limiting voters to voting for only two candidates for three seats on a statutorily created local government commission (*Humble Oil and Refining Co. v. Wojtycha*) and from restricting the franchise to freeholders, even for a statutorily created road commission (*Allison v. Blake*). Such entitlement, however, does not extend to permit a registered party member to vote in another party's "closed" primary election (*Smith v. Penta*). In other respects, however, the right to vote in primary elections is generally protected under this constitutional provision (*Quaremba v. Allan*; *Smith v. Penta*).

In 1972, the Supreme Court held that college students who were bona fide residents of college communities could vote in local elections (*Worden v. Mercer County Board of Elections*). Even though this result was clearly required under federal law by 1972, the Court specifically adopted the federal "compelling state interest test in its broadest aspects... for purposes of our own state constitution and legislation." Interestingly, as the Court noted, there had been a lively discussion in the 1844 constitutional convention concerning an unsuccessful proposal to exclude from voting "students who had taken up a transient residence for the purpose of education."

Although the right to vote is a constitutional right, the legislature may introduce reasonable regulation of that right, such as the requirement of registration, so long as "the constitutional qualifications of electors" are not "enlarged by the lawmaking authority" (*Gangemi v. Berry*).

(c) Any person registered as a voter in any election district of this State who has removed or shall remove to another state or to another county within this State and is not able there to qualify to vote by reason of an insufficient period of residence in such state or county, shall, as a citizen of the United States, have the right to vote for electors for President and Vice President of the United States, only, by Presidential Elector Absentee Ballot, in the county from which he has removed, in such manner as the Legislature shall provide.

This subparagraph was new in 1947. It provides that if a registered voter in New Jersey moves either out of state or to another election district elsewhere in New Jersey, and a federal presidential election takes place before the voter qualifies by period of residence to vote in the new state or election district, he may vote by absentee ballot for president and vice president in the old election district. This preserves the right to vote in federal presidential elections even for those persons who have moved so recently as not to qualify to vote at their new place of residence. The provision has not been the subject of judicial interpretation.

Voting by Members of Armed Services

4. In time of war no elector in the military service of the State or in the armed forces of the United States shall be deprived of his vote by reason of absence from his election district. The Legislature may provide for absentee voting by members of the armed forces of the United States in time of peace. The Legislature may provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

The guarantee to military personnel of the right to vote during wartime was added by amendment in 1875. The specific 1947 authorization of legislation providing for absentee voting by members of the armed services in time of peace was relied upon in a challenge to legislative provision for absentee voting by *civilians*. The Supreme Court noted the differing treatment of absentee voting during peacetime and wartime in *Gangemi v. Berry*:

> The 1947 Constitution does not in terms affirmatively prohibit civilian absentee voting; and the purpose so to do is not revealed as a matter of negative inference. The preceding *paragraph* 3 of *Article* II of the Constitution insures the right of suffrage to every citizen of the given age and residence qualifications. In regard to absentee voting, *paragraph* 4 treats electors absent in military service as in the one category, but differently as to imperative right depending upon whether the military service is rendered in time of war or in time of peace. In the former case, there is an absolute right to vote, constitutionally secured against legislative impairment, as was so under the 1844 Constitution; in the latter, the Legislature "may provide" for such absentee voting, a provision not expressly incorporated in the 1844 Constitution, perhaps deemed advisable in view of the general residence suffrage requirements of *paragraph* 3.

The Court went on to conclude, after tracing the history of the provisions, that the constitutional provision permitting the legislature to provide for absentee voting by those in the military during peacetime, could not, through "negative implication," preclude the legislature from permitting civilians to vote by absentee ballot.[81]

[81] For a discussion of the problem of negative implication in state constitutional interpretation, *see* WILLIAMS, *supra* note 2, at 330.

Military Service Not Considered Residence

5. No person in the military, naval or marine service of the United States shall be considered a resident of this State by being stationed in any garrison, barrack, or military or naval place or station within this State.

This provision appeared first in Article II, paragraph 1, of the 1844 constitution and was carried over in the 1947 constitution. It purports to create an exception to the paragraph 3 guarantee of voting rights, but despite its apparently clear language, it is of questionable validity under federal law. A 1972 Law Division opinion, relying heavily on a U.S. Supreme Court decision invalidating a similar provision of the Texas Constitution, concluded that the provision could not be applied to bar a resident on a military base who met the residency requirements of paragraph 3 from voting (*New Hanover Township v. Kelly*).

Incompetents May Not Vote

6. No person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting shall enjoy the right of suffrage.

This operates as an exception to the paragraph 3 guarantee of voting rights. The provision used to use the words "idiot" and "insane," which were, of course, offensive, imprecise, and received no satisfactory definition. The Appellate Division held that persons who are mentally retarded and receiving residential services at the New Lisbon State School did not automatically meet those earlier definitions for exclusion from the constitutional right to vote (*Carroll v. Cobb*). The 2007 amendment adopted the current language.

Laws May Deprive Criminals of Right to Vote; Restoration

7. The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right.

This permits the legislature, if it chooses, to make exceptions to the paragraph 3 guarantee of voting rights. The provision has its origins in paragraphs 1 and 2 of Article II of the 1844 constitution, which were the subject of considerable debate at the 1844 convention.

The legislature implemented this paragraph by statute (N.J.S.A. 19:4–1). Its choice of crimes that would result in disenfranchisement was declared in violation of the Federal Constitution's equal protection clause in 1970 (*Stephens v. Yeomans*). The legislature's reenacted statute depriving people on probation or parole for indictable offences of the right to vote was upheld by the Appellate Division, against a claim that it denied African Americans and Hispanics of equal protection because of its dispirate impact on them (*New Jersey State Conference–NAACP v. Harvey*). Generally speaking, questions of voter eligibility under this

provision turn on questions of statutory, rather than constitutional, interpretation (*Hitchner v. Cumberland County Board of Elections*).

Section II. Congressional Redistricting Commission

1. (a) After each federal census taken in a year ending in zero, the Congressional districts shall be established by the New Jersey Redistricting Commission. The commission shall consist of 13 members, none of whom shall be a member or employee of the Congress of the United States. The members of the commission shall be appointed with due consideration to geographic, ethnic and racial diversity and in the manner provided herein.

(b) There shall first be appointed 12 members as follows:

(1) two members to be appointed by the President of the Senate;

(2) two members to be appointed by the Speaker of the General Assembly;

(3) two members to be appointed by the minority leader of the Senate;

(4) two members to be appointed by the minority leader of the General Assembly; and

(5) four members, two to be appointed by the chairman of the State committee of the political party whose candidate for the office of Governor received the largest number of votes at the most recent gubernatorial election and two to be appointed by the chairman of the State committee of the political party whose candidate for the office of Governor received the next largest number of votes in that election.

Appointments to the commission under this subparagraph shall be made on or before June 15 of each year ending in one and shall be certified by the respective appointing officials to the secretary of state on and/or before July 1 of that year.

Each partisan delegation so appointed shall appoint one of its members as its chairman who shall have authority to make such certifications and to perform such other tasks as the members of that delegation shall reasonably require.

(c) There shall then be appointed one member, to serve as an independent member, who shall have been for the preceding five years a resident of this State, but who shall not during that period have held public or party office in this State.

The independent member shall be appointed upon the vote of at least seven of the previously appointed members of the commission on or before July 15 of each year ending in one, and those members shall certify that appointment to the Secretary of State on or before July 20 of that year. If the previously appointed members are unable to appoint an independent member within the time allowed therefor, they shall so certify to the Supreme Court not later than that July 20 and shall include in that certification the names of the two persons who, in the members' final vote upon the appointment of the independent member, received the greatest number of votes. Not later than August 10 following receipt of that certification, the Supreme Court shall by majority vote of its full authorized membership select, of the two persons so named, the one more qualified by education and occupational experience, by prior public service in government or otherwise, and by demonstrated ability to represent the best interest of the people of this State to be the other member. The Court shall certify that selection to the Secretary of State not later than the following August 15.

(d) Vacancies in the membership of the commission occurring prior to the certification by the commission of Congressional districts or during any period in which the districts established by the commission may be or are under challenge in court shall be filled in the same manner as the original appointments were made within five days of their occurrence. In the case of a vacancy in the membership of the independent member, if the other members of the commission are unable to fill that vacancy within that five-day period, they shall transmit certification of such inability within three days of the expiration of the period to the Supreme Court, which shall select the person to fill the vacancy within five days of receipt of that certification.

2. The independent member shall serve as the chairman of the commission. The commission shall meet to organize as soon as may be practicable after certification of the appointment of the independent member, but not later than the Wednesday after the first Monday in September of each year ending in one. At the organizational meeting the members of the commission shall determine such organizational matters as they deem appropriate. Thereafter, a meeting of the commission may be called by the chairman or upon the request of seven members, and seven members of the commission shall constitute a quorum at any meeting thereof for the purpose of taking any action.

3. On or before the third Tuesday of each year ending in two, or within three months after receipt in each decade by the appropriate State officer of the official statement by the Clerk of the United States House of Representatives, issued pursuant to federal law, regarding the number of members of the House of Representatives apportioned to this State for that decade, whichever is later, the commission shall certify the establishment of the Congressional districts to the Secretary of State. The commission shall certify the establishment of districts pursuant to a majority vote of the full authorized membership of the commission convened in open public meeting, of which meeting there shall be at least 24 hours' public notice. Any vote by the commission upon a proposal to certify the establishment of a Congressional district plan shall be taken by roll call and shall be recorded, and the vote of any member in favor of any Congressional district plan shall nullify any vote which that member shall previously have cast during the life of the commission in favor of a different Congressional district plan. If the commission is unable to certify the establishment of districts by the time required due to the inability of a plan to achieve seven votes, the two district plans receiving the greatest number of votes, but not fewer than five votes, shall be submitted to the Supreme Court, which shall select and certify whichever of the two plans so submitted conforms most closely to the requirements of the constitution and laws of the United States.

4. The New Jersey Redistricting Commission shall hold at least three public hearings in different parts of the State. The commission shall, subject to the constraints of time and convenience, review written plans for the establishment of Congressional districts submitted by members of the public.

5. Meetings of the New Jersey Redistricting Commission shall be held at convenient times and locations and, with the exception of the public hearings required by paragraph 4 of this section and the meeting at which the establishment of districts is certified as prescribed by paragraph 3 of this section, may be closed to the public.

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The Tyranny of the Two-Party System

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COLUMBIA UNIVERSITY PRESS NEW YORK

Columbia University Press
Publishers Since 1893
New York Chichester, West Sussex

Library of Congress Cataloging-in-Publication Data

Disch, Lisa Jane.
The tyranny of the two-party system / Lisa Jane Disch.
p. cm.—(Power, conflict, and democracy)
Includes bibliographical references and index.
ISBN 0-231-11034-0 (cloth: alk. paper)
—ISBN 0-231-11035-9 (pbk.: alk. paper)
1. Political parties—United States. I. Title. II. Series.
JK2265 .D565 2002
324.273—dc21
2002022542

Casebound editions of Columbia University Press books are printed
on permanent and durable acid-free paper.
Printed in the United States of America
c 10 9 8 7 6 5 4 3 2 1
p 10 9 8 7 6 5 4 3 2 1

For Steven Gerencser

Fusion in the Legislature

As the case worked its way through the courts, TCANP launched a second line of attack. At the start of the 1995 legislative session the party introduced a new democracy act, a bill that proposed to lift the ban on fusion as part of a broader "good citizenship" initiative. The proposal included the establishment of campaign juries, provision of free air time on public broadcast stations to balloted candidates, weekend voting, and the enfranchisement of sixteen year olds for school board elections as measures to stimulate active and informed voter participation. Representative Dawkins agreed to sponsor the bill, thereby demonstrating that state law could prevent him from *running* as a DFL–New Party candidate but not from *legislating* like one.[6] The bill made little headway. Although it received a hearing in the House Elections Committee, it never reached the floor but was instead relegated to "summer study," where the leadership probably hoped it would evaporate in the prairie heat.

Why should sitting legislators have done otherwise? It is a constitutional prerogative of state legislatures to regulate the time, place, and manner of voting. And state legislatures are controlled by members of the dominant parties. Any successful politician develops a reflex for weighing substantive proposals against the odds of reelection. No doubt most politicians know only slightly more about the law than the average citizen; thus, except in the most obvious instances (such as redistricting), they may not have an intuitive feel for how a given structural change will affect their prospects. Even if they cannot always calculate it, however, they are well aware that there is a politics to what political scientists call electoral "frameworks." Legislative aides, legal counsel, and long-term civil servants are their tutors in this regard. They are the specialists on whom politicians rely to brief them on the current state of the law and to assess the *strategic* implications of structural change.

Minnesota legislators had little need to consult their advisers to recognize that the new democracy act, at least in its fusion plank, proposed to do away with one of the protections that sustains major party duopoly. What could possibly persuade them to entertain it? Powerful arguments could be made *in a context where the two-party doctrine did not sanctify major party duopoly as a democratic design*. But wherever that doctrine holds sway, where journalists pay homage to its tenets as much by the stories they refuse to tell as by those they publish, where academics pay lip service to the two-party system, and where voters take it for granted, the very culture of common sense silences those arguments. Good reasons would not persuade dominant-party

legislators to relinquish the privileges that two-party duopoly affords them. As for the press, democracy's "watchdogs," the two-party doctrine robs most well-conceived arguments of the force they would need to persuade journalists to take up the cause.

On January 5, 1996, the Eighth Circuit Court of Appeals forced a sea change when it struck down Minnesota's antifusion statutes on the grounds that they "severely burden the New Party's associational rights and [that they] could be more narrowly tailored (with a consent requirement) to advance Minnesota's interests."[7] The ruling struck at the heart of the two-party doctrine, arguing that "Minnesota's interest in maintaining a stable political system simply does not give the state license to frustrate consensual political alliances." The court continued, tearing down the "ancient dilemma" of third-party voters by depicting it as a "no-win choice" imposed by "statutes [that] force . . . New Party members . . . either [to] cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all."[8] The appeals court made it clear that antifusion statutes are a democratic affront: they interfere not only with the rights of third parties but with those of voters as well. It recognized the potential of fusion to provide voters with "more specific information about the candidate's views," bring political alliances out into the open, and even "invigorate [the electoral system] by fostering more competition, participation, and representation in American politics."[9]

The appellate ruling was a breakthrough for TCANP. Not only would the party get a hearing for a crucial component of its new democracy act but the practice would be legal for the upcoming election. Plans were laid to pursue nominations of two state senators and two state legislators (including Dawkins).[10] This would require gathering three thousand valid signatures, a goal that was now well within the reach of TCANP's organizational capacities. Although it was still a relatively small party, it had developed in crucial ways since its first attempt at fusion. With funds from the national New Party, TCANP had hired a full-time organizer who had almost doubled the party's membership. It had also put a living wage initiative on the ballot in St. Paul, which had given its members new expertise in signature gathering. Now two years old, experienced at canvassing and galvanized by the court victory, the small party was poised to strike.

Few legislators were ready for them. Most were unaware of what Dawkins had been up to, uninformed about the Eighth Circuit verdict, and unprepared to reconsider a law they barely knew existed. Few legislators had any idea what fusion was; consequently they failed to appreciate what it would mean to have it practiced in the 1996 election, a scant eleven months

in the future. Even elections committee members whom TCANP had lobbied during the previous year were confounded by the ruling or persisted in the misconception that it remained up to them to decide *whether* fusion should be legal (as opposed to *how* it would be regulated). As they came to terms with what had occurred, key decision makers, especially in the Minnesota House, grew defensive and resentful; as they saw it, an inconsequential party had enlisted an unrepresentative institution to meddle in the domain of state prerogative.

Many had a knee-jerk reaction against fusion. They saw it as a kind of electoral affirmative action that gave third parties access to the ballot *and to public campaign monies* on votes they had not properly earned but had merely siphoned off an established-party candidate. The state's relatively low ballot access thresholds and its provisions for election-day voter registration already gave insurgents a vital assist: why make it even easier for them? Regardless what a panel of judges had said about the Constitution, it was obvious to them that they would never vote as a body to relegalize a practice that would make it easier for third parties to compete against them.

Much as they might have preferred to ignore the ruling altogether, the fact that fusion *was* legal and *would* be practiced forced their hand.[11] Doing nothing would have left the arena open for nonconsensual fusions: any group organized enough to gather the requisite signatures could have nominated an incumbent legislator for the 1996 election, *with or without* that legislator's permission. Such nominations could be used to sabotage a reelection campaign, by appending embarrassing or outlandish "party" lines to the establishment party standard. Although few legislators imagined that "sabotage" fusions would be likely, they were genuinely concerned that fusion would encourage the formation of "sham" parties.

Legislators' concerns about potential sham parties took two different forms. The first reflected their distrust of each other. They feared that politicians would use the petition process to file their political action committees as third parties, thereby listing themselves on the ballot with a separate party line for every hot button issue that might plausibly bring them extra votes. Fusion would literally turn the ballot into a billboard. The second came from legislators who, like Senate Elections Committee chair John Marty, generally favored participatory reforms but resisted fusion as a naive democratic ideal that would have illiberal consequences in practice.[12] As Marty saw it, fusion was an obscure strategy that would be difficult to explain to voters and be especially unlikely to work as an organizing tool with marginal voters. It could well serve grassroots organizing, but the groups who would make the best use of it would not be on the left. On the contrary, Marty saw it as a

back-door passageway for religious interests to tap into public monies through the state's comprehensive program of campaign finance. Sham parties from the religious right would be much more dangerous than the billboard parties that others envisioned. They would intensify tensions within the DFL (whose rural and urban factions divide over the issue of reproductive rights) and potentially redirect public monies in ways that compromise the separation of church and state.

In late March the legislature produced a statute that made fusion legal again but thwarted the spirit of the ruling. It made fusion candidacies technically legal, so long as they occurred between *recognized* political parties with written consent from both party chairs. Whereas the consent provision was not controversial (the language of the appellate court invited it), it was in the definition of "minor political party" that the new law closed ranks against third-party challengers. Crafted defensively to combat sham parties, the statute was produced with as little debate as possible. The DFL leadership did everything it could to foreclose discussion on the floor of the legislature, which of course minimized the coverage it could receive in Twin Cities newspapers and Minnesota's public broadcast stations.[13] The effect was insidious. The leadership squandered a perfect opportunity to educate the public about the new voting option and thereby made one of the legislators' most powerful objections against fusion—that it was obscure and potentially disenfranchising—a self-fulfilling prophecy.

The legislators who drafted the new fusion law confronted the following challenge: they needed to keep sham parties off the ballot without rendering existing law more burdensome to third parties. Already accused of unconstitutionally frustrating "consensual political alliances," if they acted to devise a remedy that imposed new *obstacles* to third-party ballot access, they risked offending the court (if the New Party were to sue again or the Supreme Court agree to hear the state's appeal) and touching off a controversy the media might take seriously. How to resolve this dilemma? The solution came out of the House Ways and Means Committee: create a new definition of minor party that would be of no consequence *except* in the event of a fusion alliance.

When Minnesota lawmakers looked to the statute books in winter 1996, they were surprised to discover no definition of a minor party. There were access thresholds for putting an alternative candidate on the ballot, but these did not constitute a definition. In effect, a group did not actually have to *be* a party to have a ballot line in the general election; it need only gather the requisite signatures to file a nominating petition. The trouble was that fusion nominations clearly put something more at stake than access: to attach a bal-

lot line to an established candidate lent an upstart group credibility and promised significantly greater returns at the polls. Legislators wanted some way to distinguish between fusion-worthy suitors and single-issue imposters. Whereas it would be most expedient to raise access thresholds, this was precisely what they could not risk without appearing obstructionist. Stipulating that potential fusion partners would have to be recognized by the state as qualified minor parties gave them an indirect way to do just that.

The new law managed to hold fusion parties to a higher standard without singling them out for special burdens.[14] While meeting the letter of the law, it was, in spirit, exactly the kind of protectionism to which the appellate court objected—and that I have characterized as exemplary of a tyrannical two-party system. And it probably would have been defensible in principle, if a case could be made for the importance of preventing "sham parties" from using fusion to gain public attention for single-issue causes, or turning the ballot into a billboard. Minnesota legislators did not stop there, however. They paired the new definition with a further stipulation, and an omission, that put the third party in a patently obstructionist double bind.

This was the omission: legislators would not redesign the ballot to accommodate fusion candidacies, for fear that any such accommodation would confuse voters and cause spoiled ballots.[15] Refusing either to list the candidate's name more than once or to provide a means for voters to designate which *party* they supported, they made it impossible to do a separate count of votes cast on the third-party line. The ballot would *list* multiple parties in the case of a fusion nomination; the victory would be credited to just one of them, presumably the largest and most established.[16] That legislators would be so bold as to write a fusion *law* that made no provision for a fusion *ballot* was astonishing. Trivial as it may seem, this omission altogether gutted fusion, which, as the appellate court had made clear, is meaningless without some way of counting the distinct contributions of the parties: "Minor party voters [send] an important message" when "a minor party and a major party nominate the same candidate and the candidate is elected because of the votes cast on the minor party line."[17] By its refusal to redesign the ballot to accommodate an arrow or box that would convey to which party a fusion vote should be assigned, Minnesota had failed to provide any vehicle for that message.

The law compounded the effects of this simple omission by stipulating that the votes cast in a fusion candidacy would not count toward qualifying a third party for either major or minor party status, and certainly not toward qualifying for public campaign finance. To put it simply, if there were benefits to be derived from the fusion candidacy, they would go exclusively to the established party. Moreover, third political parties would suffer for choosing

fusion over an independent candidacy. Because the state's position on ballot design left challenger parties no way to claim votes that were *rightfully* theirs, the law effectively forced a fusing party to reestablish itself as a "minor party" with *every* election cycle. This made a fusion candidacy, which the appeals court had recognized as an important means for a third party "to establish itself as a durable, influential player in the political arena," a setback to any minor party that practiced it.[18] With no way to determine what percentage of the vote had been cast on the third-party line, the party would lose its status as a minor party after each election in which it ran a fusion candidacy (unless it managed to meet the 1 percent requirement by means of a standalone candidate for statewide office); at the next election cycle the party would either have to run a "spoiler" candidate or exhaust its membership with a yearly petition drive.[19]

The new statute made fusion legal again in name only. In fact, it subverted what the appellate court recognized as fusion's principal benefits to parties. It either imposed unprecedented access thresholds on third parties that chose to exercise their First Amendment right to fuse or else obliged such parties to run "spoiler" candidates to gain access to that right—and then proposed to strip it from them every time they used it.[20] Rather than give citizens a way out of the "no-win choice" to cast a "wasted" vote, a "spoiler" vote, or no vote at all, the new law displaced this dilemma onto the challenger parties. So unfavorable were its terms to the newly defined "minor parties" that the legislature resorted to a most unusual strategy of defending them, by appending a "purpose" section to the front of the law.

A purpose section is an address to the court that clarifies the intent of the legislature on a potentially contentious point. Although such sections are rare—and not usually welcomed by the courts—lawmakers sometimes resort to them where they anticipate further litigation. In this instance the purpose section served to call attention to precisely what the statute itself had failed provide—means for a separate count of the votes cast for a fusion candidate on the minor party line, either by providing multiple listings of candidates or separate listings of parties. The first of these it dismissed principally on the grounds of voter confusion, stating that to "permit the candidate's name to appear on the ballot more than once . . . might give the candidate an unfair advantage and might cause some voters to become confused about how to cast their votes, to vote improperly, and to have their votes not counted." As to the second, the legislators asserted:

> This act does not permit the voter to cast a vote for the candidate's party, because the function of an election in the United States is to

> *choose an individual to hold public office*, not to choose a political party to control the office and because to do so might likewise cause some voters to become confused.[21]

With just a few words Minnesota lawmakers executed a strikingly self-defeating move. They asserted that citizens vote not for parties but for candidates. To a statute that was so concerned about the integrity of parties that it took care to differentiate between bona fide parties and sham parties, they appended a purpose section that appeared to deny the electoral role of parties altogether.

In so doing they went well beyond clarifying the "purpose" of the statute to make a pronouncement on the broader "purpose" of United States elections. And in that pronouncement they destabilized the very basis on which states claim the right to prohibit fusion: that it is two-party competition that brings us accountability and responsible opposition, thereby securing our democracy. By emphasizing the extent to which candidates in today's electoral system act independently of political parties, the purpose section revealed Theodore Lowi's "best-kept secret," that "the two-party system" survives not because it is so integral to the process of government but because it is so well protected by legislative dictate. To put it simply, a statute designed to *protect* the two-party system ended up by eroding the two-party doctrine instead.[22]

Fusion in the Courts: *Timmons v. Twin Cities Area New Party*

If New Party activists found it difficult to get a public hearing for fusion on either the floor of the legislature or in the local media, the situation was quite different in the legal community. Prominent law journals featured articles on fusion before and during the Minnesota campaign. Few expected Minnesota's statute to withstand judicial scrutiny for, even though the Constitution accords states "considerable latitude in regulating elections," the Supreme Court's recent rulings have emphasized that they may not *selectively* discriminate against third-party and independent candidates so as to accord the major parties a political monopoly on electoral office.[23] Since the candidacies of George Wallace and John Anderson, the Court has enjoined state legislatures to eliminate some of the more burdensome aspects of their ballot laws, including disproportionate filing fees, unduly strict regulation of party switching by voters, and impossibly early filing deadlines for minor party

and independent candidacies.[24] It has maintained, however, that there is no clear rule of law to guide its determination of when state action is permissible and when it infringes on the rights of parties and voters.[25]

Prominent law review articles have argued that antifusion laws "constitute a significant and disproportionate violation" to the associational rights of third parties that no state interest could be sufficiently compelling to justify.[26] Another defended fusion as an aspect of voters' rights "to associate and to exercise the franchise."[27] As the presence of a party label on the ballot is a "critical voting cue" that "prompt[s] party supporters to vote for the party's endorsed candidate," antifusion statutes "disproportionately burden the members of minor parties by precluding voting cues that are available to the members of other parties." Consequently, the ballot becomes a "a government-subsidized forum" that accords selective benefits to "major parties" it withholds from "minor parties."[28]

These arguments are interesting because they depart so dramatically from the legislative vantage point on fusion. Legislators viewed fusion parties as sham competitors trying to cheat their way onto the ballot and understood fusion as a benefit that "bona fide" parties may withhold. Legal scholars emphasize just how precarious is the established parties' own claim to authenticity and legitimacy as parties because they have secured their own ballot status by designing a system to weight the competition in their favor. From this vantage point it could be argued that fusion is a democratic right tyrannically denied by parties who fear that they could not prevail in a fair competition.

In *Timmons v. Twin Cities Area New Party*, the U.S. Supreme Court ruled six to three to sustain the states' right to ban fusion. It ruling signed onto the two-party doctrine and chose to view the electoral process from the dominant-party vantage point. Taking as given the historical connection between two-party competition and democracy, it held that states are entitled to conclude that political stability is "best served through a healthy two-party system" and that "the Constitution permits" them to enact such regulations as "may, in practice, favor the traditional two-party system."[29] There were two aspects to the judgment. The Court had to consider the third-party claim that antifusion statutes unjustifiably burdened their rights of association and weigh that claim against the state's assertion that antifusion laws served a significant public purpose.

As to the rights claim, the Court accepted the established parties' position that fusion was not a constitutional right but rather a "benefit" that states have no more obligation to provide than they do to "move to proportional representation elections or public financing of campaigns," other reforms

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Liberty Power

ANTISLAVERY THIRD PARTIES AND THE TRANSFORMATION OF AMERICAN POLITICS

Corey M. Brooks

The University of Chicago Press CHICAGO AND LONDON

PUBLICATION OF THIS BOOK HAS BEEN AIDED BY
A GRANT FROM THE BEVINGTON FUND.

The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

Published 2016
Paperback edition 2020
Printed in the United States of America

29 28 27 26 25 24 23 22 21 20 1 2 3 4 5

ISBN-13: 978-0-226-30728-2 (cloth)
ISBN-13: 978-0-226-71716-6 (paper)
ISBN-13: 978-0-226-30731-2 (e-book)
DOI: https://doi.org/10.7208/chicago/9780226307312.001.0001

Portions of this work, mainly from chapter 2, first appeared in
"Stoking the 'Abolition Fire in the Capitol': Liberty Lobbying and Antislavery
in Congress," *Journal of the Early Republic* 33, no. 3 (Fall 2013): 523–547.

Library of Congress Cataloging-in-Publication Data

Brooks, Corey M., author.
Liberty power : antislavery third parties and the
transformation of American politics / Corey M. Brooks.
pages cm—(American beginnings, 1500–1900)
ISBN 978-0-226-30728-2 (cloth : alk. paper)—ISBN 978-0-226-30731-2 (ebook)
1. Antislavery movements—United States—History—19th century. 2. Third parties
(United States politics)—History—19th century. 3. Liberty Party (U.S. : 1840–1848).
4. Free Soil Party (U.S.). 5. Republican Party (U.S. : 1854–). 6. United States—History—
Civil War, 1861–1865—Causes. 7. United States—Politics and government—1845–1861.
8. Slavery—Political aspects—United States—History—19th century.
I. Title. II. Series: American beginnings, 1500–1900.
E449. B766 2016
973.5—dc23
2015018766

♾ This paper meets the requirements of ANSI/NISO Z39.48-1992 (Permanence of Paper).

FOR LAUREN,
with so much love

warned colleagues that if they passed the bill, "you will have destroyed the last breakwater that stands between your rights and the surges of northern Abolitionism."[15]

Notwithstanding widespread Northern outrage at the repeal of the Missouri Compromise, concert in opposition strategy proved elusive. Gamaliel Bailey and ex-congressman Preston King worked the lobbies to organize cross-party cooperation, but old loyalties died hard. Not until May 20 did Bailey succeed in assembling several leading anti-Nebraska men, among them future speaker candidates Nathaniel Banks (D-MA) and Lewis Campbell (W-OH), in a private cross-party caucus, and the bill passed before they could reconvene. On May 22, through a little-used parliamentary gambit, Richardson and Stephens succeeded in discharging the bill from committee to bring it before the House for a final vote. With half the Northern Democrats joining nearly every Southerner, the bill passed 113–100, as the sounds of both "hissing" and "prolonged clapping" rang across the galleries and the House floor.[16]

Unsuccessful as Bailey and King had been in outmaneuvering the Slave Power, their efforts helped lay the groundwork for a cross-party anti-Nebraska union. The thirty anti-Nebraska members who reconvened after the bill's passage discussed plans for founding a new "Republican" fusion party, but took no definitive public action. Instead a much larger meeting of anti-Nebraska members assembled to issue an "Address to the People of the United States," which asserted a commitment to restoring the Missouri Compromise and blocking all "further aggressions of Slavery." The meeting, however, voted down Lewis Campbell's more radical draft and declined to advocate a new anti-Nebraska party. Though Free Soilers found the address too circumspect, they nonetheless lauded the apparent unanimity of antislavery sentiment among those who had opposed Douglas's bill.[17]

Most Free Soilers, though disgusted at the new law, saw real promise in this unprecedented Slave Power aggressiveness. Free Soilers vigorously fanned the conflagration of anti–Slave Power sentiment in response to the Kansas-Nebraska Act. Within weeks of the bill's passage, Giddings could celebrate overwhelming Northern outrage, even among supporters of the 1850 compromise. Familiar barbs demeaned the forty-three Northern representatives who had voted for Douglas's bill and "marched into the field under the crack of the slave-driver's whip" as "chattels" in the "Congressional slave market." So great was the ire against Douglas, that he famously quipped that he "could travel from Boston to Chicago by the light of my own [burning] effigy." In Giddings's Ashtabula County, the Friends of Freedom wryly objected that this wave of effigy construction represented "the greatest indignity and insult" to the straw.[18]

Anti-Nebraska Fusion: Opportunities, Challenges, and Promise

Free Soilers, or Independent Democrats, immediately recognized that the Kansas-Nebraska Act might provide the fulcrum for the national realignment political antislavery men had so long desired. From the outset, congressional Free Soilers had structured the legislative debate as a conflict over the Slave Power. By the time Douglas's bill passed, Independent Democrats had become fierce advocates of an anti-Nebraska fusion movement uniting the new law's diverse opponents. With the Whig Party already in shambles in many Northern states, the Kansas-Nebraska Act sounded that party's death knell *and* offered the potential for recruiting Northern Democrats to a winning anti–Slave Power coalition. Urging, "Agitation is the right arm of Liberty," former Free Soilers worked vigorously at the Capitol, on the lecture circuit, and in the press to keep the Slave Power argument front and center before the voting public. As calls for cross-party anti-Nebraska fusion multiplied, sanguine political antislavery veterans like Giddings could "begin to feel confident of a majority of anti-slavery members in the next House of Representatives." Willing to join any "practical combination" committed to the "casting off of all party trammels," political abolitionists aimed to foment a new "revolution" against the "slave power of this nation."[19]

Amid the furor over Douglas's Nebraska bill, two sensational fugitive slave rescue attempts, one successful and one not, further fueled anti-slavery anger at the Democratic Party. In May 1854, just days after pro-slavery Democrats' congressional triumph had "deepened the abhorrence with which every attempt to enforce the Fugitive Slave act is regarded in Boston," a federal marshal apprehended Virginia runaway Anthony Burns. Thousands "without distinction of Party" gathered at Faneuil Hall to protest Burns's arrest, while a smaller, more militant, and mostly black group determined to rescue the prisoner. Led by the radical white abolitionist Thomas Wentworth Higginson (who later commanded the first official black regiment in the Union Army), they broke down the jailhouse door but were pushed back by the armed guard. In the melee, shots were fired and a deputy was stabbed to death. Burns meanwhile remained incarcerated. President Pierce, anxious to defend federal law, deployed marines, cavalry, and artillery to Boston, along with a ship to transport Burns to Virginia. The administration also reputedly deterred Burns's master from selling his freedom to abolitionists, so that Pierce could showcase his commitment to the Fugitive Slave Act. With perhaps fifty-thousand Massachusetts men and women observing mournfully, federal troops marched Burns to the vessel that would carry him back to slavery. Dovetailing with the

Kansas-Nebraska Act's "flagrant outrage against Freedom and Free Labor," Burns's rendition stimulated Bay State citizens' anti–Slave Power resentments to new heights.[20]

The rescue a couple months prior of Joshua Glover had attracted similar national attention. Upon receiving news that Glover, a Missouri fugitive, had been apprehended in Racine, Wisconsin, and imprisoned in Milwaukee, longtime political abolitionist editor Sherman Booth rode through the Milwaukee streets supposedly shouting, "To the Rescue!" At an ensuing rally, Booth roused the crowd of over five thousand, a portion of whom then battered down the jail door and freed Glover, who was ultimately escorted to safety in Canada. Four days later Booth was arrested for inciting the jailbreak. The Wisconsin Supreme Court, however, freed Booth from federal authorities by granting a writ of habeas corpus and, more astoundingly, in an extreme formulation of the "freedom national" doctrine, ruled the Fugitive Slave Act an unconstitutional violation of Wisconsin's state rights and therefore inoperable in the state. Abolitionists elsewhere cheered Wisconsin as "the first to nullify that detestable spawn of the Slave Power, the infamous Fugitive Slave Law."[21]

Against the backdrop of the Wisconsin Republican Party's rapid emergence, the Glover rescue and subsequent legal battle surrounding Booth, one of the new party's most prominent and radical leaders, took on added significance. In the weeks before the jailbreak, a February 28 cross-party meeting at a Ripon, Wisconsin, church had called for a new "Republican" Party if the Kansas-Nebraska bill passed. By summer, Free Soilers and Whigs were working together to orchestrate an impressive Republican state convention, of which Booth, though still facing federal charges, was a key organizer. With over a thousand delegates descending on the state capitol grounds, the July 1854 meeting enthusiastically established the new party and adopted resolutions resembling previous Free Soil platforms. District conventions conveniently selected a Free Soiler, a Whig, and an anti-Nebraska Democrat to run as Republicans for Wisconsin's three congressional seats, and the new party elected two of the three and controlled the state legislature, which sent former Liberty man Charles Durkee to the U.S. Senate.[22]

Michigan advocates of anti-Nebraska fusion achieved similar early success. A February 22 fusion meeting in Jackson plausibly challenges Ripon for the symbolic honor of hosting the anti-Nebraska party's founding, although attendees at the first Jackson meeting did not yet call themselves "Republicans." That assemblage proposed a cross-party ticket headed by anti-extensionist Democrat Kinsley Bingham, and five months later, a mass convention in the same town confirmed Bingham's nomination, drafted

an anti–Slave Power platform, and inaugurated the Republican Party's first formal state organization. The incipient Michigan Republican Party swept the state elections and elected three of four congressmen.[23]

In antislavery Vermont, Free Soilers especially shaped the new fusion party, as the state's largely antislavery Whig Party joined with third-party men and a smattering of antislavery Democrats. Though Free Democrats had to accept gubernatorial and congressional candidates who simultaneously ran as Whigs, the Whigs adopted the fusionists' antislavery platform and united in support of a Free Soiler for lieutenant governor. When the Whig-Republican ticket won overwhelmingly, Vermont Whigs, an out-of-state antislavery paper observed, were "candid enough to acknowledge the death of their party." "In view of the fact that the aggressions of Slavery through the instrumentalities of the Administration and otherwise, were the only issues," the "friends of freedom" could "safely claim it as an Anti-Slavery victory."[24]

Across the North, pro-Nebraska Democrats suffered defeat after defeat, even in former strongholds like Iowa and New Hampshire. But in many Northern states, the political calculus facing antislavery politicians was complicated by the meteoric rise of the American, or Know Nothing, Party. This imposing new political force arose out of the nativist and anti-Catholic secret society, the Order of the Star Spangled Banner, whose members had received the sobriquet Know Nothings for their practice of claiming to "know nothing" when questioned about the order. Since the beginning of the decade, liquor prohibition and proscription of foreigners had grown increasingly popular among Northern voters. In the post-Nebraska political chaos of 1854, Know Nothings adeptly capitalized on these sentiments, along with a rising antipartisan climate generally, to take advantage of Northern Whiggery's decline at least as effectively as early Republican fusionists did.[25]

Indiana Know Nothings, for example, handpicked the state's anti-Nebraska ticket. In Pennsylvania, an anti-Nebraska Whig won the governorship, while a pro-Nebraska Democrat was chosen canal commissioner—both on the strength of Know Nothing endorsements. Across the Keystone State, Know Nothings scored unprecedented victories. Know Nothing success in the central and western parts of the state, where foreigners were few, though, can be attributed to the movement's emphasis there on temperance and opposition to the Kansas-Nebraska Act.[26]

Nowhere was the Know Nothing triumph as dramatic as in Massachusetts, where the movement incorporated a strong antislavery appeal. With the collapse of the state's Free Soil–Democratic coalition and the weakening of the once-dominant Boston Whig establishment, a political vacuum

CARL E. PRINCE, NEW JERSEY'S JEFFERSONIAN REPUBLICANS:
THE GENESIS OF AN EARLY POLITICAL MACHINE (1967) (relevant pages)

NEW JERSEY'S JEFFERSONIAN REPUBLICANS

THE GENESIS OF AN EARLY PARTY MACHINE
1789-1817

by

CARL E. PRINCE

Library of Congress Catalog Card Number 67-15103
Printed by The Seeman Printery, Inc., Durham, North Carolina
Manufactured in the United States of America

II

ORGANIZING FOR VICTORY IN 1800

FOR THE THIRD DAY IN A ROW, A WEARY JOSEPH BLOOMFIELD guided his plodding horse along the dirt paths that passed for roads in Monmouth County. His errand was vital—to coax and cajole a reluctant and insecure county organization and its leaders to unify and step up their efforts to elect Republicans in what Bloomfield knew was a pivotal set of elections in New Jersey.[1] The elections of 1800 were, because of the efforts of men like Bloomfield, contested with a thoroughness and vigor new to the local scene. Emergent party managers recognized that the party faithful liked to share in the excitement of political campaigns, and local captains endeavored to provide a role for all to play, promoting *esprit de corps* at the grass roots and encouraging the growth of functioning party machinery in many counties by boosting the use of newspapers, broadsides, pamphlets, and other electioneering aids.

In 1800 the annual local contests for the state legislature and the biennial congressional elections coincided with the presidential campaign. New Jersey's Republicans strove to elect

1. Joseph Bloomfield to Ebenezer Elmer, Aug. 25, 1801, Ely Collection, N.J. Hist. Soc.

presidential electors pledged to Thomas Jefferson, but the task was particularly difficult, for the legislature had the option of providing for the popular election of electors or choosing them itself. A Federalist legislature, it was virtually certain, would follow the latter course. Therefore, the Republicans prepared to contest each seat, hoping to secure a legislative majority as a prerequisite to carrying New Jersey for Jefferson.

In most counties, however, there were no Republican organizations prior to 1800. Those organizations that did exist, notably in Morris and Essex counties, lacked established means of communication with Republicans of like feeling outside their respective areas. Therefore, Republican managers were unprepared at the beginning of 1800 to contest the election of presidential electors by the legislature. Faced with the difficult trial and little time, party leaders worked rapidly to form a network of local party machines in as many counties as possible. By the end of the year, a number of counties had succeeded in establishing party apparatus, thus introducing a vital Republican interest stretching from Sussex County in the north to Salem and Cumberland counties in South Jersey.

The attempt to build a statewide Republican organization got underway in April 1800, spearheaded by a comparatively small but closely knit activist group who had been laying the groundwork for party development for five years, men like Aaron Kitchell of Morris County, William S. Pennington of Essex, Silas Dickerson of Sussex, and Ebenezer Elmer and Joseph Bloomfield farther south in the state. By midsummer, the coordination established by the leaders was paying dividends. Mahlon Dickerson confided to his brother, "I hear from . . . a number of other gentlemen who are well informed on the subject, that the Republicans in Gloucester County and even in Burlington County [and Salem, Cumberland, and Cape May as well] are raising their heads."[2] Elmer and Bloomfield, in conjunction with lesser southern county leaders, were doing their

2. Mahlon Dickerson to Silas Dickerson, July 28, Aug. 14, 1800, Dickerson Letter Book, N.J. Hist. Soc.; Joseph Bloomfield to Silas Dickerson, Nov. 17, 1800, Mahlon Dickerson Papers, *ibid.*

job well. "You may be assured," Kitchell promised Elmer, "that the Eastern Counties will Support the Republican Ticket —and I hope that they will not want in Exertions."[3] Silas Dickerson, a prominent Sussex Republican, also vowed that "every exertion will be used in support" of the Republican candidates.[4]

These men, and others from nearly every county, met together many times in the course of the year. What was not discussed personally was taken up through the mails. In these tangible ways, New Jersey's Republican managers succeeded in coordinating their efforts to form a thoroughgoing statewide machine.[5]

The initial public call to arms appeared on April 1, 1800, when the "Sussex and Morris subscribers" to the Newark *Centinel of Freedom* proclaimed that,

> Whereas the republican citizens of New Jersey, have in many instances, been disappointed in their hopes and expectations of having men elected to office who should represent their sentiments and interests in our State and National Councils, owing entirely to the want of unanimity in their plans of election; therefore in order to unite their exertions, and enable them to act in concert throughout the state, and by that means secure an entire representation in the next Congress and Legislature.
>
> Resolved that a Committee of three persons be appointed in this township [Morristown] to act in concert with such other committees as may be appointed in other townships for the like purpose of recommending to the people suitable persons to be supported as Candidates, for members of our next Legislature.

3. Aaron Kitchell to Ebenezer Elmer, Dec. 11, 1800, Gratz Collection, Hist. Soc. of Pa.

4. Silas Dickerson to Mahlon Dickerson, Dec. 11, 1800, Dickerson Letter Book, N.J. Hist. Soc.

5. Joseph Bloomfield to Ebenezer Elmer and George Burgin, Sept. 29, 1800, Moore Collection, Princeton University Library, Princeton, N.J.; Elizabethtown *N.J. Journal*, Oct. 14, 1800; Joseph Bloomfield, *To the People of New Jersey*, Sept. 30, 1800, New Jersey Political Broadsides Collection, 1746-1805, Rutgers University Library, New Brunswick, N.J.; Newark *Centinel*, Oct. 1800, *passim*, Dec. 9, 1800; Silas Dickerson to and from Mahlon Dickerson, 1800, *passim*, Dickerson Letter Book, N.J. Hist. Soc.; Aaron Kitchell to ?, Apr. 23, 1800, Dreer Collection, Hist. Soc. of Pa.; Aaron Kitchell to Ebenezer Elmer, May 12, 1800, Ebenezer Elmer to David Moore, May 12, 1800, Gratz Collection, Hist. Soc. of Pa.; Joseph Bloomfield to Ebenezer Elmer, Apr. 20,

The announcement summoned a meeting of the proposed Morris County committees for July 4. The delegates, the call to arms continued, then could appoint a three-man county committee, "to consult and correspond with similar committees, which may be appointed in the different Counties of this State, for the purpose of recommending suitable persons to the people, to be supported as Candidates at the next election for Representatives in Congress."[6] The employment of such committees of correspondence was reminiscent of the organizations which had appeared in New Jersey prior to the Revolution.[7]

The *Centinel*, editorializing on the appeal of the Sussex and Morris subscribers, expected that the plan would "contribute greatly to the success of the republican ticket at the ensuing election, by uniting the strength of the republicans *in every part of the state*."[8] The Morris formation, then, was designed to serve as an example to other counties.

Its apparatus was almost certainly the brainchild of Aaron Kitchell, who, as we have seen, was directing party efforts in Morris County in the spring of 1800, and was striving to establish local machinery everywhere in New Jersey. On April 23, Kitchell wrote to a South Jerseyman,

1800, Ebenezer Elmer Papers, Rutgers Univ. Lib. These are selected examples of statewide coordinated activity. The evidence supporting this point is ample. See also the discussions of county and local organizations, chapters three, five, and seven.

6. Newark *Centinel*, Apr. 1, 15, 1800.

7. In the summer of 1775, the extralegal Provincial Congress seized control and "gradually usurped the powers" of the colonial government. At the same time "the local government passed into the hands of revolutionary 'Committees of Correspondence or of Observation.'" These local revolutionary committees associated on a statewide level in the form of the Provincial Congress. The Democratic-Republican local committees meeting in the spring and summer of 1800 followed the same path. The Provincial Congress served as the focus for the local committees of correspondence from May 1775 until the adoption of the New Jersey Constitution in 1776. The Democratic-Republican state conventions of 1800 and thereafter helped to maintain unity of purpose among the local party machines in generally the same way. The latter-day local and state committees differed in that they were not merely temporary expedients, however. See Leonard Lundin, *Cockpit of the Revolution: The War for Independence in New Jersey* (Princeton, 1940), 71, 110.

8. Newark *Centinel*, Apr. 1, 15, 1800.

I am informed that Morris and Essex have chosen Committees and it is Expected that Sussex, Bergin and Somerset have also. My informant is anxious to know whether any measures will be taken in any of the western counties. It is not Expected that Committees will be chosen at any publick meetings. All they request is that some persons of information and influence will Correspond with them and propose to them Such measures as appears to them most proper to preserve an Union of the Republican interest.[9]

Other confidential indications of coordinated effort followed. Less than three weeks later, Kitchell requested Ebenezer Elmer to contact Doctor Lewis Condict of Morristown when seeking advice on the best means of promoting party activity. He added, "I hope to hear from some of our Republican friends in Cumberland [and] . . . I hope that measures will be taken to Bring Jersey forward both for President and Members of the next Congress."[10] Elmer took the hint and launched an extensive but judicious letter-writing campaign to Republicans in Cumberland and Salem counties, reminding them that "the most important national concerns" were at stake. He suggested an organizational plan and then sought tactical suggestions, indicating his own position as final arbiter for the area: "If any other arrangement shall promise better success I shall wish to adopt it."[11]

Activists like Elmer and Kitchell were busy indeed, if a Federalist appraisal has any validity: "The one [party organizer] who lives near me is very industrious and secret; he is sending off letters almost every day to the different Townships, and receiving expresses from New-York, Essex County and Morris County; but he keeps them all secret from everybody but his Republicans."[12] Republicans were "ever assiduous to diffuse

9. Aaron Kitchell to ?, Apr. 23, 1800, Dreer Collection, Hist. Soc. of Pa. The recipient of this key letter almost certainly was Ebenezer Elmer. The first public appeal for party organization in 1800 appeared in the Newark *Centinel*, Apr. 1, 1800.

10. Aaron Kitchell to Ebenezer Elmer, May 12, 1800, Gratz Collection, Hist. Soc. of Pa.

11. Ebenezer Elmer to David Moore, May 12, 1800, *ibid.* There are indications in this letter that similar missives went to others in South Jersey.

12. *Newark Gazette*, Sept. 30, 1800.

their mischievous doctrines," complained another alarmed opponent, who added that they "are lavish in expense to hire the most flagitious men, who are stationed in divers parts."[13]

Events in Morris County moved rapidly after April 1. A reporter disclosed that before the month was out "the Republicans [were] gaining ground in Morris."[14] The local delegates of five Morris towns (Morristown, Hanover, Washington, Mendham, and Pequanock) met on Independence Day. Their most important act was to create from their number a county committee to constitute a committee of correspondence to integrate the activities of county Republicans and supervise preparations for the coming canvasses.[15]

Ultimately a sophisticated and enthusiastic Republican party was developed in Morris County. But it proved something of a mixed blessing. Six weeks after it originated the organization was engaged in a dispute over the nomination of candidates, evidencing a fact of political life that always plagued even the best Republican party managers. As long as the Republicans had remained amateurs at party politics, there was never much question of their ability to unite behind a ticket. However, once a powerful political in-group appeared, the struggle for leadership led to violent internal feuds which often resulted in split tickets on election day. This was true in county after county; a direct correlation developed between the authority wielded by the party in its bailiwick and the violence and depth of the struggle for control of the machinery. A situation arose that was long to trouble New Jersey Republi-

13. *Ibid.*, May 13, 1800.

14. Mahlon Dickerson to Silas Dickerson, Apr. 24, 1800, Dickerson Letter Book, N.J. Hist. Soc. The reporter was "B[ernard] Smith," later a Republican congressman.

15. Newark *Centinel*, Oct. 7, Dec. 16, 1800. Kitchell's organizational efforts in Morris County did not go unchallenged. A bizarre counter-proposal appeared in the public prints on Apr. 10, unique for its grand phrasing. Each town, instead of electing delegates to represent them, would choose "Tribunes." These Tribunes from each township would then hold annual "grand Associate meetings" on July 4 to choose "legislative eligibles" (candidates). The simpler scheme forwarded by the "subscribers" was adopted anyway. See the Morristown *Genius of Liberty*, Apr. 10, 1800.

cans: in the most solid Republican counties, there existed the deepest cleavages in party unity.[16]

Coincident with political developments in Morris County, Essex Republicans perfected their organization. Because they had a head start, Essex Republicans temporarily achieved the best local organization in the state. At a town meeting in Newark on April 14, a committee was chosen to form an organization capable of nominating and electing a slate of Republican candidates. The meeting acknowledged in its summons that the initiative came from Morris and Sussex. Aquackanonk Township also organized a local committee at the same time, Caldwell followed suit a week later, and shortly thereafter Springfield fell into line; other towns joined as the year wore on.[17] Each township party was led by a chairman and two, three, or even four additional committee members chosen by a vote of the town's Republicans. At the county committee meeting, it was ordained that each town would have an equal voice.[18]

On August 4, the first meeting of the Committee of the County of Essex convened in Newark. Only Elizabethtown and Bloomfield were unrepresented. The committeemen, in emulation of the Morris gathering, designated three of their number as a county committee of correspondence. Before adjourning, the representatives issued a long address touching on a number of sensitive issues. It attacked Adams' foreign policy which, the remonstrance proclaimed, favored England, and condemned the waste of public money (especially insofar as public funds were used to sustain a standing army), denounced sedition laws, and glorified sedition martyrs. State issues were not ignored; the Essex delegates found it "inexpedient at this time" to revise the state constitution, but chastised the legislature for ignoring Republican petitions

16. Mahlon Dickerson to Silas Dickerson, May 18, 1800, Dickerson Letter Book, N.J. Hist. Soc. The pattern described was present in all areas of the state with but few exceptions. See discussions of local party organization for confirmation, chapters three, five, and seven.

17. Newark *Centinel*, Apr. 1, 15, 22, June 10, Aug. 19, 1800.

18. *Ibid.* See also *ibid.*, Oct. 6, 13, 1801.

requesting a popular vote in New Jersey for the presidency. Agreeing to meet again in September to nominate candidates, the new organization ended its labors with a demand for action and unity in every township.[19]

The county nominating convention gathered in Newark on September 15. Nominations were read aloud "and due deliberation had thereon" before each township cast its two votes for each nominee of its choice. All Republican candidates not endorsed by the organization at that point succumbed to party needs and declined to run for office. The whole effort was well managed; county Federalists fumed in vain at this "self created society of bastard republicans." The state elections in October vindicated the Essex machine by sweeping into office all of its nominees. Federalist resistance never materialized. However, the unexpectedly easy victory cut deeply into the sense of sacrifice exhibited by Essex party men, and they would never again prove so tractable.[20]

Republican organization efforts in Sussex County were underway in April,[21] although they developed at a much slower pace. "Combustible matter," however, was "gathering which by and by will catch the flame," said Silas Dickerson.[22] Perhaps the material was too combustible, for at the Republican nominating meeting in August, "Major Ogden and a number of others dealing freely with the jolly God and singing a number of patriotic songs . . . and giving loose to their political sentiments a quarrel ensued between the Major and one Stephen Little . . . . They came to blows and 'fought' terribly for 15 minutes and 'bled' most copiously in freedom's cause." Such was the stuff of Republicanism that "the next morning they [the combatants] breakfasted together in the utmost harmony and friendship."[23] This meeting did not give itself

19. *Ibid.*, Apr. 1, 15, 22, June 10, Aug. 19, 1800.
20. *Ibid.*, Sept. 23, 30, Oct. 7, 14, 21, 28, 1800.
21. Aaron Kitchell to ?, Apr. 23, 1800, Dreer Collection, Hist. Soc. of Pa.
22. Silas Dickerson to Mahlon Dickerson, Apr. 30, 1800, Dickerson Letter Book, N.J. Hist. Soc.
23. *Ibid.*, Aug. 22, 1800.

over entirely to bloodshed. The participants arranged for the fall elections and designated a complete legislative ticket. The difficulties attendant to maintaining party discipline in a county which had never known such regularity became evident almost at once. "It is not very unlikely," Silas Dickerson disclosed, that the Republican opposition to the nominations "will form an entire new ticket and carry their point."[24] At the least, however, Republicans were assured one way or another of gaining legislative adherents to their cause from the refractory but Republican county.

In Bergen County, Republican party development followed an even more tortuous course, although it was not apparent at the outset. Newspaper appeals, primarily in the *Centinel*, continually urged the Republican interest to mobilize. At the same time, Silas Dickerson, prompted by his brother Mahlon, spent many days in the county lending the weight of his experience to novice Bergen Republicans. Other Republicans did the same throughout the spring of 1800, according to a Federalist report: "As to the people of Essex County and Morris County, who are continually riding about our County [Bergen], and meeting with our Republicans, I don't thank them at all for saying that we are a parcel of Dutch Fools."[25] These auspicious efforts heartened state leaders. Mahlon Dickerson was optimistic that "the Republicans will carry their election in Bergen County."[26]

Encouraged by outside support and following the lead of Essex and Morris counties, many Bergen townships organized committees. Hackensack took the initiative in May, followed by Harrington and Pompton in June. By the end of July, Franklin Township, Saddle River, and New Barbadoes had also formed committees. The delegates convened at the end

24. *Ibid.*

25. *Newark Gazette*, Sept. 30, 1800; Mahlon Dickerson to Silas Dickerson, July 28, Aug. 14, 1800, Dickerson Letter Book, N.J. Hist. Soc.; Newark *Centinel*, May 6, June 3, July 22, Aug. 26, 1800.

26. Mahlon Dickerson to Silas Dickerson, Sept. 17, 1800, Dickerson Letter Book, N.J. Hist. Soc. Federalist efforts had continued apace, however, throughout the spring and summer. See the *Newark Gazette*, May-Oct., 1800, *passim*.

of August to nominate a legislative and local ticket and to designate a county committee from their number. Emulating Essex, all the Republican candidates not endorsed by the county meeting declined to run.[27]

Despite these auspicious beginnings, the whole structure collapsed before the month was out. With the election only three weeks away, the township committees were suddenly called into emergency session by the county group. They were told that two candidates for the legislature named by the earlier convention now declined to run. Shamefaced, the delegates had to confront a more serious defection. A third member of the ticket, James Jay, informed the county committee (of which he was also a member) that he could not run for the Assembly on the Republican ticket inasmuch as he had agreed to run for the same office on the Federalist slate.[28] The organization, broken by this rapid sequence of events, would not recover its composure or its initial promise of success for some time to come. Needless to say, the Republicans lost Bergen County in 1800.[29]

The effort to redraw the political lines of North Jersey was repeated in the southern part of the state as well. Aaron Kitchell, writing to Ebenezer Elmer on April 23, was "anxious to know whether any measures will be taken in any western [southern] counties." Hoping to aid the cause, he disclosed that "some persons of information and influence will correspond with them [South Jersey Republican leaders] and propose to them such Measures as appears to them most proper to preserve an Union of the Republican Interest." He added parenthetically, "I do not wish you [a would-be candidate for Congress] to take an active part [but] only to communicate

27. Newark *Centinel*, May 6, June 3, 17, 25, July 1, 8, Aug. 5, Sept. 2, 9, 1800.

28. *Ibid.*, Sept. 30, Oct. 7, 1800. The *Centinel* explained weakly that James Jay "for some motive, best known to himself, is determined to ruin his own interest in opposition to the Ticket formed by the General Committee of which he is a member." Although no more direct evidence exists, it is clear that the Federalists succeeded in infiltrating the party at its inception, and when the proper time came, simply shattered the organization in Bergen from within.

29. *Ibid.*, Oct. 14, 21, 1800.

those Ideas to Such in whom you can Confide—and to write to me if it is provable that any Union can be formed."[30] The fact that impetus was supplied by a small cadre of North Jerseymen did not deter South Jerseymen from responding to the formation of a Republican machine in much the same way as their compatriots had done in the northern counties.

The political fever sweeping the state can be charted in the diary of a young man from Fairfield, Cumberland County. Ephraim Bateman, eventually to rise through Republican ranks to the legislature, the House of Representatives, and the Senate, in 1800 was a struggling twenty-year-old schoolteacher who responded strongly to the rising tide of Jeffersonian enthusiasm. In 1799, Bateman and a group of young adults from Cumberland had formed a Juvenile Society to discuss major (and minor) issues of the day. Their debates reflect the problems that were foremost in their minds and constitute a good barometer for Republican feeling among the otherwise historically inarticulate men of the area. Interspersed among such timeless questions as, "Is it right to marry a girl because she is rich?" or "Which are the most deceitful the men or the women?" were questions of much more (or less) serious import. The Society debated such problems as "Ought any man in this U. S. to be debarred from the privilege of voting for public officers because he is not worth a certain Sum?" or "Ought a man in a public station to act agreeable to his own opinions or those of his constituents?" and ominously for the lawyer-ridden Federalist cause, "Are Lawyers any advantage to the Community?"[31] The debaters came to feel that perhaps the answers to these questions could be best expressed through political action.

By the middle of May 1800, the drive to organize the southern counties was well underway. The absence of a Republican newspaper hampered the effort, but the Republicans moved

30. Aaron Kitchell to ? [Ebenezer Elmer], Apr. 23, 1800, Dreer Collection, Hist. Soc. of Pa.

31. "Journal of Ephraim Bateman of Fairfield Township, Cumberland County," *Vineland Historical Magazine*, 13 (1928), 82-89.

quickly to propagandize the area by circulating information in other ways. The "Proceedings of Congress," a broadside drafted by Kitchell, was an example. The author hoped that "the citizens of the western [southern] Counties would examine [the proceedings] . . . and votes of their Representatives and turn out such as does not appear to have acted for the Best Interest of the State."[32]

In Cumberland and Salem counties, Ebenezer Elmer emerged as the prime mover. He maneuvered behind the scenes to organize the most appealing tickets in these areas. Elmer considered himself influential enough to revert to the first person in reporting to Aaron Kitchell that "if there is any probability of carrying [George] Burgin for Council, I shall be running him there [in Salem County]."[33] Although few details can be gleaned from the sources, it appears that the Salem party structure rested entirely on township committees patterned after the plan of the Morris and Sussex subscribers. This, at least, was the permanent form on which the county organization finally settled.[34] By midsummer "a very favorable change [had] taken place in Salem, Cumberland, Cape May and even in Gloucester."[35]

In Gloucester County, a Republican Committee met on July 28, vowing "to unite with our Republican brethren in this state and the United States." The meeting was chaired by that anomaly among Republicans, James Sloan, a Quaker Jeffersonian politician. Later to serve in Congress, he was one of four men who constituted a committee of correspondence

32. Aaron Kitchell to Ebenezer Elmer, May 12, 1800, Gratz Collection, Hist. Soc. of Pa.

33. Ebenezer Elmer to [David] Moore, May 12, 1800, *ibid.*; Joseph Bloomfield to Ebenezer Elmer, Apr. 20, 1800, Ebenezer Elmer Papers, Rutgers Univ. Lib. The letter to Moore contained extracts from a letter to Kitchell.

34. Newark *Centinel*, Aug. 26, 1800; Ebenezer Elmer to [David] Moore, May 12, 1800, Gratz Collection, Hist. Soc. of Pa.; Mahlon Dickerson to Silas Dickerson, July 28, 1800, Dickerson Letter Book, N.J. Hist. Soc. Although Salem went Federalist, the new Republican party made a good showing (929-798) at the polls, indicating the existence of a fairly sturdy party machine.

35. Mahlon Dickerson to Silas Dickerson, July 28, 1800, Dickerson Letter Book, N.J. Hist. Soc.; "Journal of Ephraim Bateman," *Vineland Hist. Mag.*, 13 (1928), 89.

in Gloucester. He was bitterly attacked in the Federalist press for slandering Washington and preaching revolution. Republican prints reported, however, that "the spirit of genuine republicanism has arisen" in the county.[36]

Burlington party men also responded to the efforts of the Jeffersonian leadership cadre, forming a county corresponding committee at a Republican meeting during the summer presided over by Joseph Bloomfield. Although an elaborate organization developed initially employing, according to one report, fifty-three workers, the organization appeared much better on paper than it was in fact. Despite Bloomfield's sanguine report that "we have good hope of sending a Republican representation" to the legislature, Burlington's Federalist majority soon swamped Bloomfield's organization in a deluge of party activity.[37] The county long remained a Federalist stronghold. The future governor was on far safer ground when boasting of South Jersey's political progress generally: "We have adhered to our promise with our Eastern [northern] Friends, and not only kept our numbers but have gained ground of the Feds.—Notwithstanding their scores of tales, Committeemen in every township, and of deception imposed on the ignorant."[38] The Republicans in North and South Jersey had made great strides in preparation for the presidential election.

36. *Gloucester County, State of New Jersey,* July 28, 1800, New Jersey Imprints Collection, N.J. Hist. Soc.; Newark *Centinel,* Aug. 26, 1800; *Newark Gazette,* Oct. 21, 1800; Frank H. Stewart, ed., "Dairy of Samuel Mickle," Apr. 5, 1800, in *Notes on Old Gloucester County,* 3 vols. (Camden, 1917), I, 166; Mahlon Dickerson to Silas Dickerson, Aug. 14, 1800, Dickerson Letter Book, N.J. Hist. Soc.

37. Joseph Bloomfield to Ebenezer Elmer and George Bergen [Burgin], Sept. 29, 1800, Moore Collection, Princeton Univ. Lib.; Joseph Bloomfield to Ebenezer Elmer, Aug. 25, 1801, Ely Collection, N.J. Hist. Soc.; Mahlon Dickerson to Silas Dickerson, Aug. 14, 1800, Dickerson Letter Book, *ibid.*; *To the People of the County of Burlington* (Mount Holly, 1800), Imprint Collection, N.Y. Pub. Lib. The Federalists made a special effort to save Burlington. See *Address to the Federal Republicans of Burlington County* (Trenton, 1800), *ibid.*; *Newark Gazette,* Sept. 16, and Sept.-Oct., 1800, *passim.* The vote in the Burlington state elections (2806-520) indicated the existence in fact of a very weak Republican organization.

38. Joseph Bloomfield to Ebenezer Elmer, Dec. 28, 1800, Joseph Bloomfield Papers, N.J. Hist. Soc. "The General" was abused terribly in the Federalist

The Presidential Election of 1800

The presidential canvass in New Jersey scheduled for October 1800 hinged on control of the legislature. If the Republicans could gain a majority of the seats, they could either appoint Jeffersonian electors or provide for a general canvass for President, as they claimed they wanted to do. It was generally acknowledged, on the other hand, that if the Federalists could hold their seats, the legislative majority would choose Adams electors. The key to the presidential vote being bound up with a legislative victory in October, the Republicans agreed that the county elections should be decided, where possible, on the presidential question rather than on local issues.

After the Republican victory in the New York elections of May 1800, it appeared that New Jersey might be pivotal in deciding the fate of Thomas Jefferson. Ebenezer Elmer predicted that "if New Jersey will give her vote for Jefferson it [the election] is done—or if New Jersey will divide or not vote at all [by deadlocking the legislature, as in Pennsylvania] it will answer."[39] A Philadelphia coterie of Jeffersonian Republicans, supervising the presidential campaign on something of a national scale, exhorted Jerseymen to win the state for Jefferson. Their New Jersey liaison, Mahlon Dickerson, wrote to his brother Silas: "If the republicans are only vigilant there can be no doubt of their success. No exertions should be spared in New Jersey." He repeated his message to other key Republicans in the state.[40]

Philadelphia Republicans exerted a great influence on New Jersey party men. Mahlon Dickerson, a native Jerseyman who practiced law in Philadelphia, coordinated his efforts with John Beckley. Beckley, working diligently with many Republicans in Philadelphia for Jefferson's election, provided

press as an apostate and rank party man. See, for example, the New Brunswick *Guardian*, Oct. 8, 15, 1800.

39. Ebenezer Elmer to Col. [David Moore], May 12, 1800, Gratz Collection, Hist. Soc. of Pa. Elmer quotes a letter he received from Aaron Kitchell.

40. Mahlon Dickerson to Silas Dickerson, May 6, 1800, Dickerson Letter Book, N.J. Hist. Soc.

Dickerson with quantities of campaign literature which the latter forwarded to New Jersey either directly or through his brother, Silas; Mahlon also advised local Republican cadremen on the national outlook, suggesting campaign strategy or remedies as the need arose; he visited the state periodically to confer with leading Democratic Republicans.[41]

Dickerson's long career in national and state politics spanned the first half of the nineteenth century. A bachelor all his long life, he was a man of many parts. Aside from his career as a lawyer, Dickerson operated an iron mine at a profit, and he was also an amateur botanist and naturalist. Above all, he was a polished and durable politician.[42] In Philadelphia he had first become involved in politics by aiding the Jeffersonian cause prior to 1800. His Republican ties led him into the camp of Governor Thomas McKean of Pennsylvania, who bestowed numerous offices on his protégé. When Mahlon returned to New Jersey in 1808, he rose rapidly—even spectacularly—through the Republican ranks, being elected to the legislature in 1811 from his native Morris County. In 1815 he became governor, and in 1817 he was sent to the Senate where he served two full terms. He was among the many Jeffersonian Republicans who made the transition to the Jackson banner between 1824 and 1828, and was rewarded with a cabinet post, serving as secretary of the Navy until Jackson's retirement from office.

With the aid of men like Mahlon Dickerson, New Jersey Republicans were stirring by early summer. The Philadelphia *Aurora,* a Republican paper widely circulated in South Jersey, printed a telling series of assaults on New Jersey's Senator

41. Mahlon Dickerson to and from Silas Dickerson, 1800-1801, *passim, ibid.* See especially letters of May 6, July 28, and Aug. 14, 1800. Other evidence confirming the existence of a Philadelphia group running Jefferson's campaign may be found in Charles O. Lerche, Jr., "Jefferson and the Election of 1800; A Case Study in the Political Smear," *William and Mary Quarterly,* 3rd Ser., 5 (1948), 467-91; John Beckley to James Monroe, Aug. 26, 1800, Monroe Papers, N.Y. Pub. Lib.; Cunningham, *The Jeffersonian Republicans, 1789-1801*; Chambers, *Political Parties in a New Nation.*

42. See Charles R. Erdman, Jr., in *DAB* s.v. "Dickerson, Mahlon."

Jonathan Dayton. These were later reprinted in the *Centinel* and in pamphlet form for distribution throughout the state.[43] Abraham Bishop's strikingly effective and celebrated denunciation of Federalism was broadcast widely in New Jersey, for it was reprinted by Pennington and Gould and Company, the publishers of the *Centinel.* It is not known how many copies were struck off in Newark, but often as many as one thousand at a time were published elsewhere.[44] The publication was late, catching only the tail end of the presidential campaign, but it proved of great value in the congressional election that followed. This tract, put to effective use, was only one of several.

From the Philadelphia headquarters of John Beckley, additional party literature was distributed far and wide throughout the United States. New Jersey received its share, as we have seen, via Mahlon Dickerson, who forwarded to his brother and others in quantity for distribution not only Beckley's own *Epitome . . . of the Life of Mr. Jefferson* but such potent political reprints as Albert Gallatin's *View of the Public Debt* and copies of John Adams' damaging *Letter to Tench Coxe.*[45] The copies of Beckley's pamphlet that Silas received, his brother instructed, were to be distributed in the area of Sussex County. Mahlon also forwarded fifty copies to John Condit for circulation in Essex and Bergen counties. Both recipients obeyed Mahlon Dickerson's instructions; Silas reported: "after keeping one [of Beckley's pamphlets] for myself [I] distributed the remainder through the County [Sussex] by sending them to a Republican meeting." The younger Dickerson was "much pleased with . . . the Pamphlets."[46] Mahlon Dickerson was in contact with leading Republicans in South Jersey also, and

43. Mahlon Dickerson to Silas Dickerson, July 28, 1800, Dickerson Letter Book, N.J. Hist. Soc.

44. Lerche, "Jefferson and the Election of 1800," *Wm. and Mary Qtly.*, 3rd Ser., 5 (1948), 467-91.

45. John Beckley to James Monroe, Aug. 26, 1800, Monroe Papers, N.Y. Pub. Lib.; Mahlon Dickerson to Silas Dickerson, July 28, Aug. 14, 1800, Dickerson Letter Book, N.J. Hist. Soc.

46. Silas Dickerson to Mahlon Dickerson, Aug. 22, 1800, Dickerson Letter Book, N. J. Hist. Soc.

it may be assumed that the same circulation pattern was employed in that area.[47]

To combat the unprecedented activity by the Republicans, the Federalists undertook a campaign of unparalleled activity to save the state for John Adams. A prominent Federalist, Lucius Horatio Stockton, "rode throughout the state with Parson Linn's poisonous pamphlets, preaching that Religion was in danger, etc. if Jefferson was elected." The Republicans themselves later admitted that Stockton "did more injury [to the Republican cause] with his pen and tongue, than any man in N. Jersey."[48] William Griffith of Burlington County also actively traversed the state in Adams' behalf.[49]

During the summer and fall of 1800 nationally prominent Federalists invaded New Jersey to watch a telling campaign. The state became a haven for residents of Philadelphia trying to escape the yellow fever, and many highly placed Federalist officials, including President Adams himself, found Trenton or Princeton a desirable refuge from the scourge. At least one Republican thought their presence spurred local Federalists to greater efforts in the hope of drawing attention to themselves and their obvious claims on the party's gratitude.[50] The quantity of anti-Jefferson material available for distribution in the state must have been enormous; at least one hundred different campaign pamphlets, totaling thousands of issues, were in print nationally in 1800, the majority of them supporting the Federalist cause.[51]

47. *Ibid.*, June-Oct., 1800, *passim*. See especially letters dated July 28, Aug. 14, 22, 1800.

48. Joseph Bloomfield to "Dear Doctor" [Ebenezer Elmer], Jan. 25, 1802, Gratz Collection, Hist. Soc. of Pa.

49. *Ibid.*

50. Silas Dickerson to Mahlon Dickerson, Oct. 22, 1799, Dickerson Letter Book, N.J. Hist. Soc.

51. Lerche, "Jefferson and the Election of 1800," *Wm. and Mary Qtly.*, 3rd Ser., 5 (1948), 467-91; Cunningham, *The Jeffersonian Republicans, 1789-1801*, 158, 253-54, and *passim*. At least one Federalist pamphlet was published in New Jersey: *Serious Considerations on the Election of a President* (Trenton, 1800), which proved especially useful in the state. See the New Brunswick *Guardian*, Sept. 17, 1800. No copy of the Trenton edition could be found by the author in existing collections, although other editions are extant.

The Republicans, emulating the Federalists, sent spokesmen to the doubtful counties. Stephen Sayre was one campaigner who "was active [for] several months before the general election . . . [for] the choice of a President."[52] Silas Dickerson, who labored in Bergen County on Jefferson's behalf, in a questionable burst of enthusiasm anonymously posted Jefferson's likeness in his church in Sussex County. This pleased the Democrats of the flock but had a dubious effect indeed on Federalist parishioners.[53] Judging by the Federalists' warnings to their supporters, the Republicans employed any number of electioneering ruses. "Be watchful that false or imperfect tickets are not imposed on you," the incumbents cautioned, "lest you get swindled."[54]

Despite the intense campaign waged for Jefferson, it became painfully obvious toward the end of the summer that the Republicans were underdogs. The counties were approximately equal in legislative representation, so the heavy vote turned out for Jefferson in Morris and Essex counties would be canceled by Federalist victories in smaller counties when the Federalist lawmakers chose Adams' electors. The Republicans made one final effort to attract new voters by calling a state convention, the first ever held in New Jersey and one of the earliest in the nation. The few leaders who promoted the meeting assumed it would draw influential Republicans

52. Joseph Bloomfield to Thomas Jefferson, Nov. 10, 1801, Thomas Jefferson Papers, CXVII, 20262, Lib. Cong.

53. Silas Dickerson to Mahlon Dickerson, July 28, Aug. 14, 1800, July 31, 1801, Dickerson Letter Book, N.J. Hist. Soc. Electioneering campaigns such as these were usually made with as little fanfare as possible throughout the period of Republican rule. Although it was fairly common practice, it was still not respectable, and, usually, the campaigner disguised his motives by transacting other business along the way. James Linn would thus appear in Sussex County in 1806, or Joseph Bloomfield would turn up in Monmouth County in 1801 and 1803. See the New Brunswick *Guardian*, Sept. 15, 1803. A clear example of this sort of activity occurred in 1820 when Warren Scott of New Brunswick appeared in Morris County. David Thompson, Jr., Assemblyman from Morris, reported: "I did not see him [Scott] but suppose from the inquries he made that he was on an electioneering campaign—whom does he want for senator?" David Thompson, Jr., to Samuel L. Southard, Sept. 4, 1820, Samuel L. Southard Papers, Princeton Univ. Lib.

54. *Newark Gazette*, Sept. 30, Oct. 21, 1800.

from most or all of the state's thirteen counties. The practicality of such a device seems to have occurred early to Republican managers, but the idea hung fire until the last minute; only some early hints indicate that a meeting was in the offing. At the beginning of August, some Republicans in Essex County, aware that a state convention was a possibility, appointed a committee of correspondence specifically to act in unison with party men from other counties upon the forthcoming congressional and presidential elections. Bergen Republicans designated a similar committee to "correspond with the Committees of other such Counties as they may deem necessary and expedient, and in *conjunction* with them, to nominate a suitable person or persons as the case may require, to represent us in Congress." Gloucester also did the same.[55]

Regardless of these activities there never was a formal public call for all counties to elect delegates, nor were there any particular qualifications outlined for those who attended this initial state gathering. Apparently delegates filled only two requirements: they were Republicans and representatives of their respective counties. The original meeting mustered late in September at Kingston but proved a failure because there was no quorum (seven counties were not represented). The small group adjourned and the convention was rescheduled for a few days later at Princeton.[56] Republicans from all counties except Cape May finally met at Princeton on September 30, just two weeks before the poll for members of the state legislature. Despite its patchwork quality it represented a major innovation in American political techniques.

Joseph Bloomfield presided at the convention and signed its address to the voters, which protested against the incumbent national administration's waste of public money, the creation and extension of a huge national debt, and the levying of

55. Morristown *Genius of Liberty*, Aug. 28, 1800; Newark *Centinel*, Sept. 2, 1800; *Gloucester County, State of New Jersey*, July 28, 1800, N.J. Imprints Collection, N.J. Hist. Soc.

56. Joseph Bloomfield to Ebenezer Elmer and George Burgin, Sept. 29, 1800, Moore Collection, Princeton Univ. Lib.

heavy taxes (the Carriage Tax was cited as an example). The Republicans asserted that so long as the incumbents remained in power the nation would not be free of foreign (British) dictation. The Federalists' method of choosing presidential electors through the New Jersey legislature was introduced as an example of that party's "aristocracy" in action.[57] Naturally, Republicans, like Federalists, proclaimed that they alone could preserve the "sacred and glorious" Revolution and Constitution. The leadership of the lawyers was denounced once again. Finally, the Jeffersonians dismissed the Federalist assertion that the major question of the campaign was "GOD—AND A RELIGIOUS PRESIDENT; or . . . JEFFERSON—AND NO GOD!!!"[58]

The Princeton meeting closed with an invitation to a state nominating convention to be held prior to the congressional election later that fall. A final appeal was made to New Jersey voters to elect Republican legislators who would either vote for a Jeffersonian slate of presidential electors or call for a general popular vote for president. Although the convention worked for a Republican victory, the delegates were "aware that the time allotted us is disproportionate to the list of objects which demand our attention."[59]

The Republican attempt to rally the voters came too late. The legislature remained Federalist. Huge Republican majorities in Sussex, Essex, and Morris counties, and Republican representation in the legislature from these counties, could not offset the other counties which again returned Federalists. The Federalist majority stood at thirty-eight, to twelve for the Jeffersonians. In the vote for electors in the joint meeting, the Adams slate triumphed by the same margin, and all five

57. Joseph Bloomfield, *To the People of New Jersey*, Sept. 30, 1800, N.J. Political Broadsides Collection, Rutgers Univ. Lib.; Newark *Centinel*, Oct. 7, 1800; Elizabethtown *N.J. Journal*, Oct. 14, 1800; Fee, *Transition*, 100-116.

58. *Newark Gazette*, Sept. 22, 1800. Fee, *Transition*, 100-116, contains a full discussion of the issues posed by the two parties in 1800.

59. Elizabethtown *N.J. Journal*, Oct. 14, 1800; Joseph Bloomfield, *To the People of New Jersey*, Sept. 30, 1800, N.J. Political Broadsides Collection, Rutgers Univ. Lib.

electoral votes from New Jersey went to Adams and Pinckney.[60]

If New Jersey Republicans could not swing the state to Jefferson and Burr, they took courage from the fact that their candidates had won the election without them. Thus they entered the pending congressional election in the state with redoubled energies and a great deal of confidence that, at last, with a strong local boost, a majority of the state's citizens would get the Republican message from other sections of the country. The Republican position in New Jersey was immeasurably strengthened by Jefferson's victory.

The Congressional Election

After winning control of the legislature, the Federalists took hold of the proverbial tiger by the tail. They not only denied the voters a canvass for the presidential election but also risked further embarrassment in designating a battleground for the congressional poll. A district canvass, even with the districts carved to their liking, would concede two, and possibly three, of five congressional seats to the Republicans. The elections of 1798 offered proof of this distinct likelihood. A general canvass meant gambling for an all-or-nothing stake. Populous Morris, Essex, and Sussex counties might prove decisive in electing all five Republican candidates. The Federalist legislative majority nevertheless chose the latter risk in drafting an election law; Federalists were willing to gamble all the seats rather than concede the certainty of at least two Republican congressmen retaining their offices. The Republicans responded with relief. "It is a measure," the *Centinel* announced, "which has been brought forward by the federal party under full confidence that their strength is sufficient to turn out the old republican members, and to elect in their room five [Federalists]."[61]

Even before the Federalist legislature drafted its at-large election law for the congressional contest, the Republicans

60. Newark *Centinel*, Oct. 21, 28, Nov. 4, 11, 1800.
61. *Ibid.*, Nov. 11, 1800.

had anticipated the move and made preparations for it. At the Republican state convention on September 30, the party managers had put in motion a second meeting should an at-large congressional election materialize. The September group agreed to meet with the Republican minority in the state legislature to fix "on the most popular characters to be run for Congress."[62] This was the usual method employed to select a political ticket among the nation's Jeffersonians.[63] Other leading Republicans in the state apparently decided, however, that a day-long convention more broadly based than one composed merely of Republican legislators and a few others would have more popular appeal. Also, a legislative caucus would be dominated by the northern counties and surely northern men could not speak authoritatively for all of New Jersey's Republicans. In any event, sometime between the first convention on September 30 and the announcement of a second meeting, a new format was definitely and permanently adopted. Each county organization was urged to designate its own delegates for the December 2 meeting. The delegations were not limited in size, but representatives to the convention voted by county, each county possessing two votes cast by the majority of the delegation. With ten counties attending the Trenton convention, it was counted a success. Only Cape May, Bergen, and Sussex counties did not respond to the roll call when the chairman called the convention to order.[64]

The second state convention of 1800 differed markedly from the original in two important respects: first, it was called specifically and publicly to nominate a slate of congressional candidates; New Jersey's Republican party was the first to implement a permanent state nominating convention, establishing a precedent for the convocation of similar state con-

62. Joseph Bloomfield to Silas Dickerson, Nov. 17, 1800, Dickerson Letter Book, N.J. Hist. Soc. Among those making the decision were Bloomfield, John Morgan, Stephen Sayre, and James Sloan.

63. Cunningham, *The Jeffersonian Republicans, 1789-1801*, 160-65, 205-6, and *passim*.

64. Newark *Centinel*, Dec. 9, 1800; New Brunswick *Guardian*, Dec. 17, 1800.

ventions to be held in succeeding years; secondly, party captains made it clear that each county was empowered to designate its delegates by means of its own choosing. Delegates were not necessarily legislators since it was not a legislative caucus. Many counties resorted to a popular choice of representatives at open county meetings.[65]

The Republican managers did not leave the choice of a congressional slate in the hands of a group of unpredictable delegates, however. A few men handpicked a ticket long before the convention actually met. It is patently obvious that this first convention was only a shrewd attempt to secure a sanction for the ticket from a general and authoritative party agency. More than two weeks *before* the convention met to adopt a ticket, General Bloomfield speculated with Silas Dickerson on the qualifications of the future Republican ticket—clearly already designated—compared to that of the Federalists: "Our friend General [William] Helm[s], has equal pretensions with A[aron] Ogden as a Soldier—Messrs. Kitchell and Condit, gather more votes than their colleagues [in the House of Representatives] Imlay and Davenport—and, I think, the two other Republicans proposed [Henry Southard and Ebenezer Elmer], have better claims, than a man lately come into the State a Bankrupt—and whose family were No-Tory-ously disaffected [in the Revolution]."[66] This estimate of the Republican ticket two weeks in advance of its nomination was too accurate to be guesswork. The "balanced" pre-convention slate and the earlier organizational pattern leaves a strong impression that the Republican party in New Jersey started out as a hierarchy-dominated organization in the hands of a few powerful captains. The cosmetic touch provided by the convention indi-

65. Elizabethtown *N.J. Journal*, Oct. 14, 1800; Joseph Bloomfield, *To the People of New Jersey*, Sept. 30, 1800, N.J. Political Broadsides Collection, Rutgers Univ. Lib.; Newark *Centinel*, Oct. 1800. For the development of the state convention into a permanent party institution, see chapters four, five, and seven.

66. Joseph Bloomfield to Silas Dickerson, Nov. 17, 1800, Dickerson Letter Book, N.J. Hist. Soc.

cated that this leadership was not only powerful but also highly sensitive to the ways of the new politics and voter response.

The convention sanctioned the ticket placed before it with the only changes in it occasioned by the declination of Aaron Kitchell. His refusal to seek another term left the way open for Helms of Sussex County to run alone from the northern portion of the state.[67] The five who were nominated were Condit of Essex, Helms, Henry Southard of Somerset, Ebenezer Elmer of Cumberland, and James Mott of Monmouth; the latter was added both to bring the number of candidates up to five, in effect replacing Kitchell after his decision had left an unfilled opening, and to provide representation on the ticket from a part of the state heretofore overlooked. The officers of the convention which sanctioned the ticket were again Joseph Bloomfield, chairman, and John Morgan, secretary. The short address to the public warned the voters that each ballot counted, even in the Federalist counties, for it was an at-large election.[68]

The Republicans set to work to augment expected solid pluralities in the three northern counties, totaling "near five thousand," with at least nominal majorities in some of the southern counties. Congressman Kitchell felt that there was "little doubt of success" if the expected pluralities materialized. In order to shore up morale in South Jersey, he enclosed for general circulation in a letter from Philadelphia a remarkably accurate forecast of the vote in Congress that would finally elect Thomas Jefferson President. Kitchell's estimate was coupled with Abraham Bishop's campaign pamphlet and given wide circulation in southern New Jersey; the congressional campaign was off to a good start. Joseph Bloomfield of Burlington was optimistic that his county and Gloucester would not turn out "so great a majority against the Republicans, as at the last [legislative] election." The Quakers, he felt, were un-

67. Jonathan Dayton to Aaron Ogden, Nov. 28, 1800, Aaron Ogden Papers, Rutgers Univ. Lib.

68. Newark *Centinel*, Dec. 9, 1800.

happy with the Federalist attack on Jefferson's lack of religion, for any assault on religious toleration, according to the General, was abhorrent to the sect.[69]

The Federalists, meanwhile, called attention to the alleged hypocrisy of the address from the Republican nominating convention in referring to the Republican ticket as a slate of farmers. "This old, worn out pretext of 'farmer' candidates, wont do," commented the *Guardian*. "John Condict [Condit] and Ebenezer Elmer, are by all accounts . . . Doctors. . . . As to Jemmy Mott, it will be hard to prove he has seen a plough for many a day. . . . This Mr. Helms [is] . . . a General; and as to Henry Southard, he has long since abandoned the peacable profession of a farmer for the trade of Jacobinism."[70]

The First Statewide Victory

The Republicans emerged barely victorious in their first organized statewide contest. All five Republican candidates were elected to Congress with a total vote ranging from 14,547 to 14,726, against a Federalist vote of 14,037 to 14,177. Approximately 71 per cent of the eligible male voters in the state were polled in this hard-fought canvass, indicating the effectiveness of both parties' campaigns for Congress.[71] Close as it was, the victory nevertheless was highly significant in terms of the Republicans' future. After defeat of the Federalists in congressional districts of that party's design in 1798, this new triumph eradicated any remaining doubt about the numerical equality of the parties, whether or not the state was carved into districts. The flow of federal patronage into the state, to be dispensed in the future by a sympathetic Republican national administration, would be enhanced by the pres-

69. Aaron Kitchell to Ebenezer Elmer, Dec. 11, 1800, Gratz Collection, Hist. Soc. of Pa.; Joseph Bloomfield to Silas Dickerson, Nov. 17, 1800, Silas Dickerson to Mahlon Dickerson, Dec. 11, 1800, Dickerson Letter Book, N.J. Hist. Soc.

70. New Brunswick *Guardian*, Dec. 17, 1800.

71. Newark *Centinel*, Jan. 6, 1801; Fee, *Transition*, 120. The figure indicating the percentage of eligible male voters in this election was taken from manuscript material in the possession of Richard P. McCormick, Rutgers University, New Brunswick, New Jersey.

ence of Republican representatives from New Jersey seated in Washington; this was especially true in 1800 when the rules governing federal patronage were yet to be laid down, and when both United States senators from the state remained Federalist. Also, the successful effort justified the extension and innovation of Republican party machinery. Finally, the real boost given the most embattled counties by an emergent state Jeffersonian organization with some claim to success, and the symbolic prod provided by the party's first victory in any general election, went a long way in transforming the image of the party from a struggling and often hopeless minority to a party not only with a pleasing present but a very promising future; few Republicans, if the exuberance of the small number who remain recorded is any indication, doubted that this was the turning point.

Their expectations were borne out by the statistical evidence. There were only a few scattering votes cast (that is, votes not delivered for an entire ticket or votes for a candidate other than a party nominee)—a significant development indicating the growing strength of party appeals. The incidence of straight ticket voting was in some measure attributable to the printed tickets that were employed in this election, as they were in contemporary elections elsewhere in the country. Printed prior to the canvass, the tickets were distributed by party workers either before the election began or at the polls.[72] The three northern counties of Essex, Morris, and Sussex cast a disproportionately large share of the Republican vote. These were the same counties that the Republicans in former years carried in the legislative elections. At this point, the parties in Hunterdon, Monmouth, Salem, and Cumberland were closely matched, though the Federalists still maintained a slight edge. The other counties remained clearly Federalist.[73]

The poll for congressional representatives climaxed a year-

72. Morristown *Genius of Liberty*, Dec. 18, 1800; Newark *Centinel*, Dec. 16, 23, 1800; *Newark Gazette*, Sept. 30, Oct. 21, Dec. 23, 1800; McCormick, *History of Voting*, 104; Fee, *Transition*, 120.

73. See Table I, pp. 76-78.

long Republican campaign to reach the voter. Semiprofessional state managers, guiding amateur local leaders, did their work well in awakening political interest. The introduction of the nominating convention was a distinct contribution by Jerseymen to the art of building a party machine. It marked the state's Republican leaders in 1800 as pioneers in party development.[74] These men were no party hacks, following old and outmoded forms. They possessed the imagination necessary to adapt new forms of political action to the needs and conditions imposed by a new political era. This original convention justified itself as a potent political device, and it ultimately spread to other states. Often, it replaced as a nominating mechanism the more restrictive legislative caucus. The representative nature of this machinery on the county level ostensibly offered wide-ranging participation to the lowliest Republican activists, and for this reason it remained popular with Republican voters. With the passing years, it proved one of the most enduring political contributions made by the state's Republicans to the evolution of the American party system, coming as it did when operative political machinery was first gaining a foothold in the United States.[75] New Jersey's Republican organization would have been far less potent and its ultimate triumph in the state much more doubtful had such exertions not been made by Jeffersonian party men.

The effective use of party machinery and propaganda to increase voter participation was amply demonstrated in New Jersey in 1800. Every effort was made to bring the voter actively to the fore in the struggle for "Jefferson and Liberty." But there remained unfulfilled two major goals to establish Re-

74. State conventions were held in Pennsylvania in 1788, and in Delaware in 1802 but neither resulted in an institutionalization of the apparatus. See Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* (Harrisburg, 1942); Harry M. Tinkcom, *The Republicans and Federalists in Pennsylvania, 1790-1801: A Study in National Stimulus and Local Response* (Harrisburg, 1950); John Munroe, *Federalist Delaware, 1775-1815* (New Brunswick, N.J., 1954); George Luetscher, *Early Political Machinery in the United States* (Phila., 1903).

75. Another original effort by New Jersey Republicans resulted in the evolution of the legislative caucus.

publicanism triumphant in New Jersey. The first was to gain control of the legislature in order to dominate the political and patronage machinery of the state. The second was to expand the Republican apparatus to cover all of New Jersey's counties as the best means of insuring and perpetuating a party following. Both goals were achieved in the years following 1800.

THE NEW JERSEY FEDERALISTS

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and
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Rutherford • Madison • Teaneck
Fairleigh Dickinson University Press
London: Associated University Presses

Associated University Presses, Inc.
Cranbury, New Jersey 08512

Associated University Presses
108 New Bond Street
London W1Y OQX, England

Library of Congress Cataloging in Publication Data

Pasler, Rudolph J
The New Jersey Federalists.

Bibliography: p.
1. Federal Party. New Jersey. 2. New Jersey—Politics and government—1775–1865. I. Pasler, Margaret C., 1939– joint author. II. Title.
JK2308.N5 1790b 329'.1'009749 73–22570
ISBN 0–8386–1525–2

PRINTED IN THE UNITED STATES OF AMERICA

July 4, 1814—speaker, New Jersey Friends of Peace Convention; organizer, Washington Benevolent Society of Trenton.

Of all the New Jersey Federalists Stockton probably made the most visible, rapid, and dramatic transition to new-style Federalism.

STOCKTON, RICHARD (1764–1828). Born in Princeton, New Jersey; son of Richard Stockton, the elder, one of the most prominent lawyers and political figures in New Jersey on the eve of the Revolution; of Episcopalian background but attended Presbyterian services; A.B. Princeton, 1779; read law under his uncle Elisha Boudinot; became the leading lawyer in the state by 1790; married the daughter of a wealthy Burlingtonian; their sons became active in Jacksonian politics; 1792, 1800—presidential elector; 1796–1799—United States senator; 1801, 1802, 1803, 1804—candidate for governor; 1813–1815—United States Congressman; 1791–1828—trustee Princeton College.

Vocal and articulate during the thirteenth Congress, the "haughty and imperious" Richard Stockton acted as the spokesman for the majority contingent of the New Jersey delegation. Largely as a consequence of his efforts, between 1813 and 1815 the voice of New Jersey Federalism in national councils was a strong one.

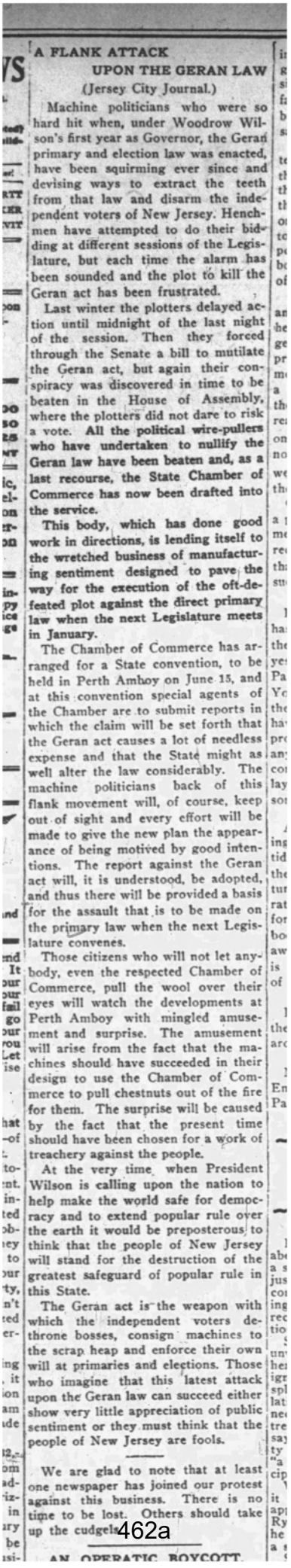
VROOM, PETER (1791–1873). Born in Somerset County; son of a wealthy landowner and Federalist politician; Dutch Reformed; graduated from Columbia College; studied law under Federalist politician George McDonald; lawyer; married (1) a Frelinghuysen (2) a Wall; militia officer in the War of 1812; 1821, 1823—candidate for New Jersey Assembly; 1826–1827, 1829—assemblyman; 1830–1836—governor; 1838–1840—Congressman; 1853–1859—minister to Prussia; 1860, 1864, 1868—presidential elector.

Vroom was one of a group of young New Jersey Federalists who labored mightily to revive the party after 1812 in the face of overwhelming odds.

WALL, GARRET D. (1783–1850). Born in Middletown (Monmouth County), New Jersey; lived in Trenton from 1803 to 1827 and Burlington City from 1828 to 1850; father a Revolutionary war officer and large landowner; Presbyterian; studied at a classical school in Woodbridge; read law under leading Federalist lawyer Jonathan Rhea; admitted to the bar in 1804; married Rhea's daughter; served as a militia officer in the War of 1812; officer, Washington Benevolent Society; 1812–1817—clerk of the New Jersey Supreme Court; 1815–1837—quartermaster general of the state; 1822, 1827—assemblyman; 1829—elected governor but declined to serve; 1829—accepted federal appointment as United States attorney for the district of New Jersey; 1834–1841—United States Senator; 1848–1850—judge, New Jersey Court of Errors.

Like some other Federalist leaders during the Era of Good Feelings, Wall eventually joined a coalition group composed of Federalists and Republicans. In 1822 he gained an Assembly seat on the fusion ticket offered by this group.

WALLACE, JOSHUA (1752–1819). Born in Philadelphia; moved to Burlington City, New Jersey in 1773; father a well-to-do Scotch immigrant who had married into a leading Philadelphia family; Presbyterian; A.B. College of Philadel-



A FLANK ATTACK UPON THE GERAN LAW

(Jersey City Journal.)

Machine politicians who were so hard hit when, under Woodrow Wilson's first year as Governor, the Geran primary and election law was enacted, have been squirming ever since and devising ways to extract the teeth from that law and disarm the independent voters of New Jersey. Henchmen have attempted to do their bidding at different sessions of the Legislature, but each time the alarm has been sounded and the plot to kill the Geran act has been frustrated.

Last winter the plotters delayed action until midnight of the last night of the session. Then they forced through the Senate a bill to mutilate the Geran act, but again their conspiracy was discovered in time to be beaten in the House of Assembly, where the plotters did not dare to risk a vote. **All the political wire-pullers who have undertaken to nullify the Geran law have been beaten and, as a last recourse, the State Chamber of Commerce has now been drafted into the service.**

This body, which has done good work in directions, is lending itself to the wretched business of manufacturing sentiment designed to pave the way for the execution of the oft-defeated plot against the direct primary law when the next Legislature meets in January.

The Chamber of Commerce has arranged for a State convention, to be held in Perth Amboy on June 15, and at this convention special agents of the Chamber are to submit reports in which the claim will be set forth that the Geran act causes a lot of needless expense and that the State might as well alter the law considerably. The machine politicians back of this flank movement will, of course, keep out of sight and every effort will be made to give the new plan the appearance of being motived by good intentions. The report against the Geran act will, it is understood, be adopted, and thus there will be provided a basis for the assault that is to be made on the primary law when the next Legislature convenes.

Those citizens who will not let anybody, even the respected Chamber of Commerce, pull the wool over their eyes will watch the developments at Perth Amboy with mingled amusement and surprise. The amusement will arise from the fact that the machines should have succeeded in their design to use the Chamber of Commerce to pull chestnuts out of the fire for them. The surprise will be caused by the fact that the present time should have been chosen for a work of treachery against the people.

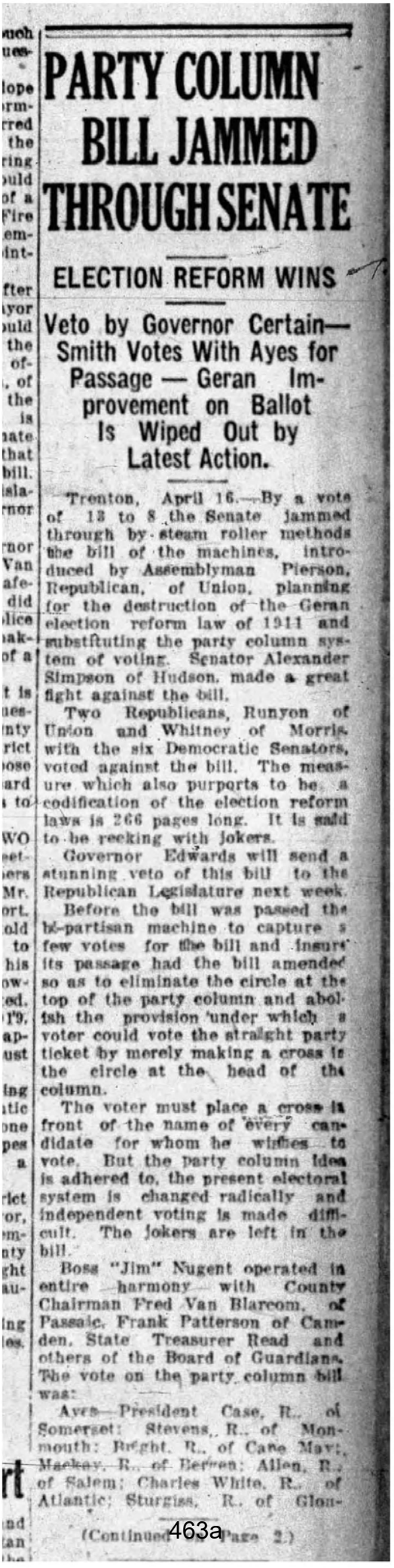
At the very time when President Wilson is calling upon the nation to help make the world safe for democracy and to extend popular rule over the earth it would be preposterous to think that the people of New Jersey will stand for the destruction of the greatest safeguard of popular rule in this State.

The Geran act is the weapon with which the independent voters dethrone bosses, consign machines to the scrap heap and enforce their own will at primaries and elections. Those who imagine that this latest attack upon the Geran law can succeed either show very little appreciation of public sentiment or they must think that the people of New Jersey are fools.

We are glad to note that at least one newspaper has joined our protest against this business. There is no time to be lost. Others should take up the cudgels.

AN OPERATIC BOYCOTT.

A Flank Attack on the Geran Law, PASSAIC DAILY NEWS, June 11, 1917



PARTY COLUMN BILL JAMMED THROUGH SENATE

ELECTION REFORM WINS

Veto by Governor Certain—Smith Votes With Ayes for Passage — Geran Improvement on Ballot Is Wiped Out by Latest Action.

Trenton, April 16.—By a vote of 13 to 8 the Senate jammed through by steam roller methods the bill of the machines, introduced by Assemblyman Pierson, Republican, of Union, planning for the destruction of the Geran election reform law of 1911 and substituting the party column system of voting. Senator Alexander Simpson of Hudson, made a great fight against the bill.

Two Republicans, Runyon of Union and Whitney of Morris, with the six Democratic Senators, voted against the bill. The measure which also purports to be a codification of the election reform laws is 266 pages long. It is said to be reeking with jokers.

Governor Edwards will send a stunning veto of this bill to the Republican Legislature next week.

Before the bill was passed the bi-partisan machine to capture a few votes for the bill and insure its passage had the bill amended so as to eliminate the circle at the top of the party column and abolish the provision under which a voter could vote the straight party ticket by merely making a cross in the circle at the head of the column.

The voter must place a cross in front of the name of every candidate for whom he wishes to vote. But the party column idea is adhered to, the present electoral system is changed radically and independent voting is made difficult. The jokers are left in the bill.

Boss "Jim" Nugent operated in entire harmony with County Chairman Fred Van Blarcom, of Passaic, Frank Patterson of Camden, State Treasurer Read and others of the Board of Guardians. The vote on the party column bill was:

Ayes—President Case, R., of Somerset; Stevens, R., of Monmouth; Bright, R., of Cape May; Mackey, R., of Bergen; Allen, R., of Salem; Charles White, R., of Atlantic; Sturgiss, R., of Glou-

(Continued on Page 2.)

Party Column Bill Jammed Through Senate, THE NEWS (Paterson), April 16, 1920

OPINION OF THE PRESS

Temporary Tinkering With Election Law

A make-shift has at last been devised for altering the Pierson election law so as to provide machinery for caring for the great increase in voters in November. This make-shift is the product of what is now designated as the "voluntary commission which drafted the 1920 revision of the election laws."

This commission constitutes the third putative father of the party column act. The State Chamber of Commerce has claimed to be the originator of the measure, Assemblyman Pierson has emphatically declared he was responsible for it, and now the "voluntary commission" insists that it "put over" the bill that has let down the bars safeguarding the honesty of elections and has turned over the machinery to the absolute control of the Republican and Democratic organizations.

But neither Republicans nor Democrats want to take the responsibility of blocking the polls on Election Day and making it difficult, if not impossible, for all the qualified voters of the State, including women, to cast their ballots. A program to relieve the situation and thus avoid an outbreak of righteous wrath has, therefore, been adopted. The "voluntary commission" is to approve a supplement to the law providing for increasing from four to six the membership of district election boards in districts where more than 250 votes were cast last year; to add an extra poll book in such districts, and to provide that the change shall be effective for this year only. When the supplemental bill is all drawn up it is to be handed over by the "voluntary commission" to Assemblyman Pierson as the adopted father, who, it is declared, will introduce the bill, which is expected to go through without opposition when the Legislature reconvenes on September 8.

Perhaps the passage of this make-shift is the best thing that can be expected under the circumstances. The machinery will not work as smoothly as it should, and there will be more opportunities for fraud than was the case under the Geran act, but probably all the voters will be able to cast their ballots in the great majority of the districts.

The adding of one Republican and one Democratic election officer in each of the big districts will furnish just so much more patronage to the party machines, and that is considered most important—to the political bosses. As an evidence of how vital they consider the change in the law that gives the party organizations control of the election machinery, taking it out of the hands of the courts, where it has been vested, witness the great excitement that has resulted from a complication in Hudson County.

There, it is claimed, the County Board of Elections failed to name district election officers and file the list with the county clerk, on the date required by the law. Thereupon, County Judge Doherty, as the law provided, named the Republican election officers, entirely different from the selections made later by the county board. The howl went up from the Republican majority faction controlled by Prosecutor Garven that the party was being shorn of its rights, that the action of the court was in favor of the Verdon faction, and that the course followed would result in weakening all chances of the Republicans making a good showing on Elyection Day. There are three county judges in Hudson, and two of them have since approved the county board's list, supported by Garven. No final decision has yet been reached as to which of the two rival groups now named as election officers shall conduct the registration, primaries and election.

The Pierson law was intended to be discriminatory in favor of Republican and Democratic organizations. It was devised, with its party column ballot—with columns for only the two old parties provided—to make independent voting difficult. The work of drafting the measure was carelessly, even recklessly, done, and the statements make regarding the effects of the law were untruthful. The troubles that have already broken out as the result of its provisions might have been expected, and, perhaps, they will be sufficiently serious to arouse sentiment in favor of the repeal of the whole law and the substitution of an act that would be in the interest of fair and honest elections.—Newark News.

Massachusetts Constitution of 1780, art. XIX

PREAMBLE

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree

upon, ordain and establish the following *Declaration of Rights, and Frame of Government,* as the **Constitution of the Commonwealth of Massachusetts**.

PART THE FIRST

A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

Article I.

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. [Annulled by Amendments, Art. CVI.]

Article II.

It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship. [See Amendments, Arts. XLVI and XLVIII.]

Article III.

As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of

The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

Article XVIII.

A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth.

Article XIX.

The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer. [See Amendments, Art. XLVIII, The Initiative, II, sec. 2.]

Article XX.

The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for. [See Amendments, Arts. XLVIII, I, *Definition* and LXXXIX.]

THE FOURTH CONSTITUTION OF NEW YORK, 1894.[1]

WE, THE PEOPLE of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution.

ARTICLE I.

[Bill of Rights.]

Section 1. [Persons not to be disfranchised.]-No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

§ 2. [Trial by jury.]-The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.

§ 3. [Freedom of worship; religious liberty.]-The free exercise and enjoyment of religious profession and worship, with-out discrimination or preference, shall forever be allowed in this State to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

§ 4. [Habeas corpus.]-The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

§ 5. [Excessive bail and fines.]-Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreason-ably detained.

§ 6. [Bill of rights.]-No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the Legislature), unless on presentment or indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

§ 7. [Compensation for taking private property; private roads; drainage of agricultural lands.]-When

§ 15. [Purchase of lands of Indians.]-No purchase or contract for the sale of lands in this State, made since the fourteenth day of October, one thousand seven hundred and seventy-five; or which may hereafter be made, of, or with the indians, shall be valid, unless made under the authority, and with the consent of the Legislature.

§ 16. [Common law and acts of the colonial and State legislatures.]-Such parts of the common law, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy five, and the resolutions of the Congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have. not since expired, or been repealed or altered; and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated.

§ 17. [Grants of land made by the king of Great Britain since 1775; prior grants.]-All grants of land within this State, made by the king of Great Britain, or persons acting under his authority, after the fourteenth day of October, one thousand seven hundred and seventy-five, shall be null and void; but nothing contained in this Constitution shall affect any grants of land within this State, made by the authority of the said king or his predecessors, or shall annul any charters to bodies politic and corporate, by him or them made, before that day; or shall affect any such grants or charters since made by this State, or by persons acting under its authority; or shall impair the obligation of any debts contracted by the State, or individuals, or bodies corporate, or any other rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice.

§ 18. [Damages for injuries causing death.]-The right of action now existing to recover damages for injuries resulting in death, shall never be. abrogated; and the amount recoverable shall not be subject to any statutory limitation.

ARTICLE II.

[Suffrage.].

Section 1. [Qualification of voters.]-Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county and for the last thirty days a resident of the election district in which he may offer his vote, shall he entitled to vote at such election in the election, district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people; provided that in time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the Legislature shall have power to provide the manner in which sad the time end place at

which such absent electors may vote, and for the return end canvass of their votes in the election districts in which they respectively reside.

§ 2. . (Persons excluded from the right of suffrage.]-No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to an other, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, the person so challenged, before the officers authorized for that purpose shall receive his vote, shall swear or affirm before such officers that he has not received or offered, does not expect to receive, has not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election. The Legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.

§ 3. [Certain occupations and conditions not to affect residence.]-For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any alms-house, or other asylum, or institution wholly or partly supported at public expense, or by charity; nor while confined in any public prison.

§ 4. [Registration and election laws to be passed.]-Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law. In cities and villages having five thousand inhabitants or more, according to the last preceding state enumeration of inhabitants, voters shall be registered upon personal application only; but voters not residing in such cities or villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters.

§ 5. [Manner of voting.]-All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.

§ 6. [Registration and election boards to be bi-partisan, except at town and village elections.]-All laws creating, regulating or affecting boards or officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that

2022 WL 16735253 (Mont.Dist.) (Trial Order)
District Court of Montana,
Thirteenth Judicial District.
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.

No. DV 21-0451.
September 30, 2022.

West Codenotes

Held Unconstitutional
Mont. Code Ann. §§ 13-2-110, 13-2-301, 13-2-304, 13-13-114, 13-13-301, 13-13-602, 13-15-107, 13-19-207, 13-21-104

Findings of Fact, Conclusions of Law, and Order

Michael G. Moses, Judge.

***1** 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** 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.[1] 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.

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.

***3** 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.

***4** 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).

***5** 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).

***6** 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.[2] 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).

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.

***7** 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).

***8** 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).

***9** 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.[3] 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.[4] 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 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.

***10** 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.[5] 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.

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).

***11** 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).

***12** 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).

***13** 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.[6] 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.[7] 18:9-15.

***14** 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 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).

***15** 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).

***16** 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).

***17** 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.

***18** 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.

***19** 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).

***20** 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).

***21** 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).

***22** 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.

***23** 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).

***24** 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).

***25** 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).

***26** 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.

***27** 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).

***28** 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,[8] 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 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).

***29** 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.

***30** 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).

***31** 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

***32** 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).

***33** 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).

***34** 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).

***35** 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).

***36** 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).

***37** 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).

***38** 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.

***39** 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").

***40** 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.[9] 28:18-29:5.

***41** 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). 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).

***42** 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.

***43** 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).

***44** 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).

***45** 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.[10] 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 (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).

***46** 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.

***47** 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.

***48** 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).

***49** 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 the 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.

***50** 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).

***51** 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.
>
> ***52** 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 highjack 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.

***53** 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).

***54** 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).

***55** 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).

***56** 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 market 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).

***57** 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-sate 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).

***58** 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.

***59** 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 Recorders 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).

***60** 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).

***61** 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).

***62** 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").

***63** 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.").

***64** 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, 326 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).

***65** 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*.

***66** 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.

***67** 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 interested 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

***68** 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.

***69** 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 identity the classes involved and determine whether they are similarly situated." *MCIA*, ¶ 15 (quoting *Rohlfs v. Klemenhagen, 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.

***70** 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.*

***71** 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 unrebutted 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.

***72** 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

***73** 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.

***74** 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.

***75** 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[11] (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 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.

***76** 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.

***77** 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.

***78** 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.

***79 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

Footnotes

1 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.").

2 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.").

3 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.").

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

5 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.").

6 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.").

7 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.").

8 As multiple experts explained, *see* Aug. 15, 2022, Trial Tr. 85:20-22, 87:17-23 (McCool); *id.* at 223:5-17 (Weichelt); 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).

9 Plaintiffs' Consolidated Deposition Designations for Trial (Aug. 11, 2022), Ex. F-1 (Deposition of Monica Eisenzimer) ("Eisenzimer Dep.").

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

11 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).

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