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IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

Montana Democratic Party and Mitch Bohn, Plaintiffs, vs. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.	Cause No.: DV 21-0451 Judge: Michael Moses **DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

P7

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Pages

Statutes

Other Authorities

INTRODUCTION

It is evident that voters care deeply about the integrity of Montana elections. It is equally clear that the Legislature takes seriously the constitutional requirement that it "shall ensure the purity of elections and guard against abuses of the electoral process." Mont. Const. Article IV, § 3. During the November 2020 election, Secretary Jacobsen's platform included Voter ID, legislative control of election laws, and clear deadlines. Corin Cates-Carney, Mont. Pub. Radio, 2020 Candidate Interview: Christi Jacobsen, https://perma.cc/C6DM-W87S (Oct. 14, 2020). Voters knew what the candidates stood for, and in an election with "record-breaking turnout," Am. Compl. ¶ 20, they overwhelmingly endorsed election security measures. *See* Montana 2020 Statewide General Election Canvass, https://perma.cc/8VWY-888A (showing Jacobsen's win by nearly 20 points statewide, a wider margin than any other candidate).

The Montana Democratic Party (MDP) filed this lawsuit in a last-ditch effort to do what it couldn't do at the ballot box or before the Legislature. The Court should reject MDP's political challenges to SB 169 and HB 176 for several reasons, each of which is dispositive. First, and as a threshold matter, MDP lacks standing to allege infringement of other, hypothetical persons' rights to vote. Second, MDP's Equal Protection challenge fails to present either a cognizable legal theory for relief or any facts (as opposed to bald legal conclusions) to support its claim. Third, MDP's right-to-vote challenge to HB 176 is foreclosed by the plain text of the Montana Constitution granting the legislature discretion over election day registration. Fourth, under any standard, MDP fails to allege any facts that would entitle it to relief on its right-to-vote challenge to SB 169. Finally, MDP asks the Court to invade authority delegated exclusively to the State Legislature by the federal Elections Clause. MDP's challenges to SB 169 and HB 176 should be dismissed.

The Court should dismiss Counts II and III entirely and Count I as it relates to SB 169 and HB 176.

BACKGROUND

A. Montana's Late Voter Registration Law

When the Montana Constitution was ratified, voters were required to register 40 days before election day for state elections, and 30 days before election day for federal elections. Rev. Code Mont. §§ 23-3016, 23-3724 (1971). At the time, there was no "late registration." In 2005, the Legislature authorized late registration up until the close of polls on election day, except that late registration was closed from noon to 5:00 p.m. the day before the election. SB 302, Ch. 286, 2005 Mont. Laws. The key difference between late and regular registration is that late registration must be done in-person at a designated location within the voter's county. Regular registration still closes 30 days before the election. *See* § 13-2-301, MCA.

HB 176 retains late registration but modifies the deadline to require that all voters register before noon the day before the election, easing the election day burden on administrators. § 13-2-304(1)(a), MCA. The bill made additional minor changes to the registration statute, none of which are relevant to MDP's lawsuit. *See* HB 176 (Ex. A.).

B. Montana's Voter ID Law

Montana has required voter identification since at least 2003. HB 190, Ch. 475, 2003 Mont. Laws. This past session, the Legislature enacted SB 169 to add clarity to the voter ID law and modify the procedures for establishing identity and eligibility to vote.

Montana's voter identification laws (both before and after SB 169) classified acceptable forms of ID as one of two types, primary and non-primary. SB 169 makes modest changes to Montana's voter ID framework. First, SB 169 designates only specific, inherently reliable government-issued IDs as primary ID but allows the use of expired IDs. Second, SB 169 requires

that voters without primary ID present some form of non-primary photo ID, along with another document showing the voter's name and address, including a utility bill, bank statement, or voter registration card. Under SB 169, student IDs are classified as a non-primary. Student IDs are easier to forge; students often attend school away from their home state; and state, federal, and tribal governments do not necessarily determine the process for issuing student IDs. A student ID, however, may be used with any number of documents showing the voter's name and address (including a voter registration card) to establish identity.

Even if a voter is unable to comply with these modest requirements, there is a failsafe. The voter may cast a provisional ballot and has until 5:00 p.m. the day after the election to verify his or her identity or submit an affidavit on a readily available form affirming a reasonable impediment to meeting the photo identification requirements. § 13-15-107(1), (3), MCA.

C. MDP's Relevant Factual Allegations

MDP is a political party dedicated to the election of Democratic Party candidates in national, state, and local elections. Am. Compl. ¶ 8. It unsuccessfully opposed SB 169 and HB 176 during the 2021 legislative session. *Id.* ¶¶ 2, 3. The Legislature enacting these laws was elected during the 2020 election, which saw "record-breaking turnout" and "remarkably high young-voter turnout" (as well as sweeping statewide losses for MDP-backed candidates). *Id.* ¶ 20.

Despite recognizing that "Montana has required some form of voter ID for in-person voting since 2003," MDP challenges the State's constitutional authority to strengthen and modernize the preexisting voter ID law. *Id.* ¶ 59. MDP contends that Montanans' concerns regarding election integrity are irrelevant, and that the State cannot implement measures to prevent voter fraud until it has proof of actual prior fraud. *Id.* ¶¶ 59–65, 74–76. MDP's primary

complaint is that students who wish to register and vote with a student ID (issued as a matter of course to postsecondary students, regardless of residency) must bring one additional document tending to establish residency. *Id.* ¶ 66–73. But MDP does not allege that students are less likely than other electors to have an acceptable form of identification, and it impliedly admits that students are perfectly capable of bringing either a student ID or documentary evidence of identity and residency, as previously required. *Id.* ¶¶ 67, 69–70.

MDP similarly contests the Legislature's authority to adjust the voter registration deadline, notwithstanding that election day registration was unavailable prior to 2005. *Id.* ¶ 21. MDP reiterates testimony and political talking points considered (and ultimately deemed unconvincing) by the Legislature during debate on HB 176 and asserts the Legislature "thwart[ed] the will" of Montana voters by changing election day registration. *Id.* ¶¶ 2, 30–44. Rather than submit the issue to the voters through the initiative process, MDP filed this challenge.

LEGAL STANDARD

A. Motion to Dismiss

"The plaintiff carries the burden to plead adequately a cause of action." *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247. The plaintiff fails to meet its burden, and a claim should be dismissed, "if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim." *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165. The Court takes all "well-pled" factual assertions as true for purposes of the motion. *Gateway Hosp. Grp. Inc. v. Philadelphia Indem. Ins. Co.*, 2020 MT 125, ¶ 12, 400 Mont. 80, 464 P.3d 44.

A complaint that states mere conclusions fails to meet the standard of a "well-pled" factual assertion. *Crenshaw v. Crenshaw*, 120 Mont. 190, 204, 182 P.2d 477, 485 (1947). And a "complaint must state something more than facts which, at the most, would breed only a suspicion that plaintiffs have a right to relief." *Jones*, ¶ 42 (quotation omitted). The Montana Supreme Court has repeatedly admonished that "the court is under no duty to take as true legal conclusions or allegations that have no factual basis[.]" *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6.

B. MDP's Facial Challenge

MDP brings facial, rather than as-applied, challenges to SB 169 and HB 176 because it seeks to invalidate the statutes completely. A facial challenge "to a legislative act is . . . the most difficult challenge to mount successfully" because the challenger "must show that 'no set of circumstances exist 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*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). Because a court reviewing a facial challenge "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases," MDP's facial challenge to SB 169 and HB 176 is appropriate for review at the pleadings stage. *Wash. State Grange*, 552 U.S. at 450.

ARGUMENT

I. MDP lacks standing to contest the constitutionality of SB 169 and HB 176.

Standing is "a threshold requirement in every case." *Baxter Homeowners Ass'n, Inc. v. Angel*, 2013 MT 83, ¶ 14, 369 Mont. 398, 298 P.3d 1145 (quotation omitted). "[T]he doctrine of standing evaluates whether a party is entitled to have a court decide the dispute, and is determined as of the time the action is brought." *Id.* at ¶ 15. If the party suing lacks standing, the

claim is nonjusticiable, and the Court cannot hear it. *Mitchell v. Glacier Cty.*, 2017 MT 258, ¶ 6, 389 Mont. 122, 406 P.3d 427. The Court should grant the State's motion to dismiss because MDP lacks standing to pursue its claims.

MDP does not allege a violation of its own constitutional rights. Nor can it. It is not a voter. Because it has no constitutional right to vote that may be infringed, it lacks standing to sue on its own behalf. Nor does it have standing to bring claims under the Montana Constitution for unidentified voters. And the single identified voter, Mitch Bohn, makes only vague allegations regarding ballot collection. He has not even attempted to allege injury under SB 169 or HB 176. *See* Am. Compl. ¶ 15.

A. MDP has not alleged a violation of its own rights.

"[T]he plaintiff generally must assert [its] own legal rights and interests." *Baxter Homeowners*, ¶ 15 (quotation omitted). "[A] general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing absent *a direct causal connection between the alleged illegality and specific and definite harm personally suffered*, or likely to be personally suffered, by the plaintiff." *Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241 (emphasis added). Here, no "direct causal connection" links the alleged unconstitutionality of SB 169 and HB 176 to the harm alleged by MDP. *Id.*

MDP already has presented its policy arguments to voters and legislators and failed. Now it tries its luck with the Court. But a political party's defeat on an issue of legislative policy generally does not provide standing for opportunistic litigation, regardless of the merits of the legislation. This case is no different. Indeed, it is a pattern by MDP, which Justice Sandefur recently criticized in another election law case: "[I]t is difficult to understand how the Democratic Party . . . can possibly have standing to assert an alleged infringement of the

constitutional rights of persons *other than themselves*." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 45, 401 Mont. 405, 473 P.3d 386 n.7 (Sandefur, J., concurring and dissenting). While the Court did not resolve MDP's lack of standing in that case because it wasn't at issue in the appeal, the observation is on all fours with this case. The MDP has sued to force a policy question it lost at the Legislature, not to vindicate any alleged injury to MDP itself. The Court should reject MDP's request that it provide a forum to rehash a stale policy debate.

B. MDP cannot sue on behalf of unidentified voters.

Without any alleged harm to itself, MDP is left to argue that it can sue on voters' behalf. That argument fares no better. Following federal law, Montana has recognized two related exceptions to the general rule that a party may only litigate its own rights: associational standing and organizational standing. Neither exception applies here.

1. MDP lacks associational standing to sue for students and young, elderly, disabled, indigent or indigenous voters.

MDP does not represent the individuals allegedly burdened by SB 169 and HB 176, and the doctrine of associational standing does not apply. Where an organization and its members are "in every practical sense identical," the organization may establish associational standing. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 42, 360 Mont. 207, 255 P.3d 80 (quoting *United Food & Com. Workers v. Brown Grp. Inc.*, 517 U.S. 544, 552 (1996)). In such instance, the organization "may assert the rights of its members," "even without a showing of injury to the [organization] itself, when (a) at least one of its members would have standing to sue in his or her own right, (b) the interest the association seeks to protect are germane to its purpose, and (c) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit." *Id.* at ¶¶ 42–43.

MDP lacks associational standing. First, "an organization suing as representative [must] include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association." *United Food*, 517 U.S. at 555. MDP does not allege that any single member of the party has standing to challenge SB 169 or HB 176, as it has not identified a member whose constitutional rights allegedly are implicated by either law. (Again, Mitch Bohn makes no claims regarding registration or voter ID.)

Second, MDP does not "seek[] to protect" an interest sufficiently "germane to its purpose." *Heffernan*, ¶ 43. "[A]n association [must] be organized for a purpose germane to the subject of its member's claim." *United Food*, 517 U.S. at 555. MDP identifies vague, non-affiliated groups of voters allegedly affected by SB 169 and HB 176: students, the young, the elderly, the indigent, and indigenous Montanans. *See, e.g.*, Am. Compl. ¶¶ 2, 7, 76, 130, 133. There is no identity of interest between MDP and these groups. And MDP is wrong to imply that one's political destiny is determined by membership in a particular demographic: members of these groups are individuals who think and vote differently.

MDP has not (and cannot) claim that SB 169 and HB 176 unconstitutionally target Montana Democrats, for whom MDP may in certain instances serve as a representative. *See, e.g.*, *Community Ass'n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶¶ 19–24, 396 Mont. 194, 445 P.3d 1195 (group organized for purpose of Flathead Lake conservation had standing to challenge authorization of bridge altering lakeshore). Such an argument would present real legal problems for MDP. For example, there is no assertion (or viable argument) that non-Democrat students are likelier to have acceptable forms of ID or that non-Democrat indigent voters will face fewer barriers to voting. Not to mention that MDP would be unable to get anywhere approximating strict scrutiny by alleging political discrimination. *See infra* Section II.

But that is the only claim that MDP would even arguably have standing to pursue, and it is one this case does not present.

Third, this matter demands the participation of the "allegedly injured part[ies]." *Heffernan*, ¶ 43. MDP has no right to vote that may be infringed. Nothing justifies allowing MDP to bring claims for alleged constitutional infirmities that affect MDP only indirectly, if at all, and MDP cannot show interference with voting rights except through individual experience.

2. MDP lacks organizational standing to pursue speculative claims for hypothetical third parties.

Nor can MDP satisfy the requirements for organizational standing. Where, as here, an organizational plaintiff sues on behalf of individuals, Montana courts apply a framework developed by the U.S. Supreme Court:

> The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute . . . ; the litigant must have a close relation to the third party . . . ; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Baxter Homeowners, ¶ 15 (quotation omitted). Assuming without agreeing that MDP has alleged an "injury in fact"—it hasn't, as explained above—the other requirements cannot be met where, as here, MDP has not even identified the third party whose interests it is acting to protect. *See, e.g., id.* at ¶ 18 (lawyer could not raise discrimination claims on behalf of unnamed potential disabled clients). MDP has not alleged a "close relation" to a single voter allegedly burdened by SB 169 or HB 176. *Baxter Homeowners*, ¶ 15. A "hypothetical" third party is plainly insufficient. *Id.* Nor has MDP alleged that "some hindrance" operates to prevent these unidentified voters from challenging SB 169 and HB 176 on their own behalves. *Id.* Again, MDP will need to demonstrate harm to specific voters to succeed.

"This is an attempt to raise putative rights of third parties, and none of the exceptions that allow such claims is present here." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). MDP has not

suffered and is not faced with constitutional harm. And it cannot be a stand-in for any group of unidentified voters, even if the voters could potentially allege constitutional harm.

II. MDP fails to present a viable challenge to SB 169 and HB 176 under Article II, § 4 (Equal Protection), and Count I should be dismissed.[1]

MDP appears to recognize (correctly) that it has no claim for unlawful discrimination under the federal Equal Protection Clause. *See Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 191 (2008) (rejecting equal protection challenge to Indiana's voter ID law). Instead, it relies strictly on the Montana Constitution's Equal Protection Clause in Article II, § 4. But, even if the Montana Equal Protection Clause may, in theory, "provide[] for even more individual protection" than its federal counterpart, that decades-old sound bite has no bearing on MDP's claim and in fact arose in a case where no enhanced protections were applied. *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987) (applying rational basis review).

Montana courts apply the same "three steps to analyze an equal protection claim" as federal courts: "(1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged legislation." *Duane C. Kohoutek, Inc. v. Mont. Dep't of Rev.*, 2018 MT 123, ¶ 34, 391 Mont. 345, 417 P.3d 1105. As to SB 169 and HB 176, Count I does not survive the first step of the analysis: the laws do not draw a line between classes of voters as required to state an equal protection claim under § 4. And even if they did, the claim would fail again at the second and third steps. At best, the laws are subject to rational basis review, which they pass handily. Count I should be dismissed for failure to state a claim. *See Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749, 753–56 (M.D. Tenn. 2015)

[1] MDP challenges SB 169, HB 176, and HB 530 under § 4. Defendant Jacobsen does not seek dismissal of HB 530 at this time.

(dismissing similar Equal Protection challenge to voter ID law allegedly discriminating against students).

A. Neither SB 169 nor HB 176 classifies voters by age.

MDP contends that SB 169 and HB 176 "will disproportionately and disparately abridge the right to vote of young Montana voters." Am. Compl. ¶¶ 119, 120. That does not state a viable equal protection claim: both laws are facially neutral and MDP's complaint is void of any allegations that would support a claim of intentional age-based discrimination.

The Equal Protection Clause is not implicated absent a classification between two categories of similarly situated groups. *Vision Net, Inc. v. Dep't of Rev.*, 2019 MT 205, ¶ 16, 397 Mont. 118, 447 P.3d 1034. Further, in the absence of discriminatory intent, a facially neutral law does not contain a classification and therefore does not trigger § 4. *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 367, 982 P.2d 421. MDP has not alleged a viable classification for equal protection purposes.

Instead, MDP seeks to have the Court adopt "disparate impact" theory—the idea that a classification exists where an otherwise neutral law has different effects on different groups of individuals. But the Montana Supreme Court has definitively rejected this theory. "Disproportionate impact of a facially neutral law will not make the law unconstitutional, unless a discriminatory intent or purpose is found." *Fitzpatrick v. State*, 194 Mont. 310, 323, 638 P.2d 1002, 1010 (1981). In other words, an allegation that some may be more affected than others by a neutral law fails to state an equal protection claim. The touchstone is discriminatory intent, not effect.

So MDP lobs ominous, conclusory allegations of discriminatory intent, *see, e.g.*, Am. Compl. ¶ 76 (describing discrimination as "all but certainly intended"), but those bare allegations

are merely talking points in numbered paragraphs, and they are legally insufficient to survive a motion to dismiss. Fatally, MDP has not alleged *facts* that, if proven, would show intent to discriminate. *See Fitzpatrick*, 194 Mont. at 323; *Spina*, ¶ 85 ("It is a basic equal protection principle that the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose."). Count I fails for this reason as a matter of law.

As for HB 176, it contains no classification whatsoever. If MDP has a theory of how § 4 analysis is triggered by a registration deadline that applies across the board to all voters, that theory cannot be discerned from the Complaint. MDP apparently recognizes as much, which is why it relies on "disparate impact" theory rather than a claim of intentional discrimination.

MDP's disparate impact theory fails as a matter of law. Neither SB 169 nor HB 176 is facially discriminatory, and MDP has not alleged facts to support a claim of intentional discrimination. Thus, MDP's equal protection argument fails. *See Spina*, ¶ 85; *Fitzpatrick*, 194 Mont. at 323, 638 P.2d at 1010. Count I can and should be dismissed on this basis alone.

B. Even if MDP had alleged a valid classification and discriminatory intent, SB 169 and HB 176 are reviewed under the rational basis test.

MDP asks this Court for a breathtaking extension of Montana equal protection doctrine, arguing that an alleged age-based classification—proven through a theory of disparate impact—somehow carries MDP all the way to strict scrutiny. MDP's allegations cannot get MDP where it wants to go. Even if MDP could get past step one of the equal protection analysis (and it cannot), the highest level of scrutiny available here is rational basis review.

"[E]qual protection challenges are generally subject only to rational basis scrutiny, absent demonstration that the alleged discrimination implicates a fundamental constitutional right or constitutionally suspect classification." *Lesage v. Twentieth Judicial Dist. Court*, 2021 MT 72,

¶ 10, 483 P.3d 490. The level of scrutiny applicable to an equal protection claim presents a purely legal question, appropriate for determination at the pleadings stage. *See Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, 354 Mont. 133, 227 P.3d 42. Again, neither SB 169 nor HB 176 classifies voters based on age. But, if they did, age is not a constitutionally suspect classification. *State v. Blue*, 2009 MT 304, ¶ 20, 352 Mont. 382, 217 P.3d 82.

MDP may suggest that, because the right to vote is "fundamental," any alleged categorization of voters is subject to strict scrutiny. But the Montana Supreme Court has never applied strict scrutiny in analogous circumstances. *See Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 19–21, 24, 32, 366 Mont. 224, 286 P.3d 1161 (applying rational basis to law affecting the fundamental rights to pursue employment, health, and privacy, where those rights were "circumscribed" by "the State's police power to protect the public health and welfare."); *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 17, 314 Mont. 314, 65 P.3d 576 (applying strict scrutiny to law completely denying the right to participate in an election to certain voters with a stake in the outcome).

And it would make no sense to apply strict scrutiny given Montana's constitutional structure. Although the right of suffrage is protected by the Montana Constitution's declaration of rights, it is not the right of *unregulated* suffrage. *See Mont. Cannabis Indus. Ass'n*, ¶ 20. The Constitution specifically directs the Legislature to "provide by law the requirements for residence, registration, absentee voting, and administration of elections" and to "insure the purity of elections and guard against abuses of the electoral process." Mont. Const. art. IV, § 3. Because legislative regulation of elections is provided for specifically within the Constitution, the constitutional right to vote is necessarily consistent with the Legislature's mandate to regulate elections procedure. *See infra* Section III.

If MDP had its way, *every* law and policy regulating suffrage would be subject to strict scrutiny. Does it violate equal protection to allow Montanans to vote by mail? Surely not, even though the indigent may be less likely to have access to residential mail, and arguably such laws make it easier for the middle and upper classes to vote. Similarly, if the state were to refuse to accept mail ballots, rural voters may be at a disadvantage because they would have to travel farther to access a polling place. And indigent rural voters may face particular difficulties related to transportation. If the Court were to accept MDP's theory, however, it would be easy enough to state a claim for equal protection on similar facts. It simply cannot be the case that strict scrutiny applies any time a law affects the right to vote to any degree.

Indeed, no distinguishing principle separates MDP's claim from the federal equal protection claim raised and rejected in *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 836–37 (D. Mont. 2020). There, the plaintiff challenged then-Governor Bullock's authorization of all-mail voting because turnout would likely increase in counties adopting mail-ballot plans. *Id.* at 836. The claim failed. As the court rightly noted, "few (if any) electoral systems could survive constitutional scrutiny" if every classification affecting voting were subject to strict scrutiny. *Id.* Nothing elevates Count I from the default rule that "equal protection challenges are generally subject only to rational basis scrutiny." *Lesage*, ¶ 10.

C. SB 169 and HB 176 are rationally related to legitimate legislative purposes.

Construing the factual allegations in the Complaint as true, SB 169 and HB 176 easily survive review under the rational basis test. "Under rational basis scrutiny, legislative enactments and procedural rules of court are presumed constitutional, with the challenger bearing the heavy burden of demonstrating that the enactment or rule is not rationally related to any legitimate government interest." *Id.* at ¶ 10. "[T]he Court's 'role is not to second guess the prudence of a

legislative decision.'" *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 46, 391 Mont. 422, 419 P.3d 685 (quotation omitted). "The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive." *Stratemeyer v. Lincoln Cty.*, 259 Mont. 147, 152, 855 P.2d 506, 509–10 (1993).

MDP's Complaint does not attempt to argue in earnest that the challenged laws do not pass rational basis review. And for good reason. The State undoubtedly has legitimate interests in ensuring only qualified electors participate in the democratic process and in promoting public confidence in the election process. *Crawford*, 553 U.S. at 191 (Interests "in deterring and detecting voter fraud" and "safeguarding voter confidence" are "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process."). These interests are rationally related to SB 169. *See Nashville Student Org. Comm.*, 155 F. Supp. 3d 749 (granting motion to dismiss Equal Protection challenge to voter ID law excluding student IDs because the law was rationally related to legitimate interest in preventing voter fraud).

The State also has a legitimate interest in ensuring that votes that have been cast are counted and reported quickly. HB 176 serves this goal because it frees election administrators to count votes on election day without also being required to process voter registrations. This is more than enough to satisfy the rational basis test. In sum, it is no trouble at all to conceive of adequate justifications for SB 169 and HB 176, and MDP fails to state a claim against these provisions under § 4.

III. Count II fails to state a claim because the Constitution grants the Legislature explicit discretion over election day registration.

MDP's Count II claims that the Legislature's modest change requiring registration by noon the day before an election violates Article II, § 13's right to suffrage. The claim is a

constitutional non-starter. The Constitution grants the Legislature explicit *discretion* to enact election day registration in Article IV, § 3; no reasonable argument supports MDP's claim that the Constitution can, at the same time, compel it in Article II, § 13.

The plain text of the Constitution provides that allowing (or disallowing) election day registration is a matter of legislative discretion:

> 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** ensure the purity of elections and guard against abuses of the electoral process.

Mont. Const. art. IV, § 3 (emphasis added). In construing this provision, the Court must use the same rules of construction used in construing statutes. *Nelson v. Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. There are several rules of construction implicated here, and they all mandate dismissal of Count II.

First, "[t]he intent of the framers of a constitutional provision is controlling. The intent should be determined from the plain meaning of the words used." *Great Falls Trib. Co. v. Great Falls Pub. Sch., Bd. of Trs.*, 255 Mont. 125, 128–29, 841 P.2d 502, 504 (1992). The plain language of Article IV, § 3 leaves no room for debate: the Framers made election day registration the Legislature's choice. The Framers *required* the Legislature to develop a system of registration, absentee voting, and residency. And they *required* the Legislature to develop systems to ensure election integrity and prevent fraud. But they *allowed* the Legislature to provide for election day registration. MDP's argument that the Constitution requires registration on election day is at odds with the Framers' unambiguous intent.

Second, if that were not enough, constitutional provisions must be read in "coordination with other sections" so that they form a consistent whole. *Howell v. State*, 263 Mont. 275, 286–87, 868 P.2d 568, 575 (1994). To accomplish that, "the specific controls over the general. When

two provisions deal with a subject, one in general and comprehensive terms and the other in minute and more definite terms, the more definite provision will prevail to the extent of any opposition between them." *Ditton v. Dep't of Just. Motor Vehicle Div.*, 2014 MT 54, ¶ 22, 374 Mont. 122, 319 P.3d 1268. Thus, Article IV, § 3's specific grant of Legislative discretion to enact election day registration controls over Article II, § 13's very general right to suffrage. Read in "coordination," these provisions clarify that the right to suffrage does not encompass MDP's claimed right to election day registration. *Howell*, 263 Mont. at 286–87, 868 P.2d at 575.

MDP's argument makes even less sense in historical context. The Court must construe the Constitution "in light of the historical and surrounding circumstances under which the Framers drafted the Constitution" which "assumes the existence of a well understood system of law which is still to remain in force." *Nelson*, ¶¶ 14, 15. Here, MDP is stuck with the historical fact that election day registration did not exist until 2005.

When the Framers drafted and the voters ratified Article IV, § 3, voters were not allowed to register on election day. Rev. Code Mont. §§ 23-3016, 23-3724 (1971) (Registration closed 30 days before federal elections, 40 days for other elections). If the Framers had wanted to change the status quo and limit the Legislature's authority, they would have. Indeed, they considered and rejected doing precisely that. Delegate Brown said it best when explaining the Framer's rationale:

> **Delegate Swanberg**: Just to get this straight now, Mr. Brown, your section does not prohibit poll booth registration, does it?
> **Delegate Brown**: Our section leaves it all to the Legislature. We're not trying to constitutionalize it.

Montana Constitutional Convention, Verbatim Transcript, February 17, 1972, Vol. III, p. 402.

MDP's effort—nearly fifty years after the fact—to rewrite the Constitution is, at best, poor textual analysis. At worst, it's a thin attempt to induce this Court to give MDP a policy

victory it lost at the Legislature. But the Constitution means what it says. The Legislature is well within its discretion to require voters to register by noon the day before an election—a less restrictive requirement than that in place when the Constitution was drafted and ratified. MDP's Claim II fails as a matter of law and this Court should dismiss it.

IV. MDP's Count III fails to state a claim because MDP failed to allege any plausible denial of the right to vote.

Count III of MDP's amended complaint fails to state a claim because it lacks any concrete facts to support the allegation that SB 169's minimal requirements impair the right to vote. The bulk of the claim is that some students may find it harder to vote because student IDs are no longer a primary form of ID. But "[i]nconvenience alone does not qualify as a substantial burden on the right to vote." *Crawford*, 553 U.S. at 198. And in any event, while MDP asserts that claim, no student does. MDP's complaint lodges only broad, speculative allegations of *potential* impact on non-plaintiff students and other voters.

MDP's fact-free allegations are not enough to state a claim for relief. To avoid dismissal, a plaintiff must do more than state "legal conclusions or allegations that have no factual basis." *Cowan*, ¶ 14. Speculative allegations about potential impacts on students or other voters is not enough to state a viable claim. *Baxter Homeowners*, ¶ 15; *see also Mitchell*, ¶ 10 ("The alleged injury must be 'concrete' rather than 'abstract,'" which means that it must be "actual or imminent, not conjectural or hypothetical.") (citation omitted). Count III, purportedly brought on students' behalves, shows why alleging speculative harm of non-parties fails to state a claim—absent plaintiffs with actual harm the case can only be decided in the abstract without the "concrete adverseness which sharpens presentation of issues." *Dist. No. 55 v. Musselshell Cty.*, 245 Mont. 525, 528, 802 P.2d 1252, 1254 (1990).

And even MDP's speculative allegations do not stand to reason. For example, MDP's claim that "thousands" of students do not possess either a driver's license or other qualifying ID is wildly conjectural and unsupported by any concrete facts. Moreover, MDP undermines the claim by acknowledging that the supposed "thousands" of students impacted by the law previously used a student ID or voter registration confirmation form to vote. Am. Compl. ¶ 72. A student ID and a voter confirmation form—both readily available to students as MDP admits—is all they need to establish their identification under SB 169. There is simply no concrete or plausible claim that SB 169 will disenfranchise any student, let alone "thousands." This Court should reject MDP's speculative legal claims about possible impacts of SB 169 on non-plaintiff voters and dismiss Count III.

V. The Elections Clause of the United States Constitution prohibits judicial override of SB 169 and HB 176.

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 2 (the "Elections Clause"). The Elections Clause delegates "broad" authority to regulate federal elections to state legislatures: "'Times, Places, and Manner' . . . are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections' . . . ." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013) (quotation omitted).

The Court may not interfere with the Legislature's authority to regulate federal elections because that authority has been delegated strictly to the Legislature, not the State at large. "Generally the separation of powers among branches of a State's government raises no federal constitutional questions, subject to the requirement that the government be republican in

character." *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari). "But the words 'shall be prescribed in each State by the *Legislature* thereof' operate as a limitation on the State." *Id.* "And to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." *Id.*

Just such a limit exists here. SB 169 and HB 176 regulate elections procedure, falling squarely within the Legislatures' delegated authority over the "Times, Places and Manner of holding" federal elections. U.S. Const. art. I, § 4. By its very terms, the Elections Clause restricts state court interference with state legislation regulating federal elections procedure.

The United States has not authorized state courts to regulate election procedure. Within the meaning of the Elections Clause—and in ordinary parlance—legislature means "the representative body which makes the law of the people." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting) (quotation omitted). Without raising a federal constitutional claim, MDP asks the Court to invalidate politically popular, legitimately enacted legislation modifying elections procedure. Under ordinary circumstances, this would be an overreach. But, because the legislation governs the "Time, Places and Manner of holding" federal elections, the relief MDP seeks would violate the federal constitution. The Legislature acted within the scope of exclusively delegated authority, and MDP's Complaint should be dismissed.

CONCLUSION

Having lost the public policy debate, MDP now seeks a judicial veto of SB 169 and HB 176. But the law is clear and clearly forecloses that objective. The Court should decline to play politics with MDP and grant Secretary Jacobsen's motion to dismiss.

Dated this 2nd day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2021, I mailed a true and correct copy of the foregoing document, by the means designated below, to the following:

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