IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0295

COREY STAPLETON, in his official capacity
as Montana Secretary of State,

Defendant and Appellant,

v.

ROBYN DRISCOLL, MONTANA DEMOCRATIC
PARTY; and DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE,

Plaintiffs and Appellees.

APPELLEES' BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Whether the district court manifestly abused its discretion when it preliminarily enjoined the State's practice of disenfranchising thousands of voters who place their voted ballots into the custody of the postal system before the close of polls, but whose ballots happen to be delivered by mail to an elections office after the close of polls.
2. Whether the district court manifestly abused its discretion when it preliminarily enjoined the law severely restricting absentee ballot collection services upon which thousands of voters had come to rely.

STATEMENT OF THE CASE

Plaintiffs, an individual Montana voter activist and two political organizations, brought this action against the Secretary of State (the "Secretary"), seeking declaratory and injunctive relief under the Montana Constitution against two statutory restrictions on the right to vote: the requirement that nearly all absentee ballots received by mail after the close of polling places must be rejected, regardless of when the ballots were mailed, and a set of restrictions on third party ballot collection services. The matter was heard by Judge Donald Harris in the Thirteenth Judicial District Court, who issued a preliminary injunction against the challenged provisions, determining that each imposed significant burdens on the right to vote without advancing any legitimate state interests. The Secretary sought a stay of the

injunction only as to the absentee ballot rejection deadline, which this Court granted. The Secretary appeals the injunction as to both provisions. In a separate case under the Montana Constitution brought by a different group of plaintiffs representing Native American Montanan voters, Judge Jessica Fehr of the Thirteenth Judicial District Court also issued a preliminary injunction against the restrictions on third party ballot collection services. Those plaintiffs filed a motion to participate in this appeal as intervenors, which this Court granted.

STATEMENT OF FACTS

As voters in Montana have increasingly turned to mail voting, two Montana laws put the voting rights of thousands of Montanans at serious and unjustifiable risk. Even before the pandemic, the vast majority of Montana voters (nearly three out of four) were casting their ballots absentee. Many relied upon assistance provided by third-party organizers to collect and hand deliver their voted and sealed ballots to ensure that they reached elections officials in time to be counted. But in 2018, the Legislature passed the Assistance Ban (or "Ban"), Mont. Code Ann. § 13-35-701 *et seq.*, broadly outlawing the practice. At the same time, the Legislature maintained the strict 8 p.m. election day deadline for the receipt of almost all absentee ballots, which requires election officials to reject ballots received after that cutoff even if the voter completed and put their ballot in the mail prior to that deadline, and even if any delay in deliver was beyond their control. *See, e.g.*, Mont.

Code Ann. § 13-13-201(3) ("Election Day Cutoff" or "Cutoff"). Now, the Election Day Cutoff and Assistance Ban restrict mail voting in Montana from both directions: the Cutoff ensures that inconsistent and variable postal delivery timelines ultimately determine whether voters' ballots will be counted or discarded, while the Ban removes an important option for returning absentee ballots that previously allowed thousands of Montanans to ensure their timely, in-person delivery. As a direct result, thousands of voters risk being disenfranchised. Dkt. No. 25, at 8-10 (Findings of Fact, Conclusions of Law, and Order) (hereinafter "Op.").

The Election Day Cutoff requires that, to be counted, most—but not all—absentee ballots must be received by the county elections office on 8 p.m. on election day. Mont. Code Ann. § 13-13-211. That means that, regardless of when the voter casts their ballot, seals it in the envelope, and deposits it into the custody of the postal system—and regardless of whether the voter is responsible for any delay the ballot encounters in the mail—the voter is disenfranchised if the ballot is not delivered by mail to elections officials by 8 p.m. on election day. Op. 9. The evidence before the District Court established that delivery times may vary as much as two weeks in Montana, depending on a voter's location. *Id.* Even when ballots are postmarked in the same city, the time that it takes a ballot to arrive in a county elections office after being postmarked can vary from between one and seven days. *Id.* As a result, if an

absentee voter returns her ballot by mail, she must send it well before election day to increase the odds that she will not be disenfranchised by the Cutoff. *Id.*

However, not all voters who mail their ballots are subjected to the sanction of disenfranchisement if their ballot happens be delivered in the mail after the close of polls. Military and overseas voters who cast federal write-in ballots are not disenfranchised if their ballots are sent before the close of polls and received by 3 p.m. on the next Monday—six days after the election. Mont. Code Ann. § 13-21-206(c). This is possible because Montana elections officials do not finish processing ballots until well after the close of polls. Indeed, Montana law prohibits them from even counting provisional ballots—*i.e.*, ballots cast by voters whose eligibility to vote is uncertain—until the sixth day after the election. Mont. Code Ann. § 13-15-107. There is no reason why election officials could not count, during this same period, ballots that arrive after election day and are postmarked on or before election day, which would prevent thousands of Montana voters from having their ballots discarded and their votes rejected in the November election and in future elections.

The Assistance Ban makes it unlawful for a person to "collect" a voter's absentee ballot unless the person is an election official, a postal worker, the voter's family member, household member, or caregiver, or an "acquaintance" of the voter. Mont. Code Ann. § 13-35-703(2). And, except for election officials and postal workers, no one may collect and return more than six absentee ballots. In addition

to these strict limitations, when delivering a ballot to elections officials, a ballot collector must fill out a form that requires providing election officials with personal information, including the collector's address and phone number and the nature of their relationship with the voter, and sign it under penalty of perjury. *Id.* at § 13-35-703(3), -704. If that requirement is not intimidating enough, those helping with the delivery of absentee ballots now face a fine of $500 per ballot for a violation of any of the new prohibitions and requirements. *Id*. at § 13-35-705.

According to the Secretary, the restrictions imposed by the Assistance Ban do not apply to ballots returned by mail. Opening Br. at 28-29 (hereinafter "Br."). As a result, the Secretary takes the position that third parties can collect ballots for voters without limitation, so long as they return them through the mail, rather than by hand delivering them to elections officials.

STANDARD OF REVIEW

The grant or denial of injunctive relief is a matter within the broad discretion of the district court based on applicable findings of fact and conclusions of law. *Davis v. Westphal*, 2017 MT 276, ¶ 10, 389 Mont. 251, 405 P.3d 73. Accordingly, the Court reviews the grant or denial of a preliminary injunction for manifest abuse of discretion. *Weems v. State by & through Fox*, 2019 MT 98, ¶ 7, 395 Mont. 350, 355, 440 P.3d 4, 8. A manifest abuse of discretion is one that is "obvious, evident, or unmistakable." *Davis*, ¶ 10. To the extent the ruling is based on legal conclusions,

the Court reviews "to determine whether the interpretation of the law is correct." *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty.*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201.

SUMMARY OF THE ARGUMENT

Based on the largely undisputed factual record before it, the District Court did not manifestly abuse its discretion when it concluded that the Election Day Cutoff significantly burdens Montanans' right to vote and is not justified by any legitimate state interests. The State's abstract interest in setting election-related deadlines is not on trial, nor is the State's general interest in setting a deadline by when votes must be cast. Rather, the issue is the State's specific decision to disenfranchise thousands of voters who placed their voted ballots into the custody of the postal system before the close of polls, but whose ballots happen to be delivered by mail to an elections office after the close of polls. The State imposes the penalty of disenfranchisement upon these voters even though the State allows some ballots that arrive after the close of polls to be counted using an administratively feasible, postmark-based procedure. The District Court's remedial order—that otherwise valid absentee ballots postmarked on or before election day and received by the deadline for receipt of federal write in ballots, should be counted—is carefully crafted to fit within the State's existing timeframe for processing and counting ballots and to preserve the

requirement that ballots are cast by election day. The District Court did not manifestly abuse its discretion when it implemented this remedy.

The District Court also did not manifestly abuse its discretion when it concluded that the Assistance Ban significantly burdens the right to vote and is not justified by any legitimate state interests. The undisputed factual record demonstrated that thousands of Montanans have relied upon organized ballot collection services provided by campaigns and civic organization, and that such services were particularly important for voters who faced unique challenges to accessing the franchise—most notably, Native American Montanans living on rural reservations. The Assistance Ban effectively shut down those organized ballot collection efforts. It also imposed onerous procedural requirements that reduced access to other important voting opportunities, such as ballot drop boxes, previously available to all absentee voters—including those who did not rely upon ballot collection services. The Secretary invokes the specter of voter fraud as an all-purpose justification for these significant burdens, but the undisputed factual record reveals no evidence of problems with prior organized ballot collection efforts, and Montana has long outlawed the conduct that the Assistance Ban purports to target. Nor are the Assistance Ban's specific prohibitions even logically linked to the fraud concerns invoked by the Secretary: under the Secretary's own interpretation, the law imposes no limits on ballot collection activities if collected ballots are returned by mail, but

severely restricts the exact same activities if the ballots are returned to election officials in person. As a result, the Assistance Ban selectively and irrationally restricts precisely the ballot collection activities that afford voters and election officials superior procedural protections and transparency. The District Court did not manifestly abuse its discretion when it enjoined this law.

ARGUMENT

A. The Montana Constitution requires that restrictions on the right to vote must satisfy strict scrutiny, but even if the Court applied a balancing test, the restrictions at issue still must satisfy a demanding standard.

The District Court faithfully applied this Court's precedents by subjecting the challenged restrictions on the fundamental right to vote to strict scrutiny. The Secretary unjustifiably asks this Court to depart from its longstanding precedent and apply what the Secretary believes should be a deferential standard of review. Br. at 8-13. The Court should decline the Secretary's invitation to weaken the protections that the Montana Constitution has long afforded the right to vote—a right that is preservative of all other rights. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). But, even if this Court were inclined to adopt a balancing test modeled upon the approaches used in the federal courts and some state courts, it should do so in a way that reaffirms the Montana Constitution's expansive protections for the right to vote, and reject the Secretary's request to cabin judicial scrutiny of voting restrictions to what would amount to a highly deferential form of rational basis review.

Montanans' right to vote, like the rights of free speech, association, and due process, is protected in the Declaration of Rights in the Montana Constitution and is, consequently, a fundamental right. *See State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 206, 113 P.3d 281, 288 ("A right is 'fundamental' under Montana's Constitution if the right . . . is found in the Declaration of Rights"); *accord Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 352, 325 P.3d 1204, 1210; *Cottrill v. Cottrill Sodding Serv*., 229 Mont. 40, 43, 744 P.2d 895, 897 (1987). All statutes that implicate such rights "must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 225, 988 P.2d 1236, 1246; *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 23, 314 Mont. 314, 322, 65 P.3d 576, 581 (applying strict scrutiny to voting restriction).

While the Secretary criticizes the District Court for applying the "wrong" standard of scrutiny, the Secretary admits that his preferred standard has never been adopted by this Court. Br. at 10. And the Secretary tacitly admits, by presenting no reasoned argument to the contrary, that neither the Ban nor the Cutoff can survive strict scrutiny. The District Court did not err by applying this Court's established

precedent to the challenged provisions or by concluding that those provisions were incapable of withstanding strict scrutiny.

To the extent that the Court accepts the Secretary's invitation to adopt a balancing test for challenges to restrictions on the right to vote, any such balancing test should comport with the strong protections afforded the right to vote by the Montana Constitution. Unlike the federal Constitution, the Montana Constitution contains an explicit and affirmative grant of the right to vote. Mont. Const. art. II, § 13; art. IV, § 2*; see also* Mont. Const art. II, § 4 (prohibiting denial of equal protection of the law). This Court has recognized that the Montana Constitution provides its citizens with broader protections than the federal Constitution with respect to certain fundamental rights enumerated in the Declaration of Rights. *See, e.g.*, *State v. Tackitt*, 2003 MT 81, ¶ 20, 315 Mont. 59, 65, 67 P.3d 295, 300 (right to privacy); *Snetsinger v. Mont. Univ. Sys*., 2004 MT 390, ¶ 15, 325 Mont. 148, 153–54, 104 P.3d 445, 449 (equal protection); *Woirhaye v. Montana Fourth Judicial Dist. Court*, 1998 MT 320, ¶ 14, 292 Mont. 185, 189, 972 P.2d 800, 802 (trial by jury). The fundamental right to vote deserves no lesser protection.[1]

[1] That voting rights were viewed as particularly sacrosanct to the drafters of the Montana Constitution is reflected in its very fabric. Montana is one of only seven states whose constitution contains two different affirmative grants of the right to vote, as well as a negative prohibition on infringements of that right. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 101-07, 107 n.91 (2014).

The Court should reject the Secretary's request to consider restrictions on the right to vote under an unduly deferential form of rational basis review, in which the State's incantation of abstract state interest would be enough to justify virtually any burden on the exercise of the right. *See* Br. at 12-13. Such a standard would not be consistent with the *Anderson-Burdick* framework applied by federal and some state courts, as the Secretary suggests. Quite the opposite: under *Anderson-Burdick*, even state regulations that do not impose "severe" burdens on the fundamental right to vote are subject to exacting forms of scrutiny, requiring the state to "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 v. Husted*, 768 F.3d 524, 545-46 (6th Cir. 2014), *vacated on other grounds* 2014 U.S. App. LEXIS 24472. Even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 538 (citing *Crawford v. Marion Cty. Election Bd*., 553 U.S. 181, 191 (2008) (controlling op.)). For example, the New Hampshire Supreme Court, which has adopted its own version of the federal balancing test set forth in *Ohio NAACP*, applies a heightened form of scrutiny to restrictions on the right to vote that are "significant, but not severe," which is similar to the intermediate tier of scrutiny recognized by both the New Hampshire Supreme Court and this Court for certain types of restrictions on constitutional rights *See Guare v. State*, 167 N.H. 658, 665-

66 (2015) (citing *Ohio NAACP*, 768 F.3d at 545); *see also Snetsinger*, ¶ 18, (applying "middle-tier scrutiny" if the law or policy affects a right conferred by the Montana Constitution but is not found in the Constitution's Declaration of Rights).

The Secretary resists these precedents for good reason: they are not satisfied by a state's assertion of vague, abstract, or hypothesized state interests, or by overbroad generalizations or justifications invented post-hoc in response to litigation. *See, e.g.*, *Guare*, 167 N.H. at 667. Instead, they would require that the Secretary show that the restrictions at issue are "actually necessary" to serve clearly identified state interests by providing sufficient evidence of the specific problem that purports to justify the restriction, and that the restriction "actually addresses" the state's interest by showing that it effectively targets the specific problem. For example, in *Obama for America v. Husted*, the federal court of appeals held that the state failed to offer evidence that local election officials actually struggled to cope with the period of early voting that the state eliminated, fatally undermining its "vague interest" in smooth election administration. *See* 697 F.3d 423, 434 (6th Cir. 2012). Similarly, in *Ohio NAACP*, the court found that the state failed to show that the particular type of voter fraud about which it expressed concern was "logically linked" to the restriction on early voting and registration at issue, and further failed to explain how the restriction would prevent the fraud. 768 F.3d at 547; *cf. Veasey v. Abbott*, 830 F.3d 216, 263-64 (5th Cir. 2016) (claim under Voting Rights Act)

(finding that Legislature's expressed concerns about noncitizens voting was misplaced, in part, because the challenged restriction "would not prevent noncitizens from voting, since noncitizens can legally obtain a Texas driver's license or concealed handgun license, two forms of [permissible] ID.").

Nor can the Secretary evade scrutiny of the challenged restrictions under a balancing test by attempting to downplay the burdens imposed upon voters. When courts applying a balancing test assess the severity of a law's burden on voting rights, they must consider the effects of the law on those voters who are actually impacted by it. *See, e.g.*, *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (explaining 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 hurdles to participation and are less likely to be able to overcome the increased costs of participation. *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). To be unconstitutionally burdensome, a law that imposes a significant or even a severe burden on the right to vote need not completely prevent voters from voting. Rather, the focus of the inquiry is on how affected voters' "ability to cast a ballot is impeded

by [the State's] statutory scheme." *Ohio NAACP*, 768 F.3d at 541; *see also Obama for Am.*, 697 F. 3d at 433 (holding burden of challenged voting practice was not "slight" even though it did not "absolutely prohibit early voters from voting"); *Guare*, 167 N.H. at 665 (holding that confusing language on voter registration form imposed at least an unreasonable burden because it "*could* cause an otherwise qualified voter not to register to vote") (emphasis added).

Moreover, when courts are confronted with laws that threaten disenfranchisement, they have held that such laws impose a severe burden on the franchise even when a relatively small number of voters are affected. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3 percent of total votes inflicted "substantial" burden on voters); *Ga. Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding severe burden where 3,141 individuals ineligible to register); *cf. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1015 (9th Cir. 2020) (en banc) (claim under Voting Rights Act) (rejecting the notion that disenfranchisement of 3,709 voters, which was .15 percent of all ballots cast, is minimal or trivial); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) (claim under Voting Rights Act) (discussing "basic truth that even one disenfranchised voter—let alone several thousand—is too many"). Indeed, voting restrictions may impose different kinds of

burdens upon different groups of voters, all of which are relevant to the court's balancing inquiry. *See, e.g.*, *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 311 (S.D.N.Y. 2020) (finding all voters were burdened by longer wait times caused by the "ripple effect[]" of voting restriction that applied only to certain voters).

While the District Court correctly applied strict scrutiny, it also concluded that Plaintiffs would still prevail under the balancing test adopted by other courts and advocated by the Secretary, because the challenged provisions significantly burden Plaintiffs' fundamental rights yet fail to advance any legitimate state interest that would justify these burdens. Op. 12. The District Court correctly applied the balancing test and did not err in reaching this alternative holding.

B. The Election Day Cutoff violates the fundamental right to vote.

The District Court did not manifestly abuse its discretion by finding that the Election Day Cutoff imposes significant burdens on the right to vote, and that no compelling or sufficiently weighty interest justifies those burdens. The District Court's order should be affirmed.

a. The Election Day Cutoff imposes a significant burden on the right to vote.

The District Court did not manifestly abuse its discretion by finding that the burdens imposed by the Election Day Cutoff—including, but not limited to, the disenfranchisement of thousands of voters—are significant. Expert testimony

credited by the District Court and unchallenged by the Secretary, Op. 7, demonstrated that thousands of Montanans have been disenfranchised because their ballots arrived after election day—at least 17,000 between 2006 and 2016, a figure that is likely an undercount. Dkt. 7 at 10-14. This expert analysis also demonstrated that late absentee ballot rejection rates in Montana are high relative to national rates and vary considerably by election type and county. *Id.*

The District Court also found, again based on uncontested evidence, that varying and inconsistent mail delivery times contribute to late-arriving ballots. Op. 9. For example, data collected by the Secretary from the 2017 special election showed delivery times ranging from one day to over two weeks. Dkt. 7 at 16. The District Court additionally found that the uncontested evidence showed that voters' confusion about the applicable deadline—based upon voters' lifetime experiences with postmark-based mailing deadlines for other government correspondence, such as tax returns—contributes to late arriving ballots. Op. 9. The same is true of mail delivery times—while voters reasonably expect that mail sent within the same city or county would arrive quickly, that is often not the case, as delivery times can increase significantly due to routing through geographically distant sorting centers. *See* Op. 9.[2] Evidence before the District Court demonstrated inconsistent guidance

[2] *See also* Dkt. 16, Ex. 3 at 33:7-14; Dkt. 16, Ex. 13, at 6 (voter's late ballot mailed from 6 miles outside of Hysham was sent to Forsyth, then Glendive, then to Billings and then back to Hysham).

from elections officials on mailing timelines, which has also changed from year to year, further contributing to confusion.[3] The District Court also found that these burdens disproportionately fall on first time voters and lower income voters with less education. Op. 7-8, 10. Finally, the District Court found that the COVID-19 pandemic will increase the use of absentee voting and exacerbate these burdens. *Id.* at 8.

Against these findings grounded in an uncontested factual record, the Secretary can do little more than attempt to minimize the significant burdens imposed by the Cutoff on Montanans' right to vote. The Secretary incorrectly argues that voters whose ballots are rejected because of the Cutoff have not been burdened, because there is no right to vote after election day. Br. at 15. This argument has no application to the claims in this case, which exclusively concern ballots that are cast by voters *before* the close of polls and placed into the custody of the postal system *before* the close of polls but happen to be delivered by the postal system to an elections office after election day. The Secretary's related argument—that the Election Day Cutoff treats all voters the same because both absentee voters and in-person voters must ensure that their ballots are received 8 p.m.—has it completely backwards. Br. at 16. As the Secretary admits, in-person voters who are *in line* at the polling place by 8 p.m. must be allowed to cast a ballot that is counted—even if they

[3] Dkt. 8 ¶¶ 12-13; Dkt. 16, Ex. 14, at 2; Dkt. 16, Ex. 15, at 2.

receive and cast their ballot well after the statutory poll closing time. *Id.* This is an eminently sensible rule: in-person voters who show up to their polling place ready to vote should not be disenfranchised because a polling place line caused by unanticipated administrative bottlenecks or voter enthusiasm prevents them from casting their ballot by 8 p.m., even though the voter, in theory, could have taken into account the possibility of such issues and arrived earlier to make sure that their vote would be cast by 8 p.m. The same principle applies with equal force to absentee voters. Voters who have placed their ballots into the custody of the postal system prior to the close of polling places have effectively "joined the line" to vote, and it is of no moment that—for whatever reason—their ballots happen to be delivered by the postal service to their elections officials after polls have closed. The District Court did not manifestly abuse its discretion when it concluded that the Cutoff fails to treat in person and absentee voters uniformly for this very reason. Op. 11.

The Secretary's attempts to shift blame for the disenfranchising effects of the Cutoff onto voters and the postal system are unsupported by the record and inapposite as a matter of law. Br. at 16-18. The Secretary incorrectly suggests that voters are at fault if they wait "too long" to mail their ballot or fail to follow instructions included in the absentee ballot envelope, and that issues with the postal service's delivery timeframes are beyond the state's control and are therefore irrelevant to the burden imposed by the cutoff. But the record demonstrates that

precisely *because of* the Cutoff, whether a ballot is "on time" rather than "too late" depends on factors outside the voter's control and turns not only on when the voter happens to place the ballot into the mail system, but also where. While voters may attempt to follow mailing guidelines—which themselves vary by county and from election to election—the Cutoff ultimately prevents voters from ensuring that they have mailed their ballot "on time" because inconsistent and variable postal delivery timelines determine whether their ballot will be counted or discarded. Moreover, the State chose to rely upon the postal service when it affirmatively encouraged Montana citizens to vote by absentee ballot. Having done so, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted. *See Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018); *see also Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010); *Obama for Am.*, 697 F.3d at 430-31.

The Secretary points to no evidence to support his related argument that the Election Day Cutoff provides a bright line rule, while a postmark deadline would create confusion. Br. at 19. While the Secretary observes that mail is not always postmarked at the precise location and exact time it is mailed, the testimony of the USPS representative submitted by the Secretary himself makes clear that mail *is* postmarked the same day it is collected. Dkt. 20, Ex. C, at ¶¶ 4, 7. As a result, it is much easier for a voter to control when her ballot is *postmarked* than it is for her to

control when it will actually be *delivered* to elections officials. For example, as the Secretary's own data demonstrates, the time it took to deliver ballots *after* they were postmarked at the same USPS distribution center ranged from one to seven days. Dkt. 7 at 16.[4] The Secretary's remarkable assertion that voter confusion related to the receipt deadline was caused by the District Court's order is baseless and unsupported by evidence. Br. at 18. All of the evidence of disenfranchisement and voter confusion credited by the District Court in its Order concerned elections that took place before the District Court issued its Order.

The Secretary's other attempts to minimize the burden imposed by the Cutoff also miss the mark. While the Secretary suggests that the District Court's ruling could call into question other election deadlines, he only serves to prove Plaintiffs' point. Br. at 18. The Secretary cites the voter registration deadline as an example, but neglects to mention that the state already uses a postmark deadline (not a receipt deadline) for voter registration applications. Mont. Code Ann. § 13-2-301. Moreover, the applicable constitutional test is necessarily fact-specific, and the District Court's reasoning in no way suggests that *any* election deadline is invalid simply because a voter could be confused by it. In each circumstance, the Court must

[4] The Secretary's brief cites a website opining on postmarks that was published more than a month *after* the District Court's opinion issued. Br. at 19. This document was not part of the record before the District Court below and is not properly before this Court on appeal.

necessarily weigh the evidence regarding the burdens that the law imposes on voters. Here, Plaintiffs proved, through largely unrefuted evidence, that the burden of the Cutoff on voters is significant.

Finally, the Secretary's contention that the cutoff cannot impose a burden simply because it has been on the books for years lacks merit. Op. 13-14. The passage of time does not make a law less burdensome or more constitutional—indeed, experience often lays bare the burdens imposed by the law. Courts routinely grant requests for preliminary injunctions where challenged voting restrictions have been in place for a number of years. *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1329 (N.D. Ga. 2018) (preliminarily enjoining Georgia's signature matching procedures, which had been in place for over a decade); *see also Weems*, ¶ 26 ("That a statute has been on the books for some time is not the relevant inquiry when entertaining a request to enjoin it.").

b. The Election Day Cutoff is not justified by any sufficiently weighty state interest.

Regardless of the standard applied, the District Court did not manifestly abuse its discretion by finding that no compelling or sufficiently weighty interest justifies the burden imposed by the Cutoff. The District Court's Order explains how the substitute procedural safeguard of a postmark deadline—a deadline already used by Montana for voter registration applications, some absentee ballots themselves, and which is utilized in numerous other states, including the two states that process the

largest number of absentee ballots—can largely resolve the burdens imposed by the Cutoff. While the Secretary's Brief does not seriously contest these points, it nonetheless contends that the Election Day Cutoff serves state interests of such overwhelming importance that the right of thousands of eligible voters to have their vote counted must fall by the wayside, and that Plaintiffs' requested relief is unworkable. None of the Secretary's arguments holds up to scrutiny.

The Secretary's invocation of state interests in setting deadlines and ensuring electoral integrity, Br. at 20-21, exemplifies precisely the kind of vague and abstract justifications that courts have found insufficient when weighed against substantial burdens imposed by a challenged election law. The Secretary never explains why the state interest in setting election deadlines necessitates the state's current practice of throwing out some absentee ballots that arrive after the close of polls while counting other ballots that arrive after the close of polls. This is because nothing about the relief sought by Plaintiffs undermines the state's ability to set election deadlines. Under the District Court's remedial order, no one can vote after the close of polls: absentee ballots must still have been cast and placed into the custody of the postal service before the close of polls in order to be counted. Similarly, the Secretary fails to offer any argument—let alone evidence—as to why counting all absentee ballots postmarked on or before election day, rather than only some of those ballots, would compromise "election integrity" in any way.

The Secretary's asserted interests in uniformity and timely reporting election results fare no better. Even under the Secretary's preferred balancing test, the Secretary again fails to demonstrate why the Cutoff is actually necessary, meaning it actually addresses, the interests asserted by the Secretary. *See, e.g.*, *Ohio NAACP*, 768 F.3d at 545-46; *see also Mont. Envtl. Info. Ctr.*, ¶ 63 (holding under strict scrutiny, state must demonstrate its action is closely tailored to effectuate the asserted interest and is least onerous path that can be taken to achieve state's objective). As the District Court correctly found, the Secretary failed to present any evidence that the Cutoff furthers those interests. Op. 11.

For example, the Secretary insists that the Cutoff is necessary to maintain timely reporting of election results, which requires the counting of votes as soon as polls close. Br. at 22-23. But the relief sought by Plaintiffs does not meaningfully impinge upon this interest, and the Secretary offered no evidence to the contrary. Most obviously, counties would remain free to count and report ballots in their possession on election night. Moreover, under the existing statutory scheme, counties already receive and count ballots after election day: federal write-in ballots for military and overseas voters may be received and counted until the Monday after election day, and provisional ballots *cannot* be counted until the sixth day after the election. Mont. Code Ann. §§ 13-21-206, 13-15-107.

Nor can the Secretary credibly argue that the Election Day Cutoff is necessary to ensure that certificates of nomination or election—*i.e.*, the final, official results of the election—are timely issued. Montana does not limit the number of days the state has to certify election results after election day, and while the county canvassing board must meet within two weeks after election day, it may postpone the canvass from day to day until all returns are received. Mont. Code Ann. §§ 13-15-507, 13-15-401, 13-15-402. Further, the requested relief does not alter statutory timelines: the current statutory scheme already assumes that process of counting ballots is not complete until the Monday after the election *at the earliest*, when federal write in ballots are due to be received and provisional ballots are allowed to be counted. Mont. Code Ann. §§ 13-21-206, 13-15-107. Nor does the Secretary cite any evidence that states that use a postmark deadline have any difficulty meeting applicable canvassing deadlines, let alone identify any reason why Montana would. *See* Dkt. 21, Ex. 1 at ¶ 13 (although populous county in a postmark deadline state receives large number of ballots after election day, elections officials have no issues meeting certification deadlines). The Secretary's speculation that counting additional ballots that arrive after election day would cause personnel issues and resource constraints is just that—speculation without an evidentiary basis in the record. Br. at 25-26.[5] It

[5] On this point, the Secretary exclusively relies upon the May 22 Declaration of Dana Corson, the Secretary's Elections Director. Br. at 26. The Secretary first submitted this declaration after the District Court's Order, in support of the Secretary's motion

is also at odds with the Secretary's repeated contention that the number of voters disenfranchised by the Cutoff is so small as to be unworthy of constitutional protection.

The Secretary's insistence that the Cutoff is necessary to maintain "uniformity" in the election code—a term the Secretary invokes to lump together several disparate strands of argument—is similarly unsupported. The Secretary suggests, without further explanation, that the "entire" statutory scheme will "unravel" because the Cutoff is referenced in multiple statutes across the election code and the Complaint did not cite every single reference to the Cutoff in the code. *See* Br. at 23. But the Secretary has never suggested that there is any substantive difference between the references to the Cutoff set forth in these different statutory provisions—because there is none. And the District Court's Order is clear: "*All* absentee ballots postmarked on or before election day shall be counted, if otherwise valid[,]" if received by the relevant deadline. Op. 17 (emphasis added). As a result, there can be no serious argument that the District Court's Order applies only to some absentee ballots but not others. The District Court's ruling in no way undermines

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to stay the District Court's Order. Even if this conclusory declaration were properly before this Court on appeal, it lacks any explanation of how, as a practical matter, the District Court's remedial order interacts with election dates or election procedures to adversely affect election staffing and processes. *See, e.g.*, *Ohio NAACP*, 768 F.3d at 549 (state failed to present evidence that remedial measure would actually impose undue or burdensome costs).

any interest in uniformity—much less risks "unravel[ing]" the "whole statutory scheme."[6]

The handful of purported conflicts with other statutes advanced by the Secretary under the umbrella of "uniformity," Br. at 26-27, are not properly before the Court on appeal. These issues were raised for the first time in the Secretary's brief in support of his motion to stay the District Court's Order, and the District Court was never afforded an opportunity to evaluate the Secretary's arguments or evidence.

But, in any event and as set forth in greater detail in Plaintiffs' response in opposition to the motion to stay, each purported conflict is meritless. *First*, voters with disabilities return their ballots to county elections offices the same way as other absentee voters and are subject to the same Cutoff enjoined by the Court's order. Br. at 27; Plaintiffs' Opp. to Mot. to Stay, Dkt. 31, at 11-12. *Second*, county elections officials could avoid any possibility of confusion regarding which ballot from a uniformed or overseas voter should be counted by implementing a simple procedural step in their existing process. Br. at 26; *see* Dkt. 31, at 12-13. *Third*, while the Secretary's concern about the inadequate period of time afforded Montana voters to fix signature-related ballot deficiencies is well-founded, Br. at 26-27, the issue he highlights was not created by the District Court's Order—rather, it is equally

[6] For the avoidance of any doubt, Plaintiffs have since sought and received leave to amend the complaint to specifically cite each reference to the Cutoff across the election code.

applicable both to ballots that arrive after election as well as ballots that arrive on or just before election day. *See* Dkt. 31, at 14-15. The Secretary reasons that all voters whose ballots happen to arrive in the mail after election day should be completely disenfranchised because a different unconstitutional law could cause some fraction of those voters' late-arriving ballots to be rejected. This defies logic. Moreover, Plaintiffs have already received leave to amend their Complaint to challenge this unconstitutionally restrictive period for resolving absentee ballots with perceived signature deficiencies.

The Secretary's argument that the District Court somehow exceeded its authority by entering its remedial order is similarly flawed. Br. at 24-25. Courts retain broad discretion to grant preliminary injunctive relief, *see Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 264, 405 P.3d 73, 85, and an injunction is an equitable remedy to be fashioned tailored to the specific circumstances of the case. *See Mont. Tavern Ass'n v. State By & Through Dep't of Revenue*, 224 Mont. 258, 265, 729 P.2d 1310, 1315 (1986). The District Court did not manifestly abuse its discretion when it implemented a remedy to the unconstitutional Cutoff that affords additional procedural protections—*i.e*. a postmark-based deadline—already used in identical or analogous election processes,[7] carefully crafted to fit within the State's

[7] *See* Mont. Code Ann. §§ 13-21-206 (sent-by deadline for federal write-in ballots), 13-15-107 (postmark deadline for provisional ballot verification information), 13-2-301(3) (postmark deadline for voter registration applications).

existing timeframe for processing and counting ballots, and which preserves the requirement that ballots be cast by voters by election day. This was consistent with approaches taken by other courts in analogous contexts. *See, e.g.*, *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 910 (S.D. Ohio), *aff'd*, 697 F.3d 423 (6th Cir. 2012) (remedying burden of early voting restrictions by allowing early voting for all voters during days and times when State already permitted early voting for some voters).

For all the reasons above, the District Court did not manifestly abuse its discretion when it found that the Secretary "failed to demonstrate through competent evidence that there is any compelling state interest that warrants the burdens and interference on the right to vote" imposed by the Election Day Cutoff. Op. 12.

C. The Assistance Ban violates the fundamental right to vote.

The District Court did not manifestly abuse its discretion by finding that the Assistance Ban imposes significant burdens on the right to vote, and that no compelling or sufficiently weighty interest justifies those burdens. The District Court's order should be affirmed.

a. The Assistance Ban imposes a significant burden on the right to vote.

The District Court did not manifestly abuse its discretion by finding that the burdens imposed by the Assistance Ban are significant. Op. 7-8. Undisputed and unrefuted testimony from affiants credited by the District Court showed that before the passage of the Ban, the Plaintiffs, other political campaigns, and civic

organizations provided ballot collection services to thousands of voters. Op. 7-8.[8] Ballot collection services are particularly critical for voters whose personal circumstances, such as physical disabilities, work or family care obligations, or lack of access to mail service or transportation, interfere with their ability to return their absentee ballot on their own. Testimony before the District Court described how those involved in get-out-the vote initiatives provided crucial assistance to Montana citizens who would not have submitted their ballots without that support. Op. 7-8.[9] The testimony also established that organizations providing ballot collection services went to great pains to protect the sanctity of voters' ballots.[10]

The Election Day Cutoff only heightens the importance of ballot collection services. Expert testimony demonstrated that many voters return their absentee ballot during the week before an election: more absentee ballots are returned on election day than any other day. *See* Dkt. 7 at 8-10. Because of postal delivery timeframes, there is a significant risk that ballots mailed within a week of an election will not arrive in time to be counted, which makes returning ballots in person the

[8] *See, e.g.*, Dkt. 8 at ¶¶ 6-9, 14-20; Dkt. 14 at ¶ 5, 7-11, 26; Dkt. 10 at ¶¶ 5-10; Dkt. 13 at ¶¶ 3-4; Dkt. 9 at ¶¶ 3-12; Dkt. 16, Ex. 3 at 72:12-19; Dkt. 15 at ¶¶ 19-20; Dkt 16, Ex. 23 at ¶ 14.

[9] *See, e.g.*, Dkt. 12 at ¶¶ 3-9, 16 (students, first-time voters); Dkt. 14 at ¶¶ 14-25 (students with full-time jobs, low-wage workers, rural residents); Dkt. 9 at ¶¶ 3-12 (voters with disabilities); Dkt. 10 at ¶¶ 11-12 (working parents); Dkt. 13 at ¶ 12 (elderly voters, voters with mobility issues); Dkt. 8 at ¶ 19 (same).

[10] *See, e.g.*, Dkt. 8 at ¶¶ 15-17; Dkt. 12 at ¶¶ 10-14; Dkt. 14 at ¶ 12; Dkt. 10 at ¶¶ 7-8, 13; Dkt. 11 at ¶ 8; Dkt. 13 at ¶¶ 4, 14.

only feasible option. Ballot collection is vital for many voters who wait until the last week and also for the many voters who mistakenly but reasonably believe their ballot will count if deposited in the mail by election day.[11]

The Assistance Ban burdens the right to vote by eliminating access to absentee ballot return services upon which thousands of voters have historically relied. The Ban's severe limitations on who is allowed to provide ballot collection services, and on the number of ballots that can be collected, effectively shut down the organized ballot collection services of civic organizations and campaigns that have helped thousands of Montana citizens to vote when they otherwise would not have.[12] The District Court found that the Ban's elimination of these services falls heaviest on those who face unique challenges to exercising their franchise—the elderly, voters with disabilities, first-time student voters, and parents working multiple low-wage jobs. Op. 7-8. The District Court credited the unchallenged testimony of Plaintiffs' expert, whose report explained how decades of political science research and data demonstrate the depressive effects of laws like the Ban on voter turnout, and how voters with lower educational attainment and socioeconomic status are less able to overcome such effects than higher income, more highly educated voters. Op. 7; *see* Dkt. 7 at 5-7, 14-18; *cf. Veasey v. Abbott*, 830 F.3d 216, 263-64 (5th Cir. 2016)

[11] Dkt. 12 at ¶¶ 8-9, 16; Dkt. 10 at ¶¶ 9, 12; Dkt. 14 at ¶¶ 14, 19; Dkt. 8 at ¶¶ 10-13.
[12] Dkt. 14 at ¶ 13-29; Dkt. 8 at ¶¶ 8-9, 21; Dkt. 11 at ¶¶ 6-7, 9; Dkt. 10 at ¶¶ 6, 10, 14-15; Dkt. 13 at ¶ 13; Dkt. 9 at ¶¶ 15-18.

(crediting district court's reliance on cost of voting framework to conclude voter ID law would decrease voter turnout).

Perhaps no segment of Montana voters is more burdened by the Ban than Native American voters in rural tribal communities, who have needed to rely on ballot collection at particularly high rates because of geographic isolation, unreliable access to mail service, high rates of poverty, and other factors linked to the State's legacy of racial discrimination. The disenfranchising effects of the Assistance Ban on Montana's Native American communities were forcefully demonstrated by the evidence presented by the *Western Native Voice* plaintiffs and credited by the *Western Native Voice* District Court in its order enjoining the Assistance Ban. *See* Dkt. 16, Ex. 22; Dkt. 6; (Appendix A) , Order, *Western Native Voice et al. v. Stapleton et al*., Cause No. 20-0377 (13th Jud. Dist. July 7, 2020); *see also Hobbs*, 948 F.3d at 1005-07, 1033 (en banc) (holding Arizona's ballot collection restrictions disparately burdened minority voters in violation of Voting Rights Act).

The Ban also burdens the right to vote by eliminating voting opportunities previously available to all absentee voters—including those who did not rely upon ballot return services—by restricting delivery of absentee ballots to sites staffed by elections officials during business hours, adding confusing procedural steps, and increasing wait times. *See Common Cause/N.Y.*, 432 F. Supp. 3d at 311 (finding all voters were burdened by "ripple effect[]" of voting restriction). Prior to enactment

of the Ban, elections officials introduced alternative methods for voters to return absentee ballots, including the use of secure drop boxes that enabled voters to submit absentee ballots outside normal business hours and at times that meshed with voters' work schedules and other daily obligations.[13] But as a result of Assistance Ban, any voter who attempts to return a ballot in person—even someone just delivering their own ballot—must stand in line to be interrogated by an election official in order to determine whether the voter is a "collector" who must sign the registry required by the law.[14] This effectively prohibits the use of unstaffed drop boxes, which has caused counties to reduce the overall number of drop boxes and the hours during which they are available. *See* Op. 8. For these reasons, as well as the significant administrative burdens the Ban imposes, county election officials have voiced strong opposition to the Ban. *See* Op. 10.

The District Court correctly found that the Secretary failed to present any evidence to dispute the Plaintiffs' evidence of the significant burdensome impact of the Assistance Ban or its disproportionate impact on vulnerable groups of voters. Op. 8. The Secretary, to his credit, all but concedes this point on appeal. Br. at 28-29. The most the Secretary can muster is that voters can return their ballots by means other than ballot collection services. *Id.* But as numerous courts have held, voting

[13] *See, e.g.*, Dkt. 13 at ¶ 10; Dkt. 16, Ex. 3 at 24:20-25:4; Dkt. 16, Ex. 10 at 2; Dkt. 16, Ex. 1 at 27:3-18.
[14] Dkt. 16, Ex. 3 at 24:20-25:9, 26:1-4; 30:22-33:6; Dkt. 13 at ¶ 10.

restrictions can still impose unconstitutional burdens even when they do not absolutely prohibit voters from voting. *See infra* at 13-14. And as the testimony before the District Court showed, for many voters, access to organized ballot collection services was the difference between voting and not voting at all. *See infra* at 30.

For all these reasons, the District Court did not manifestly abuse its discretion by finding that the burdens imposed by the Assistance Ban are significant.

b. The Assistance Ban is not justified by any sufficiently weighty state interest.

The District Court did not manifestly abuse its discretion when it found that the Assistance Ban serves no legitimate purpose. Op. 10. No such purpose is evident in the legislative history—no evidence was presented of problems with prior organized ballot collection efforts. Op. 10. To the contrary, Montana's front-line election officials testified that ballot collection has not resulted in any voting irregularities and that there was no legitimate need for the Ban. *Id.*; Dkt. 15 at ¶¶ 8-11; Dkt. 16, Ex. 1 at 7:5-8. Despite an extensive review, Plaintiffs' expert was unable to identify even a single case of documented fraud relating to ballot collection in the State. Op. 9. Moreover, Montana has long outlawed voter coercion and ballot tampering. *See* Mont. Code Ann. § 13-35-205. The fact of the matter is that the Ban does not actually target fraud; it instead "forbids *non-fraudulent* third-party ballot collection." *Hobbs*, 948 F.3d at 1036 (holding anti-fraud justification for Arizona

ballot collection ban "seems to have been contrived" given absence of evidence of fraud perpetrated through ballot collection and pre-existing procedural safeguards and prohibitions on ballot tampering).

Because the Assistance Ban does not further any state interest, let alone a compelling interest, it does not withstand even the first step of strict scrutiny. *See, e.g.*, *Wadsworth v. State,* 275 Mont. 287, 303, 911 P.2d 1165, 1174 (1996) (state must "prove the compelling interest by competent evidence"). Nor can the Secretary demonstrate that the Ban satisfies the second step, which requires narrow tailoring to achieve the purported interest. Indeed, Montana could employ less restrictive means than the Ban to provide additional safeguards for ballot collection—for example, by requiring some of the best practices already voluntarily implemented by organized ballot collection programs.[15] But, as testimony before the District Court showed, when county election administrators proposed such ameliorative amendments to the Ban in order to address their significant concerns about the Ban's negative impact on voters and elections administrators alike, the sponsor of the legislation rejected them out of hand. Dkt. 15 at ¶¶ 12-16; *see Dorn v. Bd. of Trs. of Billings Sch. Dist. # 2*, 203 Mont. 136, 150, 661 P.2d 426, 433 (1983) (noting less restrictive means "were not tried"). For the same reasons, the Secretary cannot save the law under a balancing test: the Secretary fails to articulate specific, rather than

[15] *See supra* note 10.

abstract state interests, or explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth. *See also Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 754 (9th Cir. 2018) (Thomas, C.J., dissenting), *panel majority opinion vacated en banc* 911 F.3d 942 (9th Cir. 2019) *and rev'd on other grounds en banc* 948 F.3d 989 (9th Cir. 2020) (even if burden imposed by ballot collection ban were minimal, justifications based on generic concerns regarding voter fraud are not enough to withstand scrutiny under balancing test).

The Secretary's Brief addresses none of that evidence credited by the District Court and instead casts about in vain for support from vague and unsubstantiated anecdotes from the Ban's sponsor and isolated allegations of election fraud *in other* states, Br. at 30, 32-33, 35, but none comes close to the "competent evidence" required to prove a compelling state interest. *See Wadsworth*, 275 Mont. at 303 ("Simply because the State alleges a compelling interest, does not obviate the necessity that the State prove the compelling interest by competent evidence."); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1228 (4th Cir. 1995) ("electoral 'integrity' does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction" (quotation marks omitted)).

The Secretary looks, without success, for support in the Ban's legislative history. Br. at 35. True, the bill's sponsor offered a few anecdotes about voters giving

a ballot collector their ballots and then calling law enforcement to report the collection activity as suspicious. But county election officials diligently followed up on the bill sponsor's concerns, and determined that in each of those cases, the ballots had been delivered to the county elections office on time and without issue. Dkt. 15 at ¶ 9. These kinds of vague and ultimately discredited assertions are not competent evidence of a problem necessitating the Ban, particularly in the face of competent testimony from elections administrators in opposition to the Ban and evidence of the lack of problems with ballot collection.[16] *See Wadsworth*, 275 Mont. at 303.

In the absence of a *Montana* interest, and belying his contention that one exists, the Secretary cites a Florida law professor's blog post—itself unbacked by any citation to authority—and three isolated instances of fraudulent behavior involving absentee ballots in other states. Br. at 30, 32-33. The Secretary also leans heavily on a single sentence of a 15-year old advisory commission report and the fact that some other states impose restrictions on ballot collection. Br. at 33-34. But just as the Ninth Circuit concluded in rejecting the argument that a single incident in North Carolina established that Arizona had a legitimate interest in outlawing non-

[16] The Secretary observes that there have been demonstrated cases of noncompliance with election laws in initiative petition signature gathering—contexts that have nothing to do with ballot collection or even voting. Br. at 34-35. The legislature has not reacted to these instances of misconduct by imposing relationship-based restrictions on who can collect petition signatures, or by restricting the number of signatures that any individual petition circulator can collect.

fraudulent organized ballot collection, an isolated example of absentee ballot-related fraud in another state has "little bearing" on Montana. *Hobbs*, 948 F.3d at 1037. The same is true of an advisory commission report's one sentence recommendation, which did not—and could not—account for the history of ballot collection in Montana and the specific role that ballot collection plays in ensuring access to the franchise in this state. As in Arizona, "third-party ballot collection has had a long and honorable history" in Montana. *See id.* There is zero evidence of ballot-collection fraud in Montana, and the acts alleged in the criminal indictment in North Carolina were illegal under Montana law before the passage of the Ban, and would remain illegal if the Ban were no longer the law. *See id.*; *see also* Op. 15-17.

Even more troubling is the Secretary's argument that the Assistance Ban is justified solely by the need to ensure that voters feel secure in the voting process and promote public confidence. Br. at 31. The Ban's legislative sponsors cannot manufacture a compelling governmental interest by sowing public doubt through unsubstantiated—and in some cases, demonstrably false—allegations about misconduct committed by people providing ballot collection services. As the Missouri Supreme Court has explained, "[p]erceptions are malleable. While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of

shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights." *Weinschenk v. State*, 203 S.W.3d 201, 218 (Mo. 2006). Unfortunately, this tactic has been used to attempt to justify ballot collection restrictions in other states. As the Ninth Circuit put it, "if some Arizonans today distrust third-party ballot collection, it is because of the fraudulent campaign mounted by proponents of [the ballot collection ban]. Those proponents made strenuous efforts to persuade Arizonans that third-party ballot collectors have engaged in election fraud. [. . .] It would be perverse if those proponents, who used false statements and race-based innuendo to create distrust, could now use that very distrust to further their aims in this litigation. *Hobbs*, 948 F.3d at 1037. For these reasons, the State's abstract interest in promoting public confidence cannot justify the significant burdens imposed by the Assistance Ban.

The Secretary also incorrectly suggests that the voters' approval of the Ban should suffice to demonstrate its constitutionality. Br. at 31 (citing *Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 384, 632 P.2d 300, 303 (1981)). But this Court in *Greely* did not find that voter approval was alone sufficient to insulate a law from constitutional scrutiny. The issue in *Greely* was the significance of a lack of evidence of a state interest for an initiative that increased public disclosure of lobbying activities. *Id.* Unlike the legislative referendum at issue here, the process in Montana for passing initiatives does not include a legislative fact-finding mechanism. Given

the absence of such a mechanism, this Court concluded that requiring evidence "would result in the emasculation of the initiative process in Montana" such that "no initiative could withstand a First Amendment challenge." *Id.* Considering those concerns, the court concluded that the initiative did not need to "fall in its entirety." *Id*. at 383-84. Even so, the court proceeded to strike down part of the law, despite those concerns. *Id.* at 389.

Here, in contrast, there was ample opportunity to develop evidence of a compelling state interest. Before being submitted to a popular vote, the Ban went through both chambers of the legislature, each of which has the "fact-finding capabilities" absent from the initiative process. And competent evidence was introduced during the legislative process—evidence, in particular from elections officials, that the Ban was *not* needed and would only add to administrative burdens. The lack of any evidence of a state interest here is far more consequential, and *Greely*'s concerns about emasculating the initiative process are absent.

Stripped to their core, the Secretary's arguments rely entirely upon vague and abstract state interests in "electoral integrity," as well as on overbroad generalizations about hypothetical risks posed by ballot collection. *See, e.g.*, *Guare*, 167 N.H. at 667. But in order to show that the restriction is "actually necessary" under a balancing test, the Secretary must provide competent evidence of the specific problem justifying the restriction. For example, in *Ohio NAACP*, the federal court of

appeals held that the State had to do more than provide only "a handful of actual examples of voter fraud" and "general testimony regarding the difficulties of verifying voter registration" to establish that the restriction on early voting and registration was actually necessary. *See* 768 F.3d at 547. The Secretary can do no more than offer overbroad generalizations unsupported by evidence—such as his unsubstantiated belief that ballot collectors who are "known" to voters are less likely to tamper with ballots. Br. at 31.[17]

Nor can the Secretary demonstrate that the Assistance Ban is actually necessary, meaning it actually addresses the interests asserted by the Secretary. To the extent that the Ban is truly intended to prevent fraud by limiting which third parties can handle absentee ballots and the number of ballots they can handle, it contains a gaping hole: according to the Secretary, its restrictions do not apply to ballots returned by mail. Br. at 28-29. As a result, according to the Secretary, third parties can collect ballots for voters without limitation, so long as they return them

[17] The Secretary makes passing reference to an argument, not raised in the District Court, that the Absentee Ban serves a state interest in uniformity by requiring that absentee ballots be returned to elections officials through a similar method as how they were transmitted to the voter. Br. at 35-36. Even if this argument had been properly raised below, it constitutes precisely the kind of abstract state interest invented *post-hoc* in response to litigation that is insufficient to justify significant burdens on the right to vote. Indeed, the Secretary never explains why this specific kind of uniformity advances any state interest. *See, e.g.*, *Obama for Am.*, 697 F.3d at 442 (White, J., concurring) ("[U]niformity without some underlying reason for the chosen rule is not a justification in and of itself").

through the mail, rather than by hand delivering them to elections officials. But if people providing ballot collection services hand deliver ballots to elections officials, they are subject to the Ban's restrictions. As a result, the law permits a practice that is relatively riskier than the practice it bans (because there is no guarantee that mailed absentee ballots will arrive before the Cutoff) and which features relatively less transparency than the practice it bans (because the collector mailing ballots need not complete a form or interact in person with an elections official when dropping off ballots). Whatever else can be said of the law, the particular type of voter fraud for which the Legislature and the Secretary purport to express concern is not "logically linked" to the specific restrictions on ballot collection actually imposed by the Assistance Ban. *See Ohio NAACP*, 768 F.3d at 547.

For all the reasons above, the District Court did not manifestly abuse its discretion when it found that the Secretary "failed to demonstrate through competent evidence that there is any compelling state interest that warrants the burdens and interference on the right to vote" imposed by the Assistance Ban. Op. 12.

D. The District Court did not manifestly abuse its discretion when it evaluated the constitutionality of the Election Day Cutoff and the Assistance Ban on their own terms as well as together.

The Secretary correctly concedes that the cumulative burden imposed by both the Assistance Ban and the Cutoff is even greater than the burdens resulting from each independently. But it does not therefore follow that enforcement of the Cutoff

in the absence of the Assistance Ban no longer significantly burdens voting rights. Indeed, the District Court analyzed both the Cutoff and the Ban on their own terms, and only a handful of the District Court's findings described the two provisions operating in combination with each other to amplify the burdens they impose on the right to vote. *See, e.g.*, Op. 10 (discussing combined impact).

And in any event, unless and until the Cutoff and the Ban are permanently enjoined, voters must navigate both restrictions simultaneously. The Secretary provides no authority for his contention that courts can only scrutinize voting restrictions in isolation from the broader electoral environment in which they operate.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court affirm the District Court's May 22, 2020 Order.

Respectfully submitted this 27th day of July, 2020.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,997 words, excluding certificate of service and certificate of compliance.

DATED this 27th day of July, 2020.

/s/ Peter Michael Meloy
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