Jacqueline Harrington*
Nina S. Riegelsberger*
Tabitha Crosier*
Dechert LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036
jacqueline.harrington@dechert.com
nina.riegelsberger@dechert.com
tabitha.crosier@dechert.com
(212) 698-3500

Hartley West*
Iricel Payano*
One Bush Street, Suite 1600
San Francisco, CA 94104
Hartley.west@dechert.com
Iricel.payano@dechert.com
(415) 262-4500

Alex Rate
ACLU of Montana
PO Box 1968
Missoula, MT 59806
ratea@aclumontana.org
(406) 224-1447

Hillary Schneller*
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
hschneller@reprorights.org
(917) 637-3777

Attorneys for Plaintiffs All Families Healthcare, Blue Mountain Clinic and Helen Weems

**Admitted pro hac vice*

MONTANA FIRST JUDICIAL DISTRICT COURT,
COUNTY OF LEWIS & CLARK

ALL FAMILIES HEALTHCARE; BLUE MOUNTAIN CLINIC; AND HELEN WEEMS, MSN, APRN-FNP on behalf of themselves and their patients Plaintiffs, vs. STATE OF MONTANA; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLIE BRERETON, in his official capacity as Director of the Department of Public Health and Human Services Defendants.	Cause No.: DDV-2023-592 Hon. Judge Christopher D. Abbott **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

Plaintiffs challenge HB 937, which targets clinics that provide abortion care and their patients by imposing a licensing scheme on Plaintiffs simply because they provide abortion care. Like other anti-abortion laws Montana district courts and the Montana Supreme Court have held unconstitutional, HB 937 singles out clinics that provide abortion care and their patients by imposing a new, additional, and unnecessary regulatory scheme on them simply because they provide or seek abortion, in violation of Plaintiffs' patients right to privacy and personal autonomy.

Plaintiffs sought a temporary restraining order and preliminary injunction to bar enforcement of HB 937 prior to its October 1 effective date. The State filed a Combined Brief in Support of Defendants' Mont. R. Civ. P. 12(b)(6) Motion to Dismiss and Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Defs. Br."). Plaintiffs responded to the State's opposition to their request for a Temporary Restraining Order and Preliminary Injunction on September 26, 2023, and this Court entered a temporary restraining order on September 27. TRO & Order to Show Cause ("TRO"). Plaintiffs now file this opposition to the State's Motion to Dismiss.

The State appears to argue for dismissal solely on ripeness and standing grounds. Defs. Br. 5-7 (discussing ripeness); *see also* Defs. Br. 8-9 (discussing standing in the context of likelihood of success on preliminary injunction). The remainder of the State's brief is its argument for denying injunctive relief. Defs. Br. 7-19 (discussing standing and three of Plaintiffs' claims). Nonetheless, to avoid any doubt, Plaintiffs respond here as if each of the arguments the State presses was an argument for dismissal. None have merit. As set forth in Plaintiffs' Complaint, the briefing on Plaintiffs' request for a temporary restraining order and preliminary injunction, and here, Plaintiffs have standing, their case is ripe, and they have pleaded legally sufficient claims and supporting facts for their privacy, equal protection, and due process claims.

LEGAL STANDARD

Montana is a notice-pleading state. Rule 8 of the Montana Rules of Civil Procedure requires only that a complaint set forth a "short, plain statement of the claim." When considering a motion to dismiss under Mont. R. Civ. P. 12(b)(6), "all well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to plaintiff." *Sinclair v. Burlington N. & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 403-4, 200 P.3d 46, 53 (citation omitted).

Motions to dismiss under Rule 12(b)(6) are disfavored. *Fennessy v. Dorrigan*, 2001 MT 204, ¶ 9, 306 Mont. 307, 309, 32 P.3d 1250, 1252 ("A motion to dismiss is viewed with disfavor and rarely granted."). As the State acknowledges, a court should not dismiss a complaint unless "it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim that would entitle them to relief." Defs. Br. 4 (quoting *Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 391 Mont. 156, 159, 415 P.3d 486, 489). Plaintiffs have more than met their burden by pleading sufficient allegations and facts in their Complaint that, when taken as true and construed in the light most favorable to Plaintiffs, withstand a motion to dismiss under Mont. R. Civ. P. 12.

ARGUMENT[1]

I. PLAINTIFFS CLAIMS ARE RIPE AND THEY HAVE STANDING TO ASSERT EACH CLAIM.

The State is wrong that Plaintiffs claims are unripe, and that they do not have standing to assert them, unless and until DPHHS publishes final regulations implementing HB 937. *See* Defs. Br. 6-10. Plaintiffs' claims are ripe, and they have standing to assert each of them regardless of whether and when DPHHS publishes regulations, or the precise details of those regulations. Indeed, because standing and ripeness are jurisdictional, this Court could not have entered a temporary restraining order without first concluding that Plaintiffs have standing and that their claims are ripe. *See* TRO 5-8.

The basic purpose of the standing and ripeness requirements is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements and to ensure the proper parties are before the court. *McDonald v. Jacobsen*, 2022 MT 160, ¶ 8, 409 Mont. 405, 411-12, 515 P.3d 777, 781; *Reichert v. State*, 2012 MT 111, ¶ 54, 365 Mont. 92, 116, 278 P.3d 455, 472. A case is "unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *McDonald*, ¶ 8. Moreover, "[r]ipeness asks whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Reichert*, ¶ 55.

To establish standing, a plaintiff must demonstrate a "past, present or threatened injury to

[1] Plaintiffs' arguments in opposition to dismissal largely track their arguments in support of their request for a temporary restraining order and preliminary injunction. Plaintiffs incorporate by reference the arguments contained in their Opening Brief in Support of Application for Temporary Restraining Order and Preliminary Injunction and Reply Brief.

a property or civil right . . . that would be alleviated by successfully maintaining the action." *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 324, 371 P.3d 430, 436. "The alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 48, 435 P.3d 1187, 1194 (citations omitted). In a pre-enforcement challenge alleging a threat of future injury, a plaintiff "need not 'first expose himself to actual arrest or prosecution to be entitled to challenge the statute.'" *Gryczan v. State*, 283 Mont. 433, 445, 942 P.2d 112, 119 (1997) (quoting *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 302 (1979). A plaintiff must show only that the prospect of enforcement is "legitimate and realistic" rather than "imaginary or wholly speculative." *Id*. at 445-6, 942 P.2d at 119-20.

The State presents "conjoined" standing and ripeness issues here, meaning that ripeness "can be seen as 'the time dimension[] of standing.'" *Weems v. State,* 2019 MT 98, ¶ 11, 395 Mont. 350, 356, 440 P.3d 4, 9 ("*Weems I*"), (quoting *Reichert*, ¶ 55). Accordingly: "Whether framed as an issue of standing or ripeness, the [constitutional] inquiry is largely the same: whether the issues presented are definite and concrete, not hypothetical or abstract." *Reichert*, ¶ 56 (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010)) (alteration in original); *accord Weems I*, ¶ 12. Courts routinely find that cases are ripe where an injury is sufficiently likely to happen, and indeed have reached these conclusions in virtually identical contexts where a statute directs agencies to promulgate regulations. *See* Order Denying Defendants' Motion for Summary Judgment, *Mont. Democratic Party v. Jacobsen*, No. DV 21-0451, at 7 (13th Jud. Dist. July 27, 2022) (holding that "the plain language" of the challenged statute was clear that "whatever rule ultimately does get adopted" would harm the Plaintiffs) (attached as Exhibit A). Plaintiffs' Complaint pleads more than adequate facts to demonstrate this case presents a concrete controversy. *First*, HB 937 itself provides: "A person *may not* operate or advertise the operation of an abortion clinic unless the person is licensed by the department." HB 937, § 2(1) (emphasis added). That does not depend on whether regulations implementing HB 937 have been published. As this Court has observed when granting Plaintiffs' request for a temporary restraining order: "the plain language says that as of the effective date of HB 937, Providers cannot operate or advertise their services unless they are licensed by [DPHHS]." TRO 3. Accordingly, absent an injunction, "on October 1, 2023, if Providers are 'abortion clinics' within the meaning of HB 937, then they will be operating without a license in violation of the plain meaning of Section 2(1)." *Id.* at 4; *see also* § 50-5-111, MCA

(operating a "health care facility" without a required license is unlawful). Operating without the license newly required by HB 937 subjects Plaintiffs to criminal and civil penalties, or an injunction preventing the facility from operating. §§ 50-5-112, MCA, 50-5- 113(1)(a), 50-5-108; *see also* TRO 4. HB 937, § 2(1) alone thus subjects Plaintiffs to a concrete threat of future injury. *E.g.*, Compl. ¶¶ 76, 87.

As the State acknowledges, it cannot "diminish evidence of a credible threat of future injury simply by promising not to enforce the challenged statute." Defs. Br. 10; *see also Mont. Immigrant Justice All.*, 2016 MT 104, ¶¶ 24-25, 383 Mont. 318, 327, 371 P.3d 430, 438 (upholding standing for the pre-enforcement challenge of an immigration referendum even though the sitting Attorney General had "foresworn" enforcement of the referendum). Here, however, the State has not even done that. Although the State has cited difficulties with enforcing HB 937 before it finalizes regulations, it has refused to stipulate not to enforce HB 937 in the absence of those regulations. Compl. ¶¶ 73-34; Pls. Br. in Supp. App. for TRO & Prelim. Inj. ("Pls. TRO Br.") Exs. 1 & 2; *see also, e.g.*, Defs. Br. 6. A mere statement that HB 937 would not be enforced is insufficient, and the absence of any non-enforcement agreement or disavowal of enforcement underscores the concrete threat of future injury for Plaintiffs here.

Second, Plaintiffs' case is ripe and they have standing to assert their claims irrespective of the specific regulations DPHHS may adopt under HB 937. HB 937 itself sets out 15 categories across which DPHHS must issue regulations for abortion clinics. HB 937, § 3. Plaintiffs meet the definition of "abortion clinic," and, even without regulations, it is clear that Plaintiffs and their patients are "precisely the individuals against whom the statute is intended to operate." *Weems I*, ¶ 14. (quoting *Gryczan*, 283 Mont. at 446, 942 P.2d at 120). Regardless of what the regulations are or whether Plaintiffs can comply with them, Plaintiffs are "plainly . . . impact[ed]" by HB 937—which is all that standing requires. *Id*. Plaintiffs' claims are also ripe regardless of what the regulations are; HB 937 and the 15 categories it sets out to apply to Plaintiffs are enough to make this case far more than "hypothetical, speculative, or illusory." *Reichert*, ¶ 54.

Third, there is no question that DPHHS will publish regulations; there is merely a question of when DPHHS will finalize regulations and enforce them against Plaintiffs, imminently exposing Plaintiffs to a period of noncompliance. Compl. ¶¶ 76-87. The State confirms that HB 937 compels it to publish rules, Defs. Br. 3, which will be enforced against Plaintiffs. Plaintiffs are not required to identify a certain date by which the regulations may be enforced against them; a concrete threat

of "actual or imminent" future injury that is "not abstract, conjectural, or hypothetical" is enough. *See Bullock*, ¶ 31 (citations omitted).

Moreover, as Plaintiffs have detailed, Plaintiffs remain vulnerable to efforts to enforce regulations immediately upon or shortly after their publication. Compl. ¶¶ 76-82; *see also* Pls. Reply in Supp. App. TRO and Prelim. Inj. ("Pls. TRO Reply") 5-6. The rulemaking timeline is wholly within the State's control, and the rules governing rulemaking do not prevent the State from enforcing final regulations immediately or very shortly after they become final. *See, e.g.*, § 2-4-302, MCA (stating in (2)(d) that a proposal notice is required 30 days prior to proposed action but providing no required period between adoption of final rules, which may differ from proposed rules, and their effective date); *see also* Truax Aff. ¶¶ 7-15 (discussing rulemaking timeline, but no requirement of time between when final rules are publicly available in the Montana Administrative Register and when they take effect); Pls. TRO Reply 5 (discussing Medicaid coverage rule relating to abortion that was set to take effect one business day after it was finalized and made publicly available). The State has given Plaintiffs no assurance that it will give them time to assess, attempt to comply with, or seek non-emergency judicial relief once final regulations are adopted. Compl. ¶¶ 6, 76-82.

II. PLAINTIFFS PROPERLY PLEAD CLAIMS UNDER THE PRIVACY, EQUAL PROTECITON, AND DUE PROCESS GUARANTEES OF THE MONTANA CONSTITUTION.

The State's Rule 12(b)(6) arguments require this Court to examine only whether Plaintiffs' claims are adequately stated. *Gebhardt v. D.A. Davidson & Co.*, 203 Mont. 384, 389, 661 P.2d 855, 857 (1983). The Court's adequacy determination is limited to an examination of the contents of the complaint. *Meagher v. Butte-Silver Bow City & Cnty*., 2007 MT 129, ¶ 15, 337 Mont. 339, 343, 160 P.3d 552, 556. Additionally, the effect of a Rule 12(b)(6) motion to dismiss is that all the well-pleaded allegations in the complaint are admitted as true; therefore, it should not be dismissed "unless it appears beyond reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Id.* (citation omitted).

A. Plaintiffs state a claim that HB 937 violates their patients' right to abortion.

Article II, section 10 of the Montana Constitution guarantees an individual's right to "obtain[] a . . . pre-viability abortion . . . from a health care provider of her choosing." *Armstrong v. State*, 1999 MT 261, ¶ 2, 296 Mont. 361, 363-64, 989 P.2d 364, 368. All that is required to state

a claim under the privacy clause is to allege an infringement of the right to privacy. The burden then shifts to the State to defend its law under strict scrutiny. *Id*. ¶ 34. At the motion to dismiss stage, there is no inquiry into whether the law survives that exacting standard.

As Plaintiffs set out in their reply in support of their request for a temporary restraining order and preliminary injunction, the State attempts to evade Plaintiffs allegations that HB 937 implicates the right to abortion by recycling many of the same arguments the Montana Supreme Court unanimously rejected less than a year ago when it reaffirmed *Armstrong* in *Weems v. State*, 2023 MT 82, 412 Mont. 132, 529 P.3d 798 ("*Weems II*").

First, the Montana Supreme Court rejected the State's argument that laws like HB 937 do not implicate the fundamental right to privacy and instead are an exercise of the State's police power evaluated under rational basis review. *See* Defs. Br. 12. In *Weems*, as here, plaintiffs challenged a law that singled out abortion for unique restriction, above and beyond generally applicable law to which it was already subject. *Weems II*, ¶¶ 1-2, 4 (holding unconstitutional law targeting abortion by restricting its provision to physicians and physician assistants); *see also Armstrong*, ¶¶ 1, 21 (holding unconstitutional law restricting provision of abortion to physicians only). The State argued there "that because the statute does not implicate the decision to seek and obtain an abortion but, instead, implicates the State's authority to protect public health and safety, rational basis review should be applied to assess its constitutionality." *Weems II*, ¶ 42. The court "easily conclude[d] that ship has already sailed" because the restriction at issue "interferes with a woman's right of privacy and her decision to obtain lawful healthcare from a qualified provider of her choice." *Id.* ¶¶ 42-43. *Weems II* also confirmed that "[t]he State has a police power by which it can regulate for the health and safety of its citizens," but identified that "[t]he question is not whether the Legislature has authority to act, but rather whether the Legislature's action is constitutional." *Id*. ¶ 41. But "*Armstrong* unequivocally established that a woman has a fundamental right of privacy to seek abortion care from a qualified health care provider of her choosing, absent clear demonstration by the State of a 'medically-acknowledged, [bona fide] health risk'"—not mere rational basis review. *Id.* ¶ 37 (quoting *Armstrong*, ¶ 62).

Accordingly, there, as here, where a plaintiff alleges that a law singles out abortion for unique and additional regulation, they properly state a claim that the challenged law implicates the fundamental right to privacy. Plaintiffs have alleged more than sufficient facts to demonstrate that HB 937 implicates the right to abortion in the same way the restrictions in *Weems II* and *Armstrong*

did: it singles out abortion care for special and additional regulation, layered on top of generally applicable oversight and regulation to which Plaintiffs are already subject, and intrudes on individuals' fundamental right to privacy. *See* Compl. ¶¶ 39-70.

Second, the State again trots out *Wiser* and *Montana Cannabis* to advance its "police power" argument and to characterize this case as about whether Plaintiffs have a "fundamental right to operate abortion clinics free of state regulation." Defs. Br. 11-13. The Montana Supreme Court has also rejected these arguments. *Weems II*, ¶¶ 38-44 (discussing *Wiser*, *Mont. Cannabis*, and *Armstrong*). This case is not about whether patients have a fundamental right to access health care free from regulation, *Wiser v. State*, 2006 MT 20, ¶¶ 16-18, 331 Mont. 28, 33-34, 129 P.3d 133, 137-38, or about a fundamental right to access unlawful care, *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 22, 366 Mont. 224, 231, 286 P.3d 1161, 1166. Here, as in *Weems II* and *Armstrong*, Plaintiffs are already subject to oversight and regulation by the State, and, absent HB 937, they will continue to be. *See* Pls. Br. 4-5, 8-9. This case instead concerns "[d]ecisions about whom to trust with 'intimate invasions of body and psyche,'" which "must be the individual's decision, and state regulation must be based on protecting citizens from actual health risks." *Weems II*, ¶ 37 (quoting *Armstrong*, ¶¶ 58-59). *Armstrong* held and *Weems II* reaffirmed that, whatever else the express privacy guarantee may or may not encompass, it includes a right to access abortion from a chosen provider free from unwarranted government interference. *See Weems II*, ¶ 36 (citing *Armstrong*, ¶ 14).

It is true that not "every restriction on medical care *impermissibly* infringes" the right to privacy. Defs. Br. 12 (quoting *Mont. Cannabis*, ¶ 27, which in turn quotes *Wiser*, ¶ 15); Defs. Br. 13 (quoting similar statement in *Weems II*, ¶ 38). The Montana Supreme Court has repeatedly reaffirmed—including in *Wiser* and *Montana Cannabis*—that interfering with abortion care intrudes on an individual's fundamental privacy right. *Mont. Cannabis*, ¶¶ 26-28 (distinguishing claimed right to medical marijuana from fundamental right to abortion); *Wiser*, ¶¶ 16-18 (distinguishing claimed right to unregulated medical care from fundamental right to access abortion from competent, chosen provider). That intrusion triggers strict scrutiny. The *next* question—for the merits—is whether the restriction is a *permissible* or *impermissible* restriction on that right, *i.e.*, whether the State meets its burden to show the law can withstand strict scrutiny.

State v. Skurdal, which the State also cites, is not to the contrary. It states that fundamental rights are not "immune" from government regulation; "rather, there are just constitutional

safeguards which must first be met before a government may infringe on an individual's rights." 235 Mont. 291, 294, 767 P.2d 304, 306–07 (1988). Here, Plaintiffs have sufficiently pled facts to state a claim that HB 937 infringes the right to abortion and thus that strict scrutiny is the "constitutional safeguard" the State must meet to justify that infringement.

Third, the State is incorrect that Plaintiffs must demonstrate "that regulations licensing abortion clinics . . . are unreasonable or hurt patients." Defs. Br. 12. There is no threshold requirement for Plaintiffs to allege HB 937 implicates their patients' rights by some magnitude. *See, e.g.*, *Weems II*, ¶ 45 (state must "justify[] interference"); *Armstrong*, ¶ 63 (state must demonstrate compelling interest to interfere with "right of personal autonomy to choose P.A. Cahill" from whom to access abortion care in a case where physician provider worked at same clinic); *see also Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669, 440 P.3d 461, 496 (2019) (applying strict scrutiny to abortion laws under Kansas Constitution "once a plaintiff proves an infringement—regardless of degree"). Plaintiffs must simply plead facts to show the right is implicated, which they do here by alleging that HB 937 singles out a type of health care—abortion—by imposing a new, unique, and additional regulatory scheme. Compl. ¶¶ 39-70; *cf.*, *e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (reaching merits of First Amendment claim of a signage law that targeted speech based on its content); *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581-83 (1983) (reaching merits and finding ink and paper tax unconstitutional without regard to how large the tax was, but because it singled out the press).

Here, Plaintiffs have alleged a serious threat to their patients' rights: HB 937 threatens to force Plaintiffs to close their clinics, and so has the potential wholly to deny Plaintiffs' patients their right to a chosen provider. Compl. ¶¶ 6, 80. Plaintiffs' allegations that HB 937 implicates this right—short of denying them access entirely—are also sufficient on their own to state a claim under the privacy guarantee. *See* Compl. ¶¶ 5, 7, 76-82, 91. So, too, are Plaintiffs' allegations that HB 937 singles out abortion for a unique and additional regulatory scheme. Compl. ¶¶ 63-87. Each set of allegations is adequate on its own to state a claim that HB 937 implicates the right to privacy, and to reach the merits as to whether the State properly justifies intruding on "one of the most important rights guaranteed to the citizens of this State." *Weems II*, ¶ 36 (quoting *Gryczan*, 283 Mont. at 455, 942 P.2d at 125).

Because Plaintiffs properly plead that HB 937 implicates their patients right to abortion, the privacy claim the State moves to dismiss survives.

B. Plaintiffs state claims that HB 937 violates their patients' and their own rights to equal protection.

Far from "bare assertions," Plaintiffs have pled more than adequate facts to the state equal protection claims the State challenges in its motion to dismiss. At the motion to dismiss stage, this Court need not determine whether HB 937 in fact violates the equal protection clause. All Plaintiffs must do to state an equal protection claim is allege that HB 937 treats similarly situated classes differently. *See Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, 154, 104 P.3d 445, 449 (equal protection claim "must first identify the classes involved and determine whether they are similarly situated"). Classes are similarly situated if they are "equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Vision Net, Inc. v. Dep't of Revenue*, 2019 MT 205, ¶ 16, 397 Mont. 118, 125, 447 P.3d 1034, 1038 (internal citation and quotation marks omitted).

Plaintiffs allege that HB 937 treats Plaintiffs and their patients differently from similarly situated people seeking other types of health care (and specifically, pregnancy care) and similarly situated clinicians providing such care. *First*, Plaintiffs allege that HB 937 discriminates against people who seek abortion care as opposed to those who seek other pregnancy care, such as care for miscarriage or care for continued pregnancy. Compl. ¶¶ 2, 25, 31-32, 39, 58, 86, 95. These individuals are similarly situated with respect to their exercise of their fundamental right to privacy and personal autonomy to access pregnancy care from a chosen provider. *E.g.*, Compl. ¶ 2, 95. Under HB 937, Montana law interferes with the rights of the former group but not the latter. It is irrelevant to the State's regulation of abortion care that abortion is the intentional termination of a pregnancy and that a miscarriage is the spontaneous termination of a pregnancy. *See* Defs. Br. 15. The State does not even explain any such relevance. *Id*. Nor could they: the Montana Supreme Court months ago confirmed that abortion and miscarriage care are identical, asserting that the State's arguments otherwise "logically must fail." *Weems II*, ¶ 47; *see also id*. ("[T]he protocols, procedures, and the attendant complications of abortion care are identical to miscarriage care."); Pls. Reply TRO Br. 9-10 (citing similar cases where courts also considered how state treats miscarriage care or childbirth). The Complaint here alleges analogous facts. *E.g.*, Compl. ¶¶ 2, 31-32 (abortion and miscarriage care are identical in all relevant respects, and childbirth entails more risk than abortion); *id.* ¶¶ 2, 25, 58, 86 (despite greater risk associated with childbirth than abortion, Montana permits people to birth at home or in a birth center that does not have a DPHHS license).

Second, Plaintiffs allege HB 937 discriminates against patients based on how they exercise their right to access abortion from a chosen provider. People seeking abortion care from Plaintiffs, which are clinicians' offices, and people seeking abortion care from a DPHHS licensed facility are similarly situated with respect to their right to access abortion care from a chosen provider. *E.g.*, Compl. ¶ 25 (abortion is safe throughout pregnancy, without reference to setting in which it is provided); *id*. ¶ 64 (certain settings are exempt from "abortion clinic" licensure). HB 937 threatens the rights of the former group but not the latter.[2]

Third, HB 937 treats Plaintiffs, clinicians' offices that provide abortion care, differently than similarly situated clinicians' offices that provide identical care (*i.e.*, miscarriage care) or care that can be more complex (*i.e.*, care for continued pregnancy and childbirth). *See id.* ¶¶ 2, 31-32, 84-86, 97. Plaintiffs lay out the answers to the State's questions plainly in their Complaint. *Compare* Defs. Br. 15 ("What other clinics are Plaintiffs referring to"), *with e.g.*, Compl. ¶ 2, 58 (clinics that provide miscarriage care or care during childbirth); *compare* Defs. Br. 15 ("What is the identical or more complex care?"), *with e.g.*, Compl. ¶ 2, 25, 31-32 (miscarriage care and care during childbirth). Clinicians' offices that provide abortion and miscarriage care are similarly situated with respect to patient health and safety; they provide *identical* care. *See Weems II*, ¶ 47. In fact, here, they are the *same* offices—Plaintiffs' offices. *See* Compl. ¶¶ 9, 12, 31-32. Under Montana law—and specifically in Title 50, where HB 937 is codified—provision of miscarriage care does not trigger any additional facility licensure requirement for Plaintiffs and other clinicians' offices. *See* § 50-5-101(26)(b), MCA ("Health care facility" "does not include offices of private physicians, dentists, or other physical or mental health care workers regulated under Title 37."). Montana law likewise treats birth centers—where people *labor and deliver*, a process that entails more risk than abortion care—as clinicians' offices and does not require that they be licensed as facilities. *See id*; Compl. ¶¶ 56-58.

The State is incorrect that HB 937 does not single out abortion clinics. Defs Br. 12. To be sure, HB 937 "adds clinics that provide abortion care to a larger category of . . . health care

[2] Additionally, contrary to the State's argument, Plaintiffs do not need to allege that HB 937 discriminates by some magnitude, *i.e.*, that it would "would bar access to abortions." Defs. Br. 14. Rather, Plaintiffs must allege—as they have—that HB 937 discriminates against their patients based on how they exercise their fundamental right to access abortion from a chosen provider. *See infra* Argument § II.A (discussion of Plaintiffs' privacy claim).

facilities. *Id*. It also states "[a] person *may not* operate or advertise the operation of an abortion clinic unless the person is licensed by the department." HB 937, § 2(1). In doing so, HB 937 effectively eliminates the current approach to oversight and regulation of clinicians' offices that provide abortion—*and only* for clinics that provide abortion. *Compare* HB 937, §§ 1 & 2(1) (defining "abortion clinic" and adding it to definition of "health care facility"), with § 50-5-101(26)(b), MCA ("health care facility" does not include clinicians offices).

Because HB 937 treats people seeking and providing abortion care differently than similarly situated classes, the equal protection claims the State moves to dismiss survive.

C. Plaintiffs state a claim that HB 937 is unconstitutionally vague.

Plaintiffs have additionally pled adequate facts to state a vagueness claim against HB 937, which threatens Plaintiffs with civil and criminal penalties. *See* §§ 50-5-112, MCA, 50-5-113(1)(a), 50-5-108; *see also* TRO 4. As Plaintiffs set out in Complaint, HB 937 itself suffers from numerous vague terms, which regulations cannot cure, and DPHHS failed to promulgate regulations, making licensure by October 1 impossible. Compl. ¶¶ 71-72, 79-82, 100-102.

First, the State argues that, because DPHHS is still engaged in the rulemaking process to implement HB 937, Plaintiffs' vagueness challenge is premature. Defs. Br. 17. Yet, in making this argument, the State acknowledges that "no rules have been promulgated by DPHHS" and that Plaintiffs "lack [] information". Defs. Br. 17. In other words, the State recognizes that HB 937 has left a vacuum of information and ambiguities that remain unresolved in the absence of administrative rulemaking. *Cf. Mont. Democratic Party v. Jacobsen*, No. DV 21-0451, 2022 WL 16735253, ¶¶ 646-67, *75 (13th Jud. Dist. Sep. 30, 2022) (finding voting law unconstitutionally vague despite State's claims that "the administrative rulemaking process might provide the necessary clarity"). Hypothesizing a future rulemaking process within the Act does not absolve the Legislature of its legal obligations to provide clarity in the statute itself to put Plaintiffs on sufficient notice and satisfy Plaintiffs' fundamental right of due process. Even when DPHHS publishes rules, absent an injunction, HB 937 will be in effect, and Plaintiffs may have little to no notice to conform their practices before they are subject to HB 937's administrative rules. *See supra* Argument § I; *see also State v. Woods*, (1983), 716 P.2d 624, 627; Mont. Const. Art. 2 § 17.

Second, Plaintiffs have alleged that the Act is riddled with vague terms and conditions. For example, HB 937 requires that a person operating an abortion clinic provide an attestation that the applicant is "of reputable and responsible character" but does not provide any guidance on what

this would entail. HB 937 § 2(2)(a); Compl. ¶ 101. HB 937 also fails to provide any guidelines to govern enforcement of the Act and thereby prevent its application in an arbitrary or discriminatory manner. *See State v. Stanko*, 1998 MT 321, ¶ 23, 292 Mont. 192, 974 P.2d 1132, 1136 ("Vague laws may trap the innocent by not providing fair warning;" to prevent arbitrary and discriminatory enforcement, "laws must provide explicit standards for those who apply them." (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Instead, HB 937 leaves much of the licensure and operation of abortion clinics to the discretion of DPHHS through rulemaking authority. HB 937 § 3(2). Without critical guidelines in the statute itself, there is substantial risk that DPHHS, empowered by HB 937 with both rulemaking and enforcement authority, will promulgate rules that are then applied in an arbitrary or discriminatory manner. Regulations cannot cure this defect.

Third, although Plaintiffs plainly pled facts demonstrating that HB 937 intrudes on constitutionally protected rights, *see supra*, the State is wrong that, to state a vagueness claim Plaintiffs must allege that the law reaches constitutionally protected conduct separate and apart from alleging the due process violation itself. Defs. Br. 16-17. Due process violations accrue from vague laws, even if the underlying conduct they govern is not constitutionally protected. See *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc*., 455 U.S. 489, 497 (1982) ("A law that does not reach constitutionally protected conduct . . . may nevertheless be challenged on its face as unduly vague, in violation of due process."). Although the vagueness doctrine demands more clarity of laws that implicate the exercise of constitutional rights—as HB 937 does—the doctrine still applies to laws that have no effect on the exercise of other constitutional rights, including those that regulate activity such as medical care. *See id.* at 498. Vague laws "cannot possibly be . . . excuse[d]" simply because it is within "the power of a State" to regulate the conduct. *Baggett v. Bullitt*, 377 U.S. 360, 379–80 (1964) (finding Washington statutes requiring teachers and state employees, as a condition of employment, to take loyalty oaths are unconstitutional for vagueness). Such laws are "forbidden by the Constitution" just the same. *Id.* at 380.

Because Plaintiffs properly plead that HB 937 is void for vagueness, Plaintiffs' due process claim should survive.

CONCLUSION

For the foregoing reasons, the State's motion to dismiss should be denied.

Respectfully submitted October 6, 2023.

/s/ Alex Rate

Alex Rate
ACLU of Montana
PO Box 1968
Missoula, MT 59806
ratea@aclumontana.org
(406) 224-1447

Hillary Schneller*
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
hschneller@reprorights.org
(917) 637-3777

Attorneys for Plaintiffs All Families Healthcare, Blue Mountain Clinic, and Helen Weems

Jacqueline Harrington*
Nina S. Riegelsberger*
Tabitha Crosier*
Dechert LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036
jacqueline.harrington@dechert.com
nina.riegelsberger@dechert.com
tabitha.crosier@dechert.com
(212) 698-3500

Hartley West*
Iricel Payano*
One Bush Street, Suite 1600
San Francisco, CA 94104
Hartley.west@dechert.com
Iricel.payano@dechert.com
(415) 262-4500

Admitted pro hac vice

CERTIFICATE OF SERVICE

I, Alex Rate, hereby certify on this date I filed a true and accurate copy of the foregoing document with the electronic filing system for Montana courts and electronic service was sent to:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Service Method: eService
E-mail Address: dojsupremecourtefilings@mt.gov

Attorneys for Defendants

Electronically signed by Alex Rate
Dated October 6, 2023

EXHIBIT A

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

Montana Democratic Party, Mitch Bohn, Plaintiffs, WESTERN NATIVE VOICE, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe, Plaintiffs, Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group, Plaintiffs, v. Christi Jacobsen, in her official capacity as Montana Secretary of State, Defendant.	Consolidated Case No.: DV 21-0451 Judge Michael G. Moses **ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND YOUTH PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT**

The Defendant, Montana Secretary of State Christi Jacobsen ("the Secretary") moved for summary judgment on all counts of all Plaintiffs' complaints. (Dkt. 78, Dkt.

79, Dkt. 154, Dkt. 155). Along with this motion, the Secretary submitted her Statement of Undisputed Facts (Dkt. 80; Dkt. 156). Consolidated Plaintiffs Montana Democratic Party and Mitch Bohn ("MDP"); Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe ("WNV"); and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group ("MYA") (collectively, "Plaintiffs") submitted their responses. (Dkt. 117; Dkt. 120; Dkt. 166; Dkt. 168). Plaintiffs also submitted their response to the Secretary's Statement of Undisputed Facts. (Dkt. 119; Dkt. 169). The Secretary submitted her reply. (Dkt. 181). Plaintiffs Forward Montana Foundation, Montana Youth Action, and Montana Public Interest Research Group (collectively, "Youth Plaintiffs") submitted a cross motion for summary judgment. (Dkt. 117; Dkt 118; Dkt 152; Dkt. 153). The Secretary submitted her response brief. (Dkt. 161). Youth Plaintiffs submitted their reply. (Dkt. 181). The Court held a hearing concerning these motions on July 11, 2022. (Dkt. 187).

The Court has considered the briefs, evidence presented, and oral arguments made by counsel. These motions are ripe for decision.

Factual Background

During 2021, the Montana Legislature passed four laws: House Bill 176 ("HB 176"), Senate Bill 169 ("SB 169), House Bill 506 ("HB 506"), and House Bill 530 ("HB 530"). HB 176 amends § 13-2-304, MCA, by moving the deadline to register for the

election to "noon the day before the election." Thus, HB 176 removed election day registration, which had been in effect for more than fifteen years. SB 169 amended § 13-2-110, MCA, and, *inter alia*, relegated the use of a student ID, to that of a secondary form of identification that must be presented in conjunction with "a current utility bill, bank statement, paycheck, government check, or other government document that shows the individual's name and current address" in order to register to vote. Prior to SB 169, a student ID was acceptable as a primary ID and no additional documentation was necessary to register to vote. HB 506 amended § 13-2-205, MCA, and requires that ballots cannot issue to voters until they meet residence and age requirements. Lastly, HB 530 provides that:

> [T]he secretary of state shall adopt an administrative rule in substantially the following form:
>
> (a) For the purposes of enhancing election security, a person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots.
>
> (b) "Person" does not include a government entity, a state agency as defined in 1-2-116, a local government as defined in 2-6-1002, an election administrator, an election judge, a person authorized by an election administrator to prepare or distribute ballots, or a public or private mail service or its employees acting in the course and scope of the mail service's duties to carry and deliver mail.
>
> (2) A person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of $100 for each ballot distributed, ordered, requested, collected, or delivered in violation of the rule.

Legal Standards

A. Summary Judgment

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P. In a summary judgment proceeding, "[t]he evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences are to be drawn in favor of the party opposing summary judgment." *Thornton v. Flathead County*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395. A trial on the merits is always preferable to summary judgment "if a controversy exists over a material fact." *Richards v. JTL Group*, 2009 MT 173, ¶ 12, 350 Mont. 516, 212 P.3d 264. "In evaluating cross motions for summary judgment, the District Court…must evaluate each party's motion on its own merits." *Hajenga v. Schwein*, 2007 MT 80, ¶ 19, 336 Mont. 507, ¶ 19, 155 P.3d 1241, ¶ 19; *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, ¶ 7, 403 P.3d 664, ¶ 7.

The initial burden is on the movant to prove the nonexistence of all genuine issues of material fact and entitlement to judgment as a matter of law. *Estate of Willson v. Addison*, 2011 MT 179, ¶ 13, 361 Mont. 269, 258 P.3d 410; *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 29, 356 Mont. 417, 234 P.3d 79. The moving party has the burden of

extinguishing "'any real doubt as to the existence of any genuine issue of material fact' by making a 'clear showing as to what the truth is.'" *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 12, 380 Mont. 495 (quoting *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 36, 345 Mont. 12, 192 P.3d 186).

Once the movant has satisfied this initial burden, the nonmoving party must "prove, by more than mere denial and speculation, that a genuine issue of material fact exists and that the moving party is not entitled to judgment as a matter of law." *Ehrman v. Kaufman*, 2010 MT 284, ¶ 10, 358 Mont. 519. It is essential that the nonmoving party "present facts of a substantial nature showing that genuine issues of material fact remain for trial." *Cape v. Crossroads Corr. Ctr.*, 2004 MT 265, ¶ 12, 323 Mont. 140, 99 P.3d 171. "To raise a genuine issue of material fact, the proffered evidence must be 'material and of a substantial nature, not fanciful, frivolous, gauzy or merely suspicious.'" *Estate of Willson*, ¶ 14 (quoting *Elk v. Healthy Mothers, Healthy Babies, Inc.*, 2003 MT 167, ¶ 16, 316 Mont. 320, ¶ 16, 73 P.3d 795, ¶ 16).

B. Constitutional Issue

Statutes enacted by the Legislature "are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, ¶ 32, 488 P.3d 548, ¶ 32 (quoting *Hernandez v. Bd. of Cty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, ¶ 15, 189 P.3d 638, ¶ 15)(internal quotations omitted). Constitutional challenges to statutes require that the challenging

party prove that the statute is "unconstitutional 'beyond a reasonable doubt' and, if any doubt exists, it must be resolved in favor of the statute." *Hernandez*, ¶ 15 (quoting *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, ¶ 13, 15 P.3d 877, ¶ 13).

Discussion

A. Issues the Court has previously ruled on

1. Standing

The Secretary, for the third time, argues that Plaintiffs do not have standing. The Court has previously ruled on this issue. The Secretary conceded during oral argument that she is merely preserving the issue of standing for appeal, which the Secretary has now achieved thrice over. The Court addressed this issue first in its Order Re Defendant's Motion to Dismiss (Dkt. 32) and second, in its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions. (Dkt. 124 at ¶¶ 7-32). The Court hereby incorporates both its Order Re Defendant's Motion to Dismiss and its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions. The Court has previously ruled that Plaintiffs have standing. The Secretary has raised no new arguments in support of her contention that warrant further analysis by the Court. Thus, the Court again finds based on the reasons stated in its Order Re Defendant's Motion to Dismiss and its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motions for Preliminary Injunctions that all Plaintiffs have standing.

2. Ripeness of HB 530

The Secretary again argues that HB 530 is not ripe for judicial review because it directs the Secretary to adopt a rule that is "in substantially the same form" as that presented in HB 530. In addition to the same arguments already made, the Secretary adds that the Court "does not—and cannot—know what specific types of ballot assisting activities ultimately will be prohibited, or how such a rule might actually affect Plaintiffs." (Dkt. 155 at 46).

However, as previously described in ¶¶ 47-48 of its Conclusions of Law granting Plaintiffs' Motions for Preliminary Injunctions, Plaintiffs already provided evidence that HB 530 was causing Plaintiffs to stop their ballot collection activities. The Secretary's cite to testimony that Plaintiffs have testified that HB 530 is not being enforced against them as proof of no injury is concerning given that was the expected result of the preliminary injunction. Moreover, the plain language of HB 530 is clear that whatever rule ultimately does get adopted, it will reach ballot collection activities and impose a civil penalty. Thus, the effects of HB 530 are not "speculative." In sum, the Court finds that HB 530 is ripe.

B. The Elections Clause of the U.S. Constitution

The Secretary asserts she is entitled to judgment as a matter of "United States constitutional law" because "[t]he Court may not interfere with the Legislature's constitutional obligation to regulate federal elections because that authority has been

strictly delegated to the Legislature—not the State at large—by the U.S. Constitution." (Dkt. 155 at 57-58). The Secretary further describes, that because SB 169, HB 176, HB 506, and HB 530 were enacted by the Legislature "pursuant to authority delegated to it exclusively by the U.S. Constitution" that Plaintiffs' requested relief inappropriately conflicts with "the Legislature's constitutional obligation to regulate elections." (Dkt. 155 at 58-59).

The U.S. Supreme Court has already rejected the Secretary's interpretation of the Elections Clause. Specifically, the Court described, "[w]e find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the **constitution of the State** has provided that laws shall be enacted." *Smiley v. Holm* (1932), 285 U.S. 355, 367-68, 52 S. Ct. 397, 399 (emphasis added); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n* (2015), 576 U.S. 787, 817-18, 135 S. Ct. 2652, 2673 (stating "[n]othing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Harper v. Hall* (2022), 380 N.C. 317, 391, 868 S.E.2d 499, 551 (describing a similar argument made under the Elections Clause was "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences.").

In sum, the Court finds that the Elections Clause does not prohibit judicial override of the challenged state laws as represented by the Secretary and that the Secretary is not entitled to "judgment as a matter of United States constitutional law." (*See* Dkt. 155 at 59).

C. HB 506

The Secretary submitted her Motion for Summary Judgment as to all claims made by all Plaintiffs. Youth Plaintiffs submitted their Cross Motion for Summary Judgment on Counts Three, Four, and Five of their Complaint. Youth Plaintiffs' Complaint, originally filed in DV 21-1097 prior to consolidation, alleges in Count Three that HB 506 "impermissibly restricts Plaintiffs' fundamental right of suffrage, Mont. Const., art., II, § 13, by making it more difficult for a subset of registered voters to access their ballots." (DV 21-1097, Dkt. 1 at 38-39). In Count Four, Youth Plaintiffs allege that "HB 506 impermissibly violates Plaintiffs' fundamental right not to be discriminated against on the basis of youth, Mont. Const., art. II, § 15, by making it more difficult for young people just becoming adults to access their ballots." *Id*. at 40. Lastly, in Count Five, Youth Plaintiffs allege "HB 506 violates Plaintiffs' right to equal protection of the laws, set forth as part of the right to individual dignity. Mont. Const., art. II, § 4." *Id*. at 41.

In regard to Counts Three through Five of Youth Plaintiffs' Complaint, both the Secretary and Youth Plaintiffs assert there are no genuine issues of material fact

precluding summary judgment and thus the Court "is not called upon to resolve factual disputes, but only to draw conclusions of law[.]" *Bud-Kal v. City of Kalispell*, 2009 MT 93, ¶ 15, 350 Mont. 25, ¶ 15, 204 P.3d 738, ¶ 15 (citing *Merlin Myers Revocable Trust v. Yellowstone County*, 2002 MT 201, P12, 311 Mont. 194, 53 P.3d 1268).

As described above, "legislative enactments are presumed constitutional, and the party challenging a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt." *Alexander v. Bozeman Motors, Inc.*, 2012 MT 301, ¶ 27, 367 Mont. 401, ¶ 27, 291 P.3d 1120, ¶ 27 (citing *Elliot v. State Dept. of Revenue*, 2006 MT 267, ¶ 11, 334 Mont. 195, 146 P.3d 741; *Stavenjord v. Mont. State Fund*, 2003 MT 67, ¶ 45, 314 Mont. 466, 67 P.3d 229). Because Youth Plaintiffs bring a facial challenge, they "must show that 'no set of circumstances exists under which the [challenged sections] would be valid, *i.e.*, that the law is unconstitutional in all of its applications.'" *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, ¶ 14, 368 P.3d 1131, ¶ 14 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008)).

HB 506 amends § 13-2-205(2), MCA, to provide that "[u]ntil the individual meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot." Youth Plaintiffs and the Secretary agree that, prior to HB 506, election administrators in Montana were "providing absentee ballots to individuals who did not yet meet Montana's age or residency requirements, and some

election administrators were waiting until those individuals satisfied Montana's age or residency requirements before providing them with absentee ballots." (Dkt. 169 at ¶ 92).

The Secretary submits three primary arguments as to why summary judgment as to the claims regarding the constitutionality of HB 506 is appropriate. The Secretary first offers that Youth Plaintiffs cannot show HB 506 causes injury to them because the right to vote absentee is not encompassed by the right of suffrage under Mont. Const., art. II, § 13. Next, the Secretary argues that Youth Plaintiffs equal protection claim fails because Youth Plaintiffs cannot show that HB 506 treats similarly situated groups unequally and even if they can, HB 506 would be subject to rational basis review and survive this constitutional muster. Lastly, the Secretary contends HB 506 does not violate Article II, § 15.

The Montana Constitution provides that "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const., Art. II § 13. This constitutional right of suffrage is a fundamental right. *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, ¶ 32, 325 P.3d 1204, ¶ 32.

The Secretary asserts that HB 506 is not inconsistent with the right of suffrage because that right is "explicitly limited by the Montana Constitution's (i) voter qualification standards; and (ii) mandate that the Legislature set the 'requirements for residence, registration, absentee voting, and administration of elections.'" (Dkt. 155 at

38 (quoting Mont. Const. Art. IV, §§ 2-3)). The Secretary argues that the changes HB 506 made were necessary to ensure only qualified electors were receiving ballots and mailing them in. Moreover, the Secretary contends that even if the right of suffrage encompasses the right to vote absentee, that Youth Plaintiffs' constitutional challenge still fails because fundamental rights are not absolute, and the changes made by HB 506 are reasonable.

However, as pointed out by Youth Plaintiffs, HB 506 forecloses voters turning eighteen in the month before the election from an avenue of voting available to all others in the electorate on the basis of the date that their birthday falls. Specifically, under HB 506, everyone qualified to vote in the election, apart from these voters turning eighteen in the month before the election, has the opportunity to receive their ballot in the mail, consider their voting options, and return their ballot via mail or some other means. As illustrated by Youth Plaintiffs, HB 506 will require this specific subgroup of the electorate—those turning eighteen in the month before the election—to only have the opportunity to submit their vote in-person and, depending on when their birth date falls, they may have to have the knowledge they can pre-register to vote, given the interplay between HB 506 and HB 176 (which removes election day as an option for registering to vote in the election). Not only that, but this specific subgroup of the electorate is the only subgroup of the electorate required to vote in person based on HB 506.

Thus, while the Secretary points to the fact that the Legislature is mandated to set requirements for absentee voting pursuant to Article IV, §§ 2-3, HB 506 mandates that some electors can vote absentee while others cannot. The Secretary counters with the fact that, as described in a concurring opinion, absentee voting is an "'indulgence.'" (Dkt. 155 at 41 (quoting *Crawford v. Marion Cty. Election Bd.* (2008), 553 U.S. 181, 209, 128 S. Ct. 1610, 1627 (Scalia, J., concurring)). However, under HB 506, most of the electorate is permitted this "indulgence" while a few have been excluded from the opportunity to similarly indulge.

The Court finds, first, that HB 506 severely interferes with the right of suffrage given it prevents this subgroup of the electorate from exercising their right of suffrage in ways the remainder of the electorate is not similarly prevented. Specifically, HB 506 needlessly forces one subgroup of the electorate to vote in person and impermissibly denies this subgroup access to an avenue of voting that all others in the electorate can avail themselves of. Given the substantial interference with a fundamental right, the Secretary must, even under the *Anderson-Burdick* standard discussed below, "demonstrate that the challenged statute survives strict scrutiny." *Driscoll*, ¶ 39. A statute only survives strict scrutiny if it is "narrowly tailored to further a compelling government interest." *Id.* at ¶ 40 (citing *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997); *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993)). Thus, even on a showing of a compelling government interest, the government

"must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Wadsworth v. State* (1996), 275 Mont. 287, 911 P.2d 1165, 1174.

Rather than apply the constitutional analysis that Montana Courts have applied for decades, the Secretary asks the Court to apply a "flexible standard" adopted by federal courts referred to as the "*Anderson-Burdick* standard" from *Anderson v. Celebrezze* (1983), 460 U.S. 780, 103 S. Ct. 1564, and *Burdick v. Takushi* (1992), 504 U.S. 428, 112 S. Ct. 2059. Under this standard, when voting rights are "subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063 (quoting *Norman v. Reed* (1992), 502 U.S. 279, 289, 112 S. Ct. 698, 705). However, when the restrictions imposed by the law are "'reasonable'" and "'nondiscriminatory,'" "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (quoting *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1569). When this issue came before the Montana Supreme Court during its review of a preliminary injunction, the Court declined to "set forth a new level of scrutiny[]" describing that "for purposes of resolving the instant preliminary injunction dispute, the level of scrutiny is not dispositive to the issues presented on appeal." *Driscoll v. Stapleton,* 2020 MT 247, ¶ 20, 401 Mont. 405, ¶ 20, 473 P.3d 386, ¶ 20. Thus, the federal *Anderson-Burdick* standard has not been applied by Montana courts to date.

The interests identified by the Secretary in support of HB 506 include that "providing ballots only to those individuals who meet the constitutional prerequisites to vote is clearly reasonable." (Dkt. 155 at 41). Moreover, that the State's interest "in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes…." is "a compelling interest." *Id*. at 42 (quoting *Larson v. State*, 2019 MT 28, ¶ 40, 394 Mont. 167, ¶ 40, 434 P.3d 241, ¶ 40). The Secretary cites to six specific interests furthered by HB 506:

> (1) It ensures all voters who turn 18 during the late-registration period are treated the same, regardless of the county in which they live;
> (2) It provides clarity to election administrators and the Secretary regarding the handling of absentee ballots for voters who turn 18 during the late registration period;
> (3) It ensures all Montana election administrators follow the same practices when mailing absentee ballots to voters who turn 18 during the late registration period;
> (4) It prevents election administrators from having to separately hold voted absentee ballots received from underage voters until the time the voter turns 18, a practice that is inconsistent with § 13-13-222(3), MCA;
> (5) It allows the Secretary to finalize election administration software coding for Montana's election system software; and
> ([6]) It helps ensure only qualified voters are voting in Montana elections, as defined by the Montana Constitution.

(Dkt. 155 at 42 (citations omitted)). These interests are compelling. However, as evidenced by the unadopted version of HB 506 that passed in the House of Representatives, there are less onerous ways to achieve the above objectives. Specifically, the unadopted version of HB 506 that was passed by the House provided that "[u]ntil the individual meets residence and age requirements, a ballot submitted by

the individual may not be processed and counted by the election administrator." (*See* Dkt. 153, ex. B). This unadopted version of HB 506 would have permitted everyone in the electorate to have the same access to their ballots and to the "indulgence" that is absentee voting while ensuring electors turning eighteen in the month prior to the election are treated uniformly throughout the counties and meeting the other interests outlined by the Secretary. The version of HB 506 that the Legislature ultimately passed arbitrarily subjects a subgroup of the electorate to different requirements and irrationally forecloses an avenue of voting available to all others in the electorate.

In sum, the Court finds that HB 506 does not meet strict scrutiny (which is also required under the *Anderson-Burdick* standard given the severe restriction) because it is not narrowly tailored as evidenced by the less restrictive version of HB 506 that was considered by the Legislature. Moreover, the Court finds that Youth Plaintiffs have proven beyond a reasonable doubt that HB 506 unconstitutionally infringes the fundamental right of suffrage. The Court will grant Youth Plaintiffs Cross Motion for Summary Judgment as to Count Three. Because the Court has found HB 506 unconstitutional under the right of suffrage, the Court need not address the Secretary's motion for summary judgment and Youth Plaintiffs Cross Motion for summary judgment as to Counts Four and Five of Youth Plaintiffs Complaint.

D. SB 169, HB 176, and HB 530

1. Article IV, § 3

The Secretary contends that summary judgment is appropriate as to HB 176 because first, pursuant to Article IV, § 3, the Legislature has the authority to enact or repeal election day registration ("EDR"), second, it does not violate the right to vote, and third, it is facially neutral and does not violate equal protection.

The Secretary has maintained that pursuant to Mont. Const. Art. IV, § 3, it is within the Legislature's discretion to enact or repeal EDR. Article IV, § 3 states: "[t]he legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process." Mont. Const., Art. IV § 3.

The Court has no doubt that the Legislature had the discretion to choose whether or not to enact EDR, however, the Montana Constitution does not speak to the Legislature's discretion to revoke EDR given its implementation for the past fifteen years and the significant evidence submitted by Plaintiffs showing that Montanans make significant use of EDR. Thus, judgment as a matter of law pursuant to Art. IV, § 3 is inappropriate at this stage.

2. Right to Vote

Next, concerning the right to vote, under the standard applied in Montana, when the exercise of a fundamental right is interfered with, "[t]he most stringent standard, strict scrutiny, is imposed..." *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1174. Strict scrutiny review of a statute "requires the government to show a compelling state interest for its action." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 61, 296 Mont. 207, ¶ 61, 988 P.2d 1236, ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (internal quotations omitted)). "In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Mont. Envtl. Info. Ctr.*, at ¶ 61 (quoting *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (internal quotations omitted)). On the other hand, as described above, the Secretary requests the Court, concerning the right to vote, to apply the federal *Anderson-Burdick* standard.

Plaintiffs have alleged that HB 176, HB 530, and SB 169 each unconstitutionally burden the right to vote. Under both the precedential standard and the *Anderson-Burdick* standard, the Court must "determine the level of scrutiny to apply to the infringement of that right." *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1173; *see also, Nader v. Brewer* (9th Cir. 2008), 531 F.3d 1028, 1034 (describing under *Anderson-Burdick*, "the severity of the burden the election law imposes on the plaintiff's rights dictates the

level of scrutiny applied by the court."). In making that determination, the Court considers "the nature of the interest and the degree to which it is infringed." *Wadsworth*, 275 Mont. 287, 911 P.2d 1165, 1173 (quoting *Mem'l Hosp. v. Maricopa Cty.* (1974), 415 U.S. 250, 253, 94 S. Ct. 1076, 1080)(internal quotations omitted). Under *Anderson-Burdick*, "[t]he severity of the burden that an election law imposes 'is a factual question on which the plaintiff bears the burden of proof.'" *Feldman v. Reagan* (9th Cir. 2016), 843 F.3d 366, 387 (quoting *Democratic Party of Haw. v. Nago* (9th Cir. 2016), 833 F.3d 1119, 1122-24).

In considering HB 176, HB 530, and SB 169 under either standard, it is evident there are genuine issues of material fact in dispute. For example, under SB 169, the Secretary's contentions that SB 169 made "minor" changes to the law and that voters have "a wide variety of options to identify themselves for voting purposes" is disputed by MDP and MYA with facts concerning the apparent likelihood of college-age students to possess these other forms of identification. (Dkt. 169 at ¶¶ 117-118). The reduction of the impact on voters by the option to fill out a "Declaration of Impediment for an Elector" affidavit is also disputed by MYA and MDP as they cite to the fact that that affidavit "is only available to voters who lack an accepted form of photo ID, not those who lack other forms of secondary ID." (*See* Dkt. 169 at ¶¶ 120-121.).

Under HB 176, the consideration of the burden on election staff is highly factually disputed given the statements from some administrators describing that HB 176 will assist in reducing the lines and election staff's workload on election day versus

the statements from other administrators describing that ending election day registration would not assist their jobs in administering elections. (*See id*. at ¶¶ 50-56). Under HB 530, it is disputed as to whether HB 530 places restrictions on unpaid ballot collection given the language concerning receiving a "pecuniary benefit" for collecting a ballot. (*Id*. at ¶ 104). Not to mention, the burden on voters is disputed with the Secretary describing it "imposes little burden on voters" and Plaintiffs asserting it "places a substantial burden" given the reliance on ballot collection particularly by Native American voters and the high costs to voting that they face. (*Id.* at ¶¶ 105).

In sum, the above examples illustrate just a few genuine issues of material fact that are disputed in this case that preclude this Court from granting summary judgment. Specifically, there are genuine issues of material fact as relating to the nature and extent of the burdens imposed by HB 530, SB 169, and HB 176. Additionally, the Secretary's interests in enforcing these laws, whether they are subjected to heighted scrutiny under the precedential standard or *Anderson-Burdick*, are genuine issues of material fact precluding the Court from granting summary judgment.

3. Right to Equal Protection

The Secretary asserts summary judgment is appropriate as to Plaintiffs equal protection claims relating to SB 169, HB 176, and HB 530. Concerning SB 169, HB 176, and HB 530, the Secretary argues first that the laws treat all voters the same and second, that Plaintiffs cannot prove disparate impact or discriminatory intent.

The Equal Protection Clause of the Montana Constitution aims to "ensure that Montana's citizens are not subject to arbitrary and discriminatory state action." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 15, 382 Mont. 256, ¶ 15, 368 P.3d 1131, ¶ 15. The clause specifically declares: "[n]either the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Mont. Const., Art. II § 4. Additionally, while the Legislature must be given deference when it enacts a law, "it is the express function and duty of this Court to ensure that all Montanans are afforded equal protection under the law." *Davis v. Union Pac. R.R.* (1997), 282 Mont. 233, 240, 937 P.2d 27, 31. Moreover, "[a] law or policy that contains an apparently neutral classification may violate equal protection if "in reality [it] constitutes a device designed to impose different burdens on different classes of persons." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 16, 325 Mont. 148, ¶ 16, 104 P.3d 445, ¶ 16 (quoting *State v. Spina*, 1999 MT 113, P85, 294 Mont. 367, P85, 982 P.2d 421, P85).

Concerning the challenged laws, the Secretary presents as factual the claim that "[t]he Montana Legislature did not enact the Legislation to 'harm or disadvantage any particular class or group of voters.'" (Dkt. 169 at ¶ 62 (internal citations omitted)). The Secretary also asserts that "[t]he Legislation is nondiscriminatory." *Id*. at ¶ 63. Plaintiffs dispute these claims asserting that the first claim "refers only to the personal opinions

of two legislators who do not claim to represent the views of the entire legislature" and that "HB 530 was passed in the waning days of the legislative session, with no hearing or opportunity for the public to be heard." *Id*. at ¶ 62. Moreover, Plaintiffs describe that concerning HB 530, "[t]he legislature had knowledge that a very similar law was found by multiple courts less than two years prior to harm and disadvantage Native voters among others. The legislature also heard extensive testimony about how HB 176 and HB 530 would harm Native American voters." *Id*. at ¶ 62. Concerning the intent behind SB 169, Plaintiffs point out that "comments from the sponsor of SB 169 indicate an intent to reduce student voting." *Id*. at ¶ 62. These are just a few examples of the genuine issues of material fact concerning whether the challenged laws "constitute[] a device designed to impose different burdens on different classes of persons." *See Snetsinger*, ¶ 16. Even moving forward from that aspect of the equal protection analysis, as described above, there are genuine issues of material fact concerning the Secretary's interests in implementing these challenged laws.

Thus, the Court finds that there are genuine issues of material fact precluding summary judgment as to Plaintiffs claims concerning the right to equal protection.

4. Free Speech & Vagueness

The remaining issues concern Plaintiffs claims that HB 530 violates their right to free speech and is unconstitutionally vague. The Secretary argues that HB 530 does not implicate the right to free speech because it does not prohibit the activity of collecting

ballots but merely prohibits receiving a pecuniary benefit for doing so. Plaintiffs assert that the ballot collecting activities the organizations they represent engage in provides them with the opportunity to "express their beliefs in the importance of civic engagement" and for MDP, its GOTV efforts enable it to communicate its mission to voters. (Dkt. 168 at 20). Plaintiffs describe CSKT, WNV, and Blackfeet Nation all engage in ballot collecting and that they coordinate with each other to encourage civic engagement among their members. (Dkt. 166 at 16). When this issue was raised in another case, the District Court described that "[b]y collecting and conveying ballots, [Plaintiffs] are engaged in the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' which is at the heart of freedom of expression protections." Courts Findings of Fact, Conclusions of Law, and Order, *Western Native Voice*, ¶ 30, No. DV 20-0377 (quoting *Dorn v. Bd. Of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431).

Moreover, concerning the issue of vagueness, while the Secretary is correct in pointing out that the rule making process required in HB 530 has not been undertaken and could potentially resolve some of the alleged ambiguities, Plaintiffs point to the disputed issues of fact as to whether "pecuniary benefit" would encompass their activities. Moreover, it is disputed as to whether HB 530 places restrictions on unpaid ballot collecting activities given that "HB 530 restricts giving a 'pecuniary benefit' for

collecting a ballot" which could encompass more than just monetary benefits. (Dkt. 169 at ¶ 104).

In sum, regarding claims concerning free speech and vagueness, there are genuine issues of material fact concerning the extent to which the constitutional rights are implicated that preclude summary judgment.

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

IT IS HEREBY ORDERED:

1. Youth Plaintiffs Cross Motion for Summary Judgment as to Count Three is **GRANTED;** this order constitutes a summary judgment that HB 506 is unconstitutional;

2. The Secretary's Motions for Summary Judgment are **DENIED**.

DATED July 27, 2022

/s/ Michael G. Moses
District Court Judge

cc: E. Lars Phillips
David M.S. Dewhirst
Kathleen Smithgall
Dale Schowengerdt
Ian McIntosh
Leonard H. Smith
John M. Semmens
Mac Morris
David Knobel
Ryan Aikin
Rylee Sommers-Flanagan
Matthew Gordon
Jonathan Hawley

Henry Brewster
John Heenan
Peter Meloy
Alex Rate
Clayton Gregersen
Jonathan Topaz
Niki Zupanic
Marilyn Gabriela Robb

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 10-06-2023:

Nina Riegelsberger (Attorney)
1095 Avenue of the Americas
Three Bryant Park
New York NY 10036
Representing: Blue Mountain Clinic, All Families Healthcare, Helen Weems
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Charlie Brereton, Department of Public Health and Human Services, State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Charlie Brereton, Department of Public Health and Human Services, State of Montana
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Charlie Brereton, Department of Public Health and Human Services, State of Montana
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: Charlie Brereton, Department of Public Health and Human Services, State of Montana
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Charlie Brereton, Department of Public Health and Human Services, State of Montana

Service Method: eService

Hillary Anne Schneller (Attorney)
Center for Reproductive Rights
199 Water Street
22nd Floor
New York NY 10038
Representing: All Families Healthcare
Service Method: eService

Hartley West (Attorney)
One Bush Street Suite 1600
San Francisco 94104-4446
Representing: Blue Mountain Clinic, All Families Healthcare, Helen Weems
Service Method: Email

Jacqueline Harrington (Attorney)
1095 Aveneue of the Americas
New York 10036-6797
Representing: Blue Mountain Clinic, All Families Healthcare, Helen Weems
Service Method: Email

Tabitha Crosier (Attorney)
1095 Avenue of The Americas
New York 10036-6797
Representing: Blue Mountain Clinic, All Families Healthcare, Helen Weems
Service Method: Email

Iricel Payano (Attorney)
One Bush Street, Suite 1600
San Francisco 94104
Representing: All Families Healthcare
Service Method: Email

Electronically Signed By: Alexander H. Rate
Dated: 10-06-2023