

July 22, 2022

TO: State Administration and Veterans' Affairs Interim Committee

FROM: Ginger Aldrich, Staff Attorney

RE: Litigation Updates Concerning Recent Legislation

This memorandum was prepared as background information at the request of the State Administration and Veterans' Affairs Interim Committee, and it does not represent any opinion or action on the part of the Legislative Council.

I. Montana Democratic Party v. Jacobsen

Plaintiffs: Montana Democratic Party and Mitch Bohn, Western Native Voice, Montana Native Vote, Blackfoot Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Northern Cheyenne Tribe, Montana Youth Action, Forward Montana Foundation, Montana Public Interest Research Group

Defendant: Montana Secretary of State

Venue: Montana Thirteenth Judicial District Court, Yellowstone County, Judge Michael G. Moses

Docket No.: 13-DV-21-0451; DA-22-0172

Legislation Challenged:

HB 176: AN ACT REVISING LATE VOTER REGISTRATION; CLOSING LATE VOTER REGISTRATION AT NOON THE DAY BEFORE THE ELECTION; PROVIDING AN EXCEPTION SO MILITARY AND OVERSEAS ELECTORS MAY CONTINUE TO REGISTER THROUGH THE DAY OF THE ELECTION; AMENDING SECTIONS 13-2-301, 13-2-304, 13-13-301, 13-19-207, AND 13-21-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

HB 506: AN ACT GENERALLY REVISING ELECTION LAWS; ESTABLISHING PRIORITIES FOR DEVELOPMENT OF CONGRESSIONAL DISTRICTS; REVISING PROCEDURES FOR PROSPECTIVE ELECTORS TO REGISTER AND VOTE; CLARIFYING REQUIREMENTS FOR A BOARD OF COUNTY CANVASSERS; ELIMINATING THE EXPERIMENTAL USE OF VOTE SYSTEMS; AMENDING SECTIONS 5-1-115, 13-2-205, AND 13-15-401, MCA; REPEALING SECTION 13-17-105, MCA; AND PROVIDING EFFECTIVE DATES.

HB 530: AN ACT REQUIRING THE SECRETARY OF STATE TO ADOPT RULES DEFINING AND GOVERNING ELECTION SECURITY; REQUIRING ELECTION SECURITY ASSESSMENTS BY THE SECRETARY OF STATE AND COUNTY ELECTION ADMINISTRATIONS; ESTABLISHING THAT SECURITY ASSESSMENTS ARE CONFIDENTIAL INFORMATION; ESTABLISHING REPORTING REQUIREMENTS; DIRECTING THE SECRETARY OF STATE TO ADOPT A RULE PROHIBITING CERTAIN PERSONS FROM RECEIVING PECUNIARY BENEFITS WITH RESPECT TO CERTAIN BALLOT ACTIVITIES; PROVIDING PENALTIES; PROVIDING RULEMAKING AUTHORITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

SB 169: AN ACT GENERALLY REVISING VOTER IDENTIFICATION LAWS; REVISING CERTAIN IDENTIFICATION REQUIREMENTS FOR VOTER REGISTRATION, VOTING, AND PROVISIONAL VOTING;

AMENDING SECTIONS 13-2-110, 13-13-114, 13-13-602, AND 13-15-107, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: The plaintiffs allege that provisions in HB 176, HB 530, and SB 169, including the revision of which IDs are accepted for certain voter identification purposes, the revision of late voter registration to close the day before the election, and prohibitions on providing, offering to provide, or accepting a pecuniary benefit for collecting or delivering ballots violate the following provisions of the Montana Constitution: Article II, section 4, which provides for the equal protection of the laws, Article II, sections 6 and 7, which provide freedom of assembly and freedom of speech, Article II, section 13, which provides the right of suffrage, Article II, section 17, which provides due process requirements, and Article V, section 1, which provides for legislative power. The plaintiffs have requested that the bills in question be declared in violation of the Montana Constitution and be permanently enjoined.

The plaintiffs have challenged HB 176, which revises late voter registration to close at noon the day before the election for most voters. The plaintiffs assert that HB 176 violates the right to vote and the right to equal protection of the law under the Montana Constitution by eliminating election day registration, making voting in Montana more difficult, reducing young voter turnout, and making registering to vote impossible for someone who turns 18 on election day.

The plaintiffs allege that HB 506 violates Article II, section 4 (Individual Dignity), section 13 (Right of Suffrage), and section 15 (Age Discrimination), by making it more difficult for individuals who do not yet meet age and residency voting requirements—but who will by election day—from receiving a ballot, including young voters and individuals who have recently moved.

The plaintiffs have challenged section 2 of HB 530, which directs the Secretary of State to adopt an administrative rule that prohibits a person from providing or offering to provide or accepting a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots and subjecting violators to a civil penalty. The plaintiffs assert that section 2 of HB 530 violates the right to vote, the right to freedom of speech, and due process under the Montana Constitution.

The plaintiffs allege that SB 169 violates Article II, sections 4 (Equal Protection) and 13 (Right of Suffrage), of the Montana Constitution by reducing the number of standalone forms of identification that can be used for voting purposes.

The plaintiffs have requested the District Court to declare that HB 176, HB 506, section 2 of HB 530, and SB 169 are unconstitutional and that they be permanently enjoined from enforcement. The plaintiffs have requested attorney fees and costs.

This case was consolidated with *Western Native Voice v. Jacobsen* (13-DV-21-0560) and *Montana Youth Action v. Jacobsen* (13-DV-21-1097) concerning similar claims. All three actions now appear under this docket.

The plaintiffs applied for preliminary injunctions to prevent the enforcement of HB 176, HB 506, HB 530, and SB 169 pending the resolution of their claims. The District Court held that the plaintiffs made a *prima facie* showing that HB 176, HB 506, HB 530, and SB 169 were unconstitutional and issued a preliminary injunction to preserve the status quo until a trial can be held on the merits. Initially, the Court ordered that the injunction prohibit "any aspect" of the bills, but in a later order, the Court

clarified that the injunction was limited to section 2 of HB 506, section 2 of HB 530, section 2 of SB 169, and the entirety of HB 176.

The decision has been appealed to the Montana Supreme Court under docket number DA-22-0172. The Secretary of State appealed the District Court's preliminary injunction as it applies to HB 176 and section 2 of SB 169, which concern the late registration deadline and voter ID. Finding that the status quo would leave HB 176 and SB 169 in effect because over 300,000 people voted under the provisions in 2021 and finding that leaving the bills in effect would cause less voter confusion and disruption of election administration, the Montana Supreme Court stayed the preliminary injunction.

The proceeding on the underlying merits of the case continues in the district court.

II. Montana Democratic Party v. Secretary of State and Comm of Political Practices

Plaintiffs: Montana Democratic Party, Montanans for Tester, Macee Patriitti

Defendants: Secretary of State, Commissioner of Political Practices

Venue: United States Federal District Court, District of Montana (Missoula) Judge Donald Molloy

Docket No.: 9-21-cv-00119

Legislation Challenged:

SB 319: AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE FEES MUST BE OPT-IN; PROHIBITING CERTAIN POLITICAL ACTIVITIES IN CERTAIN PLACES OPERATED BY A PUBLIC POSTSECONDARY INSTITUTION; PROVIDING FOR JUDICIAL RECUSALS UNDER CERTAIN CIRCUMSTANCES; PROVIDING PENALTIES; AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA; AND PROVIDING AN EFFECTIVE DATE.

Status: DISMISSED

Overview: Plaintiffs challenged provisions in SB 319 that prohibit certain voter registration activities on public university campuses. Specifically, section 21 of SB 319 provides, in part, that "[a] political committee may not direct, coordinate, manage, or conduct any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts for a federal, state, local, or school election inside a residence hall, dining facility, or athletic facility operated by a public postsecondary institution." Plaintiffs claimed that this section limited the information available to new voters and stopped them from engaging in constitutionally protected political speech and activities on college campuses, chilling protected speech.

Plaintiffs challenged the provisions under the First and Fourteenth Amendments of the United States Constitution as an unconstitutional restriction on core political speech and under the Twenty-Sixth Amendment of the United States Constitution as an unconstitutional abridgement of the right to vote on account of age.

The plaintiffs requested a declaratory judgment stating that the provisions are unconstitutional. They further asked that the Secretary of State and the Commissioner of

Political Practices be enjoined from enforcing them. The plaintiffs requested attorney fees and costs.

Because the court in *Forward Montana v. State* (ADV-2021-611) entered a permanent injunction of Section 21 of SB 319 and the state filed a notice that it did not intend to appeal the ruling, the parties in this case jointly requested that the matter be dismissed without prejudice. As a result, the court ordered the matter dismissed without prejudice and ordered each party to pay its own costs.

III. McDonald v. Jacobsen

Plaintiffs: Sister Mary Jo McDonald, Lori Maloney, Fritz Daily, Bob Brown, Dorothy Bradley, Vernon Finley, Mae Nan Ellingson, League of Women Voters

Defendant: Secretary of State

Venue: Montana Second Judicial District Court, Butte-Silver Bow County, Judge Kurt Krueger

Docket No.: 2-DV-21-0120; DA-22-0229

Legislation Challenged:

HB 325: AN ACT ESTABLISHING SUPREME COURT DISTRICTS; PROVIDING FOR THE SELECTION OF THE CHIEF JUSTICE; PROVIDING THAT THE PROPOSED ACT BE SUBMITTED TO THE ELECTORATE AT THE 2022 GENERAL ELECTION; AMENDING SECTION 3-2-101, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE.

Status: DECIDED; APPEALED

Overview: The plaintiffs allege that HB 325, a legislative referendum establishing election districts for Supreme Court justices, would, if approved by voters, violate the language and intent of the Montana Constitution that Supreme Court justices be selected on a statewide basis rather than a districtwide basis. It further alleges that because the change conflicts with the Montana Constitution, it violates the constitutional procedures for amendments to the Montana Constitution by enacting a statutory referendum. The plaintiffs further allege that HB 325 infringes on the right to vote under Article II, section 13, of the Montana Constitution.

The plaintiffs requested that the District Court declare HB 325 unconstitutional and enjoin the Secretary of State from certifying the referendum, as well as preventing it from appearing on the ballot.

Because the subject of the challenged initiative had already been found to be unconstitutional in *Reichert v. St. ex rel. McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, and because the challenged legislation attempted to use an inappropriate procedure to amend the Montana Constitution by legislative action, the Court found that it was appropriate for the Court to accept jurisdiction. Citing *Reichert*, the Court found that Montana Supreme Court precedent had found that the Montana Constitution intended that Supreme Court justices be elected and serve on a statewide basis. Therefore, the Court held that HB 325 was unconstitutional, and the Secretary of State was enjoined from placing HB 325 on the state's 2022 general election ballot.

The Secretary of State appealed the order to the Montana Supreme Court.

In the Montana Supreme Court, the Secretary of State argued that because HB 325 uniquely affected the justices of the Montana Supreme Court, they should disqualify themselves from the case. The Court noted that if the standard for recusal in this situation was the potential that a person may run for election or reelection to the Court, it would not only mean that the justices could not sit on the case, it would also mean that no other qualified person with the same potential could sit on the case either, invoking the Rule of Necessity. The Court added that the "potential" of an individual to run for Supreme Court justice did not amount to the "direct, personal, substantial, and pecuniary" interest that would require disqualification, and denied the Secretary of State's request.

IV. *Barrett v. State*

Plaintiffs: Steve Barrett, Robert Knight, Montana Federation of Public Employees, Dr. Lawrence Pettit, Montana University System Faculty Association Representatives, Faculty Senate of Montana State University, Dr. Joy Honea, Dr. Annjeanette Belcourt, Dr. Franke Wilmer, Montana Public Interest Research Group, Associated Students of Montana State University, Ashley Phelan, Joseph Knappenberger, Nicole Bondurant, Mae Nan Ellingston

Defendants: State of Montana, Governor Greg Gianforte, Austin Knudsen

Venue: Montana Eighteenth Judicial District Court, Gallatin County, Judge Rienne H. McElyea

Docket No.: DV-21-581 B

Legislation Challenged:

SB 319: AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE FEES MUST BE OPT-IN; PROHIBITING CERTAIN POLITICAL ACTIVITIES IN CERTAIN PLACES OPERATED BY A PUBLIC POSTSECONDARY INSTITUTION; PROVIDING FOR JUDICIAL RECUSALS UNDER CERTAIN CIRCUMSTANCES; PROVIDING PENALTIES; AMENDING SECTIONS 13-1-101, 13-35-225, 13-35-237, 13-37-201, 13-37-202, 13-37-203, 13-37-204, 13-37-205, 13-37-207, 13-37-208, 13-37-216, 13-37-217, 13-37-218, 13-37-225, 13-37-226, 13-37-227, 13-37-228, AND 13-37-229, MCA; AND PROVIDING AN EFFECTIVE DATE.

HB 102: AN ACT GENERALLY REVISING GUN LAWS; PROVIDING A LEGISLATIVE PURPOSE, INTENT, AND FINDINGS; PROVIDING LOCATIONS WHERE CONCEALED WEAPONS MAY BE CARRIED AND EXCEPTIONS; PROHIBITING THE MONTANA UNIVERSITY SYSTEM AND BOARD OF REGENTS FROM INFRINGING ON CONSTITUTIONAL RIGHTS AND PROVIDING EXCEPTIONS; PROVIDING A SEPARATE CIVIL CAUSE OF ACTION FOR VIOLATIONS OF THIS ACT; AMENDING SECTIONS 45-3-111, 45-8-316, 45-8-328, AND 45-8-351, MCA; REPEALING SECTIONS 45-8-317 AND 45-8-339, MCA; AND PROVIDING EFFECTIVE DATES.

HB 112: AN ACT CREATING THE SAVE WOMEN'S SPORTS ACT; REQUIRING PUBLIC SCHOOL ATHLETIC TEAMS TO BE DESIGNATED BASED ON BIOLOGICAL SEX; PROVIDING A CAUSE OF ACTION FOR CERTAIN VIOLATIONS OF THE ACT; PROVIDING FOR CONTINGENT VOIDNESS; AND PROVIDING AN EFFECTIVE DATE.

HB 349: AN ACT GENERALLY REVISING LAWS RELATED TO FREEDOM OF ASSOCIATION AND FREEDOM OF SPEECH ON CAMPUSES OF PUBLIC POSTSECONDARY INSTITUTIONS; PROVIDING PROTECTIONS FOR FREE ASSOCIATION ON PUBLIC POSTSECONDARY INSTITUTION CAMPUSES;

PROHIBITING DISCRIMINATION AGAINST STUDENT ORGANIZATIONS; REQUIRING PUBLIC POSTSECONDARY INSTITUTIONS TO ADOPT ANTI-HARASSMENT POLICIES; PROVIDING RESTRICTIONS ON POLICIES PERTAINING TO THE EXPULSION OF A STUDENT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Overview: Plaintiffs allege that SB 319, HB 102, HB 112, and HB 349 are facially unconstitutional as violative of Article X, section 9 of the Montana Constitution which provides the powers and responsibilities of the Board of Regents.

The plaintiffs allege that sections 2 and 21 of SB 319 infringe Section 2 of SB 319 requires that fees by a student organizations required to register as a political committee are opt-in fee only. Section 21 of SB 319 provides that a "political committee may not direct, coordinate, manage, or conduct any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts for a federal, state, local, or school election inside a residence hall, dining facility, or athletic facility operated by a public postsecondary institution."

Plaintiffs further allege that HB 2's conditional appropriation of \$1,000,000 for use in implementing HB 102 which is void "[i]f the Montana University System file a lawsuit contesting the legality of HB 102" is unconstitutional because it prevents the Regents and the Montana University System from seeking judicial recourse and it prevents the Montana University System of its authority to manage and control the Montana University System.

The plaintiffs have asked the Court to declare SB 319, HB 108, HB 112, and HB 349 unconstitutional and unenforceable and to declare void the conditionality of the \$1,000,000 appropriation earmarked for campus safety. The plaintiffs have further asked that the Court grant appropriate injunctive relief, including preliminary injunctive relief if necessary, preventing the defendants from enforcing the challenged measures. Plaintiffs have also requested attorneys' fees and costs.

Plaintiffs and defendants have both requested summary judgment.