



Montana Legislative Services Division

Legal Services Office

PO BOX 201706
Helena, MT 59620
(406) 444-3064

October 7, 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.

Status: DECIDED

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.

In late July, the District Court noted that HB 506, which provides that until an individual "meets residence and age requirements, a ballot may not be issued to the individual and the individual may not cast a ballot," forecloses absentee voting from voters turning eighteen in the month before the election, although this avenue is open to all other voters, and it requires this subgroup to vote in person. Thus, the District Court found HB 506 severely interfered with the right of suffrage specific to this subgroup. Because HB 506 infringed a fundamental right and did not meet strict scrutiny, the District Court found HB 506 unconstitutional.

In September after a trial, the District Court issued its findings with respect to HB 176, section 2 of HB 530, and SB 169. It found that burdens on fundamental rights, such as the right to vote, trigger strict scrutiny that requires the government to show a compelling state interest for its action and that the choice of legislative action is the least onerous path that can be taken to achieve the state objective.

The District Court found that by eliminating election day registration, HB 176 severely burdened the right to vote of Montana voters, "particularly Native American voters, students, the elderly, and voters with disabilities." Specifically, a significant number of historically disenfranchised voters had come to rely on it over the past 15 years, and after the state had decided to offer a voting opportunity, "the elimination of that voting opportunity is subject to constitutional limitations." The Court rejected the idea that the law was justified by a compelling or legitimate state interest because the verification process for late voter registration included additional security measures above and beyond regular registration. The District Court further found that HB 176 did not combat voter fraud and there was no evidence that HB 176 would have an impact on voter confidence. The District Court added that it did not reduce administrative burdens or wait times, and even if it did, it was not narrowly tailored to achieve that interest. The District Court found that because HB 176 burdened the right to vote and did not further a compelling state interest through the least onerous path, it was unconstitutional, and the District Court permanently enjoined HB 176.

The District Court also evaluated whether, although facially neutral, HB 176 constituted an equal

protection violation because it imposed different burdens on different classes of people. Finding that Native American voters and non-Native American voters were similarly situated, the District Court found that it levied disproportionate burdens on Native American and young voters. Subjected to strict scrutiny, the District Court found that HB 176 also violated the plaintiffs' right to equal protection.

With respect to section 2 of HB 530, despite the fact that the Secretary of State has not yet adopted an administrative rule as directed in section 2 of HB 530 to prohibit a person from providing or offering to provide or accepting a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots, the provision was ripe for review because it had already forced plaintiffs to discontinue activities because the activities may be subject to civil penalties. Bearing in mind that the Montana Ballot Interference Prevention Act (BIPA) was invalidated as a "less onerous prohibition that only targeted ballot collection," the District Court noted evidence showed that the burden on some groups such as Native Americans and people with disabilities was disproportionate. The District Court noted that section 2 of HB 530 could not be justified under any standard because no evidence of voter fraud or ballot coercion in Montana was found. Because it furthered no legitimate or compelling state interest and constituted a disproportionate and severe burden on the plaintiffs' right to vote, it was unconstitutional. Likewise, the District Court found that section 2 of HB 530 violated the plaintiffs' right to equal protection, noting that although discriminatory purpose was not required, following the BIPA litigation in *Western Native Voice* and *Driscoll*, the Legislature was "plainly on notice of the discriminatory impact of HB 530 and other ballot assistance bans." As a result, the District Court permanently enjoined section 2 of HB 530.

The District Court found that ballot collection was core political speech entitled to the "broadest protection" and that prohibiting payment to individuals who undertake ballot collection restricted the plaintiffs' right to free speech because it limited the number of voices to convey the plaintiffs' message and the size of the audience they can reach, as well as limiting speech to the wealthy (i.e., those who can forgo remuneration for their time in ballot collection). Thus, the District Court found that section 2 of HB 530 violated the plaintiffs' right to freedom of speech.

Likewise, because section 2 of HB 530 prohibited a person from providing or accepting "a pecuniary benefit," it was unclear whether the prohibition applied only to collectors paid for each ballot or whether it encompassed individuals whose employment includes ballot collection among other tasks. The District Court noted that the statute does not clarify if an individual "distribut[es]," "request[s]," "collect[s]," and "deliver[s]" a single ballot for pecuniary gain, that individual is subject to multiple fines or only one fine, leaving its meaning unclear. Similarly, because the statute exempts "a government entity" from its provisions, it is not clear whether a sovereign tribal government or organizers paid by those tribes are exempt. Therefore, the District Court found that the statute violated the plaintiffs' fundamental right to due process and was void for vagueness.

In the alternative, the District Court found that if the Secretary of State correctly argued that section 2 of HB 530 was not ripe for review because the final rule had not been promulgated, it was an unlawful delegation of legislative power because the Legislature failed to provide an objective policy, standard, or rule for the Secretary of State to follow when interpreting the term "pecuniary benefit" in rule. Therefore, section 2 of HB 530 violated Article V, section 1, of the Montana Constitution.

The District Court found that the right to vote guaranteed in the Montana Constitution did not prohibit the changes with respect to voter identification contained in SB 169 because the Constitution explicitly

charged the Legislature with passing laws governing the requirements for voter registration and the administration of elections. However, the plaintiffs also alleged that SB 169 violated the right to equal protection of the laws. The District Court found that SB 169's prohibition on out-of-state driver's licenses and Montana college or university IDs disproportionately and disparately burdened young voters, as opposed to voters in other age groups. Although rational basis scrutiny applied, the District Court noted that SB 169 was not rationally related to the government interests asserted. Although voter fraud was asserted as a governmental interest, "[t]here have been no instances of voter fraud concerning the use of student IDs in Montana. Additionally, there is no evidence that SB 169 will protect against future voter fraud." Likewise, the District Court found that the voter identification laws do not improve voter confidence. In addition, although the interest of ensuring the reliability, integrity, and fairness of Montana's election process was asserted, a witness testified that SB 169 "significantly complicated the process of determining whether the voters are presenting adequate identification to cast their vote." Thus, because SB 169 was not rationally related to the alleged government interests, the District Court held that SB 169 unconstitutionally burdened the plaintiffs' right to equal protection of the laws by imposing unequal burdens on young voters. The District Court permanently enjoined SB 169.

II. 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

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.

With respect to the merits of the case, the Montana Supreme Court found that its former holder in *Reichert* was controlling, and it rejected the Secretary of State's assertion that it was manifestly wrong. The Court reiterated *Reichert's* finding that there was a clear pattern in the Constitution that provided that county justices of the peace must run in county elections in which they live, District Court judges to preside over districts in which they live, and Supreme Court justices to preside over the state in which they live, and the individuals holding these offices were to be selected on the "basis of the polity in which they lived and served." Furthermore, the Court noted that the previous opinion was based not only on the structure and text of the Constitution of the State of Montana, it was also corroborated by the debate of the delegates at the 1972 Constitutional Convention and by the function of the Supreme Court itself, noting that a Supreme Court made up of justices that implicitly represented regional interest would be "inimical to the judicial function." Finding that the *Reichert* ruling was not manifestly wrong, the Montana Supreme Court held that *Reichert* was controlling and affirmed the District Court's decision enjoining HB 325 from being placed on the ballot in the 2022 general election.

III. *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 Ellingson

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.

Status: DECIDED in part

Overview: The 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 on section 2 of SB 319, which requires that fees by a student organization required to register as a political committee are opt-in fees 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."

The plaintiffs further allege that HB 2's conditional appropriation of \$1 million for use in implementing HB 102, which is void "[i]f the Montana University System file[s] 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 from using 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 million 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. The plaintiffs have also requested attorney fees and costs.

Plaintiffs and defendants have both requested summary judgment.

In September, the District Court held that SB 319, HB 112, and HB 349 infringed on the authority of the Board of Regents under Article X, section 9, of the Montana Constitution and permanently enjoined enforcement of these bills against the Board of Regents and the Montana University System and its constituent units and on any Montana University System campus or property.

Specific to the jurisdiction of the State Administration and Veterans' Affairs Interim Committee, the Court rejected the state's arguments with respect to SB 319, finding that the Board of

Regents had not yielded its exclusive authority by failing to promulgate a relevant policy or by delegating the matter to the students, stating that even if there was an absence of a policy, it did not allow the Legislature to act on matters constitutionally committed to the board. In addition, the Court noted that student fees that are proposed, approved, and assessed are set for in Board of Regents' policies and that a plaintiff directly affected by the policy, MontPIRG, had its funding arrangement submitted to and approved by the Board of Regents on a biennial basis. Therefore, the District Court held SB 319 violated Article X, section 9, of the Montana Constitution and declared it unconstitutional.