

11-7-2023

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Recommended Citation

Paul Dougherty et al., Legal Short, *Significant Montana Cases*, 84 Mont. L. Rev. 2 (2023).

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SIGNIFICANT MONTANA CASES

Paul Dougherty, Amy Rathke & Gordon Wallace*

I. INTRODUCTION

In the fall of 2022, the Montana Supreme Court was thrust into the national spotlight in the wake of the United States Supreme Court's June decision in *Dobbs v. Jackson Women's Health Organization*.¹ Political commentators around the country closely watched the election for one of two seats on the highest court in the Treasure State, speculating as to whether the balance would tip in favor of justices likely to follow the direction of the United States Supreme Court and overturn Montana's constitutional protection of abortion.² The judicial election raised questions of partisan influence among the members of Montana's highest bench as liberal and conservative officials endorsed incumbent Justice Ingrid Gustafson and her challenger, James Brown, respectively.³ Much of the media coverage focused on the right to privacy as codified in the Montana Constitution, and the question of whether the Montana Supreme Court would continue to construe that provision as protecting the right to obtain an abortion.⁴

Since 2020, the *Montana Law Review* has regularly published a discussion of cases likely to affect the attorney practicing law in Montana.⁵ Several decisions within this edition of *Significant Montana Cases* show further examples of the Court considering the right to privacy, including *Rogers v. Lewis & Clark County*⁶ (pertaining to inmate strip searches) and *State v. Mefford*⁷ (warrantless cell phone searches). The Court in 2022 also grappled with election law, as detailed in the below summaries of *McDonald v. Jacobsen*⁸ and *Montana Democratic Party v. Jacobsen*.⁹ While space did

* *Montana Law Review* Staff Members 2022–23.

1. 142 S. Ct. 2228 (2022).

2. Karin Brulliard, *Little-watched Montana race looms large in abortion fight*, WASH. POST (Oct. 12, 2022), <https://perma.cc/3S3X-2QUL>.

3. *Id.*

4. Shaylee Ragar, *Some states are laser-focused on supreme court elections after the Dobbs ruling*, MONT. PUB. RADIO (Aug. 1, 2022), <https://perma.cc/P7QN-A76J>; Nicole Girten, *Lawyers, judges push Gustafson, GOP backs Brown, in justice race analysts deem more partisan*, DAILY MONTANAN (Oct. 16, 2022), <https://perma.cc/YX8J-HJPP>; Shaylee Ragar, *Supreme Court race brings unprecedented spending & lobbying*, MONT. PUB. RADIO (Oct. 25, 2022), <https://perma.cc/T3H7-WB6W>; Shaylee Ragar & Austin Amestoy, *What's so special about Montana's privacy protections?* MONT. PUB. RADIO (Dec. 7, 2022), <https://perma.cc/QZ2S-27J2>.

5. See Kelsey Dayton, Lindsay Mullineaux & Remy Orrantia, *Significant Montana Cases*, 81 MONT. L. REV. 163 (2020).

6. 513 P.3d 1256 (Mont. 2022).

7. 517 P.3d 210 (Mont. 2022).

8. 515 P.3d 777 (Mont. 2022).

not allow a summary of all impactful Montana Supreme Court decisions from the previous term, the authors hope that the recapitulations included prove useful to the Montana legal community.

II. *McDONALD v. JACOBSEN*

In *McDonald v. Jacobsen*, the Montana Supreme Court bolstered an existing line of precedent that allows pre-election challenges to “facially unconstitutional” ballot measures.¹⁰ Additionally, the Court held that district-based Supreme Court elections violate the right to vote.¹¹

In 2021, the Montana Legislature passed House Bill 325 (HB 325) which—had voters approved the legislative referendum at the ballot box in November 2022—would have assigned each Montana Supreme Court seat to one of seven newly-created Supreme Court districts and required candidates “to run for election solely within the district assigned to that seat.”¹² After the 2024 election, the measure would have required the seven justices to elect the chief justice by majority vote.¹³ HB 325 would not have imposed a residency constraint requiring candidates to reside in the judicial districts for which they ran.¹⁴

Plaintiff-appellants, including a former secretary of state and a delegate to the 1972 Montana Constitutional Convention, among others, brought their lawsuit in district court seeking to enjoin Secretary of State Christi Jacobsen from placing HB 325 on the ballot.¹⁵ Relying on *Reichert v. State*,¹⁶ the district court granted summary judgment to the plaintiffs.¹⁷ On appeal, Secretary Jacobsen argued (1) that the constitutional issue posed by HB 325 lacked ripeness for review by the Court, and (2) that the bill was constitutional.¹⁸

Additionally, Secretary Jacobsen moved for the disqualification of the chief justice and six associate justices of the Montana Supreme Court from hearing this case on appeal.¹⁹ Appellants argued that, “in normal times,”

9. 518 P.3d 58 (Mont. 2022).

10. *McDonald*, 515 P.3d at 783.

11. *Id.* at 794.

12. *Id.* at 780.

13. *Id.*

14. *Id.* at 786. This is the single difference between HB 325 and a similar bill the Court found unconstitutional in *Reichert v. State*, 278 P.3d 455 (Mont. 2012).

15. *McDonald*, 515 P.3d at 780. See also Shaylee Ragar, *Celebrations planned to mark the 50th anniversary of the ratification of the State Constitution*, MONT. PUB. RADIO (June 6, 2022), <https://perma.cc/HX5T-TN3Q>; *History of the Office*, MONT. SEC’Y OF STATE, <https://perma.cc/UP67-H3UD> (last visited Mar. 22, 2023).

16. 278 P.3d 455 (Mont. 2012).

17. *McDonald*, 515 P.3d at 780.

18. *Id.*

19. *Id.* at 780 n.1.

such a case would merit recusal because none of the justices had announced an intent to retire and thus they were reviewing modifications to their own potential reelection campaigns.²⁰ Amid the controversy between the judicial and legislative branches litigated in *McLaughlin v. Montana State Legislature*²¹ in 2021, appellants argued the Montana Supreme Court should lead a “return to normalcy” by allowing an otherwise-not-disqualified consortium of randomly-selected Montana district court judges to decide this case on appeal.²² In a unanimous decision, the Montana Supreme Court rejected this argument.²³

The Court affirmed the authority of the judicial branch to render judgments on the ballot referendums prior to the actual election when such an intervention protects a constitutional right from potential infringement should voters approve the questionable initiative.²⁴ Like the district court, the Montana Supreme Court relied on *Reichert* as the controlling case to decide the issue of whether a justiciable controversy existed.²⁵

In *Reichert*, the Court determined a similar legislative referendum violated the Montana Constitution and that the Court could render a decision on the matter before the presentation of that referendum to voters.²⁶ Like HB 325, the referendum at issue in *Reichert*—Legislative Referendum 119 (LR-119)—would have created seven Supreme Court voting districts and limited the electorate for each district to only those voters residing in those districts.²⁷ Unlike HB 325, LR-119 further imposed a residency requirement on Supreme Court justices by requiring the candidate to reside in that district to run for that office.²⁸ In determining that the matter possessed the qualities of a ripe justiciable controversy, the *Reichert* Court found that the plaintiffs established their case beyond a mere “hypothetical, speculative,

20. Appellant’s Motion to Disqualify at 4–5, *McDonald v. Jacobsen*, 515 P.3d 777 (Mont. 2022) (DA 22-0229), available at <https://perma.cc/XBK5-RDQD>.

21. 489 P.3d 482, 483–84 (Mont. 2021). In that case, the Montana Supreme Court prevented the Montana Legislature’s attempted subpoena of internal judicial branch communications, including materials potentially related to justices’ impressions of certain legislative bills. The Montana Legislature then made an unsuccessful petition for certiorari to the Supreme Court of the United States. Mara Silvers, *SCOTUS Denies Legislature’s Request to Hear Judicial Case*, MONT. FREE PRESS (Mar. 21, 2022), <https://perma.cc/K5E9-V29X>. The 2023 Legislature sent Senate Bill 490, arguably a *McLaughlin* fix providing increased legislative subpoena powers, to the governor’s desk for his signature. See S.B. 490, 68th Leg. (Mont. 2023), <https://perma.cc/FS5R-S8UA>.

22. Appellant’s Motion to Disqualify at 5, *McDonald v. Jacobsen*, 515 P.3d 777 (Mont. 2022) (DA 22-0229).

23. Eric Dietrich, *Justices Deny Sweeping Recusal Request in Montana Supreme Court Districting Case*, MONT. FREE PRESS (June 15, 2022), <https://perma.cc/X9TP-VK3M>.

24. *McDonald*, 515 P.3d at 783.

25. *Id.* at 780–81.

26. *Reichert v. State*, 278 P.3d 455, 473–78 (Mont. 2012).

27. *Id.* at 459.

28. *Id.*

and illusory” dispute with the Legislature.²⁹ The *McDonald* Plaintiffs challenged the referendum on the grounds that, if passed, the referendum would immediately take effect and therefore deny them their “right to vote for each seat of the Supreme Court.”³⁰ The ripeness for justiciability arises because allowing a “facially defective” referendum to go before the voters would “waste time and money for all involved.”³¹

Additionally, the *Reichert* Court ruled that the “language and structure” of the Montana Constitution requires the election of Supreme Court justices on a “statewide basis.”³² The statewide election of justices ensures that the Court, which “has *statewide* appellate jurisdiction, general supervisory control over ‘*all other* courts,’ authority to make rules governing practice and procedure for ‘*all other* courts,’ and authority to make rules governing admission to the bar and conduct of its members,” cannot subordinate itself to “regional interests” implied by the creation of judicial districts in Supreme Court elections.³³

Here, in *McDonald*, the Montana Supreme Court followed roughly the same analysis. First, the Court determined that the plaintiffs had “presented a controversy in the constitutional sense” because they alleged “a threatened injury identical to that alleged in *Reichert*.”³⁴ While precedent discourages “intervention in referenda or initiatives prior to an election,” the Court allows for “rare” “pre-election judicial review” when “the challenged measure is facially unconstitutional.”³⁵ Indeed, *Reichert* states that the judicial branch has “a duty to exercise jurisdiction and declare” such measures invalid.³⁶ Chief Justice McGrath’s majority opinion specifically outlined the historical precedent of the Court entertaining constitutional challenges to ballot measures, signifying a consistent and robust jurisprudence historically permitting pre-election judicial review as a core, constitutional function of the judicial branch.³⁷

However, Chief Justice McGrath did not solely analogize the ballot measure here and the ballot measure in *Reichert* to conclude that, if approved, HB 325 would run afoul of the Montana Constitution. The Chief Justice thoroughly interrogated the argument that the lack of a district-residency requirement on candidates distinguished HB 325 from LR-119 at is-

29. *Id.* at 472–73.

30. *McDonald*, 515 P.3d at 781–82 (citing *Reichert*, 278 P.3d at 473).

31. *Reichert*, 278 P.3d at 474.

32. *Id.* at 475 (citing MONT. CONST. art. VII, § 9).

33. *McDonald*, 515 P.3d at 794 (quoting *Reichert*, 278 P.3d at 475–76) (emphasis added).

34. *Id.* at 783.

35. *Id.*

36. *Id.* (quoting *Reichert*, 278 P.3d at 474).

37. *Id.*; see also *id.* at 783 n.3.

sue and found it insufficient³⁸: “Contrary to the Secretary’s assertion, this Court has already squarely addressed the constitutionality of a legislative referendum replacing statewide elections for Supreme Court seats with district-wide elections” and found such a measure contradicts the Montana Constitution.³⁹ As to Secretary Jacobsen’s alternative claim that the Court erred in deciding *Reichert*, the majority concluded the opinion on the same point that proved dispositive of the constitutional issue at the heart of *Reichert*: restricting seats on the one statewide appellate court to regional districts would subject voters of one district to decisions made by justices unaccountable to them especially due to the specific and statewide responsibilities of the chief justice.⁴⁰ It would also undermine the rule of law by tasking sitting members of the Supreme Court with representing a quasi-constituency rather than “apply[ing] the law fairly and uniformly statewide.”⁴¹

As in *Reichert*, Justice Beth Baker dissented in *McDonald*, similarly finding the justiciability issue dispositive such that the Court should forgo a constitutional analysis of the ballot measure.⁴² Because the threat of voter disenfranchisement would not materialize until after the election, the case lacked “temporal urgency” and thus should proceed to voters before facing judicial review.⁴³ With the outcome of the election resting “in the voters’ hands,” any potential harm remained too remote for the Court to intercede until the process had “run its course.”⁴⁴

Ultimately, the Montana Supreme Court relied on a structural analysis of the Montana Constitution to reaffirm the line of existing precedent enshrining its “obligation to guard, enforce, and protect every right granted or secured by the Constitution” against encroachment upon those rights.⁴⁵ The significance of this case did not arise from a dramatic break from stare decisis—instead, *McDonald* strengthened existing precedent greenlighting pre-election judicial review of facially defective ballot measures and the scope of the Montana Supreme Court’s authority to shield voters from constitutionally defective referenda.⁴⁶ *McDonald* occurred within an acutely

38. *Id.* at 786–87.

39. *McDonald*, 515 P.3d at 786–87.

40. *Id.* at 794 n.11.

41. *Id.* at 795 (quoting *Reichert*, 278 P.3d at 476).

42. *Id.* at 795–96 (Baker, J., dissenting); *Reichert*, 278 P.3d at 483 (Baker, J., concurring in part, dissenting in part).

43. *McDonald*, 515 P.3d at 796 (Baker, J., with Rice, J., dissenting).

44. *Id.* at 798.

45. *Id.* at 784 (majority opinion) (quoting *Columbia Falls Elem. Sch. Dist. No. 6. v. State*, 109 P.3d 257, 261 (Mont. 2005) (internal quotation marks omitted)).

46. *Id.* at 783.

fraught political moment with deep disagreements over the scope of powers allocated to the branches of Montana's government.⁴⁷

The Montana secretary of state's office exceeded its litigation budget by \$1,300,000 in 2022 for lawsuits related to laws passed in the 2021 Legislative Session.⁴⁸ Ahead of the 2023 legislative session, Governor Greg Gianforte's budget included \$2.6 million in additional funding to defend an increase in constitutional challenges to state laws since 2021.⁴⁹ Many of those anticipated challenges will certainly include laws focused on the judicial branch.⁵⁰ As the Supreme Court of the United States recently deliberated on the controversial independent state legislature theory, which threatened to upend the established understanding of separation of powers within state governments, the Montana Supreme Court has established independent state grounds upon which the Montana Constitution defines the duties and powers for the three branches of state government.⁵¹

—Paul Dougherty

III. STATE V. BURNETT

In *State v. Burnett*,⁵² the Montana Supreme Court affirmed Amber Marie Burnett's conviction for several counts of assault on a minor and one count of perjury, over Burnett's speedy trial claim.⁵³ Additionally, the Court affirmed Burnett's perjury conviction despite her eventual acquittal on the specific charge related to those statements.⁵⁴ Ultimately, the Court found Burnett's statements generally denying aspects of the charges against her were sufficient evidence to support her perjury conviction.⁵⁵

47. See Arren Kimbel-Sannit, *Montana Supreme Court Blocks Ballot Referral Changing How Justices are Elected*, MONT. FREE PRESS (Aug. 15, 2022), <https://perma.cc/ESH5-6ZHJ>.

48. *Montana Secretary of State's Office has Spent \$1.4M Defending Election Laws*, YELLOWSTONE PUB. RADIO (Sept. 20, 2022), <https://perma.cc/T8QA-8B2Q>.

49. Austin Amestoy, *Gianforte Requests \$2.6 Million to Defend Laws Against Court Challenges*, MONT. PUB. RADIO, (Jan. 19, 2023), <https://perma.cc/UTR9-WWAS>.

50. Arren Kimbel-Sannit, *Tracking Changes to the Court System at the Legislature's Mid-Point*, MONT. FREE PRESS, (Mar. 8, 2023) <https://perma.cc/L9JM-9K9P>; Arren Kimbel-Sannit, *Legislative Efforts to Reshape Judicial Procedures are Gaining Steam*, MONT. FREE PRESS, (Feb. 1, 2023), <https://perma.cc/Y8L8-JK9A>; Arren Kimbel-Sannit, *Republican Lawmaker Advancing Changes to How Courts Issue Injunctions*, MONT. FREE PRESS, (Jan. 25, 2023) <https://perma.cc/E9KM-E8EW>.

51. See generally *Moore v. Harper*, 600 U.S. ____ (2023); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571 (2022); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997 (2021).

52. 502 P.3d 703 (Mont. 2022).

53. *Id.* at 708, 718.

54. *Id.* at 718.

55. *Id.*

Upon receiving and initially investigating a “report of suspicious bruising on” Burnett’s minor children, Montana Child and Family Services (CFS) determined that further inquiry merited the involvement of the Great Falls Police Department (GFPD).⁵⁶ Although Burnett told the responding officer that the bruising visible on her minor children, A.G. and N.G., resulted from “a snowball and playing with the family’s dog.”⁵⁷ The officer found that explanation unconvincing, and his suspicions piqued when “he observed the children’s demeanor change when he asked them about the bruises.”⁵⁸ CFS removed the children from Burnett’s home.⁵⁹ GFPD continued the investigation by interviewing Burnett, collecting her cell phone, and interviewing Burnett’s former roommate, Nicholas Conlan.⁶⁰ While living with Burnett, Conlan testified at trial that Burnett “verbally and physically abused the children on several occasions,” including the use of a taser on N.G.⁶¹ He witnessed the abuse both in person and via a video surveillance system he installed in the home with Burnett’s permission.⁶²

GFPD arrested Burnett on April 26, 2018, and she bonded out of jail the next week. On May 7, 2018, Burnett first asserted her right to a speedy trial. Yet, she made three motions to continue to better assess the State’s evidence against her within the following month, eventually pushing the start of her trial until March 18, 2019.⁶³

In the meantime, the State offered its first plea agreement to Burnett in October 2018 and, because the State believed she would accept the deal, the lead investigator ceased reviewing the surveillance footage.⁶⁴ In February 2019, the State modified the existing plea agreement to offer Burnett the opportunity to plead *nolo contendere*.⁶⁵ However, these negotiations “fell through in March 2019, and the State filed a motion to continue Burnett’s trial,” which, due to “the availability of the State and defense counsel and the court’s docket” would now begin on August 5, 2019.⁶⁶ Burnett filed her second motion to dismiss on speedy trial grounds, which the trial court denied.⁶⁷

56. *Id.* at 708.

57. *Id.*

58. *Burnett*, 502 P.3d at 708.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Burnett*, 502 P.3d at 708–09.

65. *Id.* at 709. A *nolo contendere* plea would have allowed Burnett to maintain her innocence while allowing the court to enter a sentence as though she were guilty without trial.

66. *Id.*

67. *Id.*

Concurrently, once plea negotiations broke down, the investigation into the surveillance footage resumed and ultimately resulted in the State charging Burnett with fourteen counts of felony assault of a child, two counts of misdemeanor endangering the welfare of a child, and one count of felony perjury.⁶⁸ The perjury charge resulted from Burnett's statements in a dependency and neglect proceeding where she denied Conlan's allegations that she used or threatened to use a taser on one of her children and denied "making a statement to her father about the taser during a jailhouse call."⁶⁹

A bench trial commenced on August 5, 2019, and Burnett testified on her own behalf.⁷⁰ She "did not dispute the video footage or her actions," claiming instead that she administered "appropriate parental discipline within her parental rights."⁷¹ The trial concluded after two days and the court convicted Burnett on nine counts of assault on a minor and the single count of perjury.⁷²

On appeal to the Montana Supreme Court, Burnett challenged the district court's denial of her speedy trial motion and whether the State presented sufficient evidence to support her perjury conviction.⁷³ First, the Court analyzed Burnett's speedy trial claim and unanimously affirmed the district court's denial of her motion to dismiss.⁷⁴ Next, in a 4–3 split with the majority opinion written by Justice McKinnon,⁷⁵ the Court concluded that the trial court record sufficiently supported Burnett's conviction for perjury.⁷⁶

The Court moved methodically and thoroughly measured Burnett's speeding trial claim through the factors established in *State v. Ariegwe*.⁷⁷ The justices found that the balance of those factors favored the State.⁷⁸ Despite attributing responsibility for 466 days of delay to the State⁷⁹—far longer than the threshold 200 days required to trigger a speedy trial analysis⁸⁰—the Court determined that Burnett's failure to object to the prosecu-

68. *Id.*

69. *Id.*

70. *Burnett*, 502 P.3d at 709.

71. *Id.*

72. *Id.* at 708.

73. *Id.*

74. *Id.* at 716.

75. *Id.* at 718.

76. *Burnett*, 502 P.3d at 718.

77. 167 P.3d 815 (Mont. 2007). In *Ariegwe*, the Court measured four factors to determine if an accused's right to a speedy trial had been violated: the length of the delay, the reasons for the delay, how the accused responded to the delay, and the extent to which the delay prejudiced the accused. No one factor is wholly dispositive and the fact-intensive balancing resists a bright-line rule requiring the meticulous analysis employed by the Montana Supreme Court here. *See id.* at 858–59.

78. *Burnett*, 502 P.3d at 716.

79. *Id.* at 713.

80. *Id.* at 712.

tor's motions to continue weighed against her.⁸¹ On the fourth *Ariegwe* factor, the Court found minimal prejudice against Burnett: she suffered "minimal pretrial incarceration," she "fail[ed] to connect" her anxieties and concerns "directly to the charges against her," and she failed to identify any issues with "evidence or witnesses arising from the delay."⁸² On the whole, the balance of those foregoing factors compelled the Court "to agree with the District Court's conclusion that the State did not violate Burnett's right to a speedy trial."⁸³

The Court then discussed Burnett's perjury conviction.⁸⁴ Conlan testified that Burnett used or threatened to use a taser on the children.⁸⁵ Though Burnett advanced several theories on how the State failed to meet its burden, the Court only addressed the merits of two.⁸⁶

First, Burnett claimed that "the testimony of Conlan was uncorroborated."⁸⁷ The legitimacy of Conlan's testimony hinged on the design of the taser and the jailhouse phone call Burnett made after her arrest.⁸⁸ The taser at issue had two sides: one a taser and the other a flashlight.⁸⁹ Burnett admitted to pressing the latter side against her child in the jailhouse phone call to her father.⁹⁰ A recording of this statement admitted into evidence and played for the district court directly contradicted Burnett's sworn testimony to CFS.⁹¹ This testimony was material because "whether Burnett used or pressed a taser against N.G. could have had a direct impact on the outcome" of the CFS proceeding.⁹² Furthermore, the jailhouse phone call corroborated Conlan's testimony sufficient to support a conviction for perjury.⁹³

Second, because the district court acquitted her on one count of "knowingly causing reasonable apprehension by pressing a taser to N.G.," she could not have also "knowingly made a false statement" regarding the taser.⁹⁴ The district court "noted its belief that Burnett may have used a taser," but concluded that the State had failed to prove all elements of using the taser to knowingly cause reasonable apprehension of bodily harm by

81. *Id.* at 714.

82. *Id.* at 715–16.

83. *Id.* at 716.

84. *Burnett*, 502 P.3d at 716.

85. *Id.* at 708.

86. *Id.* at 717.

87. *Id.*

88. *Id.* at 717–18.

89. *Id.* at 718.

90. *Burnett*, 502 P.3d at 717.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

pressing the taser to N.G.⁹⁵ Regardless, the majority found sufficient evidence for “use” of the taser against N.G. by Burnett because tasers are operable by “‘pressing’ it against someone,” nothing in the record suggested the taser was of the variety which only fired probes at an intended target, and, in other cases involving the use of a weapon, the Court has made no distinction between brandishing and firing.⁹⁶

Justice Gustafson authored a lengthy dissent to the Court’s decision affirming Burnett’s perjury conviction.⁹⁷ Gustafson performed a thorough post-mortem of the “testimony and evidence admitted at trial”⁹⁸ and arrived at a paradox: how could Burnett perjure herself for claiming that she did not commit a crime when the district court acquitted her of the crime “she did not do”?⁹⁹ Additionally, the dissent questioned whether the jailhouse phone call ultimately corroborated Conlan’s testimony as Conlan testified not that Burnett simply pressed the flashlight-end of the taser against N.G., but that Burnett actively and brutally tased her child.¹⁰⁰

State v. Burnett is significant for the future concerns Justice Gustafson voiced at the close of her dissent. Gustafson saw this case as a troubling precedent due to the potential for “prosecutors to charge perjury in nearly every case where a defendant generally denies the charges but is ultimately found guilty.”¹⁰¹ Indeed, Burnett was convicted of perjury for denying she committed a crime for which she was acquitted.¹⁰² Burnett was ultimately convicted for her horrific abuse of her children, but the implication that denials by a defendant could lead to additional charges of perjury even after acquittal presents troubling issues for those who may be accused of a crime in the future. Despite its vast geographic size, Montana has a small population. Burnett’s jailhouse phone call betrays her anxieties about how her community may perceive her or how she might be portrayed in the media.¹⁰³ While a sense of self-preservation may have motivated her denials in the face of significant charges, the simple fact remains that Burnett denied committing a crime of which the district court subsequently acquitted her—yet the Montana Supreme Court affirmed her conviction for perjury by making those same denials.¹⁰⁴ The only subsequent citation to *Burnett* by

95. *Id.*

96. *Burnett*, 502 P.3d at 717–18.

97. *Id.* at 718 (Gustafson, J., with McGrath, C.J. & Sandefur, J., concurring in part and dissenting in part).

98. *Id.* at 723.

99. *Id.* at 724.

100. *Id.* at 725.

101. *Id.* at 727.

102. *Burnett*, 502 P.3d at 727 (Gustafson, J., with McGrath, C.J. & Sandefur, J., concurring in part and dissenting in part).

103. *Id.* at 720.

104. *Id.* at 727.

the Montana Supreme Court did not concern an appeal of a perjury conviction.¹⁰⁵ One's memory or sense of awareness can be fallible. Could an accused's protestations of innocence, while convincing to a jury on the substantive charge, be incomplete or unspecific enough to expose them to liability for perjury? For example, could an individual acquitted of robbing a bank be found guilty for misstating the balance of a checking account under oath? Practitioners—and those accused who maintain their innocence—will need to wait until a similar scenario to *Burnett* comes before the Montana Supreme Court.

—Paul Dougherty

IV. *ROGERS V. LEWIS & CLARK COUNTY*

In *Rogers v. Lewis & Clark County*, the Montana Supreme Court affirmed a district court decision certifying a class action suit against Lewis and Clark County alleging that the County's practice of conducting strip searches of detainees arrested for non-felony offenses violated Montana law.¹⁰⁶ In its holding, the Montana Supreme Court reaffirmed the requirements that plaintiffs must meet to achieve class certification under the Montana Rules of Civil Procedure, specifically exploring the contours of numerosity, commonality, and typicality under Rule 23(a).¹⁰⁷ The Court also held that a class definition can rely on an agency's policy or practice to define its membership.¹⁰⁸

Plaintiff-Appellee William Scott Rogers, along with 95 other similarly situated persons, sought certification for all individuals subject to allegedly illegal strip search procedures at Lewis and Clark County Detention Center in violation of their constitutional and statutory rights, among other claims.¹⁰⁹ Lewis and Clark County Detention Center is the sole detention facility in Lewis and Clark County.¹¹⁰ The Detention Center maintains an unwritten policy of strip-searching any detainee being held with the general population, regardless of the severity of their crime.¹¹¹ A strip search includes a detention officer's inspection of the unclothed detainee, including their feet, armpits, the interior of their mouth, between their buttocks, and beneath their genitals or breasts.¹¹² In contrast with the unwritten policy at

105. *State v. Brown*, 517 P.3d 177, 185 (Mont. 2022).

106. 513 P.3d 1256, 1259 (Mont. 2022).

107. *Id.* at 1262–63.

108. *Id.* at 1262.

109. *Id.* at 1259–60.

110. *See Rogers v. Lewis & Clark Cty.*, 472 P.3d 171, 176 (Mont. 2020).

111. *Id.*

112. *Id.*

Lewis and Clark County Detention Center, Montana’s statutory prohibition on suspicionless strip searches requires that the detention authority suspect the detainee of concealing “a weapon, contraband, or evidence of the commission of a crime” before conducting a strip search.¹¹³ The collective Plaintiff-Appellees were each “arrested for a misdemeanor or traffic offense” but were nevertheless “subjected to a strip search as part of the booking process at the Detention Center without reasonable suspicion to believe they were concealing a weapon, contraband, or evidence of the commission of a crime.”¹¹⁴

On appeal, the County alleged that (1) the district court’s definition of the class was overly broad, (2) the district court abused its discretion in finding that the class met the requirements of the statute, and (3) the district court abused its discretion in certifying the class action lawsuit.¹¹⁵ The Court first addressed the County’s argument that the class description was overly broad, clarifying that class definitions will be construed narrowly.¹¹⁶ Asserting that the County misunderstood the definition of the class to include all persons booked into the Detention Center, when in fact the definition relied on the responses marked on the Intake Forms filled out by detention officers, the Court found that the defined class “should be readily identifiable from records that should be in the possession of the County.”¹¹⁷

The Court next turned to the question of whether the defined class met the prerequisites put forth under Rule 23(a): namely, the requirements that members of a class are sufficiently numerous, can be evaluated with a common question, and whether the “named class members’ interests align with the interests of absent class members.”¹¹⁸

A. Numerosity

Under Montana Rule of Civil Procedure 23(a)(1), a class must be “so numerous that joinder of all members is impractical,” based on a reasonable estimate of class size, proven by evidence that is more concrete than “mere speculation.”¹¹⁹ Here, the class included ninety-six named persons who all alleged they were subjected to suspicionless strip searches, and more than 3,500 similarly situated persons were booked at the Detention Center be-

113. MONT. CODE ANN. § 46-5-105 (2013).

114. *Rogers*, 513 P.3d at 1259–60.

115. See Opening Brief of Appellant at 19, *Rogers v. Lewis & Clark Cty.*, 513 P.3d 1256 (Mont. 2022) (No. DA-21-0442).

116. *Rogers*, 513 P.3d at 1261 (citing *Knudsen v. Univ. of Mont.*, 445 P.3d 834, 841 (Mont. 2019)).

117. *Id.* at 1262.

118. *Id.* at 1262–65 (citing *Byorth v. USAA Cas. Ins. Co.*, 384 P.3d 455, 464 (Mont. 2016)).

119. *Id.* at 1263 (citing *Diaz v. Blue Cross & Blue Shield of Mont.*, 267 P.3d 756, 763 (Mont. 2011)).

tween 2015 and 2018.¹²⁰ The Court did not find persuasive the County's argument that this number does not include all possible parties and instead held that the class was sufficiently numerous to render joinder of all members impracticable under the statute.¹²¹

B. Commonality

Under Rule 23(a)(2), the plaintiffs must show “there are questions of law or fact common to the class,” and that their injury should be sufficiently similar to facilitate class-wide resolution.¹²² The County asserted that the facts specific to each individual class member were divergent enough to require evaluation on a case-by-case basis.¹²³ The Court reasoned that, again, the County had misunderstood the class definition.¹²⁴ The County's policy regarding strip-searching detainees, and the consistency with which it was applied, provided sufficient evidence of commonality—evidence that is “memorialized on the Intake Forms.”¹²⁵

C. Typicality

The Court concluded its analysis of the case under Rule 23(a) by examining the requirement of typicality, which requires “the named plaintiff's claim to stem ‘from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory.’”¹²⁶ Again, the Court found the consistency of the strip search policy enacted at the Detention Center persuasive.¹²⁷ The County's argument that each plaintiff would have no representative or typical traits failed.¹²⁸

D. Other Considerations

Finally, the Court addressed the class certification requirements under Rule 23(b)(2) and 23(b)(3), which require a predominance among the class members' interests over questions specific to individual plaintiffs.¹²⁹ The County asserted that the fact patterns among the plaintiffs would be so di-

120. *Id.* at 1263–64.

121. *Id.* at 1264. *Cf. Byorth*, 384 P.3d at 465, in which the Court reversed a class certification due to insufficient evidence as to the actual number of potential claimants.

122. *Rogers*, 513 P.3d at 1264 (quoting MONT. R. CIV. P. 23(a)(2)).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1265 (quoting *Jacobsen v. Allstate Ins. Co.*, 310 P.3d 452, 468 (Mont. 2013)).

127. *Id.*

128. *Rogers*, 513 P.3d at 1265.

129. *Id.* at 1265–66.

vergent that “mini-trials for each class member” would be required to resolve the dispute.¹³⁰ The Court did not find this argument persuasive, once again leaning on the reasoning it applied with respect to numerosity, commonality, and typicality: “The County’s arguments premised on the necessity of individual assessments were not persuasive under Rule 23(b)(3) and remain unpersuasive under Rule 23(b)(2).”¹³¹

Justice Jim Rice concurred in part and dissented in part, agreeing with the majority’s reasoning that the district court did not abuse its discretion in certifying the class but disagreeing with the district court’s definition of the class, as he agreed with the County as to its overbreadth.¹³² Justice Rice suggested reframing the class definition to more squarely address the injury alleged by the plaintiffs, removing reference to the Detention Center policy and instead relying on the language of the statute.¹³³

Rogers v. Lewis & Clark County is significant because it clarifies Montana’s class certification statute while continuing the Montana Supreme Court’s history of construing Montana’s constitutional right to privacy as more stringent than the protections found under the federal Fourth Amendment—an issue that was briefed, but not addressed by the Court in its opinion.¹³⁴ The Montana Legislature enacted the state’s suspicionless strip search prohibition in 2013,¹³⁵ in the wake of the United States Supreme Court’s decision in *Florence v. Board of Chosen Freeholders of County of Burlington*.¹³⁶ In *Florence*, the Supreme Court held that detention officers are permitted to conduct strip searches of detainees before admitting them to jail without a suspicion that the detainee may be carrying contraband.¹³⁷ Here, Rogers argued that the legislative history behind Montana’s statutory prohibition on suspicionless strip searches is clear: not only was the statute

130. *Id.* at 1266.

131. *Id.*

132. *Id.* at 1266–67 (Rice, J., concurring in part and dissenting in part).

133. “To remedy the overbroad class,” Justice Rice write that he would reformulate the class definition as:

Each person arrested or detained for a non-felony offense from October 31, 2015, to the present who has been subjected to a strip search or visual body cavity search by a law enforcement officer or employee of the Lewis and Clark County Detention Center without reasonable suspicion to believe the person is concealing a weapon, contraband, or evidence of the commission of a crime, in violation of § 45-5-105.

Id. at 1268.

134. Answer Brief of Appellant at 1, *Rogers v. Lewis & Clark Cty.*, 513 P.3d 1256 (Mont. 2022) (No. DA-21-0442). *See also* Gryczan v. State, 942 P.2d 112, 121 (Mont. 1997); State v. Spang, 48 P.3d 727, 733 (Mont. 2002); State v. Allen, 241 P.3d 1045, 1057 (Mont. 2010); Deserly v. Dep’t of Corr., 995 P.2d 972, 979 (Mont. 2000)).

135. MONT. CODE ANN. § 46-5-105 (2013).

136. 566 U.S. 318 (2012). *See also* Reply Brief of Plaintiffs/Appellants at 14, *Rogers v. Lewis & Clark Cty.*, 472 P.3d 171 (Mont. 2020) (No. DA-19-0734).

137. *Florence*, 566 U.S. at 330.

drafted in direct response to *Florence*, in an effort to preserve Montana's history of a heightened protection of privacy, but its intent has been reaffirmed by the Legislature when drafting subsequent bills.¹³⁸ The Montana Supreme Court would appear to agree.

—Amy Rathke

V. *TAI TAM, LLC v. MISSOULA COUNTY*

In *Tai Tam, LLC v. Missoula County*,¹³⁹ the Montana Supreme Court narrowly reversed and remanded a district court decision to grant a board of county commissioners' motion to dismiss a property owner's application to subdivide.¹⁴⁰ The Montana Supreme Court found that the district court erred in holding that a property owner's claims brought against the board of county commissioners were time-barred due to a 30-day statute of limitations.¹⁴¹ Further, the Court's decision indicated an error on the part of the district court with respect to the property owner's due process, takings, and equal protection claims.¹⁴²

Tai Tam, LLC, is a property owner in possession of a 28.3-acre parcel of real property known as McCauley Meadows in Missoula's Target Range neighborhood.¹⁴³ The property owner initially applied to the Missoula Board of County Commissioners in 2018, seeking to subdivide the parcel into 17 lots, with 2.5 acres set aside for permanent agricultural use.¹⁴⁴ The Board denied the application, stating that the proposal failed to adequately mitigate the loss of agricultural lands within the parcel.¹⁴⁵ The property owner resubmitted its subdivision proposal, this time seeking to divide the parcel into 14 lots, with 3.8 acres reserved for permanent agricultural use.¹⁴⁶ Once again, the Board denied the proposal following a determination that the proposal did not adequately mitigate the loss of agricultural land and, further, that it failed to meet a new requirement to mitigate the impact of the subdivision on bird habitat.¹⁴⁷

138. Answer Brief of Plaintiffs/Appellees at 6–7, *Rogers v. Lewis & Clark Cty.*, 513 P.3d 1256 (Mont. 2022) (No. DA 21-0442).

139. 520 P.3d 312 (Mont. 2022).

140. *Id.* at 316–17.

141. *Id.* at 319.

142. *Id.* at 321–23.

143. *Id.* at 316.

144. *Id.*

145. *Tai Tam*, 520 P.3d at 316.

146. *Id.*

147. *Id.*

After the second denial of its subdivision application, Tai Tam filed a complaint against the Missoula Board of County Commissioners.¹⁴⁸ Tai Tam sought statutory damages against the Board under Mont. Code Ann. § 76-3-625(1), which provided that a person who has filed an application for a subdivision “may bring an action in district court to sue the governing body to recover actual damages” caused by a decision of the governing body.¹⁴⁹ Further, Tai Tam asserted claims under 42 U.S.C. § 1983¹⁵⁰ on the bases of due process violations, takings, and a violation of equal protection.¹⁵¹ Rather than bring its claims pursuant to § 1983 as a property owner with a constitutionally protected interest in its subdivision application, Tai Tam’s claims were “based on its rights inherent in the ownership of land as affected by the County’s exercise of its police power.”¹⁵² The district court found that the claims brought under § 76-3-625(1) were not timely filed because they failed to meet a 30-day statute of limitations.¹⁵³ As for the § 1983 claims, the district court found they failed to state a claim upon which relief could be granted due to a lack of sufficient property interest and that the claims were not well-pled—and as such, the district court granted the Board’s motion to dismiss.¹⁵⁴

The Court found the language of § 76-3-625(1) to be clear because it did not include a statute of limitations, and the district court erred when it imported language containing a 30-day time frame from the adjacent § 76-3-625(2).¹⁵⁵ The Court found the district court’s analysis anemic and, ultimately, unpersuasive.¹⁵⁶ As such, the Court decided the district court erred when it granted the Board’s motion to dismiss pursuant to Montana Rule of Civil Procedure 12(b)(6).¹⁵⁷

The Court then turned to the § 1983 claims and the district court’s motion to dismiss, citing Montana case law that “a motion to dismiss is ‘viewed with disfavor and rarely granted.’”¹⁵⁸ In light of a Rule 12(b)(6)

148. Opening Brief of Appellant at 1, *Tai Tam, LLC v. Missoula Cty.*, 520 P.3d 312 (Mont. 2022) (No. DA 21-0660).

149. *Tai Tam*, 520 P.3d at 316. MONT. CODE ANN. § 76-3-625(1) (2019) has since been amended to include a 180-day statute of limitations within which to bring such an action. *See* MONT. CODE ANN. § 76-3-625(1) (2021).

150. *Tai Tam*, 520 P.3d at 320 (“42 U.S.C. § 1983 provides for a cause of action when state actors violate a federally protected constitutional right.”).

151. *Id.* at 316.

152. Reply Brief of Appellant at 8, *Tai Tam, LLC v. Missoula Cty.*, 520 P.3d 312 (Mont. 2022) (No. DA 21-0660).

153. *Tai Tam*, 520 P.3d at 317.

154. *Id.* at 319.

155. *Id.*

156. *Id.*

157. *Id.* at 317. The Montana Legislature subsequently amended subsection (1) of the statute to include a 180-day statute of limitations. *See* MONT. CODE ANN. § 76-3-625(1) (2021).

158. *Tai Tam*, 520 P.3d at 319 (citing *Fennessy v. Dorrington*, 32 P.3d 1250, 1252 (Mont. 2001)).

dismissal, the Court must interpret allegations of fact as true and “construe the complaint in the light most favorable to the plaintiff.”¹⁵⁹ Thus, the remainder of the opinion did not discuss the merits of the claims or whether they would survive a Rule 56 motion for summary judgment once the factual record is more fully developed.¹⁶⁰

The crux of the § 1983 issue in *Tai Tam* is the Court’s interpretation of a protected property interest, and whether, in the light most favorable to the plaintiff, such a protected property interest was pled to the extent that it could survive a 12(b)(6) motion to dismiss.¹⁶¹

The Court first turned to the allegations of due process violations claimed in the complaint, establishing that local governmental entities may only be held liable under § 1983 when they issue policies that directly cause constitutional violations.¹⁶² Laying out the four-part test from *Dorwart v. Caraway*,¹⁶³ the Court described the requirements a plaintiff must meet to hold a local government entity liable under a § 1983 claim: (1) that the plaintiff was deprived of a constitutional right they possessed; (2) that the government entity had a policy; (3) that the policy “amounts to deliberate indifference to the plaintiff’s constitutional right”; and (4) that the constitutional violation can be substantially traced to the constitutional violation.¹⁶⁴ The Court found that *Tai Tam* met this test, given that the Board’s reasoning for denying the permit was based on “policies to protect viewsheds, protect generic values, and protect adjacent property owners,” in spite of the fact that the Board had not officially adopted those specific policies.¹⁶⁵ Since the Board never adopted those particular policies, *Tai Tam* was effectively denied adequate notice and an opportunity to be heard, resulting in a due process violation.¹⁶⁶ As a result, the Court ruled that the district court erred in its dismissal of *Tai Tam*’s due process claim.¹⁶⁷

Following the due process analysis, the Court turned to *Tai Tam*’s takings claim. Under both the federal and the Montana constitutions, takings of private property for public use are prohibited without just compensation.¹⁶⁸

159. *Id.* (quoting *Barthel v. Barretts Minerals Inc.*, 496 P.3d 541, 543 (Mont. 2021)) (internal quotation marks omitted).

160. *Id.* at 319–20.

161. *Id.* at 321.

162. *Id.* (quoting *Dorwart v. Caraway*, 966 P.2d 1121, 1149 (Mont. 1998)).

163. 966 P.2d 1121 (Mont. 1998).

164. *Tai Tam*, 520 P.3d at 322 (quoting *Dorwart v. Caraway*, 966 P.2d 1121, 1149 (Mont. 1998)). See also *Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992).

165. *Tai Tam*, 520 P.3d at 322.

166. *Id.*

167. *Id.* at 322–23.

168. See U.S. CONST. amend. V; MONT. CONST. art. II, § 29 (“Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into the court for the owner.”).

By applying new standards—that they had not yet adopted—to Tai Tam’s subdivision proposal, the Board held the proposal to a different standard than previously submitted subdivision proposals.¹⁶⁹ The Court found that, in effect, Tai Tam “shoulder[ed] the burden of preserving agricultural lands and viewsheds which was not imposed on other landowners”—and that the question of whether these burdens justified compensation was not properly before the Court, given the procedural posture of the case.¹⁷⁰

Finally, the Court addressed Tai Tam’s claim of violation of equal protection. Under the Equal Protection Clause of the Fourteenth Amendment, no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁷¹ The Court found Tai Tam’s argument for a “class of one” protection claim persuasive, based on its allegation that Tai Tam was “intentionally treated differently from others similarly situated and there was no rational basis for the difference in treatment.”¹⁷² The Court cited the facts alleged in the complaint—in particular, the inconsistent policies as applied to Tai Tam versus surrounding properties—as persuasive, since, as the Court repeatedly noted, when reviewing a Rule 12(b)(6) motion to dismiss, the alleged facts must be taken as true.¹⁷³ As such, the Court found that Tai Tam put forth sufficient evidence to overcome a motion to dismiss the equal protection claim and again found the district court erred.¹⁷⁴

Chief Justice Mike McGrath, joined by Justices Beth Baker and Dirk Sandefur, concurred in part and dissented in part.¹⁷⁵ The dissent agreed with the Court’s finding of the district court’s error in importing a 30-day statute of limitations into § 76-3-625(1).¹⁷⁶ However, the dissent took issue with the very notion that Tai Tam had legitimate § 1983 claims, and explored the argument’s flaws in a thorough tour of on-point Montana and federal constitutional case law.¹⁷⁷ Chief Justice McGrath dispatched with each of the § 1983 claims in turn. First, Tai Tam still had legal methods of redress available and so a due process claim was improper.¹⁷⁸ Second, Tai Tam knew when purchasing the property that any subdivision application was subject to Board approval, so the takings claim was improper.¹⁷⁹ Fi-

169. *Tai Tam*, 520 P.3d at 323–24.

170. *Id.* at 323.

171. U.S. CONST. amend. XIV.

172. *Tai Tam*, 520 P.3d at 324 (citing *Totem Beverages, Inc. v. Great Falls-Cascade Cty. City-Cty. Bd. of Health*, 452 P.3d 923, 931 (Mont. 2019)).

173. *Id.* at 323–24.

174. *Id.* at 324.

175. *Id.* at 325–30 (McGrath, C.J., with Baker & Sandefur, JJ., concurring and dissenting).

176. *Id.* at 325.

177. *Id.* at 325–30.

178. *Tai Tam*, 520 P.3d at 326 (McGrath, C.J., with Baker & Sandefur, JJ., concurring and dissenting).

179. *Id.* at 328–29.

nally, being a more recent purchaser in the area, Tai Tam was *not* similarly situated to more senior property owners—who, in fact, “sought development permits when there was still abundant open space available”—so the equal protection claim was improper.¹⁸⁰

Tai Tam, LLC v. Missoula County is significant in that it legitimizes a property owner’s claim that property ownership in and of itself provides the grounds for bringing a constitutional analysis to a subdivision proposal. Though procedurally correct, in focusing the opinion on the 12(b)(6) motion to dismiss, the majority missed an opportunity to consider the chilling effect this decision may have on boards of county commissioners in denying future subdivision applications. If current trends continue, subdivisions and similar developments will remain a part of Montana’s present and future.¹⁸¹ It stands to reason, then, that boards of county commissioners should retain discretion to properly evaluate and approve (or disapprove) them without the requirement of a constitutional analysis in every case.

—Amy Rathke

VI. STATE V. MEFFORD

Four justices of the Montana Supreme Court recently held that a motion to suppress evidence uncovered during a warrantless search of a parolee’s phone should have been granted.¹⁸² The Court reasoned that the search exceeded the scope of Mefford’s consent when Mefford allowed the parole officer to view a single conversation in Facebook Messenger; thus, the parole officer did not have reasonable cause to search the other contents of Mefford’s phone under the consent and probation search exceptions to the search warrant requirement.¹⁸³ Justice Baker wrote the opinion of the Court.¹⁸⁴ Justice Shea concurred as to whether the consent warrant excep-

180. Chief Justice McGrath also wrote:

Tai Tam points to no authority suggesting that the Equal Protection Clause requires that those seeking to develop the last remaining open space be treated the same as those who developed when undeveloped space was plentiful, and testing or developing these factual allegations through a fact-finding process is therefore unnecessary to the resolution of this case.

Id. at 330.

181. See Eric Dietrich, *Housing task force details regulatory reforms, other proposals aimed at affordability crunch*, MONT. FREE PRESS (Oct. 4, 2022), <https://perma.cc/8BKC-2NQE>; Spencer Elliot, *Demand For Montana Mountain Real Estate Continues to Drive New Development*, FORBES (Mar. 4, 2023), <https://perma.cc/C9SL-AGVC>; Todd Wilkinson, *Montana, In The Wake Of ‘Yellowstone’ and ‘A River Runs Through It’*, MOUNTAIN JOURNAL (Feb. 27, 2023), <https://perma.cc/6B54-KTG2>.

182. *State v. Mefford*, 517 P.3d 210, 214 (Mont. 2022).

183. *Id.* at 214, 221.

184. *Id.* at 214.

tion applied, but dissented on whether the probation search exception applied.¹⁸⁵ He was joined by Justice Rice and Chief Justice McGrath.¹⁸⁶

In November 2016, Mefford was on parole from a 2006 conviction in Flathead County.¹⁸⁷ He was under the supervision of Butte Probation and Parole, required to wear a GPS monitor on his ankle, and had a 10:00 p.m. curfew.¹⁸⁸ On November 26, 2016, Parole Officer Jake Miller observed through the GPS tracker that Mefford was in his apartment's parking lot after the curfew.¹⁸⁹ Officer Miller and his supervising officer, Jerry Finley, conducted a home visit on November 29, 2016, to investigate the curfew violation.¹⁹⁰ Mefford stated that he did not have service on his phone and he could only access the internet from the parking lot.¹⁹¹ Mefford was in the parking lot after his 10:00 p.m. curfew to use Facebook Messenger to talk to his 16-year-old daughter.¹⁹² Miller asked to see the phone so he could verify Mefford's story.¹⁹³ Mefford consented, gave Miller the phone, stated the name of his daughter, and told Miller to look for the conversation on Facebook Messenger.¹⁹⁴ Miller found the conversation in Facebook Messenger, but did not believe the profile picture was of Mefford's daughter because the woman appeared to be older than sixteen.¹⁹⁵ Without asking Mefford any follow-up questions, Miller opened the photo gallery on Mefford's phone to look for a photo of Mefford's daughter to compare with the profile picture.¹⁹⁶ In the photo gallery, Miller found several photos depicting what Miller believed to be child pornography.¹⁹⁷ The officers detained Mefford, seized the phone, revoked Mefford's parole, and returned him to the Montana State Prison.¹⁹⁸

Nearly a year after these events, Detective Sergeant Jeff Williams obtained a search warrant for the phone and had a forensic examiner make determinations concerning the aforementioned photos and conduct a forensic extraction of the phone.¹⁹⁹ The forensic examiner determined that the phone contained approximately 30 images of child pornography or child

185. *Id.* at 226 (Shea, J. with McGrath, C.J. & Rice, J., concurring and dissenting).

186. *Id.* at 229.

187. *Id.* at 214 (majority opinion).

188. *Mefford*, 517 P.3d at 214.

189. *Id.*

190. *Id.* at 214–15.

191. *Id.* at 215.

192. *Id.*

193. *Id.*

194. *Mefford*, 517 P.3d at 215.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

erotica and they had been downloaded from a file-sharing website.²⁰⁰ Based on this evidence, the State charged Mefford with sexual abuse of children.²⁰¹ Mefford moved to suppress the evidence and dismiss the charge.²⁰² He asserted that his consent was limited to the Facebook Messenger application and that a search of any of the phone’s contents beyond that application was beyond the scope of his consent.²⁰³ The district court denied the motion to suppress and dismiss after holding a suppression hearing.²⁰⁴ The case proceeded to trial, where a jury found Mefford guilty of sexual abuse of children.²⁰⁵ He was sentenced to five years in the Montana State Prison and received no time suspended.²⁰⁶

The question the Montana Supreme Court examined on appeal in this case was “whether the District Court erroneously rejected Mefford’s claim that his parole officer lacked a valid exception to the warrant requirement.”²⁰⁷ The warrant requirement is found both in the Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution.²⁰⁸ Both require that no warrant be issued without probable cause and a particular description of what is to be searched.²⁰⁹ Additionally, to infringe upon the express right to privacy under Article II, Section 10, the officer must show a “compelling state interest.”²¹⁰ The Court affirmed that, taken together, Article II, Sections 10 and 11 of the Montana Constitution afford a broader degree of privacy than the comparable provisions of the United States Constitution.²¹¹

A “search,” requiring either a warrant or a warrant exception, occurs when “government action intrudes or infringes upon an individual’s reasonable expectation of privacy.”²¹² To demonstrate that a “reasonable expectation of privacy” exists, an individual must have (1) “a subjective expectation of privacy” that is (2) “objectively reasonable in society.”²¹³ The State did not dispute that both of these prongs were met and thus conceded that a search occurred.²¹⁴ Thus, the analysis turns to whether the search was “rea-

200. *Mefford*, 517 P.3d at 215.

201. *Id.*; MONT. CODE ANN. § 45-5-625(1)(e) (2021).

202. *Mefford*, 517 P.3d at 215.

203. *Id.*

204. *Id.* at 215, 226.

205. *Id.*; MONT. CODE ANN. § 45-5-625(1)(e).

206. *Mefford*, 517 P.3d at 216.

207. *Id.*

208. U.S. CONST. amend. IV; MONT. CONST. art. II, § 11.

209. *Mefford*, 517 P.3d at 216 (citing *State v. Peoples*, 502 P.3d 129, 139–40 (Mont. 2022)).

210. MONT. CONST. art. II, § 10.

211. *Mefford*, 517 P.3d at 216 (citing *State v. Staker*, 489 P.3d 489, 494 (Mont. 2021)).

212. *Id.* (quoting *Staker*, 489 P.3d at 495).

213. *Id.* (quoting *Staker*, 489 P.3d at 496).

214. *Id.* at 217.

sonable under the circumstances.”²¹⁵ To be reasonable, the search “must be justified by a compelling state interest,” and a warrant must be validly issued.²¹⁶ Alternatively, an exception to the warrant requirement must apply.²¹⁷ When a warrant exception applies, the State must generally use the “least intrusive means” available to it.²¹⁸ As no search warrant was issued, the dispositive question is merely whether the consent or probation exceptions applied.²¹⁹

The majority held that the officer’s search of Mefford’s phone exceeded the scope of Mefford’s consent under the consent search warrant exception.²²⁰ “When an official search is properly authorized, whether by consent or by the issuance of a valid warrant, the scope of the search is limited by the terms of the authorization.”²²¹ To examine whether a search occurred within the limited scope of the consent, the Court applies a standard of “objective reasonableness.”²²² This is determined by asking “whether the state actor could have reasonably . . . understood an individual’s consent to extend to a particular area.”²²³ Based on the testimony of Miller and Mefford at the suppression hearing, the majority determined there had been no discussion at the time of the search about confirming the identity of Mefford’s daughter or accessing any information on the phone besides that contained within Facebook Messenger.²²⁴ The majority concluded it was not objectively reasonable for Miller to believe the consent extended to other applications, or information, on Mefford’s phone besides Facebook Messenger.²²⁵

The Court arrived at this conclusion by distinguishing the facts of Mefford’s case from *State v. Parker*, where the owner of a vehicle consented, without limitation, to the vehicle search.²²⁶ There, the Court had held that consent given without limitation to search a vehicle extended to the compartments and containers within the vehicle.²²⁷ Conversely, Mefford gave consent to search a specific area of his phone and impliedly excluded from

215. *Id.* at 216 (citing *State v. Goetz*, 191 P.3d 489, 500 (Mont. 2008)).

216. *Id.* at 217 (citing *Goetz*, 191 P.3d at 497–98).

217. *Mefford*, 517 P.3d at 217 (citing *Goetz*, 191 P.3d at 497–98).

218. *Id.* at 217 (quoting *Staker*, 489 P.3d at 497).

219. *Id.*

220. *Id.* at 221.

221. *Id.* at 218 (citing *State v. Graham*, 103 P.3d 1073, 1079 (Mont. 2004) (quoting *Walter v. United States*, 447 U.S. 649, 656 (1980))).

222. *Id.* (citing *State v. Parker*, 953 P.2d 692, 696 (Mont. 1998)).

223. *Mefford*, 517 P.3d at 218 (quoting *Parker*, 953 P.2d at 696) (internal quotation marks omitted).

224. *Id.*

225. *Id.* at 219.

226. *Id.* (citing *Parker*, 953 P.2d at 693, 696).

227. *Id.* at 218 (citing *Parker*, 953 P.2d at 696).

his consent the searching of other areas of his phone²²⁸—*expressio unius est exclusio alterius*.²²⁹ The Court further analogized the facts of this case to the search in *State v. Pearson*,²³⁰ where the defendant gave consent to search his vehicle but did not consent to the search of the fanny pack he was wearing while outside the vehicle.²³¹ In both *Mefford* and *Pearson*, the scope of the search was limited, and therefore, searches beyond the scope of the consent were outside the exception.²³²

The majority then turned to the probation search exception.²³³ The majority relied on the standard set forth in *State v. Peoples*.²³⁴ Under *Peoples*, parolees are subject to searches when:

- (1) such searches are generally authorized by an established state law regulatory scheme that furthers the special government interests in rehabilitating probationers and protecting the public from further criminal activity by ensuring compliance with related conditions of probation and the criminal law;
- (2) the probation officer has reasonable cause to suspect that the probationer may be in violation of the probationer's conditions of supervision or the criminal law; and
- (3) the warrantless search is limited in scope to the reasonable suspicion that justified it in the first instance except to the extent that new or additional cause may arise within the lawful scope of the initial search.²³⁵

Mefford conceded the first requirement.²³⁶ However, under the third requirement, the Court found that the only reasonable suspicion that Miller offered to search *Mefford*'s phone was to confirm *Mefford*'s story that he had been out of his apartment past curfew to use the internet to call his daughter.²³⁷ The officer's reasonable suspicion of the curfew violation was confirmed either when *Mefford* admitted to being out past curfew or when Miller inspected the Facebook Messenger conversation to confirm that it took place after *Mefford*'s curfew.²³⁸ Once the legitimate government interest in investigating a parole violation was accomplished, importantly before the general search of *Mefford*'s phone took place, the probation exception ceased to apply.²³⁹ Additionally, even if the original search was not completed by inspecting the Facebook Messenger application, the State failed to articulate how “engaging in a generalized scrolling through *Mefford*'s

228. *Id.* at 219–20.

229. “The expression of one thing is the exclusion of the alternative.”

230. 251 P.3d 152 (Mont. 2011).

231. *Mefford*, 517 P.3d at 220 (citing *Pearson*, 251 P.3d at 154–55).

232. *Id.*

233. *Id.* at 221.

234. *See id.* (quoting *Peoples*, 502 P.3d at 141).

235. *Id.* (quoting *Peoples*, 502 P.3d at 141) (internal quotation marks omitted).

236. *Id.*

237. *Mefford*, 517 P.3d at 223.

238. *Id.* at 222.

239. *Id.* at 222–23.

photos” would assist the State in confirming the individual’s identity.²⁴⁰ Lastly, the majority held that the evidence against Mefford was subject to suppression under the exclusionary rule, and reversed the district court’s order denying Mefford’s motion to suppress and dismiss.²⁴¹

Justice Shea, joined by Chief Justice McGrath and Justice Rice, concurred with the majority that the consent exception did not apply to the search, but dissented from the conclusion that the probation search exception did not apply.²⁴² The dissent argued that the probation exception allowed the officers to search the contents of Mefford’s phone in an attempt to verify his explanation as to why he violated the terms of his probation.²⁴³ The dissent further asserted that searching Mefford’s photo gallery for pictures of his daughter, as many parents have photos of their children on their phones, was within the limited scope of the officers’ reasonable suspicion that the explanation for the parole violation was false.²⁴⁴ Additionally, the dissent argued that parolees cannot concede that they have severely diminished expectations of privacy, acknowledge that a search is reasonable, and then take issue with the means by which a search is conducted.²⁴⁵

Going forward, this case will undoubtedly serve as a cornerstone of Montana jurisprudence concerning the scope of searches pertaining to electronics in an increasingly digitally connected world. While it is unfortunate that the State’s interest in punishing and deterring crime was hindered in this one instance, it is of superior and paramount importance that agents and officers of our state act beyond even a shadow of impropriety when dealing with citizen’s rights—even, perhaps especially, when dealing with citizens accused or suspected of the most heinous of crimes. We can only hope that this ruling will lead to improved practices by our state’s agents and officers to promote the general safety and welfare of our state while not offending the inviolable rights of those the state exists to protect.

—Gordon Wallace

VII. MONTANA DEMOCRATIC PARTY V. JACOBSEN

Five justices on the Montana Supreme Court recently upheld a preliminary injunction that enjoined Secretary of State Christi Jacobsen from en-

240. *Id.* at 225.

241. *Id.* at 226.

242. *Id.* at 226–27 (Shea, J., with McGrath, C.J. & Rice, J., concurring and dissenting).

243. *Mefford*, 517 P.3d at 228.

244. *Id.*

245. *Id.* at 229.

forcing Senate Bill 169 (SB 169).²⁴⁶ Additionally, four justices upheld a preliminary injunction of the enforcement of House Bill 176 (HB 176).²⁴⁷ The Court emphasized that the injunctions at issue were preliminary.²⁴⁸ Accordingly, the standard for the plaintiffs' motion to prevail was lower than what is required for a permanent injunction, as the plaintiff needed only to make a prima facie case for a preliminary injunction to be granted without needing to show that the case would prevail on the merits.²⁴⁹

SB 169 was enacted during the 2021 Montana legislative session.²⁵⁰ It required those using a student identification card, or other form of identification that is not considered a "primary" form of identification, to identify themselves when registering to vote by providing further forms of identification.²⁵¹ The further identification could include "a current utility bill, bank statement, paycheck, government check, or other government document" that shows the voter's name and address.²⁵² Alternatively, voters who cannot meet the identification can still cast a provisional ballot under SB 169.²⁵³ However, such voters must sign a declaration stating a qualifying "reasonable impediment to meeting the identification requirements."²⁵⁴

HB 176 was also enacted during the 2021 legislative session.²⁵⁵ HB 176 amended the timeline to register to vote by requiring Montanans to have filed their voter registration by noon on the day before the election.²⁵⁶ As the law stood before HB 176, voter registration ended when the polls closed on election day.²⁵⁷

The district court found that Section 2 of SB 169 (containing the amendments to student identification requirements) and HB 176 in its entirety were prima facie unconstitutional as they burdened Appellees' rights to vote and violated equal protection.²⁵⁸ Additionally, the district court concluded that irreparable harm would occur if a preliminary injunction was not entered to halt enforcement while the litigation was pending.²⁵⁹ The

246. *Mont. Democratic Party v. Jacobsen*, 518 P.3d 58, 61 (Mont. 2022); *see also id.* at 72 (Baker, J., concurring and dissenting).

247. *Id.* at 61 (majority opinion)

248. *Id.* at 63.

249. *Id.* at 63–64 (citing MONT. CODE ANN. § 27-19-201(1), (2) (2021); *Driscoll v. Stapleton*, 473 P.3d 386, 392 (Mont. 2020); *Planned Parenthood of Mont. v. State*, 515 P.3d 301, 310 (Mont. 2022)).

250. *Id.* at 61.

251. *Id.* at 62.

252. *Mont. Democratic Party*, 518 P.3d at 62 (quoting MONT. CODE ANN. § 13-13-114(1)(a)(ii)(A), (B)) (internal quotation marks omitted).

253. *Id.*

254. *Id.* (quoting MONT. CODE ANN. § 13-15-107(3)(b)) (internal quotation marks omitted).

255. *Id.* at 61.

256. *Id.* at 62; MONT. CODE ANN. § 13-2-304(1)(a).

257. *Mont. Democratic Party*, 518 P.3d at 62.

258. *Id.*

259. *Id.*

question raised on appeal was, “Did the District Court manifestly abuse its discretion in preliminarily enjoining Senate Bill 169 and House Bill 176?”²⁶⁰

District courts may issue preliminary injunctions under any of five reasons under Montana Code Annotated § 27-19-201.²⁶¹ In this case, the district court granted the preliminary injunction under subsections (1) and (2) of the applicable statute.²⁶² The Montana Supreme Court has held that for a preliminary injunction to be granted under subsection (1), a party must demonstrate “a prima facie case that they will suffer some degree of harm and are entitled to relief.”²⁶³ Alternatively, for a preliminary injunction to be granted under subsection (2), a party must demonstrate “a prima facie case that they will suffer an irreparable injury.”²⁶⁴ Establishing a prima facie case merely requires the party seeking a preliminary injunction to establish a fact to the extent that it would appear true “at first sight.”²⁶⁵ A prima facie finding does not “establish entitlement to final judgment, relief at all events on final hearing, relief at a trial on the merits, or evidence . . . sufficient to prevail at trial.”²⁶⁶

While the right to vote is found in the Montana Constitution’s Article II Declaration of Rights,²⁶⁷ and is therefore considered fundamental,²⁶⁸ the Montana Constitution specifically created a constitutional interest in the Legislature to provide for the laws and administration of elections.²⁶⁹ This specifically includes a duty for the Legislature to “[e]nsure the purity of elections and guard against abuses of the electoral process.”²⁷⁰ However, following the precedent set in *Driscoll v. Stapleton*, the majority determined there was no need to set forth a new standard of review, strict or otherwise, in this case.²⁷¹ The majority instead relied solely on the statutory framework for the issuance of preliminary injunctions.²⁷²

260. *Id.* at 63.

261. *Id.*

262. *Id.*; MONT. CODE ANN. § 27-19-201(1), (2) (2021).

263. *Mont. Democratic Party*, 518 P.3d at 63–64 (citing *Driscoll v. Stapleton*, 473 P.3d 386, 392 (Mont. 2020); *Planned Parenthood of Mont. v. State*, 515 P.3d 301, 310 (Mont. 2022)).

264. *Id.* (quoting *Driscoll*, 473 P.3d at 392; *Planned Parenthood of Mont.*, 515 P.3d at 310) (internal quotation marks omitted).

265. *Id.* at 64 (quoting *Driscoll*, 473 P.3d at 392; citing *Planned Parenthood of Mont.*, 515 P.3d at 312–13; BLACK’S LAW DICTIONARY (11th ed. 2019)).

266. *Id.* (quoting *Planned Parenthood of Mont.*, 515 P.3d at 310) (internal quotation marks omitted).

267. MONT. CONST. art. II, § 13.

268. *Mont. Democratic Party*, 518 P.3d at 65 (citing *Butte Cmty. Union v. Lewis*, 712 P.2d 1309, 1311–12 (Mont. 1986)).

269. *Id.* at 65–66 (citing MONT. CONST. art. II, § 13).

270. MONT. CONST. art. IV, § 3.

271. *Mont. Democratic Party*, 518 P.3d at 66–67 (citing *Driscoll v. Stapleton*, 473 P.3d 386, 393 (Mont. 2020)).

272. *Id.* at 67; MONT. CODE ANN. § 27-19-201(1), (2) (2021).

Turning first to SB 169, the majority held that the plaintiff demonstrated a prima facie case that SB 169 would unconstitutionally burden the right to vote.²⁷³ The district court heard a significant amount of testimony, with expert testimony asserting that SB 169 posed a burden on college students, particularly those who recently arrived from out-of-state, as they often do not possess any form of Montana identification apart from their student ID cards.²⁷⁴ Additionally, those students are less likely to have any of the needed secondary proofs of identification required under SB 169.²⁷⁵ Conversely, the Secretary provided expert witnesses detailing that the “linkage between photographic identification laws and [voter] turnout” was “fairly weak.”²⁷⁶ The Secretary also asserted that all “newly registered voters since the implementation of SB 169 have received a confirmation of voter registration in the form of a government document containing their name and address.”²⁷⁷ This document can itself be used as the secondary form of identification needed to vote when displaying a student ID.²⁷⁸ Finally, the Secretary asserted that “strict photo-ID laws” must be used to prevent voter fraud.²⁷⁹ However, the district court and the majority noted that noncitizens can obtain nearly all the forms of identification permitted as primary forms of ID, except for passports and tribal IDs.²⁸⁰ The forms of ID at issue “establish *identity*, not residency or eligibility.”²⁸¹ The expert testimony and assertion that most of these forms of ID do not establish “residency or eligibility” led the majority to hold that a prima facie case sufficient to satisfy the statutory requirement for a preliminary injunction had been met.²⁸² The Montana Supreme Court left the preliminary injunction of SB 169 in place.²⁸³

The Court then turned to HB 176.²⁸⁴ The district court heard expert testimony indicating that thousands of voters used Election Day Registration (“EDR”) every election cycle and that Native American and young voters disproportionately relied upon EDR.²⁸⁵ Additionally, EDR allows voters to combine registration and voting “into a single administrative

273. *Mont. Democratic Party*, 518 P.3d at 69.

274. *Id.* at 67–68.

275. *Id.* at 68.

276. *Id.* (alteration in original) (internal quotation marks omitted).

277. *Id.*

278. *Id.*

279. *Mont. Democratic Party*, 518 P.3d at 68–69 (quoting the appellant).

280. *Id.* at 69.

281. *Id.*

282. *Id.* (citing MONT. CODE ANN. § 27-19-201(2) (2021)).

283. *Id.*

284. *Id.*

285. *Mont. Democratic Party*, 518 P.3d at 69–70.

step,” thereby substantially reducing barriers for many voters.²⁸⁶ However, the Secretary presented evidence that challenged the link between EDR and voter turnout.²⁸⁷ She asserted “that EDR increased the workload on election staff, resulted in longer lines at the polls, and that eliminating EDR would alleviate these concerns.”²⁸⁸ Finally, the Secretary argued that since the Montana Constitution provides that the Legislature “may provide for a system of poll booth registration,”²⁸⁹ the Legislature may also *not* provide such a system.²⁹⁰ The district court and the majority rejected this argument, asserting that many of the delegates to the 1972 Constitutional Convention were in favor of EDR, but chose not to mandate it “if it later proved to be unworkable.”²⁹¹ Taking into consideration the evidence of both the Appellant and Appellee, the majority held that a *prima facie* case sufficient to satisfy the statutory requirements for a preliminary injunction had been met.²⁹² Therefore, the Court left the injunction of HB 176 in place.²⁹³

In his dissent, Justice Rice—joined by Justice Sandefur—began his analysis with SB 169 and contrasted both the district court and majority’s analyses with that of the Court in *Montana Cannabis Industries Association v. State*.²⁹⁴ In that case, the Court held that it may review the level of scrutiny used by a district court to “enjoin an allegedly unconstitutional statute.”²⁹⁵ The dissent asserted that the Court in *Montana Cannabis Industries Association* held that the implication of a fundamental right in a case did not automatically give rise to strict scrutiny in the granting of a preliminary injunction, particularly when a countervailing right of the State was implicated.²⁹⁶ Because both a fundamental right and a countervailing right of the State were implicated in the case at bar, the dissent concluded that the district court erroneously applied strict scrutiny.²⁹⁷ The dissent went on to state: “If all election laws that simply bear upon a fundamental right are subject to strict scrutiny review, the Legislature would be constrained from enacting even minor changes, despite the Constitution’s charge to the Legislature to, *inter alia*, ‘insure the purity of elections and guard against

286. *Id.* at 70 (quoting the record) (internal quotation marks omitted).

287. *Id.*

288. *Id.*

289. MONT. CONST. art. IV, § 3.

290. *Mont. Democratic Party*, 518 P.3d at 70.

291. *Id.*

292. *Id.* at 71–72 (citing MONT. CODE ANN. § 27-19-201(2) (2021)).

293. *Id.* at 72.

294. 286 P.3d 1161 (Mont. 2012).

295. *Mont. Democratic Party*, 518 P.3d at 72 (Rice, J., with Sandefur, J., dissenting) (citing *Mont. Cannabis Ind. Ass’n v. State*, 286 P.3d 1161, 1164 (Mont. 2012); *Butte Cmty. Union v. Lewis*, 712 P.2d 1309, 1311–12 (Mont. 1986)).

296. *Id.* at 72–73.

297. *Id.* at 76.

abuses of the electoral process.’”²⁹⁸ While the dissent conceded that the application of strict scrutiny would be warranted in some instances,²⁹⁹ they would have held that the district court erred when it applied strict scrutiny due to “the express constitutional authority given to the Legislature in Article IV, Section 3, to regulate in this area.”³⁰⁰

Turning to HB 176, the dissent asserted the bill did nothing to hinder voters from registering to vote and voting on the same day for the 30 days before election day.³⁰¹ HB 176 merely cuts off combining registration and voting into one trip at noon on the day before election day.³⁰² Additionally, the dissent took particular note of the fact that EDR was passed in 2005 and took effect in 2006, and was only in effect for 15 years before the Legislature passed HB 176.³⁰³ The dissent further contrasted the permissive and required language of the Montana Constitution’s grant of authority to the Legislature when regulating elections.³⁰⁴ There are numerous aspects of elections that the Legislature “shall” provide for, but systems of poll registration, like EDR, are specifically singled out as something the Legislature “may” provide.³⁰⁵ Finally, the dissent examined the transcript of the Montana Constitutional Convention and determined that the provision for EDR in the Constitution was intentionally left to the discretion of the Legislature.³⁰⁶ Correspondingly the dissent would hold that the district court erred in applying strict scrutiny to both SB 169 and HB 176.³⁰⁷ They would reverse the preliminary injunction and remand the case for further proceedings.³⁰⁸ Although Justice Baker concurred with the majority with regard to SB 169, she agreed with Justice Rice’s dissent regarding HB 176.³⁰⁹

Concerning SB 169, the majority’s assertion that most of SB 169’s acceptable forms of identification “establish *identity*, not residency or eligibility,”³¹⁰ and therefore “d[o] not serve an asserted [State] interest,”³¹¹ is puzzling. Following this rationale to its conclusion, the State would need to require identification that established identity, residency, and eligibility to

298. *Id.* at 74 (quoting MONT. CONST. art. IV, § 3).

299. *Id.*

300. *Id.* at 75.

301. *Mont. Democratic Party*, 518 P.3d at 75 (Rice, J., with Sandefur, J., dissenting) (citing MONT. CODE ANN. § 13-2-304(1)(d) (2021)).

302. *Id.*

303. *Id.*

304. *Id.* at 75–76 (citing MONT. CONST. art. IV, § 3).

305. *Id.* (citing MONT. CONST. art. IV, § 3).

306. *Id.* at 76; *see also* 3 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 400–13, 429–52 (1981).

307. *Mont. Democratic Party*, 518 P.3d at 76 (Rice, J., with Sandefur, J., dissenting).

308. *Id.*

309. *Id.* at 72 (Baker, J., concurring and dissenting).

310. *Id.* at 69 (majority opinion) (emphasis in original).

311. *Id.* at 69.

serve a state interest. This would require that the document offered to register to vote prove citizenship and be accompanied by additional proof of residency. Since only citizens can obtain passports and tribal IDs,³¹² the State would have to require these documents (with some other possible rare exceptions) in conjunction with a proof of address to actually serve its interest in ensuring that all votes cast are by those eligible. A framework like this would prove far more restrictive than that proposed by the Legislature in SB 169 and would therefore fail strict scrutiny. However, without applying this, or a similar set of requirements designed to prove identity, residency, and eligibility, any alteration to the status quo by the Legislature in the direction of increasing election security will also fail strict scrutiny because it fails to “serve an asserted [State] interest.”³¹³ The current standard from the Court does not merely require the State to meet strict scrutiny, but may very well create a complete bar on any voter ID reforms by the Legislature, an outcome clearly not intended by the Montana Constitution.³¹⁴

Concerning HB 176, the dissent’s note that EDR had only been in force for 15 years when HB 176 was passed was particularly on point.³¹⁵ If EDR is required for an election to be “free and open,” then were the elections held before 2006 not “free and open”?³¹⁶ Critics would be loath to inform the countless individuals elected to office in this state between 1973 and 2006 that their elections were not so.

—Gordon Wallace

312. *Id.*

313. *Mont. Democratic Party*, 518 P.3d at 69.

314. MONT. CONST. art. IV, § 3 (vesting the Legislature with the power and duty to “insure the purity of elections and guard against abuses of the electoral process”).

315. *Mont. Democratic Party*, 518 P.3d at 75 (Rice, J., with Sandefur, J., dissenting).

316. MONT. CONST. art. II, § 13.