

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0477

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

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

**APPELLEES' OPPOSITION TO THE SECRETARY'S MOTION FOR STAY
PENDING APPEAL OF THE DISTRICT COURT ORDER EXTENDING
THE CURE DEADLINE AND REQUEST FOR MODIFICATION OF THE
COURT'S SEPTEMBER 29 ORDER**

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INTRODUCTION

Appellees Robyn Driscoll, Montana Democratic Party, and Democratic Senatorial Campaign Committee have carefully reviewed this Court’s September 29 Opinion and Order in *Driscoll v. Stapleton*, DA 20-0295 and this Court’s September 29 Order granting the Secretary’s Motion for Stay Pending Appeal in this action (the “Order”). Appellees respectfully request modification of the relief issued in the Order only as to the stay of the District Court’s order extending the Cure Deadline. Unlike the Election Day Receipt Deadline, the Cure Deadline was never previously presented to this Court, and as the Order recognized, Appellees were not afforded the opportunity to file a response to the Secretary’s motion to stay before it was granted. As a result, there has been no briefing to this Court from Appellees about the Cure Deadline.

The Secretary’s motion for a stay of the District Court’s order extending the Cure Deadline should be denied. The equitable concerns raised by the Secretary regarding the District Court’s injunction against the Election Day Receipt Deadline—about ballot instructions, voter confusion, and orderly general election processes already under way—simply do not apply to the District Court’s extension of the Cure Deadline. Neither the ballot nor ballot instructions include any information about the current Cure Deadline. Extending the Cure Deadline poses no potential for the kind of voter confusion that could hypothetically affect the process

of submitting an absentee ballot, because the Cure Deadline becomes relevant only *after* absentee ballots are received by county elections offices—and only then to the subset of voters whose ballots are rejected for signature-related issues. And extending the time for voters to take action to cure beyond the current deadline of 5 p.m. on the day after Election Day involves no new procedures for county election officials to implement. Rather, it simply requires county elections officials to do exactly what they are already doing—accepting and processing cure information. Moreover, extending the Cure Deadline until 3:00 p.m. on the Monday after Election Day would not affect any other post-election deadlines because election officials cannot count *any* ballots cured after Election Day until 3:00 p.m. on the Monday following Election Day.

The Secretary's motion for a stay of the District Court's order extending the Cure Deadline should also be denied because he is unlikely to succeed on the merits. The testimony of numerous fact and expert witnesses during the five-day bench trial—which the Secretary's motion barely mentions—overwhelmingly demonstrated that the current Cure Deadline irrationally and unnecessarily prevents voters from avoiding disenfranchisement due to their inadvertent omission of a signature or because of an election official's erroneous determination that a voter's signature does not match. The current Cure Deadline significantly burdens the right to vote and the right to due process—particularly in an unprecedented virtually all-

mail election during a pandemic, when thousands of voters will be encountering unfamiliar mail-in voting procedures for the very first time. Moreover, the State’s rationale for maintaining the current Cure Deadline of 5 p.m. on the day after Election Day—as opposed to a cure deadline extended by a few additional days—is weak and unsupported by evidence.

For the reasons set forth below, Appellees request that the Court 1) deny the Secretary’s motion to stay as to the Cure Deadline, 2) modify its September 29 Order to vacate the stay as to the Cure Deadline, and 3) specifically order that the Cure Deadline for the 2020 General Election be extended to 3 p.m. on Monday, November 9, 2020, the sixth day after Election Day, at which time all information permitted under Sections 13-13-245(2)(a), MCA and 13-15-107, MCA must be received by county election officials.¹ Counsel for Appellees has contacted counsel to the Secretary, who opposes Appellees’ request.

¹ Plaintiffs’ First Amended Complaint alleged that extending the Cure Deadline to 3 p.m. on the sixth day after Election Day would mitigate the burden imposed by the current Cure Deadline without altering any of the State’s established post-election procedures or deadlines. At trial, the Secretary and his witnesses repeatedly suggested that if the District Court were to establish a postmark-based deadline that permitted postmarked ballots to arrive after Election Day, the Cure Deadline should be further extended beyond the sixth day after Election Day to afford voters an opportunity to cure any deficient ballots that arrive after Election Day—a point that Appellees agreed was well taken. The District Court shared the parties’ concern, and in his order establishing a postmark-based deadline, he extended the cure deadline to the ninth day after Election Day. Now that this Court has stayed the postmark-based deadline established by the District Court, Appellees respectfully suggest that

FACTUAL BACKGROUND

In Montana, thousands of eligible, registered voters who took the time and effort to request, complete, and return their ballots are disenfranchised because of curable perceived deficiencies related to the signature on the outside of the absentee ballot envelope. Absentee ballots are not counted if a voter neglected to sign the outside of their absentee ballot envelope or if an election official decides the signature on the absentee ballot does not match the voter's signature on file. *See* Mont. Code Ann. § 13-13-241; Appx. A, September 25 Findings of Fact, Conclusions of Law and Order (hereinafter "FOF") at ¶ 59. Since 2006, over 22,000 ballots have been rejected for signature-related reasons. The rejection rate has steadily increased, reaching its highest level to date during the all-mail June primary held under COVID, when more than 2,100 voters' ballots were rejected. FOF ¶ 61. Like the June primary, the November election will be a nearly all-mail election during a pandemic; by contrast, only 65% of voters voted by mail in November 2016. Appx. B. The inevitable result will be more voting by mail overall and many more voters who are voting by mail for the very first time. As a result, absent changes, both the absolute number and rate of rejected ballots will increase, likely to record heights.

their original request for relief—a Cure Deadline extended to 3 p.m. on the sixth day after the election—is sufficient to mitigate the burdens imposed on voters and fits neatly within the existing post-election day procedural framework.

Montana law provides a process by which voters can cure perceived signature-related deficiencies in person, by mail, by fax, or other electronic means. But this opportunity is sharply circumscribed: a voter must take action by 5:00 PM the day after Election Day to cure their ballot. FOF ¶ 60. While county election administrators are required to promptly notify voters of perceived deficiencies, they have discretion in the means they employ to do so. FOF ¶¶ 63-64. And county officials' ability to provide timely notice is further limited by the fact that not all voters have current phone numbers or email addresses on file with the county elections office. This is due in part to the Secretary's own voter registration and absentee ballot request forms, which explicitly advise voters that providing phone numbers and email addresses is merely "optional." FOF ¶ 64; Appx. C; Appx. D.

The burden imposed by the short time to cure falls heaviest on voters whose absentee ballots arrive by mail near or on Election Day and are subsequently deemed deficient. FOF ¶ 66.² Even for the subset of those voters who are successfully reached by phone or email, they may have mere hours to spring to action to cure their ballot. *Id.* But for those voters whom the county election official can only reach by mail, the two to five day standard postal delivery times means that it is virtually impossible for a mailed notice to arrive soon enough to afford these voters a

² The number of ballots received by mail on election day alone is substantial—for example, over 21,000 in the June primary. FOF ¶ 44.

meaningful opportunity to avoid disenfranchisement. Unsurprisingly, undisputed data cited by the District Court showed that in the June 2020 primary, the closer to election day a ballot was returned by mail, the higher the signature-related rejection rate. FOF ¶ 62.³

Even more troubling, the burden of needing to cure a ballot is not borne equally among all voters. Unrefuted trial testimony demonstrated that voters with less experience voting by mail are substantially more likely to have their ballots rejected for signature-related reasons. 9/15 Tr. ___-___ (Mayer).⁴ Undisputed testimony also showed that rates of rejection based on purportedly mismatched signatures—which reflect a matching process that involves a substantial exercise of discretion by elections officials—vary widely by county, strongly suggesting differing standards for what constitutes a signature mismatch. 9/15 Tr. ___-___ (Mayer). For example, in the June 2020 Primary, the signature mismatch rate was *thirteen times higher* in some counties than others. 9/15 Tr. ___-___ (Mayer).

³ Nor are these issues limited to voters whose ballots arrive on Election Day or just before. For example, a June 2020 primary election voter from Sidney had his ballot rejected by the Richland County Clerk on the Thursday before Election Day based on a perceived signature mismatch. Although the voter had a phone number on file, the number was disconnected. The Richland County Clerk mailed the voter a ballot rejection notice that could be used to cure the ballot, and the voter completed and mailed the form back the same day he received it. But the affidavit still arrived too late to be processed under the current cure deadline. As a result, the voter's ballot was rejected. Appx. E.

⁴ Due to the time-sensitive nature of the relief sought, Appellees will file a corrected copy of this brief providing citations as soon as the trial transcript is available.

Although the current Cure Deadline imposes a strict 5 p.m. deadline the day after Election Day for the voter to take action to cure their ballot, county election officials do not wrap up the curing process and complete the ballot counting process at that point. In fact, Montana law *forbids* county elections officials from counting any ballots cured after Election Day until 3 p.m. on the sixth day after the election. Mont. Code § 13-15-107. During this interim period—from 5 p.m. on the day after the election until 3 p.m. on the sixth day after the election—the Cure Deadline prohibits voters from taking action to cure deficiencies: a voter who walked into a county election office would not be allowed to cure her ballot. But confusingly, county election administrators still receive and process information to cure *some* deficient ballots during this period: namely, they must cure ballots for which cure information arrives by mail, so long as the information was postmarked by the day after election day. FOF ¶ 60. As a result, county election officials can neither count cured absentee ballots nor assist voters who want to cure their ballots during this interim period; they can only wait to see whether any cure information happens to arrive by mail to be processed.

After the expiration of the interim period at 3 p.m. on the Monday after Election Day, all remaining ballots can be counted by county elections officials. But the counting need not even take place at that time; the only other applicable deadlines (for the post-election audit, and the meeting of the county canvassing board) are a

full week later (the second Monday and second Tuesday after the election, respectively). Appx. F, at 8.

STANDARD OF REVIEW

Under Rule 22 of the Montana Rules of Appellate Procedure, a party may file a motion for stay of an order pending appeal in this Court. Rule 22(3) provides that “in the interests of justice,” this Court may “grant, modify, or deny the relief requested[.]”

To determine the circumstances under which to grant a stay pending appeal under Rule 22, Montana district courts have looked to federal cases interpreting the analogous Rule 8 of the Federal Rules of Appellate Procedure. *See, e.g., Taylor v. Mont. High Sch. Ass’n*, No. CDV-2015-719, 2015 Mont. Dist. LEXIS 68 (Mont. 1st Jud. Dist. Oct. 7, 2015). Because a stay is an “intrusion into the ordinary processes of administration and judicial review . . . [it] is not a matter of right, even if irreparable injury might otherwise result.” *Clark Fork Coal. v. Tubbs*, No. BDV-2010-874, 2015 WL 13614529, at *1 (Mont. 1st Jud. Dist. Ct. May 8, 2015) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)).

In determining whether to grant a stay pending appeal, Montana district courts have considered four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially

injure the other parties interested in the proceeding; and (4) where the public interest lies.” *See id.*; *Taylor*, 2015 Mont. Dist. LEXIS 68; *see also State v. Mont. First Judicial Dist. Court*, 361 Mont. 536, 264 P.3d 518 (2011) (the “court determines whether to grant a stay by balancing competing interests and considering whether the public welfare or convenience will be benefitted by a stay”). All four factors counsel against a stay here.

ARGUMENT

A. The Secretary has not shown that he will be irreparably injured absent a stay of an extended Cure Deadline.

None of the equitable considerations invoked by the Secretary in support of his motion to stay the District Court’s order establishing a postmark deadline apply to the District Court’s order extending the Cure Deadline. Tellingly, other than the Secretary’s conclusory averments that “new deadlines” are “likely to create chaos” and “interfere with election officials’ processes,” the Secretary offers not a single specific reason why extending *the Cure Deadline* could be expected to have such effects. Br. at 9-13. Rather, his argument focuses on the implementation of a postmark deadline in place of the Election Day Receipt Deadline, and none of his reasoning supports a stay of the District Court’s order extending the Cure Deadline.⁵

⁵ While Appellees understand that the Court has decided to maintain the Election Day Receipt Deadline for the November election, Appellees strongly disagree with the substance and timing of the Secretary’s unsupported post hoc assertions of “voter

First, unlike the Election Day Receipt Deadline, no information regarding the Cure Deadline is set forth in any of the instructions that accompany mailed ballots.⁶ Rather, voters are informed of the Cure Deadline only after their ballot is rejected and a county election official contacts them by phone or email or sends them a ballot rejection notice. Appx. G (Ballot Rejection Notice). To implement an extended Cure Deadline, the Secretary could simply update the one sentence on the ballot rejection notice that references the timing of the Cure Deadline, distribute the updated form to county elections officials, and instruct officials to inform voters of the extension in their phone or email communications.

Second, unlike the Election Day Receipt Deadline, a requirement with which voters must comply during the process of completing and submitting an absentee ballot, the Cure Deadline only affects the subset of voters who have *already* completed and submitted a ballot that is subsequently rejected. As a result, the District Court's extension of the Cure Deadline presents no potential for the kind of hypothetical voter confusion that might affect the process of submitting an absentee ballot. *Cf. Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 U.S. Dist.

confusion” and “chaos” from implementing a postmark-based deadline— claims that the Secretary did not press at trial and that not only lack evidentiary support but in fact are directly contradicted by the extensive record evidence developed in this case.

⁶ *See* Br. at 7 n.8 (voting instructions); Appx. H (ballot signature envelope); Appx. I (ballot secrecy envelope).

LEXIS 97085, at *32 (D.N.D. June 3, 2020) (“A voter filling out an absentee ballot will be entirely unaffected by an order enjoining the signature-matching requirement—a requirement that applies only after a ballot is submitted. In other words, there is no potential for voter confusion or dissuasion from voting because the process for submitting an absentee ballot will remain unchanged.”).

Third, unlike the Election Day Receipt Deadline, only a fraction of voters have ever had any experience with the Cure Deadline—for example, because of a ballot rejected in a past election. The Secretary advances no evidence that the Cure Deadline or other aspects of the State’s cure procedures are widely known by Montana voters. And again, there is no need to affirmatively educate all voters about a Cure Deadline that matters only a fraction of them. The Secretary’s professed concern with having to “reeducate voters” about a postmark deadline simply does not apply to extending the Cure Deadline. Br. at 9.

Fourth, unlike implementing a postmark deadline, extending the Cure Deadline involves no new procedures for county election officials to implement or potential ambiguities to resolve. Br. at 11. To the contrary, it merely requires county elections officials to do exactly what they are already doing—accepting and processing cure information submitted by voters, just for a few more days. *See Ariz. Democratic Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 U.S. Dist. LEXIS 165959, at *41 (D. Ariz. Sep. 10, 2020) (“Plaintiffs are not asking election officials

to devise new rules out of whole cloth. They are asking those officials to continue applying the same procedures they have in place now, but for a little longer.”). At trial, county election administrators testified that they could implement an extended cure deadline using their existing procedures, and that doing so would allow for more votes to be counted. 9/16 Tr. ___-___ (Scribner); Appx. K, Bear Don't Walk Dep. 132:9–22; Appx. L, Moore Dep. 121:4–20; 123:15-22.

Fifth, as compared to the Election Day Receipt Deadline, the fact that ballots have already issued to military and overseas voters poses minimal potential for “confusion” or “inequality” among voters. In the unlikely event that any counties have already rejected a ballot and provided notice of the rejection and the current Cure Deadline, and assuming that the voter has not already cured their ballot, counties have over a month to inform them of the extended Cure Deadline.⁷

In sum, the Secretary cites no evidence of the supposed chaos and confusion of an extended Cure Deadline because he presented no such evidence at trial. He instead makes these conclusory assertions for the first time in his Motion. Notably, when the Secretary agreed to a mid-September trial, he never once raised concerns to Appellees or the District Court that a decision extending the Cure Period after that date would lead to chaos, or that it would be too late for the District Court to grant

⁷ If a hypothetical voter whose ballot is rejected somehow does not receive notice of the extended Cure Deadline, and cures it prior the current Cure Deadline, no injury befalls the voter or the Secretary: the voter’s ballot is counted.

such relief—even after the District Court expressly asked the parties to provide in their respective closing arguments guidance regarding how an extended cure deadline might be implemented.

B. The Secretary is unlikely to succeed on the merits because the current Cure Deadline imposes significant burdens on the right to vote and the Secretary’s justifications for the current Cure Deadline are weak.

The Secretary makes only a token attempt to demonstrate that the District Court’s findings of fact and conclusions of law regarding the Cure Deadline are likely to be reversed by this Court on appeal, and for good reason. The evidence at trial overwhelmingly demonstrated that the Cure Deadline significantly burdens the rights to vote and to due process, particularly during a nearly all-mail election taking place in an unprecedented pandemic. Moreover, the evidence demonstrated that Secretary’s justifications for the current Cure Deadline are weak and lack support. The District Court’s decision is consistent with courts across the country that have ordered election officials to provide voters a post-election cure period in order to remedy violations of the fundamental right to vote and right to due process.⁸

⁸ *Hobbs*, 2020 U.S. Dist. LEXIS 165959 (granting preliminary injunction and ordering Arizona election officials to provide voters with seven days after Election Day to cure absentee ballots with missing signatures); *League of Women Voters of N.J. et al. v. Tahesha Way*, No. 20-cv-05990, ECF No. 34 (E.D.N.J. June 17, 2020) (granting preliminary injunction and ordering New Jersey election officials to allow voters to cure absentee ballots with missing or mismatched signatures for sixteen days after Election Day); *Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 U.S. Dist. LEXIS 108854 (D.N.D. June 5, 2020) (holding North Dakota’s cure

a. The current Cure Deadline violates the fundamental right to vote.

Whether proceeding under a strict scrutiny standard, an intermediate scrutiny standard, or even the most deferential form of the balancing test advocated by the Secretary, the Cure Deadline violates the fundamental right to vote protected by the Montana Constitution.

As set forth above, thousands of voters' ballots are rejected based upon curable signature-related deficiencies, and the rate of rejection and absolute number of rejections has steadily increased over time. Voters who happen to live in certain counties with higher signature-match rejection rates, and voters with less experience voting by mail, are disproportionately likely to have their ballots rejected and consequently to rely upon the State's cure procedures. While the State allows and encourages voters to return their absentee ballots up to Election Day, and does not require voters to provide a phone number or email address, the State nonetheless

procedures for absentee ballots violated due process and ordering North Dakota's election officials to allow voters six days after Election Day to cure their absentee ballot); *Frederick v. Lawson*, No. 1:19-cv-0959-SEB-MJD, 2020 U.S. Dist. LEXIS 150995, (S.D. Ind. Aug. 20, 2020) (permanently enjoining Indiana election officials from rejecting any absentee ballot because of perceived signature mismatch absent adequate notice and cure procedures to the affected voter); *N.C. All. for Retired Americans et al. v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (N.C. Sup. Ct. Sept. 22, 2020) (consent decree requiring North Carolina election officials to provide nine days after Election Day for voters to cure absentee ballots); *League of Women Voters of the United States et al. v. Kosinski, et al.*, No. 1:20-cv-05238, ECF No. 37 (S.D.N.Y. Sept. 17, 2020) (consent decree requiring New York election officials to provide five days for voters to cure absentee ballot after voter is notified of the need to cure the ballot).

imposes the current Cure Deadline of 5 p.m. the day after Election Day. The State imposes this requirement even though it is entirely foreseeable that certain voters whose ballots are rejected will not receive notice of the rejection until after the deadline has passed, and that others who do receive notice have limited time—in some cases, only a few hours—to take action. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (finding at least a serious burden on the right to vote when voters whose signatures were deemed a mismatch might not learn that their vote would be rejected until it was too late to do anything).

Measured against these burdens on the right to vote, the Secretary's asserted justifications for the current Cure Deadline are extraordinarily weak. The Secretary identified no justification other than meeting other post-election deadlines, but as the District Court found, based on hours of testimony from the Secretary's representative and county elections officials, an extended cure period is administratively feasible within the State's existing timeframe for processing and counting ballots. FOF ¶ 68. For example, extending the Cure Deadline to 3 p.m. on the Monday after Election Day could not impact any other election deadlines because county elections officials are forbidden from even completing their count of cured ballots until that time.

Moreover, extending the Cure Deadline to 3 p.m. on the Monday after Election Day would have a minimal—if any—impact on county election official resources or operations, because county elections officials already process cure

information received by mail up until that time. Extending the cure deadline would mean that county officials would simply continue to do what they are already doing.

Nor is there any evidence that permitting some additional number of voters to submit cure information during an extended cure period would be unmanageable for county elections officials—indeed, curing a ballot only takes a few minutes. FOF ¶ 68. While the overall number of voters *statewide* who could benefit from an extended Cure Deadline in the November election is likely to exceed 1,000 or 2,000, *see* Appx. J, the number in any given county is much smaller, and represents a small fraction of the overall number of ballots that election officials process during an election season.⁹ The only other applicable deadlines take place a full week *after* the Monday after Election Day, leaving ample time to address any unexpected contingencies. Indeed, the county election official whose testimony the Secretary cites suggested a cure deadline that extended even further than Appellees requested—to ten days after the election— and testified that such a deadline would still enable her office to meet other applicable deadlines. 9/16 Tr. ___-___ (Scribner).

Against this overwhelming evidence, the Secretary's motion can muster *only a single paragraph* that even attempts to specifically explain why the Secretary is

⁹ Indeed, extending the Cure Deadline could actually ease some of the strains on county election officials: currently, for ballots received on Election Day, county elections officials must process, reject, and attempt to provide notice of the rejection, all on the busiest day of the year.

likely to succeed on the merits of the Cure Deadline claims. *See* Br., at 10. The Secretary points to the testimony of his expert, Dr. Lonna Atkeson, who suggests that a longer deadline could result in more rejected ballots, based solely on her comparisons to rejection rates from other states. Br. at 10. But the District Court, after hearing hours of Dr. Atkeson’s testimony, specifically considered and rejected her methodology as flawed and not based on pertinent evidence: among other things, Dr. Atkeson failed to attempt to control for confounding variables that could fully account for any observed differences in rejection rates. FOF ¶ 53.¹⁰ The District Court did not clearly err in its fact-intensive analysis of expert testimony.

b. The current Cure Deadline also violates the right to procedural due process.

For the same reasons discussed above, the current Cure Deadline violates the right to procedural due process. Article II, § 17 of the Montana Constitution prohibits the state from depriving a person of “life, liberty, or property without due process of law.” *See also Goble v. Mont. State Fund*, 2014 MT 99, ¶ 46, 374 Mont. 453, 467-68, 325 P.3d 1211, 1223 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

¹⁰ The District Court is not alone in rejecting her methodology: a federal court excluded *the exact same opinion* offered by Dr. Atkeson in a similar challenge to Arizona’s cure period because it was the “product of unreliable principles and methods.” *See Hobbs*, 2020 U.S. Dist. LEXIS 165959, at *9. Although the District Court’s opinion discussed Dr. Atkeson’s methodology as applied to the Election Day Receipt Deadline, she applied the same methodology to study both late ballot rejections and signature-related rejections. The District Court’s findings regarding her flawed methodology apply equally to her study of signature-related rejections.

Deciding what protections are due requires considering: (1) the nature of the “interest that will be affected” by the government’s action, (2) “the risk of an erroneous deprivation of such interest through the procedures used” as well as the “probable value, if any, of additional or substitute procedural safeguards,” and (3) the government’s interest. *See id.* (citing *M.C. v. Dept. of Insts.*, 211 Mont. 105, 109, 683 P.2d 956, 958 (1984)). Each of these factors makes clear that the current Cure Deadline fails to provide adequate process to ensure that voters are not disenfranchised.

First, voting is a fundamental right, and the right to vote necessarily includes the right to have one’s legitimately cast vote counted. *See, e.g., Hobbs*, 2020 U.S. Dist. LEXIS 165959, at *36. This right applies equally to voting absentee: having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted. *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018).

Second, for voters whose ballots are rejected for a perceived signature-related deficiency, the risk of erroneous deprivation is high: signature mismatch rejections heavily depend on election officials’ discretionary judgments, rejection rates vary enormously between counties, less experienced voters are more likely to have their ballots rejected, and the form of notice provided to voters is also subject to county officials’ discretion. Most troublingly, the current Cure Deadline makes it virtually

impossible for county election officials to provide any notice and opportunity to cure prior to the deadline for many voters whose ballots arrive near Election Day—due in part to the Secretary’s decision not to require voters to provide county election officials a means of quickly communicating with them. The probable value of the additional procedural safeguard of an extended Cure Deadline is clear: voters would have more time to cure deficiencies and have their votes counted. FOF ¶ 67.¹¹

Third, the State’s interest in maintaining the current Cure Deadline is all but nonexistent. As discussed above, if the Cure Deadline were expanded to 3 p.m. on the Monday after Election Day, county election officials would simply process any additional cure information that arrives from the limited universe of voters whose ballots have been rejected using their established procedures. *See, e.g., Hobbs*, 2020 U.S. Dist. LEXIS 165959, at *25 (noting weak State interest where expanded post-election cure period would simply involve continuing to implement established cure procedures to limited number of ballots); *Lee*, 915 F.3d at 1323 (finding that extending already existing cure procedures to a limited subset of voters did not meaningfully disrupt election administration).

¹¹ This is not the only value that an extended Cure Deadline provides. As other courts have recognized, providing additional opportunities for voters to cure rejected ballots also advances the State’s interest in election integrity by confirming the validity of legitimate voters’ ballots. *Self Advocacy Sol. N.D.*, 2020 U.S. Dist. LEXIS 97085, at *27-28; *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 U.S. Dist. LEXIS 143620, at *21 (N.D. Fla. Oct. 16, 2016).

C. The stay will substantially injure Appellees and the public at large.

The balance of equities strongly favors permitting an extended Cure Period for the November 2020 election. The loss of one's vote constitutes an irreparable harm, which could be mitigated with the implementation of an extended post-election cure period. *See, e.g., Hobbs*, 2020 U.S. Dist. LEXIS 165959, *39; *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“[O]nce the election occurs, there can be no do-over and no redress.”). These irreparable harms injure Appellees, who expend considerable time and effort attempting to help voters cure their rejected ballots before the current Cure Deadline but who, because of the unnecessarily short window for curing, are unable to reach many voters in time. 9/14 Tr. ___-___ (Boiger). Even more importantly, the current Cure Deadline harms the public at large, which has a strong interest in permitting as many qualified voters to vote as possible—particularly in light of the expected surge in mail-in voting and in voters casting ballots by mail for the first time. *See Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012). Given the weightiness of the rights at stake and the negligible administrative burdens an extended Cure Deadline would impose, the balance of equities tilts heavily toward lifting the stay.

CONCLUSION

Plaintiffs respectfully request that the Court modify its September 29 Order to allow an extended cure period through November 9, 2020.

Respectfully submitted this 1st day of October, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,391 words, excluding certificate of service and certificate of compliance.

DATED this 1st day of October, 2020.

/s/ Matthew Gordon
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CERTIFICATE OF SERVICE

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