No. 24-2811

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA PUBLIC INTEREST RESEARCH GROUP, *et al.*,

Plaintiffs-Appellees,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State, *et al.*,

Defendants-Appellants,

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the District of Montana
Case No. 6:23-cv-00070
Hon. Brian Morris

PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANTS-APPELLANTS' AND INTERVENOR-DEFENDANTS-APPELLANTS' EMERGENCY JOINT MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL

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May 22, 2024

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees the Montana Public Interest Research Group and the Montana Federation of Public Employees, respectively, state that they have no parent corporations and that there is no corporation that holds 10% or more of their stock. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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INTRODUCTION AND BACKGROUND

Defendants-Appellants seek emergency relief by recycling arguments now twice rejected by the district court, first in a well-reasoned preliminary injunction order and again in an order denying a substantively identical stay request. Their motion ignores the factual findings and legal analysis in those two orders at nearly every step, offering this Court no persuasive reason to revisit the trial court's sound application of governing Ninth Circuit law. The emergency motion to stay should be denied.[1]

To start, Defendants fail to show any likelihood of success on the merits. This case concerns House Bill 892 (2023) ("HB892"), which created two new felonies in Montana: (i) "purposefully remain[ing] registered to vote in more than one place in this state or another state any time" (the "multiple registration prohibition"), and (ii) failing to "provide the [voter's] previous registration information on the Montana voter registration application" (the "prior-registration disclosure requirement"). Mont. Code Ann. § 13-35-210(5). Although its ostensible purpose was to reaffirm Montana's pre-existing ban on double voting, HB892's reach far exceeds this aim. The challenged provisions criminalize maintaining multiple voter registrations and omitting prior-

[1] Plaintiffs-Appellees ("Plaintiffs") refer to State Defendants (Montana Secretary of State, Montana Attorney General, and Montana Commissioner of Political Practices) and Intervenor-Defendants (Republican National Committee and Montana Republican Party) collectively as "Defendants" herein.

registration information on voter-registration applications, even if registrants never intend to and never attempt to cast multiple votes in the same election.

By punishing protected political expression beyond its legitimate aim of prohibiting double voting, HB892 violates the First and Fourteenth Amendments. And by employing vague language and unclear standards in a criminal statute regulating voter registration—a prerequisite to voting in Montana—HB892 violates due process. For these reasons, the district court's preliminary injunction order properly found that Plaintiffs "have demonstrated a likelihood of success" on their challenge to these provisions. Doc. 79 at 26 ("PI Order"); *id.* at 14–26; Doc. 94 at 5–9 ("Stay Order").[2]

Rather than meaningfully engage with the district court's analysis, Defendants claim that the court impermissibly applied a "relaxed" preliminary injunction standard under this Court's "sliding scale" approach. *See* Emerg. Joint. Mot. Under R. 27-3 at 3–4, ECF No. 3 ("Mot."). That is false. Both the PI Order and the Stay Order make clear that the district court found that Plaintiffs satisfy *any* formulation of the preliminary injunction standard. Stay Order 5; *see also* PI Order 26–33.

Defendants offer only cursory critiques of the district court's analysis of the merits—altogether ignoring its discussion of governing Ninth Circuit case law—and none raises any prospect of success, or even a serious question, on the merits. As the district court explained, while states may have a legitimate interest in preventing double

[2] "Doc." refers to filings on the district court's docket for *Montana Public Interest Research Group v. Jacobsen*, No. 6:23-cv-00070-BMM (D. Mont.).

voting, the challenged provisions implicate protected voter registration activities, reaching far beyond the legitimate sweep of HB892 (*i.e.*, preventing double voting). Plaintiffs do not challenge Montana's practice of requesting a voter's past registration information; they challenge brand new *felony restrictions*, which threaten criminal penalties for entirely innocent (and common) voter behavior, even when the voter has no intention to and never engages in double voting. Defendants fail to explain why *those provisions* are needed to combat double voting, an already near-nonexistent problem in Montana. *See* PI Order 26; Stay Order 7–9.

With respect to irreparable harm, Defendants offer nothing demonstrating they will suffer any serious harm absent a stay. And they entirely ignore county clerk testimony that the district court properly relied upon that refutes Defendants' conclusory claims of harm. PI Order 31. It is *Plaintiffs* who face real harm "because these laws will chill Plaintiffs' voter registration activities," threatening those "those they register [with] felony criminal penalties under HB 892[.]" *Id.* at 27-28.

Finally, the district court properly applied *Purcell*. Defendants' arguments to the contrary are conclusory and misplaced. Most importantly, they nowhere explain how the injunction will in fact disrupt Montana's elections in a manner that causes voter

confusion and unrefuted county clerk testimony confirms that it will not. The emergency motion to stay should be denied.[3]

LEGAL STANDARD

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (cleaned up). For that reason, a trial court's preliminary injunction "is reviewed for abuse of discretion," *California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018), and the "party requesting a stay pending appeal 'bears the burden of showing that the circumstances justify'" such extraordinary relief, *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020) (quoting *Nken*, 556 U.S. at 433–34). When weighing a stay request, courts consider: "(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." *Nken*, 556 U.S. at 434 (quotation omitted). "The first two factors . . . are the most critical." *Id.* In particular, "if the

[3] In addition to failing to satisfy the stay factors, Defendants fail to comply with Circuit Rule 27-3, which requires the movant "clearly state on the caption page of the motion the date by which relief is needed under the legend 'Emergency Motion Under Circuit Rule 27-3,'" and provide "facts showing the existence and nature of the claimed emergency." Nowhere on the caption page or anywhere else do Defendants specify when they claim relief from this Court is needed to prevent emergency. As explained below, Defendants face no prospect of irreparable harm from maintaining the injunction through final judgment.

petitioner has not made a certain threshold showing regarding irreparable harm . . . then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curium) (citing *Nken*, 556 U.S. at 433–34). This Court need only "consider the last two factors if the first two factors are satisfied." *Doe #1*, 957 F.3d at 1058.

ARGUMENT

I. Defendants fail to show a likelihood of success, and do not raise any substantial questions, on the merits.

A. Plaintiffs are likely to succeed on their overbreadth claim.

The district court did not err in finding that Plaintiffs are likely to succeed in showing that "a substantial number of" HB 892's "applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." PI Order 18 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). Accordingly, Plaintiffs "demonstrated a likelihood of success on the merits concerning their overbreadth claim." *Id.* at 26 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

1. The district court properly found Plaintiffs satisfied *any* preliminary injunction standard.

Rather than grapple with the substance of the PI Order—and the district court's unambiguous statements in the Stay Order—Defendants first claim the district court applied the wrong standard. *See* Mot. 3–6. According to them, the district court found only that Plaintiffs raised "substantial questions" about the merits of their overbreadth claim, and thus should have been held to a higher standard on the equitable factors. *Id.*

That is simply wrong. The district court *repeatedly* stated that it determined Plaintiffs are likely to succeed on the merits. *See, e.g.*, PI Order 17 ("The Court determines that the Plaintiffs have demonstrated likely success on the merits of their overbreadth claim."); *id.* at 26 ("Plaintiffs have demonstrated a likelihood of success on the merits concerning their overbreadth claim."). The PI Order is clear on its own, and the district court resolved any possible ambiguity in its Stay Order, which Defendants simply ignore. The district court there stated unequivocally that it "determined that Plaintiffs fulfilled both standards for a preliminary injunction," Stay Order 5, including by "demonstrat[ing] a likelihood of success on the merits," *id.* Defendants offer no reason why this Court should not "take the district court's explanation for its action at its word." *McGuckin v. Smith*, 974 F.2d 1050, 1056 (9th Cir. 1992).[4]

2. The district court applied governing law in holding that the challenged provisions are likely overbroad.

Defendants only briefly discuss the merits of Plaintiffs' overbreadth claim, *see* Mot. 6–9, repeating the same flawed arguments the district court twice rejected. That court correctly identified the overbreadth standards articulated by the Supreme Court, which asks whether "a substantial number of" HB892's "applications are

[4] Defendants' argument is not just wrong—it is irrelevant. The district court's Stay Order confirms Plaintiffs satisfied *both* preliminary injunction standards, a finding Defendants simply ignore. The trial court's findings below provide more than a sufficient basis to deny the present motion under any standard. *See Johnson v. Couturier*, 572 F.3d 1067, 1084–85 (9th Cir. 2009) (affirming preliminary injunction where the "court's analysis implicitly" satisfied alternative formulation of test).

unconstitutional, judged in relation to the statute's plainly legitimate sweep." PI Order 18 (quoting *Stevens*, 559 U.S. at 473). The district court then weighed these competing considerations. *See id.* at 17–26. It first "determine[d] that the legitimate sweep of HB 892 is the prohibition of double voting" based upon its review of the statute's text and title, as well as statements from the bill's proponents. *Id.* at 19–20. Next, it found that "[t]he multiple registration prohibition and prior registration disclosure requirements both implicate voter registration *beyond* HB 892's prohibition of double voting," a critical finding, given that "voter registration is speech protected by the First Amendment." *Id.* at 20 (emphasis added) (quoting *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008)).

The district court further discussed this Court's *en banc* decision in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) ("*Comite de Jornaleros*"), PI Order 21–22—a case Defendants ignore in wrongly suggesting the district court reached its decision based on out-of-circuit dicta, *see* Mot. 8–9. *Comite de Jornaleros* set forth "overbreadth principles" that apply here, namely that a law that "burden[s] substantially more [] speech than reasonably necessary to achieve its purpose" is overbroad. PI Order 22–23 (citing *Comite de Jornaleros*, 657 F.3d at 949). The district court concluded that, as in *Comite de Jornaleros*, HB892 "suppress[es] a great quantity of speech that does not cause the evils that it seeks to eliminate." *Id.* (quoting *Comite de Jornaleros*, 657 F.3d at 950); *see also id.* at 25.

Ignoring this discussion of Ninth Circuit law, Defendants instead complain that the district court improperly relied on the Seventh Circuit's decision in *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), which "analyzed a different, yet related, law concerning voter registrations." PI Order 23. Defendants suggest that *Lawson*—a case that concerned whether Indiana's voter list removal laws complied with the National Voter Registration Act ("NVRA")—actually "reaffirms . . . exactly what HB 892 requires." Mot. 9. This is nonsensical. The issue in this case is not whether HB892 complies with the NVRA. *Lawson* is relevant because it (1) recognized that an individual may have legitimate reasons to be registered in two places, and (2) refused to conflate multiple registrations with double voting. PI Order 24–25 (discussing *Lawson*, 937 F.3d at 960). The district court properly cited *Lawson* as a persuasive discussion of why it is unremarkable for many voters to have multiple voter registrations. *See id.*

Defendants contend that the district court—and apparently the Seventh Circuit as well—relied upon "fanciful" "hypotheticals" in reaching this conclusion. *See* Mot. 9. But these scenarios—such as moving for work or attending school—are everyday occurrences. *See* PI Order 26. And they were supported by unrefuted declaration testimony submitted by Plaintiffs below. *See*, *e.g.*, Doc. 13-1 ¶¶ 11, 13–14 (Losing Decl.); Doc. 13-2 ¶¶ 14–15 (Curtis Decl.). Indeed, these are among the common reasons why *millions* of Americans have historically been registered in multiple states, while actual incidents of double voting remain rare. *See* Doc. 12 at 22–25 ("PI Mem."); *see also* Doc. 13-16 (2012 Pew Center study showing that approximately 2.75 million Americans were

registered in multiple states); Doc. 13-14 (National Conference of State Legislature ("NCSL") summary showing no other state makes it a felony to remain registered in two places). Such everyday behavior is far from "fanciful." Mot. 9 (quoting *United States v. Hansen*, 599 U.S. 762, 770 (2023)). The district court properly identified "realistic" "unconstitutional applications" of HB892. *Hansen*, 599 U.S. at 770.

Defendants suggest these myriad instances of innocent double registration may be "resolve[d] . . . as they arise by using regular tools of statutory interpretation," the "rule of lenity," and the "canon of constitutional avoidance." Mot. 10 (citations omitted). But that does not remedy the chill imposed by the specter of prosecution, requiring voters to put themselves at risk of committing a felony before finding out how the law will be enforced. This argument runs contrary to well-established First Amendment principles, which recognize that, when free speech is at stake, it is not necessary to wait and see how an overbroad criminal provision will be enforced; courts do not "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480 (rejecting prosecutorial discretion and canons of construction as remedies for overbroad criminal law).

3. Defendants fail to draw a sufficient connection between the challenged provisions and double voting.

The district court also did not abuse its discretion in concluding that Defendants failed to draw a sufficient connection between maintaining multiple voter registrations and prohibiting double voting. Defendants attempt to justify the challenged criminal

restrictions by pointing to generic fears of voter "fraud," but such generalized claims fail to adequately connect—much less justify—threatening lawful voters with felony sanctions, *not* for double voting, but for merely having more than one voter registration. *Cf. Soltysik v. Padilla*, 910 F.3d 438, 448 (9th Cir. 2018) ("[t]he existence of a state interest . . . is a matter of proof" (alterations in original) (quoting *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993))). Rather than merely invoking abstract interests, Defendants had the burden of showing how the state interests that they claimed to justify these provisions are served "*in the circumstances of this case*." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (emphasis in original). They failed to do so.

It is undisputed that double voting has long been illegal in Montana. No party disputes that Montana may guard against this exceedingly rare activity by asking voters to provide prior registration information, and Defendants failed to identify any reason why it was necessary to *criminalize* failure to cancel a past registration or to disclose a past registration to prevent it. Defendants rely too heavily on the Supreme Court's holding in *Brnovich v. Democratic National Committee*, Mot. 8, which held that "[r]ules that are supported by strong state interests are less likely to violate § 2[,]" of the Voting Rights Act. 594 U.S. 647, 671–72 (2021). This is not a Section 2 VRA case, and Defendants have hardly established that HB892 is "supported by strong state interests."

All that Defendants can muster is to note that the NCSL and Pew Center exhibits suggest that voter-roll maintenance activities generally "help" election officials identify voters who have multiple registrations, and by extension, potential double voters. Mot.

8 (citing Doc. 13-14, Doc. 13-16). But Plaintiffs do not challenge Montana's longstanding practice of requesting such information on voter registration forms—they challenge the new criminal penalties that threaten voters who innocently violate them, with no intention of ever double voting. Moreover, as the district court recognized, the sources upon which Defendants rely fail to support their arguments, including because they do not connect "the imposition of felony criminal penalties" for "maintaining multiple voter registrations" to the prevention of double voting. PI Order 25–26; *see also* Stay Order 8–9. Millions of voters have multiple registrations, Doc. 13-16, and yet incidents of double voting are exceedingly rare.

B. The strength of Plaintiffs' vagueness claim further supports denying the stay.

This Court can and should deny the motion to stay based on Defendants' failure to show they will likely succeed in their appeal of the district court's overbreadth finding. Plaintiffs' vagueness claim, however, provides additional reason to conclude Defendants are not likely to succeed. *See* PI Mem. 11–18; PI Reply 4–6; *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1021 (9th Cir. 2013) (Court may affirm a preliminary injunction based on "any ground supported by the record" (quotation omitted)).

The district court recognized Plaintiffs' vagueness claim likely raised, at minimum, "substantial questions going to the merits," PI Order 17, and expressed "concern[] that voters lack notice as to what Montana law requires of them when registering to vote," *id.* at 16–17. The district court's concern is well founded: the "plain

language of HB 892 does little to clarify" the matter, *id.* at 16, and "vagueness scrutiny is more stringent" where, as here, "a law implicates First Amendment rights," *id.* at 15 (quoting *Cal Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001)). Defendants' motion nowhere acknowledges the strength of Plaintiffs' vagueness claim, which provides an independent basis for the injunction, particularly given the district court's lopsided findings on the equities. *See Valle del Sol*, 732 F.3d at 1021 (affirming preliminary injunction on alternative ground of vagueness where district court relied on preemption analysis); *cf. Johnson*, 572 F.3d at 1084–85 (the Court may affirm preliminary injunction based on lower court's implicit analysis).

II. The equitable factors weigh strongly against granting a stay.

A. Defendants have not shown that they will suffer irreparable harm absent a stay.

Defendants have not shown they will suffer irreparable harm absent a stay of the injunction, which is reason enough to deny their motion. *See Leiva-Perez*, 640 F.3d at 965. Intervenor-Defendants fail to claim *any* irreparable harm at all, and the cursory arguments advanced as to the State Defendants are unpersuasive.

First, the motion asserts the State Defendants will suffer irreparable harm from the State's purported inability to "conduct[] this year's elections pursuant to a statute enacted by the Legislature." Mot. 13 (quoting *Abbott v. Perez*, 585 U.S. 579, 602 (2018)). But that claim is undermined by the State's own position in this litigation, which is that enjoining the challenged provisions will not impact the state's ability to conduct

elections whatsoever. The State has repeatedly insisted that the challenged provisions only "codif[y] the longstanding requirement for registrants to supply previous registration information." Doc. 30 at 13 ("PI Resp."); *see also id.* at 2, 24 n.10. The Secretary's guidance on HB892 confirms this—the Secretary advised county election officials not to change the "practice [they] were following before" HB892. PI Order 13 (citing testimony of Ravalli County Clerk at Doc. 62 at 108). Defendants cannot have it both ways—they may not argue that HB892 does little to change Montana's election administration, then turn around and claim irreparable harm from the injunction.[5] Regardless, the district court had ample basis to conclude the challenged provisions do not impact how election officials review and process voter registration forms, *see* Stay Order 15, while also finding that HB892 "imposes felony criminal penalties *post hoc*" that chill legitimate expression. *Id.*; *cf. Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 368 (9th Cir. 2016) (en banc).

By contrast, courts have stayed injunctions because of irreparable harm to the state only where the injunctions at issue worked significant changes on the state's enforcement of its election laws. *See Abbott*, 585 U.S. at 593, 602 (emphasizing that

[5] To the extent Defendants argue the district court's preliminary injunction prevents Montana from continuing to enforce its election laws as it did *prior* to HB892, *see* Mot. 12, that assertion is incorrect. The injunction is careful to prevent enforcement only of HB892's new criminal prohibitions—which does not impact pre-HB892 practices. *See* PI Order 33–34. As to the prior-registration disclosure requirement, Montana's registration form *already* sought disclosure of prior registrations—HB892 added criminal penalties for failing to provide such information. *See* Stay Order 15.

injunction prevented Texas from using the legislature's districting plans); *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring) (explaining that injunction created "an entirely new system" for Idaho clerks to learn and enforce). Defendants' citation to *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc), Mot. 13, only reinforces the point. There, this Court held that where plaintiffs only raised substantial questions on the merits, it was appropriate to conclude that enjoining *an entire recall election* imposed greater hardships on the state than the plaintiffs. *See Southwest Voter*, 344 F.3d at 920; *see also Feldman*, 843 F.3d at 368 (distinguishing *Southwest Voter* from case where law imposed criminal penalties that did "not involve any change at all to the actual election process"). In contrast, the injunction here permits Montana to continue the same voter registration practices employed prior to HB892, as the Secretary has instructed. *See* PI Order 31 (discussing state court testimony and citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). Montana simply may not *prosecute* a voter after the fact for failing to comply with the challenged provisions.

Defendants charge that the district court made contradictory findings in concluding that HB892 imposes irreparable harm on Plaintiffs but does not "substantively change" voting procedures. Mot. 5. But that misconstrues Plaintiffs' claims and the district court's ruling. Defendants admit on the first page of their motion that "[n]o party disputes that the Montana voter registration form remained the same after the passage of HB 892," *Id.* at 1, and Plaintiffs nowhere argue that Montana may

not continue its longstanding practice of *asking* registrants to provide past registration information.[6] As the district court clearly explained, HB892 imposes irreparable harm on Plaintiffs because the threat of "*post hoc*" criminal sanctions chills protected expression. Stay Order 15; *see* PI Order 27, 32. But enjoining criminal enforcement of the challenged provisions does not change Montana's voter registration form or how Montana election officials use it to register voters. Stay Order 15; PI Order 13, 33; *see also Feldman*, 843 F.3d at 368.

Second, even if the State retained some interest in enforcing the challenged provisions until final judgment, its claim to irreparable harm would still fail. The State "is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (cleaned up); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (similar). *Abbott* and *Little* prove the point, explaining that the State is only harmed by enjoining enforcement of *lawful* provisions. *See Abbott*, 585 U.S. at 602 (recognizing that injunction could not cause harm if the statute is "unconstitutional"); *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring) (explaining that

[6] Defendants wrongly assert that the federal voter registration form prescribed under the NVRA "already require[s] applicants" to provide prior registration addresses. Mot. 1. No provision of federal or Montana law *requires* that section of the federal form to be completed, and the form itself merely requests that applicants "[p]lease give us as much of the address as you can remember." *National Mail Voter Registration Form* at 2, perma.cc/554D-KLXE. Federal law also does not *criminalize* failure to complete that section of the form.

injunction implicated Idaho's "sovereign interest in the enforcement of initiative requirements that are *likely consistent with the First Amendment*" (emphasis added)).

B. The public interest, and the interests of others, are best served by denying the stay.

Defendants have not shown that the equities or public interest favor a stay. "The public interest supports the issuance of an injunction against HB 892's multiple registration prohibition and prior registration disclosure requirement" as the "public maintains a strong interest in exercising the fundamental political right to vote." PI Order 32 (cleaned up). And here, whether a voter can "vote without fear of felony criminal penalties appears to substantially implicate the public's interest in protecting the franchise." *Id.* The challenged provisions also undermine Plaintiffs' protected registration efforts by inflicting financial harm on them and frustrating "activities [that] serve as a method by which many eligible Montanans register to vote, thereby enabling them to exercise their right to the franchise." *Id.*

In balancing the equities, this Court should also consider how State Defendants used the PI Order to their own benefit in parallel state court proceedings. *Cf. United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 778–79 (9th Cir. 2009) (concluding that a party was equitably estopped from relying on a position it had defeated in previous litigation because such "'gaming' of the courts [would] allow [the Defendant] the possibility of prevailing on the very position it successfully discredited while attempting to avoid preliminary injunction"). After all, a "request for a stay is an appeal

to equity" and "he who comes into equity must come with clean hands." *Steuben Foods, Inc. v. GEA Process Eng'g, Inc.*, No. 12-CV-00904-EAW-JJM, 2015 WL 1014588, at *4 (W.D.N.Y. Mar. 9, 2015) (citations omitted); *cf. Winter*, 555 U.S. at 24.

Without acknowledging that they would immediately seek a stay and reversal of the PI Order, State Defendants relied on that order to successfully defeat a parallel state-court request for similar relief against HB892. In response to the state-court plaintiffs' notice of supplemental authority in parallel proceedings ("*League of Women Voters of Montana*") informing that court of the federal injunction, Doc. 93-1, State Defendants argued that because "Defendants are already enjoined . . . granting an injunction would be unnecessary and duplicative." Doc. 93-2 at 2–3. Yet, just a few days later, State Defendants urged the district court (and now this Court) to stay the very injunction that it said removed any threat of irreparable harm to the state-court plaintiffs. State Defendants' efforts achieved its intended effect—the state court denied the pending preliminary injunction motion in *League of Women Voters of Montana* as moot. *See* Doc. 93-3. To now set aside the injunction would prove highly inequitable to both sets of Plaintiffs, permitting State Defendants to play the two actions off one another to avoid injunctive relief in either.

C. *Purcell* does not require a stay.

The district court's PI Order merely reinstated a preexisting and longstanding status quo in Montana before the challenged provisions in HB892 were enacted, permitting voters to register without fear of being criminally prosecuted for failing to

cancel or disclose other voter registrations, while still permitting the State to request prior registration information. Nothing about the injunction interferes with the Secretary's guidance to county election officials to maintain the "current practice [they] were following before" HB892. PI Order 13 (citing testimony of Ravalli County Clerk at Doc. 62 at 108). The district court properly analyzed case law applying the *Purcell* principle and correctly determined that *Purcell* did not bar preliminary relief, based both on the time until the next election and the scope of the requested relief. *Id.* at 11–14. The November general election is well over five months away—far from the time horizon for other cases applying *Purcell*. *Id.* at 11–12. Moreover, even with respect to the upcoming primary election, the district court properly concluded that "enjoining HB 892's multiple registration prohibition and prior registration disclosure requirement likely will not lead to voter confusion and disenfranchisement." *Id.* at 12. Quite the contrary: The threat of severe criminal penalties imposed by HB892 is likely to discourage voters and registrants absent an injunction.

Montana's elections officials have testified that the enjoined laws do not change how they administer Montana's voter registration procedures. *Id.* at 13. Even if that were not the case, it is hard to fathom how the district court's injunction could, as a practical matter, disrupt any upcoming election in Montana. The preliminary injunction bars the State from imposing *post hoc* criminal penalties on voters who fail to provide prior registration information on their voter registration applications, and for "purposefully remain[ing] registered" at another place. Mont. Code Ann. § 13-35-

210(5); *see also* PI Order at 33–34. The State is free to continue using the very same voter registration form and to continue requesting that registrants provide prior registration information, as it did prior to HB892. The district court's injunction is clear that "[a]ll other provisions of HB 892, codified in Mont. Code. Ann. § 13-35-210, shall remain in effect." *Id.* at 34. Nowhere do Defendants meaningfully explain how removing the threat of criminal punishment for ordinary conduct creates a "significant" risk of voter confusion. Mot. 12; *see also* Stay Order 10 ("Defendants present this argument without substantiating evidence or statistical support").

Rather than explain why *Purcell* applies, Defendants cite to an undistinguished mass of cases applying *Purcell* in 2020 during the COVID-19 pandemic. *See* Mot. 10–11. But even a cursory review of those cases shows they are fundamentally different. For one, all concerned state laws governing how ballots were cast or counted around election day. In contrast, the challenged provisions here relate solely to after-the-fact criminal prosecutions for voter registration—not the casting or counting of ballots on or shortly before election day. None of the cases that Defendants cite involved a similar attempt to criminalize commonplace voter registration behavior. Just as critically, the district court concluded that HB892 does not practically impact how Montana election officials perform their voter registration duties. PI Order 12–14. Notwithstanding the injunction, prospective voters still must complete the same voter registration form, which asks for previous registration information. The difference is that with the injunction in place, voters are no longer at risk of being criminally prosecuted for failing

to affirmatively cancel another voter registration, or for failing to list a previous voter registration.

Such an injunction "leav[es] the status quo in place," which "is what *Purcell* demands," and Defendants offer no coherent reason how "reversing [the district court's] order will cause less confusion[.]" Order Denying Stay, *Ariz. All.*, No. 2:22-cv-01374-GMS (D. Ariz. Oct. 3, 2022), ECF No. 95. Unrefuted county clerk testimony—yet again ignored by Defendants—confirms that is the case here. *See* Stay Order 14–15 (explaining "that HB 892 does not substantively change voting practices and procedures in Montana" (citing *Feldman*, 843 F.3d at 368)).

CONCLUSION

For the reasons above, the emergency motion should be denied.

Date: May 22, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that according to the word count feature of the word processing program used to prepare this motion, this motion contains 5,131 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements and length limits of Rules 27(d)(2)(A) and 32(c), and Circuit Rule 27-3.

s/*Aria C. Branch*
Aria C. Branch