No. 24-2811

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA PUBLIC INTEREST RESEARCH GROUP and MONTANA FEDERATION OF PUBLIC EMPLOYEES, *et al.*,

Plaintiff-Appellees,

v.

CHRISTI JACOBSEN, *in her official capacity as Montana Secretary of State*, AUSTIN KNUDSEN, *in his official capacity as Montana Attorney General*, and CHRIS GALLUS, *in his official capacity as Montana Commissioner of Political Practices*,

Defendants-Appellants,

REPUBLICAN NATIONAL COMMITTEE and MONTANA REPUBLICAN PARTY,

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

REPLY IN SUPPORT OF EMERGENCY JOINT MOTION

AUSTIN KNUDSEN
Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
Montana Department of Justice
215 N. Sanders
Helena, MT 59601
(406) 444-2026
christian.corrigan@mt.gov

Counsel for Appellants

THOMAS R. MCCARTHY*
KATHLEEN S. LANE
CONOR D. WOODFIN*
Consovoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com
katie@consovoymccarthy.com
conor@consovoymccarthy.com

Counsel for Intervenor-Appellants

May 24, 2024

The State of Montana is now 11 days from its primary election. Late voter registration remains ongoing. One year ago, the Montana legislature enacted a law that protects against double voting by prohibiting double registration. One month ago, the district court preliminarily enjoined that law on the grounds that the law's double voter registration prohibition was likely overbroad. But Plaintiffs assert that they "do not challenge Montana's longstanding practice" of asking for prior voter registration information and instead only "challenge the new criminal penalties that threaten voters." Resp. at 11. This concession dooms their overbreadth claim. The State, along with the Republican National Committee and the Montana Republican Party, respectfully request that this Court stay that injunction as soon as possible.

I. The State will suffer irreparable harm absent a stay

As Applicants explained, the State will suffer irreparable harm absent a stay of the injunction because it will be prevented from conducting this year's elections pursuant to a statute enacted by the Montana Legislature. Stay App. at 13 (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). This Court has instructed that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers irreparable injury. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("it is clear that a state suffers irreparable injury *whenever* an enactment of its people or their representatives is enjoined") (emphasis added)*; cf. Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) ("The decision to enjoin an

impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation."). That principle is universal. *See Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (alteration in original); *accord Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194, 225 (4th Cir. 2024); *R.K. v. Lee*, No. 22-5004, 2022 U.S. App. LEXIS 12622, at *6 (6th Cir. May 10, 2022); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020); *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018).

Plaintiffs' response to that unbroken line of precedent is that courts only stay injunctions in election cases when they "worked significant changes on the state's enforcement of its election laws." Resp. at 13. No such rule exists on paper or in practice. *See, e.g.*, *Vote.org v. Callanen*, 39 F.4th 297, 308 (5th Cir. 2022) ("When a State is seeking to stay a preliminary injunction, it's generally enough to say that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (cleaned up). The added injury to the State's enforcement of its election laws is a separate consideration. *See Pierce*, 97 F.4th at 225 ("Enjoining North Carolina from enforcing its duly enacted redistricting law in the 2024 state Senate elections would inflict a form of irreparable injury…. Not to mention the practical effects of an injunction on the State's sound and orderly administration of the 2024 Senate election, which we will discuss momentarily.").

Plaintiffs concede that the injunction prohibits the State from prosecuting a voter for violating the challenged provisions. Resp. at 14. That alone constitutes irreparable harm—full stop. *Wilson*, 122 F.3d at 719.

II. The Public Interest Weighs in Favor of a Stay

As explained in the stay application, the equities weigh in Applicants' favor. Even if the challenged law is ultimately found to be unconstitutional, *Purcell* protects the election process by "allow[ing] the election to proceed without an injunction" while Applicants' appeal is pending. *Purcell*, 549 U.S. at 6. The public has a "substantial interest in the stability of its electoral system in the final weeks leading to an election." *Lair v. Bullock*, 697 F.3d 1200, 1202 (9th Cir. 2012). And to the extent both parties have interests at stake, the equities weigh in favor of allowing the State to enforce its presumptively constitutional law that protects the integrity of the election process.

Unable to overcome the State's showing of harm and the equities that tip sharply in favor of s stay, Plaintiffs manufacture a judicial estoppel argument in the hopes of precluding the State from seeking a stay in the first place. They claim that the State "used the PI Order to their own benefit in parallel state court proceedings" by mooting the state plaintiffs' preliminary injunction motion and thus should be barred from seeking a stay here. Resp. at 16 (citing *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 778-79 (9th Cir. 2009)). But that's not how judicial estoppel works. And *Spectrum Worldwide* doesn't bar the State from seeking a stay of the injunction or availing itself of relief in this federal litigation. First, the statements at issue in *Spectrum* were

statements of fact about when and how Spectrum changed the label at the center of the trademark infringement suit. *Id.* Those facts went to the heart of the legal claims raised in the different lawsuits. Here, the alleged statements are consistent—the challenged law is presently enjoined, after all. The State made no representations to the state court about intentions to leave the preliminary injunction in place in this case. If a stay in this case may impact the state court proceedings, that is for the state court to address in a different procedural posture. It's irrelevant to whether Applicants have met their burden for a stay. Moreover, Plaintiffs in this action filed suit after the plaintiffs in the state court action filed their lawsuit. To the extent there are parallel proceedings at all, that is of their own making.

III. Applicants are Likely to Succeed on the Merits of Their Appeal

As explained in the joint motion to stay, Applicants are likely to succeed on the merits of their appeal because the district court failed to apply the correct preliminary injunction standard and failed to conduct a proper overbreadth analysis.

Preliminary Injunction Standard. With respect to the applicable preliminary injunction standard, Plaintiffs assert that the district court "repeatedly stated that it determined Plaintiffs are likely to succeed on the merits." Resp. at 6. But therein lies the problem. The district court concluded that a preliminary injunction was appropriate because it equated its conclusion that Plaintiffs "raised substantial questions" as to whether the challenged law is overbroad, see PI Order at 25, 26, with a finding that Plaintiffs were likely to succeed on the merits, *id.* at 17, 26. The district court explained

that Plaintiffs "have raised substantial questions as to whether HB 892's multiple registration prohibition and prior registration disclosure requirements will substantially chill the protected activity of voter registration." *Id.* at 25 (emphasis added). The district court added that it "views [Plaintiffs'] argument as rising above mere speculation or hypotheticals," and "that [Plaintiffs] have raised substantial questions going to the merits." *Id.* at 26. As a result, the district court concluded, because Plaintiffs "raised substantial questions," they were likely to succeed on the merits of their claims. *Id.*

Raising substantial questions going to the merits, however, is different from being likely to succeed on the merits. This Circuit's extensive case law about the "sliding scale" approach confirms that these are distinct concepts. In *Alliance for the Wild Rockies*, this Court explained that finding "serious questions going to the merits" is a lower standard than being likely to succeed on the merits. 632 F.3d 1127, 1131-32. And it is permissible for courts to hold a plaintiff to this lower standard, but only when that plaintiff has made "a stronger showing of one element." *Id.* at 1131. Here, the district court did not make the requisite finding that Plaintiffs made "a stronger showing" of another element. *Id.* The district court erred as a matter of law when it concluded that Plaintiffs were likely to succeed simply because they "raised substantial questions" going to the merits of their claim without also finding that the balance of the equities or their showing of irreparable harm "decidedly" or "sharply" tips in their favor. *Id.* at 1133.

Plaintiffs further assert that the Applicants' argument about the preliminary injunction standard is "irrelevant" because the district court provided a "more than

sufficient basis" in its stay order. Resp. at 6 n.4. Even if Respondent's characterization of the district court's stay order is correct (it's not), the subject of this appeal is the district court's preliminary injunction order, not its stay order. No matter what the stay order says, the preliminary injunction rests solely on the district court's April 24, 2024, order. And that is the order Applicants seek to reverse.

Overbreadth. In response to Applicants' overbreadth arguments, Plaintiffs fail to grapple with the significant body of case law cautioning against invalidating a statute on overbreadth grounds. *See* Stay App. at 7. Like the district court, they rely on *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008), to conclude that any law touching upon voter registration must implicate the First Amendment. But *Preminger* doesn't support this absolutist position. Indeed, this Court concluded that the parties in *Preminger* "d[id] not dispute that voter registration is speech," and added in the very next sentence, "But the privileges afforded by the First Amendment are not absolute." *Id.*

Because these privileges are not absolute, the standard for an overbreadth challenge is demanding. *See* Stay App. at 7. As such, Plaintiffs must show that the unconstitutional applications of the challenged law are "substantially disproportionate to the statute's lawful sweep." *United States v. Hansen*, 599 U.S. 762, 770 (2023). Plaintiffs first dispute the connection between HB 892 and double voting. Instead, they flip the burden on Applicants to "show[] how the state interests that they claimed to justify these provisions are served." *Id.* That's backwards. It's not Applicants' burden, particularly at the preliminary injunction stage. It's Plaintiffs' burden to show that the

presumptively constitutional law in question has substantially disproportionate number of unconstitutional applications. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) ("The overbreadth claimant bears the burden of demonstrating …that substantial overbreadth exists."). And Plaintiffs concede that their own sources show that voter-roll maintenance activities, like removing voters registered in multiple jurisdictions, assist election officials in carrying out elections. Resp. at 10.

Plaintiffs next contend that their identified "scenarios"—"moving for work or attending school"—are enough to show that the unconstitutional applications of HB 892 are substantially disproportionate. Resp. at 8. Again, it is Plaintiffs' burden at this stage, and they have produced no factual support for the contention that Montana voters will be foreclosed from registering to vote under HB 892. Instead, they rely on *Lawson* to bolster support for these "scenarios." But again, *Lawson* isn't an overbreadth case. Even if *Lawson* was on point and "an individual may have legitimate reasons to be registered in two places," Resp. at 8, the Seventh Circuit's passing observation that "[s]ome" students drop out of college by November isn't enough to satisfy Plaintiffs' burden to show a *substantial number* of applications of HB 892 are unconstitutional. Moreover, as Applicants have repeatedly asserted, *Lawson* affirms that the State can remove a duplicate registrant from its voter rolls so long as the voter herself provides the State with that information. *Common Cause Indiana v. Lawson*, 937 F.3d 944, 947 (7th Cir. 2019).

After making their overbreadth arguments, Plaintiffs pivot. They note that they actually don't dispute that the State can "ask[] voters to provide prior registration information," nor do they challenge Montana's "longstanding practice" of doing so. Resp. at 10-11. In other words, they concede that they attack only the fact that the law imposes criminal penalties. *Id.* at 11. But the "longstanding practice" that "[n]o party disputes," *id.* at 10, and that apparently "Plaintiffs do not challenge," *id.* at 11, is the *entire basis* of Plaintiffs' overbreadth claim. The constitutionality of asking voters for their prior registration information doesn't rise and fall with the penalties attached to that practice. The overbreadth analysis asks whether the law itself "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Hansen*, 599 U.S. at 770. And whether the law prohibits a substantial amount of protected speech depends on the scope of the prohibition, not the intensity of the penalties attached to the prohibition. *Id.* Plaintiffs' own concessions thus doom their overbreadth claim.

IV. *Purcell* Applies

The district court correctly concluded that this case falls squarely within the cases applying *Purcell*. Doc. 79, at 12. But the district court nevertheless refused to apply *Purcell* because it determined that an injunction "will not lead to voter confusion" since HB 892 "likely do[es] not substantively change Montana voting registration procedure." *Id.* at 13. But if the law doesn't "substantively change" Montana elections, then it's hard to see why preliminary injunctive relief could possibly be warranted. In any event, an

injunction does sow confusion by calling into question the State's longstanding practice. Stay App. at 12. This is so even crediting the district court's characterization of the law as not substantively changing Montana elections, because even "seemingly innocuous" orders can "cause unanticipated consequences." *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 31 (Oct. 26, 2020) (Kavanaugh, J.). Under *Purcell* then, a stay is warranted.

CONCLUSION

For these reasons, the Court should stay the district court's injunction pending appeal.

DATED this 24th day of May, 2024

Respectfully submitted,

AUSTIN KNUDSEN
Attorney General of Montana

/s/ Christian B. Corrigan
CHRISTIAN B. CORRIGAN
Solicitor General
Montana Department of Justice
215 N. Sanders Helena, MT 59601
(406) 444-2026
christian.corrigan@mt.gov

Counsel for Appellants

/s/ Kathleen S. Lane
KATHLEEN S. LANE
THOMAS R. MCCARTHY*
CONOR D. WOODFIN*
Consovoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

tom@consovoymccarthy.com
katie@consovoymccarthy.com
conor@consovoymccarthy.com

Counsel for Intervenor-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Christian B. Corrigan, an employee in the Office of the Attorney General of the Montana, hereby certifies that according to the word count feature of the word processing program used to prepare this motion, this motion contains 2264 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/ Kathleen S. Lane
Kathleen S. Lane

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief on May 24, 2024, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

/s/ Kathleen S. Lane
Kathleen S. Lane