No. 24-2811

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA PUBLIC INTEREST RESEARCH GROUP and MONTANA FEDERATION OF PUBLIC EMPLOYEES,

Plaintiffs-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

APPELLANTS' JOINT OPENING BRIEF

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May 30, 2024

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CORPORATE DISCLOSURE STATEMENT

The Republican National Committee is not a subsidiary or affiliate of a publicly owned corporation. The Montana Republican Party is not a subsidiary or affiliate of a publicly owned corporation. No publicly owned corporation not a party to this case has a financial interest in the outcome of this case.

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, are not subject to Federal Rule of Civil Procedure 26.1's disclosure requirement.

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INTRODUCTION

Like many States, Montana prohibits voters from being registered to vote in more than one jurisdiction. The reason is obvious: if a person is registered to vote in multiple jurisdictions for the same election, it is easier for that person to vote in multiple jurisdictions for the same election. Montana has legitimate interests in guarding against double-voting, both willful and inadvertent. And it has additional interests in administering elections efficiently, promoting public confidence in elections, and ensuring the law is clear. To further these interests, the Montana Legislature enacted HB 892, codified at Mont. Code §13-35-210, which provides by law the requirements for voter registration in the State of Montana. This law codified Montana's established practice of requiring applicants to provide prior registration information and expressly prohibited a person from purposefully remaining registered to vote in multiple locations.

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Plaintiffs, the Montana Public Interest Research Group and the Montana Federation of Public Employees brought suit, challenging subsection 5 of Mont. Code §13-35-210, and calling the law redundant and unnecessary. The law is neither. But even if it were, redundant laws are not unconstitutional laws. *See Barton v. Barr*, 590 U.S. 222, 239 (2020). Unnecessary laws are not unconstitutional laws. Applying the presumption of constitutionality afforded to §13-35-210(5), principles of constitutional law, and tools of statutory interpretation, this Court should reverse the district court's grant of extraordinary relief.

JURISDICTIONAL STATEMENT

Plaintiffs challenge the constitutionality of §13-35-210(5) under the First and Fourteenth Amendments to the U.S. Constitution, so the district court had subject matter jurisdiction under 28 U.S.C. §1331 and §1343(a). On April 24, 2024, the district court issued a preliminary injunction enjoining §13-35-210(5). Defendants and Intervenor-Defendants filed a joint notice of appeal on May 2, 2024, which is timely under Fed. R. App. P. 3(a)(1), 4(a)(1)(B), and 26(a)(1)(A)-(C), so this Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) (interlocutory orders granting preliminary injunctions).

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court apply a lower preliminary injunction standard than required under *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011)?

2. Did the district court err in concluding that Plaintiffs were likely to prevail on the merits of their overbreadth challenge to §13-35-210(5)?

3. Did the district court err in its application of the remaining preliminary injunction factors?

STATEMENT OF THE CASE

Montana's Constitution vests nearly all legislative power in the legislature,[1] Mont. Const. art. V, §1, and gives the legislature the authority to "provide by law the requirements for residence, registration, absentee voting, and administration of elections,"

[1] The people retain some legislative power under the ballot initiative and referenda process. *See* Mont. Const. art. III, §§4-5.

Mont. Const. art. IV, §3. Pursuant to this authority, the 2023 Montana Legislature passed HB 892, which is codified at Mont. Code §13-35-210 and states in relevant part:

> A person or elector may not purposefully remain registered to vote in more than one place in this state or another state any time, unless related to involvement in special district elections. A person or elector previously registered to vote in another county or another state shall provide the previous registration information on the Montana voter registration application provided for in 13-2-110.

Mont. Code §13-35-210(5).

This provision codifies Montana's longstanding practice of requiring voter registration applicants to provide previous voter registration information. ER-2 ¶6; ER-3 ¶5. Both the Montana and federal voter registration forms already require applicants to provide this information. *See* ER-118; ER-120; ER-122; ER-146; *National Mail Voter Registration Form*, U.S. Election Assistance Comm'n (last updated Jan. 22, 2024), perma.cc/554D-KLXE. No party disputes that the Montana voter registration form remained the same after §13-35-210(5) became law.

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The parties also agree on the reasoning behind the law. No party disputes that the Montana Legislature ultimately sought to prevent double voting, and they did so by prohibiting the means for one of the many ways people can vote. The former Elections Director of Montana testified below that there have been numerous "past instances in Montana where voters appeared to have voted in the same election twice." ER-150 ¶7. These double votes have the potential to make a difference in any election, especially

in Montana where elections are sometimes "decided by one vote, or even result in a tie." ER-152 ¶13.

Over four months after §13-35-210(5) went into effect, Plaintiffs challenged the provision as facially unconstitutional, alleging that it was vague, overbroad, and violated the right to vote. *See* ER-240–44. Six weeks later, and days after the 2023 municipal elections in Montana, Plaintiffs moved for preliminary injunctive relief on the grounds that §13-35-210(5) is vague and overbroad. Plaintiffs did not challenge any other provision in §13-35-210. After briefing and a hearing in which the parties presented argument, the district court enjoined the challenged provision on April 24, 2024, concluding that Plaintiffs raised substantial questions on the merits of their overbreadth claim and met the remaining three preliminary injunction factors. The district court declined to rule on their vagueness claim, concluding that the vagueness inquiry depended on "[f]urther development of the factual record," ER-20. Plaintiffs' overbreadth claim is the sole basis for the injunction.

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On May 2, 2024, Defendants Christi Jacobsen, Austin Knudsen, and Chris Gallus, along with Defendant-Intervenors, the Republican National Committee and the Montana Republican Party, jointly appealed the district court's order. They also moved for a stay of the injunction pending appeal, which this Court denied on May 30, 2024.

The parties are now five days away from Montana's primary election on June 4; four months away from the close of regular voter registration for the general election on October 7; and five months away from the general election itself on November 5.

Under a recent decision from the Montana Supreme Court, voters can register and vote up to and including election day. *See Mont. Democratic Party v. Jacobsen*, 545 P.3d 1074 (Mont. 2024). This means that late voter registration for the June primary election and regular voter registration for the November general election remain ongoing.

STANDARD OF REVIEW

This Court reviews "the district court's decision to grant … a preliminary injunction for an abuse of discretion." *Cal. Chamber of Commerce v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 475 (9th Cir. 2022) (internal quotations omitted). Reversal of a preliminary injunction is warranted if the district court "incorrectly applied the law, relied on clearly erroneous factual findings, or otherwise abused its discretion." *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). Questions of law, including the proper legal standard, are subject to de novo review. *Id.*; *see also Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014). Reversal is therefore warranted when "the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction" or "in applying the appropriate standards, the court misapprehended the law with respect to the underlying issues in the litigation." *Cal. Chamber of Com.*, 29 F.4th at 475 (internal quotation marks omitted), *cert. denied*, 143 S.Ct. 1749 (2023).

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A preliminary injunction is a drastic remedy "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). It may issue only when the movant "by a clear showing, carries the burden of persuasion." *Norbert v. City & Cnty. of S.F.*, 10 F.4th 918, 927 (9th Cir. 2021) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)

(per curiam)); *Benisek v. Lamone*, 585 U.S. 155, 158 (2018) (preliminary relief "does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits"). So Plaintiffs must carry their heavy burden of showing that (1) they have a substantial likelihood of success on the merits; (2) they will suffer irreparable injury without a preliminary injunction; (3) their threatened injury outweighs whatever harm the proposed injunction would cause their opponent; and (4) if issued, the injunction is in the public's interest. *Winter*, 555 U.S. at 20. The first *Winter* factor "is a threshold inquiry and is the most important factor." *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (internal quotations omitted). When the nonmovant is the government, the last two *Winter* factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

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Under this Circuit's "serious questions" test, a plaintiff can meet its burden by showing "serious questions going to the merits," but only when "the balance of hardships tips sharply in the plaintiff's favor." *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1188 (9th Cir. 2022). But a "serious question" doesn't exist when a plaintiff's claim is "merely plausible" or simply "because there are legal questions not directly answered by past precedent." *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 497 (9th Cir. 2023); *see also Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852, 863 (9th Cir. 2022) ("Nor can the district court forgo legal analysis just because it has not identified precedent that places the question beyond debate.").

A district court also abuses its discretion if it "rests its decision on a clearly erroneous finding of fact." *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1139

(9th Cir. 2021) (quoting *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014)). And the district court commits clear error if its factual findings are "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Id.* (cleaned up).

SUMMARY OF THE ARGUMENT

Section 13-35-210(5) is no threat to free speech. As a result, the district court's conclusion that Plaintiffs raised substantial questions going to the merits of their overbreadth claim, and were therefore likely to succeed on that claim, was in error. The district court applied the wrong preliminary injunction standard, failed to consider the relevant statutory provision, failed to evaluate that statutory provision under the proper legal framework for an overbreadth claim, and erred in its application of the other preliminary injunction factors.

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First, the district court applied a lower preliminary injunction standard than is required by this Court's sliding-scale approach. It held Plaintiffs only to presenting a "serious question" on the merits without finding that the balance of hardships tips "sharply" in their favor. In doing so, the district court granted Plaintiffs extraordinary relief—enjoining a duly enacted law—under a lower standard than required by *Winter*.

Second, the district court failed to consider the legitimate sweep of the provision challenged in this litigation, which prohibits double voter *registration*. Instead, the district court concluded that the legitimate sweep of the provision extended only to double *voting*, conduct not even addressed in the challenged provision.

Third, the district court failed to properly evaluate whether Plaintiffs met their demanding burden under the overbreadth doctrine. The district court conflated the question of whether the challenged provision is narrowly tailored with the question of whether a substantial number of applications are unconstitutional. And because the district court did not consider the numerous applications of §13-35-210(5) that are lawful, it had no way to measure whether the number of unconstitutional applications were "substantially disproportionate." *United States v. Hansen*, 599 U.S. 762, 769-770 (2023).

Fourth, the district court erred in its application of the irreparable harm and balancing-of-the-equities factors. The district court concluded that the law did not substantively change the voter registration process in Montana, yet the district court still determined that Plaintiffs would suffer irreparable harm and that the equities weighed in their favor. But if the law didn't change much, it is difficult to imagine why Plaintiffs are entitled to such extraordinary relief.

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For these reasons, this Court should reverse the district court and lift the preliminary injunction.

ARGUMENT

I. The District Court Applied a Lower Preliminary Injunction Standard

The district court first erred when it failed to "employ the appropriate legal standards that govern the issuance of a preliminary injunction." *Cal. Chamber of Com.*, 29 F.4th at 475. This Court applies a "sliding scale" approach to preliminary injunctive relief. *All. for the Wild Rockies*, 632 F.3d at 1131-32. Under the traditional four factors for

preliminary relief, Plaintiffs bear the burden to show that they are likely to succeed on the merits. *Winter*, 555 U.S. at 20. But under the sliding scale approach, "a stronger showing of one element may offset a weaker showering of another." *Id.* This means that if a party makes "a stronger showing of irreparable harm," they may still be entitled to relief even if they make a "lesser showing of likelihood of success on the merits." *Id.* Following *Winter*, this Circuit reaffirmed that "[a] preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies*, 632 F.3d at 1133 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *overruled in part on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008)).

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Here, the district court required a lesser showing on both the merits *and* irreparable harm, turning the *Winter* factors upside down. The court equated its conclusion that Plaintiffs "raised substantial questions" as to whether the challenged law is overbroad, *see* ER-28–29, with a finding that Plaintiffs were likely to succeed on the merits, ER-20, ER-29. The district court first concluded that Plaintiffs "have raised substantial questions as to whether [§13-35-210(5)]'s multiple registration prohibition and prior registration disclosure requirements will substantially chill the protected activity of voter registration." ER-28 (emphasis added). The district court later reiterated that Plaintiffs "have raised substantial questions going to the merits." ER-29. But then the district court concluded that 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 distinct from being likely to succeed on the merits. And while this Court's sliding scale approach permits a finding of "substantial questions," that lower standard can support extraordinary relief only if one of the other preliminary injunction factors tips "sharply" in Plaintiffs' favor. *All. for the Wild Rockies*, 632 F.3d at 1133. Here, the district court concluded merely that "the likelihood of irreparable harm tips in favor of Plaintiffs," "the balance of equities tips in favor of Plaintiffs," and the "public interest tips in favor of Plaintiffs." ER-32, ER-34, ER-36. In other words, the district court did not conclude that Plaintiffs made the requisite "stronger showing" on the other factors despite finding that they satisfied a "lesser showing of likelihood of success on the merits." *Winter*, 555 U.S. at 20. That misapplies this Court's sliding scale approach and warrants reversal of the district court's decision. *All. for the Wild Rockies*, 632 F.3d at 1132.

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II. The District Court Erred in Applying the Preliminary Injunction Factors.

Even if the district court had applied the correct preliminary injunction standard, its remaining analysis contains legal errors that independently warrant reversal. The district court first failed to conduct a proper overbreadth analysis. And even under the proper standard, Plaintiffs failed to show that they are likely to succeed on the merits. The district court next failed to properly apply the remaining preliminary injunction factors, concluding instead that Plaintiffs met their burden to show irreparable harm despite a finding that §13-35-210(5) does not substantively change voting or election procedures.

A. The district court erred in concluding Plaintiffs raised substantial questions and were thus likely to succeed on their overbreadth claim.

For constitutional challenges, the traditional rule is that a person may not bring a constitutional challenge "on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). The First Amendment overbreadth doctrine provides a narrow and "unusual" exception to this traditional rule. *Hansen*, 599 U.S. at 769-770. Because the overbreadth doctrine "destroys some good along with the bad," *id.* at 770, Plaintiffs bear the heavy burden of showing the law "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). They must show overbreadth "from the text of [the law] and from actual fact." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003).

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The overbreadth doctrine should not be employed "casually." *Tucson v. City of Seattle*, 91 F.4th 1318, 1328 (9th Cir. 2024). The Supreme Court has repeatedly cautioned that invalidating a statute on overbreadth grounds is "strong medicine" that should be dispensed sparingly. *Hansen*, 599 U.S. at 770; *Williams*, 553 U.S. at 293; *L.A. Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999); *Ferber*, 458 U.S. at 769. It isn't enough to "conceive of some impermissible applications," *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984), nor does the burden flip to the State to prove that "the 'vast majority' of a statute's applications [are] legitimate," *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449,476 n.8 (2007) (op. of Roberts, C.J.). And if a court can

reasonably "construe the Act as constitutional," it must do so. *United States v. Rundo*, 990 F.3d 709, 714 (9th Cir. 2021).

The district court erred because it failed to properly apply the Supreme Court's overbreadth standard. First, the district court failed to analyze the scope of the challenged provision, which is a necessary first step. *Williams*, 553 U.S. at 293 ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). Second, the district court failed to consider the legitimate sweep of the actual challenged prohibition, instead concluding that there was no legitimate sweep of the law. *Tucson*, 91 F.4th at 1328. And third, the district court failed to hold Plaintiffs to the requisite standard showing that the number of unconstitutional applications is substantial. *Id.*; *see also Hansen*, 599 U.S. at 770.

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Because the district court failed to apply the right standard, this Court should reverse. Section 13-35-210(5) reaches no further than prohibiting purposeful duplicative registrations and requiring applicants to disclose prior registration information. With this in mind, the challenged provision does not "prohibit[] a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U.S. at 292.

1. The district court failed to consider what the law covers.

The first step in an overbreadth analysis is to determine what the law covers. *Williams*, 553 U.S. at 293; *Hansen*, 599 U.S. at 770. The challenged provision here prohibits a person from "purposefully remain[ing] registered to vote in more than one place in this state or another state." Mont. Code §13-35-210(5); *see also* ER-245 (*only*

challenging subsection 5). It further requires that if a person was previously registered to vote in a different county or state, that person "shall provide the previous registration information on the Montana voter registration application." Mont. Code §13-35-210(5). The law, therefore, covers two types of conduct: it prohibits a person from purposefully maintaining multiple voter registrations, and it requires a person to disclose prior registration information.

Turning first to the prohibited conduct. According to Plaintiffs, the statute contains two key terms that are unclear: "purposefully" and "remain." Montana's criminal laws clearly define the word "purposely," and its many variants,[2] as meaning "the person's conscious object to engage in that conduct or to cause that result." *Id.* §45-2-101(65). This is a higher mens rea requirement than "knowingly," which only requires a general awareness, or "negligently," which requires the person to "consciously disregard[]" a risk. *Id.* §45-2-101(35), (43). In comparison, "purposefully" relates to "conduct or result," meaning that the person's conscious objective must be to remain registered to vote in multiple jurisdictions, or to result in remaining registered to vote in multiple jurisdictions. *State v. Starr*, 664 P.2d 893, 898 (Mont. 1983); *see also* Mont. Code §45-2-

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[2] Plaintiffs do not argue that "purposefully" in subsection 5 means something other than "purposely" as defined in Mont. Code Ann. §45-2-101(65). Regardless, the definition covers "[e]quivalent terms," including "purpose" and "with the purpose." Mont. Code Ann. §45-2-101(65). And the Montana Supreme Court has used "purposely" and "purposefully" interchangeably. *See, e.g.*, *State v. Rothacher*, 901 P.2d 82, 85 (Mont. 1995); *State v. Kline*, 376 P.3d 132, 165 (Mont. 2016); *State v. Thorp*, 231 P.3d 1096, 1102 (Mont. 2010); *State v. Williams*, 228 P.3d 1127, 1131 (Mont. 2010).

101(65). Because of this mens rea requirement, §13-35-210(5) applies only in narrow circumstances. It does not, for example, cover individuals who—upon registering to vote—merely forget they are registered elsewhere or who are aware it is "highly probable" they are registered in another jurisdiction. Mont. Code. §45-2-101(35), (43). Only when someone registers to vote with the "conscious object" to remain registered to vote in multiple jurisdictions will that person run afoul the challenged law.

The next key term, "remain," is equally straightforward for purposes of knowing what conduct the challenged law covers. Below, Plaintiffs relied on Merriam-Webster's definition of "remain" to argue—in support of their vagueness claim—that the law is unclear. *See* ER-175. But even defining "remain" as "to continue unchanged," as Plaintiffs assert, the scope of the law is clear.[3] It applies to a person who has the conscious object to continue to maintain multiple voter registrations without change. In other

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[3] Other state and federal laws also use the word "remain" to describe a person's status. *See, e.g.*, Mont. Code §41-5-1513(1)(c) ("If a youth is found to be a delinquent youth, the youth court may … require a youth found to be a delinquent youth, as the result of the commission of an offense that would be a violent offense, as defined in 46-23-502, if committed by an adult, to register and remain registered as a violent offender pursuant to Title 46, chapter 23, part 5"); Mont. Code §46-23-506 (stating that a court reviewing a petition for relief from registration on the sex offender registry list by a violent offender may grant the petition after finding that "the violent offender has remained a law-abiding citizen"); 7 U.S.C. §6k(1) ("It shall be unlawful for a futures commission merchant or introducing broker to permit such a person to become or remain associated with the futures commission merchant…."); 15 U.S.C. §7215(c)(7) ("It shall be unlawful for any person that is suspended or barred from being associated with a registered public accounting firm under this subsection willfully to become or remain associated with any registered public accounting firm…."). Section §13-35-210(5) uses ordinary statutory language.

words, a person who was registered to vote in another jurisdiction, then seeks to register to vote in Montana, and continues to register in Montana without changing the prior registration with the conscious object to be registered in both locations violates §13-35-210(5).

Turning next to the required conduct. Section §13-35-210(5) codifies Montana's longstanding practice of requiring voter registration applicants to provide previous voter information. *See* ER-111 ¶6; ER-115 ¶5. For decades, Montana has required applicants to provide their prior voter registration information. ER-118; ER-120; ER-122. The current application, which did not change after the enactment of §13-35-210(5), requires the sharing of previous registration information "if name changed or if previously registered to vote in another Montana county or in another state." ER-146. It states that the Secretary of State will use this information "to provide cancellation information to former jurisdiction," and it leaves a blank for the name and address of the previous registration. *Id.* Thus, the circumstances in which the second sentence of §13-35-210(5) applies are well defined— if a person's name has changed or if they were registered in another jurisdiction, then the person must provide their voter registration information.

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Other states and the federal voter registration application have similar requirements. As explained in the district court proceeding, within the Ninth Circuit, it is the rule rather than the exception to request prior voter registration information. ER-123–144. And in at least four of these states—Washington, Arizona, Hawaii, and Idaho—

providing this information is mandatory subject to penalty of perjury. ER-127; ER-134; ER-140; ER-143. Likewise, the federal voter registration form requires providing prior voter registration information "if you were registered before but this is the f[i]rst time you are registering from [the address submitted on the voter registration application]." *National Mail Voter Registration Form*, *supra*. In short, Montana's law codifies not only its own longstanding practice, but also the practice of other States and the federal government.

The district court failed to identify what the challenged law covers, instead bypassing this consideration and jumping straight into the overbreadth analysis.[4] ER-22–24. But this overbreadth analysis depends entirely on what the challenged law says and does. *Williams*, 553 U.S. at 293; *see also Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Without knowing "what the statute covers," it "is impossible to determine whether a statute reaches too far." *Williams*, 553 U.S. at 293.

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Skipping over the conduct the statute actually covers, the district court concluded that the statute is overbroad because it imposes "felony criminal penalties, even when a registrant does not double vote or has no intention of double voting." ER-29. But the challenged provision at issue in this litigation is not the double-voting provision—it's

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[4] In the district court's vagueness discussion, it stated that "potential issues arise" with respect to the mens rea requirement and the retroactivity of the challenged provision. ER19–20. But the district court ultimately sidestepped the vagueness question altogether. Nowhere else did the district court address the scope of the challenged provision.

the prohibition on maintaining multiple voter registrations in different jurisdictions. The district court bypassed the conduct actually regulated by the challenged provision and instead jumped to another statutory provision as the benchmark against which it measured the challenged provision. That misapplies the overbreadth doctrine and fails to analyze the actual text of the provision challenged by Plaintiffs.

2. The district court failed to consider the law's plainly legitimate sweep.

The district court cited—but then ignored—the correct standard for evaluating an overbreadth challenge. *See* ER-21 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). The district court first failed to consider the legitimate sweep of the challenged provision, instead conflating the legitimate sweep of the challenged provision with the ultimate objective of the Legislature in enacting the provision. The district court then proceeded to conflate the question of whether a substantial number of the law's applications are unconstitutional with the question of whether the law is narrowly tailored to serve a significant government interest. *Tucson*, 91 F.4th at 1328.

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As to the first part, the district court concluded that the plainly legitimate sweep of the challenged provision is limited to "prohibiting double voting." ER-23. The district court reached this conclusion by reviewing legislative statements about the objective of the amendments to §13-35-210 generally. No doubt, a chief aim of the overall amendments was to bolster Montana's prohibition on double voting. *See* ER-22 (citing statements from legislators). But the question of overbreadth depends on what the text

of the challenged provision covers, not the motivation behind the text. *Williams*, 553 U.S. at 293; *United States v. Rundo*, 990 F.3d 709, 713 (9th Cir. 2021). Here, Plaintiffs challenged subsection 5, which prohibits duplicate registration. Rather than evaluating the permissible applications of this provision, the district court determined that the "legitimate sweep of [the challenged law] is the prohibition of double voting," and therefore the challenged provision has *no* legitimate sweep. But without considering the applications of §13-35-210(5) that would not implicate protected speech—for example, all those instances where a person maintains dual registrations and on election day has the option to vote in two jurisdictions—the district court could not properly undertake the overbreadth analysis.

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Section 13-35-210(5)'s plainly legitimate sweep is extensive. First, the multiple-registration prohibition and the prior registration disclosure requirement help ensure cleaner voter rolls, facilitate efficient election administration, and prevent duplicative voting by removing the ability of individuals to vote in multiple elections. *See, e.g.*, ER-193–94; ER-214. They constitute "prophylactic measure[s]" to help the State maintain accurate voter rolls and combat election fraud. *Brnovich v. DNC*, 594 U.S. 647, 685 (2021). Second, Plaintiffs cite no authority recognizing a constitutional right to maintain multiple voter registrations. Because the right to maintain multiple registrations is not a protected right, a prohibition on dual registration does not automatically trigger heightened scrutiny. Third, to the extent the district court or Plaintiffs concluded that any law touching upon voter registration implicates the First Amendment, the only case they

cite does not support such an absolutist position. *See* ER-23; ER-180–81. In *Preminger v. Peake*, this Court noted that the parties "d[id] not dispute that voter registration is speech" and then expressly concluded that "the privileges afforded by the First Amendment are not absolute." 552 F.3d 757, 765 (9th Cir. 2008). Because the First Amendment is not absolute, and because there is no right to maintain multiple registrations, §13-35-210(5)'s legitimate sweep covers nearly all circumstances in which a person seeks to register to vote.

For an overbreadth analysis, the district court must compare the plainly legitimate sweep of the challenged provision to the number of unconstitutional applications—if there exist a substantial number of unconstitutional applications relative to legitimate applications, then the law is overbroad. It did not. As a result of the district court's flawed conclusion about the legitimate sweep of §13-35-210(5), the district court never acknowledged its numerous lawful applications. And by failing to inquire into this step of the overbreadth analysis, the district court lacked any meaningful way to analyze whether number of "unconstitutional applications" is "substantially disproportionate to the statute's lawful sweep." *Hansen*, 599 U.S. at 770.

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3. The district court failed to properly analyze the number of allegedly unconstitutional applications of the law.

The district court also applied the wrong standard to determine whether a substantial number of the law's applications are unconstitutional. The district court first cited *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* for the proposition that

the challenged ordinance was facially invalid because it "suppress[ed] a great quantity of speech that does not cause the evils that it seeks to eliminate." 657 F.3d 936, 950 (9th Cir. 2011). But this quoted passage is from this Court's discussion of whether the law at issue in *Redondo Beach* was a narrowly tailored time, place, and manner regulation, not whether the law was overbroad. *Id.* at 949 (considering whether the City had "a number of less restrictive means of achieving its stated goals"). The district court then concluded that "Defendants fail[ed] to draw a sufficient connection between maintaining multiple voter registrations and prohibiting double voting." ER-28. In other words, because the challenged provision is not narrowly tailored to the stated objective of prohibiting double voting, the law is constitutionally overbroad. But whether a statute is overbroad and whether a statute is narrowly tailored are distinct questions. *Tucson*, 91 F.4th at 1328.

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The district court next cited *Common Cause Indiana v. Lawson* for the proposition that "several circumstances" identified in *Common Cause* "could apply to [§13-35-210(5)]." ER-27. But the question isn't whether circumstances rendering the statute's application unconstitutional "could" exist—it's whether they do as an "actual fact" exist. *Hicks*, 539 U.S. at 122; *see also Hansen*, 599 U.S. at 770. The district court's explanation that follows does nothing to rehabilitate this erroneous conclusion. The district court first opined that someone in Indiana might move to Kansas and then move abruptly back to Indiana, implying that maintaining multiple registrations will give that individual flexibility to vote in Indiana. This is the exact type of "hypothetical" insufficient to

sustain an overbreadth claim. *See Hansen*, 599 U.S. at 782; *Williams*, 553 U.S. at 305-06. The district court next explained that some of the millions of Americans who go off to college will "drop out by November for academic, financial, or other reasons" and "will vote in only one place, even if they have open registrations in two." ER-27–28. Again, this fails to consider how the statute actually applies and fails to identify scenarios in which an individual is actually prohibited from engaging in protect conduct. *See Hansen*, 599 U.S. at 782; *Williams*, 553 U.S. at 305-06. Moreover, *Common Cause* reaffirms that a state can remove voters from its voter rolls so long as the *voter* provides information about prior registration directly to that state rather than a third party—exactly what §13-35-210(5) requires. 937 F.3d 944, 960 (7th Cir. 2019). In fact, the district court agreed that "[t]he only way to know whether voters want to cancel their registration is to ask them," which is precisely what the Montana voter registration application does. ER-28. Put simply, the district court's reliance on *Common Cause* is misplaced and only highlights the district court's error.

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The district court further erred when it determined that Plaintiffs met their high burden because it was more than "speculation" that §13-35-210(5) "substantially impact[s] a large class of highly transient voters." ER-29 (internal quotations omitted). The question, though, is not whether the challenged provision substantially *impacts* a large group of people. The question is whether §13-35-210(5) *prohibits* a substantial amount of *protected speech*. The district court made no finding about how this law would prohibit "transient voters" from engaging in protected speech or what speech was protected

beyond Plaintiffs' general assertion that voter registration is tied to the First Amendment. *See* ER-180–81 (citing *Preminger*, 552 F.3d at 765).

Even if the district court had applied the right standard, the number of §13-35-210(5)'s unconstitutional applications are limited. As explained previously, Plaintiffs must establish this substantial overbreadth based on the text of the law itself and "actual fact." *Hicks*, 539 U.S. at 122. Plaintiffs have failed to make this showing. *Id.* Over a year after the law was enacted, Plaintiffs have failed to identify a single prosecution—or threatened prosecution—for protected conduct under §13-35-210(5). Instead, they rest on hypothetical scenarios about "[c]ollege students, young people, and voters who temporarily relocate for job reasons" and may change their residence close to an election day. ER-183–84. But this "string of hypotheticals" is insufficient, particularly when the hypotheticals ignore the statute's mens rea requirement. *Hansen*, 599 U.S. at 782 ("Yet none of Hansen's examples are filtered through the elements of solicitation or facilitation—most importantly, the requirement (which we again repeat) that a defendant *intend* to bring about a specific result.").

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The overbreadth doctrine requires more—the overbreadth "must not only be real, but substantial as well." *Broadrick*, 413 U.S. at 615. Just because "some persons' arguably protected conduct may or may not be caught or chilled by the statute" does not mean the challenged provision must be "discarded in toto." *Broadrick*, 413 U.S. at 618. Even if Plaintiffs had identified protected conduct that would result in applications

of the challenged provisions, that would still be insufficient to establish real and substantial overbreadth. *See Vlasak v. Sup. Ct. of Calif.*, 329 F.3d 683, 689 (9th Cir. 2003).

The requirement to show substantial overbreadth is not a perfunctory exercise. Plaintiffs must provide actual facts on which to rest their overbreadth claim. The Ninth Circuit has found that parties with similarly hypothetical allegations failed to meet their burden. In *Vlasak*, for example, this Court upheld the prohibition of possessing certain wooden objects during demonstrations. 329 F.3d at 689. Although the court did not dispute the demonstrator's argument that the law could ban "canes, brooms, crutches, or a large wooden crucifix," it nevertheless concluded that "this small list does not, without more, demonstrate substantial overbreadth." *Id.* Likewise, in *Gospel Missions of America v. City of Los Angeles*, this Court upheld a charitable solicitation provision, concluding that the realistic but hypothetical situations involving panhandlers asking for money, church members soliciting for a food drive, or political activists selling a bumper sticker, failed to establish that a substantial amount of protected speech would be prohibited. 419 F.3d 1042, 1049-1050 (9th Cir. 2005). Similarly, in *Klein v. San Diego County*, this Court upheld an ordinance prohibiting picketing near residential dwellings despite Plaintiffs' examples of a child protesting in front his home or a little league team holding a "Get Well Soon Tommy" sign in front of their teammate's house. 463 F.3 1029, 1038 (9th Cir. 2006).

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In each of these cases, the party bringing an overbreadth challenge set forth realistic hypotheticals showing ways in which the challenged law may prohibit certain

speech activity. But in each of these cases, this Court reiterated that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent*, 466 U.S. at 800. Here, Plaintiffs have failed to identify the specific protected speech that is prohibited by §13-35-210(5). And Plaintiffs have failed to identify concrete examples of unconstitutional applications of §13-35-210(5). They instead rest on hypotheticals about college students, young people, and voters who temporarily relocate for job reasons. No matter how realistic these circumstances may be, they are insufficient under this Court's case law to establish that a substantial number of unconstitutional applications outweigh the statute's plainly legitimate sweep.

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At bottom, the standard for establishing that a law is overbroad on its face is demanding. The district court failed to compare the legitimate reach of §13-35-210(5) and the substantial number of unconstitutional applications. Instead, the district court concluded the challenged provision had no legitimate sweep since it went beyond a prohibition of double voting. And the district court next concluded that because the challenged provision "substantially impact[s] a large class" of voters and lacks a "sufficient connection" to double voting, it was overbroad. ER-28. Both conclusions were in error.

Even if the district had applied the correct overbreadth standard, Plaintiffs have failed to show a substantial number of unconstitutional applications relative to the challenged provision's plainly legitimate sweep. To start, there is no constitutional right to

maintain duplicate voter registrations, so §13-35-210(5) has a significant legitimate sweep. In comparison, the number of unlawful applications—to the extent any exist—are limited. Because Plaintiffs have failed to show a "lopsided ratio" of applications, the courts "must handle unconstitutional applications [of §13-35-210(5)] as they usually do—case-by-case." *Hansen*, 599 U.S. at 770.

B. Plaintiffs have failed to establish irreparable harm.

The district court's findings on irreparable harm are contradictory. It found that §13-35-210(5) "likely *do[es] not* substantively change Montana voting registration procedure," ER-16, while at the same time finding that §13-35-210(5) forced Plaintiffs "to face a proverbial Hobson's choice" of complying with the law or risking criminal penalties, ER-30. But a law that doesn't "substantively change" Montana elections can't irreparably harm anyone. The district court clearly erred in concluding otherwise. At a minimum, even if Plaintiffs faced irreparable harm, the district court's conclusion that the challenged law did not "substantively change" any voting procedure undermines any suggestion that Plaintiffs made a "stronger showing of irreparable harm" to justify a lesser merits inquiry. *All. for the Wild Rockies*, 632 F.3d at 1131.

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C. The balance of the equities weighs in favor of appellants.

Although the district court acknowledged that §13-35-210(5) does not "substantively change Montana voting registration procedure," ER-16, the district court "agree[d]" that Plaintiffs "face substantial financial and organizational hardship related to having to conform their voter registration activities to [§13-35-210(5)]'s

requirements," ER-33. Again, if the law doesn't "substantively change" Montana elections, then it doesn't follow that Plaintiffs will suffer substantial organizational hardship as a result.

Montana, on the other hand, has a compelling interest in ensuring the integrity of its elections. *Brnovich*, 594 U.S. at 685. And Montana has an interest in enforcing its laws. *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) ("The public interest may be declared in the form of a statute."); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (A State "suffers a form of irreparably injury" any time it is prevented from "effectuating" laws "enacted by representatives of its people."). Accordingly, the equities weigh against enjoining §13-35-210(5).

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III. The District Court Erred by Disregarding *Purcell*.

Montana is now five days away from its primary election, four months away from close of regular voter registration for the general election, and five months away from the general election itself. Voter registration continues to be ongoing. Because of the timing of this lawsuit, the district court correctly concluded that this case falls squarely within the cases applying *Purcell v. Gonzalez*, 549 U.S. 1 (2006). ER-15. The district court nevertheless refused to apply *Purcell* because it determined that an injunction "will not lead to voter confusion" since the challenged provision "likely do[es] not substantively change Montana voting registration procedure." ER-16.

This conclusion ignores that even "innocuous" injunctions implicate *Purcell* and can "cause unanticipated consequences." *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020)

(Kavanaugh, J., concurring); *see also Purcell*, 549 U.S. at 4-5. The district court's order, for example, introduces confusion as to whether the State may continue using its existing application form and require applicants to provide this information.[5]

Plaintiffs' statements in opposition to the stay motion below and on appeal compound this confusion—they now assert 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." Stay Resp. at 11; ER-52. But this "longstanding practice" that "[n]o party disputes," Stay Resp. at 10, and that apparently "Plaintiffs do not challenge," *id.* at 11, is the basis for the district court's injunction. If Plaintiffs only dispute the penalties, and not the scope of the conduct covered by §13-35-210(5), then it's unclear whether the State can continue to require applicants to provide prior registration information on the existing application form. The district court's order also calls into question whether registered voters may legally remain registered in other jurisdictions. Again, if Plaintiffs challenged only the penalty provision, then it's unclear whether the injunction makes the previously prohibited conduct permissible. Injecting this fresh confusion shortly before an election into the voter registration

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[5] Appellate review of a *Purcell* argument considers the circumstances at the time the district court issued its injunction. *See RNC v. DNC*, 589 U.S. 423 (2020) ("[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error."); *DNC v. Wisc. State Leg.*, 141 S. Ct. 28, 31-32 (2020) (Kavanaugh, J., concurring) ("Correcting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem.").

process about whether the existing voter registration application and legal requirements are lawful violates *Purcell*. 549 U.S. at 4.

CONCLUSION

For these reasons, this Court should reverse the district court's decision granting a preliminary injunction.

DATED this 30th day of May, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Kathleen S. Lane hereby certifies that according to the word count feature of the word processing program used to prepare this motion, this motion contains 7116 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements and length limits of Rule 32(a)(1)–(7) and Circuit Rules 32, 32-1.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief on May 30, 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
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