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 BRIEF

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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

Last year, the Montana Legislature enacted House Bill 892 ("HB892"), which creates two new felonies related to registering to vote: (1) "purposefully remain[ing] registered to vote in more than one place in this state or another state any time," and (2) failing to "provide the [voter's] previous registration information on the Montana voter registration application." Mont. Code Ann. § 13-35-210(5). Under HB892, violating either of these provisions can result in a punishment of up to 18 months in prison and a fine of up to $5,000. *Id.* § 13-35-210(6). While its ostensible purpose was to reaffirm Montana's pre-existing ban on double voting, HB892's reach far exceeds this aim. Instead, the challenged provisions criminalize innocent and common behavior: being registered to vote in more than one location and omitting prior-registration information on a voter-registration application, even if registrants never intend to and never attempt to cast more than one vote in the same election.

Plaintiffs do not challenge Montana's ban on double voting, but by punishing protected political expression that reaches far beyond that legitimate state interest, HB892 violates the First and Fourteenth Amendments. And by employing vague language and unclear standards in a criminal statute regulating voter registration, HB892 also violates due process.

The district court properly determined that Appellants are likely to succeed on their challenge to these provisions and granted them a preliminary injunction. But rather than meaningfully engage with the district court's analysis, Appellants' lead argument

on appeal is to contend that the district court impermissibly applied a "relaxed" preliminary injunction standard under this Court's "sliding scale" approach. This is simply not true. The district court's preliminary injunction order states repeatedly that it conducted its analysis under the traditional *Winter* standard for preliminary relief, while also finding that Appellees satisfied *any* formulation of the preliminary injunction standard.

Appellants' other arguments fare no better. On the issue of overbreadth, the district court properly applied controlling law to determine the scope of the challenged provisions, holding they broadly reach acts related to registering to vote, which is constitutionally-protected expressive conduct. The district court acknowledged that while Montana has a valid interest in combatting double voting, the challenged law does little to address that issue and instead sweeps in a substantial amount of lawful conduct. Indeed, as the district court correctly noted, Montana already outlaws double voting and Appellants failed entirely to explain why new *felony restrictions* are needed, particularly given that the challenged provisions threaten criminal penalties for entirely innocent (and common) voter behavior, even when the voter has no intention to and never engages in double voting, an already near-nonexistent problem in Montana.

Appellants only passingly challenge the district court's conclusion that the equitable factors weigh lopsidedly in favor of an injunction. *See* Appellants' Joint Opening Brief 25, ECF No. 10 ("Br."). Far from showing any abuse of discretion, their single paragraph discussing irreparable harm does not even address the district court's

finding that HB892 "will chill Plaintiffs' voter registration activities," threatening those "those they register [with] felony criminal penalties under HB 892[.]" ER-030–31. Instead, Appellants insist the district court erred by concluding both that HB892 irreparably harmed Appellees, but also that it did little to affect Montana election procedure. Br. 25. That argument ignores unrefuted election official testimony, as well as guidance from the Secretary of State, admitting that HB892 does little to change how officials register voters. *See* ER-034, 036. And it disregards the fact that Appellees' irreparable harm derives not from Montana's longstanding practice of *asking* for prior registration information, but from imposition of HB892's novel "*post hoc*" "felony criminal penalties." SER-17. Because HB892 does little to impact how Montana officials administer voter registration, the district court did not abuse its discretion in concluding that the balance of the equites tipped strongly in Appellees' favor. Nor did it abuse its discretion in concluding the public interest favored maximizing opportunities to register to vote.

Finally, the district court properly applied the so-called *Purcell* principle. Appellants' 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. Unrefuted county clerk testimony confirms that it will not. Moreover, Appellants cannot point to a single instance where a court relied upon *Purcell* to set aside an injunction issued more than *six months* before an election.

To cast aside the district court's well-supported order on that basis would stretch *Purcell* beyond its outer bounds.

This Court should affirm the district court. It did not abuse its discretion in granting preliminary relief.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the district court's preliminary injunction order, *see* ER-004–37, under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE PRESENTED

1. Whether the district court abused its discretion in granting Appellees' motion for a preliminary injunction.

STATEMENT OF THE CASE

I. HB892 and the Challenged Provisions

HB892 was enacted on May 22, 2023, and took immediate effect. ER-224. As relevant here, HB892 amended § 13-35-210 of the Montana Code in two ways. First, it added the two provisions at issue in this litigation. The first provision (the "multiple registration prohibition") states: "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." Mont. Code Ann. § 13-35-210(5). The second provision (the "disclosure requirement") states: "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." *Id.* Second, HB892 made it a felony—punishable by up to 18 months of imprisonment and a fine of up to $5,000—to violate any provision of § 13-35-210, which includes both the multiple registration prohibition and disclosure requirement. *See* Mont. Code Ann. § 13-35-210(6).[1]

HB892's legislative sponsors rationalized the law as necessary to clarify the meaning of double voting in Montana and to combat such behavior, although double voting was already illegal prior to HB892 and there was no evidence presented to the legislature that the pre-existing safeguards were in any way insufficient to prevent double voting in Montana. SER-54–55; SER-92; *see also* Mont. Code Ann. § 13-35-210(2). Some legislators who opposed the bill noted that the challenged provisions swept far beyond merely "clarifying" the definition of "double voting," and introduced vague and confusing registration rules backed by new criminal penalties. For example, they pointed to a lack of clarity as to what it means to "purposefully remain registered" in two places, as proscribed by the multiple registration prohibition. SER-83; SER-85–86. Others expressed concern that, under the text of the disclosure requirement, a person could potentially face jail time for simply failing to disclose a prior registration on an application. SER-60; SER-86. Throughout the process, legislators noted that HB892's stated purpose was redundant given the safeguards already contained in Montana's election laws—including that absentee voters must affirm that they only

[1] HB892 also restated and clarified Montana's existing ban on double voting. *See* Mont. Code Ann. § 13-35-210(4). Appellees do not challenge that provision of HB892.

voted once in an election and that Montana's voter registration application already requires registrants to affirm the truth of their information under penalty of perjury. SER-66–67.

II. Proceedings To Date

A. Appellees' Lawsuit

Plaintiffs filed their complaint on September 29, 2023, challenging the multiple registration prohibition and the disclosure requirement specifically. ER-223–46. Plaintiffs are both diverse, nonpartisan Montana-based membership organizations that are dedicated to working for social change and have long conducted voter registration efforts in the state, undertaken to further their organizational missions and to empower their members to participate in the political process. ER-226–29.

Appellee Montana Public Interest Group ("MontPIRG") is a student-directed, nonpartisan membership organization with a mission of empowering the next generation of civic leaders. SER-35. It has helped register young voters in Montana for nearly four decades, including 5,612 voters in 2020, and 3,046 voters in 2022. SER-35–36. In the spring of 2023, MontPIRG had roughly 5,200 members, including many young voters who regularly move addresses and rely on MontPIRG to help them navigate the voter-registration process. SER-36. MontPIRG's membership also includes members who recently turned 18 years old, at least some of whom have moved to Montana to attend college from other states with automatic voter registration. *Id.*

Appellee Montana Federation of Public Employees ("MFPE") is Montana's largest union, representing tens of thousands of demographically, geographically, and politically diverse working Montanans—including teachers, state troopers, state employees, and others with jobs that often involve moves to different parts of the state. SER-44. MFPE assists its members with registering to vote and casting ballots; its members in turn rely on MFPE to help them navigate the voter-registration process. SER-45.

Plaintiffs allege that the challenged provisions are (i) unconstitutionally vague in violation of the Fourteenth Amendment; (ii) overbroad in violation of the First and Fourteenth Amendments; and (iii) unjustifiably burden the right to vote in violation of the First and Fourteenth Amendments. ER-240–45.

On January 18, 2024, the district court granted intervention to the Republican National Committee and Montana Republican Party. ER-258. They are, in addition to the named state official defendants, collectively referred to herein as "Appellants."

B. Plaintiffs' Motion for a Preliminary Injunction

On November 6, 2023, Plaintiffs moved for a preliminary injunction based on their vagueness and overbreadth claims. ER-172–86. Plaintiffs sought an injunction to avoid the otherwise significant chill that HB892's draconian new criminal penalties threatened to impose on their voter registration activities, as well as on the ability of their members and constituents to register. ER-223–26; *see also* ER-028–31; ER-167–70; SER-37; SER-39; SER-47–49.

The district court heard oral argument on the preliminary injunction motion on March 20, 2024. ER-260–61. On April 24, 2024, it issued an order granting the motion. ER-036–37. In doing so, the district court first set forth this Circuit's two legal standards for a preliminary injunction—the *Winter* test and the "sliding scale" approach. ER-008. It then proceeded to consider "[w]hether Plaintiffs have fulfilled the *Winter* factors for injunctive relief." ER-017 (further stating the court would "evaluate the *Winter* factors"). The court evaluated "Plaintiffs' vagueness claim and overbreadth claim separately with respect to their likelihood of success on the merits." *Id.*

Beginning with the vagueness claim, the district court explained that it had "concerns [that] may rise to the level of raising substantial questions going to the merits" on Plaintiffs' vagueness claim, but noted that "[f]urther development of the factual record would be required[.]" ER-019–20. It clarified that it "need not decide whether Plaintiffs have demonstrated likely success on the merits" of their vagueness claim because it found that they *had* "demonstrated likely success on the merits of their overbreadth claim." ER-020.

In finding that Plaintiffs were likely to succeed on their overbreadth claim, the district court looked first to the text of HB892 to determine what the challenged provisions proscribe. ER-006 (citing Mont. Code Ann. § 13-35-210(5)). The district court first found that Montana "possesses a legitimate interest in preventing voter fraud and promoting public confidence in the integrity of elections," and that, to the extent the statute prohibited double voting, that was a legitimate aim. ER-021–23. But the

district court then found that, on their face, the reach of the challenged provisions was not limited to that legitimate aim. Instead, the court found that the statutory text also "implicate[s] voter registration beyond HB 892's prohibition of double voting," and in the process was capable of a substantial number of unlawful applications, including by criminalizing voters who innocently have multiple registrations—or fail to disclose prior registrations—without any intention to engage in double voting. ER-023–29. The district court further concluded that the Defendants "fail[ed] to draw a sufficient connection between maintaining multiple voter registrations and prohibiting double voting." ER-028. As a result, after careful consideration, the court determined that the challenged provisions "tend to burden protected political activity through the imposition of felony criminal penalties, even when a registrant does not double vote or has no intention of double voting," and that Plaintiffs were accordingly likely to succeed on their overbreadth claim. ER-029.

The district court next considered the equitable factors and concluded that they weighed overwhelmingly in Plaintiffs' favor. The district court found that HB892 would "chill Plaintiffs' voter registration activities" and that it presented Plaintiffs with a "proverbial Hobson's choice: attempt to conform their voter registration activities to HB 892; or cease or greatly reduce their voter registration activities for the 2024 Montana primary election and 2024 Montana general election." ER-030. The district court also found that Plaintiffs "face substantial financial and organizational hardship related to having to conform their voter registration activities to HB 892's

requirements." ER-033. The district court credited testimony from county election officials that HB892 would not change their existing voter registration practices, and found that "Defendants will suffer no harm if they are enjoined from enforcing an action that they would otherwise not take." ER-034. The district court also determined that the public interest favored Plaintiffs because there is a strong public interest in exercising the fundamental right to vote, which has an "intrinsic relationship to Plaintiffs' voter registration activities." ER-033. In reliance on county election official testimony, and based on the Secretary of State's own election guidance, the court concluded that granting "limited injunctive relief likely will not significantly impact election procedures in Montana." ER-035–36.

Finally, as part of its ruling, the district court also concluded that Plaintiffs had standing because the challenged provisions "frustrated" MontPIRG's and MFPE's abilities to carry out their voter registration activities, thus "perceptibly impair[ing] Plaintiffs' ability to navigate and advise on the Montana voter registration process" and also "caus[ing] Plaintiffs to divert resources in response to that frustration of purpose." ER-012. Finally, the district court determined that *Purcell* did not bar the court from issuing injunctive relief, ER-012–17.

C. Appellants' Stay Requests and Appeal

On May 1, 2024, Appellants noticed their appeal and filed a motion to stay the preliminary injunction in the district court. ER-247; ER-262. In their motion, Appellants relied chiefly on the argument that the district court had somehow confused

the *Winter* and "sliding scale" standards for a preliminary injunction. SER-23–24. They also argued the court erred in its overbreadth analysis but raised no argument as to the court's finding that Plaintiffs may have raised "substantial questions" on the merits of their vagueness claim. SER-24–26. And while Intervenors claimed no irreparable harm at all, Defendants insisted that the court's preliminary injunction would harm Montana's election administration. SER-26–29.

After expedited briefing, the district court denied the motion on May 16, 2024. SER-3–18. The court first rejected the notion that it applied the wrong preliminary injunction standard, reaffirming that "Plaintiffs ha[d] demonstrated a likelihood of success on the merits concerning their overbreadth claim." SER-7. It further explained, as was already apparent from its preliminary injunction order, that Plaintiffs had *also* satisfied the "sliding scale" standard: "The Court's analysis encompassed both the traditional *Winter* factors and the Ninth Circuit's sliding scale approach, and the Court determined that Plaintiffs fulfilled both standards for a preliminary injunction." SER-6–7. The court next reaffirmed its earlier overbreadth analysis. SER-7–11. Finally, it concluded that Defendants failed to establish any threat of irreparable harm because they presented only an "abstract possibility of voter confusion and loss of electoral confidence" "without substantiating evidence or statistical support." SER-12.

While the district court noted that it did not need to evaluate the balance of equities or the public interest because Appellants failed to show a likelihood of success on the merits or irreparable harm, the district court did so "out of an abundance of

caution." SER-13. The district court credited unrefuted testimony from county officials in a parallel state court proceeding in recognizing that "[t]he evidence presented at this stage in the proceedings indicates that HB 892 does not substantively change voting practices and procedures in Montana," nor does it "change the means or methods by which voter registration occurs in Montana." SER-16–17. As the court further explained, "Montana election process will continue regardless of this litigation [or injunction], as HB 892 does not regulate voter registration eligibility, but rather imposes felony criminal penalties *post hoc*." SER-17.

Also on May 16, but before the district court had entered its order denying the stay, Appellants moved this Court for a stay pending appeal. A motions panel of this Court denied that request on May 30, concluding "that appellants have not adequately shown it is likely they will suffer irreparable harm absent an immediate stay because the district court's preliminary injunction will not affect Montana's June 4, 2024 primary election processes or procedures." Order Denying Emergency Mot. for Stay 1, ECF No. 9.

Appellants filed their joint opening brief on May 30.

STANDARD OF REVIEW

A trial court's preliminary injunction "is reviewed for abuse of discretion." *California v. Azar*, 911 F.3d 558, 568 (9th Cir. 2018). "In reviewing the injunction," this Court applies "a two-part test." *Id.* "First, [the Court] determine[s] de novo whether the trial court identified the correct legal rule to apply to the relief requested. Second, [the

Court] determine[s] if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (citations omitted). The Court reviews "conclusions of law de novo and findings of fact for clear error." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation omitted). Under this rubric, this Court does not "reverse the district court where it 'got the law right,' even if [it] 'would have arrived at a different result,' so long as the district court did not clearly err in its factual determinations." *Id.* (citation omitted). Accordingly, this Court's review of preliminary relief is "limited and deferential." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

A preliminary injunction is warranted where a plaintiff shows (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in the plaintiff's favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction may [] be appropriate if a movant raises 'serious questions going to the merits' and the 'balance of hardships . . . tips sharply towards' it, as long as the second and third *Winter* factors are satisfied." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (quoting *All. for the Wild Rockies*, 632 F.3d at 1134–35)). When a government party is the defendant, as here, the balance of the equities and the public interest are considered together. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). This Court may affirm the grant of a preliminary injunction based

on any ground supported by the record. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1021 (9th Cir. 2013) (quotation omitted).

SUMMARY OF THE ARGUMENT

1. Appellants' leading argument is that the district court conflated this Circuit's two preliminary injunction standards. Br. 8–10. That is fanciful. The district court expressly and correctly applied the *Winter* test, and twice repeated its conclusion that "Plaintiffs have demonstrated a likelihood of success on the merits concerning their overbreadth claim." ER-029 (citing *Winter*, 555 U.S. at 20); *see also* ER-020 (same). Appellants ask this Court to simply ignore what district court itself expressly says. But this Court must "take the district court's explanation for its action at its word." *McGuckin v. Smith*, 974 F.2d 1050, 1056 (9th Cir. 1992).

Appellants' argument is further misguided because it ignores the district court's conclusion that Appellees satisfied *any* preliminary injunction standard on their overbreadth claim, as well as that they may have raised "substantial questions" on their vagueness claim, which supplies an independent basis for affirmance.

2. The district court properly determined the challenged provisions to be overbroad. It first determined the scope of the challenged provisions based on their plain text. While Appellants seek to attach an unsupported narrowing construction to these provisions on appeal, they offer no sound basis to disturb the lower court's determination of HB892's scope. The district court next determined the "legitimate sweep" of the challenged provisions, *United States v. Stevens*, 559 U.S. 460, 473 (2010),

acknowledging the state's valid interest in combating double voting. But it explained that scope of the law chiefly applied to innocent and unremarkable activity related to voter registration—"speech protected by the First Amendment." *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008)—by those who do not intend to double vote. Accordingly, it correctly concluded that "a substantial number of [the challenged provisions'] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." ER-021 (quoting *Stevens*, 559 U.S. at 473); *see also* ER-021–29.

3. The district court determined Appellees may have raised "substantial questions" on their vagueness claim—a finding Appellants do not dispute. For good reason. The multiple registration provision fails to explain what conduct it requires of registrants; what classes of registrants it applies to; and when it applies to them. The inclusion of a scienter requirement does nothing to clarify the matter because the text it applies to—"remain registered"—is itself irredeemably vague. The disclosure requirement is similarly vague because it fails to make clear whether *any* scienter requirement applies, as well as the extent to which an applicant must disclose past registrations. The Court may affirm the preliminary injunction on this claim.

4. The district court did not abuse its discretion in finding that the equities weigh lopsidedly in Appellees' favor. Appellants do little to challenge the actual findings of the trial court on appeal. Instead, they insist the court discounted the impact its injunction would have on election administration in Montana. But their argument ignores unrefuted testimony from county clerks—as well as guidance from the Secretary

of State—confirming supporting the court's conclusion. Instead, they rely solely upon speculation to gin up theories of disruption, but tellingly cite nothing in the record. Their *Purcell* argument fails for similar reasons.

ARGUMENT

I. The district court correctly applied the *Winter* factors, and regardless, Appellees satisfy any preliminary injunction standard.

Rather than grapple with the substance of the district court's preliminary injunction order—or that court's unambiguous statements in its order denying a stay—Appellants' central argument on appeal is that the district court applied the wrong preliminary injunction standard below. *See* Br. 8–10. According to them, the district court improperly concluded only that Plaintiffs raised "substantial questions" about the merits of their overbreadth claim, and thus should have demanded a higher showing on the equitable factors under this Court's "sliding scale" approach. *Id.*; *see also All. for the Wild Rockies*, 632 F.3d at 1131–32.

That argument is simply wrong. The district court was crystal clear that it applied—and determined that Appellees met—the *Winter* standard. *See, e.g.*, ER-029 (citing *Winter*, 555 U.S. at 20); *see also* ER-020. Despite this clear language, Appellants insist the district court somehow "equated" the *Winter* standard with this Court's alternative "sliding scale" test. Br. 9. But they provide no credible basis to support that allegation. Instead, they point solely to the fact that the district court observed that Plaintiffs had "*at minimum* . . . raised substantial questions" on their overbreadth claim,

before firmly concluding that Plaintiffs had also "demonstrated a likelihood of success on the merits" on the same. ER-029 (emphasis added); *see also* SER-6–7. There is no inconsistency between those two statements, as a finding of likelihood of success on the merits necessarily means that Appellees have also raised "substantial questions" on the merits. And this Court has often rejected the need for any talismanic language in this context. *See, e.g.*, *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (suggesting the formulations of this factor are "largely interchangeable"); *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (noting "courts routinely use different formulations to describe this element"). That Appellants have made this stray observation their lead merits argument reveals the fundamental weakness at the heart of their appeal.

Even a cursory review of the district court's order shows that it correctly applied the governing legal standards. The court correctly recited this Circuit's two preliminary injunction standards, *see* ER-008–09, and then expressly cited *Winter* in finding that Plaintiffs are likely to prevail on their overbreadth claim, *see* ER-029. The district court also plainly stated that it was "evaluat[ing] the *Winter* factors" and had found that "Plaintiffs have fulfilled the *Winter* factors for injunctive relief." ER-017 (further indicating the court reviewed Plaintiffs' claims "with respect to their likelihood of success on the merits"); *see also* ER-029, 030, 032 (citing to and applying *Winter*). In its order denying Appellants' motion to stay, the district court reaffirmed what its earlier order already made clear: "The Court determined that Plaintiffs demonstrated a likelihood of success on the merits which, pursuant to *Winter*, supports the issuance of

a preliminary injunction where the balance of equities tip in favor of the Plaintiffs, in addition to the other *Winter* factors being fulfilled." SER-7 (citing *Winter*, 555 U.S. at 20). Appellants have altogether failed to explain why this Court should not "take the district court's explanation for its action at its word." *McGuckin*, 974 F.2d at 1056.

While Appellants' argument on this point is wrong, it is also irrelevant: Plaintiffs readily satisfied *any* formulation of the preliminary injunction standard below. The district court determined that Appellees—in addition to showing a likelihood of success on the merits of their overbreadth claim—may have raised "substantial questions" on the merits of their vagueness claim. ER-020. And the ensuing discussion of the equities made clear that "the balance of hardships tips sharply in the plaintiff[s'] favor," *All. for the Wild Rockies*, 632 F.3d at 1135, meaning Appellees also satisfied this Circuit's alternative "sliding scale" standard.[2] There is no need to speculate: the district court confirmed "Plaintiffs fulfilled both standards for a preliminary injunction," including

[2] Specifically, the district court "agree[d]" that Plaintiffs had demonstrated a chill to their voter registration activities. ER-030. The court next concluded that the balance of equities tipped in Plaintiffs' favor given "the public's 'strong interest in exercising the fundamental political right to vote' and that fundamental right's intrinsic relationship to Plaintiffs' voter registration activities." ER-033 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012)). The court determined that Defendants "will suffer no harm if they are enjoined" from enforcing HB892. ER-034. And, finally, the public interest supported an injunction because it would serve "the public's interest in protecting the franchise" while not "significantly impact[ing] election procedures in Montana." ER-035–36. These lopsided determinations on the equities readily satisfy the "sliding scale" test. *E.g.*, *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (raising serious First Amendment questions means balance of equities and public interest tip strongly in favor of injunction).

by making an especially strong showing on the equities. SER-7. Indeed, because Appellees "raised serious First Amendment questions" on both their claims, that alone "compels a finding that . . . the balance of hardships tips sharply in [Appellees] favor." *Meinecke v. City of Seattle*, 99 F.4th 514, 526 (9th Cir. 2024) (cleaned up).

That further dooms this appeal. In addition to simply affirming the district court's conclusion that Appellees satisfy *Winter* on their overbreadth claim, this Court may affirm on the basis that Appellees satisfy the "sliding scale" test on that claim as well. And it may *further* affirm based on Appellees' vagueness claim, where Appellants have forfeited any suggestion that the district court was wrong in finding that Appellees may have raised substantial questions on the merits. *See infra* Arg. § III; *see also Valle del Sol*, 732 F.3d at 1021 (Court may affirm a preliminary injunction based on "any ground supported by the record" (quotation omitted)); *cf. Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009) (the Court may affirm a preliminary injunction based on implicit conclusion from lower court's analysis).

II. The district court correctly concluded that Appellees are likely to succeed on their overbreadth claim.

A. The district court properly determined the scope and legitimate sweep of the challenged provisions in finding that they are likely unconstitutionally overbroad.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." "[O]ut of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when

the overbroad statute imposes criminal sanctions," *Virginia v. Hicks,* 539 U.S. 113, 119 (2003), the Supreme Court has developed and repeatedly affirmed the "overbreadth doctrine," which "instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied." *United States v. Hansen*, 599 U.S. 762, 769 (2023).

Under the overbreadth doctrine, a law is facially unconstitutional if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 n.6 (2008)). In other words, where "the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep,' then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid." *Hansen*, 599 U.S. at 770 (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)). Thus, to determine whether a law is unconstitutionally overbroad, courts first construe the conduct covered by the challenged provision, and then must determine whether its "plainly legitimate sweep"—*i.e.*, its applications to unprotected activity—is outweighed by "a substantial number of [unlawful] applications." *Stevens*, 559 U.S. at 473; *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011).

The district court's preliminary injunction order properly applied these legal principles to find the challenged provisions overbroad. ER-020–29. Appellants lodge three criticisms of its analysis. They claim that: (1) it failed to properly consider "what

the law covers;" (2) it did not consider the "legitimate sweep" of the challenged provisions; and (3) it did not properly consider the number of unconstitutional applications of the law. *See* Br. 12–25. None of these criticisms has merit.

1. Scope of the challenged provisions. The district court properly identified what the challenged provisions cover. *See Williams*, 553 U.S. at 293 (explaining that courts must first construe the conduct covered by the challenged provisions to conduct an overbreadth analysis). Here, the district court did so expressly: it explained that "[t]he challenged portion of HB 892 has two separate but related effects: [it] 1) prohibits a person from purposefully remaining registered to vote in multiple jurisdictions ('multiple registration prohibition'); and 2) requires a person registering to vote using the Montana voter registration application to provide prior voting registration information ('prior registration disclosure requirement')." ER-006 (citing Mont. Code Ann. § 13-35-210(5)); *see also* ER-023–27.

Appellants' suggestion that the district court "bypassed the conduct actually regulated by the challenged provision and instead jumped to [the double-voting prohibition] as the benchmark against which it measured the challenged provision," Br. 17, is therefore a non-starter. The district court's overbreadth analysis expressly rested on the foundation that the challenged provisions restrict when and how a person may register to vote in Montana, which is constitutionally protected expressive conduct. *See* ER-023 ("The multiple registration prohibition and prior registration disclosure

requirements both implicate voter registration beyond HB 892's prohibition of double voting." (citing *Preminger*, 552 F.3d at 765).

Perhaps recognizing that the district court *did* in fact construe the conduct covered by the statute, Appellants focus much of their effort on trying to narrow the challenged provisions' scope. But their focus on painting the challenged provisions as "narrow" does not remedy the overbreadth of what the "statute actually covers," which is what prompted the district court to enjoin the law. Br. 12–16. Appellants note that the multiple registration prohibition's "purposefully" mens rea makes the provision apply where voters have a "conscious object" to remain registered to vote in multiple jurisdictions and not in circumstances in which a voter "knowingly" or "negligently" does so. Br. 13. Even assuming *arguendo* that Appellees are correct, that argument does little to remedy the vagueness and overbreadth of the multiple registration prohibition. Saying the multiple registration provision "only" makes it a felony for a person to have the "conscious object" to "remain registered" is cold comfort—that confusing standard still plainly sweeps in a broad array of innocent, constitutionally protected activity.

The argument is also irrelevant. The district court did not hold that the multiple registration prohibition necessarily applies to individuals who "merely forget they are registered elsewhere or who are aware it is 'highly probable' they are registered in another jurisdiction." Br. 14 (quoting Mont. Code. §45-2-101(35), (43)). In fact, its explanation of the innocent conduct that is swept up by the challenged provisions, discussed in more detail below, *infra* Arg. § II.A.3, involves circumstances in which

voters *do* have a conscious object to maintain voter registrations in more than one place, *see* ER-027–28. To the extent Appellants mean to argue that the state courts can construe the statute in a limited manner with respect to any individual prosecution, the argument goes nowhere: it is well established that courts do not "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480 (rejecting canons of construction as remedies for overbroad criminal law). The Supreme Court has stressed this point "time and again" where, as Appellants do here, a governmental defendant "advances the familiar plea that [] prosecutors can be trusted not to enforce [a] statute against small-time violators." *Snyder v. United States*, No. 23-108, 2024 WL 3165518, at *9 (U.S. June 26, 2024) (slip op.) (collecting cases). And Appellants' argument that the disclosure requirement merely "codifies Montana's longstanding practice of requiring voter registration applicants to provide previous voter information," Br. 15, ignores that HB892 introduced felony criminal penalties for those who do not provide such information—as the district court recognized, ER-006, 029.

Appellants also try to explain away the overbreadth of the disclosure requirement by suggesting that "within the Ninth Circuit, it is the rule rather than the exception to request prior voter registration information." Br. 15–16. That once more ignores that Appellees do not challenge Montana's longstanding practice of *requesting* such

information,[3] but rather the novel choice to make it a *felony* to fail to supply it. Appellants also vastly overstate the practices of other jurisdictions. They assert that providing such information on a registration form is "mandatory subject to penalty of perjury" in "at least four of these states." Br. 15–16. Yet the registration forms from Washington, Arizona, Hawaii, and Idaho merely state generally that the provision of *false* information to election officials may render the individual filling out the form subject to perjury. *See* ER-127, 134, 140, 143. Appellants do not identify any criminal provisions similar in kind in those states or in federal law. *See* Br. 15–16.

2. Legitimate sweep of the challenged provisions. Having established the scope of the challenged provisions, the district court next assessed the law's legitimate sweep. It correctly "determine[d] that the legitimate sweep of HB892 is the prohibition of double voting." ER-22–23; *see Comite de Jornaleros de Redondo Beach*, 657 F.3d at 944 (explaining that courts must determine whether "a substantial number of [the challenged provisions'] applications are unconstitutional, judged in relation to [their] plainly legitimate sweep" (citation omitted)). In doing so, the Court carefully considered both the text of the law and its legislative history. ER-022–23.

[3] Appellants again wrongly assert that the federal voter registration form prescribed under the NVRA "*requires* providing prior voter registration information." Br. 16 (emphasis added). 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.

Appellants nevertheless claim that the district court "conflat[ed] the legitimate sweep of the challenged provision with the ultimate objective of the Legislature in enacting the provision" and thus failed to "apply" this aspect of the overbreadth standard properly. Br. 17. But it is *Appellants* who misconstrue the "legitimate sweep" of the challenged provisions. They fail to appreciate that any "legitimate sweep" of these criminal prohibitions must be their application to "nonexpressive conduct" that falls within the scope of their text. *E.g.*, *Hansen*, 599 U.S. at 782 (identifying "examples" of "nonexpressive conduct" that application of the challenged law would cover in concluding that it had "extensive" legitimate sweep). Here, however, Appellants do not identify *any* "nonexpressive conduct" that the statute actually covers. *See* Br. 11–24. Instead, they tellingly argue that the challenged provisions have "legitimate sweep" because there are *objectives* that the provisions *could* serve such as to "help ensure cleaner voter rolls, facilitate efficient election administration, and prevent duplicative voting by removing the ability of individuals to vote in multiple elections." *Id.*

While courts may uphold a statute challenged as overbroad where its legitimate sweep "encompasses a great deal of nonexpressive conduct" that "does not implicate the First Amendment at all," Appellants have identified no such conduct here. *Hansen*, 599 U.S. at 782. In fact, Appellants readily admit that the statute is no more than a prophylactic effort that targets the *voter-registration process* in an attempt to address and bolster the state's prohibition on the *separate* act of double voting. Br. 18. But that is no

answer to the fact that the challenged provisions here fail to reach "a great deal of nonexpressive conduct." *Hansen*, 599 U.S. at 782.

Indeed, that the challenged provisions target voter registration is precisely why they are suspect under the overbreadth doctrine. "[V]oter registration is speech protected by the First Amendment." *Preminger*, 552 F.3d at 765. Thus, as the district court recognized, Montana's choice to criminalize registering to vote while remaining registered in another jurisdiction and failing to provide prior registration information when registering each necessarily implicates expressive conduct protected by the First Amendment. *See* ER-023 (citing *Preminger*, 552 F.3d at 765). The best Appellants can come up with in response is to argue that *Preminger* does not stand for the proposition that "any law touching upon voter registration implicates the First Amendment" because the issue was not disputed in that case. *See* Br. 18–19. But there is good reason for the lack of dispute on that matter in *Preminger*: courts have held that registering to vote, and many acts related to it, constitute protected activity under the First Amendment.[4] And, except in the case of a voter who has never before registered to

[4] *E.g.*, *Tenn. State Conf. of NAACP v. Hargett*, 420 F. Supp. 3d 683, 698–99 (M.D. Tenn. 2019) (explaining that a law imposing penalties for returning incomplete registration applications implicated First Amendment rights of "individual[s] to participate in the public debate through political expression and political association," and organizations to "encourag[e] . . . citizens to register to vote" (citations omitted)); *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010) ("[T]o participate in voter registration is to take a position and express a point of view in the ongoing debate whether to engage or to disengage from the political process."); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 702, 706 (N.D. Ohio 2006)

vote, the challenged provisions present a direct restriction upon *all* voters seeking to register or re-register in Montana.

3. Substantial unlawful applications of the challenged provisions. Given these findings, the district court was also correct to conclude that, in relation to the limited legitimate sweep of the challenged provisions, they have substantial unlawful applications to voters who have multiple registrations or who fail to disclose prior registrations. *See* ER-023–29. For example, under HB892, a person who engages in the constitutionally protected act of registering to vote in Montana risks being charged with a felony if they do not first ensure that a prior registration in another state is cancelled.

There are myriad circumstances in which a voter will purposefully maintain a prior registration when they register to vote. As the district court explained, the Seventh

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(similar); *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1334 (S.D. Fla. 2006) (similar); *accord Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (laws that "govern[] the registration and qualifications of voters" implicate First Amendment rights).

Ignoring this case law, a brief filed by amicus curiae Restoring Integrity and Trust in Elections ("RITE") asks this Court to hold broadly that registering to vote is "conduct, not protected speech," and thus that HB892's "entire sweep is 'legitimate.'" RITE Br. of *Amicus Curiae* 2–3, ECF No. 16 ("RITE Br."); *see id.* at 7. That position is untenable. As an initial matter, the brief wrongly characterizes the district court's decision by claiming that it merely assumes that the First Amendment confers a direct right to register to vote. RITE Br. 7. But that is not what the district court said. Rather, citing *Preminger*, the district court's opinion states that voter registration constitutes "speech protected by the First Amendment." ER-023. And although the issue was not in dispute among the parties in *Preminger*, this Court there properly understood that whether First Amendment protections attach turns on whether registering to vote and engaging in voter registration activities involves "expression." 552 F.3d at 765–67. This Court should continue to follow the weight of the authority and hold that "participation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment." *Project Vote*, 455 F. Supp. 2d at 701.

Circuit's decision in *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), explains why voters may have perfectly legitimate reasons to maintain registrations in more than one place. That case concluded that a voter-list maintenance law in Indiana violated the National Voter Registration Act ("NVRA") because it permitted the state to immediately remove a voter based on information received from a third-party database. *See id.* at 959–60. In so holding, that Seventh Circuit explained that there are many circumstances in which voters will purposefully remain registered to vote in multiple places for innocent reasons that have nothing to do with double voting. *See id.* at 960. As the district court correctly summarized:

> For example, a person might move to Kansas from Indiana to take a new job, and upon arrival in Kansas immediately register to vote in Kansas. A change in her personal circumstances happens before Election Day, such as flunking a probationary period on the job, a family member becoming sick, or a better opportunity arising in Indiana. These changed circumstances might lead the person to return to her former residence in Indiana. It may be perfectly rational in states that have an early registration deadline for a voter to register in a new location before getting around to canceling the old Indiana registration, selling an Indiana house, or severing other formal connections with Indiana. Every year millions of Americans go off to college in August. Some drop out by November for academic, financial, or other reasons, and land back on their parents' doorsteps. They will vote in only one place, even if they have open registrations in two.

ER-27–28 (citations omitted). And these "circumstances could apply to HB 892" because many voters in Montana, like those in Indiana, will find themselves in those same circumstances. *Id.* Under the challenged provisions, these voters risk becoming felons.

Appellants criticize the district court's citation to this discussion in *Lawson*, asserting that these examples are not "actual" instances of unconstitutional applications and instead are merely "hypothetical[s]." Br. 20. But here again they misconstrue the relevant overbreadth standard. The relevant question is simply whether the court has identified *realistic* examples showing the types of protected speech that fall within the plain language of the law. *See Comite de Jornaleros de Redondo Beach*, 657 F.3d at 948–49 & n.7; *accord Hansen*, 599 U.S. at 770 (explaining that the court must identify "realistic" "unconstitutional applications" that are not "fanciful"); *see also id.* at 783 n.5 (noting that the overbreadth doctrine necessarily "trafficks in hypotheticals"). Far from fanciful, the circumstances in which a person may need to maintain more than one registration are common—as *Lawson* and the district court recognized. ER-027–28.

And this conclusion is further supported by unrefuted testimony in the record in this case. The district court received undisputed testimony, for example, that "[m]any of MontPIRG's members and constituents are young, highly transient voters" who "recently turned 18 years old" and thus are "automatically registered in other states before moving to Montana to attend college." SER-36. As the record also shows, these are among the reasons why *millions* of Americans have historically been registered in multiple states, while actual incidents of double voting remain vanishingly rare. *See* ER-211–22 (2012 Pew Center study showing that approximately 2.75 million Americans were registered in multiple states); ER-193–209 (National Conference of State Legislature summary showing no other state makes it a felony to remain registered in

two places). The district court properly identified "realistic" "unconstitutional applications." *Hansen*, 599 U.S. at 770.

Further, the overbreadth doctrine is concerned with provisions that "risk . . . *chilling* free speech." *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 944 (emphasis added) (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 967–68 (1984)); *accord Hansen*, 599 U.S. at 770 (citing *Hicks*, 539 U.S. at 119). By criminalizing acts that are necessary components of the registration process, the challenged provisions substantially chill individuals from registering, and further chill the voter registration work of organizations like Appellees. *See* ER-028–29. This conclusion, too, finds strong support in the record. For example, MontPIRG's executive director explained that because "HB892 requires these voters to cancel all but their Montana voter registration," some of MontPIRG's members will be "discouraged from registering in Montana or be unable to vote outside of Montana in the future." SER-37. MFPE's President provided similar testimony. *See* SER-47–48 (as a result of "the serious criminal penalties for violating HB892, MFPE might not be able to help its members register to vote at all"); SER-49 ("At the very least, MFPE and its staff and volunteers will need to err on the side of caution to avoid potential liability, requiring MFPE to either cease entirely, scale back, or reorient its voter-advocacy activities.").

Thus, in short, while Appellants have failed to identify any "plainly legitimate" applications of the challenged provisions beyond circumstances in which a person actually or intends to double vote, the challenged provisions prohibit a significant

amount of identifiable expressive conduct that is protected by the First Amendment. The district court's conclusion that "HB 892 presents . . . overbreadth concerns" because "a substantial number of [the challenged provisions'] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," was therefore correct. *See* ER-020–21 (citation omitted).

B. The district court appropriately concluded that Appellants failed to draw a sufficient connection between the challenged provisions and double voting.

In their hunt for legal error in the district court's overbreadth analysis, Appellants assert that the district court's conclusion that the State "fail[ed] to draw a sufficient connection between maintaining multiple voter registrations and prohibiting double voting" somehow shows that the district court applied a different, incorrect standard for overbreadth. Br. 20 (quoting ER-28). This argument is erroneous.

As an initial matter, the district court addressed the connection between double voting and the challenged provisions when it was responding directly to *Appellants'* contention (repeated on appeal) that the challenged provisions of HB892 constitute mere "prophylactic measure[s]" to help the State maintain accurate voter rolls and combat election fraud, which *Appellants* contend demonstrates the provisions' legitimate sweep. Br. 18 (quoting *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 685 (2021)); *see* ER-028. As already explained, however, the question of whether a statute has "plainly legitimate sweep," and the extent of any such sweep, focuses on the extent of the applications of the law to "nonexpressive conduct" that does not implicate the First

Amendment, *Hansen*, 599 U.S. at 782, rather than whether it generally serves a "prophylactic" policy goal. Appellants have failed to identify such applications. *See supra* Arg. § II-A-2.

In any event, the district court's conclusion that Appellants failed to draw a sufficient connection between maintaining multiple registrations and double voting is plainly correct. Appellants attempt to justify the challenged criminal restrictions by pointing to generic fears of voter "fraud." Br. 18. But such generalized claims fail to adequately connect, much less justify, threatening lawful voters with felony sanctions—*not* for double voting—but for maintaining 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, 1405–06 n.6 (11th Cir. 1993))). Rather than merely invoking abstract interests, Appellants bear the burden of showing how the state interests that they claim 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 have failed to do so.

It is undisputed that double voting has long been illegal in Montana. Appellants have 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. All Appellants can muster is to note that the NCSL and Pew Center exhibits discussed above suggest that voter-roll maintenance activities generally "help" election officials identify voters who have multiple registrations, and by extension, potential double voters. Br. 18 (citing ER-193–

94, ER-214). 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 Appellants rely for this contention fail to support their arguments, because they do not connect "the imposition of felony criminal penalties" for "maintaining multiple voter registrations" to the prevention of double voting. ER-028–29; *see also* SER-10–11. Millions of voters have multiple registrations, *see* ER-211–22, and yet incidents of double voting are rare.

In short, the district court soundly reasoned that a substantial number of the challenged provisions' applications are unconstitutional compared to their plainly legitimate sweep, rendering the provisions unconstitutionally overbroad. None of Defendants' arguments to the contrary undermines that conclusion. This Court should affirm the district court's holding that Appellants are likely to succeed on the merits of their overbreadth claim.

III. Appellees' vagueness claim independently supports affirming the preliminary injunction.

Although nowhere acknowledged in Appellants' brief, the district court also found that Plaintiffs may have raised "substantial questions going to the merits" of their

"vagueness claim." ER-020.[5] And it further found that the equities weighed lopsidedly in Appellants' favor. *See* ER-029–36; *see also* SER-7. Appellees' showing on their vagueness claim therefore provides an independent basis to affirm the preliminary injunction because—as Appellants nowhere dispute—the record shows Appellees "demonstrate[d] . . . that serious questions going to the merits were raised [as their vagueness claim] and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies*, 632 F.3d at 1135; *see also Valle del Sol*, 732 F.3d at 1021 (this Court may affirm a preliminary injunction based on "any ground supported by the record" (quotation omitted)); ER-172–79 (Appellees' briefing on vagueness claim below).

The record below amply shows that Plaintiffs are likely to prevail on the merits of their vagueness challenge and, at minimum, have met this Circuit's "sliding scale" threshold for a preliminary injunction. As this Court has explained, "[l]aws that are impermissibly vague offend due process because they contravene [one of] two bedrock constitutional norms." *Butcher v. Knudsen*, 38 F.4th 1163, 1168 (9th Cir. 2022). *First*, that "regulated parties should know what is required of them so they may act accordingly." *Id.* And, *second*, "that laws must provide proper precision and guidance to ensure that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* (cleaned up). These concerns are acute where, as here, state laws regulate "political speech, which

[5] Appellants state that the district court "declined to rule on [Plaintiffs'] vagueness claim," Br. 4, but fail to acknowledge the court's finding that Plaintiffs may have raised "substantial questions" on the claim.

'occupies the highest rung of the hierarchy of First Amendment values.'" *Id.* at 1169. Thus, when presented with a vagueness challenge, courts must consider whether the "statute define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Both the multiple registration prohibition and disclosure requirement plainly contravene these constitutional standards.

A. The multiple registration provision is unconstitutionally vague.

The multiple registration prohibition proscribes "purposefully remain[ing] registered to vote in more than one place." Mont. Code Ann. § 13-35-210(5). To understand this text, a person of ordinary intelligence reasonably would expect to know: (1) what conduct is required of them, (2) whether the prohibition applies to them, and (3) when it applies to them. HB892's text fails to answer any of these requisite questions.

Vague as to the conduct proscribed. What it means to "remain registered" under HB892 is ambiguous and lacks any clear meaning. This Court has previously "consult[ed] the definitions of [] terms in popular dictionaries" to "determine the plain meaning of terms," *United States v. Gibson*, 998 F.3d 415, 419 n.5 (9th Cir. 2021) (quoting *Metro One Telecomms., Inc. v. Comm'r of Internal Revenue*, 704 F.3d 1057, 1061 (9th Cir. 2012)). And Merriam-Webster defines "remain" as "to continue unchanged."[6] Based on this definition, it is unclear whether Montanans with multiple voter registrations

[6] Remain, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/remain (last accessed June 27, 2024).

must take some affirmative step to change their existing registration status—such as notifying election officials in other jurisdictions or actively ensure their past registrations are cancelled—before registering to vote in Montana. By the same token, the text of HB892 makes it unclear whether a person violates the multiple registration provision if they do nothing about a past registration they are aware of when registering to vote in Montana. After all, such a person "continue[s] unchanged" to be "registered" elsewhere.[7]

The applicable mens rea requirement only adds confusion. True, the multiple registration prohibition includes a standard familiar to Montana's criminal laws: a person must remain registered elsewhere "purposefully." But "the addition of a mens rea element [is not necessarily] dispositive," as "there are recognized limitations regarding a statutory scienter requirement as some sort of cure-all or antidote in the context of a vagueness challenge." *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 498–99 (E.D. Va. 1999) (collecting cases), *aff'd*, 224 F.3d 337 (4th Cir. 2000).

[7] If HB892 *does* require the registrant to take some affirmative step, the multiple registration prohibition fails to specify *what* step must be taken. Amicus curiae RITE asserts without explanation that the provision "requires only that voters *attempt* to cancel . . . registrations of which [they] are *aware*." RITE Br. 8. But it fails to ground that bare assertion in the text of the statute, which proscribes "remain[ing] registered" in two places at "*any time*." Mont. Code Ann. § 13-35-210(5) (emphasis added). A registrant who merely asks that their registration in another state be cancelled may—if they do not confirm cancellation prior to registering in Montana—well find that they are "registered" in two places at "any time" and will "remain" so indefinitely. Thus, it appears that the only way for the registrant to avoid such limbo is to hold off from registering in Montana until they have *confirmed* the cancellation of their prior registration.

"That is because a scienter requirement 'cannot make definite that which is undefined.'" *Forbes v. Woods*, 71 F. Supp. 2d 1015, 1020 (D. Ariz. 1999) (quoting *Screws v. United States,* 325 U.S. 91, 105 (1945) (plurality opinion)), *aff'd sub nom. Forbes v. Napolitano*, 236 F.3d 1009 (9th Cir. 2000). This case illustrates why: adding "purposefully" to the text of HB892 neither clarifies what conduct is prohibited nor safeguards against arbitrary enforcement. As the Seventh Circuit explained: "A scienter requirement cannot eliminate vagueness . . . if it is satisfied by an 'intent' to do something that is in itself ambiguous." *Nova Records, Inc. v. Sendak*, 706 F.2d 782, 789 (7th Cir. 1983). And what it means to "remain registered" in another jurisdiction in this context continues to be ambiguous with or without the scienter requirement.

HB892 fails to provide clear notice of what a person must, or must not, do. For example, a reasonable person would not understand whether consciously remaining registered in multiple jurisdictions, but deciding not to deregister from any of them, constitutes "purposefully" remaining registered. Nor is it clear whether a voter who only suspects that they might be registered elsewhere—perhaps because they came to Montana from Washington, Oregon, or one of many other states with automatic voter registration, or a state with no obvious deregistration process—would be at risk of prosecution if they are willfully uncertain of these additional registrations.

Appellants suggest elsewhere in their brief that this ambiguity is resolved by giving "purposefully" the meaning of "conscious object." Br. 13. Not so. For example, does a person who registers to vote in Montana while fully aware that they are also

registered in Idaho have the "conscious object" to "remain registered" in both States? HB892's text supplies no good answer. Nor do Appellants. They fail to "identify any remotely clear lines" about what it means to have the "conscious object" to "remain" registered in two places and thus "offer no guidance at all" to registrants in Montana. *Snyder*, No. 23-108, 2024 WL 3165518, at *9. Such ambiguity, concerning the obligations and prohibitions of a criminal statute, violates the Due Process Clause.[8]

Vague as to who is covered by HB892. HB892 also fails to provide sufficient notice as to who is covered by the law. The text does not specify whether criminal penalties apply to prior Montana registrants who subsequently registered in other states before returning to vote Montana (like out-of-state college students who have come home); to new Montana registrants who had previously registered in other jurisdictions; or to existing Montana registrants who must now provide prior registration information that they did not before.

For example, suppose an eighteen-year-old in Montana registers to vote in the state shortly before she heads off to college in California, where she also then chooses

[8] Tellingly, Defendants and amicus curiae RITE also reach divergent conclusions on what HB892 prohibits and requires. Defendants interpret HB892 as limited to "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," Br. 14–15. RITE, in contrast, interprets HB892 to "require[] . . . that voters attempt to cancel and disclose duplicative registrations of which voters are *aware*," RITE Br. 8, regardless of whether they have a "conscious object" to be registered in both locations. That these aligned parties cannot even agree on what conduct HB892 proscribes illustrates the law's unacceptable vagueness.

to register to vote during a registration drive on her campus, without cancelling her Montana registration. After completing school, she returns home to Montana and casts a ballot under her existing registration. Such a voter had no prior registration to disclose at the time she first registered in Montana but, after registering in California, did she "purposefully remain registered to vote in more than one place in this state or another state at any time"? HB892 offers no real answer, but an aggressive prosecutor certainly has at least a colorable argument that the answer is yes. *Cf. United States v. Davis*, 588 U.S. 445, 451 (2019) ("Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." (collecting cases)).

Most strikingly, HB892 fails to clarify whether it applies retroactively to Montana voters who had multiple voter registrations at the time of enactment. Suppose a person who retired to Montana—and intends to vote nowhere else for the rest of their life—still had a registration elsewhere at the time HB892 went into effect. Does HB892 impose on them an affirmative obligation to cancel the earlier registration before they next vote in Montana? In fact, do they even need to first vote to "purposefully remain registered" in two places at "any time"? HB892 nowhere addresses whether Montana registrants with existing multiple registrations must take some act under the law.

Vague as to when HB892 applies. Third, as explained, HB892 fails to establish *when* it applies. In particular, it fails to address whether current Montana voters who had multiple registrations before HB892's enactment fall within the scope of the prohibition

retroactively, or if HB892 only governs new registrations in the state. This lack of "precision and guidance" leaves reasonable questions in the minds of persons of ordinary intelligence. *Butcher*, 38 F.4th at 1168.

* * *

The district court agreed with much of this analysis, "recognizing vagueness concerns stemming from the retroactivity and scope of HB 892," including as to "1) whether its requirements apply to voters newly registering in Montana; 2) voters registering in a new county in Montana when they were previously registered in Montana; 3) voters who maintain a Montana voter registration but have not re-registered since HB 892 took effect." ER-019. As the district court concluded, "[t]he plain language of HB 892 does little to clarify these questions." *Id.*

B. The disclosure requirement is also unconstitutionally vague.

HB892's vagueness issues extend to registration disclosure requirement as well. *See* Mont. Code Ann. § 13-35-210(5) ("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[.]").

To start, HB892's text makes it unclear whether the "purposefully" mens rea requirement extends to the second sentence of HB892. As a result, the statute suggests voters could be imprisoned even for inadvertently neglecting to complete that section of the application. Such strict criminal liability demands absolute clarity to provide fair notice to Montanans. Additionally, the disclosure requirement fails to specify whether

a voter must list only last-in-time or active registrations or their entire voting history, including inactive and automatic registrations.

The district court acknowledged both these concerns. It recognized the confusion as to "whether the mens rea of 'purposefully' applies both to the multiple registration prohibition and to the prior registration disclosure requirement." ER-019. And it properly expressed "concern[] that voters lack notice as to what Montana law requires of them when registering to vote." ER-019–20.

Given these deficiencies in the disclosure requirement, Montanans of ordinary intelligence could reasonably be confused about what they must do to avoid fines and imprisonment–potential penalties for even inadvertent omissions on an application given the unclear mens rea requirement. Such confusion discourages future registrations and has a "real and substantial" "deterrent effect on legitimate expression." *Cal. Tchrs. Ass'n v. State Bd. of. Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976)).

C. Appellants ignore the district court's vagueness findings and forfeit any argument that they do not support a preliminary injunction.

The district court recognized Plaintiffs' vagueness claim may raise, at minimum, "substantial questions going to the merits," ER-020. The district court's conclusion was well founded: the "plain language of HB 892 does little to clarify" the matter, ER-019, and "vagueness scrutiny is more stringent" where, as here, "a law implicates First

Amendment rights," ER-018 (quoting *Cal Teachers Ass'n*, 271 F.3d at 1150).[9] And, as explained, it credited much of Appellees' vagueness analysis above. *See* ER-017–020.

Appellants have consistently ignored this finding, including in their stay motion to the district court, SER-19–32; in their motion for a stay to this Court, ECF No. 3; and now in their opening brief as well. "The usual rule is that arguments . . . omitted from the opening brief are deemed forfeited." *Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018); *see also Turlock Irrigation Dist. v. FERC*, 903 F.3d 862, 870 (9th Cir. 2018) (same). That "usual rule" is particularly sensible here because, during the stay briefing, Appellees *twice* previewed their argument that the district court's vagueness findings independently sufficed to maintain the preliminary injunction. SER-19–32; ECF No. 3. Nonetheless, Appellants persist in ignoring that claim and forfeit any argument that the district court's findings on it are insufficient to satisfy this Court's "sliding scale" test. *All. for the Wild Rockies*, 632 F.3d at 1131–32; *see also Valle del Sol*, 732 F.3d at 1021 (affirming preliminary injunction on alternative ground of vagueness where district court relied on preemption analysis); *cf. Couturier*, 572 F.3d at 1084–85 (the Court may affirm preliminary injunction based on lower court's implicit analysis).

[9] On the record before it, this Court could also readily conclude that Appellants are likely to succeed on the merits of this claim, in addition to finding that they raised substantial questions. ER-017–20; ER-172–179.

IV. The equitable factors all favor preliminary relief.

The district court properly concluded that the equitable factors tip sharply in Plaintiffs' favor, SER-7, including through their showing how HB892 threatens them with irreparable harm.

A. Plaintiffs demonstrated they are at risk of irreparable injury.

The district court properly found that HB892 "chill[s] Plaintiffs' voter registration activities," causing them irreparable harm. ER-030. As it explained, HB892's new criminal penalties mean that Appellees' voter registration activities "may subject those they register to felony criminal penalties under HB 892," discouraging them from pursuing their constitutionally protected efforts. ER-030–31. This finding was supported by unrefuted declaration testimony, ER-034–36, that the court did not abuse its discretion in crediting, *see United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992) ("A district court's finding of the likelihood of irreparable harm is reviewed for an abuse of discretion.").[10]

Appellants barely contest this finding, limiting their argument to a single paragraph. *See* Br. 25. The gist of their argument is that the district court made contradictory findings by concluding both that HB892 causes Plaintiffs irreparable

[10] Moreover, the record below contained additional evidence of irreparable harm. For example, in addition to describing the direct harm HB892 causes to their ow organizational voter registration efforts, Appellees provided unrefuted declaration testimony explaining how HB892 discourage Appellees' members and constituents from registering and voting because it does not clearly explain what they will need to do to avoid criminal penalties. SER-37; SER-46.

harm but also does not "substantively change Montana voting registration procedure." *Id.* (quoting ER-016). HB892 causes Appellees irreparable harm because of its imposition of overbroad new "felony criminal penalties *post hoc*" for innocent and common behavior. SER-17. That finding in no way undercuts the court's recognition—based on undisputed county official testimony that Appellants neglect to mention—that HB892 does not meaningfully change how election officials in Montana register voters in the first instance. ER-016; *see also* ER-034 (Ravalli County Clerk testimony that HB892 "wouldn't change" the "current practice [election workers] were following before"); ER-099 n.10 (State Defendants conceding HB892 constituted a "codification of longstanding practice" with respect to requesting prior registration information); ER-111 (Ravalli County clerk declaration stating that "HB 892 codified Montana's longstanding requirement to supply previous registration information" and that "[v]oter registration applications that do not contain previous voter registration information are processed in the same way as prior to HB 892's codification"). Moreover, the district court's injunction of *criminal* enforcement of the challenged provisions does not change Montana's voter registration form or how Montana election officials use it to register voters. SER-17; ER-016, ER-036.

B. The balance of the equities and public interest favor the injunction.

Appellants' fleeting arguments on the remaining equitable factors largely repeat their irreparable harm argument. *See* Br. 25–26. They also passingly suggest that Montana has an interest in preserving the integrity of its elections and in enforcing its

own statutes. *Id.* at 26. But, as the district court explained, HB892 does little to impact how Montana election officials conduct their voter registration procedures in the first instance, meaning the preliminary injunction has little impact on their activities. ER-034–36. Indeed, the State has repeatedly insisted throughout this litigation that the challenged provisions only codify the longstanding requirement for registrants to supply previous information. ER-077; ER-088; ER-094; ER-099; ER-111. The Secretary's own guidance to county election officials further confirms this. ER-016. Tellingly, Appellants' argument about their interest in election integrity fails to cite any actual record evidence or supporting testimony. The only testimony heard by the district court below on this subject confirmed that "limited injunctive relief likely will not significantly impact election procedures in Montana that appear to be unchanged by HB 892." ER-036; *see also* ER-015–17; ER-034.

On the other side of the ledger, Appellees presented unrefuted testimony that the challenged provisions chilled their organizational efforts to register voters; discouraged their members and constituents from registering to vote; and forced Appellees to divert their resources in a way that further harmed their missions. SER-37–40; SER-46–50. Appellants have no answer to that testimony in their discussion of the equities on appeal.

The public interest also weighed strongly in favor of granting an injunction. ER-034–35. As the district court explained, the "ability of Montana voters to register to vote without fear of felony criminal penalties appears to substantially implicate the

public's interest in protecting the franchise." ER-35. The district court was entirely correct to find that there is a strong public interest in "permitting as many qualified voters to vote as possible," *Husted*, 697 F.3d at 437.

C. *Purcell* did not require the district court to deny Plaintiffs' requested relief.

The district court's preliminary injunction reinstated a preexisting and longstanding status quo in Montana, permitting voters to register without fear of being criminally prosecuted for failing to cancel or disclose other voter registrations, while still permitting election officials to request such prior registration information. Appellants fail to explain how the injunction possibly could interfere with the Secretary's guidance to county election officials to simply maintain the "current practice [they] were following before" HB892 was enacted. ER-036 (citing testimony of Ravalli County Clerk at Doc. 63 at 108). It does not: Montana's election officials uniformly testified that the enjoined provisions do not change how they administer Montana's voter registration procedures. ER-016, ER-034. The district court therefore correctly determined, after a thorough review of governing case law, that *Purcell* did not bar preliminary relief. *See* ER-012–17.

Appellants do not even dispute the district court's finding in its *Purcell* analysis that the challenged provisions "have not substantively changed the operation of Montana registration procedures." ER-016–17. They instead rely on the claim that even

"innocuous" injunctions "implicate" *Purcell*. Br. 26.[11] But they offer nothing in support of this assertion beyond idle speculation. For example, they suggest that the injunction "introduces confusion as to whether the State may continue using its existing application form." *Id.* at 27. They cite nothing in support of that claim, and for good reason—there is no basis for it in the district court's injunction; Appellees' requested relief; or the entire record. Indeed, at the outset of their own brief, Appellants (correctly) note that "[n]o party disputes that the Montana voter registration form remained the same after §13-35-210(5) became law." *Id.* at 3. The district court's injunction simply returns the State to its pre-HB892 status quo, which all parties agree involves using the same existing voter registration form.

Indeed, while Appellants attempt to gin up theories of voter confusion (all without record citation), 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

[11] Appellants cite Judge Kavanaugh's concurrence in *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) ("*DNC*") for the proposition that even "innocuous" injunctions may cause voter confusion. Br. at 26–27. But that case bears no resemblance to the facts here. There, "just six weeks before the November election and after absentee voting had already begun," a federal district court "unilaterally changed [Wisconsin's] deadline for receipt of absentee ballots." *DNC*, 141 S. Ct. at 30, 31 (Kavanaugh, J., concurring). Judge Kavanaugh expressed concern that such a late-breaking change required "election administrators [to] understand the court's injunction, then devise plans to implement that late-breaking injunction." *Id.* at 31. Here, in contrast, election administrator testimony made clear that the injunction—issued more than five months before the November election—would have no impact on their work.

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* ER-036–37. But it does nothing to bar election officials from *asking* for such registration information, as they long have. Moreover, the injunction is otherwise clear that "[a]ll other provisions of HB 892, codified in Mont. Code Ann. § 13-35-210, shall remain in effect." ER-037. Thus, the State is free to continue using the same voter registration form they have been using, and to continue requesting that registrants provide prior registration information, as it did prior to HB892's enactment. Removing the threat of criminal punishment for ordinary conduct does not create a "significant" risk of voter confusion.

The district court also properly took *Purcell's* timing considerations into account. While Appellants note that—at the time of filing—Montana's primary was "five days away," Br. 26, that point is now moot in the wake of the June 4, 2024 primary election. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 590 F.3d 725, 727 (9th Cir. 2009) ("A claim that has lost its character as a live controversy is considered moot, and thus we lack jurisdiction to consider it."). In any event, the district court did not abuse its discretion in considering the scope of the injunction as applied to the primary election. ER-019–29.

As for the general election, the district court explained that the November general election was "196 days from the date of this order" and thus "likely occurs outside *Purcell*'s concern as this order is not being issued on the eve of an election." ER-

014–15. It therefore correctly determined that "*Purcell* does not bar the Court's granting of a preliminary injunction against HB 892 for purposes of the Montana 2024 general election." ER-015. Appellants wrongly imply that the relevant point in time for measuring *Purcell* concerns is "now . . . five months away from the general election." Br. 26. As they are forced to acknowledge on the very next page, "Appellate review of a *Purcell* argument considers the circumstances *at the time the district court issued its injunction.*" *Id.* at 27 n.5 (emphasis added). The district court here issued its injunction nearly *200 days*—more than six months—before the November general election. Defendants cannot cite any example whether another court has extended *Purcell's* reach so far. To the contrary, other appeals courts have explained that such a period is well beyond *Purcell's* "outer bounds." *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *2 (11th Cir. Nov. 7, 2022) (declining to stay an injunction issued five months prior to an election). To reverse the district court's injunction based on *Purcell* so far out from the general election—and on such a threadbare claim of voter confusion and disruption—would extend that principle into uncharted waters.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's preliminary injunction order.

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Respectfully Submitted,

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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 12,823 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
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