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 REPLY BRIEF

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

Counsel for Appellants

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

Counsel for Intervenor-Appellants

July 18, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

Plaintiffs' argument rests on the false premise that all aspects of voter registration are core speech protected by the First Amendment. But their cited cases do not support that unqualified premise. And without that premise, Plaintiffs' arguments—and the district court's analysis—fall. The challenged law is not overbroad because nearly all its applications are constitutional. And Plaintiffs have failed to show any unconstitutional applications, let alone a substantial number of unconstitutional applications. *See United States v. Hansen*, 599 U.S. 762, 770 (2023).

The district court's order applied the wrong preliminary injunction standard, flipped the presumptive burden of proof, gave short shrift to the applicable overbreadth framework, and improperly credited Plaintiffs' speculative irreparable harm. Each of these errors independently warrants reversal. Put simply, the preliminary injunction of §13-35-210(5) is not sustainable.

Plaintiffs' vagueness claim cannot salvage the injunction. Not only did the district court expressly decline to reach the issue of vagueness because of lingering factual disputes, but Plaintiffs have also failed to carry their heavy burden to invalidate a duly enacted law on its face. This Court should reverse the district court and lift the injunction.

I. THE DISTRICT COURT APPLIED THE WRONG PRELIMINARY INJUNCTION STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs must make "a clear showing" that they are entitled to this relief. *Id.* But the district court granted relief on a less-than-clear showing by confusing the standards for a preliminary injunction. As Appellants' opening brief explains, Plaintiffs meet neither the traditional *Winter* test, *id.*, nor the sliding-scale test for preliminary injunctive relief, *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011).

Plaintiffs do not dispute that the traditional test from *Winter* and the sliding-scale test from *Alliance for the Wild Rockies* are distinct standards. Resp. Br. at 17. And they agree that the district court purported to rely on the *Winter* formulation of the preliminary injunction standard. *Id.* But they argue that "rais[ing] substantial questions" on the merits is equivalent to showing that they are likely to succeed on the merits. *Id.* at 16-18. Caselaw and the district court's decision itself show why Plaintiffs' argument is wrong.

Under the preliminary injunction standard, "serious questions" means questions that are "'substantial, difficult and doubtful.'" *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988); *accord All. for the Wild Rockies*, 632 F.3d at 1134. "Serious questions" do not promise a "probability of success," but instead require showing a "'fair chance of success on the merits.'" *Marcos*, 862 F.2d at 1362. In comparison,

"likelihood of success" is a higher standard. *All. for the Wild Rockies*, 632 F.3d at 1134. And while there may be room for argument about what "likely success" on the merits means, Plaintiffs must show something more than a "negligible" chance or a "mere possibility." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotations omitted). Because this Circuit distinguishes between likelihood of success on the merits and serious questions on the merits, likelihood of success on the merits is a higher standard than showing that the movant has "a fair chance of success" or raises "substantial" questions. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984); *Marcos*, 862 F.2d at 1362.

In contrast, district courts in this Circuit treat "substantial questions" going to the merits the same as "serious questions" going to the merits. For example, in *Rajagopalan v. Noteworld, LLC*, the district court explained that "a showing of likelihood of success on the merits is not required" and instead, parties can "argue that substantial or serious legal questions exist." 2012 WL 2115482, at *3 (W.D. Wash. June 11, 2012). In *Naretto v. City of Petaluma*, the district court likewise treated "substantial questions on the merits" the same as "serious questions going to the merits." 2022 WL 1539780, at *2 (N.D. Cal. May 16, 2022). And in each of these cases, the plaintiffs' burden to show "serious" or "substantial" questions going to the merits differed from their burden to show "likelihood of success." *Rajagopalan*, 2012 WL 2115482, at *3; *Naretto*, 2022 WL 1539780, at *2; *see also, e.g.*, *Audubon Soc'y of Portland v. Nat'l Marine Fisheries Serv.*, 849 F. Supp. 2d 1017, 1033 (D. Or. 2011); *Velasquez-Reyes v. Samsung Electronics Am., Inc.*, 2018

WL 6074573, at *2 (C.D. Cal. Mar. 8, 2018). Even the District of Montana has followed this treatment of the preliminary injunction standard in other cases. *See, e.g.*, *Donohoe v. U.S. Forest Serv.*, 2022 WL 4289913, at *1 (D. Mont. Sept. 16, 2022).

But the district court here equated the sliding-scale approach with the traditional *Winter* approach. The court first determined that Plaintiffs "raised substantial questions going to the merits." ER-29. In the following sentence, with no further explanation, the district court concluded that "Plaintiffs have demonstrated a likelihood of success on the merits." *Id.* That confuses the two different standards. Because the district court found "substantial questions" on the merits, it *should have* required Plaintiffs to establish that the harms tip sharply or decidedly in their favor. *All. for the Wild Rockies*, 632 F.3d at 1133 (quotations omitted and emphasis added). But the district court made no such finding. Instead, the court concluded that the remaining factors only "tip[]" in Plaintiffs' favor. ER-32, ER-34, ER-36.

Plaintiffs have no support for their conclusion that the district court could equate substantial questions with a likelihood of success on the merits. Resp. Br. at 17. Plaintiffs cite *Lair v. Bullock*, where this Court stated that there are different formulations of the degree of success a stay petitioner must show, but that just proves that the district court wrongly conflated "serious questions" with "likelihood of success." 697 F.3d 1200, 1204 (9th Cir. 2012). This Court noted that "reasonable probability," "fair prospect," "substantial case on the merits," and "serious legal questions … raised," are similar formulations. *Id.* (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011)

(per curiam)). But *Alliance for the Wild Rockies* confirms that "serious legal questions" and "likelihood of success" are different standards because of what Plaintiffs must show for the *other* elements. 632 F.3d at 1132. And *Lair* acknowledges that these formulations require varying degrees of proof, stating that whether there is a "substantial case for relief" is the "minimum" showing permissible for a stay to issue. 697 F.3d at 1204. While these "formulations" of the first preliminary injunction factor are similar, they attach to different standards. *All. for the Wild Rockies*, 632 F.3d at 1134.

On appeal, Plaintiffs argue that despite the district court applying an erroneous legal standard, this Court should not reverse. But this Court "must reverse" if the district court "based its decision on an erroneous legal standard." *Warsoldier v. Woodford*, 418 F.3d 989, 993 (9th Cir. 2005); *see also FTC v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1211-12 (9th Cir. 2004) ("We will reverse a preliminary injunction when a district court based its decision on an erroneous legal standard or on clearly erroneous findings of fact."). As support for that claim, they first cite the district court's May 16 order denying a stay pending appeal, where the district stated that it applied the correct standard and that, in any event, "Plaintiffs fulfilled both standards" for a preliminary injunction. Resp. Br. at 18-19 (citing SER-7). But that order is not the subject of this appeal. The district court cannot insulate its decisions from review by offering post-hoc explanations. The injunction that is in place and is the subject of this appeal is based on the district court's April 24 decision that concluded Plaintiffs "raised substantial questions

going to the merits" and that the other preliminary injunction factors only "tip[]" in their favor. ER-32, ER-34, ER-36.

Plaintiffs next assert that because they "'raise[] serious First Amendment questions,'" that "alone 'compels a finding that … the balance of hardships tips sharply'" in their favor. Resp. Br. at 19 (quoting *Meinecke v. City of Seattle*, 99 F.4th 514, 526 (9th Cir. 2024)). But whether Plaintiffs met their burden under either standard by raising serious questions or showing that they are likely to succeed on the merits does not bear on whether the district court applied the correct legal standard. *See Warsoldier*, 418 F.3d at 993. The district court did not find that "the balance of hardships tips sharply" in their favor, *see* ER-32, ER-34, ER-36, and indeed found that the challenged provision does not likely "substantively change Montana voting registration procedure." ER-16. And for the reasons explained in the next Section, Plaintiffs have not raised "serious" or "substantial" questions on their overbreadth claim, nor have they shown that they are likely to succeed on their overbreadth claim. *Contra Meinecke*, 99 F.4th at 526; *Fellowship of Christian Athletes v. San Jose Unified School Dist.*, 82 F.4th 664, 695 (9th Cir. 2023).

II. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THEIR OVERBREADTH CLAIM.

For their overbreadth challenge, Plaintiffs must show that 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). This requires the court to "first determine what [the law] covers," consider the law's "valid reach," and then determine whether

the "unlawful-to-lawful applications" are lopsided. *Hansen*, 599 U.S. at 770, 784; *see also Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2409 (2024).

Showing that a statute is unconstitutionally overbroad is demanding. Overbreadth is "strong medicine" and an "unusual" exception to traditional constitutional challenges because statutory infirmities can almost always be cured on a "case-by-case" basis. *Hansen*, 599 U.S. at 770. The decision to litigate a facial challenge "comes at a cost," and the heavy burden Plaintiffs bear "is the price of its decision to challenge the law[] as a whole." *NetChoice*, 144 S. Ct. at 2409. This demanding standard, at the preliminary injunction stage, and with the presumption of constitutionality afforded to the State of Montana, makes this type of "facial challenge[] hard to win." *Id.* at 2397.

The district court below, and now Plaintiffs on appeal, try to shift the burden to Appellants to show why the injunction should not issue. But Plaintiffs bear the burden of showing that the law is unconstitutionally overbroad. *Williams*, 553 U.S. at 292. The district court, for example, concluded that because "Defendants fail to draw a sufficient connection between maintaining multiple voter registrations and prohibiting double voting," the law was likely overbroad. ER-28. Plaintiffs assert that it is for *Appellants* to identify "nonexpressive conduct" covered by the statute, Resp. Br. at 25-26, identify "plainly legitimate" applications, *id.* at 30, and show why it was necessary to add a felony provision, *id.* at 32. But the overbreadth standard places the burden on Plaintiffs, not the State or Intervenors, to show substantial overbreadth. *Virginia v. Hicks*, 539 U.S.

113, 122 (2003); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476 n.8 (2007) (op. of Roberts, C.J.).

In addition to improperly shifting the burden to the State, the district court failed to analyze the scope of the challenged law, failed to consider the plainly legitimate sweep of the law, and failed to identify a substantial number of unconstitutional applications. App. Br. at 12. This "failure to correctly apply the law of the overbreadth doctrine is sufficient to reverse the preliminary injunction." *Tucson v. City of Seattle*, 91 F.4th 1318, 1329 (9th Cir. 2024).

A. The district court skipped the necessary first step of its overbreadth analysis.

The district court failed to grapple with the statutory text and the scope of the statute itself. *See* App. Br. at 12-16. This is a threshold question. *Hansen*, 599 U.S. at 770. The court must consider "[w]hat activities, by what actors, do the laws prohibit or otherwise regulate." *NetChoice*, 144 S. Ct. at 2398. And these questions involve more than just recitation of the statutory text. *Hansen*, 599 U.S. at 770-71. They involve thinking through the "full range of activities" covered by §13-35-210(5). *NetChoice*, 144 S. Ct. at 2397.

On appeal, Plaintiffs likewise fail to engage on the question of what protected speech and conduct the law actually covers. Plaintiffs—like the district court—summarily conclude that "when and how a person may register to vote in Montana" is constitutionally protected expressive conduct. Resp. Br. at 21-22 (citing ER-23). But

this conclusion cannot be the end of the analysis—after all, States have primary authority to regulate "when and how" a person may register to vote, *see Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). Montana, like most states, imposes citizenship requirements, Mont. Code §13-2-206, establishes hours during which individuals can register to vote in person, *id.* §13-2-201, and requires prospective voters to provide certain information, *e.g.*, *id.* §13-2-208. These laws are not automatically subject to strict scrutiny simply because they regulate the voter registration process.

Plaintiffs' briefing suggests as much. For their overbreadth claim, they focus entirely on the multiple registration prohibition. Their only mention of the requirement that voters provide prior registration information is in their conclusion that the challenged provision has "substantial unlawful applications to voters … who fail to disclose prior registrations." Resp. Br. at 27. But they do not explain how requiring this information in a voter registration application differs from the other information that voter registration applications require voters to furnish. Nor do they explain how the prior registration information implicates the First Amendment, while the information about prior addresses or prior names does not.

Despite the numerous lawful regulations of the voter registration process, Plaintiffs maintain their absolutist position that "registering to vote, and many acts related to it, constitute protected activity under the First Amendment." Resp. Br. at 26. Plaintiffs—like the district court—primarily rely on *Preminger v. Peake*, a case in which neither party disputed, and thus the court never adjudicated, whether voter registration is

protected by the First Amendment. 552 F.3d 757, 765 (9th Cir. 2008). *Preminger* involved an as-applied challenge to a law that precluded "partisan activities" on property owned by the Department of Veterans Affairs. *Id.* at 762. Because the challengers were affiliated with a specific political party, their permission to register voters was revoked. *Id.* And importantly, the Court determined that the application of the challenged regulation did not violate the First Amendment. *Id.* at 765.

Plaintiffs' other cases also do not show that registering to vote is always protected speech. Resp. Br. at 26. Each of the district court cases involved regulations of third-party voter registration drives, not restrictions on a citizen's ability to purposefully maintain multiple voter registrations in different jurisdictions. *Id.* at n.4. In *Tennessee State Conference of NAACP v. Hargett*, the district court first recognized the numerous lawful regulations covering the voter registration process, including the "when and how" of voter registration. 420 F. Supp. 3d 683, 690 (M.D. Tenn. 2019). The court then concluded that the laws regulated people's ability to "encourag[e] others to register to vote" by requiring them to include mandatory disclaimers on the forms and attend government-administered training regarding voter registration drives. *Id.* at 698-99. The court also noted that the plaintiffs had provided a "significant factual record of the practices that the Act will reach." *Id.* at 699. And ultimately the court acknowledged that with respect to elections, "making no law is not an option" and that just because "First Amendment interests are touched on by the [challenged law]" did not mean that the law was unconstitutional. *Id.* at 700. Here, the challenged provision prohibits individuals

from purposefully maintaining multiple registrations, not from participating in voter registration drives or encouraging others to vote. In this case, the challenged law was in effect for a year before the injunction issued, and yet Plaintiffs have provided no information about how this law has harmed its members or otherwise impeded their activities. *See infra* Section III. And *Hargett* confirms that even if §13-35-210 "touche[s] on" First Amendment interests, that fact alone does not render the law unconstitutional. *Hargett*, 420 F. Supp. 3d at 700.

American Association of People with Disabilities v. Herrera also does not establish that every regulation of voter registration activity implicates the First Amendment. There, the district court rejected the plaintiffs' vagueness and overbreadth arguments about third-party registration-drive regulation, concluding that "[e]ven if, as applied the challenged laws affect some speech, the Court cannot say that the facial interpretation of [the challenged law] prohibits any protected speech." 690 F. Supp. 2d 1183, 1224 (D.N.M. 2010). The court refused to "speculate about possible misinterpretations" of the statute's terms, concluding that the court "will not invalidate the challenged law merely because the Plaintiffs can speculate different ways to interpret" it. *Id.* at 1222-23. Here, even if some misinterpretations of §13-35-210(5) applied to speech, and even if some of those were unconstitutional applications, those can be handled on an as-applied basis. *Infra* Section II.B.

Project Vote v. Blackwell and *League of Women Voters of Florida v. Cobb* are also inapposite. In *Project Vote*, the district court determined that while aspects of participation

in voter registration affect the rights to associate and vote, a relaxed level of scrutiny was nevertheless appropriate. 455 F. Supp. 2d 694, 700-01 (N.D. Ohio 2006). The district court made no sweeping conclusion about whether all aspects of voter registration implicate First Amendment rights. In *League of Women Voters*, the district court merely concluded that the First Amendment protects the plaintiffs' right to manage their voter registration drives in the manner they deem effective. 447 F. Supp. 2d 1314, 1334 (S.D. Fla. 2006). Again, the court said nothing about the conduct that §13-35-210(5) regulates—prohibiting multiple registrations and requiring the disclosure of prior registration information. Finally, *Anderson v. Celebrezze* involved a signature-collection filing deadline and reaffirmed that while the "rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights." 460 U.S. 780, 788 (1983). In sum, Plaintiffs have no authority for their claim that §13-35-210(5) categorically regulates speech, let alone that a substantial number of those applications would be unconstitutional.

Plaintiffs also misconstrue Appellants' argument by suggesting that canons of statutory construction do not apply in overbreadth challenges to criminal laws. Resp. Br. at 23. But Appellants do not argue that "prosecutorial discretion" salvages an otherwise unconstitutional statute, as Plaintiffs suggest. *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010); *Snyder v. United States*, 144 S. Ct. 1947 (2024)). Rather, Appellants explained that if a court can reasonably "construe the Act as constitutional," it must do so, even where the law is challenged as being overbroad. *United States v. Rundo*,

990 F.3d 709, 714 (9th Cir. 2021); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 455-56 (2008) ("[W]e must … ask whether the ballot could conceivably be printed in such a way as to eliminate ... the perceived threat to the First Amendment."). In other words, courts must "seek a reasonable construction of the Act that comports with constitutional requirements." *Rundo*, 990 F.3d at 715; *see also Hansen*, 599 U.S. at 781 ("[O]ur task is to seek harmony, not to manufacture conflict.").

Even the cases Plaintiffs rely on confirm that courts must construe statutes in favor of finding constitutionality. In *Stevens*, the Supreme Court noted that while a court's job is not to rewrite a statute, the court can impose a limiting construction on the statute if the statute is "readily susceptible" to that construction. 559 U.S. at 581. And in *Snyder*, the Supreme Court made clear that the particular circumstances—a federal statute regulating state and local officials—justified exercising additional caution. 144 S. Ct. at 1958. These cases confirm that a court evaluating a statute's alleged overbreadth must carefully consider the statutory text to determine what the statute actually covers. The district court failed to do so. And on appeal, Plaintiffs fail to grapple with the "text of the law." *Hicks*, 539 U.S. at 122 (cleaned up).

B. Section 13-35-210(5)'s legitimate sweep extends beyond double voting.

Plaintiffs bear the heavy burden of showing that the challenged provision "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U.S. 292. After evaluating the text of the law and determining what the challenged law actually covers, this Court must next consider the plainly

legitimate sweep of the challenged law—in other words, its constitutional applications. *Hansen*, 599 U.S. at 781-82.

The district court here answered the wrong question. Rather than ask what constitutional applications the multiple registration prohibition and prior registration disclosure requirement have, the district court asked what the "chief[]" concern of the Montana Legislature was when it enacted §13-35-210. ER-22. The district court explained the "motivation" behind the bill and identified its "genesis," including the name of the bill when it was first introduced on the floor the Montana House of Representatives. ER-21–22. But none of that background information identifies the "full range of activities the law[] cover[s]" or the "constitutional … applications" of the law. *NetChoice*, 144 S. Ct. at 2397-98. Based on the law's legislative history alone, the district court concluded that the only legitimate sweep of the multiple registration prohibition and prior registration disclosure requirement "is the prohibition of double voting." ER-22. But the prohibition on double voting appears in a different statutory provision that Plaintiffs did not challenge. *See* Mont. Code §13-35-210(4).

The district court's failure to identify the legitimate sweep of the challenged provision is grounds for reversal. Without knowing what constitutional applications the law has, the court could not evaluate whether there exists a "lopsided ratio" between those constitutional applications and unconstitutional applications. *Hansen*, 599 U.S. at 770; *see also Tucson*, 91 F.4th at 1328 ("By failing to inquire into the [challenged law's] numerous lawful applications, the district court was unable to analyze whether the

number of unconstitutional applications was 'substantially disproportionate…..'"). And "[i]n the absence of a lopsided ratio," the court must evaluate unconstitutional applications on an as-applied basis. *Hansen*, 599 U.S. at 770.

The "valid reach" of §13-35-210(5) is extensive. *Id.* at 782. There is no constitutional right to maintain more than one voter registration—thus, any prohibition on purposefully maintaining more than one voter registration will be lawful in nearly all applications. Likewise, any requirement that a voter provide prior registration information will be lawful in nearly all applications, just as it is lawful to require voters to provide other information on their voter application forms.

In response, Plaintiffs argue the opposite—that because §13-35-210(5) "necessarily implicates expressive conduct protected by the First Amendment," there are seemingly *no* constitutional applications of the challenged law. Resp. Br. at 26. But no case supports their absolutist position that any regulation of the voter registration process implicates the First Amendment and is unconstitutional in all its applications. Nor are regulations of voter registration processes only legitimate to the extent that they prohibit double voting, as the district court held. ER-22.

Plaintiffs' remaining arguments misconstrue Appellants' briefing and ignore the prevailing overbreadth framework. Plaintiffs first attempt to shift the burden to the Appellants to identify "nonexpressive conduct" covered by the statute. Resp. Br. at 25-26. But Plaintiffs carry the "burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." *Hicks*, 539 U.S. at 122.

Plaintiffs next cite *Hansen* and assert that a statute's plainly legitimate sweep can extend only to "nonexpressive conduct." Resp. Br. at 25. But in *Hansen*, the Court acknowledged that the challenged law may, in fact, reach "some protected speech." 599 U.S. at 784. The question is whether the applications of the law are *constitutional*—not whether it reaches expressive conduct. *See NetChoice*, 144 S. Ct. at 2397; *Williams*, 553 U.S. at 292-93. Plaintiffs' interpretation would mean that any law regulating expressive speech or conduct has no legitimate sweep and could never withstand an overbreadth challenge. That makes no sense, which is why this Court has upheld numerous laws that implicate expressive speech or conduct. *See, e.g.*, *Smith v. Helzer*, 95 F.4th 1207, 1214, 1218 (9th Cir. 2024); *Vlasak v. Sup. Ct. of Calif.*, 329 F.3d 683, 689 (9th Cir. 2003); *Gospel Missions of Am. v. City of Los Angeles*, 419 F.3d 1042, 1049-50 (9th Cir. 2005); *Klein v. San Diego Cnty.*, 463 F.3d 1029, 1038 (9th Cir. 2006).

The district court failed to analyze the constitutional applications of §13-35-210(5)'s multiple registration prohibition and prior registration disclosure requirements. And without knowing the constitutional applications of those provisions, the district court could not evaluate whether the number of "unconstitutional applications" is "substantially disproportionate to the statute's lawful sweep." *Hansen*, 599 U.S. at 770.

C. Plaintiffs have not shown that the number of unconstitutional applications is substantial.

After the district court failed to identify the conduct covered by §13-35-210(5), and failed to consider the statute's plainly legitimate sweep, the district court then failed

to properly consider whether the statute's unconstitutional applications are "real and substantial." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see also* App. Br. at 19-25. Instead, the district court concluded that Appellants "fail[ed] to draw a sufficient connection between maintaining multiple voter registrations and prohibiting double voting." ER-28. But the question is not whether the law is justified. The question is whether Plaintiffs have shown a substantial number of unconstitutional applications of the law. *Broadrick*, 413 U.S. at 615; *see also Hansen*, 599 U.S. at 770.

Tuscon v. City of Seattle, which Plaintiffs do not address in response, is instructive. There, the plaintiffs challenged Seattle's Municipal Code, which criminalizes writing, painting, or drawing "on any public or private building." 91 F.4th at 1322. The district court concluded that the statute was overbroad because the City's goals could be accomplished in a different manner. *Id.* This Court reversed, explaining that the district court "conflat[ed]" the overbreadth question with the narrow-tailoring question. *Id.*

Likewise, here, the district court concluded that the State of Montana's goal of preventing double voting could be accomplished through different means than prohibiting the maintenance of multiple voter registration. ER-28. And the district court said nothing of the prior registration disclosure requirement except to conclude that it "tend[s] to burden protected political activity." ER-29. As in *Tucson*, the district court here conflated the question of overbreadth with the question of whether the law is narrowly tailored. The district court's reliance on *Redondo Beach* confirms this. App. Br. at 19-20. The district court here noted that in *Redondo Beach*, the law "suppress[ed] a

great quantity of speech that does not cause the evils that it seeks to eliminate." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 950 (9th Cir. 2011). But that quoted passage is in context of *Redondo Beach's* discussion of whether the challenged law in that case was narrowly tailored. *Id.* at 949. That separate inquiry has no place in determining whether there exist a substantial number of unconstitutional applications of §13-35-210(5).

One of the many reasons facial challenges are disfavored is because of the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609 (2004) (cleaned up). Plaintiffs' arguments about the number of unlawful applications of §13-35-210(5) rest on speculative misinterpretations of the challenged law. They assert that a person who registers 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." Resp. Br. at 27. That ignores the statute's *mens rea* requirement of "purposefully," which Montana law defines as having the "conscious object to engage in that conduct or to cause that result." Mont. Code §45-2-101(65); *see also* App. Br. at 13-14. Whether a law is unconstitutionally overbroad cannot depend on Plaintiffs' speculative interpretations of the statute. *Wash. State Grange*, 552 U.S. at 455-56.

Plaintiffs next assert that there "are myriad circumstances" where a person might maintain multiple voter registrations, but their only support is *Common Cause v. Lawson*. As Appellants explained, *Common Cause* does not establish that prohibitions on multiple registrations have unconstitutional applications. App. Br. at 20-21; *see also* RITE Am.

Br. at 10-14. *Common Cause* concerned the National Voter Registration Act, and there was no constitutional question at issue. *Common Cause* lists scenarios where an individual may want to maintain more than one voter registration. *Common Cause Ind. v. Lawson*, 937 F.3d 944, 960 (7th Cir. 2019). But that there may be reasons a voter wants to maintain multiple registrations is irrelevant to whether a law prohibiting them from doing so is unconstitutional in substantially all of its applications. The district court's reliance on *Common Cause* is misplaced. And Plaintiffs' continued reliance on it shows they have no better support.

Plaintiffs try to salvage their *Common Cause* argument by asserting that the relevant question is whether "the court has identified *realistic* examples showing the types of protected speech that fall within the plain language of the law." Resp. Br. at 29. But as *Hansen* confirms, that's not the question—the question is whether realistic *unconstitutional* applications exist, and whether those unconstitutional applications substantially outweigh the lawful ones. 599 U.S. at 770. *Common Cause* might identify realistic examples of where people desire to maintain more than one voter registration in case their "personal circumstances change before Election Day." 937 F.3d at 960. But it does not conclude that prohibiting that conduct in any of those identified circumstances is an "unconstitutional application." *Hansen*, 599 U.S. at 770. And neither did the district court below. The district court simply compounded hypotheticals, noting that the theoretical circumstances from *Common Cause* "could apply" to §13-35-210(5). ER-27. The overbreadth doctrine requires more. It requires the district court to find that these

unconstitutional applications exist as an "actual fact" and substantially outweigh the plainly legitimate sweep of the law. *Hicks*, 539 U.S. at 122; *Hansen*, 599 U.S. at 770.

Plaintiffs rely on *Redondo Beach* for the proposition that the "risk" of chilling speech is sufficient to show overbreadth, but that language is in context of facial challenges generally, not overbreadth challenges specifically. 657 F.3d at 944. Indeed, the antecedent language to Plaintiffs' quoted provision explains that a successful facial challenge must show that the statute "imposes a direct restriction on protected First Amendment activity," the "means chosen to accomplish the State's objectives are too imprecise," and in all "applications the statute creates an unnecessary risk of chilling free speech." *Id.* For purposes of an overbreadth challenge, Plaintiffs must show that the "ratio of unlawful-to-lawful applications" is "lopsided enough to justify the 'strong medicine' of facial invalidation." *Hansen*, 599 U.S. at 784 (quoting *Broadrick*, 413 U.S. at 613). Plaintiffs have not met this standard.

Finally, Plaintiffs again try to shift the burden to Appellants to identify the plainly legitimate applications of the challenged law. Resp. Br. at 30. But it is Plaintiffs' burden to establish that the unconstitutional applications substantially outweigh the constitutional applications. *Hicks*, 539 U.S. at 122. As explained above, there is no constitutional right to maintain multiple voter registrations, so nearly all applications of §13-35-210(5) are lawful applications. To the extent there are questionable applications at the margins based on specific scenarios, Montana courts can handle these as "they usually do—case-by-case." *Hansen*, 599 U.S. at 770.

III. PLAINTIFFS ARE NOT LIKELY PREVAIL ON THEIR VAGUENESS CLAIM.

Plaintiffs next argue that this Court can affirm the preliminary injunction on vagueness grounds and that Appellants have forfeited any response to this argument. Resp. Br. at 34. But the district court's failure to apply the correct preliminary injunction standard and to engage in the proper overbreadth analysis each independently mandate reversal. *Enforma Nat. Prods.*, 362 F.3d at 1211-12 (applying the wrong preliminary injunction standard requires reversal); *Tucson*, 91 F.4th at 1329 (applying the wrong overbreadth standard "is sufficient to reverse the preliminary injunction"). To the extent this Court can salvage the district court's injunction on alternative grounds that the district court expressly declined to address, Plaintiffs' vagueness claim is insufficient to sustain the injunction, Appellants have not forfeited any arguments, and the circumstances of this case still warrant reversal.

Like an overbreadth claim, Plaintiffs bear a "heavy burden" showing that a law is unconstitutionally vague. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (2000); *see also Or. Ass'n of Hospitals & Health Sys. v. Oregon*, 2024 WL 2209496, at *10 (D. Or. May 16, 2024). The law must lack "any ascertainable standard for inclusion and exclusion," *Smith v. Goguen*, 415 U.S. 566, 578 (1974), and involve "hopeless indeterminacy" and "grave uncertainty," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213-14 (2018). "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority

of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000). Close cases do not render statutes unconstitutionally vague. *Williams*, 553 U.S. at 305.

Plaintiffs first argue that the law is vague as to the conduct proscribed. Resp. Br. at 35. But they fail to address Appellant's arguments in the Opening Brief, at 13-14, about the terms "purposefully" or "remain." And they fail to grapple with Montana's statutory definition of the term "purposefully." Mont. Code. §45-2-101(65); *see also State v. Starr*, 664 P.2d 893, 898 (Mont. 1983). Instead, they lob a single hypothetical, asking whether someone who is "fully aware" that they are also registered in a different jurisdiction violates the law. Resp. Br. at 37-38. But Montana law already answers that question. Montana distinguishes "knowingly" from "purposefully," defining "knowingly" as "aware[ness]" that the "circumstance[s] exist[]." Mont. Code. §45-2-101(35); *see also Starr*, 664 P.2d at 898. If a person is aware that they are registered in a different jurisdiction, they may "knowingly" engage in the conduct proscribed by §13-35-210(5), but they do not "purposefully" engage in that conduct.

Plaintiffs next argue that the law is vague as to who is covered. Again, Plaintiffs conjure a hypothetical about a person who registers to vote in Montana, moves away and registers in California, and then moves back to Montana prior to the election. Resp. Br. at 39. Again, Montana law answers that question. First, Montana Code §1-2-109 states that "[n]o law contained in any of the statutes of Montana is retroactive unless expressly so declared." And second, the "purposefully" *mens rea* requirement in §13-35-210(5) means that after the law's enactment, a person must have the conscious object

to remain registered in both Montana and the other jurisdiction. If this individual knows or is aware that she is registered in multiple jurisdictions, she has not necessarily violated the law. *See* Mont. Code. §45-2-101(35). If she maintains both her California and Montana registrations because she wants to remain registered in both jurisdictions—in other words, she has the conscious object to be registered in both Montana and California at the same time—she has violated the law. *Id.* §13-35-210(5).

Plaintiffs also argue that the statute is vague as to whether it is retroactive. Resp. Br. at 39-40. But Montana law says that statutes cannot be retroactive. Mont. Code §1-2-109. And §13-35-210(5)'s *mens rea* requirement helps provide the guidance as to when the law applies—when the person has the conscious object to remain registered in multiple jurisdictions. While certain factual scenarios may arise that test the outer bounds of the law, the Supreme Court has made clear that "'statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall with their language.'" *Parker v. Levy*, 417 U.S. 733, 757 (1974).

Finally, Plaintiffs assert that the statute is vague as to whether "purposefully" extends to the disclosure requirement. Resp. Br. at 40. Again, Montana law answers this: if the statute includes a *mens rea* requirement for the "offense as a whole," that *mens rea* requirement "applies to each element." Mont. Code §45-2-103(4). Here, Plaintiffs can violate §13-35-210(5) in two ways, and since the statute only establishes a single *mens rea* requirement, that *mens rea* requirement applies throughout the provision. *Id.*

Appellants do not forfeit arguments raised in the answering brief if they address those arguments on reply. *See, e.g.*, *Maciel v. Cate*, 731 F.3d 928, 932 n.4 (9th Cir. 2013); *Sabra v. Maricopa Cnty. Comm. College Dist.*, 44 F.4th 867, 881-82 (9th Cir. 2022). Plaintiffs' cited cases say nothing to the contrary. In any event, the vagueness claim was not the basis for the preliminary injunction, and thus not the basis for this appeal. The district court made clear that it was not deciding whether Plaintiffs below were likely to succeed on their vagueness claim. ER-20. There would be no reason for the Appellants to appeal the district court's decision *not* to address one of Plaintiffs' arguments.

The district court's decision itself cautions against this Court evaluating the preliminary injunction on alternative grounds. Below, the district court explained that "[f]urther development of the factual record would be required … to determine Plaintiffs' vagueness claim," and as a result, concluded the court did not need to "decide whether Plaintiffs have demonstrated likely success on the merits." ER-20. Plaintiffs have made clear that they intend to take discovery, and they've noticed several depositions and served discovery requests on the State of Montana. Plaintiffs' discovery position below cannot be squared with its argument here that this Court can affirm the extraordinary relief of a preliminary injunction on grounds the district court expressly declined to reach because of factual issues.

IV. THE REMAINING PRELIMINARY INJUNCTION FACTORS WEIGH IN APPELLANTS' FAVOR.

Irreparable Harm. The district court concluded that §13-35-210(5) "likely" does not "substantively change Montana voting registration procedure." ER-16. That conclusion precludes a finding of irreparable harm. Plaintiffs' remaining arguments about irreparable harm depend entirely on a finding that the challenged law is unconstitutional. But because the law survives constitutional scrutiny, Plaintiffs will suffer no irreparable harm absent an injunction.

Balance of the Equities. The district court's conclusion that the challenged law does not "substantively change Montana voting registration procedure," ER-16, is inconsistent with its conclusion that Plaintiffs face substantial hardships, ER-33. Plaintiffs argue that they presented "unrefuted testimony" that §13-35-210(5) chilled their organizational efforts, discouraged their members from registering to vote, and forced their organizations to divert resources. But the cited material claims only speculative hardships. *All. for the Wild Rockies*, 632 F.3d at 1138 (rejecting "speculative" hardships). They claim that some members "might not know where they plan to vote" and "might need to maintain multiple voter registrations." SER-37; SER-46. They claim that the organizations "will need to consider developing a program to educate voters on how to cancel prior registration" and "figure out how to best educate voters." SER-38; SER-47. In addition, they claim that they will now have to ask follow-up questions to voters they are already engaging with. SER-38-39 ("We will now need to ask … not only if they are

registered to vote, but also whether they have any previous addresses, whether they registered to vote at these previous addresses, and whether they might still be registered to vote there."); SER-47 (similar).[1] None of these statements speculating about future hardships establish that Plaintiffs' activities have been "chilled." ER-45; *see All. for the Wild Rockies*, 632 F.3d at 1138.

Purcell. 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). When the district court issued the injunction, the parties were 41 days from the primary election, and only six months from the general election. And the district court held that this case fell squarely within cases applying *Purcell v. Gonzalez*, 549 U.S. 1 (2006). It was therefore inappropriate for the district court to alter "the rules of the road" so close to the elections. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays).

CONCLUSION

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

[1] Plaintiffs also ignore that the statute criminalizes only those who "purposefully" maintain a voter registration. Ignorance and even awareness are not criminalized.

DATED this 18th of July, 2024

Respectfully submitted,

AUSTIN KNUDSEN
Attorney General of Montana

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

Counsel for State Appellants

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

Counsel for Intervenor-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Kathleen S. Lane hereby certifies that according to the word count feature of the word processing program used to prepare this brief, this brief contains 6,689 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.

/s/ Kathleen S. Lane
Kathleen S. Lane

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief on July 18, 2024, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

/s/ Kathleen S. Lane
Kathleen S. Lane