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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, HELENA DIVISION

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

Plaintiffs,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State; AUSTIN KNUDSEN, in his official capacity as Montana Commissioner of Political Practices,

Defendants.

Cause No. 6:23-cv-070-BMM

DEFENDANTS' RESPONSE IN OPPOSITION TO PLANTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Montana passed House Bill ("HB") 892 to further its undisputed and compelling interest in preserving the integrity of Montana's elections. HB 892 codifies Montana's established practice aimed at preventing double voting. And, Montana's established practice follows the established practice of nearly every other state in the Ninth Circuit.

Plaintiffs ignore Montana's common-sense, long-standing practice to invent a right to maintain multiple residences and multiple voter registrations. Plaintiffs ignore HB 892's plain text and decades of established precedent defining criminal mental states in a quest for vagueness. Plaintiffs likewise ignore that, to the extent they register voters, they have done so under a functionally identical regime for years.

This Court should reject Plaintiffs' attempts to make Montana's elections less secure.

BACKGROUND

The Montana Governor signed HB 892 into law on May 22, 2023, following its passage by the Legislature with bipartisan support. HB 892 amends Mont. Code Ann. § 13-35-210 to rearticulate the prohibition of double voting with greater precision (§ 13-35-210(2), (4), (7)), to generally prohibit an elector from

purposefully remaining registered to vote in more than one jurisdiction (§ 13-35-210(5)),[1] and to provide a criminal penalty for violations of its provisions (§ 13-35-210 (6)). (*See* HB 892, attached as **Exhibit A**.) HB 892 also contains a severability clause and an immediate effective date. (*Id.* at §§ 3, 4.)

As relevant here, Plaintiffs only challenge HB 892's multiple registration prohibition,[2] which states in full:

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

(*Id.* at § 5.) This provision codifies Montana's longstanding practice of requiring voter registration applicants ("registrants") to provide previous voter registration information. (Decl. Regina Plettenberg, ¶ 6 (Nov. 20, 2023), attached as **Exhibit B**; Decl. Connor Fitzpatrick, ¶ 5 (Nov. 21, 2023), attached as **Exhibit C**.) Indeed, Montana's voter registration application forms (as provided for in Mont. Code Ann. § 13-2-110) have required registrants to provide prior voter registration information,

[1] Montana is not alone in prohibiting voters from remaining registered in more than one jurisdiction. *See*, *e.g.*, LSA-R.S. 18:101 ("A citizen of this state shall not be or remain registered or vote in more than one place of residence at any one time."); Ind. Code. § 3-14-2-4 ("A person who recklessly registers or offers to register to vote more than once commits a Class A misdemeanor."); Wis. Stat. Ann. § 12.13 ("(c) Registers as an elector in more than one place for the same election….").

[2] *See* Doc. 12 at 28.

if applicable, for decades. (*See* Montana Voter Registration from 1968, attached as **Exhibit D**; Montana Voter Registration from 1995, attached as **Exhibit E**; Montana Voter Registration from 1997, attached as **Exhibit F**.) It appears to be the rule rather than the exception for states within the Ninth Circuit to request prior voter registration information. (*See* California Voter Registration Quick Guide, Section 6, attached as **Exhibit G**; Arizona Voter Registration Form, Section 17, attached as **Exhibit H**; Nevada Voter Registration Application, Section 14, attached as **Exhibit I**; Washington State Voter Registration Form, Section 5, attached as **Exhibit J**; Alaska Voter Registration Application, Section 14, attached as **Exhibit K**; Hawaii Voter Registration Application, Section 7, attached as **Exhibit L**; and Idaho Voter Registration Form, Section 6, attached as **Exhibit M**.) Montana's Voter Registration Application follows in similar form. (*See* Montana Voter Registration Application, attached as **Exhibit N**.)

Montana law further requires registrants to establish residency. *See* Mont. Code Ann. § 13-1-112 ("For registration, voting, or seeking election to the legislature, the residence of an individual must be determined…"). The registrant must provide their address of residence to the election administrator. Mont. Code Ann. § 13-2-108. And regardless of the circumstances, whether it be a person with multiple homes or a student relocating to Montana only to attend college, by law, that person may only have one residence for purposes of voting. Mont. Code Ann. §

1-1-215(2). It therefore follows that the State must know where the registrant resides at that time and, if applicable, where they previously resided in order to ensure voter eligibility and foreclose the possibility that the registrant has the ability to improperly vote in more than one jurisdiction.

According to the former Elections Director, there have been numerous "past instances in Montana where voters have ostensibly voted in the same election twice." (Decl. Dana Corson, ¶ 7 (Dec. 1, 2023), attached as **Exhibit O**. In fact, the Montana Secretary of State's Office ("SOS") obtained a list of individual voters who appear to have cast a ballot in two different states for the same election during the 2020 Federal election. (*Id*. at ¶ 8; MT Voters Who Voted in Two Different States in the 2020 General Election, filed under seal as **Exhibit P**.) The SOS confirmed the accuracy of the list and provided it to the Federal Bureau of Investigation. (*Id*. at ¶¶ 10-11) Even one instance of double voting is significant, as close counts in elections do occur—"it is not uncommon to see a race in an election decided by one vote, or even result in a tie." (*Id*. at ¶ 13.) Such a result occurred just this Wednesday following the City Council election in Missoula, Montana.[3]

[3] *See* Bret Anne Serbin, *Missoula's Ward 6 recount results in tie; up to city council to pick winner*, (Nov. 27, 2023), available at: https://tinyurl.com/2p94s9ah (reporting the Missoula City Council's confirmation that the race, even after a recount, resulted in a tie).

Ultimately, it is clear that the occurrence, significance, and impact of double voting are not merely imagined as Plaintiffs seem to suggest.

PRELIMINARY INJUNCTION STANDARD

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Fraihat v. U.S. Immigration & Customs Enf't,* 16 F.4th 613, 635 (9th Cir. 2021) (quotations omitted). "As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018). "Rather, a court must also consider whether the movant has shown 'that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Id.* at 1944. *See also Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

To be entitled to injunctive relief, Plaintiffs must show each of the following: (1) a likelihood of success on the merits; (2) that irreparable harm is likely, not just possible, if the injunction is not granted; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). As is the case here, when "the government is a party, these last two factors merge."

Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nkhen v. Holder*, 556 U.S. 418, 436 (2009)).

Even under the sliding scale test from *Alliance for The Wild Rockies*, Plaintiffs still must show a likelihood of irreparable injury and a hardship balance that tips sharply towards them. *Angelotti Chiropractic v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015). Raising a serious constitutional question is not enough to tip the hardship scales and enjoin a duly enacted law. *See Paramount Land Co. Ltd. P'ship v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1012 (9th Cir. 2007); *see also Clear Channel Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 816 (9th Cir. 2003) (vacating a preliminary injunction where the plaintiffs were unlikely to succeed on the merits even though their First Amendment claims did raise the possibility of irreparable injury). This means there must be at least a reasonable probability of success on the merits. *See SEC v. Banc de Binary, Ltd.*, 964 F. Supp. 2d 1229, 1233 (D. Nev. 2013) ("The [*Alliance for the Wild Rockies*] court must have meant something like 'reasonable probability,' which appears to be the most lenient position on the sliding scale that can satisfy the requirement that success on the merits be 'likely.' If success on the merits is merely possible, but not at least reasonably probable, no set of circumstances with respect to the other prongs will justify preliminary relief.").

Next, even if a plaintiff establishes that a preliminary injunction should be issued, the injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). "Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987); *cf. E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) ("all injunctions—even ones involving national policies—must be 'narrowly tailored to remedy the specific harm shown'"). Ultimately, "[t]he purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (citation and quotation omitted). If a preliminary injunction does not preserve the status quo, its issuance fails to fulfill its very purpose.

ARGUMENT

Plaintiffs' Motion fails because Plaintiffs cannot meet any, much less *all*, of the four elements necessary to obtain a preliminary injunction. Plaintiffs cannot show a likelihood of success on the merits, a likelihood of suffering irreparable harm, that the balance of the equities tips in their favor, or that a preliminary injunction is in the public interest. Because the test is conjunctive, any one of these deficiencies is sufficient to defeat Plaintiffs' Motion.

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Satisfaction of a likelihood of success on the merits is "the irreducible minimum requirement to granting any equitable and extraordinary relief." *City & Cnty. of S.F. v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 789 (9th Cir. 2019) (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.* at 790. Here, Plaintiffs cannot satisfy their burden to demonstrate that the "strong medicine" of invalidating HB 892's challenged provision is warranted. *United States v. Hansen*, 599 U.S. 762, 770, 143 S.Ct 1932, 1939 (2023).

A. PLAINTIFFS FAIL TO DEMONSTRATE STANDING BECAUSE THEY CANNOT SHOW A CONCRETE INJURY.

Article III of the United States Constitution "limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). This limitation, known as the standing doctrine, requires that a plaintiff have a "personal stake in the outcome of the controversy . . . to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 442 U.S. 490, 490-99 (1975). "[T]he party invoking federal jurisdiction[] bears the burden of establishing" standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To establish standing, the plaintiff must show "(1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to

be redressed by the requested relief." *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1646 (2022).

The alleged injury at the core of Plaintiffs' facial overbreadth and vagueness claims is HB 892's purported chilling effect on their First Amendment rights. However, as the Supreme Court's cases explain, "the 'chilling effect' associated with a potentially unconstitutional law being 'on the books' is insufficient to 'justify federal intervention' in a pre-enforcement suit." *Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021) (quotation marks and citation omitted). Instead, the Supreme Court "has always required proof of a more concrete injury and compliance with traditional rules of equitable practice." *Id.* (citations omitted). "The Court has consistently applied these requirements whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right." *Id.*

Plaintiffs here make no allegation that HB 892's multiple registration prohibition or requirement that registrants provide prior voter registration information have actually impacted their ability to conduct voter outreach since HB 892 has been in effect. Nor do Plaintiffs provide evidence of any chilled speech or concrete injury resulting from Montana's decades-long requirement that registrants provide previous registration information, whether before or after HB 892. (*Contra* Ex. B at ¶ 8, Ex. C at ¶ 12; Ex. D-F.) Indeed, despite the SOS having

processed 17,341 voter registrations since HB 892 went into effect (Ex. O at ¶ 15), Plaintiffs cite no more than concerns about hypothetical problems. Moreover, at least 54 elections have occurred in Montana during that same time period, yet the SOS "has not received a single complaint from a voter related to HB 892." (*Id.* at ¶¶ 16-17.) This significantly undercuts Plaintiffs' claim that HB 892 has somehow prevented or otherwise affected their ability to "help[] register young voters." (Doc. 12 at 6.)

Plaintiffs further complain of their purported risk of criminal prosecution for aiding and abetting a violation of an election law solely based on speculative hypotheticals. (Doc. 12 at 7). Under such a scenario, a registrant would have to *purposefully* omit prior voter registration information from the application, not omit because of "inadvertent[] neglect[] or "forgetting." (Ex. A at § 5; Doc. 12 at 17.) "Purposely" is a specifically defined mental state in Montana Law. Mont. Code. Ann § 45-2-101(65). "Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove." *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 2117 (2023). A purposeful action is not neglect or forgetfulness—terms that Plaintiffs repeatedly conflate.

Furthermore, Plaintiffs neglect to fully articulate the "aiding and abetting" provision of the election code under which they supposedly fear prosecution. (Doc. 12 at 7, 25.) "A person who is legally accountable, as provided in 45-2-302, for the

conduct of another which violates a provision of the election laws of this state is also guilty of a violation of that provision." Mont. Code. Ann § 13-35-105. Plaintiffs therefore must have the "mental state described by the statute defining the offense" and "cause[] another to perform the conduct" to be legally accountable. Mont. Code. Ann § 45-2-302. This means that Plaintiffs must *purposefully*, not negligently or otherwise, cause a registrant to remain multiple registered or to omit prior registration information from the registration application. HB 892 does nothing to put Plaintiffs at additional risk of aiding and abetting.

In sum, Plaintiffs have failed to show any concrete injury-in-fact resulting from HB 892. Plaintiffs characterize HB 892 as a dramatic change to Montana's election rules, all the while ignoring that prior voter registration information has been required for decades. Plaintiffs presumably would have been aware of this standard, having previously assisted so many registrants complete applications. Plaintiffs' strained reliance on hypothetical scenarios resulting in criminal liability only demonstrates an ignorance of basic concepts of criminal law. The chilling effect of which Plaintiffs complain is woefully insufficient to justify a preliminary injunction in this case.

B. HB 892 Is Valid under the Supreme Court's First Amendment Overbreadth Analysis.

"'[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated,

evidenced, or carried out by means of language, either spoken, written, or printed." *Hansen*, 143 S. Ct. at 1947 (brackets in original) (quoting *Giboney v. Empire Storage & Ice Co., 336* U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)). "[W]here conduct and not merely speech is involved, [] the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982).

1. Proper Construction of HB 892.

"The overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198 (2003) (quoting *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 14, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988)). "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1839 (2008); *see also Hansen*, 143 S. Ct. at 1940 ("To judge whether a statute is overbroad, we must first determine what it covers."). "The plain language of a statute is the starting point for its interpretation." *Wilshire Westwood Assocs. v. Atl Richfield Corp.*, 881 F.2d 801, 803 (9th Cir. 1989) (citing *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982)).

Here, HB 892's plain language simply codifies the longstanding requirement for registrants to supply previous registration information (*See* Ex. B-F.), explicitly bans the acts of double voting and purposefully remaining registered to vote in more than one jurisdiction, and prescribes a criminal punishment should someone be convicted of violating its provisions. (Ex. A at §§ 5-6.) The Legislature specifically ascribed the *mens rea* requirement of "purposefully" to that action.[4]

Under Title 45's General Principles of Liability, "a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result." Mont. Code. Ann § 45-2-101(65). Thus, to violate HB 892's multiple registration prohibition, it must be a person's conscious object to remain registered to vote in more than one jurisdiction.[5] The intentional use of a mental state narrows, rather than broadens, the category of individuals who may run afoul of the law. Moreover, Section 6 specifically provides "on conviction"—meaning that an investigation by

[4] This *mens rea* applies to both sentences in Section 5 of HB 892, despite "purposefully" being stated only in the first sentence. *See* Mont. Code Ann. § 45-2-103(4) ("If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements of the offense, the prescribed mental state applies to each element.").

[5] For example, the State would have to prove that a person omitted prior registration information in order to remain registered in multiple jurisdictions.

law enforcement and a prosecution must precede any punishment. (Ex. A at § 6.)[6] A registrant easily satisfies the law's requirement by simply providing previous registration information on the Montana Voter Registration Application—the SOS takes care of the rest. (Ex. N, Section 9; Ex. O at ¶¶ 5-6.)

HB 892's changes to Mont. Code. Ann § 13-35-210 provide clarity to both voters and election officials without modifying the long-established process election officials employ to process voter registration submissions, do not alter the acceptance of the federally issued voter application forms, and do not conflict with the law independent of making it illegal to both double vote and purposefully remain registered in more than one jurisdiction.

2. HB 892's Alleged Overbreadth is Insubstantial in Relation to Its Plainly Legitimate Sweep.

It is Plaintiffs' burden to show that HB 892 lacks "a plainly legitimate sweep," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190 (2008), or that a "substantial number" of its applications are unconstitutional, "judged in relation to [its] plainly legitimate sweep." *Ferber*, 458 U.S. at 770-71.

> [T]he concept of substantial overbreadth is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can

[6] The State's burden of proof is beyond a reasonable doubt. Mont. Code Ann. § 26-1-403(2). *See also* Mont. Code Ann. § 45-2-104 (precluding application of absolute liability to HB 892 given its stated penalties and the lack of legislative intent to impose absolute liability).

> conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge…In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-801 (1984). "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine." *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973). "It has been employed by the Court sparingly and only as a last resort." *Id.* Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Id.*

Montana, like every other state, possesses a "'broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Clingman v. Beaver*, 544 U.S. 581, 586, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005) (citations omitted). *See also* Mont. Const. art. IV, § 3 ("The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process."). States may validly impose certain qualifications on and regulate voter registration, despite the fundamental nature of the right to vote. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50, 3 L. Ed. 2d 1072, 79 S. Ct.

985 (1959) (*superseded by statute as recognized by Morse v. Republican Party*, 517 U.S. 186, 217 n.30, 116 S. Ct. 1186, 1205 (1996)).[7]

"One strong and entirely legitimate state interest is the prevention of fraud." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021). "Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight." *Id.* "Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Id.*

Here, HB 892's plainly legitimate sweep is quite broad—it not only prohibits fraud in the form of double voting,[8] but it also prohibits multiple registrations as a prophylactic measure to *prevent* double voting and to uphold the public's confidence in fair elections. These additional interests are equally legitimate. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021) ("And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders."). Rather than meaningfully address

[7] Such regulations have been upheld in numerous contexts. *See*, *e.g.*, *Marston v. Lewis*, 410 U.S. 679, 35 L. Ed. 2d 627, 93 S. Ct. 1211 (1973) (residency); *Oregon v. Mitchell*, 400 U.S. 112, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970) (age minimum); and *Ball v. James*, 451 U.S. 355, 68 L. Ed. 2d 150, 101 S. Ct. 1811 (1981) (interested voter status).

[8] Plaintiffs wisely do not dispute that HB 892's prohibition on double voting is legitimate. (Doc. 12 at 28, 31.)

these additional interests,[9] no less their legitimacy and significance, Plaintiffs instead argue that HB 892's multiple registration ban is overbroad based on imagined scenarios on the margins (*e.g.* when a voter might need "flexibility to ensure that they do not need to choose between a last-minute change of residence and their ability to vote"). (*Id.* at 29.) Even if this were an impermissible application of the law, it is nonetheless insufficient to render it susceptible to an overbreadth challenge. *Vincent,* 466 U.S. at 800-801. Indeed, whatever impermissible applications Plaintiffs imagine in their fanciful hypotheticals pale in comparison to HB 892's plainly legitimate sweep—preventing double voting and bolstering public confidence in fair elections by prohibiting multiple registrations. Plaintiffs' facial overbreadth claim therefore fails as a matter of law.

C. HB 892 Is Not Void for Vagueness.

Although "vagueness concerns are more acute when a law implicates First Amendment rights," *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001), "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 2755 (1989). Instead, "[t]he touchstone of a facial vagueness challenge in the First Amendment context [] is not whether some amount

[9] Plaintiffs do not and cannot (reasonably) claim that prohibiting multiple registrations would logically result in the prevention of double voting.

of legitimate speech will be chilled; it is whether a *substantial* amount of legitimate speech will be chilled." *Cal. Teachers Ass'n*, 271 F.3d at 1152 (emphasis in original). It follows that "uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.'" *Id.* at 1151 (quoting *Hill v. Colo.*, 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306.

Ultimately, facial invalidation of a statute is "strong medicine" that should be employed "sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). Thus, the party seeking facial invalidation, even in the First Amendment context, bears "a heavy burden" in advancing their claim. *Id*. *See also Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (observing that the United States Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines). *See also*, *Williams*, 553 U.S. at 305-06 ("[T]he Eleventh Circuit's error is more fundamental than merely its selection of unproblematic hypotheticals. Its basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. The problem that poses is addressed,

not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.").

HB 892 articulates a clear legislative objective. It amends Mont. Code. Ann § 13-35-210 to codify Montana's established practice of requiring a registrant to disclose, if applicable, their previous registration information on the registration form. (Ex. A at § 5.) And it prohibits a registrant from "purposefully remain[ing] registered to vote in more than one place in this state or another state. . ." (*Id*.) HB 892 also dovetails with existing Montana law tying a voter's registration to the voter's residence. Mont. Code Ann. § 13-2-208. Montana law clearly states "[t]here may be only one residence." Mont. Code. Ann. § 1-1-215(2). HB 892, therefore, aligns with existing law because having two residences is prohibited for purposes of voting.

Plaintiffs further ignore HB 892's plain language and basic principles of criminal law to feign uncertainty. For example, Plaintiffs assert that "a registrant could be imprisoned for inadvertently neglecting to complete that section of the application, or for forgetting about prior registrations and failing to include them." (Doc. 12 at 17). This hypothetical directly contradicts HB 892's explicit *mens rea* of "purposefully" (Ex. A at § 5), as well as Montana's distinct definitions of "purposely" and "negligently." *Contrast* Mont. Code Ann. § 45-2-101(65) *with* § 45-2-101(43). *See also* Mont. Code Ann § 45-2-102 (purposefully imposes a higher

burden of proof than negligently); *Borden v. United States*, 141 S. Ct. 1817, 1823 (2021) (purposefully sits atop the hierarchy of culpability). The absurdity of Plaintiffs' hypothetical is evident on its face.

Furthermore, despite Plaintiffs' contentions, HB 892 clearly states "what conduct is required, to whom the prohibition applies, and when it applies." (Doc. 12 at 13.) The required conduct is to refrain from registering to vote in Montana with the conscious object of remaining registered elsewhere and to provide prior registration information, as applicable. (Ex. A at § 5.) The "who" and "when" questions are also straightforward—the multiple registration prohibition applies to those who have sought or will seek to register to vote in Montana from HB 892's effective date going forward. (*Id.*) *See also* Mont. Code Ann. § 1-2-109 ("No law contained in any of the statutes of Montana is retroactive unless expressly so declared.") A person who was registered to vote in multiple jurisdictions prior to HB 892's effective date also violates the law by remaining multiple registered after the effective date, but only if remaining multiple registered is that person's conscious object. (Ex. A at § 5.) *See also* Mont. Code Ann. § 45-2-101(65).

Plaintiffs also ignore the obvious fact that a registrant easily complies with HB 892 by simply providing their prior registration information. The SOS takes care of the rest. (*See* Ex. N, Section 9 ("Previous Registration Information – will be used to provide cancellation information to former jurisdiction."); Ex. O at ¶¶ 5-6.) If the

registrant provides the information, there is no reasonable risk of violation. This process is similar to that of other states within the Ninth Circuit. *See, e.g.*, (Ex. K, Section 14 ("I am registered to vote in another state, cancel my registration in:"); Ex. L, Section 7 ("Are you registered to vote in another state? I hereby authorize cancellation of my previous registration at the following address, county, state, and zip code.")).

The "Applicant Affirmation" section also informs an applicant of their obligation to conform their conduct according to the law. (Ex. N ("I affirm under penalty of perjury that the information on this application is true. . . I understand that if I have given false information on this application, I may be subject to a fine or imprisonment, or both, under federal and/or state law.")). Other Ninth Circuit states similarly require such affirmation. (*See* Ex. G-M.)

Ultimately, HB 892 is straightforward and common-sense legislation. It simply requires a registrant to complete the Voter Registration Application accurately and honestly to the best of their knowledge, and the SOS will cancel any identified prior registration for them. A person of ordinary intelligence can easily understand what is required of them in this context. Plaintiffs also provide no coherent argument for how HB 892 might encourage arbitrary or discriminatory enforcement in the face of clear evidence to the contrary. *See* (Ex. O at ¶¶ 15-17; Ex.

B at ¶ 8; Ex. C at ¶ 12.) Plaintiffs therefore fail to show a likelihood of success on the merits of their claims, and the Court should deny Plaintiffs' Motion accordingly.

II. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

"Even where a plaintiff has demonstrated a likelihood of success on the merits of a First Amendment claim, he 'must also demonstrate that he is likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in his favor.'" *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011) (*overruled on other grounds by Bd. of Trs. of the Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019)) (quoting *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009)).

A. Plaintiffs Delay In Seeking Relief Undercuts Any Claim That They Will Suffer Irreparable Injury.

The Ninth Circuit has made clear that a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374 1377 (9th Cir. 1985); *See also Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief."); *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 55 F.Supp.2d 1070, 1090 (C.D.Cal. 1999) ("[Plaintiff]'s [five-month] delay in seeking

injunctive relief further demonstrates the lack of any irreparable harm."), *aff'd*, 202 F.3d 278 (9th Cir. 1999); *Valeo Intellectual Prop., Inc. v. Data Dep't Corp.,* 368 F.Supp.2d 1121, 1128 ("A three-month delay in seeking injunctive relief is inconsistent with [plaintiff]'s insistence that it faces irreparable harm.").

Here, Plaintiffs' substantial (and unexplained) delay before seeking preliminary injunctive relief significantly undermines their assertion of imminent irreparable injury. HB 892 became "effective upon passage and approval" on May 22, 2023 (Ex. A at § 4), yet Plaintiffs waited a total of 169 days to seek a preliminary injunction. (Doc. 12.) If just a three-month delay is inconsistent with a claim of irreparable harm, *Valeo*, 368 F.Supp.2d 1121, 1128, then a nearly six-month delay certainly is as well. Plaintiffs have thus failed to satisfy their burden to show irreparable harm in the absence of injunctive relief, and their Motion fails for this reason alone.

B. The Court Maintains the Status Quo Only By Denying Plaintiffs' Motion.

"The purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits." *Boardman,* 822 F.3d at 1024 (citation and quotation omitted). "'Status quo ante litem' refers to 'the last uncontested status which preceded the pending controversy.'" *Id.* (citation omitted). Here, HB 892 *is* the status quo.

Indeed, during the nearly six months Plaintiffs waited to seek a preliminary injunction, 17,341 people registered to vote, and at least 54 elections occurred in Montana. (Ex. O at ¶¶ 15-16.) Plaintiffs not only fail to explain their delay, but they also completely ignore the reality that Montana went through an entire election cycle under HB 892 without any evidence of resulting problems or confusion.[10] This is reason enough to deny Plaintiffs' Motion. *See Mont. Democratic Party v. Jacobsen*, 2022 Mont. LEXIS 459, *6-12 (staying the district court's preliminary injunction based on the finding that the contested election laws were in effect for elections in which 337,000 Montanans voted *before* the plaintiffs' sought a preliminary injunction).

Contrary to the underlying purpose of a preliminary injunction, enjoining HB 892 would actually *alter* the status quo by requiring county election administrators to cease existing practices. In particular, it would impede the ability of election officials to fulfill their duty to ensure the accuracy of voter rolls. (*See* Ex. C at ¶¶ 8-12.) This means that, if the Court were to enjoin HB 892, it is the State of Montana who will actually suffer irreparable harm by being prevented from implementing legislation directed at preventing fraud and maintaining public confidence in fair elections. *See Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (noting authority for

[10] HB 892's codification of longstanding practice perhaps explains the lack of such issues. (Ex. B at ¶¶ 6-10; Ex. C at ¶ 12; Ex. D-F.)

the proposition "that 'a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined'" (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)).

Plaintiffs ultimately cannot demonstrate any likelihood that they will suffer irreparable harm in the absence of a preliminary injunction under these circumstances. Plaintiffs' Motion fails for this reason as well.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR DEFENDANTS.

Plaintiffs must also establish that "the balance of equities tips in [their] favor." *Winter*, 555 at 20. The Court should also consider whether a preliminary injunction would be in the public interest if "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Boardman,* 822 F.3d at 1023. "In fact, 'courts … should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). An overbroad injunction can also implicate the public interest. *Id*. The analyses of the public interest and balance of equities merge when the government is a party. *Drakes Bay Oyster Co*, 747 F.3d at 1092.

Plaintiffs filed their Motion to block the enforcement of HB 892, but the very fact that HB 892 is a duly enacted statute weighs against granting an

injunction here. *Golden Gate Rest. Ass'n v. City of S.F.,* 512 F.3d 1112, 1126 (9th Cir. 2008) ("The public interest may be declared in the form of a statute."); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (A State "suffers a form of irreparable injury" any time it is prevented from "effectuating" laws "enacted by representatives of its people."). There can be no reasonable dispute that Montana has compelling interests in ensuring the integrity of elections and maintaining public confidence in the same. *Brnovich*, 141 S. Ct. at 2340.

To that end, HB 892 reflects the Legislature's intent to bolster its ban on double voting by prohibiting multiple registrations as a reasonable and effective preventative measure. Suffice it to say that these interests dramatically overshadow Plaintiffs' purported fears based on conjured hypotheticals. The balance of the equities and the public interest therefore weigh heavily against a preliminary injunction here, and Plaintiffs' Motion fails accordingly.

CONCLUSION

For the reasons set forth above, this Court should deny Plaintiffs' Motion for Preliminary Injunction.

DATED this 1st day of December, 2023.

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CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: December 1, 2023 /s/ *Michael Noonan*
Michael Noonan

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this Brief in Opposition of Plaintiff's Motion for Preliminary Injunction is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word, is 6,277 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

/s/ *Michael Noonan*