Raph Graybill
GRAYBILL LAW FIRM, PC
300 4th Street North
P.O. Box 3586
Great Falls, Montana 59403
rgraybill@silverstatelaw.net
ph. (406) 452-8566

Jonathan P. Hawley
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
jhawley@elias.law
ph. (206) 656-0179

Aria C. Branch*
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, D.C. 20001
abranch@elias.law
ph. (202) 968-4490

Attorneys for Plaintiffs

**Admitted pro hac vice*

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

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

Plaintiffs,

vs.

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

Defendants.

CV 23-70-H-BMM-KLD

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

While the Montana Legislature retains the authority to regulate elections, "such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action." *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (per curiam). Plaintiffs' dispute with HB892 is not its stated purpose of preventing double voting, but rather that its vague text threatens to reach well beyond that objective in violation of the First and Fourteenth Amendments. Because Plaintiffs are likely to succeed on the merits of their constitutional claims and the equities counsel in favor of relief, the motion for preliminary injunction should be granted.

ARGUMENT

I. Plaintiffs have standing to bring their claims.

Plaintiffs have demonstrated concrete injuries for purposes of Article III standing.

First, Plaintiffs have established "organizational standing by showing that" HB892 has "perceptibly impaired their ability to provide the services they were formed to provide." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (cleaned up). Plaintiffs have attested that HB892 frustrates their critical organizational objectives by impeding their abilities to foster broad engagement in the political process and register new voters. *See* Ex. 1 ¶¶ 4–9, 15, 18, 20, 22–24;

Ex. 2 ¶¶ 8, 12–13, 16, 22–24.[1] Moreover, HB892 will require them to retool their voter-registration and training materials, diverting their limited financial and personnel resources from voter-engagement activities and other efforts. *See* Ex. 1 ¶¶ 16–17, 21, 23–24; Ex. 2 ¶¶ 17–18, 23–24. Plaintiffs are also threatened by Montana's aiding-and-abetting statute, which poses a risk of criminal prosecution for their staff and volunteers. *See* Ex. 1 ¶¶ 19–20; Ex. 2 ¶¶ 20–21. Because "an organization has direct standing to sue where it establishes that the [challenged conduct] has frustrated its mission and caused it to divert resources in response to that frustration of purpose," *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021), Plaintiffs have organizational standing to challenge HB892.

Second, Plaintiffs have demonstrated associational standing on behalf of their members and constituents. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Both Plaintiffs have thousands of members and constituents throughout Montana, including those most likely to be affected by HB892—young and highly mobile voters. *See* Ex. 1 ¶¶ 10–12; Ex. 2 ¶¶ 4–5, 9–11. These members and constituents "would otherwise have standing to sue in their own right" if their ability to register to vote or cast a ballot were impeded or chilled by HB892, *Hunt*, 432 U.S. at 343, and even "a concrete *risk* of harm . . . is sufficient for injury in fact,"

[1] Plaintiffs' exhibits were attached to the declaration of Jonathan P. Hawley, filed concurrently with Plaintiffs' motion for preliminary injunction.

Covington v. Jefferson County, 358 F.3d 626, 638 (9th Cir. 2004) (emphasis added). Safeguarding the right to vote and promoting political engagement across their memberships are "germane to [Plaintiffs'] purpose[s]," *Hunt*, 432 U.S. at 343; *see also* Ex. 1 ¶¶ 4–9, 12–15; Ex. 2 ¶¶ 8–16, and the "participation of individual members" is not needed to secure relief, *Hunt*, 432 U.S. at 343—especially not for Plaintiffs' vagueness and overbreadth claims, which present primarily legal questions and for which Plaintiffs seek only declaratory and injunctive relief, *see Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001).

Defendants' standing arguments are without merit. *See* Defs.' Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs. Opp'n") at 8–11, ECF No. 30. Plaintiffs *have* "alleg[ed]" (and demonstrated through declaration testimony) that HB892 "ha[s] actually impacted their ability to conduct voter outreach." *Id.* at 9. Plaintiffs do not need to identify specific members (or Montanans generally) who have been injured by HB892; "it is sufficient that some inevitably will." *Fla. Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1254 (N.D. Fla. 2016); *see also Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Lastly, Defendants suggest that, because HB892 is *not* vague, Plaintiffs and their members could not be injured by it. *See* Defs. Opp'n 10–11. But setting aside that HB892 *is* unlawfully vague, *see infra* at 4–6, Plaintiffs' standing does not rise and fall with the merits of their suit. Regardless of whether the Court finds HB892 vague or overbroad, the law attaches

new restrictions[2] on Montana voters that will force Plaintiffs to retool their educational and outreach materials, diverting their limited resources and frustrating their objective of promoting political engagement—concrete injuries that are neither hypothetical nor speculative.

II. Plaintiffs are likely to succeed on the merits of their vagueness claim.

Defendants concede that vagueness concerns are heightened in the First Amendment context and do not dispute that HB892's severe criminal consequences require stringent vagueness analysis. Instead, Defendants and Proposed Intervenor-Defendants Republican National Committee and Montana Republican Party ("Proposed Intervenors") make various arguments to suggest that HB892 can survive the applicable legal standards, but none withstands scrutiny.

First, Defendants suggest that HB892's "clear legislative objective" cures any vagueness problem, Defs. Opp'n 19, but an articulated objective alone cannot save a statute where, as here, its *text* is unclear, *cf. Mertens v. Hewitt Assocs*., 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are [] inadequate to overcome the words of its text[.]"). Courts "are not opposed to interpreting vague or

[2] Throughout their opposition, Defendants suggest that HB892 simply "codifies Montana's established practice[s]." Defs. Opp'n 1, 13, 19, 24 n.10. But though voter applications already inquired about prior registrations, HB892 now (1) attaches novel criminal penalties to the prior-registration disclosure requirement and (2) introduces the multiple-registration prohibition. These are *new* restrictions, not mere codifications of any existing law or practice.

ambiguous statutory texts in light of evident purposes," *Reed v. Brex, Inc*., 8 F.4th 569, 577 (7th Cir. 2021), but an articulated objective is only a guide, not a panacea; courts must still analyze the clarity and precision of the actual statutory text.

Second, Defendants argue that HB892's inclusion of the term "purposefully" resolves any ambiguity or confusion. Defs. Opp'n 19–20. But this mens rea requirement does not resolve the multiple-registration prohibition's vagueness, *see* Br. in Supp. of Pls.' Mot. for Prelim. Inj. ("Mot.") 14–17, ECF No. 12, and it does not apply to the prior-registration disclosure requirement. While there is a rebuttable presumption that a mens rea requirement applies to all elements of the *same* offense, this does not apply to *separate* offenses—as Proposed Intervenors acknowledge. *See* Proposed Intervenor-Defs.' Proposed Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Proposed Intervenors Opp'n") 7, ECF No. 28 (recognizing that Ninth Circuit has "refus[ed] to apply scienter terms from one sentence in a statute to other statutory subsections" (citing *United States v. Collazo*, 984 F.3d 1308, 1329 (9th Cir. 2021))). Though contained in the same subsection, the multiple-registration prohibition and prior-registration disclosure requirement are separate offenses, and thus "purposefully" does not necessarily apply to the latter.

Third, Defendants claim that the multiple-registration prohibition is clear because it applies only to registrants who have "the conscious object of remaining registered elsewhere." Defs. Opp'n 20; *see also* Proposed Intervenors Opp'n 5–6, 8.

But this only begs the questions Plaintiffs posed in their motion, *see* Mot. 15–16; in particular, whether opting not to deregister elsewhere satisfies this "conscious object," whether affirmative deregistration is required, and whether the "purposefully" means rea requirement is related to HB892's stated purpose of prohibiting double voting. *None* of these questions is answered by the statutory text, leaving Montanans to guess what the law proscribes.[3]

Ultimately, "federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Boos v. Barry*, 485 U.S. 312, 330 (1988). As Plaintiffs previously explained, HB892's multiple-registration prohibition does not clearly state what conduct is proscribed and who is liable, and the prior-registration disclosure requirement fails to specify what information voters must provide. *See* Mot. 13–18. The only way to cure this pervasive confusion would be to fill in the gaps by rewriting HB892—an undertaking within "the domain of [the] state legislature," not a federal court. *Legend Night Club v. Miller*, 637 F.3d 291, 301 (4th Cir. 2011).

[3] Defendants suggest that "a registrant easily complies with [HB892] by simply providing their prior registration information" because "the SOS will cancel any identified prior registration for them," Defs. Opp'n 20–21, but if the State's practice is to cancel voters' other registrations without first obtaining their consent—which the current iteration of the registration form *does not do*, *see* Ex. 12—then it likely violates the National Voter Registration Act, *see, e.g.*, *Ariz. All. for Retired Ams. v. Hobbs*, 630 F.Supp.3d 1180, 1189–94 (D. Ariz. 2022), *appeal docketed*, No. 22-16490 (9th Cir. Sept. 27, 2022).

III. Plaintiffs are likely to succeed on the merits of their overbreadth claim.

As articulated by its legislative sponsor, its bill title, and now Defendants, the purpose of HB892 is to "prevent[] double voting." Defs. Opp'n 1. But the law actually goes much further, criminalizing both "purposefully remain[ing] registered to vote in more than one place" and failing to "provide [] previous registration information on the Montana voter registration application." Mont. Code Ann. § 13-35-210(5). Because neither these limitations nor the criminal penalties that attach to them are limited only to Montanans who engage in double voting, HB892 exceeds its legitimate bounds and unlawfully burdens constitutionally protected activity. *See* Mot. 19–25.

In response, both Defendants and Proposed Intervenors emphasize the State's interest in regulating elections and preventing fraud, *see* Defs. Opp'n 15–17; Proposed Intervenors Opp'n 10–11, but this is not enough to cure HB892's fatal overbreadth. HB892 burdens protected political activity through the imposition of severe criminal penalties for entirely innocent conduct; the challenged provisions apply regardless of whether registrants have an intention to commit double voting. Under these circumstances, a mere recitation of the State's regulatory interests does not suffice.[4]

[4] For this reason, the amicus brief filed by Restoring Integrity and Trust in Elections also misses the mark: It focuses on why duplicative registrations should be regulated

Proposed Intervenors try to shield HB892 from First Amendment scrutiny by noting that "no voter has a right to maintain multiple voter registrations." Proposed Intervenors Opp'n 10–11. But laws that "govern[] the registration and qualifications of voters" implicate the First Amendment, *see Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), and, as Plaintiffs have explained, there are myriad reasons why voters might need multiple registrations to safeguard their ability to cast a *single* ballot; these registrants "will *vote* in only one place, even if they have open registrations in two," *Common Cause Ind. v. Lawson*, 937 F.3d 944, 960 (7th Cir. 2019); *see also* Mot. 20–22. For these voters, a second registration might mean the difference between suffrage and disenfranchisement. Defendants dismiss these concerns as "imagined scenarios on the margins," Defs. Opp'n 17, but Plaintiffs have readily cleared the low bar of merely "describ[ing] the instances of arguable overbreadth of the contested law," *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (en banc) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). Historically, *millions* of Americans have been registered to vote in more than one state; by contrast,

rather than the relevant question of whether HB892's multiple-registration prohibition is properly tailored to the law's stated purpose of prohibiting double voting.

instances of double voting are vanishingly rare. *See* Mot. 23–24.[5] Accordingly, the risk that HB892 will burden or even disenfranchise voters who have legitimate need for multiple registrations—and *no* intention of voting twice at the same election—is far from hypothetical.

IV. The equities support injunctive relief.

The equities support preliminary injunctive relief in this case, *see* Mot. 25–27, and the arguments to the contrary raised by Defendants and Proposed Intervenors should be rejected.

First, Plaintiffs did not unreasonably delay. *See* Defs. Opp'n 22–23; Proposed Intervenors Opp'n 15. HB892 was signed into law on May 22, 2023; Plaintiffs filed the underlying complaint a mere four months later; and their preliminary-injunction motion followed five-and-a-half weeks after that. The Ninth Circuit cases on which Defendants rely, by contrast, involved delays of "many years," *Oakland Trib., Inc. v. Chron. Publ'g Co.*, 762 F.2d 1374, 1375 (9th Cir. 1985), and "five years," *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984), and there is

[5] Defendants' Exhibit P, which lists individuals who *might* have voted twice in 2020, shows only the possibility of 14 double votes in an election where 612,075 Montanans cast ballots. *See 2020 General: Statewide*, Mont. Sec'y of State, https://sosmt.gov/wp-content/uploads/State_Canvass_Report.pdf (last visited Dec. 15, 2023). (If anything, Exhibit P demonstrates that double voting can be monitored even without HB892, thus limiting the justification for the law as a prophylactic necessity.) And although Montana's former elections director claims to be "aware of past instances" of double voting, his declaration cites only Exhibit P as support. Decl. of Dana Corson ¶¶ 7–8, ECF No. 30-15.

certainly no indication of prejudice or unreasonable delay here, *see Apache Survival Coal. v. United States*, 118 F.3d 663, 665 (9th Cir. 1997). Moreover, "delay by itself is not a determinative factor in whether the grant of interim relief is just and proper," especially where, as here, Plaintiffs are suffering "ongoing, worsening injuries" (as the Ninth Circuit has noted, each instance of infringed speech or conduct "contribute[s] to the constitutional injury [] suffered") and assert violations of their constitutional rights. *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) (cleaned up).[6]

Second, Defendants wrongly claim that HB892 "*is* the status quo" such that preliminary relief is not appropriate. Defs. Opp'n 23–25. This argument misunderstands the relief Plaintiffs seek: They ask the Court to enjoin HB892's multiple-registration prohibition and prior-registration disclosure requirement—and the new criminal penalties associated with both—*not* the double-voting ban or any other facet of HB892 that was previously Montana law or practice. *See supra* note 2. The enactment of these new voting-rights limitations initiated "the pending controversy" and, as such, the law *prior* to HB892 represents the "[s]tatus quo ante litem." Defs. Opp'n 23 (quoting *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011,

[6] Defendants and Proposed Intervenors point to months-long delays in other cases to suggest a bright line for diligence, but "[t]he significance of [] delay depends on context," *Y.Y.G.M. SA v. Redbubble, Inc.*, 75 F.4th 995, 1006 (9th Cir. 2023), and none of the cases they cite involved the ongoing deprivation of constitutional rights.

1024 (9th Cir. 2016)). That HB892 is currently in effect does not mean that Plaintiffs are trying to "*alter* the status quo," as Defendants suggest. *Id.* at 24. Even if this were the case, courts have rejected Defendants' overly formalistic approach: Because "[t]he purpose of a preliminary injunction is always to prevent irreparable injury," "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . . The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). Here, HB892 is irreparably harming Plaintiffs, their members, and their constituents, and it should be enjoined.

Third, Proposed Intervenors incorrectly claim that Plaintiffs must identify someone who "has been denied the right to vote because of" HB892. Proposed Intervenors Opp'n 14–15. Plaintiffs do not need to identify specific Montana voters who have been or will be injured by HB892 to obtain injunctive relief because *Plaintiffs themselves* will be directly and irreparably harmed by the new law's unconstitutionally vague and overbroad provisions. *See* Mot. 26; *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009). Moreover, Proposed Intervenors cite no authority for the proposition that specific injured voters must be identified to secure injunctive relief in voting-rights cases. *Cf. La Raza*, 800

F.3d at 1041–42 (rejecting argument that specific injured members must be identified by organization to satisfy Article III standing).

Fourth, the mere fact that HB892 is "a duly enacted statute" does not mean that enjoining the law constitutes irreparable harm so great as to tip the equitable scale in Defendants' favor. Defs. Opp'n 24–26. "[A] state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional," *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (cleaned up), and "it is always in the public interest to prevent the violation of a party's constitutional rights," *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)). To the extent Defendants claim the equitable advantage based on their beliefs that "Plaintiffs' purported fears [are] based on conjured hypotheticals" and that HB892 is legally justified, Defs. Opp'n 26, this simply begs the merits questions addressed above, *see* Proposed Intervenors Opp'n 14, 16 (acknowledging that equities rise and fall with merits in this case).

Finally, Proposed Intervenors invoke the *Purcell* principle, *see id.* at 16–17, but that doctrine does not foreclose relief in voting-rights cases whenever injunctive relief coincides with an election (let alone when, as here, a state is still months away from the closure of a pre-primary registration period), *see Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (recognizing that *Purcell* is not

"absolute" and is simply "a sensible refinement of ordinary stay principles for the election context"); *cf. Yazzie v. Hobbs*, 977 F.3d 964, 968–69 (9th Cir. 2020) (per curiam) (applying *Purcell* in context of "last-minute challenge to a decades-old rule"). *Purcell v. Gonzalez* addressed a particular feature of election cases: that the risk of disenfranchisement created by a challenged rule must be weighed against the risk that judicial intervention could "result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. 1, 4–5 (2006) (per curiam). Here, there is no evidence that enjoining the challenged provisions of HB892 would frustrate the administration of Montana's elections or otherwise impose hardships on officials or voters.[7] Quite the contrary: The threat of severe criminal penalties imposed by HB892 is likely to discourage voters and registrants if the law is *not* enjoined.

CONCLUSION

Plaintiffs respectfully request that the Court preliminarily enjoin the challenged provisions of HB892.

[7] Defendants cite the declarations of two county officials who attest that the disclosure of prior registrations helps keep voter rolls accurate, Defs. Opp'n 2, but Montana's registration form already required this information before HB892. Plaintiffs seek to enjoin the new criminal penalties attached to the disclosure requirement, which has no impact on pre-HB892 practices.

Dated: December 15, 2023

By: /s/ Raph Graybill

Raph Graybill
GRAYBILL LAW FIRM, PC
300 4th Street North
P.O. Box 3586
Great Falls, Montana 59403
rgraybill@silverstatelaw.net
ph. (406) 452-8566

Jonathan P. Hawley
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
jhawley@elias.law
ph. (206) 656-0179

Respectfully submitted,

Aria C. Branch*
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, D.C. 20001
abranch@elias.law
ph. (202) 968-4490

Attorneys for Plaintiffs

**Admitted pro hac vice*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 3,245 words, excluding the contents listed in D. Mont. L.R. 7.1(d)(2)(E).

Dated: December 15, 2023

/s/ Raph Graybill
Counsel for Plaintiffs