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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

MONTANA PUBLIC INTEREST RESEARCH GROUP, et al., *Plaintiffs*, and JACOBSEN, et al., *Defendants*.	CV 6:23-cv-070-BMM **PROPOSED INTERVENOR-DEFENDANTS' PROPOSED RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

Montana's Constitution vests all legislative power in the legislature, Mont. Const. art. V, §1, and gives the legislature the authority to "provide by law the requirements for residence, registration, absentee voting, and administration of elections," Mont. Const. art. IV, §3. Exercising its constitutional authority, the 2023 Montana Legislature passed HB892, which provides by law the requirements for registration in the State of Montana.

Unsatisfied with HB892, Plaintiffs brought suit, calling the law "redundant" and unnecessary. The law is neither. Even if it were, redundant laws are not unconstitutional laws. Plaintiffs' attempt to cast doubt on the statute's enforceability through linguistic gymnastics and a series of generalized hypotheticals falls woefully short of the standard for obtaining a preliminary injunction. Applying the presumption of constitutionality afforded to HB892, principles of constitutional law, and tools of statutory interpretation, this Court must reject Plaintiffs' request for extraordinary relief.

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BACKGROUND

The Montana Constitution states that a citizen who meets "the registration and residence requirements provided by law" is a qualified elector. Mont. Const. art. IV, §2. And Montana law provides just that: registration and residence requirements. For example, an individual must be "a resident of the state of Montana and of the county in which the person offers to vote for at least 30 days." Mont. Code §13-1-111. That residency, in turn, is determined by "where the individual's habitation is fixed and to which, whenever the individual is absent, the individual has the intention of returning." *Id.* §13-1-112(1); *see also Downs v. Piocos*, 537 P.3d 99, 102 (Mont. 2023) (concluding that

"habitation" under §13-1-112 means the person's "place of abode in the county to which, even when the person is absent, they intend to return"). While an individual does not lose residency if she leaves the State or county with the intention of returning, she does lose residency if she "exercises the election franchise" elsewhere. Mont. Code §13-1-112(4). Indeed, Montana law expressly provides that an individual may have "only one residence." *Id.* §13-1-113.

The law provides further instruction for voting in an election in Montana. First, it prohibits—as it did prior to HB892—an individual from voting twice in one election. *Id.* §13-35-210(1). Second, it permits any "legally registered elector or provisionally registered elector" to "vote by absentee ballot." *Id.* The only requirement for doing so is that the elector executes the absentee ballot in the manner specified in §13-13-201(2) by marking the ballot, placing the ballot in the secrecy envelope, placing the secrecy envelope in the signature envelope, signing the signature envelope, and returning the envelope in person or via mail. The law does not require any explanation for the voter's absence or any affirmation that the voter intends to remain in Montana. And on the absentee ballot application, a voter may "request an absentee ballot to be mailed to me for ALL elections in which I am eligible to vote as long as I reside at the address listed on this application." *Application for Absentee Ballot*, Montana Secretary of State, perma.cc/LN7K-5XS3. Voters who select this option will continue to receive absentee ballots so long as they do not remove themselves from Montana's voter registration list.

In 2023, the Montana Legislature passed HB892 to reinforce its existing prohibition against double voting. The law amends §13-35-210 to add several

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provisions explaining the conduct prohibited and the penalty associated with violating the provisions. Plaintiffs only challenge subsection (5), 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.

The first sentence prohibits individuals from being registered in multiple jurisdictions, but only if they do so "purposefully." The second sentence then explains that a person filling out a Montana voter registration application shall provide their previous registration information.

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Over four months after this law went into effect, Plaintiffs filed this lawsuit, alleging a grab bag of constitutional claims. The Republican National Committee and Montana Republican Party moved to intervene as defendants. *See* Docs. 7-8. Shortly thereafter, the State held an election, and Plaintiffs moved for preliminary injunctive relief. Because the motion to intervene is still pending, proposed intervenor-defendants file this proposed response, asking this Court to deny Plaintiffs' motion.

LEGAL STANDARD

"Statutes are presumed constitutional." *State v. Britton*, 30 P.3d 337, 339 (Mont. 2001). "Whenever possible," a court must construe a statute in a manner that "renders [the] challenged statut[e] constitutional." *State v. Martel*, 902 P.2d 14, 18 (Mont. 1995). The court must look to the text and the "statute as a whole" to determine its meaning. *Id.*

A court may issue a preliminary injunction only "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). This standard is not toothless—Plaintiffs must show (1) they are "likely to succeed on the merits;" (2) they are "likely to suffer irreparable harm;" (3) the "balance of equities" weighs in their favor; and (4) "an injunction is in the public interest." *Id.* at 20. Although the Ninth Circuit has adopted a "sliding scale" test, an injunction may issue only if a plaintiff meets each of these factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Here, Plaintiffs fail to meet this burden and fail to show that such an "extraordinary remedy" is warranted. *Winter*, 555 U.S. at 22.

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ARGUMENT

I. Plaintiffs are not likely to succeed on their vagueness claim.

A law is facially vague if it "simply has no core." *United States v. Powell*, 423 U.S. 87, 92 (1975). It 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). In other words, the challenged law must be "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). As this Court has held, a "vagueness inquiry does not invalidate every statute whose application or interpretation is complex." *United States v. DeFrance*, 577 F. Supp. 3d 1085, 1103 (D. Mont. 2021); *see also United States v. Hogue*, 752 F.2d 1503, 1504 (9th Cir. 1985). Mere imprecision or the potential for confusion are insufficient. *See United States v. Williams*, 553 U.S. 285, 305 (2008) ("[A] basic mistake lies in the belief that the mere fact that close cases can be envisioned

renders a statute vague."). The question is whether "men of common intelligence must necessarily guess at its meaning." *Winters v. New York*, 333 U.S. 507, 671 (1948) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Accordingly, courts look to see if the law "'define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.'" *Free Speech Coal. v. Reno*, 198 F.3d 1083, 1095 (9th Cir. 1999) (quoting *Kolender v. Lawsone*, 461 U.S. 352, 357 (1983)).

Montana's law does not meet this high standard for vagueness. The operative word for whether a person violates subsection 5 is "purposefully." As Plaintiffs admit, Montana's criminal laws clearly define that word. "Purposely" (and its variants[1]) means that "it is the person's conscious object to engage in that conduct or to cause that result." Mont. Code §45-2-101(65). It "relates to conduct or result." *State v. Starr*, 664 P.2d 893, 898 (1983). Knowingly, by comparison, means only that the "person is aware of the person's conduct" or "is aware that it is highly probable that the result will be caused by the person's conduct." Mont. Code §45-2-101(35). The awareness—as opposed to a conscious objective—"relates to conduct, circumstances, facts or result." *Starr*, 664 P.2d at 898 (quoting Essman, *A Primer on Mental State in the Montana Criminal*

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[1] Plaintiffs don't argue that there is any substantive difference between "purposefully" in subsection 5 and "purposely" in the criminal code definitions. Indeed, they appear to concede the two words are synonymous. *See* Doc. 12 at 14 (citing Mont. Code Ann. §45-2-103 and conceding that "purposefully" is a "standard familiar to Montana's criminal laws"). In any event, section 45-2-101 says that the definition of "purposely" covers "equivalent terms" such as "purpose" and "with the purpose," and the Montana Supreme Court has used the terms interchangeably, *see State v. Rothacher*, 901 P.2d 82, 85 (Mont. 1995); *State v. Kline*, 376 P.3d 132, 165 (Mont. 2016); *State v. Thorp*, 231 P.3d 1096, 1102 (Mont. 2010); *State v. Williams*, 228 P.3d 1127, 1131 (Mont. 2010).

Code of 1973, 37 Mont. L. Rev. 401, 403-04 (1976)). Both incorporated "substantially the same" definitions as contained in the Model Penal Code. Mont. Code §45-2-101, Criminal Law Committee Comments. To violate HB892, a person would need to have the conscious objective to bring about the result prohibited by law. *Starr*, 664 P.2d at 898.

The conduct prohibited by law is also clear: the challenged provision prohibits one action and mandates another. It first prohibits remaining registered to vote in more than one place. It next mandates that any person filling out the voter registration application who was previously registered to vote elsewhere must provide the previous registration information. A voter who "purposefully" fails to remove themselves from double-registration commits a criminal act. Someone who merely forgets to unregister from a different jurisdiction, or someone who assumes that by registering in Montana they will automatically be removed from another jurisdiction's voter list, or even someone who thinks they might be registered elsewhere but never verifies, will not be covered by H892 because they do not have the "conscious object" to remain registered in two locations. Mont. Code §45-2-101(65).

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While Plaintiffs might conceive of "marginal fact situations," *Powell*, 423 U.S. at 93, or question HB892's applicability "in a particular situation," *Harris Cnty Comm'r Court v. Moore*, 420 U.S. 77, 87 n.9 (1975), these do not amount to a vague law. After all, "due process does not require impossible standards of clarity," *Kolender*, 461 U.S. at 361, nor can we ever "expect mathematical certainty from our language," *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

Under the vagueness standard, the court must consider whether the statute is "sufficiently precise to provide comprehensible notice" of the prohibited conduct. *United States v. Vasarajs*, 908 F.2d 443, 448 (9th Cir. 1990). Here, the challenged provision provides sufficiently precise notice. Whereas subsection 4 of HB892 imposes a strict liability standard for voting twice, as explained above, subsection 5 imposes a mens rea requirement of "purposefully" to the act of "remain[ing] registered to vote in more than one place." That is, the mens rea requirement attaches to the intent to remain registered to vote in more than one place, not the intent to engage in conduct from a different subsection of the statute as Plaintiffs suggest. *See United States v. Collazo*, 984 F.3d 1308, 1329 (9th Cir. 2021) (refusing to apply scienter terms from one sentence in a statute to other statutory subsections).

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After determining that the statute is "sufficiently precise," the court must then ask whether the statute is enforced arbitrarily or discriminatorily. *Free Speech Coal.*, 198 F.3d at 1095. This means considering whether there exists a "principled means … to distinguish those that received the penalty from those that did not." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). This depends on the level of subjectivity given to the person enforcing the statute. *See Grayned*, 408 U.S. at 108-09. For example, the Supreme Court held that a statute permitted arbitrary enforcement because it required an officer to determine whether someone was "loitering" based on whether the officer believed the person had an "apparent" purpose for lingering. *City of Chicago v. Morales*, 527 U.S. 41 (1999). Likewise, this Circuit enjoined a law criminalizing material portraying a person that "appear[ed] to be a minor" and "convey[ed] the impression" that the minor was engaging in sexual activity. *Free Speech Coal.*, 198 F.3d at 1095. In

comparison, HB892 does not leave room for arbitrary and subjective determinations—instead, the question is whether the person "purposefully" engaged in the conduct prohibited.

Plaintiffs attempt to inject ambiguity into a statute that is clear on its face. None of their arguments are persuasive. With respect to the first sentence in subsection 5, Plaintiffs argue that the statute is ambiguous as to "what conduct is required, to whom the prohibition applies, and when it applies." Doc. 12 at 21. Plaintiffs first argue that what it means to "remain registered" is ambiguous. But the law is clear: any person or elector who "purposefully remain[s] registered to vote" in multiple places violates the statute. That is, the provision applies to any person or elector, not just to those filling out their registration application, and it applies to those with the "conscious object" to remain registered in multiple jurisdictions. This is reinforced by Montana's other voting laws, which require voters to be a resident of the state of Montana and prohibits individuals from having more than one residence. Mont. Code §§13-1-111, 13-1-113.

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Plaintiffs next argue that the "mens rea" requirement "only adds to the confusion." Doc. 12 at 14. As discussed above, the mental state of "purposefully" in subsection 5 applies to the conduct of "remain[ing] registered" in Subsection 5, not voting more than once, conduct that is prohibited in subsection 4. *See Collazo*, 984 F.3d at 1329. Montana criminal law already defines "purposely" as distinct from "knowingly," and numerous Montana laws include "purposely" as the requisite intent. *See* Mont. Code §§45-2-103, 45-5-202(1), 45-9-104(6). In support of their argument, Plaintiffs rely on *Richmond Medical Center for Women v. Gilmore* for their confusion, which merely acknowledges that adding a scienter requirement cannot always salvage an

otherwise-vague statute. 55 F. Supp. 2d 441, 498-99 (E.D. Va. 1999). But Plaintiffs use the scienter requirement to infuse vagueness into the statute, asserting that a "reasonable person" might not be able to distinguish between "purposefully" and "knowingly," terms clearly defined under Montana law. Doc. 12 at 23. Plaintiffs' argument thus differs from the arguments made in *Richmond Medical Center*, and stand in contrast to the Montana Supreme Court's recognition that inclusion of a "mental state to do a prohibited act" may indeed salvage a Montana criminal statute. *Martel*, 902 P.2d at 20.

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In sum, Plaintiffs quibble with the marginal application of HB892. *See Powell*, 423 U.S. at 93. But HB892's terms are not "oblique or ambiguous … particularly in the specific context of the [statute]." *Vlasak v. Sup. Ct. of Cal.*, 329 F.3d 683, 688 (9th Cir. 2003). The Court should reject their vagueness claim.

II. Plaintiffs are not likely to succeed on their overbreadth claim.

To succeed on an overbreadth challenge, a plaintiff must show that the law "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U.S. at 292. A court must consider whether the unconstitutional applications are "realistic, not fanciful" and whether they are "substantially disproportionate to the statute's lawful sweep." *United States v. Hansen*, 599 U.S. 762, 770 (2023); *see also Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (noting a statute is not overbroad just because "one can conceive of some impermissible applications"). And if a court can reasonably "construe the Act as constitutional," it must do so. *United States v. Rundo*, 990 F.3d 709, 714 (9th Cir. 2021).

The Supreme Court has repeatedly cautioned that invalidating a statute on overbreadth is "strong medicine" that should be dispensed sparingly. *Hansen*, 599 U.S. at 770; *Williams*, 553 U.S. at 293; *L.A. Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999); *New York v. Ferber*, 458 U.S. 747, 769 (1982). It isn't enough to "conceive of some impermissible applications," *Taxpayers for Vincent*, 466 U.S. at 800, nor does the burden flip to the State to prove that "the 'vast majority' of a statute's applications [are] legitimate," *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 476 n.8 (2007) (op. of Roberts, C.J.). In short, succeeding on an overbreadth challenge "is not easy to do." *Doe v. Valencia Coll.*, 903 F.3d 1220, 1232 (11th Cir. 2018). The reason for this high bar is that "invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects." *Williams*, 553 U.S. at 292. The court can always cure any overbreadth "through case-by-case analysis" in as-applied challenges brought later. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988).

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Here, the multiple-registration prohibition and the prior registration disclosure requirement help ensure cleaner voter rolls, facilitate efficient election administration, and prevent duplicative voting by removing the ability of individuals to vote in multiple elections. This is particularly true of absentee voters who opt to receive an absentee ballot in all elections at, for example, a temporary residence out of state. Even if that temporary residence becomes their permanent residence, they will continue to receive absentee ballots to vote until they are removed from the registration list. HB892 seeks to minimize that threat by prohibiting individuals from undertaking conduct to remain registered in multiple locations. Because no voter has a right to maintain multiple voter

registrations, the law has no unconstitutional applications, let alone a substantial number of unconstitutional applications to justify invalidation for overbreadth.

Plaintiffs carry the "burden of establishing from both 'the text' language and 'actual fact' that the Act is substantially overbroad." *United States v. Rundo*, 990 F.3d 709, 713 (9th Cir. 2021) (quoting *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)). Turning first to the text. *Williams*, 553 U.S. at 293 ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). The challenged law clearly prohibits individuals from remaining registered to vote in more than one place. This prohibition in turn, Plaintiffs argue, "chills the constitutionally protected conduct" of voters by possibly discouraging some voters from registering in Montana, which deprives them of their right to vote. Doc. 12 at 27, 33. This level of attenuation falls outside the "traditional 'overbreadth' cases." *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993). "We must conjure up a vision" of a Montana citizen opting not to register to vote for fear of "commit[ing] an offense covered by the statute" and then not registering to vote elsewhere. *Id.* at 488-89. It isn't enough for Plaintiffs to hypothesize that some individuals might not register to vote in Montana—these voters have to choose not to register to vote in Montana *and then choose not to register to vote in any other jurisdiction*. After all, there is no right to be registered to vote in multiple locations. If an individual is registered in a state other than Montana (which requires that that person independently meets that state's residency requirement), and as a result chooses not to register to vote in Montana, then it strains credulity to assert that they have been denied their First Amendment right to register to vote.

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Next, the court must consider whether HB892 covers a substantial amount of protected speech "relative to [its] plainly legitimate sweep." *Williams*, 553 U.S. at 292. Plaintiffs make no attempt to show that HB892 will cover a substantial amount of protected speech. Plaintiffs suggest that this law will prohibit voter registration among "[c]ollege students, young people, and voters who temporarily relocate for job reasons" because these individuals might flunk a probationary period of their job, relocate to take care of an ailing family member, or drop out of college. Doc. 12 at 29-30 (citing *Common Cause Ind. v. Lawson*, 937 F.3d 944, 960 (7th Cir. 2019)). But as discussed above, it isn't enough to "conceive" of some scenarios where individuals might choose not to register to vote in Montana. Plaintiffs bear the burden of showing that the impermissible applications are substantial in number compared to the permissible applications. Plaintiffs have failed to carry their burden. Plaintiffs' remaining arguments merely dispute the justification or necessity for HB892, which has no bearing on the scope of its application.

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Plaintiffs next assert that the prior registration restriction "fares no better" under the overbreadth analysis. Doc. 12 at 32. They argue that because it applies to all Montana registrants, regardless of their intent to vote twice, "it sweeps legitimate, otherwise-protected conduct within the scope of its criminal penalties." *Id.* For the same reasons above, this argument fails. Plaintiffs, and Montana residents more broadly, possess no right to be registered in multiple jurisdictions.

To the extent Plaintiffs inject ambiguity into the statute by imagining specific hypotheticals, courts can resolve these issues as they arise by utilizing regular tools of statutory interpretation in as-applied challenges. *N.Y. State Club Ass'n*, 487 U.S. at 14.

This is not to say that in all overbreadth challenges the court should engage in a wait-and-see approach. But given the specific circumstances of *this* statute, as explained above, Plaintiffs' concerns will play out only in very limited situations, which are overshadowed by the "plainly legitimate sweep" of the statute. *Williams*, 553 U.S. at 292. The "strong medicine" of invalidating the entire statute, therefore, is unjustified here.

For example, any court considering an as-applied challenge will need to consider the rule of lenity and the canon of constitutional avoidance. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). Where the court finds ambiguity in a criminal statute, "the tie must go to the defendant." *Id.* Likewise, the canon of constitutional avoidance instructs courts to construe the statute to avoid raising serious constitutional problems. *Edward J. De Bartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *Ferber*, 458 U.S. at 769 n.24 ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.").

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Put simply, HB892 is not overbroad. And in the event questions arise from specific factual scenarios, courts possess the necessary tools to evaluate as-applied challenges as they come. Plaintiffs have failed to meet their burden showing that HB892 covers a substantial amount of protected speech "relative to [its] plainly legitimate sweep." *Williams*, 553 U.S. at 292.

III. Plaintiffs fail to meet the other preliminary injunction factors.

Plaintiffs' arguments about the remaining preliminary injunction factors rise and fall entirely with their arguments about their likelihood of success on the merits. While this Circuit applies a "sliding scale approach" when considering a preliminary injunction, *All. for the Wild Rockies*, 632 F.3d at 1131, Plaintiffs' arguments collapse this approach into a single question: are Plaintiffs likely to succeed on the merits? Because they are not, Plaintiffs cannot show irreparable harm or that the balance of the equities and public interest weigh in their favor.

A. Plaintiffs fail to show they will suffer irreparable harm.

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As for irreparable harm, Plaintiffs simply reassert their allegations that HB892 violates their constitutional rights. Doc. 12 at 33-34. And while it may be true that a violation of one's constitutional rights amounts to irreparable injury, Plaintiffs have not shown they are likely to succeed on their constitutional claims. They provide no other basis for the Court to find they are likely to suffer irreparable harm. Regardless, Plaintiffs' claims of irreparable harm fail for at least two other reasons.

First, Plaintiffs have no evidence that anyone has been denied the right to vote because of the law they challenge. Plaintiffs cite *Mi Familia Vota v. Hobbs*, 492 F. Supp. 3d 980, 988 (D. Ariz. 2020), in which the applicants pointed to the "loss of possibly tens of thousands of voter registrations." Doc. 12 at 34. But Plaintiffs cannot even point to one. Plaintiffs filed this lawsuit over four months after HB892 went into effect, and they moved for injunctive relief three days *after* the most recent election. Yet Plaintiffs can only speculate about the impact on "college students, young people, and voters who temporarily relocate." *Id.* at 29-30. A general concern about a potential violation of an

individual's constitutional rights does not warrant the extraordinary remedy of preliminary injunctive relief.

Second, Plaintiffs unduly delayed over four months in bringing their preliminary injunction. "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). A "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Four months is an undue delay. *See, e.g.*, *Oregon Nat. Desert Ass'n v. Bushue*, 594 F. Supp. 3d 1259, 1266 (D. Or. 2022) (delay of "two months" "counsels against a finding of likely irreparable harm"); *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2021) ("five-month" delay supported denial of preliminary injunction); *Valeo Intellectual Prop., Inc. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D. Wash. 2005) ("three-month delay" was "inconsistent with [the plaintiff's] insistence that it faces irreparable harm"). More to the point, Plaintiffs allowed an election to pass under the law they claim imposes "draconian criminal penalties" on individuals and "chill[s] the right to vote." Doc. 1 ¶¶2, 5; Doc. 12 at 10, 27. Their lawsuit was not urgent then, and it's not urgent now. It's also no response to say their claims would have run into *Purcell* problems, because the requirement to show reasonable diligence "is as true in election law cases as elsewhere." *Benisek*, 138 S. Ct. at 1944. Plaintiffs' undue delay defeats their motion.

The Court can deny the preliminary injunction for these reasons alone. A showing of irreparable harm "is a prerequisite to a preliminary injunction." *Oakland*

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Trib., 762 F.2d at 1378. And because Plaintiffs have failed to show irreparable harm, the Court "need not decide whether plaintiff[s] will eventually prevail in [their] claims." *Id.*

B. The balance of the harms and public interest weigh against Plaintiffs.

Plaintiffs' arguments on the third and fourth factors fail for the same reason. They assert that it is in the public's interest not to violate constitutional rights, so this factor weighs in their favor. Doc. 12 at 35. But that argument only works if Plaintiffs have shown that they are likely to succeed on their claim that HB892 violates their constitutional rights. They haven't. So they can't succeed on this factor, either.

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IV. *Purcell* forecloses preliminary injunctive relief.

Federal courts do not "lightly interfere with … a state election." *Sw. Voter Reg. Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). The Supreme Court recognized in *Purcell v. Gonzalez* that the risk of voter confusion resulting from court orders affecting elections increases as that election draws closer. 549 U.S. 1, 4 (2006). *Purcell* protects parties, like Defendants here, from the disruption of elections through voter or administrative confusion. *Id.* at 4-5. And it safeguards the "public's substantial interest in the stability of its electoral system" leading up to an election. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). Plaintiffs don't even cite *Purcell*.

Even without reaching the merits, the Court can deny the requested relief based on "due regard for the public interest in orderly elections." *Benisek*, 138 S. Ct. at 1944-45. The Supreme Court has stayed preliminary injunctions of state election laws while expressing "no opinion" on the merits, *Purcell*, 549 U.S. at 5, even where the challenged law was "invalid," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see also Merrill v. Milligan*,

142 S. Ct. 879, 882 (2002) (Kavanaugh, J., concurring in grant of stay applications). Lower courts have done the same. *See Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (applying *Purcell* six months before an election); *League of Women Voters of Fla. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) (four months "easily falls within" *Purcell*'s reach). Montana's presidential primary is scheduled for June 2024. Regular registration is open right now, and closes May 6.[2] By the time briefing is complete and the Court is prepared to rule, any injunction would interfere with the "orderly" administration of Montana's election. *Benisek*, 138 S. Ct. at 1944-45.

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The State's interest in preserving the integrity of its elections—and preventing individuals or electors from voting in two jurisdictions—is grounds for denial of Plaintiffs' motion. After waiting over four months to bring the lawsuit, Plaintiffs now demand the Court enjoin the challenged law with the 2024 Montana primary only six months away. Defendants have an "indisputably … compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4. *Purcell* forecloses Plaintiffs' requested relief.

CONCLUSION

For the reasons in this brief, this Court should deny Plaintiffs' motion for preliminary injunctive relief.

[2] Montana Secretary of State, *2024 Primary and General Election Calendar* (Oct. 25, 2023), https://bit.ly/3sBkczH.

Dated: December 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that the foregoing brief complies with Local Rule 7.1(b) and (c) and contains 5,009 words.

Dated: December 1, 2023

By: /s/ Dale Schowengerdt