

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 et al.,

Plaintiffs,

vs.

CHRISTI JACOBSEN, in her
official capacity as Montana
Secretary of State, et al.,

Defendants,

and

REPUBLICAN NATIONAL
COMMITTEE et al.,

Defendant-
Intervenors.

CV 23-70-H-BMM-KLD

PLAINTIFFS' PRELIMINARY
PRETRIAL STATEMENT

Plaintiffs Montana Public Interest Research Group (“MontPIRG”) and Montana Federation of Public Employees (“MFPE”) respectfully submit this preliminary pretrial statement pursuant to L.R. 16.2(b)(1).

I. Factual Outline of the Case

Plaintiffs challenge the voter-registration law codified at section 13-35-210(5) of the Montana Code under the First and Fourteenth Amendments to the U.S. Constitution.

On May 22, 2023, House Bill 892 (“HB892”) was signed into law. Although Montana’s election rules already prohibited double voting, *see* Mont. Code Ann. § 13-35-210(1) (2021) (“No person may vote more than once at an election.”), HB892’s legislative sponsor claimed that the new bill would clarify what double voting means under Montana law. By its terms, however, HB892 goes much further than this limited aim, introducing new limits on Montanans’ voting rights and imposing criminal penalties for violations of the new law.

First, HB892 provides that “[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,” *id.* § 13-35-210(5) (2023), with potential felony criminal penalties attaching to violations of this provision, *see id.* § 13-35-210(6) (“A person who violates this section shall, on conviction, be fined up to \$5,000, be imprisoned for up to 18 months, or both.”); *id.* § 45-2-101 (defining

“[f]elony” as “an offense in which the sentence imposed upon conviction is death or imprisonment in a state prison for a term exceeding 1 year”). However, the law neither defines what it means to “purposefully remain registered” nor clarifies what affirmative steps must be taken to avoid the criminal penalties associated with this prohibition. Moreover, the criminal penalties are not limited only to those who actually engage in double voting, or even those who intend to engage in double voting; by its terms, they reach *anyone* who “purposefully remain[s] registered to vote in more than one place,” even if they never intend to vote twice in the same election.

Second, HB892 requires that “[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.” *Id.* § 13-35-210(5). Failure to comply with this prior-registration disclosure requirement is also punishable as a felony under section 13-35-210(6). But HB892 does not ascribe a mens rea requirement to this prior-registration disclosure requirement, nor does it clarify the extent of the information registrants must include on their applications.

Plaintiffs filed suit on September 29, 2023, asserting that HB892 is vague in violation of the Fourteenth Amendment and overbroad in violation of the First and Fourteenth Amendments, and further violates the right to vote as protected by the First and Fourteenth Amendments. Their motion for preliminary injunction, seeking

immediate relief on their vagueness and overbreadth claims, followed on November 6, 2023. The Court has set a hearing on the pending motion for March 20, 2024.

II. Jurisdiction and Venue

The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1357 and 42 U.S.C. §§ 1983 and 1988, since Plaintiffs challenge a state statute under the U.S. Constitution and federal law and seek to enforce the right of Montanans to vote. The Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

Venue is proper pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district.

III. Factual Bases for Plaintiffs' Claims

In recent years, political officials in Montana have repeatedly erected barriers to the franchise, efforts that have been rejected by the judiciary as unconstitutional. *See generally, e.g., W. Native Voice v. Stapleton*, No. DV 20-0377, 2020 WL 8970685 (Mont. Dist. Ct. Sept. 25, 2020) (concluding that Ballot Interference and Protection Act violated Montana Constitution); *Mont. Democratic Party v. Jacobsen*, No. DV 21-0451, 2022 WL 16735253 (Mont. Dist. Ct. Sept. 30, 2022) (enjoining multiple provisions of election code under Montana Constitution), *appeal docketed*, No. DA

22-0667 (Mont. Nov. 22, 2022). HB892 represents a continuation of these vote-suppressive—and unconstitutional—tactics. Although its sponsor claimed that it was meant to simply reiterate existing bans on double voting (already unlawful under state and federal law), HB892 goes much further, pairing vague new voter-registration requirements with draconian criminal penalties.

Specifically, HB892 provides that “[a] person or elector may not purposefully remain registered to vote in more than one place in this state or another state any time, unless related to involvement in special district elections,” Mont. Code Ann. § 13-35-210(5), but the phrase “purposefully remain registered” is neither defined nor explained, and it is thus unclear whether voters must affirmatively cancel existing registrations and confirm those cancellations to avoid potential liability. HB892 further requires that “[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,” *id.*, but the scope of the mandated information and the mindset required for violations are not clarified. Anyone who violates these opaque provisions “shall, on conviction, be fined up to \$5,000, be imprisoned for up to 18 months, or both,” *id.* § 13-35-210(6)—meaning that violations of HB892 can constitute felonies under Montana law, *see id.* § 45-2-101.

HB892 was enacted despite lawmakers’ articulated concerns that the bill was not only redundant and unnecessary given the safeguards already contained in

Montana's election code, but also could be used to impose criminal penalties for entirely innocent conduct.

In short, HB892's reach far exceeds its stated purpose of prohibiting double voting. It criminalizes both the act of maintaining multiple voter registrations and the failure to include prior-registration information on applications, even if voters and registrants have no intention of actually voting in more than one place, and even if they never do. The chilling effect HB892 will have on eligible voters' political participation is particularly troublesome given that the risk of criminal liability attaches at the earliest stage of the voting process—completion of a voter-registration application—and that maintaining multiple voter registrations is not only common, but also sometimes necessary to ensure that a voter has access to a ballot.

Plaintiff MontPIRG is a student-directed, nonpartisan membership organization that, among other issues, seeks to register young voters. Plaintiff MFPE is Montana's largest union and encourages its members to register and vote. Both organizations are injured by HB892, as they must now redirect their limited resources to retooling their training and informational materials and counteracting the chilling effects of HB892's new restrictions. Additionally, MontPIRG's and MFPE's members and constituents include Montanans who are most likely to be affected by HB892—in particular, young and transient voters—and so the new law

both frustrates their organizational missions and impedes the exercise of their members' voting rights and political expression.

Defendants are state officials responsible for the implementation and enforcement of Montana's election laws, including the provision of HB892 codified at section 13-35-210(5) of the Montana Code.

IV. Legal Theories Underlying Plaintiffs' Claims

The provisions of HB892 codified at section 13-35-210(5) of the Montana Code violate bedrock constitutional principles.

Vagueness. A law is unconstitutionally vague when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Butcher v. Knudsen*, 38 F.4th 1163, 1169 (9th Cir. 2022) (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). “The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.” *Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). In particular, “[i]f a statute subjects transgressors to criminal penalties, . . . vagueness review is even more exacting,” *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000), and vague statutes are especially objectionable when they “abut upon sensitive areas of basic First Amendment freedoms,” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)—

including the right to vote, *see Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1186–87 (9th Cir. 2021) (First Amendment protects against unjustified burdens on right to vote).

Here, HB892 criminalizes the act of “purposefully remain[ing] registered to vote in more than one place” and requires registrants to “provide [] previous registration information on the Montana voter registration application.” Mont. Code Ann. § 13-35-210(5). But the law does not define what it means to “purposefully remain registered” or what affirmative steps must be taken to avoid the threat of severe criminal penalties, nor does it ascribe a mens rea requirement to the prior-registration disclosure requirement or clarify the extent of the information registrants must include on their applications. HB892 thus creates confusion for Montanans of ordinary intelligence, leaving them guessing how to avoid significant criminal penalties and consequently chilling the fundamental right to vote. The statute therefore violates the U.S. Constitution’s guarantee of due process.

Overbreadth. A law is unconstitutionally overbroad when it exceeds its legitimate objectives and punishes conduct that is otherwise constitutionally protected. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (plurality opinion) (“[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of

the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’” (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973))).

Here, HB892 goes beyond its legitimate objective—prohibiting double voting—and criminalizes other facets of the voter-registration process. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (laws that “govern[] the registration and qualifications of voters” implicate “the individual’s right to vote”). It imposes criminal penalties on voters who maintain multiple registrations and registrants who neglect to include prior-registration information on their applications—regardless of whether these Montanans actually intend to vote twice in an election—and thus exceeds its lawful ends, burdening and chilling constitutionally protected conduct. Moreover, as a consequence of the election code’s aiding-and-abetting provision, *see* Mont. Code Ann. § 13-35-105, HB892 also applies to groups (like Plaintiffs) and individuals who help their fellow Montanans access the franchise, chilling an additional category of constitutionally protected conduct, *see Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008) (“[V]oter registration is speech protected by the First Amendment.”). By criminalizing and chilling political expression beyond its stated and legitimate purpose of prohibiting double voting, HB892 is fatally overbroad in violation of the First and Fourteenth Amendments.

Right to Vote. When adjudicating right-to-vote claims under the U.S. Constitution, courts “must weigh the character and magnitude of the asserted injury

to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Ariz. Democratic Party*, 18 F.4th at 1187 (cleaned up) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)); see also *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc) (characterizing "standard of review for laws regulating the right to vote" as "balancing and means-end fit framework"). "[A]n election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest." *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008).

Here, HB892 unjustifiably burdens the right to vote in at least two ways. First, the law prohibits Montanans from maintaining multiple voter registrations—including registrations in other states—even if voters have no intention of voting more than once in an election, and even though voters might have legitimate reasons to retain prior registrations in order to ensure their ability to cast ballots in the future. See, e.g., *Common Cause Ind. v. Lawson*, 937 F.3d 944, 960 (7th Cir. 2019). Second, the criminal penalties imposed on Montanans who maintain multiple voter registrations or fail to provide prior-registration information have the effect of deterring potential Montana voters from registering in the first place and denying

them the franchise during periods of incarceration, both of which impose the severest burden on the right to vote: disenfranchisement. Because these burdens cannot be justified by any legitimate state interests, and are certainly not narrowly tailored to serve any compelling state interests, HB892 violates Montanans' right to vote as protected by the First and Fourteenth Amendments.

V. Computation of Damages

Plaintiffs do not seek the recovery of monetary damages from Defendants, other than requests for attorneys' fees, litigation expenses, and costs. Such fees and costs are unknown at this time and contingent on the course and outcome of the litigation.

VI. Pendency and Disposition of Related Litigation

The provisions of HB892 codified at section 13-35-210(5) of the Montana Code are currently being challenged in Montana state court in *League of Women Voters of Montana v. Knudsen*, No. DV 16-23-1073 (Mont. 18th Jud. Dist. Ct.). The *League of Women Voters* plaintiffs have not asserted any federal claims; instead, they have asserted claims under the Montana Constitution's free-speech, free-association, right-to-vote, and due-process provisions. The court held a hearing on the plaintiffs' preliminary-injunction motion on February 8, 2024; the court has not yet issued its ruling.

VII. Proposed Additional Stipulations of Fact and Law

1. Over the past four decades, MontPIRG has worked to ensure access to same-day voter registration, supported the passage of the state's Motor Voter Law, and led voter-registration campaigns on Montana campuses.

2. During the 2020 election cycle, MontPIRG volunteers and interns registered 5,612 voters across the state; made 73,323 get-out-the-vote calls; and collected 1,103 "Why I Am Voting" pledges from students at the University of Montana in Missoula and Montana State University in Bozeman.

3. During the 2022 election cycle, MontPIRG volunteers and interns registered 3,046 voters across the state.

4. MontPIRG had roughly 5,200 members in the spring of 2023.

5. Over 85% of MFPE's members are registered to vote.

6. As Plaintiffs assert only claims under the First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, federal law applies.

VIII. Proposed Deadlines to Join Parties or Amend Pleadings

Having met and conferred with Defendants and Defendant-Intervenors, Plaintiffs have agreed on March 22, 2024, as the deadline to join parties and amend pleadings.

IX. Controlling Issues of Law That Might Be Suitable for Pretrial Disposition

1. Are the provisions of HB892 codified at section 13-35-210(5) of the Montana Code vague in violation of the Fourteenth Amendment to the U.S. Constitution?

2. Are the provisions of HB892 codified at section 13-35-210(5) of the Montana Code overbroad in violation of the First and Fourteenth Amendments to the U.S. Constitution?

3. Do the provisions of HB892 codified at section 13-35-210(5) of the Montana Code violate the right to vote as protected by the First and Fourteenth Amendments to the U.S. Constitution?

X. Persons Having Information Regarding This Case

No.	Witness	Address & Phone Number	Subject(s) of Information
1	Hunter Losing	Available through undersigned counsel	Mr. Losing’s work as Executive Director of MontPIRG; MontPIRG’s operations, governance, organizational objectives, members, and plans; MontPIRG’s voter-registration efforts; effects of HB892 on MontPIRG’s operations, resources, members, and constituents

No.	Witness	Address & Phone Number	Subject(s) of Information
2	Amanda Curtis	Available through undersigned counsel	Ms. Curtis's work as President of MFPE; MFPE's operations, governance, organizational objectives, members, and plans; MFPE's voter-registration efforts; effects of HB892 on MFPE's operations, resources, members, and constituents
3	Any witness identified in discovery		
4	Any witness identified by Defendants		
5	Any witness identified by Defendant-Intervenors		
6	Any witness necessary for foundation, rebuttal, or impeachment		

XI. Insurance

N/A.

XII. Prospects for Compromise

The parties have not engaged in settlement discussions and Plaintiffs do not believe a resolution is likely through compromise.

XIII. Suitability of Special Procedures

None.

Plaintiffs reserve the right to supplement this statement.

Dated: March 18, 2024

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
abranh@elias.law
ph. (202) 968-4490

Attorneys for Plaintiffs

**Admitted pro hac vice*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of March, 2024, a copy of the foregoing document was served on the following persons by the following means:

1, 2, 3 CM/ECF
 Hand Delivery
 Mail
 Overnight Delivery Service
 Fax
 E-Mail

1. Dale Schowengerdt
Landmark Law PLLC
7 West 6th Ave., Ste. 518
Helena, MT 59601
dale@landmarklawpllc.com

2. Kathleen Smithgall
Thomas McCarthy
Conor Woodfin
Consovoy McCarthy PLLC
1600 Wilson Blvd, Ste. 700
Arlington, VA 22209
katie@consovoymccarthy.com
tom@consovoymccarthy.com
conor@consovoymccarthy.com

3. Thane Johnson
Michael Russell
Michael Noonan
Alwyn Lansing
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620
thane.johnson@mt.gov
michael.russell@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

/s/ Raph Graybill
GRAYBILL LAW FIRM, P.C.