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

MONTANA PUBLIC INTEREST RESEARCH GROUP and 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 Attorney General*, and CHRIS GALLUS, *in his official capacity as Montana Commissioner of Political Practices*,

Defendants,

REPUBLICAN NATIONAL COMMITTEE and MONTANA REPUBLICAN PARTY,

Intervenor-Defendants.

No. 6:23-cv-070-BMM

BRIEF IN SUPPORT OF JOINT MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

This Court entered a preliminary injunction on April 24, 2024, enjoining enforcement of HB 892's multiple registration prohibition and prior registration disclosure requirement provisions, which are codified in Montana Code Annotated §13-35-210(5). Doc. 79. Defendants and Intervenor-Defendants ("Movants") have noticed appeals. Doc. 81. Together, they respectfully ask this Court to stay its decision pending appeal. *See* Fed. R. App. P. 8(a)(a) (requiring parties to ask the district court for a stay pending appeal before asking the court of appeals). The stay factors are all satisfied, for the reasons give below. Movants seek to move quickly and respectfully request an expedited ruling from this Court, whether it be a grant or a quick denial.

ARGUMENT

Stays pending appeal turn on four factors:

1. The movant's likelihood of success on the merits.
2. Whether the movant will suffer irreparable harm without a stay.
3. Whether the stay will substantially injure other interested parties.
4. And whether a stay is in the public interest.

Nken v. Holder, 556 U.S. 418, 426 (2009); *see also N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1044 (D. Mont. 2020). In "election cases when a lower court has issued an injunction of a state's election law in the period close to an election," courts also must consider the *Purcell* principle. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grants of applications for stays) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). These factors, both individually and collectively, favor a stay.

In fact, when district courts enjoined state election laws in 2020 and States moved for stays, virtually every one of those motions was granted. *See id.* at 880; *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 n.2 (11th Cir. 2020). If the court of appeals didn't enter a stay, then the Supreme Court did; and if the court of appeals entered a stay, then the Supreme Court left it in place. *E.g.*, *RNC v. DNC*, 140 S. Ct. 1205 (2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), *application to vacate denied*, 140 S. Ct. 2015 (June 26, 2020); *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020), *application to vacate denied*, 2020 WL 3456705 (U.S. June 25, 2020); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (July 2, 2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (July 30, 2020); *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020); *Clarno v. People Not Politicians Ore.*, 141 S. Ct. 206 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (Oct. 21, 2020); *Andino v. Middleton*, 141 S. Ct. 9 (Oct. 5, 2020); *A. Philip Randolph Inst. of Ohio v. Larose*, 831 F. App'x 188, 189 (6th Cir. 2020); *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564 (5th Cir. 2020); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220 (5th Cir. 2020); *Priorities USA v. Nessel*, 978 F.3d 976, 978 (6th Cir. 2020); *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1039 (7th Cir. 2020); *Curling v. Sec'y of State of Ga.*, 2020 WL 6301847 (11th Cir. Oct. 24, 2020); *DNC v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020), *application to vacate stay denied*, *DNC v. Wis. State Leg.*, 141 S. Ct. 28 (Oct. 26, 2020). To avoid burdening more courts with more emergency requests, the parties respectfully request this Court stay its own decision now.

I. MOVANTS ARE LIKELY TO SUCCEED, AND HAVE AT LEAST RAISED SUBSTANTIAL QUESTIONS, ON THE MERITS.

Movants respectfully disagree with this Court's decision for the reasons they've presented in briefing and at the preliminary injunction hearing held last month. Of course, few courts think the decision they just issued is *likely* to be reversed on appeal. *See Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 561 n.4 (D.D.C. 2018). But the Federal Rules contemplate that district courts will stay their own decisions pending appeal, *see* Fed. R. App. P. 8(a), and for good reason. Under the Ninth Circuit's "sliding scale" approach, a stay may be appropriate when the balance of equities decidedly favors the appellant and "offset[s] a weaker showing of" the appellant's likelihood of success on the merits. *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). In other words, the district court can grant the stay (without questioning its own decision) on the ground that the movant has raised "serious legal questions" that are fair grounds for appeal. *Manrique v. Kolc,* 65 F.4th 1037, 1041 (9th Cir. 2023).

Movants believe they are likely to prevail on appeal. At a minimum, though, the equities decidedly favor preserving the pre-decision status quo in election cases—as evidenced by the legion of stays that were granted during the 2020 cycle. *See supra* pp. 3-4. A stay is thus warranted here if this Court's decision presents a "serious" question that warrants further review. *Manrique,* 65 F.4th at 1041. It presents several, including the following.

First, this Court applied the incorrect preliminary injunction standard. As explained above, the Ninth Circuit has endorsed a "sliding scale" approach to injunctions. *All. for the Wild Rockies*, 632 F.3d at 1133. Normally, Plaintiffs bear the burden to show that "they are likely to succeed on the merits." Doc. 79, at 5. But the Court may lower this likelihood-of-success requirement if the "balance of hardships tips *decidedly* in [Plaintiffs'] favor." *All. for the Wild Rockies*, 632 F.3d at 1133 (cleaned up) (emphasis in original). In *Alliance for the Wild Rockies*, the Ninth Circuit reaffirmed the following standard: "A preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Id.* (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *overruled in part on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008)). That is, Plaintiffs must make a stronger showing on the equities if they seek to avail themselves of the lower standard for showing success on the merits. *Id.* at 987.

Here, the Court merely found that "[t]he balance of equities tips in favor Plaintiffs." Doc. 79, at 31. Yet the Court lowered the standard for Plaintiffs' showing of success on the merits, concluding that Plaintiffs only "raised substantial questions going to the merits of HB 892's multiple registration prohibition and prior registration disclosure requirements." *Id.* at 26. The Ninth Circuit does not permit a court to lower the standard for the merits inquiry in the absence of a finding that the equities tip "decidedly" or "sharply" in Plaintiffs favor. *All. for the Wild Rockies*, 632 F.3d at 1133.

The Court made no such finding here, and, in fact, acknowledged that the new law "likely *do[es] not* substantively change Montana voting registration procedure." Doc. 79, at 13 (emphasis in original). This undercuts Plaintiffs' claims that the equities tip in their favor at all, let alone tip decidedly in their favor.

Second, the Court's overbreadth analysis sidestepped important and binding Supreme Court precedent in favor of dicta from a Seventh Circuit decision in a case involving entirely different claims. The Supreme Court has repeatedly held that Plaintiffs bear the burden of showing that the law "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." *See United States v. Williams*, 553 U.S. 285, 305 (2008); *see also United States v. Hansen*, 599 U.S. 762, 770 (2023); *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973). The Supreme Court warns lower courts that laws are not overbroad simply because "one can conceive of some impermissible applications." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Indeed, lower courts must "construe the [challenged law] as constitutional" if it is at all reasonable to do so. *United States v. Rundo*, 990 F.3d 709, 714 (9th Cir. 2021).

This Court relied heavily on the dicta in *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), to conclude that HB 892 covers a substantial amount of protected speech. Doc. 79, at 23-25. *Common Cause*, however, reaffirms that a state can remove voters from its voter rolls as long as the *voter* provides information about prior registration directly to that state rather than a third party—exactly what HB 892 requires. 937 F.3d at 960. And while this Court found persuasive the Seventh Circuit's

hypothetical scenarios where an individual might want to maintain multiple voter registrations, this Court concluded only that those hypotheticals "*could* apply to HB 892." Doc. 79, at 24 (emphasis added). This conclusion impermissibly adopts Plaintiffs' "fanciful" and hypothetical situations rather than finding that Plaintiffs successfully showed a substantial number of impermissible applications relative to the legitimate sweep of the law. *Hansen*, 599 U.S. at 770. The law has been in effect for over a year and municipalities successfully ran their 2023 elections pursuant to the law. Yet Plaintiffs cannot point to a single person who has been prevented from registering to vote. Doc. 39, at 21. This falls short of Plaintiffs' burden to show that the law "prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 305.

This Court further concluded that the State "fail[ed] to draw a sufficient connection between maintaining multiple voter registrations and prohibiting double voting." Doc. 79, at 25. But the Supreme Court has already drawn this connection, holding that States can adopt "prophylactic measure[s]" to "prevent election fraud." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021). And Plaintiffs' own documents explain the connection between multiple voter registrations and double voting. For example, Plaintiffs include Exhibit 14, which is from the National Conference of State Legislatures and states that identifying voters that have moved "help[s] with identifying potential duplicate registrations and by extension, double voters." Doc. 13-14. Likewise, Plaintiffs' Exhibit 16 states that "[n]otice of [multiple voter registrations] would help a state keep accurate rolls by verifying residence and

eligibility" and that duplicate registrations in multiple states are a "major problem." Doc. 13-16. There's ample evidence in the record supporting the connection.

In sum, Movants have identified several grounds for seeking relief from the Ninth Circuit and have raised—at a minimum—serious legal questions, if not shown outright that they are likely to succeed on the merits. *Leiva-Perez*, 640 F.3d at 964 (9th Cir. 2011).

II. MOVANTS WILL SUFFER IRREPARABLE HARM WITHOUT A STAY.

Movants "will suffer irreparable harm" absent a stay. *Nken*, 556 U.S. at 426. Because Movants are likely to succeed on appeal, this Court's decision will "seriously and irreparably harm" Defendants and Intervenor-Defendants by preventing the State of Montana from "conducting this year's elections pursuant to a statute enacted by the Legislature," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and "vindicating its sovereign interest," *Little*, 140 S. Ct. at 2617 (Roberts, C.J., concurring). Movants will also suffer the well-known problems that the *Purcell* principle tries to avoid. Even if Movants ultimately succeed on appeal and the preliminary injunction is lifted, the harm caused in the meantime, including voter confusion and the loss of electoral confidence, cannot be undone. *See infra* Section III.

III. A STAY WILL NOT IRREPARABLY HARM PLAINTIFFS AND SERVES THE PUBLIC INTEREST.

Because Movants include governmental actors, the last two factors—harm to others and the public interest—"merge." *Nken*, 556 U.S. at 435. When assessing these

factors in an election case, the most important consideration is *Purcell*, which says "that lower federal courts should ordinarily not alter the election rules on the eve of an election." *RNC v. DNC*, 589 U.S. 423, 424 (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). Even if the challenged provisions ultimately are declared unconstitutional, *Purcell* protects the election process by "allow[ing] the election to proceed without an injunction" while Movants' appeal is pending. *Purcell*, 549 U.S. at 6; *accord Riley v. Kennedy*, 553 U.S. 406, 426 (2008). Accordingly, the equities weigh decidedly in Movants' favor. *Leiva-Perez*, 640 F.3d at 964.

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). As a result, *Purcell* dictates how courts must balance the equities in election cases. By staying the judicial hand, *Purcell* promotes "the public interest in orderly elections." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944-45 (2018). Running an election is a "complicated endeavor," requiring a "massive coordinated effort" by many "officials and volunteers." *Wis. State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). Even "seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Id.* The *Purcell* principle also protects individuals by preventing "voter confusion" and safeguarding "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; *see also Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

Although this Court ultimately rejected Intervenor-Defendants' *Purcell* arguments, this Court acknowledged that this case falls "within the purview of the cases" following *Purcell*'s decision. The deadline for registering for the Montana state primary election is days away. Doc. 79, at 12. And the deadline for registering to vote in the general election is less than six months away. Regardless of the "substantive[] change" to Montana's law, these are the precise types of "innocuous" injunctions *Purcell* guards against. *Wis. State Legislature*, 141 S. Ct. at 31. This Court's injunction thus falls within *Purcell*'s forbidden window. *See, e.g.*, *Milligan*, 142 S. Ct. at 888 (Kagan, J., dissenting from grant of applications for stays) (noting that the Court was staying a decision issued four months before the primary); *Thompson*, 959 F.3d at 813 (declining to vacate a stay of a decision issued six months before the election).

League of Women Voters of Florida, Inc. v. Florida Sec'y of State, 32 F.4th 1363 (11th Cir. 2022), provides a persuasive roadmap for *Purcell*'s application to voter registration laws, such as HB 892. In *League of Women Voters*, the plaintiffs challenged a host of election provisions, including one implicating voter registration that was underway for an election four months away. *Id.* at 1369. Like this Court, the Eleventh Circuit held that the timing of the lawsuit fell squarely within *Purcell*'s reach. But the Eleventh Circuit went further, recognizing that because voter registration was underway, a stay of the district court's injunction was warranted. *Id.* at 1371. And the Eleventh Circuit reiterated that *Purcell* protects against even the most "innocuous" changes in election law because of the potential "unanticipated consequences."

The risk of voter confusion is significant. First, the law introduced a prohibition on remaining registered to vote in more than one location. The Court's order now leaves open the question of whether registered voters may legally remain registered in other jurisdictions. Second, the Court's order introduces confusion as to whether the State may continue requiring previous registration information on the existing voter registration application, which has been used in elections prior to HB 892. *See* Doc. 30-14. Injecting confusion into the registration process about whether the existing voter registration application and legal requirements are lawful directly implicates *Purcell*. 549 U.S. at 4.

The balance of equities here decidedly favors a stay. Under *Purcell*, the balance favors a stay *even if* Plaintiffs were likely to succeed on appeal. *See Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). For the reasons stated above, *supra* pp. 4-8, Movants—not Plaintiffs—are likely to succeed on appeal. Even so, a stay is warranted given "the public's substantial interest in the stability of its electoral system in the final weeks leading to an election," let alone the final *days*. *Lair*, 697 F.3d at 1202. And a stay will not hurt Plaintiffs. Again, this Court concluded that "the multiple voter registration prohibition and prior registration disclosure requirement likely *do not* substantively change Montana voting registration procedure." Doc. 79, at 13.

CONCLUSION

For all these reasons, Movants request this Court stay its decision pending appeal. In the event this Court determines that such a stay is inappropriate, Movants request this Court summarily deny this motion.

DATED this 1st day of May, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that the foregoing motion complies with Local Rule 7.1(b) and (c) and contains 2,715 words.

Dated: May 1, 2024 By: */s/ Kathleen S. Lane*

CERTIFICATE OF SERVICE

I certify that on May 1, 2024, an accurate copy of the foregoing notice was served electronically through the Court's CM/ECF system on registered counsel.

/s/ Kathleen S. Lane