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

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

Plaintiffs,

v.

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

Defendants, and

REPUBLICAN NATIONAL COMMITTEE; and MONTANA REPUBLICAN PARTY,

Defendant-Intervenors.

CV-23-70-H-BMM

ORDER

INTRODUCTION

Defendants Austin Knudsen ("the Attorney General"), Republican National Committee, and Montana Republican Party (collectively "Defendants") filed an

emergency motion to stay the Court's preliminary injunction on May 1, 2024. (Doc. 83.) Plaintiff Montana Public Interest Group ("MontPIRG") and Plaintiff Montana Federation of Public Employees ("MFPE") (collectively "Plaintiffs") oppose Defendants' motion. (Doc. 92.) Defendants filed an unopposed joint motion to expedite the consideration of their motion to stay the preliminary injunction pending appeal on May 13, 2024. (Doc. 91.) Plaintiffs filed an affidavit containing an order from the Montana Eighteenth Judicial District Court, Gallatin County, in the case *League of Women Voters of Montana v. Knudsen et al.*, Cause No. DV-16-23-1073 (April 29, 2024), and that order's associated briefing. (Docs. 93, 93-1, 93-2, 93-3.) The Court declines to stay the preliminary injunction based on the foregoing discussion.

FACTUAL AND LEGAL BACKGROUND

This action concerns House Bill 892 ("HB 892") and its amendments to Mont. Code Ann. § 13-35-210. The facts remain the same as the facts in the Court's previous order. (*See* Doc. 79 at 2-4.) The Court previously granted Defendants' motion to take judicial notice of a transcript of a proceeding conducted in the case *League of Women Voters of Montana v. Knudsen et al.*, Cause No. DV-23-1072, in the Montana Eighteenth Judicial District Court, Gallatin County, Montana. (Doc. 70.) The Court granted Plaintiffs' motion for a preliminary injunction and enjoined

enforcement of HB 892's multiple registration prohibition and prior registration disclosure requirement, codified in Mont. Code. Ann. § 13-35-210(5). (Doc. 79.)

LEGAL STANDARD

A court considering a stay pending appeal examines the following four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Ninth Circuit has determined that the party moving for a stay must show that they "have a substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). "The first two factors . . . are the most critical," while the last two factors are only considered when "an applicant satisfies the first two factors." *Nken*, 556 U.S. at 434–35. The party moving for a stay pending appeal bears the burden of demonstrating that the factors support a stay. *Id.* at 433-34.

DISCUSSION

The Court will consider each factor independently.

I. Whether the defendants have made a strong showing that they are likely to succeed on the merits.

Defendants contend that they are likely to be successful on the merits for the following reasons: 1) the Court incorrectly applied the preliminary injunction

standard; and 2) the Court's overbreadth analysis relied too heavily on hypotheticals and dicta in the face of contrary U.S. Supreme Court precedent and evidence. (Doc. 84 at 4-8.) The Court disagrees and will address each argument in turn.

a. The Court's preliminary injunction standard.

Defendants argue that the Court incorrectly applied the Ninth Circuit's "sliding scale" approach because the Court did not determine that the balance of hardships tip *decidedly* in Plaintiffs' favor. (Doc. 84 at 5.) Defendants' argument proves unpersuasive.

A plaintiff seeking a preliminary injunction must establish the following four elements: 1) that they are likely to succeed on the merits; 2) that they are likely to suffer irreparable harm in the absence of preliminary relief; 3) that the balance of equities tips in the plaintiff's favor; and 4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). The Ninth Circuit also employs a "sliding scale" approach under which a preliminary injunction may be granted "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." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011).

The Court wrote in its previous order that "*at minimum*, that Plaintiffs have raised substantial questions going to the merits of HB 892's multiple registration prohibition and prior registration disclosure requirements. *All. for the Wild Rockies*,

632 F.3d at 1134. Plaintiffs have demonstrated a likelihood of success on the merits concerning their overbreadth claim. *Winter*, 555 U.S. at 20." (Doc. 79 at 26) (emphasis added.) The Court's analysis encompassed both the traditional *Winter* factors and the Ninth Circuit's sliding scale approach, and the Court determined that Plaintiffs fulfilled both standards for a preliminary injunction. It is true that the Court wrote that "[t]he balance of equities tips in favor of Plaintiffs." (Doc. 79 at 31.) The Court's omission of the word "decidedly" or "sharply" does not amount to a substantial argument going to the merits, however, because the Court applied both the sliding scale and the traditional *Winter* factors. The Court determined that Plaintiffs demonstrated a likelihood of success on the merits which, pursuant to *Winter*, supports the issuance of a preliminary injunction where the balance of equities tip in favor of the Plaintiffs, in addition to the other *Winter* factors being fulfilled. 555 U.S. at 20.

b. The Court's overbreadth analysis.

Defendants argue that the Plaintiffs failed to demonstrate that HB 892 prohibits a substantial amount of protected speech relative to its plainly legitimate sweep. (Doc. 84 at 6.) Defendants assert that the Court instead impermissibly adopted Plaintiffs' hypothetical situations. (*Id.* at 7.) Defendants' argument proves unavailing.

Plaintiffs argued in their motion for a preliminary injunction that HB 892's multiple registration prohibition and prior registration disclosure requirement substantially impact a large class of "highly transient voters," including "[c]ollege students, young people, and voters who temporarily relocate for job reasons . . .." (Doc. 12 at 30.) The Court viewed Plaintiffs' argument as rising above mere speculation or hypotheticals. (Doc. 79 at 26.) The Ninth Circuit has determined that a party challenging a law as overbroad "need not necessarily introduce admissible evidence of overbreadth, but generally must at least 'describe 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) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n. 6 (2008)). Defendants' argument does not disturb the arguable instances of overbreadth, that is, HB 892's effect on "highly transient voters" that the Court concluded rises above mere speculation.

Defendants relatedly challenge the Court's discussion of *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), and claims that the Court impermissibly adopted hypotheticals from that case in its analysis. (Doc. 84 at 7.) Defendants' argument misconstrues the Court's discussion of *Common Cause Ind.*, 997 F.3d. The Court discussed *Common Cause Ind.*, 977 F.3d at 960, for the proposition that "[w]hile double voting is surely illegal, having two open voter

registrations is a different issue entirely. In the over-whelming majority of states, it is not illegal to be registered to vote in two places." (Doc. 79 at 25.) The Court's discussion of *Common Cause Ind.*'s hypothetical situations where a voter would not wish to relinquish their prior registration was used in context to support and illustrate the rationale for why the majority of states hold that it is not illegal to maintain multiple voter registrations. (*See id.* at 23-24.) The Court's reference to *Common Cause Ind.*'s discussion was not an impermissible adoption or application of the hypotheticals posed by the Seventh Circuit. (*Id.*) It was merely a point of comparison. Plaintiffs' argument concerning HB 892's effect on "highly transient voters" stands independent of the Court's discussion and comparison to *Common Cause Ind.,* 937 F.3d.

Defendants claim additionally that there exists a connection between prohibiting multiple voter registrations and prohibiting double voting. (Doc. 84 at 7.) The Court recognizes that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. ___, 141 S. Ct. 2321, 2347 (2021) (quotation omitted). The Court further recognizes that a State may take action to prohibit election fraud before it occurs. (*Id.* at 2348.) The Court determines, however, that Defendants have failed to demonstrate that a prohibition on multiple voter registrations and a prior registration disclosure requirement amount to a permissible prophylactic against double voting.

The Court previously noted that HB 892's plainly legitimate sweep is prohibiting double voting. (Doc. 79 at 20.) The Court determined, however, that Defendants failed to sufficiently connect prohibiting multiple voter registrations and requiring prior voter registration information to prohibiting double voting. (*Id.*) Defendants now point to exhibits filed by Plaintiffs that Defendants allege demonstrate that prohibiting multiple voting registrations connects to prohibiting double voting. (Doc. 84 at 7-8.) The reports cited to by Defendants do not appear to make such a claim so directly. The National Conference of State Legislatures ("NCSL") October 25, 2022 summary writes in pertinent part that "[a]n ever-increasing number of states participating in crosschecks with other states to help identify voters who have moved, which can help identify potential duplicate registrations and by extension, double voters." (Doc. 13-14 at 3.) The NCSL's summary appears to be chiefly concerned with cleaning and maintaining voter rolls and does not contemplate the permissibility of regulating voter registration through felony criminal penalties; the NCSL summary instead appears to be a summary of state laws existing in 2022 that prohibited double voting. (*See id.* at 4-17.)

Defendants similarly cite to a Pew Center issue brief concerning upgrades to the U.S. voter registration system. (Doc. 13-16.) The Pew Center issue brief appears chiefly concerned with increasing voter registration, decreasing cost of registration per voter, and increasing the efficiency of voter roll updating procedures. (*See id.*)

The Pew Center issue brief does not contemplate the issue of felony criminal penalties as a means to address voter registration system issues. Defendants' evidence, while possibly connecting multiple voter registrations to the opportunity to double vote, does not connect the imposition of felony criminal penalties for maintaining multiple voter registrations to the prevention of double voting. Such evidence fails to challenge the Court's conclusion that HB 892's multiple registration and prior registration disclosure requirement tend to overly burden protected political activity through the imposition of felony criminal penalties, even when a registrant has no intention of double voting or does not double vote. (Doc. 79 at 26-27.)

Defendants additionally fail to point to any authority supporting the conclusion that imposing felony criminal penalties for maintaining multiple voting registrations or for failing to disclose prior voting registrations amounts to a permissible prophylactic against double voting. The Court similarly fails to locate any such authority.

The Court determines that Defendants fail to demonstrate that they will succeed on the merits. This factor cuts in favor of Plaintiffs.

II. Whether the defendants will be irreparably injured absent a stay.

Defendants contend that they will be irreparably harmed absent a stay because they are likely to succeed on appeal, and therefore the State of Montana will be

prevented from conducting the 2024 presidential primary and 2024 general election pursuant to HB 892. (Doc. 84 at 8.) Defendants' argument appears to presuppose that Defendants have made a strong showing of success on the merits. The Court disagrees with the Defendants' presupposed conclusion.

Defendants further assert that they will be harmed by the Court's preliminary injunction due to voter confusion and a loss of electoral confidence, referred to by Defendants as the *Purcell* principles. (*Id.*) The Court recognizes the validity of such concerns. *See Northeast Ohio Coal. for Homeless v. Larose*, 2024 WL 83036 (N.D. Ohio January 8, 2024) (states possess a legitimate interest in preventing voter fraud and promoting public confidence in the integrity of elections); *see also* (Doc. 79 at 20). Defendant claims that the Court's preliminary injunction introduces confusion regarding whether voters may remain registered in other jurisdictions and whether the State of Montana may continue requiring previous voter registration information on the Montana voter registration application. (*See* Doc. 84 at 11.) Defendants present this argument without substantiating evidence or statistical support. (*See id.*) The abstract possibility of voter confusion and loss of electoral confidence fails to demonstrate an irreparable injury, which is required for a stay pending appeal. *See Nken*, 556 U.S. at 434-35 ("[S]imply showing some possibility of irreparable injury fails to satisfy the second factor.") (quotation omitted).

The U.S. Supreme Court has determined that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quoting N*ew Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)). The Court's preliminary injunction enjoins enforcement of HB 892's multiple registration prohibition and prior registration disclosure requirement. The injury suffered by Defendants due to an inability to enforce those HB 892 prohibitions must be balanced against the injury posed to Plaintiffs should HB 892's multiple registration prohibition and prior registration disclosure requirements take effect. (*See* Doc. 79 at 27) ("Plaintiffs appear to face a proverbial Hobson's choice: attempt to conform their voter registration activities to HB 892; or cease or greatly reduce their voter registration activities for the 2024 Montana primary election and 2024 Montana general election.") Plaintiffs risk exposing those they assist in registering to vote to felony criminal penalties. (*Id.* at 27-28.) Both parties face potential injury based on HB 892's multiple registration prohibition and prior registration disclosure requirement. This factor proves neutral.

The Court is not required to consider the last two factors for a stay pending appeal, pursuant to *Nken*, 556 U.S. at 434-35, because Defendants have failed to satisfy the first two factors. The Court chooses, however, out of an abundance of caution, to additionally analyze the last two factors.

III. Whether the issuance of a stay will substantially injure the Plaintiffs, and whether public interest supports staying the Court's preliminary injunction.

Defendants group the last two factors together in their argument, and, therefore, the Court will consider these factors collectively. (*See* Doc. 84 at 8-11.) Defendants claim that *Purcell v. Gonzalez*, 549 U.S. 1 (2006), bars the Court's granting of a preliminary injunction against HB 892's multiple registration prohibition and prior registration disclosure requirement provisions codified in Mont. Code. Ann. § 13-35-210(5). The Court previously considered the application of *Purcell*'s directive that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020). The Court recognized that the Montana primary election registration deadline likely falls within the purview of *Purcell*. (Doc. 79 at 12.) The Court determined, however, that *Purcell*'s caution against changing voting laws on the eve of an election does not apply to this action because enjoining HB 892 will not lead to the evils *Purcell* sought to avoid of voter confusion and disenfranchisement. (*Id.* at 12-14.)

Defendants argue that the Court should take guidance on *Purcell*'s application from the Eleventh Circuit's decision in *League of Women Voters of Florida, Inc. v. Florida Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022). (Doc. 84 at 10.) The Eleventh Circuit in *League of Women Voters* stayed the Florida district court's permanent

injunction less than four months before statewide elections and while local elections were occurring. 32 F.4th at 1371. *League of Women Voters of Florida* proves unpersuasive. The Eleventh Circuit in *League of Women Voters of Florida* considered a challenge to Florida's S.B. 90, a wide ranging election law that addressed various election topics, including "procedures for challenging a provision of the election code, testing protocols for the online voter-registration system, live turnout data reports, guidelines for the duplication of damaged vote-by-mail ballots, and rules for the inspection of ballot materials." 66 F.4th 905, 919 (11th Cir. 2023).

The district court in *League of Women Voters of Florida* enjoined four S.B. 90 provisions: 1) drop box provision; 2) enforcement of solicitation provision; 3) enforcement of the registration-delivery provision; and 4) enforcement of the subsequently repealed registration-disclaimer provision. *Id.* at 920. S.B. 90's registration-delivery provision proves distinguishable from HB 892's multiple registration prohibition and prior registration disclosure requirement. As described by the Eleventh Circuit, S.B. 90's registration-delivery provision required voter-registration organizations to "promptly deliver[] the registration forms to the division or the supervisor of elections in the county in which the applicant resides within 14 days after the application was completed by the applicant, but not after registration closes for the next ensuing election." *League of Women Voters of Florida*, 66 F.4th at 920. The challenged portion of Florida's S.B. 90 does not

concern or implicate multiple voter registrations or prior registration disclosures when registering to vote in Florida, unlike the HB 892 provisions at issue.

The Court further recognizes that Florida's S.B. 90 substantially changed how voter registration occurred by changing the use of drop boxes to collect ballots, changing the timing by which voter registration organizations were required to deliver completed voter registrations to the requisite counties, changing information voter registration organizations were required to disclose to would-be registrants, and changing areas where voter registration solicitation could be conducted. *See League of Women Voters of Fla.*, 32 F.4th at 1369. HB 892, in contrast, does not change the means or methods by which voter registration occurs in Montana. The Court recognized previously that HB 892 would not change election worker's current practices. (Doc. 79 at 13.) The Court noted additionally that HB 892's prior registration disclosure requirement codified Montana's previously-existing and long-standing requirement for registrants to supply prior registration information. (*Id.*) The Court declines to view *League of Women Voters of Florida*, 32 F.4th 1363, as persuasive.

"At the outset, it is important to remember that the Supreme Court in *Purcell* did not set forth a per se prohibition against enjoining voting laws on the eve of an election." *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 368 (9th Cir. 2016). The Court views the Ninth Circuit's discussion of *Purcell* in *Feldman*, 843 F.3d at

368, as instructive. The Ninth Circuit determined that the Arizona district court's enjoinment of Arizona's H.B. 2023, which criminalized knowingly collecting voted or unvoted early ballots from another person, did not affect the state's election processes or machinery. *Id.* at 368. The Ninth Circuit recognized further that enjoining Arizona's H.B. 2023 "does not involve any change at all to the actual election process. That process will continue unaltered, regardless of the outcome of this litigation." *Id.* The Ninth Circuit further noted that Arizona's H.B. 2023 proved distinguishable from *Purcell* because "the voter-ID law at issue in *Purcell* changed who was eligible to vote and directly told election officials to turn people away if they lacked the proper proof of citizenship." *Id.* The evidence presented at this stage in the proceedings indicates that HB 892 does not substantively change voting practices and procedures in Montana. (*See* Doc. 79 at 13) ("[HB 892] wouldn't change any of our [election workers] – the current practice we were following before.") (citing Doc. 63 at 108.) The Montana election process will continue regardless of this litigation, as HB 892 does not regulate voter registration eligibility, but rather imposes felony criminal penalties *post hoc*.

These factors cut in favor of the Plaintiffs. Defendants have failed to meet their burden for a stay pending appeal.

ORDER

Accordingly, **IT IS ORDERED:**

1. Defendants' emergency motion to stay the Court's preliminary injunction (Doc. 83) is **DENIED**.
2. Defendants' unopposed joint motion to expedite consideration of the motion to stay injunction pending appeal (Doc. 91) is **GRANTED**. The Court's order is issued in line with Defendant's request for a decision by Thursday, May 16, 2024.

DATED this 16th day of May 2024.

Brian Morris, Chief District Judge
United States District Court