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MONTANA 18TH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY

LEAGUE OF WOMEN VOTERS OF MONTANA,

Plaintiff,

v.

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

Defendants.

Cause No. DV 16-23-1073
Hon. Peter B. Ohman

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Unable to justify HB 892's burdensome, cumulative, and unsupported Deregistration Requirement and Omission Provision, Defendants instead contrive and then defend a *different* legal framework from the one Plaintiff challenges. Even though the Deregistration Requirement and Omission Provision have distinct text and were examined separately in the legislative process, Defendants merge the two provisions and treat them as if they were one law in order to claim that HB 892 simply bars being registered with the goal to vote in two places. *E.g.*, Defs.' Br. in Opp'n to Pl's. Mot. for Prelim. Inj., 2-4, 17 (Dec. 8, 2023) (hereinafter "Defs.' Br."). But that is not what the provisions say, and Plaintiff does not challenge HB 892's separate ban on double voting. Also, unwilling to contend with the harms that the two challenged provisions impose on Montana civic organizations and voters, Defendants simply ignore the law's threat of serious criminal penalties and Plaintiff's declaration testimony, instead inventing facts in a failed attempt to explain away HB 892's defects. In doing so, Defendants fail to meet their burden to show that HB 892's impairments of fundamental rights survive strict scrutiny. Plaintiff, by contrast, has carried its burden to establish that HB 892 should be preliminarily enjoined.

ARGUMENT

I. Plaintiff Has Standing to Challenge HB 892

Plaintiff LWVMT has both organizational and associational standing. Defendants' arguments to the contrary (Defs.' Br. 6-8) disregard Plaintiff's evidence and improperly conflate standing analysis with the decision on the merits. *See Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241.

First, LWVMT has organizational standing "to vindicate whatever rights and immunities the association itself may enjoy." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 42, 360 Mont. 207, 255 P.3d 80. To begin, HB 892 chills Plaintiff's speech and association, and

"[e]stablishing standing in … claims alleging the chilling of free speech … is not that demanding." *Menders v. Loudon County Sch. Bd.*, 65 F.4th 157, 164 (4th Cir. 2023) (collecting cases). It requires only a "danger of chilling free speech" from a credible, sufficiently imminent threat of enforcement that will cause the party to alter its protected activity. *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *accord Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). LWVMT has and will suffer such chilled speech because, for example, it is reluctant to express its pro-voter registration message and has to change what it will say because of concerns about liability under HB 892. Pl.'s Ex. 1, Leifer Decl. ¶¶ 52-61, 116-127. The threat of enforcement is also far from idle. *Id.* ¶¶ 92-115; 135-151. In the sponsor's words, the Legislature enacted HB 892 specifically because the State wanted the new laws "to prosecute" perceived violators. Pl.'s Br. in Supp. of Prelim. Inj., 5 (Nov. 16, 2023) (hereinafter "Pl.'s Br."). All counties have criminal enforcement authority under the law, as do Defendants Knudsen and Gallus. *Id.* 4-5. None have disclaimed enforcement plans. Under these circumstances, Plaintiff has organizational standing to vindicate its rights. *See, e.g.*, *Mont. Immigrant Just. All. v. Bullock*, 2016 MT 104, ¶ 24, 383 Mont. 318, 371 P.3d 430.

Additionally, LWVMT must counteract HB 892's burdens by diverting its resources (*i.e.*, time, volunteer effort, programmatic focus, and tangible costs) from its other voting programs and projects on other subjects. *See* Leifer Decl. ¶¶ 116-127, 135-51. This is exactly the kind of "otherwise unnecessary expense and burden" that establishes injury-in-fact and thus standing for each of Plaintiff's claims. *See Larson*, ¶ 47. And, as numerous Montana courts have recognized, groups such as LWVMT have organizational standing to pursue right to vote claims.[1] HB 892

[1] *See Driscoll v. Stapleton*, 2020 MT 247, ¶ 25, 401 Mont. 405, 473 P.3d 386 (political party had organizational standing for right to vote claim); App. C, *Mont. Dem. Party v. Jacobsen*, DV 21-

frustrates Plaintiff's mission to ensure that as many eligible Montanans as possible can register in a hassle- and risk-free manner. Leifer Decl. ¶¶ 62-91. The law makes voter registration efforts riskier and more difficult for LWVMT and the thousands of "cross-jurisdiction movers" in Montana's electorate, on whom LWVMT must expend further resources and time to ensure they comply and avoid HB 892's penalties. *Id*. ¶¶ 116-127, 135-51; Pl.'s Ex. 6, Street Rep. ¶¶ 14-15.

Second, and independently, LWVMT has associational standing because (a) "at least one of its members would have standing"; (b) "the interests [it] seeks to protect" relate to LWVMT's mission; and (c) this case does not "require[] the participation of" an individual member. *Heffernan*, ¶ 43. Associational standing "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." App. A, *Mont. Dem. Party v. Jacobsen*, ¶ 44 (citation and quotation omitted).[2] LWVMT seeks to protect the rights of its members, including two who submitted declarations (ignored by Defendants) stating that they recently moved jurisdictions and that HB 892's vague requirements and criminal risks burden their ability to re-register. Pl.'s Ex. 4, Kohl Decl. ¶¶ 2-12; Pl.'s Ex. 5, Lincoln Decl. ¶¶ 2-12; *see also* Leifer Decl. ¶¶ 9-17. In doing so, LWVMT reinforces its mission to empower and inform members and voters, assist them through the voting process, and encourage active electoral participation. Leifer Decl. ¶¶ 5, 5-58, 61, 68, 79-83, 87-91, 123, 125-27, 135-51. Finally, because LWVMT seeks declaratory and injunctive relief, the participation of individual

0451, at *2-3 (13th Jud. Dist. Ct. Nov. 10, 2021) (same), *aff'd* 410 Mont. 2022 (defendants did not challenge standing on appeal); *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 15, 314 Mont. 314, 65 P.3d 576 (same for municipal plaintiffs); *accord Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 829 (D. Mont. 2020) (campaign had organizational standing).

[2] In questioning Plaintiff's citations to *Montana Democratic Party v. Jacobsen* (App. A) and *Western Native Voice v. Stapleton* (App. B), Defendants both conflate standing with the preliminary injunction standard and overlook the validity of prior cases concerning the latter. *See, e.g.*, *Benesh v. Hebert*, 2023 MT 123N, ¶ 12, 530 P.3d 1293, 2023 Mont. LEXIS 647 (Mont. June 20, 2023) (citing amended preliminary injunction statute while applying pre-amendment cases).

members is not required. *See Heffernan*, ¶ 46. Thus, LWVMT has both organizational and associational standing to challenge the Deregistration Requirement and Omission Provision.

II. Plaintiff is Likely to Succeed on the Merits

LWVMT has established that it is likely to succeed on its free speech, association, suffrage, and due process claims. Defendants do not dispute that these rights are fundamental and subject to strict scrutiny. Nor do they contest that Plaintiff has cognizable claims against both the direct and indirect impairments that HB 892 imposes on its rights. Instead, Defendants rely on the presumption of constitutionality and attack the factual sufficiency of Plaintiff's claims. But Plaintiff has overcome the presumption by making a "threshold" showing that "the challenged statute substantially interferes with the exercise of a fundamental constitutional right." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 39, 401 Mont. 405, 473 P.3d 386. And the record shows that HB 892's provisions violate the Constitution's core "guarantees [of] access to and free participation in the political process." *See Gehring v. 1993 Legislature*, 269 Mont. 373, 378, 889 P.2d 1164 (1995).

A. HB 892 is Void for Vagueness

The Deregistration Requirement and Omission Provision are void for vagueness because they fail to give fair notice of their forbidden conduct—causing Plaintiff and others to curtail their speech, associations, and suffrage rights to steer clear of HB 892—and lack minimal guidelines for law enforcement. Pl.'s Br. 16-17.[3] In claiming that the challenged provisions are not vague, Defendants attempt to recast those provisions into a *different* law, which the State appears to believe would be more defensible. Defs.' Br. 2-4, 11-13. But Defendants' misinterpretations of HB 892 find little support in the text, legislative process, and historical practices in Montana, and only reinforce that the challenged provisions are vague. Defendants compound these shortcomings

[3] Defendants do not contest that vagueness concerns are heightened when the law implicates the exercise of fundamental rights. *See* Pl.'s Br. 16.

by failing to address many of Plaintiff's vagueness concerns with HB 892.

First, Defendants attempt to meld the Deregistration Requirement and Omission Provision into a single requirement. *Id.* 2-4, 17. But even Defendants cannot fully commit to their conflation, conceding elsewhere that the provisions can be separately violated. *Id*. 8 ("A violation of this prohibition requires *either* the overt act of purposefully remaining registered in multiple jurisdictions *or* the overt act of purposefully omitting prior registration information from the voter registration form." (emphasis added)); *accord id.* 13. HB 892, by its text, has two related but individually enforceable commands challenged here: do not "purposefully remain registered in more than one place" and do not omit "previous registration information," or else face felony prosecution. § 13-35-210(5), MCA. A clear indication of their separate application is that the Deregistration Requirement purports to apply to *all registrants*, whether by Federal Form or State Form, while the Omission Provision specifies *only* State Form registrants. *Id*. As such, a Federal Form applicant could violate the Deregistration Requirement but not the Omission Provision.[4]

Flowing from Defendants' conflation is their claim that the Deregistration Requirement's use of "purposefully" also applies to the distinct Omission Provision, which lacks any mens rea requirement. Defs.' Br. 4, 7-9. Again, Defendants fail to ground this argument in the text or legislative history. They instead rely solely on § 45-2-103(4), MCA, which permits imputing a mens rea specified for one element of an offense to another element of that offense. However, § 45-2-103(4) applies only to sub-elements *of a single offense*. *See, e.g.*, *State v. Hovey*, 2011 MT 3, ¶ 22, 359 Mont. 100, 248 P.3d 303. The Deregistration Requirement and Omission Provision are separate offenses of HB 892, as Defendants at times admit. Based on the text, "purposefully" is

[4] The Legislature treated the two provisions as separate requirements, with several legislators raising separate concerns to each. Pl.'s Br. 2-4, 16-17. No legislator claimed that "purposefully" applied to the Omission Provision or explained the textual gap in such an application. *See id.*

attached only to the former.[5] And as explained *infra*, inserting that mens rea for the Deregistration Requirement does not resolve the problems of its ambiguous actus reus.

Defendants also declare as obvious that a voter inputting their previous registration information satisfies both of the challenged provisions (Defs.' Br. 3, 12-13), but that argument similarly ignores HB 892. The two provisions are different, and Defendants' *ipse dixit* position in litigation that providing previous registration information will satisfy both HB 892 provisions falls far short of relieving the constitutional concerns based on the text and the State's paltry guidance.

Second, Defendants are wrong that HB 892 is not vague because it merely "codifies Montana's longstanding practice of requiring" previous registration information. Defs.' Br. 2, 17. Inviting voters to *optionally* supply the information, without consequence, is far afield from *requiring* it on threat of a felony. None of the other registration forms Defendants cite—from Montana's history or other states—indicate that previous registration information is actually required.[6] To the extent Montana officials required the information in the past (unbeknownst to voters), Defendants identify no authority for doing so. Critically, even the *current form* and the State's minimal post-HB 892 guidance still leave voters (and election officials, *see* Pl.'s Exs. 9,

[5] Even if the Legislature had enacted the Omission Provision to require purposeful misconduct, as Defendants claim, that would not have fully resolved Plaintiff's injuries and constitutional concerns regarding the challenged provisions. The shadow of HB 892's other uncertainties and stringent felony penalties that hangs over LWVMT's work and the rights of voters favors fully enjoining the provisions instead of accepting Defendants' atextual litigation positions and the representations of a *former* Elections Director, which are no replacement for a binding court order or consent decree that would relieve the burdens and risks that Montanans face.

[6] Several of the other states' forms clarify that the information is optional, and none has a law requiring it. *E.g.*, Defs.' Exs. J, K, M, N. Defendants also point to no state with a law analogous to the Omission Provision. While they purport to identify three states that could be interpreted as having their own deregistration requirement, only one (Wisconsin) has a *felony* penalty like HB 892. The other two laws (Louisiana and Indiana) were enacted decades ago, before the National Voter Registration Act reshaped registration systems, and Plaintiff has not found any indication of their enforcement. Even in the company of these three states, Montana is still an extreme outlier.

24) to guess if the information is required. Pl.'s Br. 4. Among the continued ambiguities, it is unclear whether providing the information is needed to register; no law says that an application violating HB 892 will be rejected, *see id*. 5, and Defendants apparently concede that HB 892 cannot be applied to refuse an otherwise valid registration application. Defs.' Br. 10.

Third, Defendants fail to address several of Plaintiff's core contentions. While Defendants claim the mens rea "purposefully" is clear, they overlook that the Deregistration Requirement "provides little instruction on the equally important actus reus." *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 821 (9th Cir. 2016). For the actus reus, what does "remain registered" in HB 892 mean? Is it different from its plain meaning, "to continue unchanged?" Pl.'s Br. 16. Defendants have no answer, and a host of doubts arise from the vague actus reus. *Id.* 16-17; *see also City of Sumner v. Walsh*, 148 Wash. 2d 490, 497-502 (2003) (holding curfew law inadequately defining "remain" is void for vagueness).[7] Thus, simply inserting "purposefully" into an ambiguous provision "cannot solve the problem." *United States v. Loy*, 237 F.3d 251, 265 (3d Cir. 2001).

The Omission Provision is even worse, lacking constitutionally adequate clarity for both the actus reus and any scienter condition. Pl.'s Br. 17; *see also* Pl.'s Ex. 10 (Yellowstone County official describing lack of means rea). Because of these hazards, it is unsurprising that legislators opposing HB 892 worried that someone "could interpret [the provisions] any way you want" and, alarmingly, "what hangs in the balance is jail time" for innocent voter activity. Pl.'s Br. 2.

B. HB 892 Violates Plaintiff's Freedom of Speech

HB 892 violates Plaintiff's speech rights. *Id.* 9-11. Defendants do not contest that LWVMT's registration activities are core political speech warranting utmost constitutional

[7] Defendants' effort to reassure against retroactivity (Defs.' Br. 13) is cold comfort based on the same flawed premise. Because "remain" could be interpreted by a prosecutor to mean its normal definition—"to continue unchanged"—the statute could implicate the *present* conduct of currently registered Montanans who may also have continued "unchanged" a registration existing elsewhere.

protection. Instead, Defendants insist that "Plaintiff is clearly aware of HB 892's multiple registration prohibition, and can continue its work without issue by simply informing voters and registrants of that fact." Defs.' Br. 8-9. This misses the point. HB 892 impairs Plaintiff's speech—namely, its ability to unequivocally express its pro-democracy, pro-voting message—precisely because it makes LWVMT alter its communications to inform voters, members, and volunteers about HB 892's new hurdles and to warn them of the criminal risks. Leifer Decl. ¶¶ 27-28, 51, 57, 137-39, 142-43. This requires LWVMT to dedicate more resources and time to each voter it assists to effectively encourage them to overcome HB 892. *Id.* ¶¶ 63, 149-51. HB 892 violates LWVMT's core protected speech because it impairs an "integral part of [Plaintiff's] message," *W. Native Voice v. Stapleton*, DV 20-0377, 2020 Mont. Dist. LEXIS 3, at *61 (13th Jud. Dist. Ct. Sept. 25, 2020), and restricts its "ability to engage with voters to encourage and assist them [to register] to vote," App. A, *Mont. Dem. Party*, ¶ 73; *accord Meyer v. Grant*, 486 U.S. 414, 423 (1988).

C. HB 892 Violates Plaintiff's Freedom of Association

HB 892 violates LWVMT's associational rights. Pl.'s Br. 12-14. Defendants attack only the factual sufficiency of Plaintiff's claim (Defs.' Br. 9-10), but again ignore Plaintiff's detailed declaration testimony of the harms to its protected associational activity. Leifer Decl. ¶¶ 32-41; *see also* Pl.'s Ex. 2, Maxon Decl. ¶¶ 12-13, 25-33; Pl.'s Ex. 3, Iwai Decl. ¶¶ 6, 15-20. LWVMT's "attempt to broaden the base of public participation in and support for its activities" by encouraging electoral engagement is "undeniably central to the exercise of the right of association." *VoteAmerica v. Schwab*, No. 21-cv-2253, 2023 U.S. Dist. LEXIS 78316, at *27 (D. Kan. May 4, 2023); *accord* Pl.'s Br. 12-13 (collecting cases).

Defendants' attempt (Defs.' Br. 10) to distinguish *Mont. Auto Ass'n v. Greely*, 193 Mont. 378, 632 P.2d 300 (1981), is unconvincing. *Greely* is on point not for the specific law it enjoined, but its mode of analysis of similar free speech and association claims. *Id.* at 396. There, the

challenged disclosure scheme was not a direct regulation of associational activity; it was a requirement that an organization disclose certain payments. *Id.* But that formal distinction was no matter when considering the nature of the law's abridgment. *See id.* at 397. *Greeley* held that the indirect restriction nonetheless impaired the organization in ways that "constitute an effective restraint on freedom of association." *Id.* (alterations and quotations omitted). HB 892 does the same here by impairing LWVMT's message and means of associating through its effective registration programs. Leifer Decl. ¶¶ 3, 52-61, 141-44, 151; *see also* Maxon Decl. ¶¶ 58, 66-80; Iwai Decl. ¶¶ 40-53.[8]

D. HB 892 Violates the Fundamental Right to Vote

HB 892 curtails Plaintiff's suffrage rights. Pl.'s Br. 14-15. Defendants' contrary argument that Plaintiff's claim rests solely on speculation (Defs.' Br. 10) neglects Plaintiff's *evidence* of voting burdens: (1) declarations from two voters deterred from registering because of HB 892's confusing provisions and risk of criminal liability, *see* Kohl Decl. ¶¶ 2-12, Lincoln Decl. ¶¶ 2-12; (2) declarations from Plaintiff and other civic organizations attesting to the concrete burdens HB 892 places on voters based on their significant voter engagement experience, *see* Leifer Decl. ¶¶ 64-67, 71-83, 87, 89; Maxon Decl. ¶¶ 58-61, 63-65, 79; Iwai Decl. ¶¶ 35-38, 47-49, 52; and (3) expert testimony on the adverse effects of HB 892, *see* Street Rep. ¶¶ 10, 12-16, 20-26.

Defendants' main response is that HB 892 cannot be discouraging voter registration because 17,982 people have registered since the law went into effect. Defs.' Br. 10, 15. But the fact that some Montanans have overcome HB 892's obstacles and, knowingly or not, taken on its criminal risks to become registered does not lessen the law's unconstitutional burdens on voters.

[8] Moreover, efforts to expand expressive associations to new associates warrant the same constitutional protection as efforts to join with current associates. *See NAACP v. Button*, 371 U.S. 415, 429-32, 437 (1963); *Healy v. James*, 408 U.S. 169, 181 (1972).

See, e.g., App. A, *Mont. Dem. Party*, ¶¶ 38-43, 44-45, 50-54.[9] Also, in the absence of those substantial burdens, the number of people who have registered to vote in Montana since May 2023 would have been *greater* than 17,982. *See, e.g.*, Kohl Decl. ¶¶ 2-12, Lincoln Decl. ¶¶ 2-12. Finally, as noted *supra* II.A., it remains unclear whether the government could misuse HB 892 to prevent otherwise qualified voters from registering, which would only heighten the harm to voters.

Defendants likewise insist that there is no constitutional violation because "[n]othing about HB 892 prevents a voter from voting." Defs.' Br. 10. But Defendants undercut their own argument by acknowledging—as they must—that the right to vote is "protected in more than the initial allocation of the franchise." *Id.* (citing *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219). The Constitution guarantees that "elections shall be free and open" and protects the "free exercise of the right of suffrage," Mont. Const. Art. II, § 13, including the right to freely register. *See, e.g.*, *Mont. Dem. Party v. Jacobsen*, 2022 MT 184, ¶¶ 33, 37, 410 Mont. 114, 518 P.3d 58; *State ex rel. Durland v. Bd. of Comm'r of Yellowstone Cnty.*, 104 Mont. 21, 64 P.2d 1060, 1063 (1937) (emphasizing that registration is a condition precedent to voting). As the framers proclaimed: "we consider the right to vote so precious and so cherished that you shall not limit it by the artificial barrier of registration." Mont. Constitutional Convention, Tr. Vol. III, p. 406 (Feb. 17, 1972) (Del. Dahood), perma.cc/GM4X-XCH3. It is thus irrelevant that HB 892 may not prevent already registered voters from actually voting (unless, of course, they are incarcerated for violating HB 892 and then completely disenfranchised). HB 892 burdens the ability of Montanans to register by imposing onerous new requirements backed by the threat of felony penalties.

[9] The Secretary's irrelevant argument that no voter has personally complained (Defs.' Br. 7) is also belied by the two lawsuits against HB 892 filed by three groups who represent the interests of thousands of voters adversely affected by HB 892's two challenged provisions. Leifer Decl. ¶ 9; App. D, Compl. ¶¶ 10, 14, *MontPIRG v. Jacobsen,* 6:23-cv-70 (D. Mont. Sept. 29, 2023).

III. Defendants Fail to Carry Their Burden to Show HB 892 Survives Strict Scrutiny

HB 892's challenged provisions fail strict scrutiny. *See Mont. Dem. Party*, ¶ 18. At the threshold, Defendants wholly ignore the strict scrutiny analysis for the fundamental rights here, failing to even mention "scrutiny" in their brief. Instead, Defendants rattle off a handful of interests, offering, for example, a repeated one-sentence prerogative in "preventing fraud and preserving public confidence." Defs.' Br. 2, 15-17. Defendants disregard their shifted burden to explain how *these provisions* are "justified by" and "narrowly tailored to effectuate" such an interest. *See Weems v. State*, 2023 MT 82, ¶ 34, 412 Mont. 132, 529 P.3d 798 (internal quotation marks omitted). Defendants' failure to establish by "competent evidence" that the laws are "the least onerous path that can be taken to achieve the state objective" is fatal. *See Wadsworth v. State*, 275 Mont. 287, 302-03, 911 P.2d 1165 (1996).

Even accepting Defendants' scattershot approach to naming state interests, they fail on their merits. *First*, while the State has an interest in preventing double voting in the abstract, these laws are not justified by or tailored to that interest. Defendants ignore that "having two open voter registrations is a different issue entirely" from double voting. *Common Cause Ind. v. Lawson*, 937 F.3d 944, 960 (7th Cir. 2019). Multiple registrations are a natural consequence of "the U.S. combination of a mobile national electorate and local election administration," in which it is inevitable that voters will be temporarily registered in two places despite no intent to vote in both. Street Rep. ¶¶ 11-14. As such, it is on the government—not voters under criminal threat—to maintain voter lists. Likewise, Montana and federal laws already prohibit double voting without encumbering innocent voter conduct. Pl.'s Br. 18-19.[10] Defendants fail to show that these laws are insufficient to prevent double voting absent the (at best) cumulative requirements and penalties

[10] Other laws and practices also sufficiently prevent fraud overall. *See, e.g.*, §§ 13-35-210(1)-(4), 13-35-103, 13-35-205(2), 13-35-207, 13-35-208, 13-35-209, 13-35-214, 13-35-215, MCA.

under the challenged HB 892 provisions. *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 204-05 (1999) (examining effectiveness of existing anti-fraud laws); *Meyer*, 486 U.S. at 427 (same).[11]

Defendants also claim that the substantial burdens HB 892 places on civic organizations and tens of thousands of Montanans who move across jurisdictions are justified by a list alleging that fourteen people voted twice. Defs.' Ex. P. This list, from an advocacy organization with a history of flawed methodology,[12] is far from reliable. *See* Pl.'s Ex. 24, Street Supplemental Report ¶¶ 1-14 (Dec. 16, 2023). But even taking the list at face value, it shows double voting is extremely uncommon, just as voter fraud in general is "vanishingly rare." *Mont. Dem. Party*, ¶ 27.[13]

Regardless, the challenged HB 892 laws do nothing to address most of these alleged yet unproven instances. Street Suppl. Rep. ¶¶ 20-22. And, critically, Defendants do not explain how election officials can even use the previous registration information they do or do not receive, given that the counties already have easy internal access to previous intrastate registration information and cannot check for out-of-state information. Pl.'s Br. 19.[14] Even Defendants' own witness, Clerk and Recorder Plettenberg, is unwilling to state that HB 892 "assists election administrators" or is otherwise useful. *Compare* Defs.' Ex. B, Plettenberg Decl., *with* Defs.' Ex. C, Fitzpatrick Decl. ¶¶ 6, 8, 10-11, 15. Moreover, if Montana wishes to increase cross-state

[11] And Montana declined to follow other states in enacting a multiple registration statute actually targeted at double voting. *Cf.* Mo. Rev. Stat. § 115.175 (prohibiting "[a]ny person who knowingly or willfully … registers to vote *with the intention of voting more than once in the same election*" (emphasis added)).

[12] *See LULAC v. Pub. Int. Legal Found.*, No. 1:18-cv-00423, 2018 U.S. Dist. LEXIS 136524 (E.D. Va. Aug. 13, 2018) (ruling against PILF for intimidating voters through flawed methodologies).

[13] *At worst*, 14 votes of the 612,075 total cast in the 2020 election is .0023% of the votes. *See 2020 General: Statewide*, Mont. Sec'y of State, perma.cc/HF8H-8ZRB. This is far from a significant, widespread problem with double voting and pales in comparison to the tens of thousands of cross-jurisdiction movers who are burdened and threatened by HB 892. *See* Street Rep. ¶¶ 14-15.

[14] Ms. Plettenberg also raised serious concerns about HB 892's uncertainties and adverse effects on voters. *See* Pl.'s Ex. 23; Pl.'s Br. 3-4 (noting legislative hearing).

coordination, the ERIC system is an established reliable practice rather than HB 892's ineffective approach to extract voters' information by fear of felony penalties. Street Suppl. Rep. ¶ 17; Pl.'s Ex. 10 (Fitzpatrick emails).[15] In short, "it does not follow like the night the day" that these provisions are tailored to address double voting or add to existing prohibitions, and Defendants fail to carry their strict scrutiny burden. *Buckley*, 525 U.S. at 204 & n.23.

Second, Defendants surmise that HB 892 increases confidence in elections. Defs.' Br. 2, 15-17. But Defendants present not a single witness claiming that HB 892's provisions improve voter confidence. In contrast, Plaintiff demonstrates that voter confidence is decreased by the exaggeration of unfounded fraud claims and the Deregistration Requirement's and Omission Provision's vague, burdensome, and threatening criminal penalties. *See, e.g.*, Leifer Decl. ¶¶ 64-114; Maxon Decl. ¶¶ 34-65; Iwai Decl. ¶¶ 21-39; Street Rep. ¶¶ 26-27.

Third, Defendants' conclusion that HB 892's provisions "bolster[] existing voter residency requirements" (Defs.' Br. 9) is unfounded. Such a *post hoc* rationalization cannot support a law that impairs fundamental rights. Strict scrutiny requires looking to the "actual considerations that provided the essential basis for the [decision-making], not *post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *accord United States v. Virginia*, 518 U.S. 515, 533 (1996). Purportedly "bolster[ing]" residency was never an interest raised during the consideration of HB 892.

Still, it is unclear how HB 892 could bolster establishing residency. On the registration form, voters attest to their lawful Montana residence under penalty of perjury. Pl.'s Ex. 7. They do the same when returning a mail ballot. § 13-13-201(2)(d), MCA. The provided residential address

[15] Defendants hint at a goal to maintain *other states'* voter lists (Defs.' Br. 3), but Montana lacks a cognizable interest to do so and in particular cannot burden its own voters' rights in the process.

"is presumed to be current unless proved otherwise." Mont. Admin. R. 44.3.2302(1). That a voter happens to be *registered* in another jurisdiction says nothing of their residence; they must in fact "exercise[] the election franchise in the other state" to lose their presumption of lawful residence in Montana. § 13-1-112(4), MCA. Thus, a specific ban on double voting itself could conceivably be interpreted to bolster residency, but Defendants fail to explain how the Deregistration Requirement and Omission Provision would, much less that they are narrowly tailored to do so.

IV. All Other Preliminary Injunction Factors Favor Plaintiff

A. Plaintiff Faces Imminent, Irreparable Injury

Defendants do not contest that the loss of a constitutional right constitutes an irreparable injury, particularly concerning impaired free speech, association, or suffrage. HB 892's provisions impose "ongoing, worsening injuries" to these rights as LWVMT's upcoming voter registration programs near in early 2024. *See Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019); *see also* Leifer Decl. ¶¶ 42-51; Maxon Decl. ¶ 68; Iwai Decl. ¶ 42. Instead, Defendants insist that Plaintiff's timing for seeking relief is a "delay" (without alleging any prejudice) and that HB 892 maintains the status quo because elections occurred this fall. Defs.' Br. 14-16. Defendants are wrong on both counts.

Defendants' delay argument (Defs.' Br. 14-15) relies on *Montana Democratic Party v. Jacobsen*, 2022 Mont. LEXIS 459 (May 17, 2022), which is inapposite for several reasons. First, unlike here, *Montana Democratic Party* involved a motion for a *stay*, which "is an entirely different question, with different analysis, from the issue of whether the preliminary injunction was correctly granted." *Id.* at *5. Second, the Court concluded that the over a year-long delay in that case disrupted extensive "voter education, election administrator and poll volunteer training, and drafting and application of administrative rules," including "airing thousands of public service announcements . . . and sending a mailing to every registered voter that noted the new registration

deadline." *Id.* at *8-9. Here, however, Defendants do not and cannot claim to have done anything of the like since HB 892 passed. Leifer Decl. ¶¶ 111-12; Pl.'s Ex. 9 (Missoula County seeking but not receiving implementation guidance); Pl.'s Ex. 10 (Lewis & Clark County confirming lack of guidance). Finally, unlike the laws challenged in *Montana Democratic Party* that impacted election day activity and voters' and officials' reliance interest in stability for that day, HB 892 restricts *registration programs*, not constrained to a particular election day. This difference lessens the import of elections occurring this fall and, here, there is no risk of confusion or administrative disruption to warrant keeping HB 892's provisions in place despite their likely unconstitutionality.

Regardless, LWVMT was justified in seeking relief when it did.[16] Rather than rush to the courthouse, Plaintiff first sought guidance from the State on how it should proceed. Leifer Decl. ¶ 51. It tried to "encourage the Secretary of State to do something about HB 892" by submitting a notice violation letter and public records request and calling the Elections Office, to no avail. *Id.* ¶¶ 114-15. LWVMT sued after it was clear that litigation was necessary, particularly in advance of Plaintiff's quickly approaching voter registration activities in early 2024. *Id.* ¶¶ 42-49.

Moreover, had Plaintiff sought relief sooner, in all likelihood Defendants would have either protested the ripeness of the claims or argued that granting relief would violate the equitable principles of *Purcell v. Gonzalez*, 549 U.S. 1 (2006), that may have cautioned against enjoining HB 892 close to the 2023 municipal elections. This Court should reject Defendants' efforts to trap Plaintiff in a Goldilocks paradox whereby Plaintiff can never get the timing "just right." *See, e.g.*, *DNC v. Bostelmann*, 466 F. Supp. 3d 957, 963-65 (W.D. Wis. 2020) (rejecting "too soon or too late" arguments); *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 942-43 (W.D. Va. 2018) (similar).

[16] Defendants insist that even three months delay would be inconsistent with a claim of irreparable harm (Defs.' Br. 14) but cite no support for this contention. The Ninth Circuit cases they cite that involve *years* of delay and substantial prejudice to defendants have no application here. *See id.*

Finally, Defendants' argument (Defs.' Br. 15) that enjoining HB 892 would alter the status quo of asking for previous registration information again mischaracterizes HB 892's text and Montana's history. *See supra* II.A. HB 892 goes far beyond codifying any ultra vires practice of requesting previous registration information; on its face, HB 892 imposes two *new* requirements for voters to deregister and ensure they do not omit previous registration information, on threat of felony penalties. In short, the status quo is the state of the law that existed prior to HB 892's enactment when Montanans did not fear felony prosecution for innocent voter conduct.

B. The Balance of Equities and Public Interest Favor Plaintiff

The balance of equities and public interest favor Plaintiff. Pl.'s Br. 20. Defendants do not contest that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (citation and quotations omitted). Instead, they insist that "the very fact that HB 892 is a duly enacted statute weighs against granting an injunction." Defs.' Br. 16. But Defendants ignore that "[w]hile a statute is generally afforded a presumption of constitutionality, it is not afforded greater protection from a preliminary injunction." *Mont. Dem. Party*, ¶ 17; *see also, e.g.*, *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 33, 409 Mont. 378, 515 P.3d 301; *Driscoll*, ¶ 16. The equities and public interest favor Plaintiff because, as explained above, the threats to and burdens on Plaintiff's constitutional rights are high, whereas Defendants' interests in enforcing HB 892 are minimal.

CONCLUSION

The Court should preliminarily enjoin HB 892's challenged provisions.

Respectfully submitted December 20, 2023:

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