

A.J. FERATE (*Pro Hac Vice Application Pending*)
COURTNEY POWELL (*Pro Hac Vice Application Pending*)
SPENCER FANE LLP
9400 North Broadway Ext. #600
Oklahoma City, OK 73114
(405) 844-9900
ajferate@spencerfane.com
cpowell@spencerfane.com

SCOTT YOUNG (10695)
SPENCER FANE LLP
10 Exchange Place, Eleventh Floor
Salt Lake City, UT 84111
(801) 521-9000
rsyoung@spencerfane.com
Attorneys for Colby Jenkins

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – SOUTHERN DIVISION

COLBY JENKINS, an individual,
MICHAEL GILLESPIE, an individual,
MARSHA GILLESPIE, an individual,
TANNER GILLESPIE, an individual,
JOSHUA HORLACHER, an individual,
CAMILLE TOPHAM, an individual,
RICHARD TOPHAM, an individual,
KELSIE TOPHAM, an individual,
LAJUANA ROBINSON, an individual,

Plaintiffs,

vs.

BEAVER COUNTY; GINGER McMULLIN,
in her official capacity as Clerk/Auditor for
BEAVER COUNTY; DAVIS COUNTY;
BRIAN McKENZIE, in his official capacity
as Clerk/Auditor for DAVIS COUNTY;
GARFIELD COUNTY; CAMILLE MOORE,
in her official capacity as Clerk/Auditor for

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Case No: 4:24cv63 DN

Judge: David Nuffer

**(ORAL ARGUMENT AND EXPEDITED
HEARING REQUESTED)**

GARFIELD COUNTY; IRON COUNTY;
JON WHITTAKER, in his official capacity as
Clerk/Auditor for IRON COUNTY; JUAB
COUNTY; TANIELLE CALLAWAY, in her
official capacity as Clerk/Auditor for JUAB
COUNTY; KANE COUNTY; CHAMEILL
LAMB, in her official capacity as
Clerk/Auditor for KANE COUNTY;
MILLARD COUNTY; MARKI ROWLEY,
in her official capacity as Clerk/Auditor for
MILLARD COUNTY; PIUTE COUNTY;
KALI GLEAVE, in her official capacity as
Clerk/Auditor for PIUTE COUNTY; SALT
LAKE COUNTY; LANNIE K. CHAPMAN,
in her official capacity as Clerk/Auditor for
SALT LAKE COUNTY; SEVIER COUNTY;
STEVEN C. WALL, in his official capacity
as Clerk/Auditor for SEVIER COUNTY;
TOOELE COUNTY; TRACY SHAW, in her
official capacity as Clerk/Auditor for
TOOELE COUNTY; WASHINGTON
COUNTY; RYAN SULLIVAN, in his
official capacity as Clerk/Auditor for
WASHINGTON COUNTY; WAYNE
COUNTY; FELICIA SNOW, in her official
capacity as Clerk/Auditor of WAYNE
COUNTY; and, DEIDRE HENDERSON, in
her official capacity as the Lieutenant
Governor of the State of Utah.

Defendants.

RELIEF REQUESTED AND GROUNDS

Plaintiffs Colby Jenkins (“Mr. Jenkins”), Michael Gillespie, Marsha Gillespie, Tanner Gillespie, Joshua Horlacher, Camille Topham, Richard Topham, Kelsie Topham, and LaJuana Robinson (collectively, “Plaintiff Voters”), by and through their counsel, seek a temporary restraining order and injunction to (1) enact a new cure period for all invalidated ballots, (2) require

Defendants Beaver, Garfield, Iron, Kane, Millard, Piute, Sevier, Washington, and Wayne to count all ballots timely cast and mailed before election day, but postmarked after June 24, 2024 by SLC Las Vegas, which are accompanied by a voter affidavit attesting to compliance with [Utah Code Ann. § 20A-3a-204](#), and (3) to enter an injunction prohibiting the certification of the result of the vote in the Second Congressional District until voters are given the opportunity to cure any defects caused by the processing and postmarking delay.

Plaintiffs are congressional candidate Colby Jenkins and several voters whose votes have not been counted because (1) they have not been allowed to timely cure alleged deficiencies as allowed under Utah law, or (2) their votes were timely mailed, but not timely postmarked by the USPS Las Vegas Distribution Center where they were processed. Mr. Jenkins is in a closely contested primary election where over 100,000 votes have been cast and he is trailing the other candidate, Celeste Maloy, by just 214 votes.

“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). Once citizens have been granted the right to vote, the government “may not, by later arbitrary and disparate treatment, value one person's vote over that of another.” *Id.* at 104-05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, (1966)). This fundamental right is made clear in [Article 1, Section 17 of the Utah Constitution](#), which provides that “[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law.” The failure to count timely mailed ballots and to allow citizens to cure alleged deficiencies as required by law has deprived Plaintiff Voters of equal

protection and their right to vote, and candidate Colby Jenkins of the right to have every vote counted in the primary election. For these reasons, and others set forth below, the Court should enter a temporary restraining order and preliminary injunction ensuring that these votes are counted.

STATEMENT OF FACTS

1. This action concerns an election law barrier that will disenfranchise a significant number of voters in southern Utah – specifically, the Second Congressional District – that resulted in Defendants’ failure to properly count valid ballots in accordance with [Utah Code Ann. § 20A-3a-204](#) and [Utah Code Ann. § 20A-3a-401](#).

2. The impact of these failures is that voters in southern Utah will simply have their votes discarded because they did not know that the processing and postmarking time necessitated early mailing of their ballots.

3. It has long been recognized that the right to vote is the “fundamental political right, because [it is] preservative of all rights.” [Yick Wo v. Hopkins](#), 118 US. 356, 370 (1886). This is so well accepted that the qualification that preceded the declaration in [Yick Wo](#) – that voting is a “privilege merely conceded by society according to its will, under certain conditions” – sounds foreign. *Id.* There is “no right [is] more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” [Wesberry v. Sanders](#), 376 U.S. 1, 17 (1964).

4. Plaintiffs seek two kinds of relief: first, emergency relief relating to the certification of the June 24, 2024, primary election that is scheduled to be certified on Monday,

July 22, 2024, and second, relief under the Equal Protection Clause to ensure that all votes are protected and counted, regardless of where a ballot happens to be mailed or processed.

Utah Law Concerning Ballots Cast by Mail.

5. U.C.A. § 20A-3a-202 provides, “An election officer who administers an election: (a) shall in accordance with Subsection (3), no sooner than 21 days before election day and no later than seven days before election day, mail to each active voter within a voting precinct: (a) a manual ballot; (ii) a return envelope; (iii) instructions for returning the ballot that include an express notice about any relevant deadlines that the voter must meet in order for the voter’s vote to be counted.”

6. In Utah, ballots returned by mail must be mailed and clearly postmarked or otherwise marked as received by the United States Post Office (“USPS”) before election day. Utah Code Ann. § 20A-3a-204(2)(a). Mailed-in ballots must also be received by election officers on or before noon on the day of the official canvass following the election. *Id.*

7. According to USPS, when a mail piece, including a ballot, is dropped off at a post office location before the location’s last pick-up time, it will be postmarked with the date it was dropped off.¹

8. Furthermore, every ballot that is returned by mail or via a ballot drop box must first be checked to ensure that the signature on the envelope matches the signature in the voter registration records. Utah Code Ann § 20A-3a-401(3).

¹ Last visited 7/18/2024 <https://faq.usps.com/s/article/What-is-the-Latest-Collection-Time-at-a-Post-Office#:~:text=000007492-.If%20a%20mailpiece%20is%20dropped%20off%20at%20a%202024%2Dhour,and%20postmarked%20that%20same%20day>

9. If a poll worker determines that the signature is not “reasonably consistent,” then the poll worker must reject the ballot, contact the individual to inform them that their signature is in question, and notify them how the voter can cure their ballot so that it will be counted. *See Utah Code Ann. § 20A-3a-401(4)-(5).*

Primary Race for the Second Congressional District.

10. Colby Jenkins is one of two candidates running in the Republican primary election for Utah’s Second Congressional District that concluded on June 25, 2024.

11. Utah’s Second Congressional District is comprised of thirteen counties. These counties include: Beaver, Davis, Garfield, Iron, Juab, Kane, Millard, Piute, Salt Lake, Sevier, Tooele, Washington, and Wayne.

12. The Second Congressional primary race is an extremely close election. A total of 107,282 votes have been counted, and, as of Wednesday July 11, 2024, there are only 214 votes separating the two candidates, Colby C. Jenkins and Celeste Maloy.²

Known delay in postmarking ballots.

13. The zip codes of the 13 counties that compose the Second Congressional District range from 84010 (Davis County) through 84780 (Washington County).³

14. Mail from Utah localities bearing the 3-digit zip code prefix 840-846 is sent to USPS’s Salt Lake City, UT Area Distribution Center (“ADF SLC”) for sorting and postmarking.⁴

²Last updated on July 10, 2024, <https://electionresults.utah.gov/results/public/utah/elections/primary06252024/ballot-items/3056360d-8faf-4d2c-9b63-786969d068ff>

³ Last visited 7/18/2024, <https://secure.utah.gov/datarequest/zipcodes.html>

⁴ Last visited 7/18/2024, <https://fast.usps.com/fast/fastApp/resources/labelListFileDetails.action?listCode=L004&effectiveDateStr=06/01/2024>

In other words, for all voters located in Davis County, Salt Lake County, Tooele County, and Juab County who cast their ballots through mail, their ballots were sent to ADF SLC for processing and postmarking.

15. Mail from Utah localities bearing the 3-digit zip code prefix 847 is sent to USPS's Las Vegas, NV Sectional Center Facility ("SLC Las Vegas") for sorting and postmarking.⁵ For voters located in Beaver County, Garfield County, Iron County, Kane County, Piute County, Washington County, and Wayne County who cast their ballots through mail, their ballots were sent to SLC Las Vegas for processing and postmarking.

16. However, certain counties include both the 846 prefix and the 847 prefix. In Millard County and Sevier County, voters within the Second Congressional District who cast their vote via mail, had their ballots sent to either ADF SLC or SLC Las Vegas for sorting and postmarking:⁶

- a. In Millard County, ballots cast by mail in the following municipalities were sent to ADF SLC for sorting and postmarking: Delta, Fillmore, Hinckley, Holden, Kanosh, Leamington, Lynndyl, Meadow, Oak City, Oasis, and Scipio.
- b. In Millard County, ballots cast by mail in Garrison were sent to SLC Las Vegas for sorting and postmarking.
- c. In Sevier County, ballots cast by mail in the following municipalities were sent to ADF SLC for sorting and postmarking: Aurora, Redmond, Salina, and Sigurd.

⁵ Id.

⁶ Id.

- d. In Sevier County, ballots cast by mail in the following municipalities were sent to SLC Las Vegas for sorting and postmarking: Anabella, Elsinore, Glenwood, Joseph, Koosharem, Monroe, Richfield, and Sevier.

17. The ballot processing and postmarking problem was well-known to the Utah legislature. In May 2024, the Utah Legislature considered a bill to amend [U.C.A. § 20A-6-108](#), Requirements for Printing and Mailing Ballots, to include the following, “If the election officer’s jurisdiction is located in an area that is assigned to a United States Postal Service area distribution center located outside of Utah, the election officer may deliver ballots directly to the assigned area distribution center for delivery to voters.” *See* Ballot Distribution Revisions Bill, Exh. 1.

18. On May 15, 2024, Utah State Senator Don Ipson from Washington County raised this issue during a Government Operations Interim Committee meeting. The meeting, in its entirety, may be viewed at <https://le.utah.gov/av/committeeArchive.jsp?mtgID=19472>. The issue of USPS delivery of ballots is discussed and at approximately 52:00, Senator Ipson states, “Doesn’t get postmarked until it gets to Vegas 2-3 days later, the vote never counted, there have been some elections swayed by that. While we are dealing with this, I think we need to address that as well.” *See Id.*

19. The Government Operations Interim Committee discussed this issue again on Wednesday, June 19, 2024. The discussion, in its entirety, may be viewed at, <https://le.utah.gov/MtgMinutes/publicMeetingMinutes.jsp?Com=INTGOC&meetingId=19473>,
3A – Ballot Distribution Revisions.

Ballot abnormalities remain uncured.

20. As of July 9, 2024, each county in Utah, including those in the Second Congressional District, had completed its own canvass. However, the Lieutenant Governor's office is required to conduct a statewide canvass on the fourth Monday after the primary election, or July 22, 2024. See [Utah Code Ann. § 20A-4-306\(5\)](#).

21. Multiple counties within Utah's Second Congressional District have outstanding ballots wherein voters have yet to cure perceived errors.

22. For example, Juab County has 30 ballots that have not been cured,⁷ Kane County has 16 ballots that have not been cured,⁸ Millard County has 26 ballots that have not been cured,⁹ Tooele County has 23 ballots that have not been cured¹⁰ and Washington County has 342 ballots that have not been cured.¹¹

23. If a ballot anomaly is curable, voters need only return a signed affidavit (as described in [Utah Code Ann. § 20A-3a-401\(c\)](#)), "no later than 5 p.m. three days before the day on which the canvass begins" to cure their ballot. [Utah Code Ann. § 20A-3a-401\(5\)\(e\)\(ii\)](#).

24. An example of the issues with curing was posted by Paul Cozzens, Iron County Commissioner, on July 10:

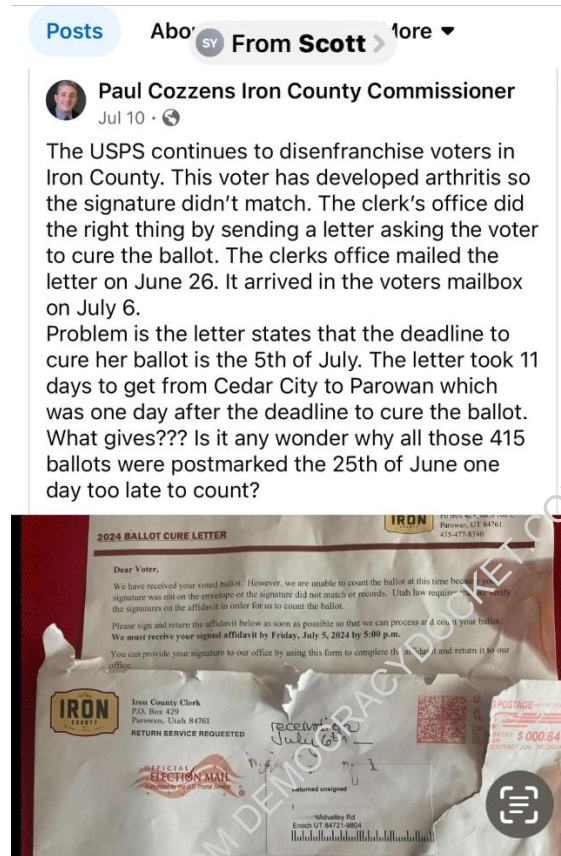
⁷ Last viewed July 11, 2024 <https://juabcounty.gov/wp-content/uploads/2024/07/24P-Canvass-Rpt.pdf>

⁸ Last viewed July 11, 2024 <https://kane.utah.gov/gov/dept/clerk-auditor/2024-primary-election-ballot-statistics1/>

⁹ Last viewed July 11, 2024 https://docs.google.com/spreadsheets/d/1OWPUk1Aq_RkxWbdgWYrY234je7QUdccc/edit?gid=1695919852#gid=1695919852

¹⁰ Last viewed July 11, 2024 <https://cms3.revize.com/revize/tooelecountyut/Document%20Center/Elections/Results%202024/07102024/24P%20Signed%20Election%20Canvass%20Report.pdf>

¹¹ Last viewed on July 11, 2024 https://www.washco.utah.gov/forms/clerk-auditor/elections/2024/reports/2024%20JUNE%20Ballot%20Statistics-FINAL_07-10-2024.pdf



As this post shows, the voter, who apparently has arthritis that affected the signature, did not receive the Notice to Cure until the period to cure had expired. Thus, she had no opportunity to cure the signature discrepancy caused by arthritis.

Processing and postmarking delays invalidate ballots.

25. Multiple counties within Utah's Second Congressional District have outstanding ballots wherein ballots were postmarked by SLC Las Vegas after June 24, 2024, despite being deposited in the mail on or before June 24, 2024.

26. Nine counties in Utah's Second Congressional District – Beaver, Garfield, Iron, Kane, Millard, Piute, Sevier, Washington, and Wayne – have towns that bear the 3-digit zip code

prefix “847,” necessitating processing and postmarking at SLC Las Vegas, before the mailed in ballot is returned to election officials.

27. Citizens in multiple Utah counties that have their mail processed and postmarked at SLC Las Vegas, claim to have filled out and mailed ballots prior to election day as required, but due to processing delays, their ballots were not postmarked until after June 24, 2024, and therefore were not counted.¹²

28. Each of the Plaintiff Voters placed their ballots in the mail before the deadline. *See* Declarations of Plaintiff Voters, Exh. 2. And each ballot cast by the Plaintiff Voters was disregarded because it was postmarked after the deadline. *See id.* However, the trashing of ballots impacted more than just the Plaintiff Voters. Many other citizens likely mailed ballots prior to election day even though their ballots were postmarked after the deadline.

29. Thomas Mackel, President of Engage Marketing, Inc., a company that provides mailing services to political consultants, and a member of the Postmaster General’s Mailers Technical Advisory Committee on behalf of the American Association of Political Consultants, has testified via Declaration:

- a. The Office of Inspector General for the United States Postal Service has audited instances of timely disputes caused by postal handling issues. OIG audit report 22-187-R23 was published March 27, 2023 citing statistical processing failures during the 2023 midterm elections, “ALL CLEARS - Per Postal Service policy, mail

¹² For example, see <https://www.sunews.net/post/southern-utah-counties-potentially-refuse-election-certification-over-ballot-concerns#:~:text=Whittaker's%20message%20was%20addressed%20to,%2C%20Kane%2C%20Garfield%20and%20Wayne>.

processing facilities are required to certify they are clear of Election Mail by 10 a.m. each day and delivery units are required to certify they are clear of Election Mail twice a day, once prior to 10 a.m. and once in the afternoon before close of business. During our observations, we found two of 104 (1.9 percent) mail processing facilities and 61 of 793 (7.7 percent) delivery units did not certify the facility was all clear prior to 10 a.m. Additionally, 14 of 793 (1.8 percent) delivery units' observations did not complete the afternoon all clear prior to close of business. We also reviewed nationwide daily all clear certification data at all mail processing facilities and delivery units for the period of October 11, 2022, through November 10, 2022. We found 3 percent of mail processing facilities and 22.3 percent of delivery units were not compliant with daily all clear certifications prior to 10 a.m. and 30.3 percent of delivery units' observations were not compliant with daily all clear certifications in the afternoon prior to close of business." The OIG has sixteen reports, many of which cite concerns over consistent postmarking, under the category of Election and Political Mail. I suspect the statistical failures are much higher during lesser known primary election dates.

- b. Citizens in multiple Utah counties have their mail processed and postmarked at the Las Vegas Processing and Distribution Center (SCF), located adjacent to Harry Reid International Airport at 1001 Sunset Road, claim to have filled out and mailed ballots prior to election day as required, and claim, due to processing delays, their ballots were not postmarked until after June 24, 2024, and therefore were not counted.

- c. Mail collected throughout the day usually makes its way back to the local Destination Delivery Unit by route mail carriers. USPS collection boxes are also generally serviced by local DDU postal employees. This mail is then staged at the DDU for an external contractor or postal service vehicle to transport mail to a processing center. The claimants' mail-in ballots appear to route from one hundred to three hundred miles away in another state.
- d. County election officials should actively communicate any critical information to the US Postal Service as listed in USPS publication 632. At minimum, election officials are advised within Publication 632 to contact their Postal Service Manager of Customer Relations no less than two weeks prior to election day. Specifically, the USPS publication 632 states election officials to "Inform your Postal Service Manager of Customer Relations of your cut-off time for receiving returned ballots." Notifying the Postal Service Manager of Customer Relations is of critical importance when election mail is handled by contract trucking, or Nevada based postal employees.
- e. In previous elections, I've interviewed many SCF and transportation employees, including management, who simply do not know they are handling time sensitive election mail near a cutoff date. This problem is almost always caused by a lack of communication to the USPS by county election officials for primary or special election dates. Nevada based employees and contractors would be especially vulnerable because Nevada primaries had already concluded. Further, Nevadans were subjected to election confusion with February presidential primaries, where

“None of the Above” won for the Republican Party, there was a separate GOP Caucus, and a June 11th primary election.

- f. Utah counties’ election officials with mail routed to Las Vegas for postmarks could’ve preventatively communicated postmark requirement and delay concerns. USPS officials, with timely notice, can alert all mail handlers of the cut-off date and sensitivity. Additionally, the USPS can provide alternate means to ensure cut-off day collections by manually postmarking timely ballots prior to dispatch from the DDU up to the SCF. This would provide the same treatment as if a customer walked a stamped letter over the front retail counter for hand cancellation and acceptance.
- g. The Office of Inspector General to the United States Postal Service reported a specific example of proper awareness and handling of ballots, “October 26, 2020, the Postal Service implemented extraordinary measures to accelerate the delivery of ballots to ensure they were included in the election process. This included expedited delivery of ballots through Express Mail and postmarking and sorting ballots for local delivery at delivery units, rather than sending them to mail processing facilities.” Voters in the defendants’ counties did not appear to be afforded such an easy safeguard to ensure their ballots were properly counted. See March 5, 2021, OIG report 20-318-R21.
- h. Also, Utah counties’ election officials could have collaborated on a sensible curing process given the inherent delay of transporting in county correspondence mailings to a sectional facility hundreds of miles away, in southern Nevada.

- i. Mail in ballots sent through Las Vegas may not receive the proper postmark despite being submitted to what a voter would believe is timely. Although the Postal Service has accepted the ballot within the cut-off date. Any number of possible delays in transit could cause a properly mailed and timely ballot to receive a postmark cancellation later than the proper date. Additionally, outbound ballot mail can get stuck to other mail pieces in processing or incur other mechanical delays between timely acceptance and delivery referred to as “loop mail.”
- j. It appears voters, who deposited mail for timely collection prior to the cutoff date, were not afforded a timely local postmark. Utah’s Congressional District 2 features some of the most distant postmark cancellation of stamped mail in the United States. Incongruently dated postmarks can happen as explained above. It appears this has occurred to timely voters in Utah’s Congressional District 2 election.

30. At the time of the election, Defendants Beaver, Garfield, Iron, Kane, Millard, Piute, Sevier, Washington, and Wayne, were aware of the processing and postmarking delays at SLC Las Vegas. *See* May 15, 2024, Government Operations Interim Committee meeting, at <https://le.utah.gov/av/committeeArchive.jsp?mtgID=19472>.

31. Despite their knowledge of the processing and postmarking delays, Defendants Beaver, Garfield, Iron, Kane, Millard, Piute, Sevier, Washington, and Wayne did nothing to address the delay or advise voters that their votes would not be counted as a result of the delay.

32. A majority of these nine counties, whose ballots were processed at SLC Las Vegas, have reported ballots as not being curable due to late postmarking:

- a. In Beaver County, 2 ballots have not been counted due to late postmarking;¹³
- b. In Iron County, 491 ballots have not been counted due to late postmarking;¹⁴
- c. In Kane County, 8 ballots have not been counted due to late postmarking;¹⁵
- d. In Washington County, 662 ballots have not been counted due to late postmarking;¹⁶ and
- e. In Wayne County, 8 ballots have not been counted due to last postmarking.¹⁷

33. As a result of Defendants failure to address the processing and postmarking delay, approximately 1,171 known Utah residents – who exercised their right to vote – will be disenfranchised.

34. The results of the primary race will be tainted unless the uncounted ballots are counted.

ARGUMENT

A party seeking a preliminary injunction bears the burden of demonstrating four elements: “(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely

¹³ Last visited July 11, 2024 <https://www.beaver.utah.gov/DocumentCenter/View/2053/Canvass-Beaver-Co-June-Primary-2024>

¹⁴ See *supra*, n. 3.

¹⁵ See *supra*, n. 5.

¹⁶ See *supra*, n. 8.

¹⁷ Last visited July 11, 2024 <https://waynecountyutah.org/uploads/canvas-results-june-25-2024.pdf>

affect the public interest.” “Because a preliminary injunction is an extraordinary remedy, the movant’s right to relief must be clear and unequivocal.” *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002) (internal quotation marks and brackets omitted). Each of these factors is satisfied here.

I. PLAINTIFF IS SUBSTANTIALLY LIKELY TO PREVAIL ON ITS CLAIMS.

Plaintiff has alleged violation of Equal Protection, failure to cure ballots, and failure to process and postmarking delay. Plaintiff is highly likely to prevail on each of these claims.

A. Equal Protection

“[E]qual protection ... require[s] the uniform treatment of” similarly situated individuals. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). In order to state an equal protection claim, a plaintiff must allege that the Defendants provided either differential treatment based on a suspect classification, or denied a fundamental right. See *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995). Defendants are statutorily and constitutionally required to apply the law equally and to not favor any certain group of citizens or geographic area of the State. See generally, *Gray v. Sanders*, 372 U.S. 368 (1963).

The principle of “one person, one vote” requires that courts seek to “[e]nsure that each person’s vote counts as much, insofar as it [i]s practicable, as any other person’s.” *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 54 (1970). “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). Once citizens have been granted the right to vote, the government “may not, by later arbitrary and disparate treatment, value one

person's vote over that of another.” *Id.* at 104-05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, (1966)). This fundamental right is made clear in Article 1, Section 17 of the Utah Constitution, which provides that “[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law.”

Equal protection applies to the USPS’s handling of ballots. Recently, in *Jones v. USPS*, 488 F.Supp.3d 103 (S.D.N.Y. 2020), the Southern District of New York held:

Defendants further contend that the equal protection principles Plaintiffs invoke do not apply to USPS’s handling of Election Mail. Yet, states are relying on USPS as a “vital partner in administering a safe, successful election.” (Amended Complaint Ex. 7 (Letter from the leadership of the National Association of Secretaries of State to DeJoy dated August 7, 2020)). And, even the nuts and bolts of election administration must comport with equal protection. *Bush v. Gore* stands for the proposition that an equal protection violation occurs when arbitrary disparities in voting mechanisms make it less likely that voters in certain areas will cast votes that count. Nonuniform mail service functions in the same way as the nonuniform vote counting standards at issue in *Bush v. Gore*, making it less likely that absentee voters in certain areas will cast votes that count, due in substantial part to failures in the Postal Service’s Election Mail operations. Defendants offer no persuasive explanation for why USPS should be exempt from the same standards that apply to other government entities that handle ballots.

Id., at 130 (emphasis added). The court then held:

Plaintiffs have thus made a sufficient showing that the lack of uniformity in the Postal Service’s treatment of Election Mail among local post offices will result in intrastate and interstate disparities in citizens’ voting power ... Specifically, whether an individual’s vote will be counted may depend in part on something completely arbitrary – their place of residence and by extension, the mailbox or post office where they dropped off their ballot ... For these reasons, the Court concludes that USPS has not satisfied the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.

Id., at 135-136 (cleaned up).

The Southern District of New York reached the same result in a case concerning votes that lacked a timely postmark from the USPS. See *Gallagher v. New York State Board of Elections*, 477 F.Supp.3d 19 (S.D.N.Y. 200). In *Gallagher*, “fourteen New York City voters who voted by absentee ballot in New York's June 23, 2020 primary election, and four candidates on the ballot allege that their rights under the First and Fourteenth Amendments to the United States Constitution, and corresponding sections of the New York Constitution, were violated when their absentee ballots were deemed invalid because they lacked a United States Postal postmark, or a timely postmark.” *Id.*, at 26. “[T]housands of absentee ballots case in the June 23 Primary were invalidated because they (1) arrived after the close of polls on June 23 and lacked a postmark or (2) reflected a postmark with a date later than June 23.” *Id.*, at 32. The court then ruled that plaintiffs were entitled to an injunction to ensure their votes were counted, stating, “When voters have been provided with absentee ballots and assured that their votes on those ballots will be counted, the state cannot ignore a later discovered, systemic problem that arbitrarily renders those ballots invalid.” *Id.*, at 45.

The present case is similar to both *Jones* and *Gallagher*. Plaintiffs have alleged differential treatment based on the fundamental right to have all votes counted in a primary election. Plaintiff has shown that two classes of votes currently have not been properly counted – uncured ballots and ballots that were timely deposited in the U.S. mail, but not timely postmarked by the Area Distribution Center in Las Vegas. The ballots, and the citizens who cast them, are entitled to equal protection and counting under the law. Thus, these votes must be counted, and Plaintiffs are substantially likely to prevail on their equal protection claim.

B. Failure to Cure Ballots.

Pursuant to [Utah Code Ann. § 20A-3a-401\(5\)](#), if a ballot is challenged because the signature on the return envelope is not consistent with the individual's signature in the voter registration records, voters can "cure" their ballots by submitting a signed affidavit attesting that they voted the ballot and returning the ballot to an election officer. In addition, pursuant to [Utah Code Ann. § 20A-3a-401\(6\)](#), if a ballot is rejected, the election officer is required to notify the individual of the rejection and the reason for the rejection. The election officer, if all requirements are met under [§ 20A-3a-401\(5\)](#) or [\(6\)](#), is required to count the vote if the affidavit is received no later than 5 p.m. three days before the day on which the canvass begins. It is the responsibility of the Defendant Clerks to notify a voter about the opportunity to "cure" a ballot.

Letters from Defendant Clerks located in the Defendant Counties of Beaver, Garfield, Iron, Kane, Piute, Washington, and Wayne County show that knew that letters placed in the mail for delivery by USPS were sent first to the SLC Las Vegas for processing and postmarking. Because the letters advising of defects and rejections were sent to the SLC Las Vegas, there was a delay in the letters reaching the voters. At least one voter received his letter advising him of his right to cure his ballot after the deadline had passed. As a result, his vote was not counted. Thus, Plaintiffs are entitled to an order requiring Defendant Clerks and Counties to enact a new cure period for invalidated ballots.

C. Failure to Process Ballots with Postmarking Delay caused by the USPS.

Pursuant to [Utah Code Ann. § 20A-3a-204\(2\)\(a\)\(i\)](#), a ballot that is mailed must be postmarked, or otherwise clearly marked as received by USPS before election day. Additionally,

ballots must be returned to the office of an election official before noon the day before the official canvass begins. *See Utah Code Ann. § 20A-3a-204(2)(a)(ii)*.

Thomas Mackel, President of Engage Marketing, Inc., and a member of the Postmaster General's Mailers Technical Advisory Committee on behalf of the American Association of Political Consultants has testified that the Office of Inspector General for USPS has audited similar instances of timely disputes caused by postal handling issues. *See Mackel Decl., ¶ 5, Exh. 3*. He has also testified that Utah citizens have their mail processed at the Las Vegas Distribution Center and that he has personally interviewed many USPS employees, including management, who do not know how to handle time-sensitive election mail. *See Id., ¶ 9*. He has testified that Utah election officials could have communicated with the Las Vegas Distribution Center before the election to apprise it of these concerns and that election officials could have collaborated with the Las Vegas Distribution Center in advance of the election on a curing process. *See Id., ¶¶ 10, 12*. Mr. Mackel concluded, "It appears voters, who deposited mail for timely collection prior to the cutoff date, were not afforded a timely local postmark." *Id., ¶ 14*.

This is the very concern Utah State Senator Ipson raised in a May 15, 2024, hearing for the Government Operations Interim Committee meeting. At that meeting, the issue of USPS delivery of timely ballots was discussed and Senator Ipson stated, "Doesn't get postmarked until it gets to Vegas 2-3 days later, the vote never counted, there have been some elections swayed by that. While we are dealing with this, I think we need to address that as well." *See Fact #18*. Thus, there is ample evidence this is a significant issue and that Utah lawmakers were aware of it in advance of the primary election.

But for the delays and/or malfeasance at SLC Las Vegas in processing and postmarking ballots mailed in a timely manner, hundreds of ballots would have been considered valid and counted. Plaintiff voters whose ballots were timely cast and mailed prior to election day, but postmarked after June 24, 2024, have submitted affidavits testifying to the same. As such, Plaintiffs are substantially likely to prevail on this claim and they are entitled to an order requiring Beaver, Garfield, Iron, Kane, Millard, Piute, Sevier, Washington, and Wayne to perform an act as required by law to count all ballots timely cast and mailed before election day, but postmarked after June 24, 2024, by SLC Las Vegas, that are accompanied by a voter affidavit attesting to compliance with [Utah Code Ann. § 20A-3a-204](#).

II. PLAINTIFF WILL SUFFER IRREPARABLE HARM UNLESS A TRO AND INJUNCTION ARE ISSUED.

“To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (cleaned up). “Irreparable harm is not harm that is merely serious or substantial.” *Id.* (Cleaned up). “The party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” *Id.* (Cleaned up).

The right to vote and have that vote counted in an election is a foundational right given to every citizen. See *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (the right “to cast their votes effectively ... rank[s] among our most precious freedoms ... [W]e have said with reference to the right to vote: No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”)).

Irreparable harm is clear in this case. If the ballots in question are not counted, the citizens who cast those ballots will have lost their fundamental right to vote and Mr. Jenkins (and his opponent) will have lost the right to have all ballots counted in an election. Once the vote is certified, the lost votes cannot later be counted. The election will be finalized and the right to vote in this election will be lost forever. Thus, Plaintiffs will suffer irreparable harm unless a TRO and injunction are issued.

III. THE THREATENED INJURY OUTWEIGHS THE HARM OF AN INJUNCTION.

“To be entitled to a preliminary injunction, the movant has the burden of showing that the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction.” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (citations omitted).

The threatened injury in this case greatly outweighs the harm of an injunction. The injury here is the citizens’ loss of the fundamental right to vote and the candidates’ right to have every vote counted. These votes, if not counted, could change the outcome of the election. As set forth above, just 214 votes currently separate the candidates and the number of votes in question due to postmarking delays is a minimum of 1,171. An additional 779 votes may still be cured due to ballot abnormalities. Thus, there are a minimum of 1,950 votes that, if counted, could alter the result of the election.

By contrast, the harm of an injunction to make sure these ballots are counted is minimal. While it will require additional time, this delay does not outweigh the threatened harm of changing an election and preventing both citizens and candidates from having all votes counted. Thus, this factor weighs heavily in favor of an injunction.

IV. A TRO/INJUNCTION PROMOTES THE PUBLIC’S SIGNIFICANT INTEREST IN VOTING.

“A movant also has the burden of demonstrating that the injunction, if issued, is not adverse to the public interest.” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1191 (10th Cir. 2003) (citations omitted). As set forth above, voting is a fundamental right and therefore, the public has a significant interest in counting all votes and ensuring that the election tally and result are accurate. Thus, this factor weighs heavily in favor of an injunction.

CONCLUSION

For the reasons set forth above, the Court should grant Plaintiffs’ motion for temporary restraining order and preliminary injunction. Specifically, the Court should (1) enact a new cure period for all invalidated ballots, (2) require Defendants Beaver, Garfield, Iron, Kane, Millard, Piute, Sevier, Washington, and Wayne to count all ballots timely cast and mailed before election day, but postmarked after June 24, 2024 by SLC Las Vegas, which are accompanied by a voter affidavit attesting to compliance with [Utah Code Ann. § 20A-3a-204](#), (3) enter an injunction prohibiting the certification of the result of the vote in the Second Congressional District until voters are given the opportunity to cure any defects caused by the processing and postmarking delay.

DATED this 18th day of July, 2024.

SPENCER FANE LLP

/s/ Scott Young
A.J. Ferate
Courtney Powell
R. Scott Young
Attorneys for Plaintiff