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

**Joe Lamm, Ravalli County Republican  
Central Committee, Jeff Wagner,  
Sylvia Wagner, Fiona Nave, Brent  
Nave,**

Plaintiffs,

v.

**Stephen Bullock**, in his official capacity  
as Governor of Montana; **Corey Staple-**  
**ton**, in his official capacity as Secretary of  
State of Montana,

Defendants.

Case No.: \_\_\_\_\_

**Verified Complaint for  
Declaratory and Injunctive  
Relief**

## **Verified Complaint for Declaratory and Injunctive Relief**

Plaintiffs Joe Lamm, Ravalli County Republican Central Committee, Jeff Wagner, Sylvia Wagner, Fiona Nave, and Brent Nave (collectively “Voters”) complain against (i) Governor Bullock’s unlawful and unauthorized expansion of mail voting (the “Plan”) and (ii) the Secretary of State’s implementation of it by approving county plans implementing the Plan as follows:

### **Introduction**

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments and Article I, Section IV, clause 1 of the Constitution of the United States, as well as 42 U.S.C. § 1983. It concerns the constitutionality of Governor Bullock’s unlawful and unauthorized expansion of mail voting and the Secretary of State’s implementation of the Plan.

### **Jurisdiction and Venue**

2. This action arises under 42 U.S.C. § 1983, the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Section IV, clause 1 of the Constitution of the United States.

3. This Court has jurisdiction over all claims pursuant to 28 U.S.C. §§ 1331 and 1343(a). It also has jurisdiction pursuant to the Declaratory Judgment Act as

codified at 28 U.S.C. §§ 2201 and 2202.

4. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred or will occur in this District.

### **Parties**

5. Plaintiff Joe Lamm is an eligible and registered voter, who is qualified to and intends to vote in the upcoming general election. He is a resident of Park County, Montana. Mr. Lamm is also a candidate for Montana State Representative House District 60. He is on the ballot for the upcoming general election. He intends to vote in person if allowed.

6. Plaintiff the Ravalli County Republican Central Committee is the county Republican party for Ravalli County, Montana. Its principal place of business is in Hamilton, Montana. The Ravalli County Republican Central Committee represents Republican voters in Montana.

7. Plaintiff Jeff Wagner is an eligible and registered voter, who is qualified to and intends to vote in the upcoming general election. He is a resident of Park County, Montana. Mr. Wagner actively participates in the political process, serving as an election judge. He intends to vote absentee.

8. Plaintiff Sylvia Wagner is an eligible and registered voter, who is qualified to and intends to vote in the upcoming general election. She is a resident of Park

County, Montana. Ms. Wagner actively participates in the political process, serving as an election judge. She intends to vote absentee.

**9.** Plaintiff Fiona Nave is an eligible and registered voter, who is qualified to and intends to vote in the upcoming general election. She is a resident of Stillwater County, Montana. Ms. Nave is a candidate for Montana State Representative House District 57, and also serves as the chairwoman for the Stillwater County Republican Central Committee. She intends to vote in person.

**10.** Plaintiff Brent Nave is an eligible and registered voter, who is qualified to and intends to vote in the upcoming general election. He is a resident of Stillwater County, Montana. He intends to vote absentee.

**11.** Defendant Stephen Bullock is the Governor of Montana. Governor Bullock issued the challenged directive. The Governor is sued in his official capacity.

**12.** Defendant Corey Stapleton is the Montana Secretary of State. As Secretary of State, he is Montana's chief election officer and oversees the elections in Montana. Mont. Code Ann. ("MCA") § 13-1-201. He is responsible for enforcing and interpreting election laws in a uniform manner (*id.*) and certifying election results (MCA § 2-15-401(f)). He is also responsible for approving written election plans submitted by counties, including plans implementing the Plan. MCA § 13-19-205. Secretary Stapleton is sued in his official capacity.

## Facts

### *Montana Election Law*

13. Montana law does not allow for universal mail-in voting for the general election.

14. Montana law does allow voters to vote an “absentee ballot,” but only if the individual applies to do so. MCA §§ 13-13-201, 211, 212. An application must be made before noon the day before the election. MCA § 13-13-211(1).

15. A voter may apply for an absentee ballot using the form provided by the Secretary of State, which requires detailed information about the voter including *inter alia* name, address, date of birth, and signature. MCA § 13-13-212(1)(a). A voter may also apply by written request, which must include the voter’s date of birth and be signed. *Id.*

16. Montana law requires that the election administrator compare the signature on a voter’s application to the signature on the voter’s registration form before providing a ballot. MCA § 13-13-213.

17. If the application does not contain a signature or the signatures do not match, the election administrator must notify the voter—giving the voter the opportunity to resolve the situation by *inter alia* verifying the signature, providing proof of identification, completing a new registration, etc. MCA § 13-13-

213(3)(b), 13-13-245.

**18.** Ballots may only be mailed to voters who are registered (or provisionally registered), and “from whom the election administrator has received a valid absentee ballot application under 13-13-211 and 13-13-212[.]” MCA § 13-13-214.

**19.** Absentee ballots, for which a valid application has been received, must be made available 30 days before election day for absentee voting in person, and must be mailed to absentee voters 25 days before election day for absentee voting by mail. MCA § 13-13-205(1).

**20.** Absentee ballots must be received by 8 pm on election day. MCA § 13-13-211(3).

**21.** Montana law allows for “mail ballot elections” only for certain local elections. MCA § 13-19-101, et seq. But specifically prohibits such mail-ballot voting for “(a) a regularly scheduled federal, state, or county election; (b) a special federal or state election, unless authorized by the legislature; or (c) a regularly scheduled or special election when another election in the political subdivision is taking place at the polls on the same day.” MCA § 13-19-104(3).

**22.** In authorizing mail-ballot voting for certain local elections. The legislature made clear that the mail-ballot voting provisions:

recognize that sound public policy concerning the conduct of elections often

requires the balancing of various elements of the public interest that are sometimes in conflict. Among these factors are the public's interest in fair and accurate elections, the election of those who will govern or represent, and cost-effective administration of all functions of government, including the conduct of elections. The provisions of this chapter further recognize that when these and other factors are balanced, the conduct of elections by mail ballot is potentially the most desirable of the available options in certain circumstances.

MCA § 13-19-101.

**23.** Even considering and balancing the above factors, the legislature made clear that mail-ballot voting was not permitted for “a regularly scheduled federal, state, or county election,” MCA § 13-19-104(3), such as the November 3, 2020 election.

**24.** For local mail-ballot elections, a proposal to conduct the election via mail-ballot voting must be made by the election administrator or local governing body. MCA §§ 13-19-201, 202. The Secretary of State is tasked with reviewing and approving such proposals. MCA § 13-19-105.

**25.** In a local mail-ballot election, a ballot must be sent to all qualified voters. MCA § 13-19-106(2). Ballots are sent to the voter at the most current address available. MCA § 13-19-206(3)(a).

**26.** Mail ballots must be received by 8 pm on election day. MCA § 13-19-306(2). They may be mailed back to the election office or placed in a designated drop box. MCA §§ 13-19-306, 307.

**27.** Despite the clear lack of authorization from the legislature and statutory language that prohibits such action, Governor Bullock issued a directive expanding mail-ballot voting.

**28.** Under that directive, counties are permitted to conduct the “general election under the mail ballot provisions of Title 13, Chapter 19[.]”

**29.** Counties that opt to conduct mail-ballot voting must make ballots available by October 2, 2020.<sup>1</sup> They must also send ballots to all qualified voters on October 9, 2020. *Id.*

**30.** As of September 8, 2020, 46 of Montana’s counties had opted in, 10 had not.<sup>2</sup> “Broadwater, Carbon, Fergus, Mineral, Petroleum, Powder River, Powell, Stillwater, Treasure, and Wibaux counties did not submit mail ballot plans, according to the Secretary of State’s Office.” *Id.*

### ***COVID-19***

**31.** While the COVID-19 pandemic has been a significant concern for the

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<sup>1</sup> Gov. Bullock, *Directive implementing Executive Orders 2-2020 and 3-2020 and providing for measures to implement the 2020 November general election*, (Aug. 6, 2020) available at [https://covid19.mt.gov/Portals/223/Documents/2020-08-06\\_Directive%20-%20November%20Elections.pdf?ver=2020-08-06-112431-693](https://covid19.mt.gov/Portals/223/Documents/2020-08-06_Directive%20-%20November%20Elections.pdf?ver=2020-08-06-112431-693) (all websites herein were last visited on September 7, 2020).

<sup>2</sup> Sara Diggins, *46 Montana counties file mail ballot plans*, Missoulain, Sept. 4, 2020, available at [https://missoulain.com/news/state-and-regional/govt-and-politics/46-montana-counties-file-mail-ballot-plans/article\\_b14cfead-9bbc-5601-95c3-d69c0a0563f0.html](https://missoulain.com/news/state-and-regional/govt-and-politics/46-montana-counties-file-mail-ballot-plans/article_b14cfead-9bbc-5601-95c3-d69c0a0563f0.html).



American people, policymakers quickly adopted measures to protect the health and safety of the public. Likewise, Montana implemented many provisions aimed at protecting the public and lowering the curve.

**32.** On March 12, 2020, Governor Bullock declared a state of emergency.<sup>3</sup> Thereafter, Governor Bullock has issued “directives” to implement his emergency orders.<sup>4</sup> He closed schools, limited gatherings, encouraged social distancing, limited non-essential travel, etc.

**33.** Across the United States, these protective measures have been effective. The curve has flattened, the spread of the virus is being controlled, the fatality rate has decreased rapidly, testing is more readily available and widespread, and the death rate is much lower than originally expected.<sup>5</sup> As a result, the United States has re-opened. And the existing protective measures have been adjusted as knowledge of the virus increases and the risk has lowered.

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<sup>3</sup> Mont. Exec. Order No. 2-2020, available at [https://governor.mt.gov/Portals/16/docs/2020EOs/EO-02-2020\\_COVID-19%20Emergency%20Declaration.pdf?ver=2020-03-13-103433-047](https://governor.mt.gov/Portals/16/docs/2020EOs/EO-02-2020_COVID-19%20Emergency%20Declaration.pdf?ver=2020-03-13-103433-047).

<sup>4</sup> See, e.g., Gov. Bullock, *Directive implementing Executive Orders 2-2020 and 3-2020 and establishing conditions for Phase Two* (May 19, 2020), available at <https://covid19.mt.gov/Portals/223/Documents/Phase%20Two%20Directive%20with%20Appendices.pdf?ver=2020-05-19-145442-350>.

<sup>5</sup> See *Provisional Death Counts for Coronavirus Disease (COVID-19)*, CDC, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>; *COVIDView*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>.

**34.** Likewise, Montana’s efforts have been effective. Indeed, even Governor Bullock admitted that:

These efforts have been effective. To date, our health care system has not been overwhelmed and we continue to work to increase our testing capacity. Through the collective efforts of all Montanans to reduce the transmission of COVID-19, Montana now has fewer than two dozen active cases and one of the lowest per capita rates of infection in the United States.<sup>6</sup>

**35.** Montana began reopening on April 22, 2020. *Id.* It is currently in Phase 2 of their reopening plan. *Id.*

**36.** Phase 2 includes allowing all businesses to operate, increasing capacity of “restaurants, bars, breweries, distilleries, and casinos” and “[g]yms, indoor group fitness classes, pools, and hot tubs” to 75% capacity, allowing concert halls, bowling alleys to open, and increasing capacity for childcare facilities, etc. *Id.*

**37.** Governor Bullock stressed that “that individual responsibility—such as good hygiene, frequent cleaning of highly-touched surfaces, and strict adherence to social distancing—remains Montana’s best tool in the fight against new infections.” *Id.*

**38.** On July 15, 2020, Governor Bullock released a directive requiring face

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<sup>6</sup> Gov. Bullock, *Directive implementing Executive Orders 2-2020 and 3-2020 and establishing conditions for Phase Two* (May 19, 2020), available at <https://covid19.mt.gov/Portals/223/Documents/Phase%20Two%20Directive%20with%20Appendices.pdf?ver=2020-05-19-145442-350>, at 2.

coverings.<sup>7</sup>

**39.** Expanding mail voting is unnecessary to combat COVID-19. The same social distancing and good hygiene practices— which are effective for preventing the spread of the virus when going out for essential services, like grocery shopping and other essential services— are also an effective way to prevent the spread of the virus for in-person voting.

**40.** Voters are able to vote in-person while social distancing and taking appropriate precautions (i.e. wearing gloves, wearing a mask, sanitizing hands, not touching one’s face, etc.) to protect themselves and others from the virus.

**41.** Dr. Fauci, director of the National Institute of Allergy and Infectious Diseases, supported this position, stating that there is no reason that Americans cannot vote in person, so long as proper safety measures are in place.<sup>8</sup> He stated that “if you go and wear a mask, if you observe the physical distancing, and don’t have a crowded situation, there’s no reason why you shouldn’t be able to [vote].” *Id.*

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<sup>7</sup> Gov. Bullock, *Directive implementing Executive Orders 2-2020 and 3-2020 and providing for the mandatory use of face coverings in certain settings* (July 15, 2020), available at <https://covid19.mt.gov/Portals/223/Documents/Mask%20Directive%20FINAL.pdf?ver=2020-07-15-140109-633>.

<sup>8</sup> Connor Perrett, *Fauci says ‘there’s no reason’ in-person voting shouldn’t be safe with masks and proper social distancing*, BusinessInsider.com, Aug. 15, 2020, available at <https://www.businessinsider.com/fauci-says-in-person-election-with-distancing-masks-is-safe-2020-8>.

42. There has been no established causal link between in-person voting and the contracting of COVID-19.

43. Moreover, Montana already allows voters to vote absentee, so long as they fill out a valid application.

44. Despite these facts, Governor Bullock has unilaterally expanded mail-ballot voting, allowing counties to conduct the general election under MCA § 13-19.<sup>9</sup> As discussed above, this code section is reserved for *local* elections, and is specifically prohibited from being applied to federal elections.

45. Under the directive, counties may opt in to this expanded mail-ballot voting.

46. Those who do so must make ballots available no later than October 2, 2020, and must mail ballots no later than October 9, 2020. *Id.*

### ***Mail-Ballot Voting Issues***

47. There is a multitude of issues with mail voting, including *inter alia* fraud, pressure or coercion to vote a particular way, lost ballots, ballots being delivered late, ballots being sent to people who should not have received them, ballots not

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<sup>9</sup> Gov. Bullock, *Directive implementing Executive Orders 2-2020 and 3-2020 and providing for measures to implement the 2020 November general election*, (Aug. 12, 2020), available at [https://covid19.mt.gov/Portals/223/Documents/2020-08-06\\_Directive%20-%20November%20Elections.pdf?ver=2020-08-06-112431-693](https://covid19.mt.gov/Portals/223/Documents/2020-08-06_Directive%20-%20November%20Elections.pdf?ver=2020-08-06-112431-693).

being sent to those that should have received them, rejected ballots, election workers not being able to keep up with demand, increased errors in processing, etc.

Some examples of these issues are detailed below, however, it is impossible to document *all* issues and examples as they are far too numerous.

**48.** According to a bipartisan commission co-chaired by President Jimmy Carter and George W. Bush’s Secretary of State James A. Baker III, mail-in ballots were “the largest source of potential voter fraud” and is “likely to increase the risk of fraud and of contested elections.” *Building Confidence in U.S. Elections*, September 2005, at pp. 35, 46, available at <https://bit.ly/3dXH7rU> (Carter-Baker Report).

**49.** It is therefore unsurprising that The Heritage Foundation has been able to compile a list of 1,296 cases of documented voter fraud in recent years.<sup>10</sup> While this number is already high, it does not reflect all instances of voter fraud—as it does not include cases that were reported but never investigated or prosecuted. *Id.*

**50.** The Heritage Foundations also released a report detailing four elections that were overturned due to fraud relating to mail-in ballots, including a North Carolina congressional election, a school board election in California, a primary election in

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<sup>10</sup> *A Sampling of Recent Election Fraud Cases from Across the United States*, The Heritage Foundation, available at <https://www.heritage.org/voterfraud>.

Indiana, and a Miami mayoral election.<sup>11</sup>

**51.** There have been many other recent examples of election fraud. For example, in New Jersey, four men were charged with criminal election fraud related to mail voting.<sup>12</sup> There was also evidence of a single New Jersey voter carrying numerous ballots and postal workers leaving ballots sitting out in building lobbies.<sup>13</sup>

**52.** In California, it was confirmed that double voting occurred in the March 2020 primary election.<sup>14</sup>

**53.** In Texas, the Attorney General noted that “[t]wo-thirds of our cases over the last decade have been about mail-in ballots. And so we know for a fact that there is mail-in ballot voter fraud going on every day.” He also said “[i]n Texas,

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<sup>11</sup> *Evidence Mounts that Mail-In Voting Will Bring Only Fraud and Chaos, Issues and Insights*, Issues & Insights, August 5, 2020, available at <https://issuesinsights.com/2020/08/05/evidence-mounts-that-mail-in-voting-will-bring-only-fraud-and-chaos/>.

<sup>12</sup> Erin Vogt, *All-Mail Pandemic Election Ends IN Fraud Charges Against NJ Politicians*, New Jersey 101.5, June 25, 2020, available at [https://nj1015.com/all-mail-pandemic-election-ends-in-fraud-charges-against-nj-politicians/?trackback=fbshare\\_mobile](https://nj1015.com/all-mail-pandemic-election-ends-in-fraud-charges-against-nj-politicians/?trackback=fbshare_mobile)

<sup>13</sup> Greg Re, *Mail-in voting faces slew of issues nationwide, as emergency USPS memo sounds alarm*, Fox News, July 22, 2020, available at <https://www.foxnews.com/politics/mail-in-voting-faces-slew-of-issues-nationwide>

<sup>14</sup> John Binderman, *Flashback: Deceased Dogs Sent Voter Registration Forms in Swing States*, Breitbart, July 10, 2020, available at <https://www.breitbart.com/politics/2020/07/10/flashback-deceased-dogs-sent-voter-registration-forms-in-swing-states/>.

the Legislature has tried to balance this idea of if people are out of town or they can't vote, we allow them to vote. But we also know there is a risk, a higher risk of voter fraud, with these mail-in ballots. So they have limited it[.]”<sup>15</sup>

**54.** In Detroit, data showed that 72 percent of absentee voting precincts had ballot counts that didn't match the total amount tracked in the poll books.<sup>16</sup> Moreover, poll watchers detailed how election workers improperly altered some votes. They also detailed that election workers improperly counted thousands of absentee ballots without checking them against the voter lists, despite being required by law to do so. *Id.*

**55.** An anonymous Democratic operative revealed an account of his own experience with committing widespread voter fraud, noting that fraud is “plenty common.”<sup>17</sup> He described scams including operatives collecting ballots from voters

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<sup>15</sup> Julia Musto, *Texas AG Ken Paxton says there's 'a lot of voter fraud' involving mail-in ballots*, Fox News, June 26, 2020, available at <https://www.foxnews.com/media/tx-ag-ken-paxton-mail-in-voting-fraud-supreme-court-win>.

<sup>16</sup> Craig Mauger, *“This can't go on”: Detroit primary ballots went unchecked, GOP poll challengers say*, The Detroit News, September 2, 2020, available at <https://www.detroitnews.com/story/news/politics/2020/09/02/republican-observers-say-detroit-ballots-went-unchecked/5680540002/>.

<sup>17</sup> Post Editorial Board, *Mass vote-by-mail really does invite fraud – we need to guard against it*, The New York Post, August 31, 2020, available at <https://nypost.com/2020/08/31/mass-vote-by-mail-really-does-invite-fraud-we-must-guard-against-it/>.

under the guise of offering to mail them on the voters behalf and then steaming the ballot envelopes open and inserting their own ballots, “helping” the elderly by filling out ballots for them, postal workers discarding envelopes from areas that favor candidates from the opposite political party, and bribing voters.<sup>18</sup>

**56.** There are also concerns that dependent family members could be pressured or otherwise follow the advice of those whom they depend on.<sup>19</sup> Dependent family members could do so to avoid intimidation, conflict, dislike or ridicule, or to gain favor or sympathy. *Id.*

**57.** Mailed ballots can be filled out in private by someone other than the voter or by voters subject to undue influence. An Oregon survey found 5% of polled voters admitted someone else filled out their ballot.<sup>20</sup>

**58.** Mailed ballots have been filled out fraudulently for ineligible, false, impersonated, or duplicate voter registrations.<sup>21</sup>

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<sup>18</sup> *Id.*; John Levine, *Confessions of a voter fraud: I was a master at fixing mail-in ballots*, The New York Post, August 29, 2020, available at <https://nypost.com/2020/08/29/political-insider-explains-voter-fraud-with-mail-in-ballots/>.

<sup>19</sup> Toplak, Jurij, *Push for mail-in vote gaining steam, and scrutiny*, Boston Globe, May 11, 2020, available at <https://www.bostonglobe.com/2020/05/12/opinion/push-mail-in-vote-gaining-steam-scrutiny/>.

<sup>20</sup> A ‘Modern’ Democracy That Can’t Count Votes, Los Angeles Times, Dec. 11, 2000, <https://www.latimes.com/archives/la-xpm-2000-dec-11-mn-64090-story.html>.

<sup>21</sup> See, e.g., *U.S. Has 3.5 Million More Registered Voters Than Live Adults* —



**59.** Apart from fraud, Voters can be disenfranchised through delays and issues with mailed ballot voting.

**60.** Indeed, where states without a history of many mailed ballots suddenly create a flood of mailed ballots, that sudden flood poses serious risks to the right to vote.

**61.** With a significant increase in mailed ballots, many applicants may never receive their ballot or may receive it too late. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1210 (2020) (Ginsberg, J. dissenting) (“The surge in absentee-ballot requests has overwhelmed election officials, who face a huge backlog in sending ballots.”).

**62.** Data from federal Election Assistance Commission reports that from 2012 to 2018 over 28 million mailed ballots—nearly one in five mail in ballots cast—went missing.<sup>22</sup>

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*A Red Flag For Electoral Fraud*, Investor’s Business Daily, Aug. 16, 2017, <https://www.investors.com/politics/editorials/u-s-has-3-5-million-more-registered-voters-than-live-adults-a-red-flag-for-electoral-fraud/>; *Oregon AG gets guilty plea voter fraud case*, Oregon Catalyst, Sept. 18, 2010, <https://oregoncatalyst.com/3510-oregon-ag-gets-guilty-plea-voter-fraud-case.html>; Steve Roberts, Jr., *Court Docs: James City Man Indicted on Voter Fraud Charges*, THE MORNING CALL, April 9, 2019, available at <https://www.mcall.com/va-vg-richard-dohmen-indicted-0409-story.html>.

<sup>22</sup> *See* Mark Hemingway, *28 Million Mail-In Ballots Went Missing in Last Four Elections*, Real Clear Politics, 2020, available at [https://www.realclearpolitics.com/articles/2020/04/24/28\\_million\\_mail-in\\_ballots\\_went\\_missing\\_in\\_last\\_four](https://www.realclearpolitics.com/articles/2020/04/24/28_million_mail-in_ballots_went_missing_in_last_four)

**63.** Data shows that, even more than the threat of voters fraudulently casting multiple ballots, the frenzied roll-out of mailed ballots in unprepared states has led to more eligible voters getting disenfranchised through this years primary elections.<sup>23</sup>

**64.** In South Carolina, multiple ballots were found in Maryland election offices.<sup>24</sup> As a result, an entire county did not get presidential ballots in their presidential primary in February. *Id.*

**65.** In Wisconsin, several tubs of absentee ballots were discovered outside a postal center near Milwaukee.<sup>25</sup> At least 9,000 absentee ballots were never sent to their intended target and others which were recorded as sent but never received. *Id.* Among those who never received their ballot was the Democratic minority leader of the Wisconsin State Assembly, who ultimately chose not to vote. *Id.*

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\_elections\_143033.html.

<sup>23</sup> Marshall Cohen, *State's failed to get absentee ballots to thousands of voters in recent primary elections, signaling problems for November*, CNN, June 22, 2020, available at <https://www.cnn.com/2020/06/20/politics/absentee-voting-election-problems/index.html>.

<sup>24</sup> Ashe Schow, *South Carolina Absentee Ballots Found In Maryland*, Dailywire.com, May 22, 2020, available at <https://www.dailywire.com/news/south-carolina-absentee-ballots-found-in-maryland>.

<sup>25</sup> Nick Corasaniti & Stephanie Saul, *Inside Wisconsin's Election Mess: Thousands of Missing or Nullified Ballots*, The New York Times, April 9, 2020, available at <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>.

66. In Georgia, the House Minority Leader noted that “[t]here were probably 40,000 to 50,000 voters who requested an absentee ballot who never received it[.]”<sup>26</sup>

67. In Indiana, thousands of voters’ ballots did not arrive in time.<sup>27</sup>

68. In New York, a voter who failed to receive her absentee ballot reported feeling “turned away” when she was incorrectly told to go home after arriving at her polling place to try to vote in person.<sup>28</sup>

69. Other communities may have difficulties sending and receiving mailed ballots. For example, in Native American reservations in remote villages many residents do not have traditional mailing addresses or reliable postal service.<sup>29</sup>

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<sup>26</sup> Brandon Mielke, Kendall Karson, and Alisa Wiersema, *As ballots pile up in the mail, a potential ‘nightmare’ looms on Election Night*, abc news, July 13, 2020, available at <https://abcnews.go.com/Politics/ballots-pile-mail-potential-nightmare-looms-election-night/story?id=71719232>.

<sup>27</sup> Lesley Weidenbener, *Clerk warns that thousands of mail-in ballot might not be counted; voters can still go to polls*, Indiana Business Journal, May 29, 2020, available at <https://www.ibj.com/articles/clerk-warns-thousands-of-mail-in-ballots-might-not-be-counted-voters-can-still-go-to-polls>.

<sup>28</sup> Pelz, Jennifer, *Joe Biden, AOC win New York primary, but some results could take until July*, abc7ny, June 2, 2020, available at <https://abc7ny.com/politics/new-york-primary-voters-might-await-results-into-july/6260756/>.

<sup>29</sup> Jessica Huseman, *Voting by mail Would Reduce Coronavirus Transmission but It Has Other Risks*, ProPublica, March 24, 2020, available at <https://www.propublica.org/article/voting-by-mail-would-reduce-coronavirus-transmission-but-it-has-other-risks>

70. On the other hand, there are many voters who received ballots but should not have. Records show that in Clark County, Nevada, only 7,774 names were removed from voter roles in 2019 out of a total of 26,623 who people passed away in that year.<sup>30</sup> And of the 7,774 who were removed, not all of them had died in 2019. *Id.* Reports also show that Clark County had over 50,000 non-citizens registered to vote in 2017.<sup>31</sup>

71. Another issue with mailed ballots is that they are more frequently rejected. In person voting leads to a rejection rate of .01 percent, while mailed ballots easily see rejection rates 100 times that.<sup>32</sup> This year, many states exceeded the standard rejection rate in their primaries due to a higher number of mailed ballots. *Id.*

72. Election workers inexperienced with mail voting will be more error-prone, given that election workers and systems aren't used to processing so many mail ballots.

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<sup>30</sup> Rob Lauer, *18K Plus Deceased Voters Mailed Ballots in Clark County*, 320 News Las Vegas, May 23, 2020, available at [http://360newsลาสвеegas.com/80k-plus-deceased-voters-mailed-ballots-in-clark-county/?fbclid=IwAR2\\_xIXCS0b1OAblcAR-F\\_\\_X1-GYl2Wz2aYa0X4yqlE1jHFPSbmgy2FAYRQ](http://360newsลาสвеegas.com/80k-plus-deceased-voters-mailed-ballots-in-clark-county/?fbclid=IwAR2_xIXCS0b1OAblcAR-F__X1-GYl2Wz2aYa0X4yqlE1jHFPSbmgy2FAYRQ)

<sup>31</sup> Rob Lauer, *Only "30" non-citizens removed from voter roles in 2019 Clark County*, 360 News Law Vegas, May 22, 2020, available at <http://360newsลาสвеegas.com/only-30-non-citizens-removed-from-voter-roles-in-2019-clark-county/>

<sup>32</sup> Ted S. Warren, *Democrats Should Curb Their Enthusiasm for Mail-in Voting*, Politico, September 2, 2020, available at <https://www.politico.com/news/magazine/2020/09/02/democrats-mail-in-voting-407939>

73. Likewise, voting rights advocates warn that rejection of ballots because of mail delays, signature match problems, and general errors in completing and sealing the forms could lead to hundreds of thousands of people being disenfranchised.<sup>33</sup>

74. In Wisconsin's primary, nearly 23,000 ballots were thrown out, predominantly because voters or their witnesses missed at least one line on a form.<sup>34</sup> This number is almost the equivalent of Trump's 2016 margin of victory in Wisconsin, a state which was critical to his ultimate victory. *Id.* With voter turnout expected to double in November to nearly 3 million, "a proportionate volume of absentee ballot rejections could be the difference in who wins the swing state – and possibly the presidency." *Id.*

75. An NPR analysis found an "extraordinarily high" number of ballots have been rejected in this years presidential primaries, with more than 550,000 ballots

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<sup>33</sup> Elise Viebeck and Michelle Yee Hee Lee, *Tens of thousands of mail ballots have been tossed out in this year's primaries. What will happen in November?*, The Washington Post, July 16, 2020, available at [https://www.washingtonpost.com/politics/tens-of-thousands-of-mail-ballots-have-been-tossed-out-in-this-years-primaries-what-will-happen-in-november/2020/07/16/fa5d7e96-c527-11ea-b037-f9711f89ee46\\_story.html](https://www.washingtonpost.com/politics/tens-of-thousands-of-mail-ballots-have-been-tossed-out-in-this-years-primaries-what-will-happen-in-november/2020/07/16/fa5d7e96-c527-11ea-b037-f9711f89ee46_story.html).

<sup>34</sup> Scheck, Tom and Geoff Hing, *How Wisconsin's 23,000 rejected absentee ballots in spring could spell trouble for the November election*, Green Bay Press Gazette, July 29, 2020, <https://www.greenbaypressgazette.com/story/news/2020/07/29/wisconsin-election-rejected-absentee-ballots-could-spell-trouble-november/5529702002/>.

being thrown out.<sup>35</sup> It also found that tens of thousands of ballots were rejected in key battleground states, where the outcome of those states, and ultimately the presidential election, could be determined by a small number of votes. *Id.*

76. In Kentucky, more than 15,000 combined ballots were rejected in its two most populous counties.<sup>36</sup>

77. In New York City, rejection rates were extremely high, with around 20 percent of ballots being rejected in Manhattan and nearly 30 percent being rejected in Brooklyn.<sup>37</sup>

78. In New Jersey's special election in June, about ten percent of the mailed ballots were rejected, which experts warned could foreshadow tens of thousands of rejected ballots in New Jersey in November.<sup>38</sup>

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<sup>35</sup> Pam Fessler and Elena Moore, *More than 550,000 Primary Ballots Rejected in 2020, Far Outpacing 2016*, NPR, August 22, 2020, available at <https://www.npr.org/2020/08/22/904693468/more-than-550-000-primary-absentee-ballots-rejected-in-2020-far-outpacing-2016>.

<sup>36</sup> Tobin, Ben, *More than 15,000 primary absentee ballots rejected between Kentucky's two largest counties*, Louisville Courier Journal, July 7, 2020, available at <https://www.courier-journal.com/story/news/politics/elections/kentucky/2020/07/07/kentucky-elections-jefferson-county-rejects-more-than-8-000-ballots/5389986002/>.

<sup>37</sup> Richard Pildes, *New York's Delay in Counting Votes Could Signal a Real Disaster in November*, July 18, 2020, available at <https://electionlawblog.org/?p=113218>.

<sup>38</sup> Colleen O'Dea, *One in 10 Ballots Rejected in Last Month's Vote-by-Mail*

**79.** Prepaid postage was among one of the major causes of ballot rejection. In New York, the approved use of pre-paid postage means the USPS may omit postmarks.<sup>39</sup> However, in order to be counted, absentee ballots must be postmarked by election day, leading to the invalidation of ballots otherwise validly filled out. *Id.*

**80.** And even when applied, postmarks proved problematic for rural communities in Wisconsin whose mail trucks come, for example, once a day at 7:30 am.<sup>40</sup> Therefore, anything placed in the mail after 7:30 am on election day would be postmarked the next day and subsequently rejected, even though it was validly put in the mail on election day. *Id.* A couple ballots were discarded in Wisconsin due to a lack of postmarks. *Id.*

**81.** In Florida, researchers found that rejection rates varied widely by county, which suggests non-uniformity in how county elections officials verify signatures

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*Elections*, NJ Spotlight, June 10, 2020, available at <https://www.njspotlight.com/2020/06/one-in-10-ballots-rejected-in-last-months-vote-by-mail-elections/>.

<sup>39</sup> Kay Dervishi, *When to expect the Board of Elections to count absentee ballots*, City & State NY, July 8, 2020, available at <https://www.cityandstateny.com/articles/politics/campaigns-elections/when-expect-board-elections-count-absentee-ballots.html>.

<sup>40</sup> Nick Corasaniti & Stephanie Saul, *Inside Wisconsin's Election Mess: Thousands of Missing or Nullified Ballots*, The New York Times, April 9, 2020, available at <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>.

and other details on mailed ballots.<sup>41</sup>

**82.** Minority voters have their ballots rejected at a rate higher than non-minorities.

**83.** Research suggests that African Americans, young people, and first-time voters were less likely to have their ballots counted due to noncompliance with technical requirements or late arrival. *Id.*

**84.** And when compared to an average of 1.3 percent of total ballots which go uncounted, the rejection rate among young and minority voters was notably higher. *Id.* Young voters under 30 were rejected 3.56 percent of the time, first time voters had a 2.54 rejection rate, and black voters had 2.32 percent rejected. *Id.*

**85.** The Brennan Center examined data from the Georgia primary and saw that far fewer white voters had their ballots rejected than non-white voters.<sup>42</sup>

**86.** Another issue with mail voting is the inability of election workers to keep up with increased mail votes.

**87.** A significant increase in mail balloting is a burden that current election

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<sup>41</sup> Allison Ross, *More than 18,000 mail ballots not counted in Florida's March presidential primary*, Tampa Bay Times, June 29, 2020, available at <https://www.tampabay.com/news/health/2020/06/29/more-than-18000-mail-ballots-not-counted-in-floridas-march-presidential-preference-primary/>.

<sup>42</sup> Rick Hasen, “*Far Fewer white voters had their mail ballots rejected than non-white voters*” in *Georgia Primary; Most rejected for Being Late*, Election Law Blog, August 26, 2020, available at <https://electionlawblog.org/?p=114462>.



officials will not be able to bear, which is sure to result in mistakes being made. An expansion of mail balloting would require significantly more funding and staffing in order to administer ballots with accuracy.

**88.** In Wisconsin, reports from the primary election revealed workers putting in 110 hour weeks which resulted in an overworked workforce and a systemic failure to maintain accuracy without falling behind.<sup>43</sup> One County Clerk described there being “no way humanly possible” to keep up with amount of ballot requests. *Id.* The head of the Milwaukee Election Commission described the situation as “chaos” and “not an appropriate environment to be administering an election.” *Id.*

**89.** Charles Stewart at the Massachusetts Institute of Technology says that the root of the problem was the fact that “[t]his system was designed for a world in which 5% of voters voted by mail, not for a system in which 70% of voters voted by mail . . . [s]o something has to give, and the thing that ends up giving is probably the accuracy of the request for the ballot.” *Id.*

**90.** Montana Election Offices may not have enough staff, space, or secure storage to deal with a large influx of mailed ballots, which risks boxes being mis-

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<sup>43</sup> Daphne Chen et al., *‘They should have done something’: Broad failures fueled Wisconsin’s absentee ballot crisis, investigation shows*, Milwaukee Journal Sentinel, 2020, available at <https://www.jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002/>.

placed, lost, or tampered with.

**91.** Human error exists in all elections. These errors would be sure to increase if an elections office is overwhelmed with applications and ballots.

**92.** The United States Postal Service (USPS) is not equipped to deal with a significant increase of mailed ballots.

**93.** A recent audit found 8 percent of election-related materials, both ballots and political mailings, were not delivered on time.<sup>44</sup> The report found that voter addresses needed to be updated in many states. *Id.* It concluded that a lack of management and oversight along with unclear guidance could lead to delays in processing the ballots in the presidential election, which in turn could create confusion about the winner. *Id.*

**94.** An audit found that 68,000 pieces of political mail sat in a Baltimore processing facility untouched for five days before management discovered them.<sup>45</sup> Several other postal facilities were found to not properly complete daily certifica-

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<sup>44</sup> Alexander Nazaryan, *Postal Service report warns of bottlenecks in processing mail-in ballots*, AOL, September 2, 2020, available at <https://www.aol.com/article/news/2020/09/02/postal-service-report-warns-of-bottlenecks-in-processing-mail-in-ballots/24608920/>.

<sup>45</sup> Emily Opilo, *Baltimore postal facility sat on 68,000 pieces of election mail for 5 days ahead of primary, audit shows*, Baltimore Sun, September 2, 2020, available at <https://www.baltimoresun.com/politics/bs-md-pol-postal-service-baltimore-audit-20200902-23yhohiebaw3ipzpgi57qoqpu-story.html>.

tions confirming all election mail had been processed in the weeks leading up to their respective primaries. *Id.* This discovery highlights reports of widespread postal delays and warnings by the Postal Service to nearly every state that deadlines for ballot requests may not provide sufficient time. *Id.*

**95.** US postal officials are concerned voters won't receive ballots in time for Election Day.<sup>46</sup> One official noted the agency's printers "just don't have the capacity they were used to in prior elections" to support the expected influx. *Id.* Another official was concerned deadlines for requesting ballots did not provide enough time for the ballots to be sent and returned. *Id.*

**96.** USPS has warned nearly every state there is a risk that ballots may not be returned to election offices in time to be counted due to an incompatibility between election rules and the time needed for delivery and return of absentee ballots.<sup>47</sup>

These letters highlighted a growing concern surrounding a slowdown in postal delivery due to recent changes at USPS. *Id.*

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<sup>46</sup> Lucas Manfredi, *USPS officials worry "supply chain" issues could impact mail ballots: Report*, Fox Business, September 3, 2020, available at <https://www.foxbusiness.com/politics/senior-usps-officials-worried-issues-in-the-supply-chain-could-prevent-voters-from-receiving-ballots-in-time-for-election-day-report>

<sup>47</sup> Ellie Kaufman, *Postal service warns nearly every state it may not be able to deliver ballots in time based on current election rules*, CNN, August 15, 2020, available at <https://www.cnn.com/2020/08/14/politics/usps-warn-states-mail-in-ballot-delivery/index.html>.

97. The inspector general at USPS has outlined a number of ongoing concerns over their ability to handle the influx of mailed ballots in the general election, apart from the recent actions by Postmaster General DeJoy.<sup>48</sup> A report found several potential problems, including ballots mailed without mail-tracking and out-of-date voter addresses. *Id.* Several facilities reviewed also “did not always comply with election and political mail readiness procedures.” *Id.*

98. In elections across the country, there have already been issues with USPS delivery, with ballots showing up after the election or being lost altogether. These issues would certainly increase if there were a sudden increase of mailed ballots.

99. Mail voting is also far more expensive and complicated than in-person voting. Recently the Brennan Center estimated costs of “maintaining in-person voting” nationally as \$271.4 million.<sup>49</sup> The total estimated cost to provide all Americans with a “vote by mail option” was between \$982 million and \$1.4 billion. *Id.*

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<sup>48</sup> *Postal Service Watchdog Outlines ‘Concerns’ Surrounding Election Readiness*, NPR, September 1, 2020, available at <https://www.npr.org/2020/09/01/908395806/postal-service-watchdog-outlines-concerns-surrounding-election-readiness>

<sup>49</sup> Lawrence Norden et al., *Report: Estimated Costs of Covid-19 Election Resiliency Measures*, Brennan Center for Justice (2020), available at <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>; see also M. Mindy Moretti, *In Focus This Week: What are costs of voting by mail?*, Electionline.org (2020), available at <https://electionline.org/electionline-weekly/2020/04-23/> (finding that absentee voting is more expensive than in person voting).

**100.** States that have moved to “all-mail elections took many years to get there . . . putting too much strain on an entirely new system is sure to result in breakdowns and failures.”<sup>50</sup> The same breakdowns and failures would occur here with a swift transition to many more mailed ballots.

**101.** And with the increased costs of mail voting versus in-person voting, and no increased funding provided by the legislature, given the Governor’s unilateral action, Montana Election Offices may not be able to afford to administer additional mailed ballots.

**102.** Finally, mailed ballots could lead to a delay and uncertainty in election results.

**103.** In New York City, voters remained uncertain of the results of races, including a key congressional primary, for over a month after election day.<sup>51</sup>

**104.** In Philadelphia, the slow counting of mailed ballots had officials concerned whether results could be certified by the 20-day deadline mandated by state

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<sup>50</sup> Lawrence Norden et al., *Report: Estimated Costs of Covid-19 Election Resiliency Measures*, Brennan Center for Justice (2020), available at <https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures>.

<sup>51</sup> Jada Yuan, *A month later, this New York City primary is a train wreck and a warning to us all*, The Washington Post, July 25, 2020, available at [https://www.washingtonpost.com/lifestyle/style/a-month-later-this-new-york-city-primary-is-still-a-train-wreck-and-a-warning-to-us-all/2020/07/25/1c19f9c4-cb68-11ea-b0e3-d55bda07d66a\\_story.html](https://www.washingtonpost.com/lifestyle/style/a-month-later-this-new-york-city-primary-is-still-a-train-wreck-and-a-warning-to-us-all/2020/07/25/1c19f9c4-cb68-11ea-b0e3-d55bda07d66a_story.html).

law.<sup>52</sup>

**105.** As CNN noted, “The stakes couldn’t be higher. For instance, about 14,000 absentee voters never got their ballots in Wisconsin, a state Trump carried in 2016 by only about 23,000 votes. If just 1% of absentee ballots aren’t delivered to voters in key states this fall, that could tip the balance in a close presidential election and potentially trigger a constitutional crisis.”<sup>53</sup>

**106.** Stanford political science professor Larry Diamond said the combination of a close election and the public failing to appreciate it could take days or weeks to count mailed ballots could lead to “an unprecedented post-election crisis in the United States.”<sup>54</sup>

### **Montana Mail Voting Issues**

**107.** The Montana Association of Counties wrote Governor Bullock a letter

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<sup>52</sup> Lai, Jonathan, Election results in Philly are going to take even longer than expected: Half the votes still haven’t been counted, The Philadelphia Inquirer, June 5, 2020, available at <https://www.inquirer.com/politics/election/philadelphia-pa-primary-votes-not-counted-20200605.html>.

<sup>53</sup> Marshall Cohen, *State’s failed to get absentee ballots to thousands of voters in recent primary elections, signaling problems for November*, CNN, June 22, 2020, available at <https://www.cnn.com/2020/06/20/politics/absentee-voting-election-problems/index.html>

<sup>54</sup> Garrison, Joey, No presidential winner on election night? Mail-in ballots could put outcome in doubt for weeks, USA Today, June 28, 2020, available at <https://www.usatoday.com/story/news/politics/2020/06/28/election-2020-vote-mail-could-mean-election-week-not-election-day/3256643001/>.

requesting the challenged directive for a mail-ballot election.<sup>55</sup> In support of this, they highlighted what they referred to as the “success” of Montana’s mail ballot primary election, claiming it was streamlined and more accurate. *Id.* However, the Montana primary did not occur without issues that left voters disenfranchised.

**108.** Moreover Montana, like other states, faces the same risks associated with mailed ballot voting discussed above.

**109.** Some of these were evident in the recent primary. For example, Missoula County’s Election Administrator admitted there were drawbacks to the mail-ballot primary election, noting “[o]ne of the things that was a little bit harder with this was that since it was an all mail ballot election, we had a lot of undeliverable ballots.”<sup>56</sup>

**110.** Thousands of ballots in Montana’s primary did not reach their intended recipients. In Gallatin County, 4,500 voters did not receive their ballots.<sup>57</sup> Lewis and Clark County mailed out more than 41,000 ballots, with 1,600 being returned

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<sup>55</sup> Montana Association of Counties, July 24, 2020 Letter to Governor Bullock, available at [https://drive.google.com/file/d/13v4w1BKOU2jmdQJzcH6WAlnnJ\\_1DaOTC/view](https://drive.google.com/file/d/13v4w1BKOU2jmdQJzcH6WAlnnJ_1DaOTC/view).

<sup>56</sup> Peter Christian, Missoula County Primary Election Results As Of 8 PM, NewsTalk KGVO, June 2, 2020, available at <https://newstalkkgvo.com/missoula-county-primary-election-results-as-of-8-pm/>.

<sup>57</sup> Deion Broxton, *4,500 mail-in ballots sent back to Gallatin Co. Elections Office*, NBC Montana, May 20, 2020, available at <https://nbcmontana.com/news/local/4500-mail-in-ballots-sent-back-to-gallatin-co-elections-office>.

as undeliverable.<sup>58</sup>

**111.** A longtime resident of Yellowstone County reported that she and her husband received “two Republican ballots, one Green Party ballot and no Democratic Party ballot” in their election envelopes.<sup>59</sup> The Yellowstone County Election Administrator acknowledge 100 additional envelopes with the same incorrect party ballots. *Id.*

**112.** The Montana Association of Counties additionally claimed that security features such as signature verification mean mail ballots are not susceptible to fraud. However, as discussed above, fraudsters have designed ways to counteract these security measures that often go undetected. *See supra*, e.g. ¶ 55. And it is likely that election officials will not check security verifications if overworked and flooded with ballots, like happened in Michigan. *See* ¶ 54 (detailing how election workers in Detroit improperly counted thousands of absentee ballots without

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<sup>58</sup> Jonathan Ambaria,, *Montana Election Officials: contact county if mail ballot hasn't arrived*, KTHV, May 22, 2020, available at <https://www.ktvh.com/news/montana-politics/montana-election-officials-contact-county-if-mail-ballot-hasnt-arrived>.

<sup>59</sup> Mike Kordenbrock and Paul Hamby, *Yellowstone County on track to break primary voting record by 10,000 ballots*, Billings Gazette, June 2, 2020, available at [https://billingsgazette.com/news/local/yellowstone-county-on-track-to-break-primary-voting-record-by-10-000-ballots/article\\_d8fc1820-9f5a-5d07-b4b2-521db9f19fd3.html](https://billingsgazette.com/news/local/yellowstone-county-on-track-to-break-primary-voting-record-by-10-000-ballots/article_d8fc1820-9f5a-5d07-b4b2-521db9f19fd3.html)



checking them against the voter lists, as required by law).

## **Claims**

### **Count I**

#### **The Plan Violates Article I, Section 4, Clause 1 of the U.S. Constitution.**

**113.** Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

**114.** The expansion of mail-ballot voting in a manner specifically prohibited by the Legislature violates Voters' right to have, and to vote in, a federal election where the "Manner" of election is "prescribed . . . by the Legislature," as required:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1.

**115.** Federal candidates are on the ballot for the November 3, 2020 general election, including the Governor. So the election must be conducted in the legislature's prescribed manner.

**116.** The legislature expressly *barred* mail-ballot voting for such "regularly scheduled federal ... election[s]." MCA § 13-19-104(3)(a).

**117.** Yet Governor Bullock's expansion of mail-ballot voting is not what the legislature prescribed, being contrary to controlling legislation.

**118.** This expansion of mail-ballot voting overrides and displaces the Legislature's controlling balancing of ballot access and election integrity and violates Article I, § 4, cl. 1, including by violating Voters' right to have, and to vote in, an election conducted as the U.S. Constitution mandates.

## **Count II**

### **The Plan Violates the Fundamental Right to Vote by Vote-Dilution Disenfranchisement. (42 U.S.C. § 1983; U.S. Const. amends. 1 and 14)**

**119.** Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

**120.** The right to vote, with the included right to have one's vote counted, is protected by the First and Fourteenth Amendments and is fundamental, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966), and well-established: "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections" and to have that vote counted. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

**121.** "The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." *Id.* at 555 (internal citations omitted). "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*

**122.** “[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment . . . .” *Griffin v. Roupas*, 385 U.S. 1128, 1131 (7th Cir. 2004). “[S]tates that have more liberal provisions for absentee voting may well have different political cultures . . . . One size does not fit all.” *Id.*

**123.** Voting fraud connected to mail voting is well-established as a cognizable harm, along with the related needs to protect election integrity and safeguard voter confidence. *See, e.g., Crawford*, 553 U.S. at 192-97 (citing and relying on, *inter alia*, the Report of “the Commission on Federal Election Report, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III”); *see also Griffin*, 385 U.S. at 1130-31 (absentee ballot problems that require the legislature to balance).

**124.** Under the balancing required by the *Burdick* test, *Burdick v. Takushi*, 504 U.S. 428 (1992), applied in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), the many people who will be disenfranchised by the inclusion of unlawful votes weighs heavily against the Plan under the current situation, making it a severe burden that cannot be justified by a fear of in-person voting amidst COVID-19 fears when existing election law is fully compliant with Phase 2 generally, with by-request absentee-ballot voting available with no required excuse for the minor-

ity specially at risk, so there was no need for the Plan.

**125.** The Plan violates the Voters' right to vote by vote-dilution disenfranchisement. The Legislature, exercising its quintessential balancing prerogative, determined that mail-ballot voting should be prohibited for the general election. That indicates a concern that in Montana, the risk of illegal voting by mail-ballot voting did not justify allowing mail-ballot voting. That is the Legislature's judgment in exercising its prerogative to balance voting access and election integrity.

**126.** Given the Legislature's prohibition of such mail voting, there is a cognizable risk of ballot fraud from mail-ballot elections. Because illegal votes dilute legal votes, this violates the rights of Voters and all voters due to vote-dilution disenfranchisement.

### **Count III**

#### **The Plan Violates the Fundamental Right to Vote by Direct Disenfranchisement. (42 U.S.C. § 1983; U.S. Const. amends. 1 and 14)**

**127.** Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

**128.** The Plan also violates the Voters' right to vote by direct disenfranchisement.

**129.** Due to the sudden surge in mail ballots—on top of approved, lawful absentee-ballot requests and voting—that will result from the Plan, many voters

will be disenfranchised because requested ballots never arrive or arrive too late and filled-out ballots get lost or are delayed in the return process.

**130.** Given the Legislature’s prohibition of such mail-ballot voting—based on its authoritative and expert legislative balancing—along with evidence supporting the legislative balancing, there is a cognizable, substantial risk of direct disenfranchisement from mail-ballot voting. Due to this widespread disenfranchisement caused by not abiding by the Legislature’s balancing, the Plan violates the right to vote by direct disenfranchisement.

#### **Count IV**

#### **The Plan Violates Voter’s Right to Vote and Equal Protection under the Fourteenth Amendment, as Interpreted by *Bush v. Gore*, 531 U.S. 98 (2000)**

**131.** Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

**132.** In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court found that favoring voters in one county to the disadvantage of voters in other counties violates a long line of one-person-one-vote authority that requires that citizens in one county not be disadvantaged compared to voters in other counties. This is a violation of the right to vote (by dilution of vote values in other counties) and the Equal Protection Clause of the Fourteenth Amendment.

**133.** As *Bush* noted, the voters of one county may not be favored over those of

another:

An early case in our one-person, one-vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders*, 372 U.S. 368 (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie*, 394 U.S. 814 (1969), where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that “[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.” *Id.*, at 819.

*Id.* at 107.

**134.** A reported 46 of 56 Montana counties have filed mail-ballot plans. If the plans are approved, voters in the 46 counties will have greater voting power than other-county voters.

**135.** The Plan enhances the odds of voters in counties adopting the Plan being able to vote and have their votes counted (while violating the legislature’s controlling balancing of access and integrity by increasing the odds of ballot fraud).

**136.** As a result, proportionally more votes will be obtained from in-Plan counties than from other counties—with the difference not being accounted for by population differences

**137.** Because of this, the Plan violates the equal-protection clause and causes and risks vote dilution.

### **Prayer for Relief**

**138.** Declare that the Plan violates Article I, § 4 , cl. 1 of the U.S. Constitution;

**139.** Declare that the Plan violates the fundamental right to vote by vote-dilution disenfranchisement under the First and Fourteenth Amendments of the U.S. Constitution;

**140.** Declare that the Plan violates the fundamental right to vote by direct disenfranchisement under the First and Fourteenth Amendments of the U.S. Constitution;

**141.** Declare that the Plan violates the fundamental right to vote and equal protection under the Fourteenth Amendment, as interpreted by *Bush v. Gore*, 531 U.S. 98 (2000);

**142.** Issue a preliminary and permanent injunction that prohibits Defendants from implementing and enforcing the Directive;

**143.** Issue a preliminary and permanent injunction that prohibits the Secretary of State from approving any proposals from counties to conduct a mail election;

**144.** Award Voters their costs and attorneys fees under 42 U.S.C. § 1988 and any other applicable authority; and

**145.** Grant any and all other such relief as this Court deems just and equitable.

Date: September 9, 2020

Respectfully Submitted,

/s/ Emily Jones

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Terre Haute, IN 47807-3510  
Telephone: 812/232-2434

*Lead Counsel for Plaintiffs*

*\* Pro Hac Vice forthcoming*



### Verification of Joe Lamm

I, Joe Lamm, declare as follows:

1. I am a resident of Montana.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on Sep 4, 2020.

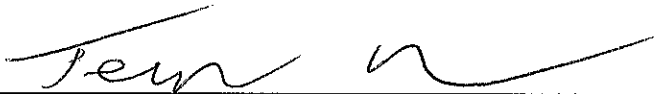
  
\_\_\_\_\_  
Joe Lamm

### **Verification of Ravalli County Republican Central Committee**

I, Terry Nelson, declare as follows:

1. I am the chairman of the Ravalli County Republican Central Committee.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning the Ravalli County Republican Central Committee and its past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on September 4<sup>th</sup>, 2020.

  
\_\_\_\_\_  
Terry Nelson

### Verification of Jeff Wagner

I, Jeff Wagner, declare as follows:

1. I am a resident of Montana.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on 5 September, 2020.

  
\_\_\_\_\_  
Jeff Wagner

### Verification of Sylvia Wagner

I, Sylvia Wagner, declare as follows:

1. I am a resident of Montana.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on 6 Sept, 2020.

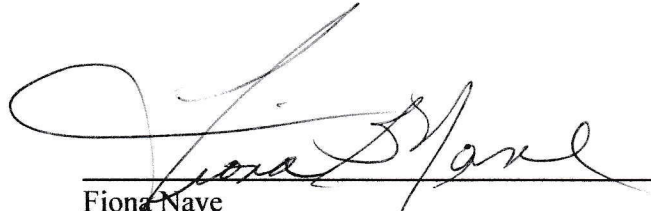
  
\_\_\_\_\_  
Sylvia Wagner

### Verification of Fiona Nave

I, Fiona Nave, declare as follows:

1. I am a resident of Montana.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on 9/7, 2020.

  
Fiona Nave

### Verification of Brent Nave

I, Brent Nave, declare as follows:

1. I am a resident of Montana.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on 25 Sept., 2020.

  
Brent Nave