

No. 20-35847

In the United States Court of Appeals for the Ninth Circuit

**Joe Lamm, Ravalli County Republican Central Committee, Jeff Wagner,
Sylvia Wagner, Fiona Nave, and Brent Nave, *Plaintiffs-Appellants***

v.

**Stephen Bullock, in his official capacity as Governor of Montana, and
Corey Stapleton, in his official capacity as Secretary of State of Montana,
*Defendants-Appellees***

On Appeal from the U.S. District Court for the District of Montana,
Case No 6:20-cv-00067-DLC, Honorable Dana L. Christensen, District Judge

**Emergency Motion of Appellants Lamm et al. for an Injunction
Pending Appeal Under Circuit Rule 27-3(b)
Relief Requested by October 5, 2020**

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Circuit Rule 27-3 Certificate

The undersigned counsel certifies the following:

(i) Telephone numbers and addresses for the attorneys for the parties in this case, *Lamm v. Bullock*, No. 6:20-cv-00067-DLC (“No. 20-67”) in the United States District Court for the District of Montana,¹ are as follows:

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¹ *Lamm* was consolidated below with *Donald J. Trump for President v. Bullock*, No. 6:20-cv-00066-DLC. ECF numbers herein are from the No. 20-67 docket.

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(ii) Facts showing the existence and nature of the emergency:

The existence and nature of the emergency involves irreparable harm to Appellants' ("Voters"²) rights to vote and equal protection, U.S. Const. art. I, § 4, cl. 1, amend. I, and amend. XIV, if (i) requested relief is not granted by October 8, the day before October 9 when unrequested "mail ballots"³ are to be sent to voters un-

² "Voters" herein includes qualified, registered, individuals who intend to vote, state-office candidates (also voters), and a political party (representing voters).

³ In some elections, Montana allows "mail ballots," which are sent automati-

der the Governor’s Directive⁴ (Exhibit 2), and if (ii) mail-ballot voting is allowed in the November 3 election.

The district court consolidated the hearing on the preliminary-injunction motion and the hearing on the merits and issued an Order on September 30, 2020, ECF No. 73 (Exhibit 1), denying permanent injunctive relief against the Directive and its implementation. The same day it denied an injunction pending appeal. ECF No. 79.

Facts showing the existence and nature of the emergency are as follows. First, the Directive allowed counties to choose mail-ballot elections, based on an alleged emergency due to COVID-19 concerns. But as the legislature’s prescribed manner of in-person voting, with a no-excuse-required alternative of absentee-ballot voting, could be done under the Governor’s *own* Phase 2 reopening requirements,⁵ COVID-19 posed no emergency. In other words, any qualified voter can obtain an

cally registered voters, Mont. Code Ann. (“MCA”) 13-19, but *not* for a “regularly scheduled federal ... election,” such as the November 3, 2020 election, MCA 13-19-104(3)(a). Note that these “mail ballots” differ from Montana’s currently available, *by-request*, no-excuse-required “**absentee ballots**,” MCA 13-13.

⁴ Gov. Bullock, *Directive implementing Executive Orders 2-2020 and 3-2020 and providing for measures to implement the 2020 November general election safely* (Aug. 6, 2020), covid19.mt.gov/Portals/223/Documents/2020-08-06_Directive%20-%20November%20Elections.pdf?ver=2020-08-06-112431-693 (“**Directive**”). All hyperlinks herein were checked on September 28, 2020.

⁵ See Gov. Bullock, *Directive implementing Executive Orders 2-2020 and 3-2020 and establishing conditions for Phase Two* (May 19, 2020), available at covid19.mt.gov/Portals/223/Documents/Phase%20Two%20Directive%20with%20Appendices.pdf?ver=2020-05-19-145442-350.

absentee ballot, which application is noncognizable as a burden on the right to vote and cannot cause COVID-19, and all counties continue to have some form of in-person voting under safeguards, ECF No. 73 at 6 n.2 (“[T]he Directive does not abandon in-person voting, which will occur in all of Montana’s 56 counties.”), so there was no emergency. That makes the Directive’s authorization of a mail-ballot option for counties (i) unjustified factually, (ii) unauthorized by allegedly applicable emergency powers, and (iii) unjustified by the required balancing analysis under *Burdick v. Takushi*, 504 U.S. 428 (1992). Forty-five of Montana’s fifty-six counties had mail-ballot plans approved by the Secretary of State under the Directive, which mail-vote counties comprise “94% of the State’s total electorate.” ECF No. 73 at 6 n.2.

Second, since (i) “striking ... the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment . . . ,” *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004); (ii) only state legislatures are authorized to “prescribe” the “Manner” of this election, U.S. Const. art. I, § 4, cl. 1; and (iii) the legislature *banned* “mail ballots” for this election, MCA 13-19-104(3)(a), displacing that legislative balancing triggered substantial election-integrity risks as a matter of law that had been reduced to a level the legislature found safe. *Infra* I.B. These must be weighed in the *Burdick* balancing. *Id.*

Third, county plans may be amended “at any time prior to the 35th day before

election day,” MCA 13-19-205(3), i.e., September 29, 2020, and rejected plans must be resubmitted and approved, so state law has built-in flexibility.

Fifth, on September 30, 2020, the U.S. District Court for the District of Montana denied permanent injunctive relief sought by Voters. ECF No. 73). The Court held that Voters have standing for all four claims, *id.* at 19 n.4; *see also id.* at 17-19, 21 (analysis of standing and summary of holding). But it held that (i) they lacked actual success on the merits, *id.* at 24-40; (ii) they lacked irreparable injury, *id.* at 39-40; (iii) and the balance of harms and public interest did not favor a permanent injunction, *id.* at 40-45.

Sixth, on September 30, 2020, Voters filed their Notice of Appeal (ECF No. 76) and moved for an injunction pending appeal by October 2 (ECF Nos. 77, 78), which was denied on September 30, 2020 (ECF No. 79).

Thus, Voters present an actual emergency requiring the requested injunction pending appeal. Irreparable harm will occur on *both* October 9 (when “mail ballots” are sent to voters under the Governor’s Directive), *and* November 3 (when an election would be held largely by mail ballot), if the requested injunction pending appeal is not granted and mail ballots are sent out and the election is held under the Directive. Voters have no remedy at law. Voters seek an order

- (i) enjoining Defendants from implementing and enforcing the Directive;
- (ii) enjoining the Secretary from approving county plans to conduct mail elec-

tions under the Directive; and

- (iii) requiring the Secretary to rescind approvals of plans to conduct elections under the Directive until Voters' appeal in this Court finally adjudicated.

(iii) Whether the motion could have been filed earlier:

This motion could not have been filed earlier. While the Directive was issued August 6 *allowing* a mail-ballot choice, only by September 4, 2020 did counties actually have to *choose* mail-ballot voting plans, which were to be approved or disapproved in five days, MCA 13-19-205, i.e., by September 9, the day this case was filed. The district court consolidated the hearing on the preliminary-injunction with the hearing on the merits, which was not an evidentiary hearing,⁶ and issued its order (ECF No. 73) and judgment (ECF No. 74) denying Voters requested declaratory and injunctive relief on September 30. Voters filed their Notice of Appeal (ECF No. 76) and moved for an injunction pending appeal on the same day (ECF Nos. 77, 78), which was denied the same day (ECF No. 79). This motion has been prepared and filed as soon as reasonably possible after Voters received the district court's order denying their motion for permanent injunctive relief.

(iv) When and how counsel was notified:

Voters' counsel notified opposing counsel by email on September 30, 2020, of Voters' intent to file the present Motion. At the time of filing this Motion, attorney

⁶ Thus, Voters do not attach the hearing transcript (ECF No. 74).

Raphael Graybill, counsel of record for Gov. Bullock has stated his opposition. No other response has been received. Based on prior communications, Defendants have made clear that they cannot agree at any stage to the injunctive relief sought.

(v) Whether relief was first sought in the District Court:

Voters moved for an injunction pending appeal on September 30, 2020 (ECF Nos. 77, 78), which was denied the same day (ECF No. 79).

Proposed briefing schedule:

Voters intend to seek an injunction pending appeal from the U.S. Supreme Court if one is denied here, so the schedule must allow for that prior to October 8, 2020. So Voters request that Defendants-Appellees be ordered to respond to this Motion by Friday, **October 2**, with any Voters' reply due by Sunday, **October 4**, and a requested decision from this Court by **October 5**.

Rule 26.1 Corporate Disclosure Statement

No Plaintiff-Appellant is a corporation, so none has a parent corporation or stock.

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Introduction

As explained, *supra* at i-iv, Voters challenge the Directive allowing counties to choose “mail ballots” for the November election and the Secretary’s approval of mail-ballot plans, which displace the legislature’s *ban* on mail ballots for “regularly scheduled federal ... election[s],” MCA 13-19-104(3)(a). Crucially, allowing what the legislature’s balancing of election access and integrity found too dangerous *automatically* triggers cognizable, substantial risks of voter-fraud and sudden-flood harms, *as a matter of law*, that resolve legal analyses in Voters favor. *See* I.B.

Facts

A. Montana’s safe system of in-person with no-excuse-absentee voting complies with Phase 2 reopening rules, obviating any justification for the Directive.

As COVID-19 risk subsided, the Governor authorized Phase 2 reopening,⁷ allowing over fifty to assemble with social distancing and recommending “face coverings while in public, especially in circumstances that do not readily allow ... physical distancing (e.g., grocery/retail stores ...),” *id.* at 3-4. These safeguards are possible at polls to protect voters and workers. CDC, *Considerations for Election Polling Locations and Voters*, [cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-)

⁷ *See* Gov. Bullock, *Directive implementing Executive Orders 2-2020 and 3-2020 and establishing conditions for Phase Two* (May 19, 2020), available at covid19.mt.gov/Portals/223/Documents/Phase%20Two%20Directive%20with%20Appendices.pdf?ver=2020-05-19-145442-350.

[ncov/community/election-polling-locations.html](https://www.ncov/community/election-polling-locations.html). Asked if “people [can] safely ... vote in person... this year,” Dr. Anthony Fauci says, “I think if carefully done, according to the guidelines, there’s no reason that I can see why that [would] not be the case.” Akpan, *What Fauci says the U.S. really needs to reopen safely*, National Geographic, Aug. 13, 2020, nationalgeographic.com/science/2020/08/what-anthony-fauci-says-united-states-really-needs-to-reopen-safely-cvd/. He said the minority specially at risk might wish to mail a ballot, *id.*, which Montana’s no-excuse-required, absentee-ballot voting permits, MCA 13-13.

As Montana’s in-person and absentee-ballot voting is safe and consistent with Phase 2, the Directive is factually unjustified, arbitrary, capricious, and irrational—and the Governor is a U.S. Senate candidate. See [stevebullock.com/](https://www.stevebullock.com/).

B. As a matter of law, mailed ballots pose the greater fraud risk.

The Supreme Court has recognized⁸ that vote-fraud risk is greater with mailed ballots than in-person ballots, making that true *as a matter of law*. *Crawford v. Marion Cty. Elect’n Bd.*, 553 U.S. 181, 191-97 (2008); *see also Griffin*, 385 F.3d at 1130-31(same). Voters also need not prove the risk is *widespread* as one or a few vote-fraud cases can swing close elections. Mail ballots pose a greater threat than

⁸ *Crawford* relied in part on the Carter-Baker Report, prepared by a bipartisan commission co-chaired by President Carter, which said mailed ballots are “the largest source of potential voter fraud” and are “likely to increase the risk of fraud and of contested elections.” Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 35, 46 (2005), available at bit.ly/3dXH7rU.

absentee ballots, arriving unrequested and to many invalid addresses, leaving unclaimed ballots available for vote-fraud use. Though this risk with mailed ballots need not be proven, examples abound in, e.g., in *Crawford*'s citations and The Heritage Foundation's *A Sampling of Recent Election Fraud Cases from Across the United States* with 1,298 examples of recent documented voter fraud. See [heritage.org/voterfraud](https://www.heritage.org/voterfraud).

C. A sudden flood of mailed ballots poses substantial risks to the right to vote.

An unusual, sudden flood of mailed ballots poses substantial risks to the right to vote, e.g., absentee-ballot applicants risk not getting their ballot. *RNC v. DNC*, 140 S. Ct. 1205 (2020) (Ginsberg, J. dissenting) (the “surge in absentee-ballot requests has overwhelmed election officials”). The sudden-flood problem has deprived tens of thousands of requested ballots. Verified Complaint for Declaratory and Injunctive Relief (“VC,” ECF No. 1, Exhibit 3) ¶¶ 61-67.

While word limits preclude documenting this and following facts more fully, sudden-flood substantial risk is established *as a matter of law* based on the legislative balancing, *infra* I.B.,⁹ and examples are in the Verified Complaint. Mailed ballots have rejection rates 100 times in-person voting. Ballots are rejected at higher rates for African Americans, young people, and first-time voters due to technical

⁹ Crucially, departing from the legislative balancing establishes *both* sudden-flood and ballot-fraud risks *as a matter of law* as detailed in I.B.

noncompliance or late arrival. VC ¶¶ 82-85.

Election workers, overwhelmed by the sudden flood, have less ability to review and screen out fraudulent mailed ballots, creating a substantial risk that fraudulent votes will be counted. Sometimes they simply don't check mail ballots.¹⁰

Widespread problems have occurred with the U.S. Postal Service ("USPS") losing ballots and delivering them too late due to the sudden flood. VC ¶¶ 93-96.

Mail-ballot voting is more expensive and complicated than in-person voting.¹¹ With increased costs and no increased funding from the legislature, election officials may be unable to properly administer the sudden flood.

Mail ballots will likely lead to delay and uncertainty in election results, which New York City and Philadelphia voters experienced in primaries. Experts fear the "constitutional crisis" that could occur if presidential-election results remain long unknown. VC ¶¶ 103-106.

Though the Montana Association of Counties requested the Directive and claimed "success" in the mail-ballot primary, thousands of voters in Gallatin and

¹⁰ Mauger, 'This can't go on': Detroit primary ballots went unchecked, GOP poll challengers say, Detroit News, Sept. 2, 2020, detroitnews.com/story/news/politics/2020/09/02/republican-observers-say-detroit-ballots-went-unchecked/5680540002/ .

¹¹ Norden et al., Brennan Center for Justice, *Report: Estimated Costs of Covid-19 Election Resiliency Measures* (2020), brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures.

Lewis and Clark counties didn't get ballots or got wrong ballots, and Mizzoula County's Election Administrator admitted, "since it was an all mail ballot election, we had a lot of undeliverable ballots." VC ¶¶ 107-112. As 45 of 56 Montana counties have mail-ballot plans, there will be a sudden flood.

D. Voters are irreparably harmed by the Directive.

Appellants include registered, eligible voters who intend to vote in the November election, some living in counties that did *not* adopt a mail-ballot plan, who will be harmed if the Directive remains in force. VC ¶¶ 5-10. First, their right to have, and vote in, an Elections-Clause-compliant election will be violated. Second, the Directive creates a substantial risk that the sudden flood will result in more illegal ballots and vote-dilution disenfranchisement. Third, the Directive creates a substantial risk that the sudden flood will result in ballots not sent, lost, and tardy and direct disenfranchisement. Fourth, Plaintiffs in non-mail-ballot counties suffer a violation of their one-person-one-vote rights. Plaintiffs Joe Lamm and Fiona Nave are local candidates, with the same risks as other voters plus the substantial risk of losing ballots cast for them from voters suffering such disenfranchisement. VC ¶¶ 5, 9. Ravalli County Republican Central Committee's mission is to educate, motivate, and assist voters to elect Republicans and help Republicans get elected, and it asserts the interests of its members, who include registered, eligible voters intending to vote and thus have the voter harms stated above. VC ¶ 6. The harms are

irreparable; elections lack do-overs.

Standing

The district court correctly recognized Voters’ standing for all claims. ECF No. 73 at 19 n.4. Voters meet the requirements of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), as they suffer personal harm, traceable to the Governor’s Directive and its implementation, redressable by requested relief. Their equal-protection claim (Count IV) provides standing under the analysis of *Bush v. Gore*, 531 U.S. 98, 107 (2000) (and cited cases), for voters in non-mail-ballot counties disadvantaged by the increased voting power of voters in mail-ballot counties. Other claims aren’t generalized grievances under *Lujan*’s two formulations of that doctrine:

[1] a plaintiff raising only a generally available grievance about government—claiming only harm to his and *every citizens*’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy,

id. at 560-61 (emphasis added), and

[2] an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable ... [and] cannot alone satisfy the requirements of Art. III ...,”

id. at 575-76 (internal quotation marks and citation omitted). This yields two questions: (1) whether the claimant is just a *citizen* trying only to make the government

do its job and (2) whether the claim is the same held by “every citizen.” As the first issue is more specific, it is the core of the analysis. “[T]he proper inquiry is whether the plaintiffs sue solely as citizens who insist that the government follows the law.” *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 8 (Tex. 2011) (citing E. Chemerinsky, *Constitutional Law: Principles and Policies* 91 (3d ed. 2006)). “[N]either citizens nor taxpayers can appear before a court simply to insist that the government and its officials adhere to the requirements of law.” C.A. Wright et al., *Federal Practice & Procedure* § 3531.10 (3d ed. 2008). So mere “citizen” standing is the issue, and this is no generalized grievance under either question.

First, Voters don’t bring their claims under mere “citizen” standing. Rather, they assert personal harms from the violation of their own fundamental right to vote that is protected by the First and Fourteenth Amendments and U.S. Const. art. I, § 4, cl. 1. Given the Supremacy Clause, U.S. Const. art. IV, para. 2, state officials must obey constitutional mandates. Voters’ claims are also particularized. They don’t challenge anything not directly bearing on their claims, so they are not just trying to make the government do its job in some general way but rather challenge what violates their rights.

Second, Voters assert a harm that is not the same as for every “citizen.” “The bar is based not on the number of people affected—a grievance is not generalized merely because it is suffered by large numbers of people.” *Andrade*, 345 S.W.3d at

7 (citing Chemerinsky, *Constitutional Law* 91). “[D]enying standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.” *United States v. SCRAP*, 412 U.S. 660, 686-68 (1973). “[W]here a harm is concrete, though widely shared, the Court has found injury in fact.” *FEC v. Akins*, 524 U.S. 11, 24 (1998). Voters’ harm is three levels more specific than “all citizens” for one claim, four levels more specific for two claims, and five levels more specific for the final claim. (1) Within “citizens” are *registered* voters; only they can suffer vote harm. (2) Within registered voters are *eligible* voters; only they have a right to vote that can suffer harm. (3) Within registered, eligible voters are those who *actually vote*; only they can have a vote lost or diluted. So Voters have standing for their Elections-Clause claim. *Infra* I.A. (4) Voters intend in-person or absentee-ballot voting, providing standing for vote-dilution and direct-disenfranchisement claims. *Infra* I.B, I.C. (5) Voters in Stillwater County— one of only ten non-mail-ballot counties, together comprising 6% of Montana’s eligible, registered voters—have standing to make their one-person-one-vote claim. *Infra* I.D. Voters’ harms are particularized.

Voters’ also have standing because an election is when “the People,” U.S. Const. pmbl., exercise their sovereignty, making elections precisely about voters’ right to vote and requiring their ability to challenge harm to that right. And politi-

cal parties are routinely permitted to assert the voting rights of their members, which depends *solely* on those voting members have standing. *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), held that for representational standing organizations must “make specific allegations establishing that at least one identified member had suffered or would suffer harm” or that “*all* the members of the organization are affected by the challenged activity”), *id.* at 498-99. *Cf. Georgia Republican Party v. SEC*, 886 F.3d 1198, 1203-05 (11th Cir. 2018) (rejecting political party standing for not establishing that a member had standing). So individual voters necessarily have standing to challenge harms to their voting rights.

Moreover, Plaintiff Ravalli County Republican Central Committee represents voters and has its own interest in electing Republican candidates just like other political parties whose standing is typically recognized in such cases. and candidates Lamm and Nave will be harmed if votes for them are lost or diluted, if the election is not conducted in the legislature’s prescribed manner, and if voters in some counties have greater voting power than those in others.

Voters’ harms are non-speculative.. As a matter of law, (i) mailed ballots pose a fraud risk under Supreme Court precedent, *supra* Facts(A), and (ii) mail ballots in Montana pose fraud and sudden-flood risks under legislative balancing, *infra* I.B, I.C. Legislatures may prophylactically eliminate harms, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976), which Montana did by banning mail ballots. *Due to that*

prophylaxis, there is little evidence of *past* harms from mail ballots, but *removing* that key prophylaxis assures that those harms *will occur* according to the legislature’s authoritative and expert balancing.

Legal Standard

Injunctions pending appeal are analyzed like preliminary-injunctions, *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 769 (9th Cir. 2018), with a sliding-scale test:

Plaintiffs ... must establish ... (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest.... The Ninth Circuit weighs these factors on a sliding scale, such that where there are only “serious questions going to the merits”—that is, less than a “likelihood of success” on the merits—a preliminary injunction may still issue so long as “the balance of hardships tips *sharply* in the plaintiff’s favor” and the other two factors are satisfied.

Short v. Brown, 893 F.3d 671, 675 (9th Cir. 2018) (citations omitted) (emphasis in original). “An allegation of future injury may suffice if ... there is a ‘substantial risk’ that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). On merits success, “the burdens at the preliminary injunction stage track the burdens at trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

Argument

I.

Voters are likely to succeed on the merits.

The district court held against Voters on the merits, ECF No. 24-39, but Voters are likely to succeed on the merits.

A. The Directive violates the Elections Clause.

The Directive violates Voters’ right to have, and vote in, an election under the Elections Clause: “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof” U.S. Const. art. I, § 4, cl. 1.¹² As federal candidates are on the November ballot, this controls. Yet, though the legislature *barred* mail ballots, MCA 13-19-104(3)(a), the Directive *allows* them. The Governor is not the legislature. Mont. Const. art. III, § 1 (separation of powers); art. IV, § 3 (legislature regulates elections).

No statutory authority can override these constitutional mandates, but even emergency authority the Directive cites doesn’t apply as there is no emergency since the legislature’s prescribed manner (in-person and no-excuse-required absentee voting) is consistent with Phase 2 restrictions. *Supra* Facts(A). The Directive

¹² The “Manner” “encompasses ... ‘... supervision of voting, protection of voters, prevention of fraud and corrupt practices’” *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (citation omitted).

cites MCA 10-3-104(2)(a), but given no emergency, there is no interference with “necessary action in coping with the emergency,” *id.* It cites MCA 10-3-104(2)(c), but given no emergency, “compliance ... would [*not*] in any way prevent, hinder, or delay necessary action in coping with the emergency,” *id.*

That the Elections Clause provides a cause of action is clear from *Bush*, 531 U.S. 98, which included as an issue claimed violation of the similar Electors Clause (legislature prescribes election’s manner): “whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution.” 531 U.S. at 103. In *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), the Court also granted certiorari on an Electors Clause claim raised by candidate Bush, *id.* at 472. In *Bush v. Gore*, three Supreme Court members *would* have reached the Electors Clause and employed it as part of “additional grounds to reverse the Florida Supreme Court’s decision.” *Id.* at 111 (Rehnquist, CJ, joined by Scalia and Thomas, JJ.) “A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.” *Id.* at 113. That and of certiorari grants indicate a cause of action for the Electors Clause. That applies to the Elections Clause given the parallel language.

B. The Directive violates the right to vote by imposing the substantial risk of *vote-dilution* disenfranchisement that the legislative balancing rejected.

The Directive violates the right to vote because it poses a substantial risk of vote-dilution disenfranchisement by inclusion of unlawful votes. This risk is cognizable as a matter of law.

As a matter of law, a substantial risk of vote-dilution and direct disenfranchisement exists when an election is not conducted in the legislature’s prescribed manner because it has the exclusive authority and expertise to balance voting access with election-integrity issues, including the higher risk of fraud posed by mailed ballots established in *Crawford. Supra* Facts(B). So the “legislative balance” in state election law is the binding finding of what is safe for *this* state in *this* election to prevent such vote-dilution and direct disenfranchisement. Consequently, the Directive violates the right to vote as a matter of law because it allows what the legislature did *not* allow in its legislative balancing because it posed a substantial risk of such disenfranchisement.

This is well-supported law. The U.S. Constitution “confers on states broad authority to regulate the conduct of elections, including federal ones.” *Griffin*, 385 F.3d at 1130 (citing U.S. Const. art I, § 4, cl.1). “[S]triking ... the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment” *Id.* at 1131 (emphasis added). There is no right to vote

by mail and mailed ballots pose special fraud risks, so only the legislature has the authority and is equipped to balance access and integrity in the mailed-ballot context. *Id.* at 1130-31.

Thus, deviating from the legislature’s access-integrity balance to favor access automatically triggers a cognizable risk to election integrity *as a matter of law* because *only* the legislature has authority and expertise to strike that balance. The legislative balance is expressed in state election laws and is that point between protecting access and integrity where the legislatures authoritatively *finds* those concerns safely balanced, as illustrated next for *this* election in *this* state regarding the fraud and sudden-flood risks and particularly mail ballots:

<i>Safe Zone</i> • in-person voting (compliant with Phase 2) • no-excuse-required, absentee-ballot voting	<i>Danger Zone</i> • mail ballots (banned)
<i>Protect Access</i>	<i>Legislative Balance</i> ↑ (safe point) <i>Protect Integrity</i>

By sliding the balance point into the legislature’s danger zone, i.e., expanding the protect-access zone and diminishing the protect-integrity zone, the Directive imposes a substantial risk of ballot fraud and sudden-ballot-flood that the legislature authoritatively and expertly found dangerous and rejected.

The legislative balancing cannot be gainsaid based on what other states do because only *this* state’s legislature has authority to balance and mandate what is needed in *this* state. “[S]tates that have more liberal positions ... may well have dif-

ferent political cultures ..., cultures less hospitable to election fraud.” *Id.* So “[o]ne size need not fit all.” *Griffin*, 385 F.3d at 1131.

Nor can the legislative balancing be gainsaid on the notion that a particular safeguard isn’t needed because the legislature provided others. The legislature thought they *all* were required in its balancing. Specifically, as *Griffin* and *Crawford*, 553 U.S. at 193-96, recognize, there is a known greater integrity risk with mailed ballots, so legislatures control mailed-ballot access based on perceived risk to confine the risk to a level it finds safe. Maintaining the legislative balance is vital because “confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy” and “[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

So the substantial risk of illegal votes diluting legal votes is real and cognizable, as a matter of law, and vote dilution is forbidden disenfranchisement. “[T]he Constitution of the United States protects the right of all qualified citizens to vote” and have that vote counted, *Reynolds v. Sims*, 377 U.S. 533, 554 (1964), which right “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.* at 555. As mail-ballot voting creates a volume of illegal votes the legislative balancing determined unsafe, Voters suffer a substantial risk that their votes will be diluted

by illegal votes, which establishes vote-dilution disenfranchisement.

Burdick, 504 U.S. 428, is used to evaluate “state election law[s].” *Id.* at 434. Here the Directive *displaces* “state election law,” but nonetheless *Burdick* balancing establishes that the legislative balancing banning mail ballots is justified and the Directive is not. *Burdick* requires “weighing ‘the character and magnitude of the asserted injury to the rights ... that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’” considering “‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Id.* at 434 (citation omitted). Strict scrutiny applies to “‘severe’ restrictions,” but “reasonable, nondiscriminatory restrictions” only get rational-basis review and typically survive, *id.* at 434. As disenfranchisement is a severe burden, *see, e.g., LWV of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012), Defendants must prove that (i) the Directive is narrowly tailored to a compelling governmental interest and (ii) the original statute is not a reasonable, non-discriminatory restriction that is rationally justified by the legislative balancing of access and integrity.

The legislature has the authority and expertise to balance access and integrity, and it banned mail ballots. That is reasonable, nondiscriminatory, and rationally based on its expert balancing to keep the matter-of-law risks of ballot-fraud and

sudden-flood risks to a safe level. That should end the matter. But Defendants’ purported justification for the Directive is COVID-19, which is not compelling for two reasons.

First, in-person and no-excuse-required absentee-ballot voting comply with Phase 2 requirements, so the Directive is unneeded. *Supra* Facts(A).

Second, measured against the permissible-burden benchmark in *Crawford*, 553 U.S. 181, the burdens of complying with Phase 2 requirements for in-person voters or requesting an absentee ballot are *not cognizable*, let alone compelling. *Crawford* found it reasonable to require “the inconvenience of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph” to get a free ID card because that did “not qualify as a substantial burden on most voters’ right to vote ...,” *id.* at 198 (controlling op.). So there was *no violation* of the right to vote. “And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish” the facial relief sought. *Id.* at 199-00. These reasonable burdens were closely related to legitimate state interests, including preventing “voter fraud,” and “safeguarding voter confidence.” *Id.* at 192-97. Since the burden in *Crawford* was reasonable and justified despite some possible harm to some persons, Defendants must prove any burden here is substantially greater and not similarly a reasonable requirement for most people. But practicing the recommended safeguards for engaging in essential activities is no greater

burden than the burden found reasonable in *Crawford*, so it is a reasonable, non-discriminatory restriction that is readily justified in balancing by state interests in election integrity. Even if the legislative mandate might be a problem for a small number, that in no way justifies the facial replacement of the legislative mandate with the Directive, *id.* at 199-200, especially as requesting an absentee ballot is no burden under *Crawford*.

Turning to tailoring, given that the Directive is a broad facial remedy for alleged COVID-19 problems with the legislative balancing, Defendants must satisfy the test in *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid”). So at a minimum, the remedy of the Directive should have been as-applied to those specially at risk. Instead, the Directive replaced the legislative balancing with an overbroad mail-ballot Directive. That overbreadth alone dooms the Directive under *Burdick*. As the Supreme Court said when applying *Burdick* and *Salerno* in *Crawford*, one ought not invalidate the whole provision. 553 U.S. at 202-03. This tailoring analyses proves Defendants cannot meet their burden to prove the Directive narrowly tailored to a compelling state interest. It even fails rational-basis analysis.

C. The Directive violates the right to vote by imposing the substantial risk of *direct* disenfranchisement the legislative balancing rejected.

The Directive violates Voters' right to vote because it poses a substantial risk of direct disenfranchisement by lost or tardy votes. The analysis parallels I.B. As a matter of law, a substantial risk of direct disenfranchisement exists when an election is not conducted in the legislature's prescribed manner because it balanced access and integrity issues, including the substantial risk of lost or tardy mailed ballots when there is the sudden flood of mailed ballots described in Facts(C). The Directive violates the right to vote as a matter of law because it allows what the legislature did *not* allow since it posed this substantial risk.

The legislature already has done the authoritative and expert balancing and banned mail ballots here, which was reasonable, nondiscriminatory, and rationally based on (inter alia) the known sudden-flood risk. Under *Burdick*, 504 U.S. at 434, Defendants' COVID-19 justification is not compelling because existing election law was compliant with Phase 2 restrictions, with by-request absentee ballots available for any specially at risk. Under *Crawford*, the burdens of complying with Phase 2 requirements for in-person voters or requesting an absentee ballot are non-cognizable, so there was no burden on the right to vote of anyone to justify the Directive, though there are cognizable burdens on Voters' right to vote due to the Directive.

Regarding tailoring, Defendants must satisfy the *Salerno* test, 481 U.S. at 745, and at most the Directive should have provided only an as-applied remedy for those specially at risk. It did not. That overbreadth alone dooms the Directive under *Burdick*, *Salerno*, and *Crawford*. Defendants cannot meet their burden to prove the Directive narrowly tailored to a compelling state interest. It even fails rational-basis review.

D. The Directive violates the right to vote and equal protection by empowering voters in some counties over others.

Voters in mail-ballot counties have greater voting power than other-county voters, including some present plaintiffs, because the former have higher overall odds of being able to vote and have their votes counted. That doesn't make the Directive constitutional—nor does saying “it makes voting easier”—because it violates the legislature's controlling *balancing* of access and integrity by creating a substantial risk of ballot fraud and lost or tardy ballots. So proportionally more votes will be obtained from mail-ballot counties than from other counties—with the difference not being accounted for by population differences. Empowering a county's voters at the expense those in other counties the right to vote (by vote dilution) and the Equal Protection Clause as discussed in *Bush*:

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 selec-

tion 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.

531 U.S. at 107. This analysis doesn’t turn just on *Bush* because it relied on a case line. In *Bush*, the Florida Supreme Court’s plan was to include totals from two counties though they “used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.” *Id.* Because of this and similar equal-protection violations causing vote dilution, “[s]even Justices of the Court agree[d] that there [were] constitutional problems with the recount ordered by the Florida Supreme Court that demand[ed] a remedy.” *Id.* at 111. The Florida Supreme Court should have implemented a system *without* greater voting strength for one group, just as Montana must have a neutral, uniform voting system..

* * *

As Plaintiffs have a strong likelihood of success on their claims, other factors follow, particularly as the right to vote is based on the First and Fourteenth Amendments. At least “the balance of hardships tips *sharply* in [Plaintiffs’] favor’ and the other two factors are satisfied.” *Short*, 893 F.3d at 675 (citation omitted).

II.

Voters will suffer irreparable harm absent an injunction.

Voters have irreparable harm for reasons tracking their claims. *See also* Facts(D). They have no remedy at law if mail-ballot voting is implemented and the election is held in violation of Voters’ rights to vote in and have an Elections-Clause-compliant election, not be disenfranchised, and have equal protection. Because “the right of suffrage is a fundamental matter in a free and democratic society.” *Reynolds*, 377 U.S. at 561-62 (1964), “[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury,” *League of Women Voters of N.C. v. North Carolina* (“LWVNC”), 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases). “[O]nce the election occurs, there can be no do-over and no redress,” making the injury to “voters ... real and completely irreparable if nothing is done to enjoin [the challenged] law.” *Id.* The harm is imminent because the Directive is being implemented, mail ballots go out October 9, and the election is November 3.

III.

The balance of equities and the public interest support injunctive relief.

As Voters will suffer violations of their constitutional rights, the equities and public interest require protection. A state suffers no harm if likely unconstitutional actions are preliminarily enjoined. *See, e.g., Giovanni Carandola v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). “[U]pholding constitutional rights surely serves the pub-

lic interest.” *Id.* The Directive is unjustified by COVID-19 concerns because the existing legislative balancing complies with Phase 2. *See* Facts(A). Vitally, following the legislative balancing is in the public interest and outweighs all because only the legislature has authority and expertise to balance such interests and prescribe the election’s manner.

Conclusion

The Court should grant this Motion.

September 30, 2020

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Certificate of Compliance

I hereby certify that the foregoing Motion complies with the requirements of Federal Rule of Appellate Procedure 27(d) and Ninth Circuit Rules 27-1(1)(d) and 32-3. The Motion was prepared in 14-point proportional font, and other than portions excluded by rule contains 5,190 of the 5,200 words permitted under Fed. R. App. P. 27(d)(2)(A), as counted by WordPerfect X9.

September 30, 2020

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Certificate of Service

I certify that counsel of record have been served by this Court's ECF service
and by email.

/s/ Courtney Turner Milbank
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***Lamm v. Bullock*, Case No. 6:20-cv-00067-DLC,
ECF No. 73 Order Denying Relief
EXHIBIT 1**

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

DONALD J. TRUMP FOR
PRESIDENT, INC., REPUBLICAN
NATIONAL COMMITTEE;
NATIONAL REPUBLICAN
SENATORIAL COMMITTEE;
MONTANA REPUBLICAN STATE
CENTRAL COMMITTEE,

Plaintiffs,

and

GREG HERTZ, in his official capacity
as Speaker of the Montana House of
Representatives; SCOTT SALES, in
his official capacity as President of the
Montana Senate, on behalf of the
Majorities of the Montana House of
Representatives and the Montana
Senate,

Intervenor-
Plaintiffs,

vs.

STEPHEN BULLOCK, in his official
capacity as Governor of Montana;
COREY STAPLETON, in his official
capacity as Secretary of State of
Montana,

Defendants,

and

CV 20–66–H–DLC

(Consolidated with Case No. CV–
20–67–H–DLC)

ORDER

DSCC, DCCC, and MONTANA
DEMOCRATIC PARTY,

Intervenor-
Defendants.

“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.” *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). As this case illustrates, protecting this right during a global pandemic presents unique challenges. Indeed, jurisdictions across the country have had to make difficult decisions about their electoral processes, often balancing the interests of public health against the interests of ensuring their citizens can adequately exercise their franchise. Montana is no exception.

This litigation requires the Court to determine the constitutionality of Governor Bullock’s August 6, 2020 directive permitting counties to conduct the November 3, 2020 general election, in part, by mail ballot (“the Directive”). Plaintiffs in the lead case (CV 20–66–H–DLC) (“Lead-Plaintiffs”), Intervenor-Plaintiffs, and Plaintiffs in the member case (CV–20–67–H–DLC) (“Member-Plaintiffs”) (collectively “the Plaintiffs”) ask this Court to permanently enjoin

enforcement of the Directive. (Docs. 1 at 34; 1 at 39;¹ 38 at 21–22.) Additionally, Member-Plaintiffs seek to enjoin Secretary Stapleton’s approval of proposals from counties seeking to conduct the November 3, 2020 general election, in part, by mail ballot. (Doc. 1 at 39.)

In response, Defendant Stephen Bullock (“Governor Bullock”) and Intervenor-Defendants (collectively referred to as “Defendants”) assert that not only do Plaintiffs’ claims fail, but jurisdictional hurdles preclude the issuance of the relief they seek. (*See generally* Docs. 73–74; 81.) For the reasons stated herein, the Court finds that while it has jurisdiction over the dispute, the Plaintiffs’ claims are without merit. Accordingly, the Plaintiffs’ prayers for relief will be denied and judgment in Defendants’ favor will be entered.

In many respects, this case requires the Court to separate fact from fiction. As referenced throughout this Order, the parties have provided the Court with considerable evidence in the form of declarations and documents. Central to some of the Plaintiffs’ claims is the contention that the upcoming election, both nationally and in Montana, will fall prey to widespread voter fraud. The evidence suggests, however, that this allegation, specifically in Montana, is a fiction.

¹ As discussed below, this Court has consolidated the lead case (CV 20–66–H–DLC) and member case (CV–20–67–H–DLC) pursuant to Federal Rule of Civil Procedure 42(a)(2). (Doc. 45.) Citation to document “1 at 39” refers to document 1 as it exists in the member case (CV–20–67–H–DLC) pre-consolidation. Throughout this Order citations to certain documents reference documents filed only in the member case (CV–20–67–H–DLC).

When pressed during the hearing in this matter, the Plaintiffs were compelled to concede that they cannot point to a single instance of voter fraud in Montana in any election during the last 20 years. Importantly, Montana's use of mail ballots during the recent primary election did not give rise to a single report of voter fraud. This is due, in large part, to the fact that Montana has a long history of absentee voting by as many as 73% of its electorate, combined with the experience, dedication, and skill of Montana's seasoned election administrators. Thus, there is no record of election fraud in Montana's recent history, and it is highly unlikely that fraud will occur during the November 3, 2020 general election. This is fact, which should provide comfort to all Montanans, regardless of their political persuasion, that between now and November 3, 2020 they will be participating in a free, fair, and efficient election.

BACKGROUND

I. Factual Background

The COVID-19 pandemic constitutes a serious global health risk that has paralyzed most of the world. As with the rest of the United States, Montana has not been immune to the virus' effect on society. In response to COVID-19's worldwide outbreak, on March 12, 2020, Governor Bullock issued an executive order declaring a state of emergency within Montana. (Doc. 81-8.) Notably, on March 13, 2020, Governor Bullock amended his prior executive order "to run concurrent to the

emergency declaration of the President of the United States,” after President Donald J. Trump declared a national state of emergency earlier that day. (Doc. 81-9.) Currently, both the United States and Montana remain in states of emergency because of the COVID-19 pandemic.

As Montana’s 2020 primary election approached, Governor Bullock issued a directive permitting counties to “conduct the June 2 primary election under the mail ballot provisions of Title 13, Chapter 19.” (Doc. 81-10 at 4.) Pertinent to this case, Governor Bullock rooted this directive in the suspension power vested in him by Montana Code Annotated § 10-3-104(2)(a) by suspending Montana Code Annotated § 13-19-104(3)(a)’s prohibition on the use of mail ballots for a “regularly scheduled federal . . . election.” (*Id.* at 2, 4.) Interestingly enough, one of the Intervenor-Plaintiffs in this case, the Speaker of the Montana House of Representatives, Greg Hertz, expressed his “full support” for the directive which, in his view, allowed “counties to choose what is best for their voters and election staff during this state of emergency.” (Doc. 81-20 at 3.)

Following Montana’s successful June 2, 2020 primary election, which resulted in a record 55% turnout rate, the Montana Association of Counties and the Montana Association of Clerk & Records wrote to Governor Bullock applauding his prior directive, and urging him to issue a similar directive for the November 3, 2020 general election. (*See generally* Doc. 81-2.) On August 6, 2020, Governor

Bullock issued the Directive, which, as with Montana’s primary election, permits, but does not require, counties to “conduct the November 3, 2020 election under the mail ballot provisions of Title 13, Chapter 19, MCA.” (Doc. 81-15 at 4.) As with the prior directive, Governor Bullock relies on the suspension power vested in him by Montana Code Annotated § 10-3-104(2)(a), to render Montana’s prohibition on the use of mail ballots for federal elections ineffective. (*Id.* at 2.) Pursuant to the Directive, 45 of Montana’s 56 counties have opted to conduct the November 3, 2020 general election by mail ballot.²

II. Procedural Background

Lead-Plaintiffs filed suit on September 2, 2020 advancing several constitutional challenges to the Directive. (Doc. 1.) Specifically, Lead-Plaintiffs’ complain that the Directive violates: (1) Article I, Section IV of the United States Constitution by changing the time, place, and manner of the November 3, 2020 general election without legislative involvement; (2) Article II, § I of the United States Constitution by changing the manner in which Montana appoints electors for the November 3, 2020 general election without legislative involvement; and (3) their rights under the Fourteenth Amendment of the United States Constitution by facilitating fraud and other illegitimate voting practices. (Doc. 1 at 31–33.)

² These 45 counties are home to 680,315 of Montana’s 720,355 registered voters, or 94% of the State’s total electorate. Of note, the Directive does not abandon in-person voting, which will occur in all of Montana’s 56 counties.

Following the filing of this complaint, the DCCC, DSCC, and the Montana Democratic party moved to intervene as defendants and Greg Hertz and Scott Sales, on behalf of the Republican majorities of the Montana House of Representatives and the Montana Senate, moved to intervene as plaintiffs. (Docs. 28; 33.) The Court permitted such intervention and placed the Plaintiffs' motion for preliminary injunctive relief on an expedited schedule. (Doc. 35.) The Intervenor-Plaintiffs have asserted claims identical to those advanced by the Lead-Plaintiffs. (Doc. 38.)

A nearly identical lawsuit was filed by Member-Plaintiffs on September 9, 2020. (Doc. 1.) In that case, the Plaintiffs' complain that the Directive violates: (1) Article I, Section IV of the United States Constitution by changing the time, place, and manner of the November 3, 2020 general election without legislative involvement; (2) their right to vote by "vote-dilution disenfranchisement" on account of the "cognizable risk of ballot fraud from mail-ballot elections"; (3) their right to vote by "direct disenfranchisement" on account of "the sudden surge in mail in ballots" resulting in "requested ballots never" arriving or arriving too late and "filled-out ballots" getting lost or delayed in the return process; and (4) their right to vote and the Equal Protection Clause of the Fourteenth Amendment by providing greater voting power to voters in counties that elect to send mail ballots than voters in the 11 counties that do not. (Doc. 1 at 33–38.)

Given the common questions of law and fact that exist in the lead case (CV 20–66–H–DLC) and the member case (CV–20–67–H–DLC), this Court consolidated the actions. (Doc. 45.) The Court additionally consolidated determination of the Plaintiffs’ motions for preliminary injunctions (Docs. 2; 8) with a trial on the merits. (Doc. 69.)³ A hearing on this matter was held on September 22, 2020.

LEGAL STANDARD

An injunction “is an extraordinary remedy never awarded as of right.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). In adjudicating requests for injunctive relief, this Court must “balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Id.* In doing so, it is imperative that this Court “pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.* As outlined below, the injunctive relief Plaintiffs request would severely impede Montana’s administration of the November 3, 2020 general election.

To obtain the injunctive relief they seek, the Plaintiffs must demonstrate: (1)

³ It also bears noting that the Intervenor-Defendants have moved to dismiss the Lead-Plaintiffs’ complaint (Doc. 1) and for judgment on the pleadings. (Doc. 72.) Because the legal issues raised in this motion (Doc. 72) share the Court’s analysis with respect to the issuance of injunctive relief, the Court finds separate analysis of this motion unnecessary.

actual success on the merits; (2) that they have suffered an irreparable injury; (3) there exists no adequate remedy at law; (4) the balance of the hardships justifies a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction. *Independent Training & Apprenticeship Program v. California Dep't of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013) (citing *eBay Inc. v. MerchExch., LLC*, 547 U.S. 388, 391 (2006)). When the government is a party, the final two factors merge into one. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

In applying these elements, the Court is mindful that “[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction” and that cases interpreting the preliminary injunction standard apply “with equal force to . . . permanent injunction cases.” *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 996 (9th Cir. 2011) (internal citations omitted). In considering these legal standards, the Court finds that the Plaintiffs have failed to carry the burden necessary to warrant the imposition of permanent injunctive relief.

ANALYSIS

Given the complexity of this action, the Court finds it necessary to discuss how it categorizes the Plaintiffs and their claims. Plaintiffs can be split into three distinct groups. The first group, referred to as the “Organizational Plaintiffs,” consists of the Lead-Plaintiffs and the Ravalli County Republican Central

Committee, a party in the member case (CV–20–67–H–DLC). The Organizational Plaintiffs are various committees involved in efforts designed to improve Republican electoral prospects in Montana. (Docs. 1 at 3–5; 1 at 6.)

The second group, referred to as the “Legislative Plaintiffs,” is composed of the Intervenor-Plaintiffs, including Greg Hertz, Speaker of the Montana House of Representatives, and Scott Sales, President of the Montana Senate. (Doc. 38 at 4–5.) Legislative Plaintiffs allege they were authorized by a majority of each chamber of the Montana Legislature to bring this action. (*Id.*) Finally, the third group, referred to as the “Candidate and Voter Plaintiffs,” constitute voters and candidates (who, critically, also intend to vote) for public office in Montana. (Doc. 1 at 3–4.)

Additionally, the Court finds that some of Plaintiffs’ claims rest on sufficiently analogous legal grounds to warrant simultaneous attention. First, there are the “Emergency Powers Claims” which, in essence, allege that the Directive violates the Elections and Electors Clauses of the United States Constitution, by permitting Governor Bullock to alter the time, place, and manner of Montana’s federal elections and process for appointing Presidential electors without legislative involvement. (*See Id.* at 33–34; 1 at 31–32; 38 at 18–19.)

Second, there are the “Right to Vote Claims” which are premised on the contention that the Directive will disenfranchise voters by: (1) opening the door to

voter fraud; and (2) creating such an influx of mail ballots in the postal system that “requested ballots never arrive or arrive too late and filled-out ballots get lost or are delayed in the return process.” (*See* Doc. 1 at 34–37; 1 at 33; 38 at 20–21.) Third, there is the “Equal Protection Claim,” asserted by the Member-Plaintiffs, which alleges that the Directive violates the Fourteenth Amendment because voters in counties that opted to conduct the election by mail ballot have a greater chance of having their votes counted. (Doc. 1 at 37–38.) Pursuant to this analytical framework, the Court proceeds first to the issue of jurisdiction.

I. Jurisdictional Issues.

Defendants have raised the following jurisdictional issues: (1) whether the Eleventh Amendment bars Plaintiffs’ Emergency Powers Claims; (2) whether Plaintiffs lack standing to prosecute this action; and (3) whether the Court should abstain from adjudication. Each issue shall be discussed in turn.

A. The Eleventh Amendment.

Defendants maintain that Plaintiffs’ Emergency Powers Claims are barred by the Eleventh Amendment. The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.” U.S. Const. amend XI. A literal reading would, of course, compel only the conclusion

that Montana is immune from suits in federal court brought by persons who are not citizens of Montana. But this is not the law.

Indeed, the Supreme Court has construed the Eleventh Amendment “to stand not so much for what it says, but for the presupposition” it confirms, namely, that a state is not “amenable to the suit of an individual without its consent.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (internal citations omitted). That is, the Eleventh Amendment is not governed by its text, but rather by “a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.” *Puerto Rico Aqueduct and Sewer Auth. V. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Sovereign immunity acts a shield, depriving the Court of jurisdiction over suits that are otherwise justiciable. *See Federal Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 754 (2002).

But this shield is not impenetrable. Long ago, the Supreme Court carved out a “necessary exception” to the general rule that the Eleventh Amendment prevents individuals from suing states in federal court. *Puerto Rico*, 506 U.S. at 146. In *Ex Parte Young*, the Supreme Court held that the Eleventh Amendment does not preclude prospective enjoinder of a state official for ongoing violations of federal law. 209 U.S. 123, 155–56 (1908). This exception “gives life to the Supremacy Clause” by “vindicat[ing] the federal interest in assuring the supremacy” of federal

law. *Green v. Mansour*, 474 U.S. 64, 68 (1985).

While *Ex Parte Young*'s general rule has survived, its underlying theory "has not been provided an expansive interpretation." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). In *Pennhurst*, the Supreme Court extended (in fact, contracted) its prior Eleventh Amendment jurisprudence by holding that the Eleventh Amendment prohibits federal courts from ordering state officials to comply with state law. 465 U.S. at 103–17. Thus, under *Pennhurst*, suits brought against state officials in federal court that complain of violations of state law alone, remain barred by the Eleventh Amendment. More precisely, under the Eleventh Amendment, federal courts have no business compelling state officials to comply with state law.

Predictably, the parties disagree on *Pennhurst*'s application to the present suit. Defendants contend that although Plaintiffs' complain of violations of the federal constitution, the interpretation of state law necessary to resolve the merits of those complaints renders the claims barred by the Eleventh Amendment. In other words, Defendants contend that the Plaintiffs have brought claims based solely on state law under the guise of a federal constitutional claim. Plaintiffs respond that while their federal claims certainly require this Court's interpretation of state law, their claims are firmly rooted in the United States Constitution and are thus constitutionally permissible under the Eleventh Amendment. The Court finds

Plaintiffs’ position persuasive.

The Supreme Court in *Pennhurst* acknowledged that the doctrine of *Ex Parte Young* exists to, above all else, “promote the vindication of federal rights.” 465 U.S. at 105. With that in mind, the Court finds that it would undercut *Ex Parte Young* completely to conclude that simply because a federal constitutional claim requires the interpretation, or rests on the purported violation of, state law, it suddenly comes within *Pennhurst*’s grasp. Indeed, if the presence of underlying state law issues in a federal constitutional claim was sufficient to deprive this Court of jurisdiction under *Pennhurst*, then *Ex Parte Young* would no longer perform the necessary function of protecting the supremacy of federal law.

The Plaintiffs complain of violations of federal law and seek an injunction rectifying the resulting injury. Specifically, in their Emergency Powers Claims, Plaintiffs contend that Governor Bullock, not the “Legislature,” has altered the time, place, and manner of Montana’s federal elections in contravention of the United States Constitution. As addressed at length below, the state law issues underlying these claims guide but by no means dictate their resolution. Critical to the outcome of these claims is a determination of what exactly the term “Legislature” in the Elections and Electors Clauses means—and depending on the answer— whether injunctive relief halting their violation should issue. This is quintessentially a federal question. In short, the Court finds Plaintiffs have

asserted proper *Ex Parte Young* claims and no Eleventh Amendment barrier blocks adjudication.

B. Standing.

Defendants maintain Plaintiffs lack standing to prosecute this action. “It is a fundamental precept that federal courts are courts of limited jurisdiction.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). This notion is derived from the United States Constitution itself, which limits the Court’s subject matter jurisdiction to justiciable “cases” or “controversies.” U.S. Const., Art. III, § 2. The federal courts’ limited jurisdiction “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (internal citations omitted).

As such, it is incumbent upon this Court to ascertain whether subject matter jurisdiction exists before analyzing the merits of a litigant’s claims. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Indeed, this Court is to presume it is without jurisdiction to hear a case until a contrary showing is made. *Stock West, Inc. v. Confederates Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Subject matter jurisdiction is “the courts’ statutory or constitutional power to adjudicate the case.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998). This includes underlying concepts such as standing. *In re Palmdale Hills Prop., LLC*, 654 F.3d 868, 873 (9th Cir. 2011). The doctrine of standing

requires “federal courts to satisfy themselves that the plaintiff[s have] alleged such a personal stake in the outcome of the controversy as to warrant [their] invocation of federal-court jurisdiction.” *Summers*, 555 U.S. at 493 (internal citations and quotation marks omitted).

In order to establish standing, Plaintiffs must show “(1) [they have] suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). Critically, the threshold question of whether Plaintiffs possess standing “precedes, and does not require, analysis of the merits.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

Moreover, the “standing analysis which prevents a claim from being adjudicated for lack of jurisdiction, [cannot] be used to disguise merits analysis, which determines whether a claim is one for which relief can be granted if factually true.” *Catholic League for Religious and Civil Rights v. City and Cty. of S.F.*, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc). Finally, because Plaintiffs seek equitable relief, not damages, the Court “need not address standing of each plaintiff if it concludes that one plaintiff has standing.” *Townley v. Miller*, 722

F.3d 1128, 1133 (9th Cir. 2013). With this in mind, the Court therefore examines whether at least one Plaintiff possesses standing.

1. Organizational Plaintiffs.

Defendants maintain the Organizational Plaintiffs have neither representational or direct organizational standing. Each is discussed in turn.

i. Representational Standing

Representational standing exists when an organization’s “members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth*, 528 U.S. at 181. The Plaintiffs do not seem to contest, and the Court finds, that the interest at stake—ensuring that Republican voters can exercise their franchise—is germane to the Organizational Plaintiffs’ respective purposes. The Court can likewise dispose of the third requirement at the outset, because when injunctive relief is sought, participation of the individual members “is not normally necessary.” *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996). Thus, the Court will focus its analysis on the first prong of the representational standing inquiry.

Defendants assert that the Organizational Plaintiffs’ members complain of nothing more than generalized grievances insufficient to confer Article III

standing. The Court agrees, as it must, that generalized grievances do not normally constitute a particularized injury necessary to establish standing. *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015). But the fact that “a harm is widely shared does not necessarily render it a generalized grievance.” *Id.* (internal citations and quotation marks omitted). In fact, the Supreme Court has been clear that “where large numbers of voters suffer interference with voting rights” the interests related to that are sufficiently concrete to obtain the standing necessary to seek redress in an Article III Court. *F.E.C. v. Akins*, 524 U.S. 11, 24 (1998) (holding that claims implicating voting rights “the most basic of political rights, is sufficiently concrete and specific” to establish standing); *see also Baker v. Carr*, 369 U.S. 186, 206–07 (1962) (noting that prior cases have “squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue”).

The Court finds that injuries related to voter rights are central to the Organizational Plaintiffs’ claims and stem directly from issuance of the Directive. Because the alleged injuries to the members’ voting rights at issue in this case could conceivably be asserted by any Montanan does not eradicate the standing necessary to assert these claims. On the contrary, the Supreme Court has repeatedly enumerated the principle that claims alleging a violation of the right to vote can constitute an injury in fact despite the widespread reach of the conduct at

issue. In short, the harm complained of here is sufficiently concrete to pass the Organizational Plaintiffs through the standing gateway necessary to adjudicate their claims on the merits.⁴

ii. Organizational Standing

Even if the Organizational Plaintiffs’ lacked representational standing the Court finds they similarly enjoy organizational standing. The test of whether an organizational plaintiff has standing is identical to the three-part test outlined above normally applied in the context of an individual plaintiff. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). An organization establishes the requisite injury upon a showing of “both a diversion of its resources and a frustration of its mission.” *Id.* But, as Defendants correctly note, the Organizational Plaintiffs cannot simply “spend money fixing a problem” for the purpose of manufacturing standing. *Id.* Instead, the Organizational Plaintiffs are required to demonstrate “it would have suffered some other injury if it had not diverted resources to counteracting the problem.” *Id.* The Court is persuaded the Organizational Plaintiffs have established a diversion of resources sufficient to confer standing.

⁴ The Court likewise finds that this legal conclusion supports a finding of standing for the Voter and Candidate Plaintiffs, who similarly allege infringements on their right to vote. (Doc. 1 at 3–4.) Because the Candidate Plaintiffs allege they intend to vote, the Court need not address whether they possess standing to prosecute their claims as candidates.

Defendants contest this form of standing by asserting that Organizational Plaintiffs have nothing to educate their members about, since the Directive expands rather than contracts the opportunity to vote. But this assertion cannot withstand scrutiny. The Directive, while certainly expanding the remote voting opportunities of Montanans, necessarily contemplates a reduction in available in-person voting opportunities by counties that opt-in to the mail ballot option. (Doc. 81-15 at 5.) As the supplemental declaration provided by the Member-Plaintiffs establishes, there is a “73% drop in the number of in person polling places open to Montanans who want to vote in person on Election Day across the state.” (Doc. 109-1 at 3.) This reduction requires the Organizational Plaintiffs’ to expend resources in an effort to inform their members how individual counties intend to administer the November 3, 2020 general election and where in-person voting opportunities are located. As such, the Organizational Plaintiffs’ purpose of educating Republican voters—especially those who wish to vote in person—on available voting opportunities is necessarily impacted by the Directive.

Organizational Plaintiffs have provided the Court with declarations to this effect. For example, the Declaration of Sam Rubino explains how expenditure of resources is necessary to “inform voters about the directive’s changes” to voting opportunities, including “when, and where to submit mail-in ballots if they have never submitted one before; and where to cast a traditional ballot at whatever in-

person polling locations counties may provide.” (Doc. 94-1 at 3.) The remaining declarations submitted by Ryan Dollar and Spenser Merwin confirm the expenditure of resources necessary to educate the Organizational Plaintiffs’ members on the Directive’s impact on voting in Montana for the November 3, 2020 general election. (Docs. 93-1 at 3; 93-2 at 3–4.) This is sufficient to confer the Organizational Plaintiffs with organizational standing. Having found that the Organizational Plaintiffs and Voter and Candidate Plaintiffs have standing, the Court possesses the constitutional authority to adjudicate all of the Plaintiffs’ claims on the merits. As such, the Court need not address the standing of Legislative Plaintiffs, who assert claims identical to that of the Lead-Plaintiffs.

C. Abstention.

Governor Bullock urges this Court to abstain from resolving Plaintiffs’ claims on the merits under the *Pullman* abstention doctrine. “The *Pullman* abstention doctrine is a narrow exception to the district court’s duty to decide cases properly before it which allows postponement of the exercise of federal jurisdiction when ‘a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law.’” *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983). *Pullman* abstention is only appropriate upon satisfaction of a three-prong test:

- (1) The complaint “touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open;”
- (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and
- (3) The possibly determinative issue of state law is doubtful.

Id. In applying these factors, the narrowness of this exception cannot be understated, and this Court should only abstain “in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.” *Id.* The Court find abstention inappropriate in this case.

Regarding the first prong, the Court agrees that Plaintiffs’ claims regarding Montana’s electoral processes touches on a sensitive area of social policy. But it cannot be said this is an area federal courts are hesitant to enter. On the contrary, federal courts are routinely tasked with resolving issues related to the state administration of elections. *See, e.g., Crawford v. Marion Cty Election Bd.*, 553 U.S. 181 (2008). The Court also finds that resolution of the state law issues underlying this dispute will not terminate the action. On the contrary, determination of whether Governor Bullock has exceeded his authority under state law is separate and distinct from the question of whether the provisions providing such authority comport with the Elections and Electors clauses. This second

question is as essential to the resolution of the Emergency Powers Claims as the first.

Finally, as discussed at length below, the Court finds that the state law issues underlying this case are far from uncertain and are readily determinable by the Court. In short, this is not the unique case in which abstention is justified. Governor Bullock urges this Court to follow the abstention path paved by the Western District of Pennsylvania in a similar case. *See Trump for President, Inc. v. Boockvar*, 2020 WL 4920952 (W.D. Pa. 2020). But the Court finds this case distinguishable. While not determinative, a compelling justification for abstention in *Boockvar* was the actual existence of state law proceedings that would resolve the state law issues present in that case. *Id.* at *18. No party to this action disputes that time is of the essence. Ballots are set to be mailed on October 9, 2020. (Doc. 81-15 at 4.) The Court does not find it wise to force Plaintiffs to assert identical claims in state court at this late hour with no promise of timely adjudication. *Potrero Hills Landfill v. County of Solano*, 657 F.3d 875, 889–90 (9th Cir. 2011) (“Federal courts are not required to send a case to the state court if doing so would simply impose expense and long delay upon the litigants without hope of its bearing fruit . . . to the contrary, under such circumstances, it is the duty of a federal court to decide the federal question when presented to it”) (internal

quotation marks and citations omitted). In short, abstention is neither required nor appropriate in this case.

II. Injunctive Relief.

Having concluded that the Eleventh Amendment does not bar consideration of the Plaintiffs' Emergency Powers Claims, that standing exists, and that abstention is inappropriate, the Court will adjudicate the claims presented on the merits. As noted above, in order to obtain injunctive relief, Plaintiffs must demonstrate: (1) actual success on the merits; (2) that they have suffered an irreparable injury; (3) there exists no adequate remedy at law; and (4) the balance of the hardships justifies a remedy in equity and the public interest would not be disserved by a permanent injunction. *Independent Training*, 730 F.3d at 1032; *Jewell*, 747 F.3d at 1092.⁵ Each element is discussed in turn.

A. Actual Success on the Merits.

i. Emergency Powers Claims.

The United States Constitution provides, in relevant part, that the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” U.S. Const., art. I, § 4, cl. 1. Additionally, Article II mandates that “Each State shall appoint, in such Manner as

⁵ The Court notes that Plaintiffs also request declaratory relief to the effect that the Declaration is unconstitutional. However, because the issuance of this relief is dependent on Plaintiffs' actual success on the merits, the Court finds separate analysis of these claims unnecessary.

the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress” *Id.*, art. II, § 1, cl. 2.

Plaintiffs contend that the Directive violates these clauses by altering the manner in which Montana conducts the November 2, 2020 general election through executive fiat rather than legislative action. In support of their argument, Plaintiffs invoke a myriad of provisions of the Montana Code Annotated which they contend either fail to permit or outright prohibit Governor Bullock from issuing the Directive. The Defendants maintain that not only has Governor Bullock acted well within the authority conferred on him by the Montana Legislature, but that this delegation of power does not offend the Elections or Electors Clauses.

Resolution of these claims requires the Court to analyze the relevant statutory framework under which Montana conducts its elections and by which Governor Bullock purports to act. In doing so, the critical question becomes whether the Montana Legislature has, in its laws governing the manner in which federal elections are administered, permitted Governor Bullock to authorize counties to conduct such elections, in part, by mail ballot. The Court is convinced it has.

As a starting point, the Court notes that the Montana Constitution provides

that the “legislature shall provide by law the requirements for . . . administration of elections.” Mont. Const. art. IV, § 3. In exercise of this constitutional command, the Montana Legislature has adopted a comprehensive framework of laws governing the electoral process. Relevant here are the provisions outlining the process by which elections can be conducted by mail. In passing such laws, the Montana Legislature stated:

The purpose of this chapter is to provide the option of and procedures for conducting certain specified elections as mail ballot elections. The provisions of this chapter 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.

Mont. Code Ann. § 13-19-101.

Notably, the provisions of Montana law permitting an election to be conducted by mail-ballot provide that “a regularly scheduled federal, state, or county election” cannot “be conducted by mail ballot.” Mont. Code Ann. § 13-19-104(3)(a). Montana’s statutory framework regarding the administration of elections cannot be read in isolation, however, and particular attention to the emergency powers afforded to the Governor must be paid. Specifically, the Montana Legislature has provided Governor Bullock with the power to “suspend

the provisions of any regulatory statute prescribing the procedures for conduct of state business or orders or rules of any state agency if the strict compliance with the provisions of any statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster.” Mont. Code Ann. § 10-3-104(2)(a).

Emergency is defined as “imminent threat of a disaster causing immediate peril to life or property that timely action can avert or minimize.” *Id.* § 10-3-103(8). Disaster is defined as “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any . . . outbreak of disease.” *Id.* 10-3-103(4). The Court has no trouble concluding that the COVID-19 pandemic constitutes a disaster and emergency within the meaning of the aforementioned statutes. As such, the Court must determine whether Governor Bullock has exceeded his authority under Montana Code Annotated § 10-3-104(a)(2).

The parties devote significant argument to whether the statute in question, Montana Code Annotated § 13-19-104, is regulatory and therefore falls within Governor Bullock’s suspension power conferred on him through Montana Code Annotated § 10-3-104(a)(2). Plaintiffs urge this Court to construe “regulatory” narrowly, limiting the term to licensing statutes or other public service laws enacted pursuant to Montana’s inherent police powers. Defendants argue for a

broad reading, characterizing regulatory statutes as those which apply to the conduct of state actors.

Statutes governing the electoral process are by their very nature regulatory. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (construing Ohio’s statutory deadline for candidacy statements as part of its “regulation of elections” and exercise of the state’s “important regulatory interests”); *Burdick*, 504 U.S. at 433–34 (interpreting Hawaii’s statutory framework regarding write-in voting as a facet of “the State’s important regulatory interests”); *Crawford*, 553 U.S. at 203 (referring to Indiana’s voter identification statute as a “neutral, nondiscriminatory regulation of voting procedure”).

Indeed, the statute at issue does not permit the Governor to suspend any regulatory statute, but rather only those regulatory statutes that prescribe “the procedures for conduct of state business.” Mont. Code Ann. § 10-3-104(2)(a). None of the cases relied on by Plaintiffs interpret the reach of the Governor’s suspension power. Instead, Plaintiffs point to a series of Montana cases using the words “regulatory statute” completely divorced from the situation at hand and the powers at play. One case for example, characterizes the Montana Unfair Trade Practices Act as a “regulatory statute.” *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 371 P.3d 446, 455. But *Mark Ibsen* refers to the Montana Unfair Trade Practices Act which regulates “trade practices in the business of insurance,” not the

conduct of state business. *Id.*; *see also* Mont. Code Ann. § 33-18-101. The failure to connect the word regulatory to “conduct of state business” severely undermines Plaintiffs’ proposed interpretation.

The Court is convinced that the statute at issue here, Montana Code Annotated § 13-19-104(3)(a), which forbids local officials from conducting a “regularly scheduled federal, state or county election” by mail ballot, is precisely the sort of regulatory statute that falls within Governor Bullock’s statutory suspension power. After all, the administration of federal, state, and local elections is quintessentially state business. *See Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (noting that the Constitution “grants States broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives . . . which power is matched by state control over the election process for state offices”) (internal citations and quotation marks omitted). As discussed below, the Court has no trouble concluding that suspension of Montana Code Annotated § 13-19-104(3)(a) is necessary to facilitate Montana’s effective response to the COVID-19 pandemic. The provisions on which Governor Bullock relies in issuing the Directive not only provide him with such authority, but likewise constitute a fundamental part of the legislative enactments governing the time, place, and manner of elections in Montana and how electors are appointed.

But this does not end the matter, because there is the additional question of

whether such delegation by the Montana Legislature to Governor Bullock is constitutional. Resolution of this question depends on the meaning of the term “Legislature” as used in the Elections and Electors Clauses. As an initial matter, the Court finds no need to distinguish between the term “Legislature” as it is used in the Elections Clause as opposed to the Electors Clause. Not only were both these clauses adopted during the 1787 Constitutional Convention, but the clauses share a “considerable similarity.” *Arizona State Legis. v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 839 (2015) (Roberts, J., dissenting).

Additionally, “[w]herever the term ‘legislature’ is used in the Constitution, it is necessary to consider the nature of the particular action in view” before affording it a certain meaning. *Smiley v. Holm*, 285 U.S. 355, 366 (1932). With this in mind, the Court finds that the term “Legislature” is used in a sufficiently similar context in both clauses to properly afford the term an identical meaning in both instances. Specifically, the term “Legislature” as used in both clauses refers to a state’s legislative function as opposed to the term’s use in other places in reference to an electoral, ratifying, or consenting function. *Id.* at 365–66. As such, the Court conducts a singular analysis in resolving both constitutional questions.

A survey of the relevant case law makes clear that the term “Legislature” as used in the Elections Clause is not confined to a state’s legislative body. On the contrary, nearly a century ago the Supreme Court concluded that the term

“Legislature did not mean the representative body alone” but also “a veto power lodged in the people” by way of the Ohio Constitution’s referendum process. *Davis v. Hildebrant*, 241 U.S. 565, 566–70 (1916). The Supreme Court followed the trajectory established by *Davis* several years later in *Smiley v. Holm*, where it concluded that the term “Legislature” in the Elections Clause did not “preclude[] a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.” 285 U.S. 355, 372–73 (1932). Thus, after *Davis* and *Smiley* it was clear that the term “Legislature” in the Elections Clause included not only a state’s lawmaking body, but also the citizens’ referendum power and the Governor’s veto.

The Supreme Court expanded, rather than abandoned, this interpretation of the term “Legislature” just five years ago. There, the Supreme Court concluded that the term “Legislature” in the Elections Clause also encompasses an independent redistricting commission utilized by Arizona to draw congressional districts. *Arizona State Legis.*, 576 U.S. at 804–09. In doing so, the Supreme Court concluded the Elections Clause “respect[s] the State’s choice to include” the people’s referendum power, the Governor’s veto, and an independent restricting commission in decisions regarding the times, places, and manners of federal elections. *Id.* at 807.

Upon review of these cases, the Court finds no reason to conclude that the Montana Legislature's decision to afford the Governor's statutory suspension power a role in the time, place, and manner of Montana's federal elections should not be afforded the same respect. In other words, Governor Bullock's use of the legislatively created suspension power is not repugnant to the constitutional provisions invoked by Plaintiffs.⁶ As such, the Court finds that the Directive violates neither the Elections or Electors clause of the United States Constitution and judgment in favor of the Defendants on this claim is appropriate.

ii. Right to Vote Claims.

While not specifically enumerated, “[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). This right is “individual and personal in nature.” *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). Additionally, this right “can neither be denied outright . . . nor destroyed

⁶ Plaintiffs reference in passing Article III, § 1 of the Montana Constitution which forbids “the exercise of power properly belonging to one branch” by another. But not only have Plaintiffs failed to assert a stand alone claim under the Montana Constitution, jurisdictional issues attendant to such a claim aside, this constitutional provision does not require “absolute independence” which “cannot exist in our form of government.” *Powder River Cty v. State*, 60 P.3d 357, 231–32 (Mont. 2002). On the contrary, this provision “has never been accepted as an absolute principle in practice” and is designed to prevent “a single branch from claiming or receiving inordinate power” rather than “bar[ring] cooperative action among the branches of government.” *Id.* at 232. Cooperative action in the administration of elections and response to an emergency are exactly what has occurred here. As such, the Court has serious doubts about the merits of a state constitutional claim, assuming it had properly been raised in this case.

by alteration of ballots . . . nor diluted by ballot-box stuffing.” *Reynolds*, 377 U.S. at 554. The parties have focused their argument on whether a claim for vote dilution rooted in the United States Constitution is cognizable. The Court finds such an analysis to be unnecessary because, even assuming such a claim exists, Plaintiffs have not even attempted to introduce the requisite evidence necessary to prevail.

The Plaintiffs maintain that because the Directive permits counties to conduct the November 3, 2020 general election by mail ballot, this election will be ripe with fraud and thus result in unconstitutional disenfranchisement of a both direct and dilutive nature. Yet, Plaintiffs have not introduced even an ounce of evidence supporting the assertion that Montana’s use of mail ballots will inundate the election with fraud. Indeed, as indicated at the beginning of this Order, at the September 22, 2020 hearing on the merits, counsel for both the Member-Plaintiffs and Lead-Plaintiffs conceded they do not possess any evidence establishing prior incidents of voter fraud in Montana, which has an established and well used absentee voting system. The Court is thoroughly unconvinced that will change in counties electing into the Directive’s mail ballot option.

The record is replete with evidence that Montana’s elections and the use of mail ballots present no significant risk of fraud. The Declaration of Dr. Michael Herron is particularly enlightening. There, Dr. Herron concludes that there is

absolutely no evidence that deliberate voter fraud has occurred in Montana from 2012 to 2020. (Doc. 75-2 at 21.) Particularly, Dr. Herron concludes that “[v]oter fraud of all types is rare in the United States and rare in Montana as well.” (*Id.*) Upon systematic dissection of the Lead-Plaintiffs’ motion (Doc. 8), Dr. Herron concludes that they have failed to “establish a compelling likelihood that voter fraud will occur in Montana if this state uses universal vote-by-mail in the November election.” (Doc. 75-2 at 22.)

The Court also agrees that “[t]he most appropriate comparison election for the upcoming, statewide November 2020 General Election in Montana is the statewide, June 2020 Primary election in Montana” in which no evidence of voter fraud has been uncovered. (*Id.* at 34, 37.) The declarations provided by Governor Bullock from three election officials in Montana fortifies the conclusion that a county’s use of mail ballots does not meaningfully increase the already nominal risk of voter fraud in this State. (Docs. 81-3 at 4; 81-4 at 5.) The Intervenor-Defendants have similarly provided the Court with deposition testimony from various state officials confirming the lack of prior voter fraud in Montana. (Doc. 75-5 at 4, 9–10; 75-6 at 4–6; 75-7 at 4–5; 75–8 at 3–5.)

Additionally, the Court finds no reason to believe that the electoral safeguards designed to protect the integrity of Montana’s elections and prevent fraud will not operate as they have in the past. These include, but are not limited

to, Montana’s proscription on voting twice in one election, Montana’s ban on fraudulent voter registration, and the required signature verification upon receipt of a mail ballot. Mont. Code Ann. §§ 13-13-241, 13-19-309, 13-35-209, 13-35-210(1). None of these statutory provisions have been suspended by Governor Bullock’s Directive.

The Member-Plaintiffs point to the Supreme Court’s dicta in *Crawford* as conclusive evidence of voter fraud. (Doc. 3 at 3.) But *Crawford* does not limit its discussion of possible voter fraud to mail ballots. Instead, *Crawford* discusses prior instances of voter fraud in the registration, in-person voting, and absentee voting contexts. 553 U.S. at 194–95, ns. 11–13. Additionally, the Supreme Court in *Crawford* did not deploy its discussion of voter fraud to invalidate an entire electoral scheme—as Plaintiffs seek to do here—but rather to justify the imposition of the exact sort of safeguards previously discussed. *Id.* at 196.

Furthermore, if reliance on *Crawford* alone without any supporting evidence were enough, it is unclear how our republic could be expected to conduct elections at all. Litigants could simply attack any electoral structure as inviting fraud and thus offensive of the constitutional rights Plaintiffs invoke here. Such a result would cripple our great democratic experiment and bolster forces determined on thwarting popular government. In the final analysis, the Court finds that Plaintiffs have not established that the use of mail ballots by Montana counties will introduce

any meaningful level of fraudulent behavior into the election that could possibly rise to the level of a constitutional violation.

The Lead-Plaintiffs also allege that the Directive infringes on the right to vote because the “sudden surge in mail ballots” will result in requested ballots never arriving, arriving too late, or completed ballots getting lost or delayed in the return process. But this contention suffers from the same fatal flaw as that based on voter fraud, an utter lack of any supporting evidence. The Plaintiffs have failed to provide any proof that Montana’s mail system will be unable to process an influx in ballots. It takes more than mere supposition to prevail on the merits. Plaintiffs’ claim regarding errors in the mail system suffers the same fate as those rooted in voter fraud.

iii. Equal Protection Claim.

The Member-Plaintiffs’ Equal Protection Claim lacks clarity. In their complaint, the Member-Plaintiffs rely on the Court’s holding in *Bush v. Gore* and allege that because “46 of 56 Montana counties have filed mail-ballot plans,” if such plans are approved “voters in the 46 counties will have greater voting power than other-county voters.” (Doc. 1 at 38.)⁷ The complaint further alleges that the Directive “enhances the odds of voters in counties adopting” it of “being able to

⁷ As noted in this Order, the number of counties currently opting in under the Directive is 45 not 46.

vote and have their voices counted” and “[a]s 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.” (*Id.*)

The briefing submitted by Member-Plaintiffs fails to further illuminate the argument, simply contending that the Directive is a “disparate-power Plan” that provides some voters with greater voting power. (Doc. 91 at 12.) At oral argument, counsel for Member-Plaintiffs confused the issue by characterizing their equal protection argument as being rooted in the risk of voter fraud attached to the use of mail ballots. To the extent voter fraud plays a role in the Equal Protection Claim, which is not clear from the face of the complaint, such a claim can be easily disregarded for the reasons discussed above, again the complete absence of any evidence establishing that voter fraud has occurred in the past or is likely to occur by way of the Directive in Montana.

In *Bush v. Gore*, the Supreme Court reiterated the longstanding principle that “one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.” 531 U.S. 98, 107 (2000). Particularly, the Supreme Court held that “[e]qual protection applies” to the right to vote and “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.* at 104–05. Applying these principles, the Supreme Court found that

the Florida Supreme Court’s ratification of disparate standards used by counties to determine what is or is not a valid vote resulted in the arbitrary and disparate treatment forbidden by the Equal Protection Clause. *Id.* at 104–09. The Court finds no such equal protection issue here.

First, the Supreme Court was clear in *Bush v. Gore* that the question was not “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” *Id.* at 109. Yet this is precisely the conduct of which the Member-Plaintiffs now complain. The crux of their argument, as pled in their complaint, is that the use of a mail ballot system by some counties and not others results in unconstitutionally disparate treatment. The Court agrees with Governor Bullock’s argument that few (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause.

Second, in any event, the Court finds Member-Plaintiffs’ complaints of disparate and unequal treatment unfounded. The Directive makes clear that even in counties electing to opt into Montana’s mail ballot procedure for the November 3, 2020 general election, in-person voting opportunities will remain available. (Doc. 81-15 at 3.) Additionally, the Member-Plaintiffs have not introduced any evidence that the 11 Montana counties electing to conduct the election without the use of mail ballots are utilizing procedures that render voters in those counties less

likely to have their votes cast. Likewise, nothing in the record supports the claim that the counties who have opted to proceed under the Directive are more likely to permit their citizens to successfully cast a ballot. As such, the Directive does not condone or facilitate any disparate treatment of Montana voters, and instead, is designed to ensure that all eligible Montanans can vote in the upcoming election. In sum, the Member-Plaintiffs Equal Protection Claim is without merit.

As the foregoing illustrates, Plaintiffs do not enjoy actual success on the merits of any of their claims. This conclusion alone precludes Plaintiffs' request for injunctive relief. *See Confederated Tribes & Bands of Yakama Nation v. Yakama Cty.*, 963 F.3d 982, 993 (9th Cir. 2020) (concluding that Yakama Nation was not entitled to a permanent injunctive after failing to show actual success on the merits). Nonetheless, the Court finds it prudent to address the remaining factors.

B. Irreparable Injury.

To establish this factor, Plaintiffs must demonstrate that they have suffered irreparable injury. It is not lost on this Court that constitutional violations are often sufficient in and of themselves to establish irreparable harm. *Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991). As noted above, the entirety of Plaintiffs' claims consist of purported

constitutional violations. But, as discussed at length, none of these claims are meritorious. Thus, Plaintiffs have not suffered any irreparable injury.

Consequently, this factor weighs in Defendants' favor.

C. Adequacy of Remedies at Law.

In analyzing this factor, the Court notes that “unlike monetary injuries, constitutional violations cannot be adequately remedied through damages.”

Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal citations and alterations omitted). This notion, of course, depends on the actual finding of a constitutional violation, which is not present in this case. Having found no constitutional violation, the Court holds that Plaintiffs are not entitled to any relief, equitable or otherwise.

D. Balance of Hardships and Public Interest.

In conducting the final injunctive inquiry, this Court heeds the Supreme Court's warning against changing the rules of the game on the eve of an election. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (internal citations omitted). This warning necessarily cautions against the issuance of injunctive relief in this case, just days before ballots are to be mailed by counties who have elected to utilize the mail ballot procedures authorized by the Directive.

Indeed, federal courts have time and time again been cautioned against

injecting themselves into the electoral process. *See, e.g., Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (holding “[t]here is no doubt that the right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state election”). In fact, “[t]he decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation.” *Id.* (collecting authority).

This restraint on the issuance of injunctive relief is unsurprising, because ultimately an “injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.” *Winter*, 555 U.S. at 32. Accordingly, even if Plaintiffs’ had actually succeeded on the merits of their claims, which they have not, it does render the issuance of an injunction preordained. On the contrary, the Court is compelled to carefully balance the equities and the public interest before awarding the extraordinary relief Plaintiffs’ seek. In doing so, the Court finds that this factor weighs strongly in the Defendants’ favor.

The evidence in the record demonstrates that issuance of the injunctive relief sought by Plaintiffs would have profound, and most likely catastrophic consequences on the administration of Montana’s general election. Election officials have extensively outlined the nearly insurmountable challenges which would arise should the Court enjoin enforcement of the Directive. These include:

(1) the impossibility of procuring, training, and certifying the competency of the election judges necessary to administer an election in the absence of mail ballot procedures; (2) the logistical nightmare posed by completely reversing course at this late hour and moving from a mail ballot to traditional election administration; and (3) the difficulty, harm to election integrity, and resulting confusion that would occur if counties had to notify their citizens of the abrupt last minute change to available voting opportunities. (Docs. 81-3 at 2–3; 81-4 at 2–4; 81-15 at 7–13.) These concerns are well founded and provide strong equitable and public interest considerations against enjoinder of the Directive.

This Court finds that it would not only be unequitable, but also strongly against the public interest, to upset the current election procedures of 45 Montana counties just days before mail ballots are to be sent to registered voters. Those 45 counties would be forced, likely in vain, to quickly develop the electoral infrastructure necessary to administer the general election under normal conditions. The result is the possible disenfranchisement of thousands of Montana voters who as of the date of this Order, are operating under the belief that they will shortly receive a ballot in the mail. Issuance of an injunction presumes counties could successfully notify these voters of the need to apply for an absentee ballot (which may not be successfully processed in time) in order to vote from the safety of their home or that these voters will be willing to brave the pandemic and exercise their

franchise in person. Both are unlikely. As such, the injunction Plaintiffs' seek would likely bring about significant disenfranchisement.

Irrespective of these administrative issues, the Court also finds that enjoinder of the Directive would only accelerate the outbreak of COVID-19 which Montana now faces. Contrary to Plaintiffs' assertions that Montana is out of the woods and free from the virus that continues to cripple society across the globe, Montana continues to struggle with outbreaks across the state. In fact, as of September 29, 2020, and as the following graph indicates, Montana's COVID-19 cases continue to rise, with a commensurate increase in deaths.



Montana Covid Map and Case Count, N.Y. TIMES, <https://nyti.ms/2R3F2S9> (last visited September 29, 2020). It is not hard to imagine that enjoinder of the Directive would vastly increase the number of Montanans exercising their

franchise in person during the election. Given the contraction of available in-person voting opportunities, this influx of in person voters would obviously hasten the already increasing spread of COVID-19 infections in Montana.

Indeed, these health concerns were the primary basis on which Governor Bullock rooted the Directive. (Doc. 81-15 at 2–3.) Evidence submitted in this case raises compelling public health concerns stemming from enjoinder of the Directive. (*See, e.g.*, Doc. 81-1 at 6.) The Declaration of Dr. Gregory Holzman, for example, outlines at length the safety measures necessary to safely conduct an election by predominately in-person voting. (Doc. 81-5 at 5–6.) In the end, however, Dr. Holzman concludes that “last minute changes that eliminate mail voting would require substantial effort by election administrators to provide for high-density, crowded polling place election procedures that satisfy the” necessary safety measures. (*Id.* at 7.)

Governor Bullock has provided the Court with a declaration from a resident of Cascade County, Montana who intends to vote in the upcoming election. (Doc. 81-6 at 2.) Because of this voter’s health conditions, voting in person is simply not possible. (*Id.* at 2–3.) Enjoining the Directive would effectively disenfranchise this voter, who, based on the administrative issues outlined above, would unlikely be able to successfully register for and receive an absentee ballot prior to election day. This voter does not exist in isolation, and in-person voting by his family

members and friends, which would be increasingly likely if the Directive was enjoined, would vastly increase his own risk of viral exposure with possibly deadly consequences. (*Id.*) These concerns are likely not unique and apply with equal force to many Montanans, who either themselves or a loved one suffer from a medical condition for which COVID-19 exposure poses a grave risk.

Ultimately, considerations of public health weigh strongly against the issuance of an injunction, even if Plaintiffs' claims were meritorious. Having weighed the requisite factors, the Court concludes that Plaintiffs are not entitled to injunctive relief. Because they have not actually succeeded on the merits of any of their claims, the Court additionally finds that they are not entitled to any of the relief they seek. As such, judgment in favor of the Defendants in both the lead and member cases is warranted.

Accordingly, IT IS ORDERED that the Plaintiffs' requests for injunctive, declaratory, or any other form of relief are DENIED.

IT IS FURTHER ORDERED that judgment in both the lead case (CV 20–66–H–DLC) and the member case (CV–20–67–H–DLC) shall be entered in the Defendants' favor.

IT IS FURTHER ORDERED that all pending motions are DENIED as moot.

The Clerk of Court is directed to enter judgments in the lead and member

cases by separate documents and close the case files.

DATED this 30th day of September, 2020.



Dana L. Christensen, District Judge
United States District Court

***Directive implementing Executive Orders 2-2020
and 3-2020 and providing for measures to imple-
ment the 2020 November general election safely***
EXHIBIT 2

OFFICE OF THE GOVERNOR
STATE OF MONTANA

STEVE BULLOCK
GOVERNOR



MIKE COONEY
LT. GOVERNOR

TO: Montanans; county clerks; and all officers and agencies of the State of Montana
FROM: Governor Steve Bullock
DATE: August 6, 2020
RE: Directive implementing Executive Orders 2-2020 and 3-2020 and providing for measures to implement the 2020 November general election safely

Executive Orders 2-2020 and 3-2020 declare that a state of emergency exists in Montana due to the global outbreak of COVID-19 Novel Coronavirus.

Section 10-3-104(2)(a), MCA, authorizes the Governor during a state of emergency to “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or orders or rules of any state agency if the strict compliance with the provisions of any statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster.” Further, § 10-3-104(2)(c), MCA, authorizes the Governor to “control ingress and egress to and from an incident or emergency or disaster area, the movement of persons within the area, and the occupancy of premises within the area,” and § 10-3-305(2), MCA provides that “all officers and agencies shall cooperate with and extend their services and facilities to the governor as the governor may request.”

Montana’s public health laws also authorize the Department of Public Health and Human Services (DPHHS), acting under the Governor’s direction, to “issue written orders for correction” of “conditions of public health importance,” to “prevent and mitigate conditions of public health importance” through measures including “isolation and quarantine” and “abatement of public health nuisances.” Section 50-1-202, MCA. DPHHS, under the Governor’s direction, may also take action to correct public health deficiencies in “buildings or facilities where people congregate.” Section 50-1-203, MCA.

COVID-19 is an easily transmissible, potentially fatal respiratory illness that has infected millions of Americans, hospitalized hundreds of thousands, and taken over 150,000 lives, particularly among those who are aged 60 years or older or who have co-occurring medical conditions that put them at risk of severe complications. The Centers for Disease Control and Prevention (CDC) has recognized that in-person voting on election day increases the risk of transmission, and has therefore urged states to “[e]ncourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.” Unfortunately, the same factors that give rise to the CDC’s concerns are present in Montana’s typical election procedures as well: election workers, many over 60 years old, are placed in close proximity to each other; large crowds or lines congregate in a limited number of locations; and papers, pens, and other possible infection vectors are exchanged.

Based on these considerations, and in response to requests from Montana’s county election administrators, on March 25, 2020, I issued a Directive providing for expanded mail-in and early voting for school district elections and the June 2020 primary election. County election administrators adeptly managed the change in procedures, and that election was a success, marked by an increase in voter turnout compared to previous primary elections.

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Since the June 2020 primary election, the number of COVID-19 cases has grown across Montana and the United States. It is increasingly unlikely that the pandemic will have fully abated by November such that traditional in-person voting will not pose a significant risk to public health and human safety. Public health experts have advised that typical election procedures in Montana would create an unacceptable health and safety risk to all Montanans—voters, poll workers, and non-voters alike.

Montana's bipartisan group of county election administrators have agreed that the March 25, 2020 Directive successfully maximized safety and Montanans' opportunity to vote. Based on their experience with the primary election and the increase in cases since, these local administrators have formally requested that the same process be followed for the 2020 general election. They have stressed the serious ethical concerns with conducting an election using standard procedures. The election administrators warn of potential chaos if polling locations (such as school gyms) are closed at the last minute or counties are forced to consolidate polling locations. The election administrators, in their expert judgment, urge that Montana follow a process resembling that used for the June 2020 primary—providing early voting opportunities as well as expanded mail voting—to maximize opportunities to vote while minimizing the risk to public health.

The state's chief executive has a duty to protect the health and safety of Montanans, and to safeguard their constitutional rights. Chief among those rights is the franchise. Accordingly, in consultation with election administrators and public health experts, I have determined that reliance on typical election procedures for the general election would prevent, hinder, or delay necessary action in coping with the emergency.

Fortunately, Montana already has a simple, clear, well-established set of procedures in law that govern mail elections. And existing law provides opportunities for Montanans to vote early—at any time during the voting period. Measures that encourage more Montanans to vote by mail and to vote early will ease crowding and pressure on Election Day voting. Under current procedures, Montanans who have not affirmatively signed up for an absentee ballot sufficiently in advance of the election will face the choice of whether to vote in person, risking exposure to COVID-19, or to stay at home. This Directive is intended to ensure no Montanan will have to choose between their vote or their health.

The Directive implements most of the measures that were put into place for the June 2020 primary election, with some changes aimed at improving procedures and adopting recommendations from county election administrators. As with the March 25, 2020 Directive, this Directive permits counties, at their local discretion, to expand access to voting by mail *and* early voting. Additionally, the Directive continues measures that require all counties to ensure appropriate social distancing to make voting and voter registration safe for all Montanans. This Directive applies only to the 2020 general election.

Current law permits in-person voting during the entire voting period. Therefore, even in counties that opt for vote-by-mail, in-person voting will still be permitted. Giving the counties the option to invoke mail balloting procedures is intended to shift the default position from voting in person to voting by mail. The default under current law—voting in person—poses too many risks in the State's fight against COVID-19. The success of the June 2020 primary election, as reviewed by Montana's bipartisan election administrators, has left me confident that the best course of action is to empower local leaders to make the choice for how to administer the election in a manner best suited to their communities' public and civic health needs.

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Therefore, in accordance with the authority vested in me under the Constitution, Article VI, Sections 4 and 13, and the laws of the State of Montana, Title 10, Chapter 3 and Title 50, Chapter 1, MCA, and other applicable provisions of the Constitution and Montana law, I hereby direct the following measures be in place in the State of Montana effective immediately:

1. Counties Permitted to Conduct Mail Ballot Elections and Expanded Early Voting

- Counties in Montana may, but are not required to, conduct the November 3, 2020, general election under the mail ballot provisions of Title 13, Chapter 19, MCA.
 - To the limited extent that § 13-19-104(3), MCA, is in conflict, strict compliance with its provisions is suspended.
 - Except as expressly provided otherwise in this Directive, all other provisions of Title 13, Chapter 19, MCA, apply to a mail ballot election conducted pursuant to this Directive.
- Counties that opt to conduct a mail ballot election pursuant to this Directive and Title 13, Chapter 19, MCA, must expand opportunities for early voting by:
 - Making ballots available at the election administrator's office or other designated location from October 2, 2020, until the end of the election.
 - Allowing voters to apply for, receive, and mark a ballot in-person in a manner consistent with the provisions of § 13-13-222, MCA.
 - If an elector marks a ballot in-person under this provision, and has also been sent a mail ballot, the election administrator shall mark the mailed ballot as void in the statewide voter registration system.
 - Counties that receive a request for satellite voting services from a tribal government must provide a satellite voting office capable of providing the early voting services described above from October 2, 2020, until the end of the election in accordance with the Secretary of State's Election Directive #01-2015 and any relevant agreements in the *Wandering Medicine v. McCulloch* settlement.
- Counties that opt to conduct an early vote/mail ballot election pursuant to this Directive and Title 13, Chapter 19, MCA, shall send mail ballots on October 9, 2020, consistent with § 13-13-205(1)(a)(ii), MCA.
 - To the extent § 13-19-207(1), MCA, permits ballots to be mailed after October 9, 2020, strict compliance with its provisions is suspended.
- Counties that opt to conduct an early vote/mail ballot election pursuant to this Directive and Title 13, Chapter 19, MCA, must include a prominent notice with instructions sent to voters with mail ballots that a postage stamp is not necessary to return the ballot by mail.
 - Counties may seek reimbursement from the Montana Department of Administration for postage costs incurred by voters returning a ballot through the mail, to be paid from the fund provided at § 10-3-312, MCA, or through federal emergency assistance and response funds if available, subject to the approval of the Office of Budget and Program Planning. Further guidance will be distributed to counties on how to obtain this reimbursement.
 - Nothing in this Directive prevents counties from seeking additional reimbursement from the federal government or the Secretary of State if federal emergency assistance is made available.

- Provisions of Title 13, Chapter 19, MCA, that are inconsistent with this Directive are suspended to the limited extent necessary to achieve conformity with the above.

2. Measures Required for Safe Registration and Voting

- All counties, regardless of whether they have opted to conduct a mail ballot election, shall establish, implement, and enforce protocols—consistent with CDC guidelines as well as state and local public health directives—to limit the transmission of COVID-19 at polling locations, designated drop-off locations, or public-facing portions of facilities involved in voting.¹
- County election administrators shall not close regular registrations until 10 days before election day. Strict compliance with the provisions of § 13-2-301(a), MCA, is suspended to the extent the statute is in conflict.
 - Extending the close of registration until 10 days before election day will minimize the need for in-person registration or lines for registration near the end of the election.
 - It is the responsibility of any individual who does not register in-person before the election to ensure that they receive and return a ballot before the end of the election, either under mail ballot/early vote procedures provided in this Directive for individuals registered in counties that opt to conduct a mail ballot election pursuant to the provisions of this Directive, or through typical voting procedures for individuals registered in counties that do not so opt.
- In advance of the election, counties should publicize and provide information to voters about polling locations and designated drop-off locations, as well as any changes or updates to those locations through website updates, letters, posters, advertising, posted signs, or other communications.
 - The Secretary of State is requested to include designated place of deposit locations, and changes and updates thereto, on voters' "My Voter Page" profiles on the Secretary of State's website.
- Counties should have Automark or Expressvote available at polling locations from October 2, 2020, through election day and should, to the maximum extent possible, make accommodations for Montanans with disabilities to vote during the election period.
- Counties are encouraged to explore curbside and drive-up options for voting, registration, and other voter services. Counties are also encouraged to promote the availability of early voting or voting by mail. Finally, counties are encouraged to use designated places of deposit as provided in § 13-19-307, MCA, provided that these too are administered consistent with social distancing guidelines.
- In response to county election administrators' request, in counties containing all or part of a reservation, election administrators are encouraged to coordinate with Western Native Voice or similar nonprofit organizations advocating for Native Americans to facilitate voting on reservations, including but not limited to arrangements for adequate designated drop-off locations on the reservations or making transportation arrangements for voters seeking to vote in person.

¹ The guidance is available at <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

Authorities: Executive Orders 2-2020 and 3-2020; Montana Constitution, Art. VI, Sections 4 and 13; §§ 10-3-103, -104, -302, and -305, MCA; §§ 50-1-202, -203, and -204, MCA; and all other applicable provisions of state and federal law.

Limitations

- This Directive is effective immediately and expires at the end of the 2020 general election.
- This Directive shall be implemented consistent with applicable law and subject to the availability of appropriations.
- Nothing in this Directive shall be construed to limit, modify, or otherwise affect the authority granted by law to the Governor or any department, agency, political subdivision, officer, agent, or employee of the State of Montana, except as provided in this Directive or other Directives now in effect implementing Executive Orders 2-2020 and 3-2020.
- This Directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the State of Montana, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

***Verified Complaint for Declaratory
and Injunctive Relief***
EXHIBIT 3

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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, 2020.¹ 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.² “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

¹ 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 (all websites herein were last visited on September 7, 2020).

² 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.

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.³ Thereafter, Governor Bullock has issued “directives” to implement his emergency orders.⁴ 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.⁵ 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.

³ 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.

⁴ 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>.

⁵ 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.⁶

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

⁶ 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.⁷

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.⁸ 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.*

⁷ 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>.

⁸ 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 § 13-19.⁹ 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

⁹ 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.

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.¹⁰ 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

¹⁰ *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.¹¹

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.¹² There was also evidence of a single New Jersey voter carrying numerous ballots and postal workers leaving ballots sitting out in building lobbies.¹³

52. In California, it was confirmed that double voting occurred in the March 2020 primary election.¹⁴

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,

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

¹² 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

¹³ 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>

¹⁴ 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[.]”¹⁵

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.¹⁶ 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.”¹⁷ He described scams including operatives collecting ballots from voters

¹⁵ 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>.

¹⁶ 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/>.

¹⁷ 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.¹⁸

56. There are also concerns that dependent family members could be pressured or otherwise follow the advice of those whom they depend on.¹⁹ 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.²⁰

58. Mailed ballots have been filled out fraudulently for ineligible, false, impersonated, or duplicate voter registrations.²¹

¹⁸ *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/>.

¹⁹ 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/>.

²⁰ 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>.

²¹ 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.²²

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>.

²² *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

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.²³

64. In South Carolina, multiple ballots were found in Maryland election offices.²⁴ 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.²⁵ 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.*

_elections_143033.html.

²³ 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>.

²⁴ 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>.

²⁵ 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[.]”²⁶

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

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.²⁸

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.²⁹

²⁶ 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>.

²⁷ 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>.

²⁸ 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/>.

²⁹ 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.³⁰ 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 2017.³¹

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.³² 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.

³⁰ 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

³¹ 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/>

³² 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.³³

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.³⁴ 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

³³ 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.

³⁴ 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.³⁵ 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.³⁶

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.³⁷

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.³⁸

³⁵ 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>.

³⁶ 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/>.

³⁷ 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>.

³⁸ 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.³⁹ 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.⁴⁰ 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

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/>.

³⁹ 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>.

⁴⁰ 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.⁴¹

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.⁴²

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

⁴¹ 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/>.

⁴² 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.⁴³ 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-

⁴³ 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.⁴⁴ 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.⁴⁵ Several other postal facilities were found to not properly complete daily certifica-

⁴⁴ 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/>.

⁴⁵ 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-20200902-23yhohiebnaw3ipzpgi57qoqpu-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.⁴⁶ 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.⁴⁷ These letters highlighted a growing concern surrounding a slowdown in postal delivery due to recent changes at USPS. *Id.*

⁴⁶ 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>

⁴⁷ Ellie Kaufman, *Postal service warns nearly every state it may not be able to delivery 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.⁴⁸ 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.⁴⁹ The total estimated cost to provide all Americans with a “vote by mail option” was between \$982 million and \$1.4 billion. *Id.*

⁴⁸ *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>

⁴⁹ 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.”⁵⁰ 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.⁵¹

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

⁵⁰ 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>.

⁵¹ 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.

law.⁵²

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.”⁵³

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.”⁵⁴

Montana Mail Voting Issues

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

⁵² 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>.

⁵³ 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>

⁵⁴ 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.⁵⁵ 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, Mizzoula 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.”⁵⁶

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.⁵⁷ Lewis and Clark County mailed out more than 41,000 ballots, with 1,600 being returned

⁵⁵ Montana Association of Counties, July 24, 2020 Letter to Governor Bullock, available at https://drive.google.com/file/d/13v4w1BKOU2jmdQJzcH6WAlnnJ_1DaOTC/view.

⁵⁶ 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/>.

⁵⁷ 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.⁵⁸

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.⁵⁹ 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

⁵⁸ 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>.

⁵⁹ 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

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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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


A handwritten signature in black ink, appearing to read "Joe Lamm", is written over a horizontal line.

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 4th, 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.



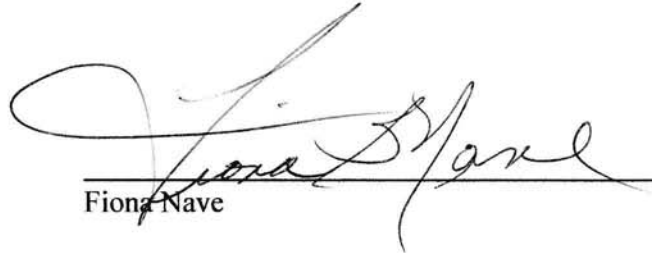
Sylvia Wagner

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