No. 20A- _____

In the Supreme Court of the United States

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

v.

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

Emergency Application for Writ of Injunction, Relief Requested by Thursday, October 8, 2020

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Ninth Circuit

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Questions Presented

Montana's Governor recently issued a Directive allowing the Montana Secretary of State to approve county "mail balloting" plans for the upcoming general election. The Secretary initially approved "mail ballot" plans on September 9 and they were final as of September 29. Counties with approved plans intend to send "mail ballots" to all registered voters on October 9. The Legislature banned "mail ballots" for general elections, instead allowing only by-request, no-excuse-required "absentee ballots" and in-person voting compatible with Phase 2 safety restrictions in the Governor's COVID-19 reopening plan.

The District Court upheld the Governor's Directive and the Secretary of State's approval of "mail ballot" plans and also held that *Purcell v. Gonzalez*, 549 U.S. 1 (2006), barred an injunction to redress any violations of constitutional rights caused by the Governor's and Secretary's actions.

I. Do the doctrines designed to protect long-standing Legislatively adopted election laws, the *Purcell* principle, also protect an "eve of an election" substantial change in election laws by state officials, contrary to that prescribed by the Legislature?

II. Does the Directive violate the Elections Clause, U.S. const., art. I, § 4, cl. 2, by displacing the "Manner" prescribed by the Legislature?

III. Does the Directive violate the right to vote by creating a substantial risk of vote-dilution disenfranchisement by allowing mail ballots that the Legislature deemed dangerous to election integrity in its expert balancing of election

access and integrity concerns?

IV. Does the Directive violate the right to vote by creating a substantial risk of direct disenfranchisement by the sudden flood of mail ballots that the Legislature deemed dangerous to election integrity in its expert balancing of election access and integrity concerns?

V. Does the Directive violate the one-person-one-vote, equal-protection rights, under the Fourteenth Amendment, of voters in counties not choosing "mail ballot" elections?

Parties to the Proceeding

The caption contains the names of all parties.

Corporate Disclosure Statement

No party is a corporation, so none has a parent corporation or stock.

Related Proceedings Below

U.S. Court of Appeals for the Ninth Circuit:

- *Lamm et al. v. Bullock et al.*, No. 20-35847 (9th Cir.) — appeal pending; motion for an injunction pending appeal was denied Oct. 6

U.S. District Court for the District of Montana:

- *Lamm et al. v. Bullock et al.*, No. 6:20-cv-0067-DLC (D. Mont.) — judgment entered Sept. 30, 2020.

- This case was consolidated with *Donald J. Trump for President, Inc. et al. v. Bullock et al.*, No. 6:20-cv-0066-DLC (D. Mont.) — no notice of appeal was filed as of the time of filing this Application

Table of Contents

Appendix Contents

Table of Authorities

Cases

Constitutions, Statutes, and Rules

Other Authorities

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/. 10

Ambaria,, *Montana Election Officials: contact county if mail ballot hasn't arrived*, KTHV (May 22, 2020), www.ktvh.com/news/montana-politics/montana-election-officials-contact-county-if-mail-ballot-hasnt-arrived. 9

Brennan Center for Justice and Infectious Diseases Society of America, *Guide-*

To the Honorable Elena Kagan, Associate Justice of the Supreme Court and Circuit Justice for the Ninth Circuit:

Pursuant to Supreme Court Rules 20, 22, and 23, and 28 U.S.C. § 1651, Applicants ("Voters")[1] respectfully request a writ of injunction by ***Thursday, October 8***—related to the Montana Governor's recent Directive[2] allowing the approval by Montana Secretary of State, which was final on September 29th, of counties sending unsolicited "mail ballots"[3] to all registered voters on October 9—that (i) enjoins Defendants from implementing and enforcing the Directive; (ii) enjoins the Secretary from approving county plans to conduct mail elections under the Directive; and (iii) requires the Secretary to rescind approvals of county mail-ballot plans. Voters also ask the Court to treat this Application as a petition for certiorari, grant certiorari on the questions presented (as well as the existence of Article III standing if the Court believes Voters might lack standing), treat the Application papers as merits briefing, and issue a merits decision as soon as practicable.

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

[2] 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 last checked on October 5, 2020.

[3] In a few local elections, Montana law allows "**mail ballots**," which are sent automatically to all registered voters, Mont. Code Ann. ("MCA") 13-19-101, but *not* for a "regularly scheduled federal . . . election," such as the November 3, 2020 election, MCA 13-19-104(3)(a). This "mail ballot" procedure differs from Montana's currently available no-excuse "**absentee ballot**" law, MCA 13-13-201, principally by not requiring a contemporaneous request by the voter, i.e. an application, for a mail-in ballot.

The district court denied Voters' motion for an injunction pending appeal on September 30, 2020, and the Ninth Circuit denied Voter's motion for an injunction pending appeal on October 6, 2020.

While COVID-19 is a national tragedy, it posed no emergency to justify the Directive because the Montana Legislature already allowed *any* qualified voter to obtain a no-excuse "absentee ballot" by merely applying. And by displacing the legislative finding of what is safe and unsafe in this state for this election, based on the Legislature's authoritative and expert balancing of election access and integrity, the Directive violates the vital mandate that legislatures determine the manner of elections and violates Voters' right to vote and equal protection in four distinct ways.

Furthermore, the District Court upheld the Governor's Directive and the Secretary's approval of "mail ballot" plans and also held that the *Purcell* principle barred an injunction to redress the violations of constitutional rights caused by the Governor's and Secretary's actions. However, the *Purcell* principle was designed to protect long-standing Legislatively adopted election laws, not "eve of election" substantial election-law changes by state officials contrary to the Legislature's prescription.

Voters thus respectfully request that this Circuit Justice grant the requested relief or refer this application to the Court.

Introduction

This emergency Application involves irreparable harm to Voters' rights to vote and have equal protection, U.S. Const. art. I, § 4, cl. 1 ("Elections Clause"); *id.* amends. I and XIV, if (**I**) requested relief is not granted by October 8, the day before

unrequested "mail ballots" are to be sent to voters under the Directive, App. 71a, and if (**ii**) mail-ballot voting is allowed in the November 3, 2020 election.

This case presents a unique opportunity to provide guidance regarding the flawed constitutional analysis employed by lower courts struggling to deal a flood of current and future "eve of an election" changes in election laws by state officials and courts. The Stanford-MIT Healthy Elections Project lists 343 COVID-related cases. healthyelections-case-tracker.stanford.edu/cases. The central flaw is failure to follow the mandate that *only legislatures* have the authority and expertise to "prescribe" the "Manner" of elections. 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." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). The long-held expectation is that election-law changes must come from *legislatures* and *well before* elections, but of late, courts, governors, and election administrators have suspended state laws and, as a result, imposed new election laws on the "eve of an election."

The Montana Governor did so here, issuing a Directive on the eve of an election, August 6, "suspending" the Legislature's long-standing prohibition on "mail balloting" in general elections, and permitting the Secretary to approve county mail balloting plans for this general election, which were final on September 29, even though Montana has no-excuse-required "absentee ballots" by simple request and ongoing in-person voting safely conducted under the Governor's *own* safeguards for COVID-19 reopening.

This Court has developed two doctrines to protect the constitutionally mandated role under the Elections Clause of the Legislature in adopting election laws. First, this Court employs a deferential test for the constitutionally of election law under *Anderson-Burdick* line of cases. *Anderson v. United States*, 417 U.S. 211 (1974); *Burdick v. Takushi*, 504 U.S. 428 (1992). Second, in order to protect long-standing Legislative-adopted election laws from an "eve of an election" challenge, the Court has adopted the *Purcell* principle to severe limited the equity power of the lower courts to enjoin long-standing election laws just prior to an election.[4]

However, the lower courts are now facing a unique challenge, "eve of an election" changes in election laws by state officials, as here, overturning long-standing state election laws. The courts below erroneously applied the *Purcell* principle, developed to protect Legislative-adopted election laws from challenge, to this case, an eve of an election overturning of long-standing election laws by state officials.[5] This Court should hold that neither doctrine applies here and, in so doing, this Court will resolve this case, provide much needed direction to lower courts for now and after the election, substantially increase the likelihood that election law cases will be decided correctly under the Constitution, abate the flood, reduce the resulting chaos regarding election procedures and the uncertainty regarding the outcome of the election, and restore public confidence in our elections.

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[4] The *Anderson-Burdick* test is applicable to state court challenges to election laws and the *Purcell* principle should be applied if that state court challenge is brought on the eve of an election against long-standing ones.

[5] Similarly, while the *Anderson-Burdick* test should be applied to eve of an election changes by the Legislature in election laws, the *Purcell* principle should not.

Decisions Below

The district-court Order denying permanent injunctive relief to Voters is yet unreported but at App. 2a. It's judgment is unreported but at App. 48a. Its denial of an injunction pending appeal is unreported but at App. 50a. The Ninth Circuit's denial of an injunction pending appeal is unreported but at App. 1.

Jurisdiction

On September 30, 2020, the U.S. District Court for the District of Montana issued an Order denying permanent injunctive relief to Voters, App. 2a, though holding that Voters have standing for all four of their constitutional claims. On the same day, Voters filed their notice of appeal and District Court motion for injunction pending appeal, which was also denied that day, App. 50a. The Ninth Circuit denied Voters' motion for an injunction pending appeal on October 6. App. 1. This Court has jurisdiction over this Application under 28 U.S.C. § 1651(a).

Constitutional and Statutory Provisions Involved

This case involves U.S. Constitution Article I, § 4, clause 1 ("Elections Clause") and the First and Fourteenth Amendments; Mont. Const. art. III, § 1 and art. IV, § 3; MCA §§ 10-3-104(2)(a), 10-3-104(2)(c), 13-13-201, 13-13-211, 13-19-101, 13-19-104(3), 13-19-205(3); and 42 U.S.C. § 1983, all appended at App. 52a et seq.

Factual and Procedural Background

In some local elections, Montana allows "mail ballots," which are sent automatically to all registered voters. MCA 13-19-101. But the legislature does *not* allow

mail-ballot voting for a "regularly scheduled federal . . . election," such as the November 3, 2020 general election. MCA 13-19-104(3)(a). Instead, it authorizes *by-request*, *no-excuse-required* "absentee ballots," MCA 13-13-201, and in-person voting.

A. Mailed ballots pose a greater risk of ballot fraud.

This Court has recognized 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) (controlling plur. op. of Stevens, J.); *see also Griffin*, 385 F.3d at 1130-31(same). *Crawford* recognized that states have interests in "election modernization" (including cleaning up voter roles recognized to contain unqualified voters), preventing "voter fraud," and "safeguarding voter confidence." 553 U.S. at 192-97.[6]

Mail voting poses myriad dangers, including fraud, pressure or coercion to vote in a particular way, lost ballots, ballots being delivered late (both coming and going), ballots sent to people who do not receive them or should not received them, rejected ballots, and increased errors in processing, to name a few. Voters need not prove the risk of mailed ballot fraud is *widespread* as one or a few vote-fraud cases can swing close elections. Mail ballots pose a greater threat than absentee ballots, arriving unrequested and to many invalid addresses, leaving unclaimed ballots

[6] Ironically, the Governor and the District Court insisted on prior evidence of voter fraud in Montana to justify Voters' claims. But the Directive eliminates the very anti-fraud provision, especially the application requirement, that has held voter fraud at bay. *Due to that prophylaxis*, there is little evidence of *past* harms from mail ballots, but *removing* that key prophylaxis creates a substantial risk that harms *will occur* according to the Montana Legislature's authoritative and expert balancing and the experience in other states.

available for vote-fraud use.[7] Though this recognized risk with mailed ballots need not be proven, examples abound in, e.g., *Crawford*'s citations[8] and The Heritage Foundation's *A Sampling of Recent Election Fraud Cases from Across the United States* with1,298 examples of recent documented voter fraud. *See* heritage.org/voterfraud.

B. Sudden floods of mailed ballots pose a risk to election integrity.

Apart from fraud, voters can be disenfranchised through delays and other issues with mailed ballot voting. An unusual, sudden flood of mailed ballots poses substantial risks to the right to vote, because the "surge in absentee-ballot requests has overwhelmed election officials," *RNC v. DNC*, 140 S. Ct. 1205, 1210 (2020) (Ginsberg, J. dissenting). Thus, absentee-ballot applicants risk not getting their ballots, and mail ballots have gone missing, over 28 million from 2012 to 2018—nearly one in five mail ballots cast,[9] and overwhelmed election workers have

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[7] Contemporaneous prior request for absentees ballots, MCA 13-13-211, is a key anti-fraud feature that ensures the applicant is alive and still eligible to vote, requires the voter to provide their current address, and provides an audit trail and a signature match. The Directive's authorization of mail ballots removes this anti-fraud feature unique to absentee ballots.

[8] *Crawford* relied in part on the Carter-Baker Report, prepared by a bipartisan commission co-chaired by President Carter, which explained the long-held bipartisan consensus that 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.

[9] *See* Hemingway, *28 Million Mail-In Ballots Went Missing in Last Four Elections*, Real Clear Politics (Apr. 24, 2020), www.realclearpolitics.com/articles/2020/04/24/28_million_mail-in_ballots_went_missing_in_last_four_elections_143033.html.

less ability to screen out fraudulent mailed ballots.[10] primaries.[11] The Postal Service has lost ballots and delivered them too late due to the sudden flood.[12] Mailed ballots also have a rejection rate of 100 times in-person voting, ballots are rejected at higher rates for African Americans, young people, and first-time voters[13] and an NPR analysis found that more than 550,000 ballots were rejected in this year's presidential. Furthermore, mail in balloting is more expensive and complicated than in-person voting[14] and, absent increased funding, election officials may be unable to properly administer the sudden flood. While present page limits preclude further documentation, that is unnecessary since the sudden-flood substantial risk is established *as a matter of law*. The Montana Legislature expressly took these factors into account when they limited mail balloting only to local elections in Montana. The Legislature itself described the factors they considered in limiting the use the mail balloting procedure to only "certain circumstances":

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[10] *See, e.g.*, 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] Fessler & Moore, *More than 550,000 Primary Ballots Rejected in 2020, Far Outpacing 2016*, NPR (Aug. 22, 2020), npr.org/2020/08/22/904693468/more-than-550-000-primary-absentee-ballots-rejected-in-2020-far-outpacing-2016.

[12] Corasaniti & Saul, *Inside Wisconsin's Election Mess: Thousands of Missing or Nullified Ballots*, N.Y. Times (Apr. 9, 2020), nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html.

[13] Warren, *Democrats Should Curb Their Enthusiasm for Mail-in Voting,* Politico (Sept. 2, 2020), politico.com/news/magazine/2020/09/02/democrats-mail-in-voting-407939.

[14] 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.

> The purpose of this ["mail ballot"] 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.

MCA 13-19-101 (emphasis added). The Governor overturned this Legislative balancing and lacks the expertise to do so.

Though the Montana Association of Counties requested the Directive and claimed "success" in using the mail balloting procedure in the primary,[15] Montana has its election integrity issues too. Thousands of ballots in Montana's primary did not reach their intended recipients, in Gallatin County, 4,500 voters.[16] And in Lewis and Clark County 1,600 were returned as undeliverable.[17] Mizzoula County's Election Administrator admitted that, "since it was an all mail ballot election, we had a

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[15] The Governor issued a similar Directive before the 2020 primary permitting use of the mail balloting procedure only in the primary. Gov. Bullock, *Directive Implementing Executive Orders 2-2020 and 3-2020 and providing for measures to implement the 2020 June primary election safely* (March 25, 2020), governor.mt.gov/Portals/16/Directive%20on%20Elections.pdf?ver=2020-03-26-102626-610

[16] Broxton, *4,500 mail-in ballots sent back to Gallatin Co. Elections Office*, NBC Montana (May 20, 2020), nbcmontana.com/news/local/4500-mail-in-ballots-sent-back-to-gallatin-co-elections-office.

[17] Ambaria,, *Montana Election Officials: contact county if mail ballot hasn't arrived*, KTHV (May 22, 2020), www.ktvh.com/news/montana-politics/montana-election-officials-contact-county-if-mail-ballot-hasnt-arrived.

lot of undeliverable ballots."[18] As 45 of 56 Montana counties chose mail-ballot plans for this year's general election, there will be a sudden flood caused by the Governor and the Secretary, despite the well-consider decision of the Legislature preventing this.

C. The Directive was not based on an emergency.

As COVID-19 risk subsided, the Governor authorized Phase 2 reopening as of June 1,[19] 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-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 those specially at risk might wish to mail a ballot, *id.*, which Montana's no-excuse-required, absentee-ballot voting

[18] Christian, *Missoula County Primary Election Results As Of 8 PM*, NewsTalk KGVO (June 2, 2020), https://newstalkkgvo.com/missoula- county-primary-election-results-as-of-8-pm/.

[19] *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.

permits, MCA 13-13. The Brennan Center for Justice agrees: "In-person voting can be conducted safely if jurisdictions take the necessary steps to minimize the risk of transmission of Covid-19 to voters and election workers." Brennan Center for Justice and Infectious Diseases Society of America, *Guidelines for Healthy In-Person Voting* (Aug. 12, 2020), brennancenter.org/sites/default/files/2020-08/2020_08_Guide%20for%20Healthy%20In%20Person%20Voting_Finalv2.pdf. There has been no established causal link between in-person voting and contracting COVID-19.[20]

D. Appellants will be irreparably harmed.

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. 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 disen-

[20] Paradis et al., *Public Health Efforts to Mitigate COVID-19 Transmission During the April 7, 2020, Election—City of Milwaukee, Wisconsin, March 13–May 5, 2020*, 69 CDC: Morbidity and Mortality Weekly Report 1002, 1002 (July 31, 2020), cdc.gov/mmwr/volumes/69/wr/pdfs/mm6930a4-H.pdf?utm_source=WisPolitics.com%2FWisBusiness.com&utm_campaign=25096327e6-EMAIL_CAMPAIGN_2020_08_03_09_44&utm_medium=email&utm_term=0_5c11c3adf4-25096327e6-120838263 ("These data provide an initial assessment of potential impacts of public health efforts to mitigate COVID-19 transmission during an election. No clear increase in cases, hospitalizations, or deaths was observed after the election, suggesting possible benefit of the mitigation strategies, which limited in-person voting and aimed to ensure safety of the polling sites open on election day.").

franchisement. 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. 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. The harms are irreparable; elections lack do-overs.

Thus, Voters present an actual emergency requiring the requested relief. 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 relief is not granted and mail ballots are sent out and the election is held under the Directive.

Reasons for Granting the Application

Affirmative injunctions may be issued by Circuit Justices "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987). As "[a] Circuit Justice's issuance of an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' it 'demands a significantly higher justification' than that required for a stay." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J.) (citation omitted). So generally, "[t]o ob-

tain injunctive relief from a Circuit Justice, an applicant must demonstrate that 'the legal rights at issue are 'indisputably clear.'" *Id*. at 1306 (citation omitted). But the Court may issue injunctions, "based on all the circumstances," without having that "construed as an expression of the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171, 1171 (2014). And here the original status quo was the *Legislature*'s prescribed manner of conducting this election, which had the sole authority under both the Montana and United States Constitutions and also the expertise to balance election access and election integrity. The Governor should not be able to displace that legislative balancing "on the eve of an election" and then claim the advantage of the status quo. Rather, Voters should be deemed as defending the status quo, with an appropriately lower standard to meet, though they meet the higher standard.

I.

There is a "significant possibility" this Court would grant certiorari and reverse because the violation of Voters' rights are "indisputably clear."

This case presents this Court with the opportunity to address important Constitutional issues and to provide needed guidance to the lower courts regarding the flood of election law cases already pending and expected, regarding the historically unique, but now ubiquitous, situation where state officials, as here, or state courts, overturn long-standing Legislative enactments on the eve of an election. This Court has developed doctrines to protect Legislative enactments of state elections laws, because of their unique position under the Constitution, through the *Anderson-Burdick* test and, if those election laws are challenged on the "eve of an election,"

through the *Purcell* principle. But now this Court has the opportunity to decide in this case whether the actions of state official, as here, or state courts, overturning long-standing Legislative enactments on the eve of an election, are protected by these doctrines. This is particular urgent because lower courts are not getting it right and there is a flood of election law litigation that threatens to overwhelm the lower courts, and this Court, now and after the election. This Court can provide this needer guidance by granting this motion and by ultimately granting certiorari. And it is likely that this Court will do so and reverse the lower courts herein.

And because the Directive that displaced the Legislative enactment was unjustified, and because the Voters' rights to have elections governed by Legislative enactments, to vote, and to have equal protection are well established as a matter of law, the violation of these rights are indisputably clear.

A. The mail-ballot Directive was unjustified because in-person voting complies with reopening Phase 2 and requesting an available no-no excuse absentee ballot is a noncognizable burden on the right to vote.

As established in the Factual Background, Montana's in-person voting under the Governor's own Phase 2 safeguards is safe and *anyone* preferring to vote absentee can vote by mail, which poses *no* risk of COVID-19 exposure. In fact, as the District Court below stressed regarding early voting in all counties and election-day voting in non-mail-ballot counties, "the Directive does not abandon in-person voting, which will occur in all of Montana's 56 counties." App. 7a, n.2. So there was no cognizable *health risk* to justify the Directive. Nor is requesting an absentee ballot or complying with safeguards for in-person voting a cognizable *burden* on the right to vote of

any Montana voter under *Crawford*, 553 U.S. at 192-97. So there was no emergency to trigger emergency powers asserted to justify the Directive and no burden on any Montana voter's right to vote under the voting procedures mandated by the Montana Legislature. The Directive is factually unjustified and legally arbitrary, capricious, and irrational, while the Governor himself is a U.S. Senate candidate in this election. *See* stevebullock.com/.

B. Voters have standing to challenge the Directive.

The District Court correctly recognized Voters' standing for all claims. App. 20a, 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 actions of the Governor and Secretary, 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. *See also Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) ("[A] person's right to vote is 'individual and personal in nature,'" so "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage" (citations omitted)).

And the Voters 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). *Lujan* establishes two questions that need to be answered: (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.

Voters here are not asserting 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." "[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); *see also*, *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. At Level (**1**), within "citizens" are *eligible* voters; only they can suffer vote harm. At Level (**2**), within eligible voters are *registered* voters; only they have a right to vote that can suffer harm. At Level (**3**), within eligible, registered voters are those who *actually vote*; only they can have a vote deprived or diluted. At Level 3, these Voters now have standing for their Elections-Clause claim. At Level (**4**) are eligible, registered and actual Voters who *intend to vote in-person or by absentee-ballot voting*; only these Voters can suffer vote-dilution and direct-disenfranchisement by the addition of mail balloting. At Level 4, these Voters have standing to make their vote-dilution and direct disenfranchisement claims. At Level (**5**) are *eligible, registered and actual Voters in Stillwater County*— one of only ten non-mail-ballot counties, which together comprising 6% of Montana's eligible, registered voters—who have standing to make their *Bush v. Gore* equal protection claim.[21, 22]

Voters' harms are non-speculative. As a matter of law, (i) mailed ballots pose a greater fraud risk as recognized in *Crawford*, 553 U.S. at 192-97, and (ii) mail ballots in Montana pose fraud and sudden-flood risks. And Legislatures may prophylactically eliminate harms, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976), which the Montana Legislature did by banning mail ballots in general elections

[21] Plaintiffs herein fall into each of the three Levels that grant them standing, Levels 3, 4 and 5.

[22] And, as the District Court correctly held, App.18a-20a, political parties also are 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, 498-99 (2009).

C. Properly integrating the Elections Clause, *Anderson-Burdick* test, and *Purcell* principle resolves this case and abates the flood.

As outlined next, this case presents a unique opportunity to reemphasize the primacy of long-standing Legislative enactments and the role of the *Anderson-Burdick* test and *Purcell* principle in protecting them and to explain that election eve changes in state election laws by state officials, overturning long-standing Legislative enactments, does not benefit from these two doctrines. Doing so will reassert what the Constitution requires and abate the onrushing election law litigation flood.

1. The Elections Clause requires that the "Manner" of an election be prescribed by the "Legislature."

The Elections Clause mandates that "[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.[23] That applies to the November 3 general election, as does the similar Electors Clause, Art. II, § 1, cl. 2, which also entrusts the electors' election to the manner determine by the legislature.[24]

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[23] 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).

[24] The Elections Clause provides a cause of action (asserted under 42 U.S.C. § 1983) because this Court has twice recognized that a candidate's claim under the parallel Electors Clause, Art. II, § 1, cl. 2, is a cognizable issue. *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 72 (2000) (granted certiorari on Electors Clause claim); *Bush v. Gore*, 531 U.S. 98, 103 (2000) (same). In *Bush v. Gore*, three Justices would have reached the Electors Clause issue as "additional grounds." *Id.* at 111(Rehnquist, C.J,, joined by Scalia and Thomas, JJ.) ("A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.").

Underlying reasons for the Elections Clause support assignment by the Clause of the Legislature to determine election procedures is that Legislature has the expertise to balance election access with integrity issues, along with the cost of elections as compared to available resources. The U.S. Constitution thus "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). "[S]tates that have more liberal provisions for absentee voting may well have different political cultures . . . . One size does not fit all." *Id.* There is, of course, no right to vote by mail and mailed ballots pose special fraud risks, so only the legislature has been given the authority design voting procedures because it is equipped to balance election access and integrity issues, including in the mail balloting context. *Id.* at 1130-31. The legislative balancing, taking into account all the factors of access and integrity may be illustrated as follows:

Safe Zone • what is permitted	*Danger Zone* • what is banned

Protect Access ***Legislative Balance*** ↑(safe point) *Protect Integrity*

One factor is vote fraud, which poses two serious problems. First, it violates the right to vote of legitimate voters by diluting their votes. "[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. Second, "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust in government," "confidence in the integrity of our electoral processes is essential top the functioning of our participatory democracy," *Purcell*, 549 U.S. at 1, 4.

As a matter of law, a substantial risk of voter fraud is not speculative. First, 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 Crawford*, 553 U.S. at 192-97 (citing and relying on (inter alia) the Report of "the Commission on Federal Election Reform, 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 ballots require the legislature to balance to limit risk). "As Justice Stevens noted, 'the risk of voter fraud' is 'real.'" *Texas Democratic Party v. Abbott*, 961 F.3d 389, 413 (5th Cir. 2020) (Ho, J., concurring) (quoting *Crawford*, 553 U.S. at 196 (plurality op. of Stevens, J.). According to the bipartisan Carter-Baker Report, mailed ballots are "the largest source of potential voter fraud" and are "likely to increase the risk of fraud and contested elections." *Building Confidence in U.S. Elections* 35, 46 (Sept. 2005), available at bit.ly/3dXH7rU.

Legislatures may also employ prophylactic laws to eliminate potential harms they find to require such protection, *see, e.g.*, *Crawford*, 553 U.S. at 196; *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976), which Montana did by limiting mail ballots to only local elections. Montana's legislative balancing arrived at the following balance as to what election procedures are permitted and not permitted:

Safe Zone	*Danger Zone*
• in-person voting (compliant with Phase 2) • no-excuse-required, absentee-ballot voting	• mail ballots (banned)

Protect Access ***Legislative Balance*** ↑(safe point) *Protect Integrity*

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 imposed a substantial risk of ballot fraud and sudden-ballot-flood harms that the Legislature found unacceptable when they banned mail balloting for general elections.

The Montana Legislative balancing cannot be gainsaid based on what other states do because only *this* state's legislature has authority to balance and to mandate what is needed in *this* state. "[S]tates that have more liberal positions ... may well have different political cultures ..., cultures less hospitable to election fraud." *Griffin*, 385 F.3d at 1131. So "[o]ne size need not fit all." *Id.*

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 acceptable, given the resources it has. 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*, 549 U.S. at 4.

In sum, the primacy of, and deference to, the Legislative enactments is fully justified and enshrined in the Elections Clause. The Constitution mandates respect for legislative balancing, since only legislatures have expertise for it, election-integrity requires it, and straying from protecting can cause harm and a flood of litigation.

2. The *Anderson-Burdick* test and the *Purcell* principle protect long-standing Legislatively adopted state election laws.

Because of the mandate of the Elections Clause giving primacy for legislative enactment of state election laws, this Court has the *Anderson-Burdick* test and the *Purcell* principle *protect* those laws.

Burdick, 504 U.S. 428, is used to evaluate "state election law[s]," *id.* at 434, and is relatively deferential to duly enacted state election laws, as evidenced in its application to upholding voter ID laws in *Crawford*, 553 U.S. 181. However, it is inappropriate to use the *Anderson-Burdick* test state official or state courts displace the legislatures' balancing. Such displacement should be presumed unconstitutional, not deferred to as under *Anderson-Burdick*, and any claimed authority (such as emergency authority) by state officials to act on the legislature's behalf should be rejected if the authority is used to make displace Legislative enactments and create new election law.

The Directive at issue here was not a product of the legislative balancing of access and integrity resulting in the Legislature's adoption of a new election law but the unilateral displacement of the Legislature's choice with the Governor's own balancing of access and integrity. This is contrary to the Elections Clause.[25]

[25] Voters argued below that under a *Burdick* analysis the legislative balancing

Purcell, 549 U.S. 1, was designed to also protect long-standing state election laws, adopted by the Legislature, from being displaced by court orders near an election. But the *Purcell* principle does not protect state official, as here, or state courts from upsetting "long-established expectations that might have unintended consequences," *Lair v. Bullock*, 697 F.3d 1200, 1212-14 (9th Cir. 2012), on the eve of an election. *Purcell* favors maintaining long-established expectations arising from long-standing state election laws to prevent "voter confusion and consequent incentive to remain away from the polls," *Purcell*, 549 U.S. at 4-5, if the long-established expectations are upset on the eve of an election.

Here, the actions of the Governor and the Secretary in imposing mail balloting contrary to the long-standing provisions of Montana election law upsetting long-established expectations on the eve of an election, triggering "voter confusion and consequent incentive to remain away from the polls." As a result, the District Court erroneously used the *Purcell* principle to shield the Governor's Directive from constitutional attack.

A recent Eleventh Circuit opinion in *The New Georgia Project v. Raffensperger*, No. 20-13360, slip op., (11th Cir. 2020),[26] illustrates some of the foregoing in rejecting a lower-court extension of the absentee-ballot deadline. It said "the district court misapplied the *Anderson-Burdick* framework when it enjoined the State defendants'

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should not have been displaced and the Directive fails scrutiny, *see infra* I.E.1. and I.E.2, which the District Court ignored, but a strict test should apply here and court balancing should also not displace legislative balancing.

[26] *See* https://media.ca11.uscourts.gov/opinions/pub/files/202013360.pdf.

enforcement of a *long-standing* Georgia absentee ballot deadline," *id.* at 2 (emphasis added), and the Eleventh Circuit's stay put the "decades-old" law back into force. *Id.* at 10. And as particularly relevant here, where there is no emergency so the right to vote wasn't implicated to trigger the Directive, the Eleventh Circuit decided that the statutory "deadline does not implicate the right to vote at all," because voters had many other options to get their vote counted. *Id.* at 5. It then applied *Purcell* in support of that long-standing statutory deadline. *Id.* at 8-9.

D. The Directive violated the Elections Clause by overturning Legislatively enacted voting procedures.

As discussed, the Elections Clause recognizes the legislature's expertise in balancing access and integrity in adopting state election laws and authorizes the legislature to describe the manner of an election. The Directive violated the Elections Clause by striking the Legislatures prohibition on use of mail balloting in general elections.

1. The Governor is neither the Legislature nor has legislative power.

The Governor is not the legislature and therefore lacks the legislature's authority and expertise to balance access and integrity in adopting state election laws and has no state law lawmaking power to regulate elections. Mont. Const. art. III, § 1 (separation of powers; "No person ... charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others"); art. IV, § 3 (legislature regulates elections, including "absentee voting" and "shall insure the purity of elections and guard against abuses of the electoral process"). No statutory authority can override these constitutional mandates, which

mandate that only the Legislature may make laws governing elections. They both have the effect of prohibiting the Governor from doing so, by "suspending" law or otherwise.

The district court said the Governor had emergency-power authority to displace the legislatively enacted laws with the Directive. App.25a-33a. But the District Court errs. First, there was no emergency. The Governor has some authority to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business," MCA 10-3-104(2)(a), but given no emergency, there is no interference with "necessary action in coping with the *emergency*," *id.* (emphasis added). Given no emergency, "compliance ... would [not] in any way prevent, hinder, or delay necessary action in coping with the *emergency*," MCA 10-3-104(2)(c) (emphasis added). There was no emergency—a prerequisite for emergency power—because voting by absentee ballot is open to *any* qualified voter by application and poses *no* COVID-19 risk; even in-person voting is now being conducted for early voting under safeguards the Governor declared suitable for people to do like activity. Second, even if applicable, the emergency laws only gave the Governor state power to *suspend*, not *make* laws. MCA 10-3-104(2)(a) ("suspend").[27] So at most the Governor had power to suspend the provision barring mail ballots. But the Directive didn't just suspend the mail-ballot ban, it made new law in several ways, but two ex-

[27] This Court has power to "ascertain what" state law requires, *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985), and decide what constitutes lawmaking under the Election Clause, *see, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015), and invoking that is no mere effort to make the state officials comply with state law.

amples suffice: (i) The Directive gives counties discretion to choose mail-ballot plans or not and (ii) it requires ballot availability at prescribed places and times. App. 73a. This was unauthorized lawmaking.

Even assuming *arguendo* that the Governor had the state lawmaking authority he claims under Montana law, that is contrary to the Election Clause's requirement that the Legislature prescribe the election's manner. In *Ariz. State Legislature*, 576 U.S. 787, this Court upheld an Arizona independent redistricting commission because it was deemed part of the "Legislature" for the purpose of the Elections Clause. But here, the Montana Constitution confers authority to administer elections on the Legislature, not the Governor. And no court has ever held that a Legislature may, consistent with the Election Clause, delegate its exclusive lawmaking power to a Governor. If that were not so, the Montana Constitution and Elections Clause would lack meaning.

2. *Burdick* and *Purcell* don't protect the Governor's election-eve change in law but rather condemn it.

Neither *Burdick*, 504 U.S. 428, nor *Purcell*, 549 U.S. 1, protects the Directive.

a. *Burdick* doesn't protect the Directive but rather condemns it.

Since the Directive is not a state election law adopted by the Legislature, *Burdick* does not apply and should not protect it. But the Directive fails even under *Burdick*. First, no emergency or burden on the right to vote existed because any Montana voter can vote by no-excuse-required absentee ballot or by (ongoing) in-person voting under Phase 2 safety guidelines the Governor himself declared as sufficient for the safety of most people in public. *Supra* Facts(C). Absent a burden on

the right to vote, *Burdick* analysis was not even triggered by the Directive. But even applying *Burdick*, the absence of any COVID-19 risk or burden on the right to vote means there was nothing to balance in favor of the Directive, while the election-integrity risks that the legislative balancing found sufficient for banning mail balloting in general elections readily support the state law and doom the Directive. And the Directive makes no attempt at the tailoring required by *Burdick*, imposing an overbroad mail balloting solution instead of tailoring the solution to those who somehow (though it is not explained by the Directive) are at risk from absentee ballot voting or in-person voting under the Governor's Phase 2 restrictions.

b. *Purcell* doesn't protect the Directive but rather condemns it.

The *Purcell* principle is designed to protect long-established Legislatively adopted election laws from being upended on the eve of an election to prevent chaos, harm to election integrity, and discouraging voters from voting. Thus, *Purcell* is not designed to protect state officials that upending state election laws on the eve of an election. And the underlying reasons for *Purcell* condemns, rather than protects the Directive.

A problem occurs when, as here, state officials change state election laws on the eve of an election and then claims the change can't be enjoined by a court under *Purcell*. But given the primacy of the legislative enactments, *Purcell* applies to protect legislative enactments from being upended by court order, not state official who upend state election laws on the eve of an election. As a result, any action by state officials that upsets the long-standing legislative mandates are not protected by

Purcell but its reasoning condemns them.

In sum, the Directive violates the Elections Clause and is doomed under, not saved by, *Burdick* and *Purcell*.

E. The Directive also violates the right to vote in three ways.

In addition to violating Voters' right to vote in an election governed by the Elections Clause, the Directive violates their right to vote by (**1**) creating a substantial risk of vote-dilution disenfranchisement, (**2**) creating a substantial risk of direct disenfranchisement, and (**3**) diminishing the power of voters in non-mail-ballot counties compared to those in other counties under one-person-one-vote doctrine.

1. The Directive creates substantial risk of vote-dilution disenfranchisement.

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*. 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 by allowing what the legislature did *not* allow in its legislative balancing which posed a substantial risk of such disenfranchisement.

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*, 377 U.S. at 554, 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, nondiscriminatory 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 balloting in general elections. 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, no-excuse-required absentee-ballot voting poses no risk of exposure to COVID-19 and in-person voting complies with Phase 2 requirements, so there was no emergency and the Directive was unneeded.

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, nondiscriminatory 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 a no-excuse 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 legislatively adopted election laws, 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 balloting 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. Given this tailoring analyses, Defendants cannot meet their burden to prove the Directive is narrowly tailored to a compelling

state interest. It even fails rational-basis analysis.

2. The Directive creates substantial risk of direct disenfranchisement.

The Directive violates Voters' right to vote because it poses a substantial risk of direct disenfranchisement by lost, tardy and disqualified ballots. The analysis parallels the one just done regarding vote-dilution disenfranchisement. 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 the Legislature has balanced access and integrity issues, including the substantial risk of lost, tardy and rejected mailed ballots when there is the sudden flood of mailed ballots. 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 Montana Legislature already has done the authoritative and expert balancing and banned mail ballots in general elections, which was reasonable, nondiscriminatory, and rationally based on 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 dooms the Directive under *Burdick*, *Salerno*, and *Crawford*. Defendants cannot prove the Directive narrowly tailored to a compelling state interest. It even fails rational-basis review.

3. The Directive violates equal protection under one-person-one-vote doctrine.

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 (while violating the legislature's controlling balancing of access and integrity by creating a substantial risk of ballot fraud and lost or tardy ballots). 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, tardy or rejected mail 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 v. Gore*:

> 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.

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 claims are based on constitutional rights.

II.

Voters will suffer irreparable harm absent an injunction.

Voters have irreparable harm for reasons tracking their claims. 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.*, *Giovani Carandola v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). "[U]pholding constitutional rights surely serves the public interest." *Id.* The Directive is unjustified by COVID-19 concerns because the existing legislative balancing complies with Phase 2. *See* Facts(C). So Montana voters are free to vote by no-excuse-required absentee ballot, and there remains time for them to do so. Those who choose in-person voting may continue to do so in the early voting that is already ongoing under the Governor's own Phase 2 safety guidelines, and the State can conduct in-person voting on election day as is already being planned for in many places. 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.

If the Governor argues against changing the rules of the game on the eve of an election, relying on *RNC*, 140 S. Ct. at 1207, and *Purcell*, 549 U.S. at 5, because of

"voter confusion and consequent incentive to remain away from the polls" that increases "[a]s an election draws closer," *id.*, it is not this lawsuit that has resulted in a "chang[e in] the rules of the game on the eve of an election," but rather the finalization of the county's mail-ballot plans, as initially approved by the Secretary on September 9, under the Governor's Directive, but not final until September 29, at the earliest, when amendments could be proposed and approved. This was just a few days ago. And under these now-finalized mail-ballot plans, counties plan to mail ballots to all registered voters on October 9. It is this "eve of an election" radical change in voting procedures by state officials that has triggered the chaos predicted by this Court.

The Governor seeks to benefit from the resulting chaos triggered by his and other state official's "eve of an election" change in voting procedures, by arguing that, under the balancing of the equities and the public interest, Voters may not seek relief from federal courts to protect the violations of their constitutional rights under the U.S. Constitution. But that errs for at least two reasons.

First, if the Governor argues that any emergency here is the Voter's creation by failing to file sue earlier, voters lacked standing until they had personal injury. *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972) ("The 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("A 'concrete' injury must be 'de facto'; that is, it must actually exist."). Voters sued on September 9, the day the Secretary was required to approve submitted

county election plans, including mail-ballot plans, and the date Voters could argue that they had suffered an injury. And until September 29, when amended plans must be filed, followed by Secretary approval, it could be said mail-ballot harms were "conjectural or hypothetical," *Lujan*, 504 U.S. at 560 ("the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical[.]").

Second, an injunction by the Court would restore Montana's "long-standing" voting procedures adopted by the Legislature, and unlawfully changed at the "eve of an election" by state officials, preventing irreparable harm to the State of Montana and mitigating the chaos that the Governor and Secretary have caused.

Instructive here is *Raffensperger*, No. 20-13360-D, slip op. (Oct. 2, 2020). There the Eleventh Circuit stayed a district-court injunction of a "long-standing Georgia ballot deadline," which put the "decades-old" election law back into force. *Id.* at 2, 10. This prevented Georgia from suffering irreparable harm that results when a State cannot "conduct[] this year's elections pursuant to a statute enacted by the Legislature," *id.* at 9 (citation omitted), since U.S. Const. art 1, § 4, cl. 1, gives the Legislature "state control over the election process for state offices," which "is necessarily structured to maintain the integrity of the democratic system." Slip op. at 2.

Furthermore, the Eleven Circuit found that staying the "alter[ation] of election rules on the eve of an election" will "prevent voter confusion" and serve other "important" interest—including "conducting an efficient election, maintaining order,

quickly certifying election results, and preventing voter fraud." As a result, a "stay preserves the status quo and promotes confidence in our electoral system–assuring voters that all will play by the same, legislatively enacted rules." *Id.* at 10.

The same applies here. No-excuse-required absentee ballots pose no COVID-19 risks and may be requested until noon the day before the election, MCA 13-13-211(1), and ongoing in-person voting is accomplished safely under the Governor's own Phase 2 reopening requirements, while the Governor's mail-ballot scheme poses greater fraud and disenfranchisement risks that result in irreparable harm of Voters. The balance tilts sharply in Voters' favor.

Conclusion

Because "a State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily "should not be subject to second-guessing by [a Governor who] lacks the background, competence, and expertise to assess public health," *Andino v. Middleton*, No. 20A55, 592 U.S. ___, slip op. at 2 (Oct. 5, 2020) (Kavanaugh, J., concurring) (citation omitted), the Court should issue the requested writ of injunction.

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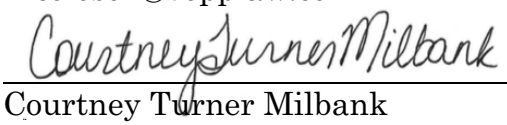

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