

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0172

MONTANA DEMOCRATIC PARTY and MITCH BOHN, WESTERN NATIVE
VOICE et al., MONTANA YOUTH ACTION, et al.,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,

Defendant and Appellant.

APPELLANT'S RULE 22(2) MOTION TO STAY

On Appeal from the Montana Thirteenth Judicial District Yellowstone County
Cause No. DV-21-0451
Honorable Judge Michael G. Moses

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Defendant Christi Jacobsen, as Montana Secretary of State, moves this Court to stay the District Court’s Order Granting Plaintiffs’ Motions For Preliminary Injunctions dated April 6, 2022 (the “Order”). Although the Order enjoins four separate legislative enactments—SB 169, HB 176, HB 530, and HB 506—Defendant only is appealing the Order as it applies to SB 169, which made minor changes to voter ID requirements, and HB 176, which changed the late registration deadline by one day. App. 105. The Secretary asks this Court to stay the Order pending appeal because it upends nearly a year of voter education, election administrator and poll volunteer training, and administrative rules that successfully have been applied in three elections over the past year.

Plaintiffs filed three now-consolidated cases challenging these statutes. These lawsuits feature two tactics that have become commonplace by organizations and special interest groups in election law litigation: 1) plaintiffs delay preliminary injunction motions until just before an election to force a decision under a truncated timeline and avoid appeal ahead of the election; and 2) they try to support broad allegations of voter harm with academic compilations and abstract political theory, rather than direct evidence of actual voter harms. This case is a good example of both.

When faced with similar facts, this Court and the Ninth Circuit consistently have stayed orders enjoining election laws pending appeal. *See* Order, *Stapleton v. Thirteenth Judicial District Court*, OP 20-0293 (May 27, 2020) (“Stapleton Order”); *see also Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1084 (9th Cir. 2020) (concluding the “public interest is well served by preserving Arizona’s existing election laws, rather than by sending the State scrambling” to conform with a preliminary injunction that has been appealed); *see also Mi Familia Vota v. Hobbs*, 977 F.3d 948, 952–54 (9th Cir. 2020) (same). Such judicial restraint is imperative when, as here, elections are scheduled to occur within weeks, i.e., on May 3, 2022, and local election officials already published notices on when registration closes. App., 80, 98-99 (James Decls.); *Mi Familia Vota*, 977 F.3d at 953 (“‘[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion,’ and the risk increases ‘[a]s an election draws closer.’”) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, (2006)).

BACKGROUND AND PROCEDURAL HISTORY

While the Legislature enacted several election laws last session, the two at issue here are narrow in scope. HB 176 modified § 13–2–304, MCA, and ended Montana’s recent experiment with election day registration (“EDR”). App. 392-98. When the Montana Constitution was adopted in 1972, voter registration ended

at least 30 days prior to Election Day. Rev. Code Mont. §§ 23-3016, 23-3724 (1971). Conversely, HB 176 ends voter registration at noon on the day before Election Day. App. 392-98. The Legislature adopted HB 176 to ease the administrative burden EDR imposes on election officials, shorten lines for in-person voters, bolster public confidence in elections, and speed up vote tabulation. App. 23.

SB 169 made minor changes to Montana's voter identification laws. App. 399-407. SB 169 establishes seven types of acceptable primary identification, i.e., government-issued identification that, standing alone, is sufficient to qualify a voter. *Id.* For example, under SB 169, tribal photo identification cards are acceptable stand-alone forms of identification. *Id.* SB 169 also establishes various other types of secondary identification, i.e., non-governmental photo identification (including student identification) that may be used in conjunction with a document showing the voter's name and address to qualify them to vote. *Id.* Plaintiffs' primary complaint is that student ID is now secondary identification.

Implementing these laws required a great deal of coordination, voter education, and administrative effort.

- Airing public service announcements approximately 14,240 times on broadcast television and 18,102 times on radio educating the public about the laws' requirements;
- Sending a mailing to every registered voter in the state noting the new registration deadline;

- Issuing Election Judge Handbooks, Polling Place Quick Guides, and other training materials to all election officials in the state, which are rendered inaccurate if the District Court’s Order is not stayed;
- Overhauling administrative rules governing elections to reflect the new laws. Because prior rules were repealed, and the new laws are woven throughout the new rules, the Order effectively guts the guidance election officials rely upon to administer elections; and
- Extensive election administrator and election staff training on the new laws.¹

See App. 71-95 (1st James Decl.), 97-99 (2nd James Decl.), 379-81 (2nd Tucek Decl.).

And undersigned counsel, after learning Plaintiffs intended to significantly delay seeking a preliminary injunction, took the unusual step of requesting that Plaintiffs file earlier to avoid all the consequences that are now patent:

The State has a strong preference that plaintiffs file their preliminary injunction motion earlier. Scheduling a hearing on a motion for preliminary injunction six months from now, and a year after the case is filed, is highly unusual. Typically in Montana a preliminary injunction motion is filed at the beginning of the case. I still don’t understand the delay in filing the motion, **and the longer plaintiffs delay in filing it, the more difficult and prejudicial it is to the State. There is obviously a lot of work that goes into implementing the laws, which is already well underway.**

App. 386, 11/3/2021 email from Dale Schowengerdt (emphasis added).

Plaintiffs ignored the request. Although they initiated proceedings challenging those laws on April 19, 2021, Plaintiffs did not seek injunctive relief

¹ These highlight only some of the work implementing the laws, as established by the attached affidavits.

until January 12, 2022, i.e., 268 days later. Plaintiffs obtained injunctive relief by claiming that conducting elections in 2022 pursuant to HB 176 and SB 169 would subject Montanans to “irreparable harm.” But Plaintiffs did not object when more than 337,000 Montanans successfully voted in 2021 elections that complied with these laws. App. 80 (1st James Decl.). Notably, Plaintiffs have not identified any Montanans who were unable to vote solely because of HB 176 or SB 169.

The reason Plaintiffs cited to justify their delay highlights the second tactic noted above. They claimed to need State voter files (which are publicly available documents some Plaintiffs already possessed) so their experts could extrapolate anticipated harm to voters. Plaintiff Western Native Voice et al.’s Reply Memorandum in Support of Motion for Preliminary Injunction, Dkt. 98 at 4. Plaintiffs needed expert reports here because they could produce no actual voters to support their improbable claims of widespread harm. *See id.*

The District Court granted Plaintiffs’ Motions for Preliminary Injunction on April 6, 2022, i.e., 28 days before Montana’s elections on May 3, 2022. In fact, the District Court granted additional relief not requested by Plaintiffs and, when alerted to this fact, subsequently modified the scope of its Order. The Order adopted the factual premise of Plaintiffs’ complaints in full. Boiled down, the Order turned on the novel—and wholly unsupported—legal conclusion that **any** law that

“implicates the fundamental right to vote [must] be subjected to strict scrutiny.”

Order, ¶ 40. If correct, every Montana election law—including laws Plaintiffs ostensibly support—must pass strict scrutiny to survive constitutional review.

Defendant asked the District Court to suspend its preliminary injunction of HB 176 and SB 169 pending immediate appeal to this Court, and provided detailed factual evidence support for her request to stay the preliminary injunction for the same reasons this Court previously has stayed orders enjoining election laws in the past. App. 104-117, 170-187. In particular, Defendant highlighted how the Order forced those who oversee Montana elections—who already have been trained on HB 176 and SB 169, and many of whom have never overseen an election before—to conduct the rapidly-approaching elections based on a different set of laws, for which no guidance appears in the Election Judge Handbook or Administrative Rules of Montana. App. 86-88, 91-93 (1st James Decl.), 110-12, 181-85 (citing App. 379-81 (2nd Tucek Decl.)). Although the District Court acknowledged at least some of Defendant’s concerns were valid, the District Court denied the motion. App. 9.

ARGUMENT

Staying the Order as applied to HB 176 and SB 169 is consistent with Montana and federal law. In *Driscoll v. Stapleton*, the Court granted a stay because “the injunction disrupts the status quo, is likely to cause voter confusion, and

interferes with the ability of the State to administer an orderly general election process already under way.” Stapleton Order, at 2-3.

Plaintiffs asserted such analysis was facially deficient, and argued Defendant must instead satisfy the four-factor test used by federal courts. This Court has not adopted that test, but even if it did, Defendant meets it.

I. Defendant’s Appeal Raises Serious Legal Questions.

Defendant easily satisfies the first prong of the federal test, which requires the party seeking a stay to show “serious legal questions are raised.” *Leiva-Perez*, 640 F.3d at 967 (citations omitted). The District Court agreed Defendant met that burden. *See* App. 8 (“The Court agrees that at issue are serious legal questions”). Instead of ending the analysis, the District Court justified denying a stay based on its ultimate legal conclusion that HB 176 and SB 169 are not constitutional. *Id.* But Defendant was not required to convince the District Court it is “likely to be reversed on appeal” to obtain a stay. *See Strobel v. Moran Stanley Dean Witter*, No. 04CV1069BEN, 2007 WL 1238709, *1 (S.D. Cal. Apr. 24, 2007). SB 169’s voter ID requirements are not unique and should easily pass constitutional muster. The United States Supreme Court had no trouble concluding just that in *Crawford v. Marion County Election Board*, 553 U.S. 181, 191-97 (2008) (concluding that “gathering the required documents, and posing for a photograph surely does not

qualify as a substantial burden on the right to vote” and that requiring government-issued ID prevents fraud, promotes confidence in elections, and modernizes election procedures). The bipartisan Carter-Baker Commission recommended government-issued photo IDs to vote for those reasons. *Id.* at 194.

HB 176 is even more clear cut because the Montana Constitution explicitly grants the Legislature discretion on whether to enact election day registration. *See* Mont. Const. art. IV, § 3. The delegates made it clear they did not want to “constitutionalize” election day registration, and instead explicitly sought to provide flexibility to the Legislature to enact and/or repeal EDR. Montana Constitutional Convention, Verb. Transc., Feb. 17, 1972, Vol III, pp. 402, 450.

II. Defendant Will Be Injured Absent A Stay.

Defendant also satisfies the second prong, which requires showing the State’s interests will be harmed absent a stay. *Leiva-Perez*, 640 F.3d at 966 (citations omitted). An order enjoining a duly-enacted statute satisfies this test. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (“a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined”). That is especially so when a preliminary injunction issues on the eve of an election. Stapleton Order, at 2-3. The injuries the State—and all Montanans—would experience absent a stay include: (i) voiding the significant time and

resources implementing these laws and educating election officials and voters; (ii) forcing election officials to conduct rapidly-approaching elections without sufficient training or other resources; and (iii) voters' resulting confusion and decrease in confidence in Montana elections.

III. Plaintiffs Will Not Be Injured By A Stay.

If this Court stays the Order, Montana voters would participate in Montana's 2022 elections under the same election laws that governed Montana's 2021 elections, without issue. App. 80. Plaintiffs' delay in seeking a preliminary injunction undermines their claims of irreparable injury. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). And Plaintiffs' failure to prove HB 176 and SB 169 prevented Montanans from voting in 2021 elections confirms the harms alleged are wholly speculative. *See Nat'l Urb. League v. Ross*, 977 F.3d 770, 781 (9th Cir. 2020).

IV. The Public Interest Favors A Stay.

The public's interest in preserving existing election law, particularly in the face of impending elections, is beyond dispute. *Arizona Democratic Party*, 976 F.3d at 1086–86 (“the public interest is well served by preserving Arizona's existing election laws” pending appeal); *see also Lair v. Bullock*, 697 F.3d 1200, 1214–16 (9th Cir. 2012) (orders enjoining election laws should be stayed pending appeal to avoid “throw[ing] a previously stable system into chaos”). The Ninth Circuit's

reasoning in *Mi Familia Vota* particularly are instructive. 977 F.3d at 953-54 (noting the “administrative burdens” imposed on the State by the injunction were “significant,” including that the injunction “suddenly forced the County Recorders in local election offices—some with limited staffs of only two or three people in rural counties,” to oversee elections pursuant to different election laws); *see also* App. 379-81 (2nd Tucek Decl.).

Altering election procedures on the eve of an election fundamentally impacts voters’ perception of Montana’s election system. Regardless of whether an individual supports or opposes either the revisions to the law or their enjoinder, both sides are necessarily left with the impression that the rules can change even after the game has started. And while lawyers argue over the details, Montana voters head to the polls wondering what information they received over the last year from the State’s election officials is accurate. This result is not inevitable and is a direct consequence of Plaintiffs’ delay in seeking this injunction.

CONCLUSION

Secretary Jacobsen requests this Court stay the District Court’s Order pending appeal.

Respectfully submitted April 27, 2022.

/s/ Dale Schowengerdt
Counsel for Defendant/Appellant Jacobsen

CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and is within the 10 page limit under Rule of Appellate Procedure 22.

/s/Dale Schowengerdt

CERTIFICATE OF SERVICE

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