

# Appendix

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

OCT 6 2020

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

JOE LAMM; et al.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

No. 20-35847

D.C. No. 6:20-cv-00067-DLC  
District of Montana,  
Helena

ORDER

Before: W. FLETCHER, BERZON, and BYBEE, Circuit Judges.

Appellants' emergency motion for injunctive relief pending appeal (Docket Entry No. 3) is denied. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, (2008).

The briefing schedule established previously remains in effect.

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;<sup>1</sup> 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.

<sup>1</sup> 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.<sup>2</sup>

## **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.)

<sup>2</sup> 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.)<sup>3</sup> 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)

<sup>3</sup> 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.<sup>4</sup>

## 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.

<sup>4</sup> 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.<sup>5</sup> 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

<sup>5</sup> 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.<sup>6</sup> 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

<sup>6</sup> 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.)<sup>7</sup> The complaint further alleges that the Directive “enhances the odds of voters in counties adopting” it of “being able to

<sup>7</sup> 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.

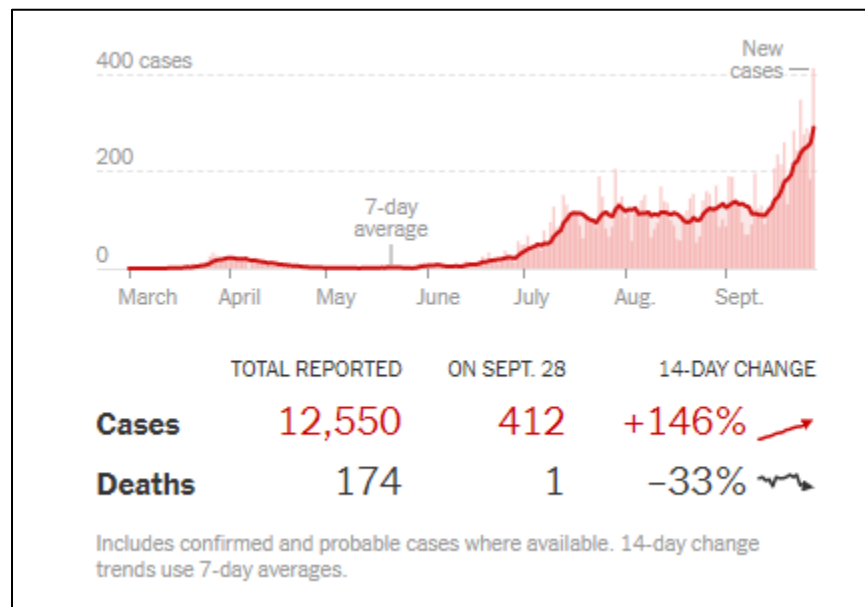
The evidence in the record demonstrates that issuance of the injunctive relief sought by Plaintiffs would have profound, and most likely catastrophic consequences on the administration of Montana’s general election. Election officials have extensively outlined the nearly insurmountable challenges which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

A handwritten signature in blue ink, reading "Dana L. Christensen". The signature is written in a cursive style with a large initial "D".

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Dana L. Christensen, District Judge  
United States District Court

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)

JUDGMENT

DSCC, DCCC, and MONTANA  
DEMOCRATIC PARTY,

Intervenor-  
Defendants.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came before the Court for bench trial, hearing, or determination on the record. A decision has been rendered.

IT IS ORDERED AND ADJUDGED That Judgment is entered in favor of the Defendants and against the Plaintiffs.

Dated this 30th day of September 2020.

TYLER P. GILMAN, CLERK  
By: /s/ Heidi Gauthier  
Heidi Gauthier, Deputy Clerk

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.

Before the Court is Member-Plaintiffs' motion for an expedited injunction pending appeal. (Doc. 77.) The Court has already concluded Member-Plaintiffs' claims have no merit. (Doc. 112 at 39.) As such, injunctive relief is not appropriate.

Accordingly, IT IS ORDERED that Member-Plaintiffs' request for an injunction pending appeal (Doc. 77) is DENIED.

DATED this 30th day of September, 2020.



Dana L. Christensen, District Judge  
United States District Court

## **U.S. Constitution**

### **U.S. Constitution Article I, § 4, clause 1**

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.

### **First Amendment**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### **Fourteenth Amendment**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein

shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

### **Montana Constitution**

#### **Mont. Const. art. III, § 1 – Separation of powers**

The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.



### **Mont. Const. art. IV, § 3 – Elections**

The legislature shall provide by law the requirements for residence, registration, absentee voting, and administration of elections. It may provide for a system of poll booth registration, and shall insure the purity of elections and guard against abuses of the electoral process.

### **Montana Statutes Annotated**

#### **MCA 10-3-104 – General authority of governor**

- (1) The governor is responsible for carrying out parts 1 through 4 of this chapter.
- (2) In addition to any other powers conferred upon the governor by law, the governor may:
  - (a) 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;
  - (b) direct and compel the evacuation of all or part of the population from an emergency or disaster area within the state if the governor considers this action necessary for the preservation of life or other disaster mitigation, response, or recovery;
  - (c) 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.
- (3) Under this section, the governor may issue executive orders, proclamations, and regulations and amend and rescind them. All executive orders or proclamations declaring or terminating a state of emergency or disaster must indicate the nature of the emergency or disaster, the area threatened, and the conditions that have brought about the declaration or that make possible termination of the state of emergency or disaster.

**MCA 13-13-201 – Voting by absentee ballot--procedures**

- (1) A legally registered elector or provisionally registered elector is entitled to vote by absentee ballot as provided for in this part.
- (2) The elector may vote absentee by:
  - (a) marking the ballot in the manner specified;
  - (b) placing the marked ballot in the secrecy envelope, free of any identifying marks;
  - (c) placing the secrecy envelope containing one ballot for each election being held in the signature envelope;
  - (d) executing the affirmation printed on the signature envelope; and
  - (e) returning the signature envelope with all appropriate enclosures by regular mail, postage paid, or by delivering it to:
    - (i) the election office;
    - (ii) a polling place within the elector's county;
    - (iii) pursuant to 13-13-229, the absentee election board or an authorized election official; or
    - (iv) in a mail ballot election held pursuant to Title 13, chapter 19, a designated place of deposit within the elector's county.
- (3) Except as provided in 13-21-206 and 13-21-226, in order for the ballot to be counted, each elector shall return it in a manner that ensures the ballot is received prior to 8 p.m. on election day.
- (4) A provisionally registered elector may also enclose in the outer signature envelope a copy of the elector's photo identification showing the elector's name. The photo identification may be but is not limited to a valid driver's license, a school district or postsecondary education

photo identification, or a tribal photo identification. If the provisionally registered elector does not enclose a photo identification, the elector may enclose a copy of a current utility bill, bank statement, paycheck, notice of confirmation of voter registration issued pursuant to 13-2-207, government check, or other government document that shows the elector's name and current address.

**MCA 13-13-205 – When ballots to be available for absentee voting**

- (1) Except as provided in subsection (2), the election administrator shall ensure that ballots for a polling place election are available as follows:
  - (a) for an election conducted on a primary or general election day:
    - (i) 30 days prior to election day for absentee voting in person;
    - (ii) 25 days prior to the election for mailing ballots to absentee voters; and
  - (b) 20 days prior to election day for a special purpose district or school district election, except that ballots for a conservation district election held on a primary or general election day must be available as provided in subsection (1)(a).
- (2) A federal election ballot requested by an absent uniformed services or overseas elector pursuant to Title 13, chapter 21, must be sent to the elector as soon as the ballot is printed but not later than 45 days in advance of the election.

**MCA 13-13-211 – Time period for application**

- (1) Except as provided in 13-13-222, 13-21-223, and subsection (2) of this section, an application for an absentee ballot must be made before noon on the day before the election.
- (2) A qualified elector who is prevented from voting at the polls as a result of illness or health emergency occurring between 5 p.m. of the Friday preceding the election and before the

close of polls on election day may request to vote by absentee ballot as provided in 13-13-212(2).

- (3) An absentee ballot cast pursuant to subsection (2) must be received prior to 8 p.m. on election day pursuant to 13-13-201.

**MCA 13-13-212 – Application for absentee ballot--special provisions--absentee ballot list for subsequent elections**

- (1) (a) Except as provided in subsection (1)(b), an elector may apply for an absentee ballot by using a standard application form provided by rule by the secretary of state pursuant to 13-1-210 or by making a written request, which must include the applicant's birth date and must be signed by the applicant. The request must be submitted to the election administrator of the applicant's county of residence within the time period specified in 13-13-211.
- (b) A person who holds a power of attorney from a uniformed-service voter may apply for an absentee ballot for that election on behalf of the uniformed-service voter. The applicant shall provide a copy of the power of attorney authorizing the request for an absentee ballot along with the application.
- (2) (a) If an elector requests an absentee ballot because of a sudden illness or health emergency, the application for an absentee ballot may be made by written request signed by the elector at the time that the ballot is delivered in person by the absentee election board or by an authorized election official as provided in 13-13-225.
- (b) The elector may request by telephone, facsimile transmission, or other means to have a ballot and application personally delivered by the absentee election board or by an authorized election official at the elector's place of confinement, hospitalization, or residence within the county.

- (c) A request under subsection (2)(a) must be received by the election administrator within the time period specified in 13-13-211(2).
- (3) An elector may at any time request to be mailed an absentee ballot for each subsequent election in which the elector is eligible to vote as long as the elector remains qualified to vote and resides at the address provided in the initial application. The request may be made when the individual applies for voter registration using the standard application form provided for in 13-1-210.
- (4) (a) An elector who has requested to be on the absentee ballot list and who has not filed a change of address with the U.S. postal service must continue to receive an absentee ballot for each subsequent election.
- (b) (i) The election administrator shall biennially mail a forwardable address confirmation form to each elector who is listed in the national change of address system of the U.S. postal service as having changed the elector's address.
- (ii) The address confirmation form must request the elector's driver's license number or the last four digits of the elector's social security number. The address confirmation form must include an e-mail address for the election administrator that can be used by the elector to confirm that the elector wishes to continue to receive an absentee ballot and to provide the requested information. The address confirmation form must be mailed in January of every even-numbered year. The address confirmation form is for elections to be held between February 1 following the mailing through January of the next even-numbered year.

- (iii) An election administrator may provide a website on which the elector can provide the required information to confirm that the elector wishes to remain on the absentee ballot list.
- (iv) If the elector is providing confirmation using the address confirmation form, the elector shall sign the form, indicate the address to which the absentee ballot should be sent, provide the elector's driver's license number or the last four digits of the elector's social security number, and return the form to the election administrator.
- (v) The elector may provide the required information to the election administrator using:
  - (A) the e-mail address provided on the form; or
  - (B) a website established by the election administrator.
- (vi) The elector does not need to provide a signature when using either option provided in subsection (4)(b)(v) to confirm that the elector wishes to remain on the absentee ballot list.
- (vii) If the form is not completed and returned or if the elector does not respond using the options provided in subsection (4)(b)(v), the election administrator shall remove the elector from the absentee ballot list.
- (c) An elector may request to be removed from the absentee ballot list for subsequent elections by notifying the election administrator in writing.
- (d) An elector who has been or who requests to be removed from the absentee ballot list may subsequently request to be mailed an absentee ballot for each subsequent election.
- (5) In a mail ballot election, ballots must be sent under mail ballot procedures rather than under the absentee ballot procedures set forth in this section.

**MCA 13-13-213 – Transmission of application to election administrator--delivery of ballot**

- (1) All absentee ballot application forms must be addressed to the appropriate county election office.
- (2) Except as provided in subsection (4), the elector may mail the signed application directly to the election administrator or deliver the application in person to the election administrator.  
An agent designated pursuant to 13-1-116 or a third party may collect the elector's application and forward it to the election administrator.
- (3) (a) The election administrator shall compare the signature on the application with the applicant's signature on the registration form or the agent's signature on the agent designation form. If convinced that the individual making the application is the same as the one whose name appears on the registration form or the agent designation form, the election administrator shall deliver the ballot to the elector in person or as otherwise provided in 13-13-214, subject to 13-13-205.  
  
(b) If no signature is provided or the election administrator is not convinced that the individual signing the application is the same person whose name appears on the registration form or agent designation form, the election administrator shall notify the elector as provided in 13-13-245.
- (4) In lieu of the requirement provided in subsection (2), an elector who requests an absentee ballot pursuant to 13-13-212(2) may return the application to the absentee election board or an authorized election official. Upon receipt of the application, the absentee election board or authorized election official shall examine the signatures on the application and a copy of the voting registration form or agent designation form to be provided by the election administrator. If the absentee election board or an authorized election official believes that

the applicant is the same person as the one whose name appears on the registration form or agent designation form, the absentee election board or authorized election official shall provide a ballot to the elector when the ballot is available pursuant to 13-13-205.

**MCA 13-13-214 – Mailing absentee ballot to elector–delivery to person other than elector**

- (1) (a) Except as provided in 13-13-213 and in subsection (1)(c) of this section, the election administrator shall mail, postage prepaid, to each legally registered elector and provisionally registered elector from whom the election administrator has received a valid absentee ballot application under 13-13-211 and 13-13-212 whatever official ballots are necessary in a manner that conforms to postal regulations to require the return rather than forwarding of ballots.
- (b) The election administrator shall mail the ballots in a manner that conforms to the deadlines established for ballot availability in 13-13-205.
- (c) The election administrator may deliver a ballot in person to an individual other than the elector if:
  - (i) the elector has designated the individual, either by a signed letter or by making the designation on the application form in a manner prescribed by the secretary of state or pursuant to 13-1-116;
  - (ii) the individual taking delivery of the ballot on behalf of the elector verifies, by signature, receipt of the ballot;
  - (iii) the election administrator believes that the individual receiving the ballot is the designated person; and
  - (iv) the designated person has not previously picked up ballots for four other electors.
- (2) The election administrator shall enclose with the ballots:



- (a) a secrecy envelope, free of any marks that would identify the voter; and
  - (b) a signature envelope for the return of the ballot. The signature envelope must be self-addressed by the election administrator and an affirmation in the form prescribed by the secretary of state must be printed on the back of the signature envelope.
- (3) The election administrator shall ensure that the ballots provided to an absentee elector are marked as provided in 13-13-116 and shall remove the stubs from the ballots, keeping the stubs in numerical order with the application for absentee ballots, if applicable, or in a precinct envelope or container for that purpose.
- (4) Instructions for voting must be enclosed with the ballots. Instructions for primary elections must include disposal instructions for unvoted ballots. The instructions must include information concerning the type or types of writing instruments that may be used to mark the absentee ballot. The instructions must include information regarding use of the secrecy envelope and use of the signature envelope. The election administrator shall include a voter information pamphlet with the instructions if:
- (a) a statewide ballot issue appears on the ballot mailed to the elector; and
  - (b) the elector requests a voter information pamphlet.

**MCA 13-13-245 – Notice to elector--opportunity to resolve questions**

- (1) As soon as possible after receipt of an elector's absentee ballot application or signature envelope, the election administrator shall give notice to the elector by the most expedient method available if the election administrator determines that:
- (a) the elector's ballot is to be handled as a provisional ballot;
  - (b) the validity of the ballot is in question; or

- (c) the election administrator has not received or is unable to verify the elector's or agent's signature under 13-13-213 or 13-13-241.
- (2) The election administrator shall inform the elector that, prior to 8 p.m. on election day, the elector may:
  - (a) by mail, facsimile, electronic means, or in person, resolve the issue that resulted in the ballot being handled as a provisional ballot, confirm the validity of the ballot, or verify the elector's or agent's signature or provide a signature, after proof of identification, by affirming that the signature is in fact the elector's, by completing a new registration form containing the elector's current signature, or by providing a new agent designation form; or
  - (b) if necessary, request and receive a replacement ballot pursuant to 13-13-204.
- (3) The ballot of an elector who fails to provide information pursuant to subsection (2) must be handled as a provisional ballot pursuant to 13-15-107.
- (4) (a) If a ballot is returned as undeliverable, the election administrator shall investigate the reason for the return.
  - (b) An elector must be provided with:
    - (i) the elector's undeliverable ballot upon notification by the elector of the elector's correct mailing address; or
    - (ii) a replacement ballot if a request has been made pursuant to 13-13-204.

**MCA 13-19-101 – Statement of purpose**

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.

**MCA 13-19-104 – Mail ballot elections not mandatory--when authorized--when prohibited--when county election administrator conducts**

- (1) Conducting elections by mail ballot is only one option available to local officials, and this chapter does not mandate that the procedure be used.
- (2) Except as provided in subsection (3), any election may be conducted by mail ballot.
- (3) The following elections may not be conducted by mail ballot:
  - (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.
- (4) (a) Except as provided in subsection (4)(b), if more than one mail ballot election is being conducted in the political subdivision on the same day, the county election administrator shall conduct the elections.
  - (b) The requirement that a county election administrator shall conduct more than one mail ballot election on the same day does not apply to a mail ballot school bond election conducted by the trustees of any two or more school districts that have unified pursuant to 20-6-312 or that have created a joint board of trustees pursuant to 20-3-361.

**MCA 13-19-105 – Role of secretary of state**

In addition to other powers and duties conveyed by law, the secretary of state, with advice from election administrators, shall:

- (1) prescribe the form of materials to be used in the conduct of mail ballot elections;
- (2) review written plans for the conduct of mail ballot elections as provided in 13-19-205; and
- (3) adopt rules consistent with this chapter to:
  - (a) establish and maintain uniformity in the conduct of mail ballot elections; and
  - (b) establish procedures for the conduct of mail ballot elections that, when implemented by the election administrator:
    - (i) prevent fraud;
    - (ii) ensure the accurate handling and canvassing of mail ballots; and
    - (iii) ensure that the secrecy of voted ballots is maintained.

**MCA 13-19-106 – General requirements for mail ballot election**

A mail ballot election must be conducted substantially as follows:

- (1) Subject to 13-12-202, official mail ballots must be prepared and all other initial procedures followed as provided by law, except that mail ballots must be paper ballots and are not required to have stubs.
- (2) An official ballot must be mailed to every qualified elector of the political subdivision conducting the election.
- (3) Each signature envelope must contain a form that is the same as the form for absentee ballot signature envelopes and that is prescribed by the secretary of state for the elector to verify the accuracy of the elector's address or notify the election administrator of the elector's correct mailing address and to return the corrected address with the voted ballot in the manner provided by 13-19-306.

- (4) The elector shall mark the ballot and place it in a secrecy envelope.
- (5) (a) The elector shall then place the secrecy envelope containing the elector's ballot in a signature envelope and mail it or deliver it in person to a place of deposit designated by the election administrator.  
  
(b) Except as provided in 13-21-206 and 13-21-226, the voted ballot must be received before 8 p.m. on election day.
- (6) Election officials shall first qualify the voted ballot by examining the signature envelope to determine whether it is submitted by a qualified elector who has not previously voted in the election.
- (7) If the voted ballot qualifies and is otherwise valid, officials shall then open the signature envelope and remove the secrecy envelope, which must be deposited unopened in an official ballot box pursuant to the timeline specified in 13-13-241(7).
- (8) Except as provided in 13-19-312, voted ballots must be counted and canvassed as provided in Title 13, chapter 15.

#### **MCA 13-19-201 – How election initiated**

A proposal to conduct an election under this chapter may be initiated by either the election administrator or the appropriate governing body as provided in 13-19-202 through 13-19-204.

#### **MCA 13-19-202 – Initiation by governing body**

- (1) A political subdivision may, by resolution of the governing body addressed to the election administrator, request that a particular election be conducted under the provisions of this chapter.

- (2) No later than 70 days before election day, the governing body shall transmit its request to the election administrator, who shall determine whether it is economically and administratively feasible to conduct the requested election by mail ballot.
- (3) Except as provided in 13-19-204, the decision to conduct an election under the provisions of this chapter is within the sole discretion of the election administrator.
- (4) Within 5 days after receiving a request, the election administrator shall respond in writing, stating that the request is either granted or denied for reasons specified. If granted, the election administrator shall prepare a plan as provided in 13-19-205.

**MCA 13-19-205 – Written plan for conduct of election--amendments--approval procedures**

- (1) The election administrator shall prepare a written plan for the conduct of each election to be conducted by mail and shall submit the plan to the secretary of state in a manner that ensures that it is received at least 60 days prior to the date set for the election. There must be a separate plan for each type of election held even if held on the same day.
- (2) The written plan must include:
  - (a) a timetable for the election; and
  - (b) sample written instructions that will be sent to the electors. The instructions must include but are not limited to:
    - (i) information on the estimated amount of postage required to return the ballot;
    - (ii) (A) the location of the places of deposit and the days and times when ballots may be returned to the places of deposit, if the information is available; or
    - (B) if the information on location and hours of places of deposit is not available, a section that will allow the information to be added before the instructions are mailed to electors; and

- (iii) any applicable instructions specified under 13-13-214(4).
- (3) The plan may be amended by the election administrator at any time prior to the 35th day before election day by notifying the secretary of state in writing of any changes.
- (4) Within 5 days of receiving the plan and as soon as possible after receiving any amendments, the secretary of state shall approve, disapprove, or recommend changes to the plan or amendments.
- (5) When the written plan and any amendments have been approved, the election administrator shall proceed to conduct the election according to the approved plan unless the election is canceled for any reason provided by law.

**MCA 13-19-206 – Distributing materials to electors--procedure**

For each election conducted under this chapter, the election administrator shall:

- (1) mail a single packet to every qualified elector of the political subdivision conducting the election;
- (2) ensure that each packet contains only one each of the following:
  - (a) an official ballot for each type of election being held on the specified election day;
  - (b) a secrecy envelope;
  - (c) a signature envelope; and
  - (d) complete written instructions, as approved by the secretary of state pursuant to 13-19-205, for mail ballot voting procedures;
- (3) ensure that each packet is:
  - (a) addressed to a single individual elector at the most current address available from the official registration records; and

- (b) deposited in the United States mail with sufficient postage for it to be delivered to the elector's address; and
- (4) mail the packet in a manner that conforms to postal regulations to require the return, not forwarding, of undelivered packets.

**MCA 13-19-306 – Returning marked ballots--when--where**

- (1) After complying with 13-19-301, an elector or the elector's agent or designee may return the elector's ballot on or before election day by either:
  - (a) depositing the signature envelope in the United States mail, with sufficient postage affixed; or
  - (b) returning it to any place of deposit designated by the election administrator pursuant to 13-19-307.
- (2) Except as provided in 13-21-206 and 13-21-226, in order for the ballot to be counted, each elector shall return it in a manner that ensures it is received prior to 8 p.m. on election day.

**MCA 13-19-307 – Places of deposit**

- (1) (a) The election administrator shall designate the election administrator's office and may designate one or more places in the political subdivision in which the election is being conducted as places of deposit where ballots may be returned in person by the elector or the elector's agent or designee.
  - (b) If the election administrator's office is not accessible pursuant to 13-3-205, the election administrator shall designate at least one accessible place of deposit.
- (2) Prior to election day, ballots may be returned to any designated place of deposit during the days and times set by the election administrator and within the regular business hours of the location.



- (3) On election day, each location designated as a place of deposit must be open as provided in 13-1-106, and ballots may be returned during those hours.
- (4) The election administrator may designate certain locations as election day places of deposit, and any designated location functions as a place of deposit only on election day.
- (5) Each place of deposit must be staffed by at least two election officials who, except for election judges serving in elections under Title 20, chapter 20, are selected in the same manner as provided for the selection of election judges in 13-4-102.
- (6) The election administrator shall provide each designated place of deposit with an official ballot transport box secured as provided by law.

### **Federal Statutes**

#### **42 U.S.C. § 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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.

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.

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.<sup>1</sup>
- 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.

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<sup>1</sup> 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.

October 6, 2020

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