

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

COREY STAPLETON, in his official capacity as Montana
Secretary of State,

Petitioner,

v.

ROBYN DRISCOLL; MONTANA DEMOCRATIC PARTY;
and DEMOCRATIC SENATORIAL CAMPAIGN
COMMITTEE,

Respondents.

PETITION FOR WRIT OF SUPERVISORY CONTROL

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PETITION FOR WRIT OF SUPERVISORY CONTROL

Pursuant to Mont. R. App. P. 6(3)(e) and 14, the Montana Secretary of State (State) requests this Court issue a writ of supervisory control over the district court with respect to its Order preliminarily enjoining Montana's longstanding rule that absentee and mail ballots must be received by election officials by 8pm on Election Day (Election Day deadline) or, alternatively, expedite the State's appeal.

Montana's elections officials and voters cannot wait for the normal appeal process to play out—they need final direction now. Not only do these deadlines impose a minimal burden, if any, on voters, but enjoining the Election Day deadline with the primary election imminent will adversely affect the integrity of the election, the ability of election officials to administer the election without confusion, and the State's right to regulate its elections.

Because the primary election is rapidly approaching, the State also asks this Court to immediately issue a stay of the Election Day deadline injunction.¹ The State does not seek relief as to the portion of the district court's Order enjoining the Ballot Interference Protection Act (BIPA).

¹ To this end, the State filed a Motion to Stay in district court on Friday at 5pm, hours after the court issued its Order. (App'x G). Due to the urgency of the injunction's effect on Montana elections, the State asks this Court to issue a stay without waiting for the district court to rule on the motion below.

BACKGROUND AND PROCEDURAL HISTORY

The requirement that election officials receive mail ballots by 8pm on Election Day was first codified in 2009 for mail-ballot elections. Mont. Code Ann. § 13-19-106 (Compiler's Comments). Before 2009, and dating back to 1985, Mont. Code Ann. § 13-19-106 provided ballots must be "received before a specified time on election day." *Id.* In 2011, the Legislature approved House Bill 99, adding the Election Day deadline to Mont. Code Ann. § 13-13-201. (App'x G (Miller Decl.), ¶ 2); *see also* House State Admin. Hearing at 8:30:52–8:31:50 (Jan. 21, 2011).² The bill's purpose was to create uniformity between the mail-ballot and absentee statutory schemes, thereby ensuring fairness and preventing voter and election administrator confusion. House State Admin. Hearing at 8:27:15–32, 8:28:41–45, 8:30:52–8:31:50, 8:32:04–17, 8:35:40–8:36:16. In 2013, the Legislature added a reference to the Election Day deadline in Mont. Code Ann. § 13-13-211. *See* Compiler's Comments.

The Election Day deadline in House Bill 99 codified Montana election administrators' long-standing practice. At least as far back as 2001, election administrators uniformly applied the deadline to absentee and mail ballots. (App'x G (Miller Decl.) ¶ 3.) Absentee ballots received after 8pm on Election Day,

² Available at <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/21810?agendaId=99704>

other than pursuant to Mont. Code Ann. § 13-21-206, were disregarded. *Id.* This decision was based on Montana’s statutory scheme for elections. *Id.* ¶ 4.

Despite this long-standing history, Respondents did not file their Complaint until March 13, 2020, or serve the Attorney General until March 18, seven weeks before absentee ballots became available. Mont. Code Ann. § 13-13-205(1)(i)–(ii); App’x G (Miller Decl.) ¶ 3. Respondents then delayed filing their motion for a preliminary injunction until April 27, 2020, one week before in-person absentee voting began, Mont. Code Ann. § 13-13-205(i), *thirty-five years* after the statute requiring mail ballots be received by Election Day took effect, Mont. Code Ann. § 13-19-106, and at least *nineteen years* after the Election Day deadline became standard practice for mailed absentee ballots (App’x G (Miller Decl.) ¶ 3).

In the meantime, the Governor issued a directive permitting counties to conduct all-mail-ballot elections.³ In response, every county in Montana implemented a mail-ballot election. (App’x G (Corson Decl.) ¶ 11.) Yet in their Complaint, Respondents only challenged Mont. Code Ann. § 13-13-201, which applies to absentee ballots. (Doc. 1 at 4.) After the State pointed out at least three other statutes cite the Election Day deadline (App’x C at 11), Respondents argued

³ Governor Steve Bullock, Directive Implementing Executive Orders 2-20-2020 and 3-2020 and providing for measures to implement the 20-2020 June primary election safely (Mar. 25, 2020), *available at* <https://covid19.mt.gov/Portals/223/Documents/Directive%20on%20Elections.pdf?ver=2020-03-25-152812-903>

in a footnote there was “no reason why the Court could not enjoin these provisions under its equitable powers to afford further relief that it deems necessary and proper,” and “[i]n the alternative, Plaintiffs would respectfully seek the Court’s leave to amend the Complaint to explicitly reference these provisions” (App’x D at 8, n. 4). Respondents never amended their Complaint, nor did the Court provide leave to amend.

The district court then granted Respondents’ motion for a preliminary injunction. (App’x F.) Relevant here, the court ordered the State is “IMMEDIATELY restrained and prohibited from enforcing . . . the election receipt deadline for absentee ballots set forth in Mont. Code Ann. § 13-13-201(3), Mont Code Ann. § 13-13-211(3), and Mont. Code Ann. § 13-19-106(5)(b) pending resolution of [Respondents’] request that [the State] be permanently enjoined from enforcing” those statutes. *Id.* at 17. Additionally, the Court ordered: “All absentee ballots postmarked on or before election day shall be counted, if otherwise valid, provided such ballots are received by the deadline for *federal* write-in ballots for military and overseas voters.” *Id.* (emphasis added).

For the reasons below, the State requests this Court exercise supervisory control over the district court’s order enjoining the enforcement of the Election Day deadline in Mont. Code Ann. §§ 13-13-201(3), 13-13-211(3), and 13-19-

106(5)(b), return to the status quo of the Election Day deadline, and allow the State to administer an orderly election.

SUMMARY OF REASONS FOR GRANTING WRIT

This Court should exercise supervisory control because the district court's injunction of the Election Day deadline on the eve of Montana's primary election involves constitutional issues of statewide importance, constitutes judicial involvement in a political question in violation of the separation of powers doctrine, impacts the ability of election officials to properly administer the election, and threatens confusion and inequality among voters. The normal appeals process is inadequate because the primary election is just one week away.

ARGUMENT

The district court's issuance of a preliminary injunction constitutes a mistake of law and involves constitutional issues of statewide importance for which direct appeal is an inadequate remedy.

A. Standards

Supervisory control is "justified when urgency or emergency factors" render a direct appeal inadequate, when a case presents purely legal questions, and—relevant here—when one of the following circumstances are present:

- a. The other court is proceeding under a mistake of law and is causing a gross injustice; [or]
- b. Constitutional issues of state-wide importance are involved[.]

Mont. R. App. P. 14(3). Both circumstances are present because the district court's ruling on the constitutionality of the Election Day deadline is legally incorrect and harmful with statewide implications. It is crucial that Montana's electoral system not be disrupted at the last minute, especially considering the unique circumstances presented by COVID-19 where all counties have issued mail ballots to all voters. Here, the nature of the case and the need for stability satisfy the urgency required for supervisory control.

B. The district court's ruling is a mistake of law imposed statewide.

The district court's ruling contradicts U.S. Supreme Court precedent and impermissibly decides a political question. The Order will harm election officials, who are now tasked with implementing a brand new law, and deadline, just days before Election Day, and voters, many of whom have already submitted their ballots and been informed of the Election Day deadline. The Order also implicates constitutional issues of state-wide importance by functioning as legislation on the eve of the election, affecting all counties and voters, failing to account for the entire statutory scheme, and treating voters unequally.

1. The Order violates the political question doctrine.

The political question doctrine precludes courts from hearing "controversies . . . which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government."

Larson v. State, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241 (citation and internal quotation marks omitted). Setting election deadlines is at the heart of a state’s right to regulate elections; and changing them involves a political question. *See Bennett v. Yoshina*, 140 F.3d 1218, 1225 (9th Cir. 1998) (“The Supreme Court has long held that the structure of a state’s internal democratic processes is a ‘political question’ beyond the ken of judicial review.”) (citing *Baker v. Carr*, 369 U.S. 186, 218-26 (1962)); *Larson*, ¶ 40 (“Montana has a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes.”).

The Legislature—not the courts—has the prerogative to amend Title 13 of the Montana Code. *See* Mont. Const. art. IV, § 3 (“The legislature shall provide by law the requirements for . . . absentee voting, and administration of elections.”).⁴ This makes sense given the complex intersection of the various election laws. As discussed above, the Legislature decided voters should be uniformly treated with respect to when their ballots are due. The Election Day deadline also appears multiple times throughout the Montana Code. *See* Mont. Code Ann. §§ 13-13-

⁴ Recently, another Montana district court declined to “invade the role of executive or legislative branches” by changing election laws to allow electronic signature collection for ballot initiatives. *New Approach Montana v. State of Montana*, No. XBDV-2020-444, at *7 (Mont. First Jud. Dist., Apr. 30, 2020) (Larson, J.).

201(3) (absentee ballots), 13-13-211(3) (absentee ballots), 13-13-246 (mail ballots returned by disabled voters), 13-19-106(5)(b) (mail ballots).

In enjoining the Election Day deadline, the district court took on the role of the Legislature in violation of the political question doctrine. The court affirmatively created legislation by directing election administrators to accept “[a]ll absentee ballots postmarked on or before election day” and “received by the deadline for federal write-in ballots for military and overseas voters.” (App’x F at 17.) The court’s decision to substitute a postmark date as a deadline infringes on the Legislature’s constitutional prerogative to regulate elections. *See* Mont. Const. art. IV, § 3 and art. V, § 1.

2. The Order is contrary to U.S. Supreme Court precedent.

The Order also directly contradicts the U.S. Supreme Court’s decision in *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). In that case, the court overruled a decision that Wisconsin absentee ballots could be postmarked after Election Day. *Id.* The Court noted it has “repeatedly emphasized” its disfavor of judicial alteration of election rules on the eve of an election. *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasy v. Perry*, 574 U.S. 951 (2014)). This is because “Court orders affecting elections . . . can themselves result in voter

confusion and consequent incentive to remain away from the polls. *As an election draws closer, that risk will increase.*” *Purcell*, 549 U.S. at 4–5 (emphasis added).

The district court incorrectly concluded *Republican Nat’l Committee* was inapplicable, then granted relief Respondents never requested in their Complaint in direct contravention of the Supreme Court’s decision. Despite Respondents only requesting relief from Mont. Code Ann. § 13-13-201(3) in their Complaint, the Court also enjoined application of Mont. Code Ann. § 13-13-211 (absentee ballots) and § 13-19-106(5)(c) (mail ballots). This type of judicial interference in elections is impermissible. *Republican Nat’l Committee*, 140 S. Ct. at 1207 (admonishing district court for granting relief plaintiffs did not request in preliminary injunction motion).

3. The injunction fundamentally alters the nature of the election.

The district court also incorrectly concluded the injunction would not “fundamentally alter the nature of the election,” result in voter confusion, or disenfranchise voters. (App’x F at 14.) The court reached this conclusion even though the Election Day deadline is the long-standing status quo in Montana.

a. The injunction will hamper election officials’ duties.

The injunction’s effect is not limited to the invalidated statutes. Chapter 13 of the Montana Code imposes many deadlines on critical election functions, such

as state canvassing and post-election audits. App'x G (Corson Decl.) ¶ 8; Mont. Code Ann. §§ 13-15-401 (county canvass board meeting deadline), 13-15-502 (state canvass board meeting deadline), 13-17-503 (requiring post-election audit after unofficial results are available but before official county canvass). State and county election official resources are allocated in a manner that reflects these deadlines and the related critical election functions. (App'x G (Corson Decl.) ¶ 8.) For example, staffing decisions are based on staff's ability to perform different functions based on upcoming deadlines. *Id.* Under the Order, the timing of critical election functions would overlap, creating numerous personnel issues and resource constraints. *Id.*

The Order also does not account for other deadlines in Chapter 13 that impact how election administrators count ballots. For example, it does not address Mont. Code Ann. § 13-21-206. Sometimes, uniformed and overseas voters submit both a mail-ballot and a federal write-in absentee ballot (FWAB), and Mont. Code Ann. § 13-21-206 dictates which ballot to accept. (App'x G (Corson Decl.) ¶ 10.) If no mail ballot is received by 8pm on Election Day, the election administrator accepts the FWAB. *Id.* Under the Order, though, a mail-in ballot could arrive later than 8pm on Election Day, causing confusion as to which ballot should be accepted. *Id.*

The injunction thus fundamentally alters the nature of elections by hampering election officials' duties.

b. The injunction will create confusion and inequality among voters.

Not only will the injunction hamper election officials, it will confuse and create disparity among voters. First, the district court's substitution of a postmark date does not necessarily create clarity. In Montana, mail is not always stamped with the postmark date at the location and time it is mailed, and therefore a postmark date is not always a reliable indicator of when something was placed in the mail. *See* App'x C (Keller Decl.) ¶¶ 4, 7. Mail submitted in drop boxes or without a specific request for a date stamp typically is not stamped until it reaches a major processing facility. *Id.* ¶ 4. Thus, for example, if an item is put in a drop box after pickup, it will not be stamped that day. By contrast, current law provides a clear line by requiring ballots to be received by 8pm on Election Day regardless of how they are delivered.

Moreover, Montanans have already received their ballots for the upcoming primary election, and these ballots contain instructions about the Election Day deadline. The instructions inform voters in three separate places that ballots must be received by the election office by 8pm on Election Day. (App'x C (Corson Decl.) ¶¶ 7, 9) The instructions also emphasize “[a] postmark is not accepted” and warn the Postal Service recommends mail at least one week before the election. *Id.*

¶ 10. The Secrecy Ballot Envelope has a similar caution. *Id.* ¶ 12. The district court's order directly contradicts these instructions and ignores that mail-ballot voting has been underway for weeks. As of May 22, when the court issued its Order, 192,276 absentee voters had already turned in ballots. (App'x G (Corson Decl.) ¶ 11). That number has only increased since.

The injunction thus creates inequality between voters who have mailed their ballots in early who might otherwise have waited and those who waited and are now able to submit on Election Day. It also disparately impacts disabled absentee voters who mail their ballots because, under Mont. Code Ann. § 13-13-246(2)(c) and (d), disabled voters may return a voted ballot by mail provided it is received by 8pm on Election Day. By not taking these voters into account, the Order treats disabled voters differently from other voters who return their ballots by mail.

Finally, the Order creates a conflict with Mont. Code Ann. § 13-13-245, which requires election administrators to notify voters of ballot deficiencies. Under Mont. Code Ann. § 13-15-107(5), a provisional ballot may only be counted if the voter's information is verified by 5pm the day after the election or postmarked by 5pm the day after the election and received by 3pm the sixth day after the election. If a voter does not mail a ballot until 8pm on Election Day, it may not be received in time for the election administrator to notify of an issue and allow the voter to correct it within these time limits.

The district court's order thus threatens voter confusion, disenfranchisement, and unequal treatment.

4. Respondents failed to meet the standards for a preliminary injunction.

The district court also incorrectly concluded Respondents meet the preliminary injunction standards. “The purpose of a preliminary injunction is to preserve the status quo,” and it should only “be granted with caution.” *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (citation omitted). “In the context of a constitutional challenge, an applicant . . . must establish a prima facie case of a violation of its rights under the constitution.” *Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4 (citation omitted). “[A] preliminary injunction should not issue absent an accompanying prima facie showing, or showing that it is at least uncertain, that the applicant will suffer irreparable injury prior to final resolution on the merits.” *Id.* (citations omitted).

Montana Constitution Article II, § 13 protects the right to vote, not the right to return a ballot after polls close. Voters do not have the right to submit ballots after Election Day, just like they do not have a right to vote after Election Day. Voters may mail their ballots earlier if they wish to ensure timely arrival, submit their ballots in person, or have someone else submit their ballots. That a voter might wait too long to mail a ballot does not impact the constitutionality of the statute. *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 U.S. Dist. LEXIS

90812, at *73 (D.S.C. May 25, 2020) (“South Carolina’s generally applicable deadline for receipt of absentee ballots is constitutional because it imposes only a minimal burden, if any, on [the] right to vote.”). At most, the deadline is an inconvenience, which alone “does not result in a denial of ‘meaningful access to the political process.’” *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) (quoting *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004)).

Moreover, there was no urgency to this challenge, which came decades after the Legislature created the mail-ballot deadline. Even Mont. Code Ann. § 13-13-201, the only deadline challenged in the Complaint, was codified more than eight years ago. Respondents’ “long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (en banc) (months-long delay in seeking injunction undercut claim of irreparable harm). Respondents’ use of COVID-19 to excuse this delay is unavailing; given that every county in Montana has implemented a mail-ballot election, the Election Day deadline is more important now than ever to a timely, organized election.

Because Respondents failed to show a prima facie constitutional violation, the injunction should be reversed.

5. The district court incorrectly applied strict scrutiny.

The district court applied the wrong test—strict scrutiny—to these fundamental election laws. “[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Instead, when analyzing state election laws, courts should balance the severity of the law’s burden against the state’s interests, considering the “extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* at 434 (citation omitted). Under this test, courts typically will uphold laws imposing lesser burdens based on the State’s regulatory interests. *See Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 730 (9th Cir. 2015).

Although this Court generally applies strict scrutiny to laws impacting fundamental rights, it cites federal cases for its strict scrutiny standard and should follow the federal balancing test when considering election laws. *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1174 (1996) (citation omitted). A balancing test is appropriate because “[e]lection laws will invariably impose some burden upon individual voters.” *Burdick*, 504 U.S. at 433. Montana has the right to regulate elections without each regulation being subject to strict scrutiny. Mont. Const. art. IV, § 3.

Montana “indisputably has a compelling interest in preserving the integrity of its election process” because “[c]onfidence in the integrity of [the] processes is essential to the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (“[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”). The Order undermines election integrity and instead threatens confusion among voters and election officials, disrupts the statutory scheme, and disenfranchises certain voters.

Montana also has an interest in providing timely results, which is furthered by the deadline. *See Thomas*, 2020 U.S. Dist. LEXIS 90812 (upholding South Carolina’s absentee ballot deadline of 7pm on Election Day); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) (“[T]he State’s interests in ensuring a fair and honest election and to count votes within a reasonable time justifies the light imposition on Plaintiffs’ right to vote.”). This is reflected throughout Title 13. For example, election judges must provide results to election administrators “immediately” after ballots are counted, Mont. Code Ann. § 13-15-101; the vote count must begin “immediately upon the closure of the polls,” § 13-15-207; and the canvass board must meet no later than 14 days after an election to canvass the vote, § 13-15-401. Montana’s election scheme thus is focused on the state’s

interest in beginning the vote count as soon as the polls close. To that end, the Secretary of State live-casts election results online.⁵

The Election Day deadline also provides equal treatment with in-person voters. Montanans voting in person at the polls must return their ballots by 8pm (or at least, be in line by 8pm), Mont. Code Ann. § 13-1-106, and the deadline ensures absentee voters return their ballots by 8pm (whether by mail or in person). Consequently, these otherwise similarly situated voters are treated equally.

Finally, the district court erred by combining the State's interests in BIPA and the Election Day deadline. Respondents alleged BIPA and the deadline "work in concert" to violate their rights. But the Court failed to separately analyze the Election Day deadline. Considered by itself, the State's interests in setting uniform deadlines outweighs any minimal burden, especially with BIPA enjoined. *See Crawford*, 553 U.S. at 197; *Thomas*, 2020 U.S. Dist. LEXIS 90812 at *73. Further, the injunction interferes with the State's interest in providing results in an expedient manner and may impact other important deadlines.

Because the court applied the wrong scrutiny standard, this Court should reverse the injunction.

⁵ *See* <https://sosmt.gov/elections/results/>.

C. Direct appeal constitutes an inadequate remedy in this case.

Due to the immediacy of the primary election, direct appeal does not adequately remedy the district court's ruling enjoining the Election Day deadline. Election officials are working to ensure the election proceeds smoothly, but the Order throws the system into chaos. Especially given the conflict with numerous election statutes, election officials would have to guess how to proceed without immediate direction by this Court.

While a preliminary injunction is immediately appealable, Mont. R. App. P. 6(3)(3), the State has filed both a notice of appeal and this writ of supervisory control to obtain immediate relief. If the Court determines a writ is inappropriate, the State requests it issue a stay of the injunction and expedite the appeal process.

CONCLUSION

This Court's exercise of supervisory control is both justified and warranted. Due to the threat to the State's election authority and ability to provide an ordered election, immediate relief is needed.

Respectfully submitted this 26th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,995 words, excluding certificate of service and certificate of compliance.

/s/ Aislinn W. Brown
AISLINN W. BROWN

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APPENDIX

Complaint for Declaratory and Injunctive Relief (March 13, 2020).....	App'x A
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CERTIFICATE OF SERVICE

I, Aislinn W. Brown, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 05-26-2020:

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Dated: 05-26-2020