No. 20-35847

In the United States Court of Appeals for the Ninth Circuit

JOE LAMM, Ravalli County Republican Central Committee, JEFF WAGNER, SILVIA WAGNER, FIONA NAVE, and BRENT NAVE, *Plaintiff-Appellants*

v.

STEPHEN BULLOCK, in his official capacity as Governor of Montana, and COREY STAPLETON, in his official capacity as Secretary of State of Montana, *Defendants-Appellees*

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

Appellee Governor Steve Bullock's Response in Opposition to Appellants Lamm et al.'s Emergency Motion for an Injunction Pending Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

CIRCUIT RULE 27-3 COUNTER-STATEMENT

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

Appellants have not shown emergency relief is necessary because they have not shown any harm.

Appellants' theory is that the Election Directive, Doc. 3-3, will dilute their votes because mail voting supposedly facilitates fraud. But, as the District Court held, "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." Doc. 3-2 at 33. Indeed, Appellants "conceded they do not possess any evidence establishing prior incidents of voter fraud in Montana." *Id.* "The record is replete with evidence that Montana's elections and the use of mail ballots present no significant risk of fraud." *Id.* Without any showing of harm, irreparable or otherwise, Appellants are not entitled to emergency relief.

Appellants' arguments to the contrary fail. Their paragraphs beginning with "First" and "Second," Doc. 3-1 at iii-iv, recite their merits arguments while saying nothing about an emergency. Appellants' "Third" paragraph, Doc. 3-1 at iv-v, touts the counties' purported "built-in flexibility" until September 29. That misstates the facts, but no matter: September 29 has come and gone. Appellants' "Fifth" and "Sixth" paragraphs,[1] Doc. 3-1 at v, summarize the procedural history. Nowhere do Appellants identify any actual emergency.

Time is surely of the essence, but Appellants go too far by misleadingly implying, Doc. 3-1 at v, that this Court can provide emergency relief before October 9 without consequence. Voting in Montana has already begun. The Election Directive took effect on August 6. Within two weeks, four of the most populous counties in the State publicly opted to conduct mail-ballot elections under the Election Directive. By September 4, 45 counties had submitted mail-ballot election plans to the Secretary of State. On October 2, pursuant to the Election Directive's expanded early voting period, in-person early voting began.

October 9 is the deadline for the 45 mail-ballot counties to mail ballots to all registered voters. These ballots have been prepared with precision to enable county election offices to meet the mailing deadline. Ballots for voters on the absentee list are identical and indistinguishable from mail ballots for active voters who normally

[1] Appellants omit a paragraph beginning with "Fourth."

vote in person. EER425-26.[2] Election officials would face an insurmountable challenge if, to comply with Appellants' injunction, they were now forced to remove ballots from the boxes where they are meticulously sequenced by zip code and precinct. *Id.* This would require hundreds of hours sorting ballots to identify and separate out those requested by absentee voters. EER426-27. They would simultaneously have to dramatically increase recruitment of election judges, train them, locate more polling places even as traditional polling places—*e.g.*, schools and nursing homes—become increasingly unavailable during the pandemic, rewrite election plans to comply with health department instructions, implement a public notification campaign for voters unsure where to go and upset about not receiving the mail ballot they were promised, and deal with confusion around postage for absentee ballots. EER428-32. The practical consequences associated with an injunction now would be much worse than they would have been at the time of the District Court hearing. *See generally* Supplemental Affidavit of Audrey McCue. The injunction would also create legal ambiguity about the validity of votes already cast pursuant to the Election Directive's expanded early voting start on October 2.

(iii) Facts showing why the motion could not have been filed earlier

Any "emergency" in this case is entirely of Appellants' creation. Montana's June primary was conducted using the same mail-ballot procedures under a directive

[2] EER refers throughout to the concurrently filed Emergency Excerpts of Record.

issued six months ago. Were Appellants legitimately concerned about fraud and dilution, they could and should have challenged that directive. After the primary was successfully conducted without fraud or other incident, a bipartisan group of county election administrators publicly requested that the Governor authorize a mail-ballot option for the general election. EER232. The resulting August 6 Election Directive is nearly identical to the earlier Primary Directive. Yet Appellants waited until September 9 to file this case—five days after 45 counties submitted their mail-ballot election plans.

Appellants' justification for waiting makes little sense. They claim: "While the Directive was issued August 6 *allowing* a mail-ballot choice, only by September 4, 2020 did counties actually have to *choose* mail-ballot voting plans." Doc. 3-1 at vi. That most counties would opt to conduct the election by mail, however, was both inevitable and widely known. If the primary election—conducted universally by mail ballot—was not a sufficient clue, then the public and bipartisan July 24 letter from election administrators requesting permission to conduct the general election by mail ballot certainly was. Indeed, five of the six most populous counties approved mail ballots within two weeks of the Directive: Lewis and Clark and Missoula by August 13; Cascade and Gallatin by August 18; and Yellowstone by August 20. Appellants have no excuse for their delay.

INTRODUCTION

Early voting in the presidential election is underway in Montana. In six days, mail ballots will be sent out. Yet Appellants request that this Court undo the decision below, hoping to force a course-reversal on 45 mail-ballot elections two months in the making, leaving local officials scrambling at the last minute to conduct a polling-place election during a pandemic—and throwing into question the status of all early votes cast since October 2 under the challenged directive. Appellants fail entirely to meet the standard for an injunction pending appeal.

Even "pandemic" does not quite evoke the present circumstances. Scores of Montanans have died of COVID-19, and Montana's total cases have more than doubled in the last two weeks alone. To minimize crowding at polling places, protect election workers, and prevent Montanans from having to choose between their vote and their life—or the lives of their loved ones—Governor Bullock exercised his statutorily delegated emergency powers on August 6 to permit counties to conduct the election by mail (subject to various requirements, including that in-person voting remains an option everywhere beginning October 2).

With 31 days until Election Day, while Montanans are already casting ballots, Appellants want to call a halt. They want this even though the primary election was conducted successfully using the same procedures, even though Montanans have been voting by mail in large numbers for years, and even though Appellants *concede* there has been no evidence of voter fraud in Montana for decades. EER413,

at 34:10-13. They are too late. Granting an injunction now would sow chaos in an ongoing election, likely disenfranchising thousands of voters, and risking dozens of potential "super-spreader" events on Election Day. Injunctive relief would be grossly inequitable and damaging to the public interest.

Appellants' claims are meritless as well: their voting-based constitutional claims have no basis in law or fact, and their Elections/Electors Clauses claim is premised on the mistaken contention that the Directive exceeds the legislatively delegated power to suspend state procedures during a state of emergency. Appellants also lack standing to assert these claims. The Court should deny this hazardous, eleventh-hour invitation to generate chaos in Montana's elections.

FACTS

In response to the COVID-19 crisis, Governor Bullock declared a state of emergency on March 12, 2020, which remains in place today. EER273; EER277. Since that time, the Governor has prioritized Montanans' health and safety, working to keep the pandemic in check while preserving rights and freedoms. As part of these efforts, the Governor issued a directive on March 25, providing for measures to implement the June primary election safely. EER279 ("Primary Directive"). He incorporated input from county election administrators, the Montana Secretary of State, and state legislators, among others. *Id.*

The primary election was a success. In a July 24, 2020, letter, the Montana Association of Clerks and Recorders/Election Administrators, a bipartisan group of

county election administrators, observed that it had resulted in "a 10% increased rate-of-return." EER232 ("Election Administrators Letter"). They wrote that the mail-ballot primary election "was streamlined, accurate, and as safe as possible under the current pandemic" and that with "about 14 years of experiencing in conducting mail ballot elections ... [it] was a proactive approach that showcased Montana in a very good light." *Id.* Moreover, the election administrators pointed out that "results were reported much earlier" than usual, partly because the ballots "were largely received earlier (paid postage no doubt aiding in the matter)." *Id.* Indeed, primary voter turnout was the highest since 1972. EER385.

Over the ensuing months, Montana's COVID-19 case count climbed. On March 25, Montana had only 19 new cases; on August 5, the state reported 170 new cases. EER287; EER289. As of this filing, Montana has 14,356 reported COVID-19 cases, 189 active hospitalizations, and 186 deaths. *Mont. Response: COVID-19 - Coronavirus - Global, National, & State Information Resources*, *available at* https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b, (accessed Oct. 3, 2020). In the last two weeks, the average number of daily new cases has more than doubled, and 501 new cases, a new record, were reported on Saturday, October 3.

In the July 24 letter, election administrators requested authority to use mail ballot procedures and expanded early voting for the November election, noting that

"the most significant improvement that can be made is to allow more time by providing a directive earlier as opposed to later." EER233. They warned that inaction would mean practical and ethical concerns of COVID-19 spreading through in-person interactions at polling places, challenges related to polling locations and election judges, and significant voter confusion. EER234-35.

Relying on input from these county election administrators and public health officials, the Governor issued the August 6 Election Directive allowing counties to expand early voting and adopt mail-balloting procedures for the November general election. EER293 ("Election Directive"). The Election Directive does not "rewrite" Montana election law: it permits counties to use procedures established by Montana statute (title 13, chapter 19, Mont. Code Ann., and chapter 44.9, ARM) to conduct the 2020 general election, subject to certain enumerated conditions. Counties that opt-in must provide in-person voting options through Election Day. Doc. 3-3 at 4. Counties must provide satellite voting offices for Indian reservations. *Id.* Counties must expand early voting opportunities and may use secure ballot drop-off locations. *Id.*; *see also* Mont. Code Ann. § 13-19-307. And all counties, whether or not they opt-in, must adopt infection control protocols at polling places and expand the time for voter registration. *Id.* at 4. Forty-five counties encompassing over 94% of active, registered voters in Montana chose to opt-in after very public approval processes in each county.

The March 25 and August 6 Directives are consistent with other states' responses to the pandemic—nearly half of all states expanded access to mail ballots for primaries. EER299. For the general election, states from Nevada to New Jersey, California to Vermont are sending mail ballots to all registered voters. EER308.

Appellants filed their complaint and motion for a preliminary injunction on September 9. The District Court converted the preliminary-injunction motion hearing to one on the merits, which occurred on September 22. On September 30, the District Court denied injunctive relief. Doc. 3-2.

ARGUMENT

"In evaluating a motion for an injunction pending appeal," the Court "consider[s] whether the moving party has demonstrated that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest." *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020).

Because Appellants seek to alter election procedures at the last minute (indeed, while the election is already underway), the standard is exacting. As the District Court correctly explained, "federal courts have time and time again been cautioned against injecting themselves into the electoral process." Doc. 3-2 at 40-41. "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.* at 41 (quoting *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)). In *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the Supreme Court reversed an injunction suspending certain Arizona election requirements shortly before an election. The Court explained that in balancing the equities, courts must "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Id.* at 4. As the Court observed: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 5. Like the District Court, this Court should "heed[] the Supreme Court's warning against changing the rules of the game on the eve of an election." Doc. 3-2 at 40 (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020)).

I. Granting an injunction would plunge the election into chaos and threaten widespread transmission of a potentially fatal disease.

Although the Governor is sure to succeed on the merits, this appeal can be decided based on the balance of the equities and the public interest alone.

As the District Court rightly held, the balance of the equities strongly favors denial. The harm Appellants' requested injunction would inflict on Montanans—election administrators, voters, and the nonvoting-yet-medically-vulnerable populace

alike—is extraordinary. Judge Christensen outlined the record evidence of "profound, and most likely catastrophic consequences on the administration of Montana's general election," including the following "nearly insurmountable" challenges:

> (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.

Doc. 3-2 at 41-42.

The District Court also correctly held that an injunction would "not only be unequitable, but also strongly against the public interest." *Id.* at 42. The consequence of changing course now, the district court found, was 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." *Id.* "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." *Id.* at 42-43. "Both are unlikely. As such, the injunction Plaintiffs seek would likely bring about significant disenfranchisement." *Id.* at 43. Apart from

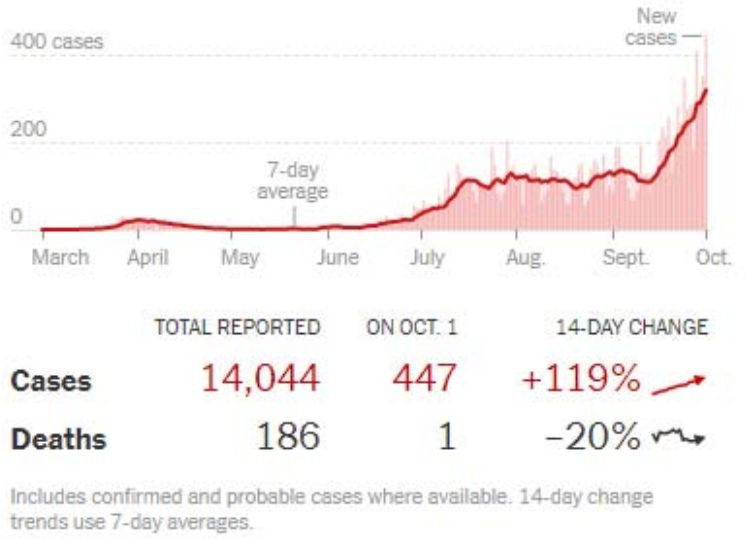
attempting to dismiss this looming calamity as a question of "administrative convenience," EER408, at 29:17, Appellants have disputed none of this.

Moreover, the District Court ruled that the consequences of an injunction would be "catastrophic" based on affidavits submitted on September 17. It is now October 3, and the catastrophic consequences from an injunction would be exponentially worse. Audrey Jean McCue, Election Supervisor in Lewis and Clark County, has submitted a supplemental affidavit giving a detailed explanation of the practical impossibility of shifting to a polling place election at this point, and concluding: "I do not believe there is time to develop and implement a Polling Place election without jeopardizing the integrity and safety of the election." Supp. McCue Aff. ¶ 11. The affidavit further concludes: "Based on my experience and training, I am deeply concerned that issuing new information about election procedures that conflicts with previous guidance from our office could confuse voters and undermine voters' confidence in the election." Supp. McCue Aff. ¶ 12. The Court should not jeopardize Montana's ability to conduct a free and fair election.

Judge Christensen also found "enjoinment of the Directive would only accelerate the outbreak of COVID-19 which Montana now faces." Doc. 3-2, at 43. Finding the undisputed affidavit testimony of the State's chief medical officer "compelling," the court noted that forcing more voters to crowd into fewer polling places would only fuel the spread, affecting both voters and their associates. *See id.*

at 43-44. While Appellants' counsel asserted that because he "was in a packed plane for four and a half hours" flying to the district court hearing, "surely people can vote," EER410, at 31:4-7, Appellants presented no competent evidence to dispute the major public health hazard crowded in-person voting presents.

Indeed, the District Court's assessment of the pandemic unfolding in Montana is already outdated: since September 29, the same New York Times case map it cited, shows as of October 2,[3]:



In five days *alone*, Montana's total reported cases have increased by nearly 15 percent, and total deaths by nearly 7 percent.

Appellants provide no Montana-related evidence and do not dispute the District Court's factual findings. Instead, they argue that their convoluted

[3] https://www.nytimes.com/interactive/2020/us/montana-coronavirus-cases.html

constitutional claims must upend Montana's election administration despite the plethora of evidence showing that the Governor's Directive will lead to a well-managed election while saving lives. As Judge Christensen explained at length, counties "would be forced, likely in vain, to quickly develop the electoral infrastructure necessary to administer the general election under normal conditions." Doc. 3-2 at 42.

Simply put, there is no time for counties to pivot to a polling-place election at this late juncture. To enjoin the mail-ballot election would be disenfranchising and dangerous. There are neither polling locations nor election judges available in large enough numbers to facilitate necessary social distancing for a polling-place election. There is not a scintilla of evidence of fraud, but there is evidence that voters will be confused, frustrated, and forced to choose whether to risk their health if Appellants' requested relief is granted.

And, with voting underway in Montana, an injunction would cast doubt on the validity of all votes cast between October 2 (the date when early voting begins in opt-in counties) and October 5 (the date it begins otherwise).

Appellants had more than a month to challenge the Election Directive and they sat on their rights. The record is replete with evidence of the harm their proposed relief will cause. They make no effort at all to refute it, to respond to it, or to acknowledge that Montana is a real place with real citizens facing real

repercussions should Appellants succeed in enlisting the courts to join them in tilting at the windmills of fraud.

II. Appellants cannot show a likelihood of success on the merits.

An injunction should be denied for the additional reason that none of Appellants' claims have any possibility of success. As the District Court rightly concluded, the Election Directive does not violate any provision of the Constitution. And, contrary to the District Court's conclusion, Appellants lack Article III standing. For both reasons, Appellants cannot show irreparable harm.

A. Appellants cannot prevail on their Elections Clause and Electors Clause claims.

Appellants allege that the Election Directive violates the Elections Clause and Electors Clause because it conflicts with the Legislature's statutes governing elections. As the District Court correctly held, this argument fails because the Montana Legislature statutorily delegated power to the Governor to issue the Election Directive.

"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 ... if the strict compliance with the provisions of any statute ... would in any way prevent, hinder or delay necessary action in copying with the emergency or disaster.'" Doc. 3-2 at 26-27 (quoting Mont. Code Ann. § 10-3-104(2)(a)). First, there is no question COVID-19 is a "disaster" under Montana law. Doc. 3-2 at 28; Mont. Code Ann. § 10-3-103(4) ("disaster" includes "outbreak of

disease"). Second, "[s]tatutes governing the electoral process are by their very nature regulatory." Doc. 3-2 at 28 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Third, "the administration of federal, state, and local elections is quintessentially state business." Doc. 3-2 at 29. Therefore, the Montana election law at issue "is precisely the sort of regulatory statute that falls within Governor Bullock's statutory suspension power." *Id.* Indeed, "[t]he 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." *Id.*

Appellants respond: "[T]here is no emergency since the legislature's prescribed manner ... is consistent with Phase 2 restrictions." Doc. 3-1 at 11. But it is the Governor, not Appellants, with delegated authority to decide whether an "emergency" exists and the measures necessary to respond to it. Indeed, Phase 2 is itself a construct of the Governor's Directives and has no meaning outside of the COVID-19 emergency context; the Election Directive is consistent the system of Directives issued since March, including the Phase 2 Directive. Further, "[c]ontrary 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. ... Montana's COVID-19 cases continue to rise, with a

commensurate increase in deaths." Doc. 3-2 at 44. "Evidence submitted in this case raises compelling public health concerns stemming from enjoinment of the Directive." *Id.* at 44. Governor Bullock did not err in concluding that the COVID-19 emergency warrants the Election Directive.

Appellants nonetheless argue that the Elections and Electors Clauses constitutionally bar the Legislature from granting the Governor emergency authority. Doc. 3-1 at 11. As the District Court held, however, this argument squarely conflicts with a century of Supreme Court precedent establishing that these Clauses authorize Governors and other state actors to have a role in election administration. Doc. 3-2 at 29-32. Appellants ignore the District Court's reasoning.

Finally, although the District Court did not reach this argument, Appellants lack third-party standing to pursue their Elections Clause and Electors Clause claims. They allege the Governor has exercised power belonging to the Legislature, and so seek to vindicate the Legislature's constitutional injury. But the Legislature is a third party that has declined to sue. Generally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A "limited" exception to this rule applies if a litigant demonstrates (1) closeness to the third party *and* (2) a hindrance to the third party's ability to bring suit. *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). Appellants demonstrate neither: voters and candidates are not

"close" to the Legislature, and the Legislature faces no hindrance in protecting its own interests—it has merely chosen not to sue. It is Appellants, not Governor Bullock, who would usurp the Legislature's authority by seeking to vindicate rights that the Legislature itself has chosen not to pursue.[4]

B. Appellants cannot prevail on their Right-to-Vote claim.

Appellants insist that the Election Directive violates their right to vote through "disenfranchisement." Doc. 3-1 at 16. But they do not contend they have lost their right to vote. Rather, they theorize that others will vote illegally, diluting their vote.

This argument, however, falls with Appellants' inability to produce evidence of voter fraud. As the District Court rightly held, "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." Doc. 3-2 at 33. Indeed, Appellants "conceded they do not possess any evidence establishing prior incidents of voter fraud in Montana." *Id.* "The record is replete with evidence that Montana's elections and the use of mail ballots present no significant risk of fraud." *Id.* "The declarations provided by Governor Bullock from three elections officials in Montana fortif[y] the conclusion that a county's use of mail ballots does not meaningfully

[4] Also, to the extent Appellants seek a federal injunction based on Governor Bullock's alleged violation of state law, Appellants' claim is barred by sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). The Governor respectfully disagrees with the District Court's contrary view. Doc. 3-2 at 13-15.

increase the already nominal risk of voter fraud in this State." *Id.* at 34. These findings foreclose Appellants' right-to-vote claim.

Notably, on appeal, Appellants do not contest the conclusion that there is zero evidence of voter fraud, instead claiming that such evidence is unnecessary because Governor Bullock's purported violation of state law automatically establishes a right-to-vote violation. Doc. 3-1 at 13-16, 19-20. Appellants offer a "*Safe Zone/Danger Zone*" grid of their own creation to argue that the Legislature concluded "mail ballots" are in the "*Danger Zone*." Doc. 3-1 at 14.

Appellants' argument is baseless. First, the District Court rightly concluded that the Election Directive complied with state law. Second, Appellants have presented no evidence of a burden on their right to vote, let alone evidence "sufficient to support a facial attack on the validity" of the Directive. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 20 (2008). No authority holds that a bare claimed violation of state law automatically establishes a constitutionally cognizable burden on voting, as Appellants contend.[5]

C. Appellants cannot prevail on their Equal Protection claim.

The District Court recognized that Appellants' equal protection claim "lacks clarity," but construed Appellants' argument to be that the Equal Protection Clause

[5] Appellants likewise insist that the *absence* of the Election Directive would *not* impose an unconstitutional burden on voting. Doc. 3-1 at 17–18. But the question is whether the Election Directive violates their right to vote, not whether a hypothetical constitutional challenge to the absence of the Election Directive would succeed.

bars different counties from using different procedures on mail voting. Doc. 3-2 at 36-37. The District Court correctly rejected this argument, agreeing with the Governor that "few (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause." *Id.* at 38. It further found "Plaintiffs' complaints of disparate and unequal treatment unfounded," because "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." *Id.* at 39. Appellants' response, Doc. 3-1 at 20-21, does not engage with this reasoning.

D. Appellants lack Article III standing.

The Court also should deny an injunction because Appellants lack Article III standing. The Governor respectfully disagrees with the District Court's conclusion to the contrary.

Appellants—who are voters, candidates, and an organization purporting to represent voters and candidates—lack standing for two reasons. First, they allege an "undifferentiated, generalized grievance about the conduct of government." *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Insofar as Appellants claim the Election Directive will result in uncounted votes, they have no particularized reason to believe this fate will befall *their votes*. Their general speculation that the Directive might cause an unspecified number of votes to be processed improperly does not allege a particularized injury. Likewise, playing out their unsubstantiated claim that the

Election Directive will yield voter fraud, their votes could only be diluted to precisely the same extent as those of every other voter in the state.

Rejecting this argument, the District Court reasoned that "the fact that a harm is widely shared does not necessarily render it a generalized grievance," and "where large numbers of voters suffer interference with voting rights," they all have standing to sue. Doc. 3-2 at 18 (quotation marks omitted). That misses the point. Large numbers of voters may suffer particularized injuries. For instance, if a particular group is barred from voting, each group member can claim a *particularized* injury—the loss of *their own personal* right to vote. But that is not happening here. Rather, Appellants merely complain that someone, somewhere in Montana *might* vote illegally—a classic generalized grievance.

Second, Appellants lack evidence sufficient to establish standing. The voter and candidate Appellants premise their theory of standing on the Election Directive facilitating voter fraud, resulting in vote dilution. But "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." Doc. 3-2 at 33. Without such evidence, there can be no injury-in-fact.

The District Court appeared to believe that simply *alleging* harm was sufficient to show standing. Doc. 3-2 at 18-19 (finding standing because voters "alleg[ed] a violation of the right to vote," and therefore suffered an "injury in fact

despite the widespread reach of the conduct at issue"). This is incorrect. To obtain an injunction, Appellants must not only *plead*, but also *prove* standing. *See Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) ("[A]t the preliminary injunction stage, a plaintiff must make a 'clear showing' of his injury in fact."). Appellants have not proven any injury.

The District Court also found that the plaintiff organizations had standing based on their need to expend resources educating members about voting changes. Doc. 3-2 at 19-21. None of those organizations remain as parties before this Court except for the Ravalli County Republican Central Committee, which asserts *only* representational standing—not organizational standing. Doc. 3-1 at 9.

E. Appellants cannot show irreparable harm.

Finally, Appellants cannot make the requisite showing of irreparable harm. As the District Court explained, because none of Appellants' claims is meritorious, "Plaintiffs have not suffered any irreparable injury." Doc. 3-2 at 40. And because Appellants concede they cannot show voter fraud in Montana, they cannot show a right-to-vote injury via dilution: there is truly no evidence that the Election Directive will cause anyone to vote fraudulently or illegally. Appellants have not sustained their burden of showing irreparable injury absent an injunction.

CONCLUSION

Appellants seek an injunction that would result in pandemonium; they are wrong on the merits; and they lack standing. This Court should deny Appellants' motion for an injunction pending appeal.

Respectfully submitted,

/s/ Raphael Graybill

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October 3, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 27(d) and Ninth Circuit Rules 27-1(1)(d) and 32-3, the foregoing Response in Opposition to Appellants' Emergency Motion for an Injunction Pending Appeal, I certify the following:

1. the document is double spaced except for footnotes and quoted and indented material;

2. the document is proportionally spaced, using Baskerville, 14-point font; and

3. the document contains 5,151 words, excluding the caption, certificates, and tables, as calculated by Microsoft Word.

Dated: October 3, 2020

/s/ Raphael Graybill
Raphael Graybill

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2020, I electronically filed this brief in opposition to Appellants' motion for an injunction pending appeal through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Raphael Graybill
Raphael Graybill