

ORIGINAL

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05/27/2020

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 20-0293

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 20-0293

FILED

MAY 27 2020

Bowen Greenwood
Clerk of Supreme Court
State of Montana

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

Petitioner,

v.

ORDER

THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY, HON. DONALD L.
HARRIS, Presiding,

Respondent.

Montana Secretary of State Corey Stapleton, by and through the Montana Attorney General, seeks a writ of supervisory control and immediate partial stay of an order entered on Friday, May 22, 2020, by the Thirteenth Judicial District Court, the Hon. Donald L. Harris, presiding, in that court's Cause No. DV 20-408. We have amended the caption to reflect the appropriate parties to a supervisory control petition. Stapleton has filed a separate notice of appeal from the District Court's preliminary injunction and requests this Court to either entertain the petition or set an expedited briefing schedule on the appeal.

The petition arises from an action filed in mid-March by Robyn Driscoll, the Montana Democratic Party, and the Democratic Senatorial Campaign Committee challenging the constitutionality of two provisions of Montana law, the 2017 Montana Ballot Interference Prevention Act, §§ 13-35-701 through 13-35-705, MCA, and the election-day receipt deadline for absentee ballots set forth in § 13-13-201(3), MCA. The plaintiffs filed a motion for preliminary injunction six weeks later. In the meantime, Governor Steve Bullock entered a statewide directive on March 25, permitting counties to conduct all-mail-ballot elections to protect against public health threats from the novel coronavirus. In response, every county in Montana implemented a mail-ballot election for the 2020 election cycle.

After receiving all parties' briefs and affidavits, and upon their waiver of a hearing, the District Court entered findings of fact, conclusions of law, and an order granting the preliminary injunction. The court determined the plaintiffs had made out a prima facie case and were likely to prevail on the merits of their claims that both provisions were unconstitutional as neither advances a legitimate state interest and both place significant burdens on the fundamental right to vote. The District Court entered its preliminary injunction ten days before the June 2, 2020 primary election and two weeks after election administrators mailed ballots to all Montana voters. Those ballots include instructions to voters in three separate places that ballots must be *received* by the election office by 8:00 p.m. on Election Day, June 2.

The Secretary of State does not challenge the District Court's preliminary injunction against the Ballot Interference Prevention Act, only its order prohibiting enforcement of the election-day receipt deadline. The court's order temporarily invalidates three separate statutes: §§ 13-13-201(3), 13-13-211(3), and 13-19-106(5)(b), MCA, each of which imposes the election-day receipt deadline for absentee or mail-in ballots. The court directed in relevant part that "[a]ll 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[.]"

The petition argues that this Court's exercise of supervisory control is appropriate because the District Court's ruling is a mistake of law with urgent statewide ramifications that make direct appeal an inadequate remedy. Should the Court choose to have the case proceed on appeal, the petition seeks an immediate stay of the order enjoining the election-day receipt deadline. The Secretary of State includes a copy of the motion for stay he filed in the District Court on the day its order was entered, along with the affidavit of Elections Director Dana Corson explaining the effect the order will have on other statutory deadlines and why a stay is necessary to prevent increased public confusion of voters regarding the essential timelines for casting ballots. Corson's affidavit also explains that the District Court's order did not address ballot deadlines for disabled voters in § 13-13-246(2)(c) and

(d), MCA, creating disparity in administration of the election. Notwithstanding the filing of his motion, the Secretary of State seeks immediate relief here given the impending primary election.

As the Secretary of State recognizes, orders granting injunctions are immediately appealable. M. R. App. P. 6(3)(e). *State v. BNSF Ry. Co.*, 2011 MT 108, ¶ 15, 360 Mont. 361, 254 P.3d 561. Where appeal is an adequate remedy, this Court will decline its discretion to exercise supervisory control. M. R. App. P. 14(3). The Court determines that the ordinary course of appeal, with an expedited briefing schedule, affords adequate time to address the issues the Secretary of State presents with the benefit of the record and full development of the arguments by both parties. The Court agrees with the Secretary of State, however, that it is appropriate to stay the District Court's order enjoining enforcement of the election-day receipt deadline in order to maintain the status quo pending consideration of the issues.

Status quo means "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350, 440 P.3d 4 (internal quotations and citations omitted). That condition, in place for many years, is that ballots cast by mail must be received in the election administrator's office by 8:00 p.m. on election day. This year's all-mail-ballot primary election is a first for Montana and presents an unusual situation. Election administrators have responded swiftly to ensure that ballots were timely mailed to voters across Montana. Because those ballots include express directive that they will not be counted unless received by the 8 p.m. election-day deadline, we conclude that there is good cause to maintain the election-day deadline for this primary election in order to avoid voter confusion and disruption of election administration.

IT IS THEREFORE ORDERED that the District Court's order enjoining the Secretary of State and others acting in concert with him from enforcing the election-day receipt deadline for absentee and mail ballots is hereby STAYED pending this Court's consideration of the merits of the legal issues presented. That portion of the court's order preliminarily enjoining the enforcement of the Ballot Interference Prevention Act, § 13-35-

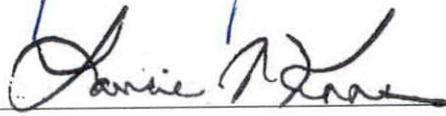
701, MCA, is undisturbed and remains in effect without objection by the Secretary of State.

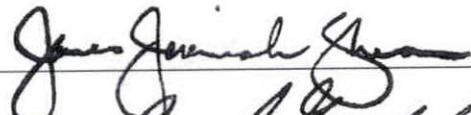
IT IS FURTHER ORDERED that the petition for writ of supervisory control is DENIED. The matter shall proceed under this Court's Cause No. DA 20-0495 with submission of briefs in accordance with M. R. App. P. 13. Notwithstanding that the District Court record has yet to be transmitted, Appellant Corey Stapleton's Opening Brief shall be due within thirty days of the date of this Order. It is the Court's intent to have briefing completed by mid-August to allow sufficient time for consideration and ruling in advance of preparations for the November general election. To that end, extensions will not be granted.

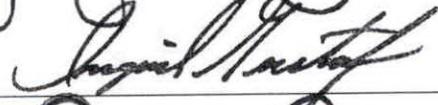
The Clerk is directed to provide immediate notice of this Order to all counsel of record in Yellowstone County Cause No. DV 20-408 and to the Thirteenth Judicial District Court, the Hon. Donald L. Harris, presiding.

Dated this 27 day of May, 2020.











Justices

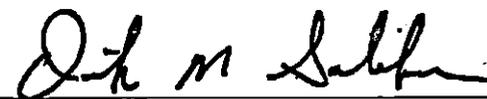
Given the fundamental right of voting, I would not grant a stay. This is a unique situation of course, as there has never been an all-mail election in Montana. More significantly, we have not had all of the usual polling places closed. Allowing ballots to be

counted in the same manner as military ballots is not a significant distinction from the current system.



Chief Justice

Justice Dirk Sandefur would join Chief Justice McGrath in denying the stay.



Justice