

1 Abby J. Moscatel
2 Blacktail Law Group, PLLC
3 P.O. Box 931
4 Lakeside, MT, 59922
5 (406) 318-722
6 amoscatel@blacktaillaw.com
7
8

9 Craig W. Trainor*
10 Rachel L. Jag*
11 Constitutional Litigation Partnership
12 America First Policy Institute
13 1001 Pennsylvania Avenue NW, Suite 530
14 Washington, D.C. 20004
15 (571) 348-1802
16 ctrainor@americafirstpolicy.com
17 rjag@americafirstpolicy.com
18 *Admitted *Pro Hac Vice*
19

20 *Attorneys for Plaintiffs*
21

22 **MONTANA FOURTH JUDICIAL DISTRICT COURT**
23 **MISSOULA COUNTY**
24

25 JOHN R. LOTT JR., Ph.D., and
26 MISSOULA COUNTY
27 ELECTION
28 INTEGRITY PROJECT
29

30 Plaintiffs,
31

32 v.
33

34 MISSOULA COUNTY
35 ELECTIONS
36 OFFICE, and BRADLEY
37 SEAMAN, IN HIS OFFICIAL
38 CAPACITY,
39

40 Defendants.

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Dept 3: Judge John W. Larson
Cause No.: DV-22-729

**MOTION FOR
PRELIMINARY
INJUNCTION**

*Oral Argument and Expedited
Review Requested*

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INTRODUCTION

1 On June 27, 2022, Plaintiffs filed this lawsuit seeking declaratory judgment
2 and injunctive relief. The case is about two inextricably linked principles of law:
3 (1) Plaintiffs’ constitutional right to know about the operation of their local
4 government in its handling of federal elections, and (2) ensuring Defendants are
5 preserving the integrity of local federal elections as state and federal law requires.
6 To that end, Plaintiffs seek a preliminary injunction and expedited review thereof
7 because the 2022 federal midterm elections will be upon us on November 8, 2022.

8 As more fully explained below, Defendants maintain voter and election
9 records in a “live” database that, with each update, overwrites the previous record,
10 causing the original to be permanently lost, in violation of the law. Similarly, in the
11 2020 election, Defendants used a video surveillance device to livestream the vote
12 count in their Counting Center and failed to preserve that video, in violation of the
13 law. As a result, Plaintiffs’ request for that video went unsatisfied. Intending to
14 make similar requests for election records relating to the November 8, 2022,
15 federal midterm elections, Plaintiffs seek this preliminary injunction to ensure their
16 constitutional right to know is not violated again.

17 Plaintiffs’ counsel certifies that they have contacted Defendants’ counsel
18 concerning this motion, and Defendants’ counsel objects to it. Plaintiffs request
19 oral argument or a hearing on this motion as Montana Code Annotated § 27-19-
20 301(1) and (2) contemplates.

BACKGROUND

I. The Parties

1 The Missoula County Election Integrity Project (the “Integrity Project”) is a
2 non-partisan, all-volunteer organization whose principal purpose is to investigate,
3 audit, and protect the integrity of elections in Missoula County. The Integrity
4 Project was founded in 2020 and pursued its mission through its agents. John R.
5 Lott, Jr. (collectively, with the Integrity Project, “Plaintiffs”) is a Missoula County
6 resident and registered voter. Pl. Compl. ¶ 18. Mr. Lott voted in the November
7 2020 election and worked closely with the Integrity Project preceding this
8 litigation.

9 The Missoula County Elections Office (“Missoula County”) is the agency
10 responsible for administering elections in Missoula County; responsible for all
11 recordkeeping of election data relative to Missoula County and maintaining those
12 records for public inspection. Pls. Compl. ¶ 20; Defs. Ans. ¶ 20. Bradley Seaman
13 (collectively, with Missoula County, “Defendants”) is the Elections Administrator
14 for Missoula County, Montana, and he oversees the Missoula County Elections
15 Office. Mr. Seaman was appointed before the November 2020 election, Def. Ans. ¶
16 22, and he holds that office today.¹

¹ *Elections Office Contact Us*, Missoula County (last visited Sept. 23, 2022)
<https://www.missoulacounty.us/government/administration/elections-office/contact-us> (naming Bradley Seaman as Missoula County Election Administrator).

II. Missoula County’s Voter Lists, Ballots, and Stubs

1 In May 2021, Plaintiffs submitted an information request email for a list of
2 every voter in Missoula County and the stub numbers from their ballots relative to
3 the November 2020 election. Def. Ans. ¶ 49. In May 2022, Plaintiffs’ agent
4 submitted a formal request on Missoula County’s Public Record Request site,
5 further requesting a list of all voters “who voted in the November 3rd, 2020,
6 General Election,”² with accompanying specifications. Pl. Compl. ¶ 49.
7 Acknowledging only the 2021 request in their Answer, Defendants were unable to
8 satisfy this request due to their method of processing and maintaining the
9 information that Plaintiffs sought. Def. Ans. ¶ 49. The information that Plaintiffs
10 sought was maintained by Defendants on a database. This database is structured so
11 that it automatically updates every time data is added, deleted, or substituted. Def.
12 Ans. ¶ 49. Defendants describe this database as “live” such that any “report run by
13 Missoula County would reflect the data on the day the report was run.” Def. Ans. ¶
14 49. Defendants could only provide information relative to the day their search was
15 performed; information as it had been updated, altered, and modified as of May
16 2021 and not as it had existed in November 2020. Def. Ans. ¶ 49. Defendants’
17 recordkeeping methodology was physically incapable of satisfying Plaintiffs’

² See Allison Frank, *Request 22-56*, Public Record Requests: Missoula County, Montana (May 9, 2022), <https://missoulacountymt.nextrequest.com/requests/22-56>

request “for the time frame that was meaningful to the Defendants *[sic]*.” Def.

Ans. ¶ 49. In other words, they do not preserve or retain their election records.

III. The Video Footage of Missoula County’s 2020 Election Count

During the 2020 election cycle, Defendants installed a video surveillance device in Missoula County’s ballot counting center (the “Counting Center”). Def.

Ans. ¶ 2. The Montana Governor ordered the device installed in response to social distancing restrictions that limited the number of physically present observers in

the Counting Center. Def. Ans. ¶ 7. With social distancing restrictions in place, the

surveillance video device broadcasted a livestream of the Counting Center during

the November 2020 election vote count as a substitute for in-person observation.

Def. Ans. ¶ 7. On December 22, 2020, Plaintiffs’ agent submitted an information

request regarding video images of the Counting Center during the 2020 election

vote count. Def. Ans. ¶ 8; Def. Ans. Exh. B. Rather than actively preserving this

livestream as a digital record, Defendants utilized an automated process for

handling what it considered a mere “surveillance video.” Def. Ans. ¶ 7; Def. Ans. ¶

59 (“Surveillance footage was maintained under the appropriate retention

schedules, and the fact that the data was livestreamed does not change what sort of

data it is and how Missoula County is responsible to manage it.”). In the 43 days

between the election livestream and Plaintiffs’ request, Defendants’ automated

system had purged any record of the Missoula County ballot Counting Center

livestream. Def. Ans. ¶ 9. Despite Defendants’ attempts to retrieve the requested

1 data from their internal technical department, the video record was lost and
2 “unavailable to produce by the time it was requested” by Plaintiffs’ agent. Def.
3 Ans. ¶ 9.

4 **IV. The 2022 Congressional Midterm Elections**

5 Plaintiffs are seeking a preliminary injunction in this case because, on
6 November 8, 2022, a federal midterm election will be held where every seat in the
7 United States House of Representatives and one-third of the seats in the United
8 States Senate will be determined at the polls, including those operated by
9 Defendants. *See* Congressional, State, and Local Elections, USA.gov,
10 <https://www.usa.gov/midterm-state-and-local-elections#item-213861>. And the
11 voters in Missoula County will be electing their representative for Montana’s 1st
12 Congressional District. *See Election Guide ’22*, Montana Free Press,
13 <https://apps.montanafreepress.org/election-guide-2022/>. Given that Defendants
14 deny they have the preservation obligations that Plaintiffs assert in their
15 Complaint, Plaintiffs respectfully request that the Court grant a preliminary
16 injunction that requires (1) Defendants immediately record and retain their “live”
17 database voter rolls so that each iteration is preserved for future inspection, and (2)
18 Defendants preserve and retain any and all video that they livestream or record
19 having to do with election counts, audits, voting, registration and other reasonably
related activity connected to the 2022 midterm elections.

STANDARD OF REVIEW

I. Mont. Code Ann. § 27-19-201

Under Montana law, a party may obtain a preliminary injunction by satisfying any one of five criteria. *See* Mont. Code Ann. § 27-19-201 (“§ 27-19-201”). *See also Driscoll v. Stapleton*, 401 Mont. 405, ¶13 (2020) (“These subsections are disjunctive; a court need find just one subsection satisfied in order to issue a preliminary injunction.”) (citations omitted). Specifically, § 27-19-201 provides that “[a]n injunction order may be granted in the following cases:

(1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;

(3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant’s rights, respecting the subject of the action, and tending to render the judgment ineffectual; ***

II. The District Court’s Broad Discretion

In reaching its decision, the “district court must exercise its otherwise broad discretion only ‘in furtherance of the limited purpose of [a] preliminary injunction[:] to preserve the status quo and minimize the harm to all parties pending final resolution on the merits.’” *Driscoll*, ¶ 14 (citation omitted) (alterations in original). The status quo is defined as “the ‘last actual, peaceable, non[-]contested condition which preceded the pending controversy.’” *Driscoll*,

¶ 14 (citation omitted) (alterations in original). The district court “should not issue” a “preliminary injunction” if it “will not accomplish its limited purposes.” *Driscoll*, ¶ 14 (citation omitted).

With these principles in mind, the “district court need find only that an applicant made a prima facie showing she will suffer a harm or injury—‘whether under the ‘great or irreparable injury’ standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201.’” *Driscoll*, ¶ 15 (citation omitted). The term “[p]rima facie is defined as ‘at first sight’ or ‘on first appearance but subject to further evidence or information.’” *Driscoll*, ¶ 15 (citation omitted). As demonstrated below, Plaintiffs easily satisfy § 27-19-201(1) and plainly satisfy § 27-19-201(2) and (3).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on Obtaining the Relief Demanded as Voter Roll Records Are Election Records Subject to State and Federal Record Retention Policies.

Plaintiffs are entitled to a preliminary injunction because Defendants’ voter registration record retention scheme violates Montana’s records retention law and federal preservation obligations.

As a threshold matter, Montana election administrators have an independent obligation to retain election records that is severable from the obligation of the Secretary of State. Indeed, under Montana law,

1 The election administrator is responsible for the administration of all
2 procedures relating to registration of electors and conduct of election,
3 *shall keep all county records relating to elector registration and*
4 *elections*, and is the primary point of contact for the county with
5 respect to the statewide voter registration list and implementation of
6 other provision of *applicable federal law* governing elections.

7 Mont. Code Ann. § 13-1-301 (emphasis added). The Secretary of State has an
8 independent duty to maintain accurate election records, and election administrators
9 have an additional duty to provide election-related data. Mont. Code Ann. § 13-1-
10 204. Nevertheless, because Montana law holds that “all records pertaining to . . .
11 *elections* are public records” that “shall be open for inspection during regular
12 office hours,” *see* Mont. Code Ann. § 13-1-109, Defendants cannot be relieved of
13 their statutory obligation to maintain for open inspection those records, irrespective
14 of other submission requirements to the Secretary of State.

15 Plaintiffs requested the election data discussed herein under Montana’s
16 Constitutional Right to Know, *see* Mont. Const. Art. II § 9, and as a formal public
17 records request. Missoula County denied those requests. Therefore, Plaintiffs have
18 a cause of action under Mont. Code Ann. § 2-6-1009.

**a. Montana State Law requires the election records that Plaintiffs
sought be retained for at least 22 Months.**

19 Montana state law holds that “all records pertaining to *elector registration*
20 and *elections* are public records. They shall be open for inspection during regular
21 office hours.” Mont. Code Ann. § 13-1-109(emphasis added). A county’s “election
22 administrator is responsible for the administration of all procedures relating to

1 registration of electors and conduct of elections, *shall keep all county records*
2 *relating to* elector registration and *elections*, and is the primary point of contact for
3 the county with respect to the statewide voter registration list and implementation
4 of other provisions of applicable federal law governing elections.” Mont. Code
5 Ann. § 13-1-301 (emphasis added).

6 Moreover, the Local Government Records Committee (“LGRC”) is
7 responsible for establishing record retention and disposition schedules for local
8 government records. Mont. Code Ann. § 2-6-1202. In 1996, the LGRC adopted an
9 Elections Records Schedule, known as Schedule No. 3, outlining the applicable
10 record retention “minimums” for county election records. Local Government
11 Records Committee, *Election Records Schedule*, (last revised April 2019),
12 <https://sosmt.gov/wp-content/uploads/elections-records-schedule.pdf> (“LGRC
13 Schedule 3”).

14 Under this scheduling matrix, for an election involving federal or statewide
15 candidates, records of the following must be maintained for 22 months: (1) voted
16 and unvoted and detached stubs; (2) unused ballots; (3) unverified provisional
17 ballots; (4) verified provisional ballot secrecy envelopes and outer affirmation
18 envelopes; and (5) test ballots-automark. *See* LGRC Schedule No. 3 at ER5.
19 Similarly, as it relates to voter registration information, records for the following
20 must be maintained for either four or five years: (1) voter confirmation card—

1 returned as undeliverable (five years); (2) cancellation notice from other counties
2 or states (four years); (3) death notices from other counties or states (four years);
3 and (4) lists of purged voters—canceled voters purged from the statewide system
4 by SOS (five years). *See* LGRC Schedule No. 3, at ER7.

5 Defendants concede that they are unable to provide voter lists, ballots, or
6 stubs as they existed in November 2020 because these pieces of election data are
7 maintained in a “database” that is “live,” and, thus, “any report run” for these
8 records only “reflect the data on the day that the report was run. . . .” Defs. Ans.

9 ¶ 49. This admission demonstrates that, as a “live” document, these election
10 records are continually destroyed upon a new incidental update—an addition,
11 deletion, or substitution of some relevant voter data. Each update serves as a new
12 record relevant to any election integrity group seeking to verify voter registration
13 data. But due to the “live” nature of Defendants’ record retention system, each new
14 update overwrites the previous record, causing the original to be permanently lost.
15 As these records relate to voting and elections, they are undeniably records that fall
16 within the LGRC Schedule No. 3 requirements. And, with respect to ballots and
17 stubs, LGRC Schedule No. 3 requires minimum retention of 22 months. *See* LGRC
18 Schedule No. 3, at ER5. And regarding voter lists maintained by registration data,
19 LGRC Schedule No. 3 requires data to be maintained for up to as long as five
20 years. *See* LGRC Schedule No. 3, at ER7. Defendants have not conformed to this

1 schedule, nor do they appear to admit they must, which means the destruction of
2 these election records under their “live” database system will continue into the
3 midterm elections of 2022 and beyond. This posture requires that the Court issue a
4 preliminary injunction to prevent the continued real-time or “live” destruction of
5 election records under Montana law. Plaintiffs respectfully request that it do so.

b. Federal Law Reinforces Montana’s Own Record Retention Requirements by Requiring Election Records of All Kinds to be Retained for at least 22 Months.

6 Like Montana’s election record retention requirements, federal law imposes
7 a standard on Defendants that creates a floor rather than a ceiling. Specifically, 52
8 U.S.C. § 20701 requires that:

9 Every officer of election shall retain and preserve, for a period of
10 twenty-two months from the date of any general, special, or primary
11 election of which candidates for the office of President, Vice
12 President, presidential elector, Member of the Senate, Member of the
13 House of Representatives . . . are voted for, all records and papers
14 which come into his possession relating to any applicant, registration,
15 payment of poll tax, or other act requisite to voting in such election,
16 except that, when required by law, such records and papers may be
17 delivered to another officer of election and except that, if a State . . .
18 designates a custodian to retain and preserve these records and papers
19 at a specified place, then such records and papers may be deposited
20 with such custodian, and the duty to retain and preserve any record or
21 paper so deposited shall devolve upon such custodian. . . .
22

23 Although 52 U.S.C. § 20701 does not appear in and of itself to create a private
24 right of action, *see, e.g., Ickes v. Whitmer*, 1:22-cv-817, 2022 U.S. Dist. LEXIS
25 161719, at *6 (W.D. Mich. Sept. 8, 2022) (collecting cases) (observing “52 U.S.C.

§ 20701 likely does not create a private right of action”), it nevertheless imposes a duty on Defendants upon which they must comply.

As demonstrated previously, the “live” nature of the database that Defendants utilize to maintain their election records seemingly results in the regular destruction of voter and election data depending on every incidental update. When Plaintiffs requested 2020 election records, Defendants live database did not contain the records responsive to Plaintiffs’ request, despite federal law requirements to preserve those records for at least 22 months.

Defendants may argue that the live database that maintains their election and voter records does not constitute a record under federal law. Although 52 U.S.C. § 20701 does not internally define what an election record is, it recognizes that records are more than just mere papers. 52 U.S.C. § 20701 (Every officer of election shall retain and preserve . . . *all records and papers* . . . relating to any applicant, registration, payment of poll tax, or other act requisite to voting in such election.”). Case law interpreting a related federal election law statute is instructive.

In *Project Vote, Inc., v. Kemp*, 208 F. Supp. 3d 1320, 1323-34 (N.D. Ga. 2016), the plaintiff sought disclosure of records relating to, among other things, rejection of voter registration applications under the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. § 20501, *et seq.* Noting that the NVRA required

1 “a State to maintain and ‘make available for public inspection . . . all records
2 concerning the implementation of programs and activities conducted for the
3 purposes of ensuring the accuracy and currency of official lists of eligible voters,”
4 the court observed that—as in this case—“[t]he statute does not define the term
5 ‘records’” *Kemp*, 208 F. Supp. 3d at 1335 (quoting 52 U.S.C. § 20507(i)(1)).
6 In reliance upon “the common and ordinary meaning of the term” and upon
7 reviewing various dictionaries, the court concluded that, for the purposes of the
8 NRVA, “records” encompasses “information in electronic form.” *Id.* at 1335-36.
9 Rejecting “Defendant’s implicit argument that ‘records’ are limited to physical
10 materials,” the court viewed Black’s Law Dictionary’s “definition of the term as
11 dispositive; specifically, a record under federal law includes “information ‘stored
12 in an electronic or other medium.’” *Id.* at 1335 (quoting *Black’s Law Dictionary*
13 1465 (10th ed. 2014)). Notably, the court also outlined other definitions of the term
14 “records,” including “anything preserving information and constituting a piece of
15 evidence about past events.” *Id.* at 1335 (internal citations and quotation marks
16 omitted).

17 Here, that Defendants have chosen a live database that fails to preserve the
18 requested voter documents does not vitiate their obligation under federal law.
19 Federal law imposes a statutory duty on Defendants to “retain and preserve, for a
20 period of twenty-two months from the date of” any election for federal

1 officeholders “all records and papers which come into his possession relating to
2 any applicant, registration, payment of poll tax, or other act requires to voting in
3 such election. . . .” 52 U.S.C. § 20701.

4 Defendants’ violation of their federal duty reinforces their violation of
5 Montana law, upon which this lawsuit is predicated—Plaintiffs’ constitutional
6 “right to know.” Mont. Const. Art. II, § 9. By Defendants’ own admission, they do
7 not preserve the records Plaintiffs sought, despite LGRC Schedule No. 3’s
8 application to local government election offices like Missoula County and despite
9 its federal obligation. Plaintiffs are entitled to the records they sought and intend to
10 make similar requests related to the upcoming 2022 midterm elections. Thus,
11 Plaintiffs sued to request a declaratory judgment. A preliminary judgment
12 complements the relief being sought. Further, as the 2022 elections are nearly one
13 month away, the continuance of Defendants’ failure to preserve these records will
14 produce a great or irreparable injury to Plaintiffs. *See Driscoll*, ¶ 15 (stating that
15 “the loss of a constitutional right constitutes an irreparable injury”). Plaintiffs have
16 made a prima facie showing to obtain a preliminary injunction, and they
17 respectfully request that the court grant the requested relief.

**II. Plaintiffs Are Likely to Succeed on Obtaining the Relief Demanded
Because Video Recordings of Election Counts Are Election Records
Subject to State and Federal Record Retention Policies.**

18 Plaintiffs are entitled to a preliminary injunction because Defendants treat
19 and have treated recorded video of federal election counts as “surveillance video”

1 rather than as election records that must be preserved under federal law and state
2 law. Defendants admit that “Missoula County” had “successfully livestreamed its
3 surveillance video from the Counting Center during the 2020 vote count” and that
4 they are not “obligated to retain” this video “any longer than applicable retention
5 schedules.” Defs. Answer ¶¶ 7-10. Defendants even assert that, as “[s]urveillance
6 footage,” the video of the Counting Center “was maintained under the appropriate
7 retention schedule and the fact that the data was livestreamed does not change what
8 sort of data it is and how Missoula County is responsible to manage it.” Def. Ans. ¶
9 59. It is Defendants’ fundamental misunderstanding—that video footage of an
10 election Counting Center, from which poll watchers were excluded, is somehow
11 not an election record—that this preliminary injunction seeks to correct.
12 Defendants reiterate county policy that “Recorded digital video images will be
13 stored on hardware in a secure area of Missoula County. Recordings will be
14 retained for no more than 60 days in accordance with Missoula County’s records
15 retention schedule, unless required as part of an ongoing investigation or
16 litigation.” Defs. Ans. ¶ 4. But policy is not law, and this policy certainly cannot
17 control video footage of an election Counting Center in the face of applicable state
18 and federal law.

19 When Plaintiffs made a request to view this video footage on December 22,
20 2020—only 43 days after the election—the video of the Counting Center was lost

1 and destroyed. Or, as Defendants put it, “[t]his surveillance video had been
2 processed according to the automated system for surveillance videos, and the
3 technical term for deletion of videos according to this process is ‘purging.’” Defs.
4 Ans. ¶ 9. Whether it was “purged” or “destroyed,” Defendants’ current method of
5 maintaining election center footage is violative of the law. Plaintiffs need to ensure
6 this does not happen again because they intend to make the same request for any
7 Counter Center video footage that relates to the 2022 federal midterm elections.

**a. Federal Law treats Missoula County’s video recording of the
2020 vote count as an election record that must be retained for
at least 22 months.**

8 Federal law treats video of an election count as an election record that must
9 be maintained for 22 months. Significantly, LRGC Schedule No. 3 requires Audit
10 Logs for central counters and precinct counters to be maintained for 22 months in
11 elections with a statewide or federal candidate. Insofar as an Audit Log is a dataset
12 used to verify the authenticity of counting reports at a counting center, a strong
13 parallel may be drawn to the video of Defendants’ Counting Center. This parallel
14 is reinforced by the expansive language of “all election records” that federal law
15 employs.

16 Despite Defendants’ conclusory claim that “[t]he livestream of Missoula
17 County’s surveillance video [of its 2020 election count] does not constitute a
18 record of the election,” *see* Defs. Ans. ¶ 7, there can be no serious question that a

1 video recording of a federal election count constitutes an election record under 52
2 U.S.C. § 20701, as the Northern District of Georgia explained in *Kemp*.

3 Like Defendants’ live database that contains voter lists, ballots, and stubs,
4 the recorded video of the 2020 Counting Center encompasses “information in
5 electronic form,” which qualifies as a record under federal voting and election
6 laws. *Kemp*, 208 F. Supp. 3d at 1335-36. The *information* is *the count*, and the
7 *electronic form* is *the video*. Likewise, this video also constitutes an election record
8 because it “preserv[ed] information and constitut[ed] a piece of evidence about
9 past events,” namely, the 2020 federal election vote count. *Id.* at 1335 (internal
10 citations and quotation marks omitted).

11 Similarly, the language of 52 U.S.C § 20701 is unambiguous: “all record and
12 papers.” The use of the modifier “all” in “all records” strongly supports the
13 extensive meaning of the word “records.” Indeed, the United States Court of
14 Appeals for the Fourth Circuit, in interpreting NVRA § 8(i)(1) (codified as 52
15 U.S.C. § 20507(i)(1)), recognized that “‘the use of the word ‘all’ [as a modifier]
16 suggests an expansive meaning because ‘all’ is a term of great breadth.’” *Project*
17 *Vote/Voting for Am., Inc., v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (citation
18 omitted) (alterations in original). Defendants can call recorded video of the 2020
19 vote count in their jurisdiction mere “surveillance video,” but that in no way makes
20 it any less an election record—an election record that must be preserved for 22

1 months. Furthermore, Defendants’ duty is not alleviated by the relieving provision
2 of 52 U.S.C. § 20701 (“if a State . . . designates a custodian to retain and preserve
3 these records and papers at a specified place, then . . . the duty to retain and
4 preserve any record or paper so deposited shall devolve upon such custodian”),
5 because, by Defendants’ own assertion, the Counting Center video was a mere
6 “surveillance video” that was routinely purged. Def. Ans. ¶ 7; Def. Ans. ¶ 59.
7 Defendants cannot have it both ways.

8 As Defendants make clear, they view the count footage as mere surveillance
9 video of a municipal building—even where it records the counting of ballots in an
10 election for the President of the United States—and hold no such federal (or state,
11 for that matter) duties attach to their treatment of this video. This means this
12 conduct will continue. Defendants’ prior conduct and current method of data
13 retention require the Court to issue a preliminary injunction to prevent the
14 destruction of video footage that records anything having to do with the upcoming
15 2022 federal election and beyond. Plaintiffs respectfully request that it do so.

**III. The Court Should Waive the Security Deposit Attending the Granting
of This Preliminary Injunction in the Interest of Justice.**

16 Since Plaintiffs seek a preliminary injunction in this case to ensure the
17 integrity of Missoula County’s 2022 midterm election by preserving voter and
18 election records that Defendants have an obligation to retain under state and
19 federal law, it is in the interest of justice to waive the security deposit requirement.

1 Under Montana law, where the district court grants an injunction, “the judge
2 shall require a written under undertaking to be given by the applicant for the
3 payment of the costs and damages that may be incurred or suffered by any party
4 who is found to have been wrongfully enjoined or restrained,” except that this
5 “may be waived . . . in the interest of justice.” Mont. Code Ann. § 27-19-306(1).
6 The district court enjoys the sound discretion to determine whether to require or
7 waive a security bond, and its judgment will only be disturbed for an abuse of
8 discretion. *See Four Rivers Seed Co., v. Circle K Farms, Inc.*, 303 Mont. 342
9 (2000) (citation omitted).

10 Plaintiffs respectfully request that the Court waive the security for damages
11 because it is in the public interest and, thus, in the interest of justice to waive such
12 an undertaking. Defendants, as a municipal entity and officer, have no interests to
13 protect beyond following the law and will sustain no real damages by conducting
14 themselves consistent with the demands of this preliminary injunction. Indeed, the
15 opposite is true. Defendants will benefit by following state and federal law as it
16 pertains to the upcoming election and likely avoid future election-related litigation.
17 Any costs Defendants incur in compliance with the preliminary injunction are
18 nominal, at most. *Cf. Canfield v. Batiste*, No. C11-5994RJB, 2011 U.S. Dist.
19 LEXIS 158570, at *3 (E.D. Wash. Dec. 6, 2011) (waiving preliminary injunction
20 bond where plaintiff likely to succeed; defendants unlikely to incur significant

costs or damages; and bond would adversely affect plaintiff's constitutional rights)
(citations omitted).

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that, pursuant to Mont. Code Ann. § 27-19-201, the Court grant this application for a preliminary injunction, requiring (1) Defendants restructure their "live" database as to record each subsequent change or update as a separate election record preserved for future inspection, and (2) Defendants preserve and retain any and all video they take having to do with election counts, audits, voting, registration and other reasonably related activity connected to the 2022 election.

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Respectfully submitted,

By: /s/ Abby J. Moscatel
Abby J. Moscatel Blacktail Law
Group, PLLC
P.O. Box 931
Lakeside, MT, 59922
(406) 318-722
amoscatel@blacktaillaw.com

Craig W. Trainor*
Rachel L. Jag*
AMERICA FIRST POLICY
INSTITUTE
Constitutional Litigation Partnership
1001 Pennsylvania Avenue, N.W.,
Suite #530
Washington, D.C. 20004
(571) 348-1802
ctrainor@americafirstpolicy.com
rjag@americafirstpolicy.com
*Admitted *Pro Hac Vice*