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THE COUNCIL OF STATE GOVERNMENTS

U.S. Supreme Court Denies Freeze on Montana Mail Ballots

Justice Kagan [denied](#) an emergency petition asking the Supreme Court to freeze a district court decision allowing counties to send mail ballots to all registered voters. Forty-five of Montana's 56 counties have opted to conduct the general election by mail ballot. Following this ruling these counties will be able offer mail ballots, as well as in person voting in all Montana counties.

Montana law states that “a regularly scheduled federal, state, or county election” cannot “be conducted by mail ballot.” However, state law also allows the governor to “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business” in the event of an emergency or disaster.

Due to COVID-19, Governor Bullock permitted counties to conduct the June primary by mail ballot. After record turnout, the Montana Association of Counties urged the governor to do the same for the general election, which he agreed to do. Challengers brought numerous claims against the governor all of which a federal district court [rejected](#).

The district court first concluded the governor had statutory authority to suspend the prohibition on mail ballots. COVID-19 was a disaster and an emergency under Montana law. The prohibition on mail ballots is a “regulatory” statute which may be suspended because “administration of federal, state, and local elections is quintessentially state business.” According to the district court, the Montana Legislature could constitutionally delegate to the governor the authority to



suspend the prohibition on mail ballots because the “Legislature” per the Constitution’s Elections Clause isn’t “confined to a state’s legislative body.”

The challengers also claimed that voting by mail “will be ripe with fraud and thus result in unconstitutional disenfranchisement of a both direct and dilutive nature.” The district court rejected this argument noting that the challengers “have not introduced even an ounce of evidence supporting the assertion that Montana’s use of mail ballots will inundate the election with fraud.”

Finally, the district court rejected the challengers’ Equal Protection claim that counties with mail ballots will have greater voting power than other counties. Challengers cited to *Bush v. Gore* (2000) in which the Supreme Court stated that “one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.” The district court responded that the Supreme Court was clear in *Bush v. Gore* that the question was not “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” According to the district court, this is what the challengers want in this case.

The Ninth Circuit, without explaining its reasoning, refused to freeze the district court decision.

Before the Supreme Court, the challengers [renewed](#) their arguments that the governor acted outside his statutory authority and unconstitutionally.

This emergency petition went to Justice Kagan. She neither asked the governor to respond, nor asked the rest of the Supreme Court to participate in ruling in this



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case, indicating she didn't see the case as a close call. She also issued no opinion which is common in the case of emergency petitions.

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