No. _____

In the Supreme Court of the United States

COREY STAPLETON, MONTANA SECRETARY OF STATE,

Applicant,

v.

THE MONTANA DEMOCRATIC PARTY,

Respondent.

On Application to the Honorable Elena Kagan to Stay the Orders Of the Montana Supreme Court

APPENDIX TO EMERGENCY APPLICATION FOR STAY

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August 24, 2020

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IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 20-0396

MONTANA DEMOCRATIC PARTY and TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through its SECRETARY OF STATE, COREY STAPLETON,

Defendant and Appellant.

ORDER

On August 7, 2020, the State of Montana, by and through its Secretary of State Corey Stapleton, appealed from Findings of Fact, Conclusions of Law, and Order issued that same day by the First Judicial District Court, Lewis and Clark County, in its Cause No. DDV-2020-856. After expedited briefing, this Court issued an Order affirming the District Court on August 19, 2020. The District Court's rulings and this Court's affirmation of such resulted in the removal of the Montana Green Party candidates from the State's election ballots for the 2020 general election.

The Secretary has moved for a stay of this Court's Order. He asserts that he intends to petition the United States Supreme Court for certiorari and argues that judicial review will be frustrated if the matter is not stayed as the Secretary must certify the 2020 general election ballots today, August 20, 2020. The Secretary maintains that the candidates cannot be added to the ballot at a later date should he prevail on appeal, but the candidates could be marked out or covered up if this Court's determination is ultimately upheld.

The Secretary offers no legal authority for a motion to stay an order of this Court because the party intends to petition the United States Supreme Court for certiorari. The

Secretary cites generally to *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, 335 Mont. 94, 149 P.3d 565, in which this Court held that Appellants' appeal to this Court was mooted by their failure to move the district court to stay execution of its decision, but the procedure for staying a district court ruling pending appeal to this Court, set forth in M. R. App. P. 22, is inapplicable to the present matter.

IT IS THEREFORE ORDERED that Appellant's motion for stay is DENIED.

The Clerk is directed to provide immediate notice of this Order to all counsel of record.

DATED this 20th day of August 2020.

Chief Justice

Justices

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 20-0396

MONTANA DEMOCRATIC PARTY and TAYLOR BLOSSOM, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED, individual electors,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through its SECRETARY OF STATE, COREY STAPLETON,

Defendant and Appellant.

ORDER

On August 7, 2020, the State of Montana, by and through its Secretary of State Corey Stapleton, appealed from Findings of Fact, Conclusions of Law, and Order issued that same day by the First Judicial District Court, Lewis and Clark County, in its Cause No. DDV-2020-856. There, the District Court denied the Secretary's motion for partial summary judgment and granted the cross-motion for summary judgment of Plaintiffs and Appellees Montana Democratic Party, and individual electors Taylor Blossom, Ryan Filz, Madeline Neumeyer, and Rebecca Weed. The District Court concluded that a petition to obtain ballot access for the Montana Green Party for the November 2020 general election ballot failed to meet the requirements of § 13-10-601(2), MCA, and thus enjoined the Secretary and all persons acting under his authority from giving any effect to the Green Party petition for ballot access.

By Order of August 11, 2020, this Court set an expedited briefing schedule in this matter. Pursuant to our Order, the parties timely filed their appellate briefs. We have read and considered each of those briefs, as well as the amicus briefs filed in this matter, along with the record on appeal.

Having now done so, and with due consideration of the arguments and issues raised,

IT IS THEREFORE ORDERED that the August 7, 2020 Order of the First Judicial District Court, Lewis and Clark County, in its Cause No. DDV-2020-856, enjoining the Secretary of State and all persons acting under his authority from implementing or giving effect to the petition to qualify the Green Party as a minor party eligible for the 2020 election ballot is AFFIRMED. This Court's opinion, analysis, and rationale will follow in due course.

The Clerk is directed to provide immediate notice of this Order to all counsel of record.

DATED this 19th day of August, 2020.

Chief Justice

Justices

Justices Jim Rice and Beth Baker would reverse on the issues presented on appeal.

Justices

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY, and TAYLOR BLOSSOM, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through its SECRETARY OF STATE COREY STAPLETON, Defendant.	Cause No.: DDV-2020-856 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

This Court heard this matter on July 14 and 15, 2020.[1] Peter Michael Meloy and Matthew Gordon represented Plaintiffs Taylor Blossom, Ryan Filz, Madeline Neumeyer, Rebecca Weed, and the Montana Democratic

[1] The more extensive and complicated procedural history of this matter is recited in the Findings of Fact, below.

Party (MDP). Austin James and Matthew T. Meade represented Defendant State of Montana, by and through Secretary of State Corey Stapleton (Secretary).

The parties presented testimony and evidence and made oral arguments. Following the hearing, the parties submitted proposed findings of fact and conclusions of law and briefs. On July 17, 2020, the parties submitted notices of submittal.[2]

From the file, the testimony and evidence presented, the Court makes the following:

FINDINGS OF FACT

1. This matter came before the Court on an order to show cause on Plaintiffs' Complaint for Declaratory and Injunctive Relief.

2. Plaintiffs filed the complaint on June 1, 2020, against the Secretary, alleging that the Secretary erroneously failed to honor the requests of several hundred Montana voters to withdraw their names from a petition to obtain ballot access for the Montana Green Party for the November 2020 general election ballot. Plaintiffs alleged that once the withdrawals are accounted for, the petition fails to meet the requirements of Section 13-10-601(2), MCA, the political party qualification statute, because it does not contain the requisite number of valid signatures from at least thirty four legislative House Districts.

3. On Monday, June 22, 2020, the First Judicial District Court, Judge Kathy Seeley presiding, began a hearing on an order to show cause. Six days before the hearing, Plaintiffs filed a trial brief containing exhibits and declarations from Plaintiffs' trial witnesses. Late Friday before the hearing, and on the morning of the hearing, the Secretary filed various motions to dismiss the complaint and to vacate the hearing. Plaintiffs opposed all motions. At the

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[2] The Court has also granted status to certain entities and people to file briefs as *amici curiae* as set forth in the findings of fact below and in the accompanying Order on Supplemental Motion.

hearing before Judge Seeley, counsel argued the Secretary's motions about whether to proceed, and upon hearing argument, the Court decided to proceed with the hearing and hear evidence and testimony. The Secretary then requested a two-minute recess during which the Secretary filed a motion to substitute Judge Seeley. Judge Seeley referred the matter to Judges Mike Menahan and Michael F. McMahon, both of whom declined to assume jurisdiction. Judge Seeley then referred the matter to the undersigned, who accepted jurisdiction and set a continuation of the show cause hearing for Tuesday, July 7.

4. Prior to the July 7 hearing, the Montana Republican Party (MTGOP) and two petition signers filed motions to intervene as defendants. The MTGOP also filed a motion to reschedule the Tuesday, July 7 hearing. The Secretary filed a response joining in the MTGOP's request to reschedule the Tuesday, July 7 hearing. Plaintiffs opposed the motions to intervene and the motion to reschedule the hearing. On the Sunday before the July 7 hearing, the Secretary filed an emergency motion to continue the hearing due to a family emergency that befell one of its counsel.

5. Plaintiffs filed a supplemental trial brief containing exhibits and declarations that reflected subsequent productions of public records by county elections offices and the Secretary since the first hearing in the case. This filing included copies of every signature withdrawal form known to Plaintiffs to have been submitted to county elections offices or to the Secretary.

6. On July 7, the parties convened before the Court. The Court granted the Secretary's request to continue the hearing, and re-set the hearing to begin Tuesday, July 14.

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7. On July 8, the Secretary moved for partial summary judgment regarding the use of electronic signatures on withdrawal forms. Plaintiffs opposed the Secretary's motion and cross-moved for summary judgment on this issue.

8. On July 14 and 15, the Court held a two-day evidentiary hearing.

9. At the outset of the hearing on July 14, the Court denied the motions to intervene by the MTGOP and two individual signers of the petition. The Court granted these entities the right to file briefs as *amici curiae*. The two individual signers immediately filed a petition for a writ of supervisory control in the Montana Supreme Court seeking to reverse the Court's order denying their motion to intervene. The Montana Supreme Court denied the petition on July 15, noting Plaintiffs did not object to the signers' participation as *amici curiae*. *Campbell v. Montana First Judicial District Court,* No. OP 20-360.

10. The Court heard testimony from five witnesses for the Plaintiffs, including MDP representatives Kendra Miller and Trent Bolger, and individual plaintiffs Madeleine Neumeyer (Neumeyer), Rebecca Weed (Weed), and Taylor Blossom (Blossom). The Secretary called one witness, Dana Corson, the Secretary's Elections Director. On rebuttal, Plaintiffs re-called Kendra Miller and Trent Bolger to testify. All witnesses were subject to cross examination, and both parties offered exhibits into evidence. The Court concluded the hearing with closing argument on the issues presented in the case.

11. The political party qualification statute, § 13-10-601, MCA, specifies how parties are eligible to conduct a primary election. The statute has two ways by which a party may appear on the primary election ballot. First, a political party will appear on the primary ballot if it had a candidate for statewide

office in either of the last two general elections who received a total vote that was at least five percent of the total vote received by the successful candidate for governor. § 13-10-601(1), MCA. Under this provision, MDP, the MTGOP and the Montana Libertarian Party have qualified to appear on the primary ballot.

12. If a party does not qualify under this previous subsection, it may nevertheless qualify for the primary by submitting a petition, on a form prescribed by the Secretary, requesting a primary election. Section 13-10-601(2)(a), MCA. Section 13-10-601(2)(b), requires:

> The petition must be signed by a number of registered voters equal to 5% or more of the total votes cast for the successful candidate for governor at the last general election or 5,000 electors, whichever is less. The number must include the registered voters in more than one-third of the legislative districts equal to 5% or more of the total votes cast for the successful candidate for governor at the last general election in those districts or 150 electors in those districts, whichever is less.

13. Montana has 100 legislative districts. Mont. Const. Art. V, section 2. Therefore, as set forth in this statute, the petition must include the verified signatures of registered voters in at least 34 legislative districts, being "more than one-third of the legislative districts." Section 13-10-601(2)(b), MCA.

14. Plaintiff Neumeyer signed the petition in Helena in February 2020. Neumeyer believed the petition was being advanced by an environmental organization. She did not know the circulation of the petition was being funded by the MTGOP, as explained below. Neumeyer generally supports the Democratic Party and Democratic candidates for office. Had she known that the MTGOP was behind the petition, she would not have signed it.

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15. Plaintiff Weed signed the petition in Bozeman in February 2020. Weed believed the petition circulator was working with the Montana Green Party to get the Green Party on the ballot. Weed generally leans towards supporting the Democratic Party and usually supports Democratic candidates for office. She did not know the circulation of the petition was being funded by the MTGOP. Had she known that the MTGOP was behind the petition, she would not have signed it.

16. Plaintiff Blossom signed the petition in in Bozeman in February 2020. Based on his conversation with the petition circulator, Blossom believed that the petition circulator was working with the Montana Green Party to get the Green Party on the ballot. Blossom considers himself to be a member of the Democratic Party and supports Democratic candidates for office. He did not know the circulation of the petition was being funded by the MTGOP. Had he known that the MTGOP was behind the petition, he would not have signed it.

17. By mid-February when the circulators had finished collecting almost all of the petition signatures that they would eventually turn in, there was not any public information as to whom was financing the Montana Green Party petition effort, although there was discussion in the general news media raising the question as to whom was financing this effort.

18. On February 12, the Montana Green Party posted a message on its Facebook page stating:

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> We have been receiving notice that there are people falsely collecting information on behalf of the Green Party. As of the moment, we are still in a legal battle against the state of MT, and in such a state are not collecting, nor have we hired or asked for volunteers to collect information this 2020 cycle. . . As of now, we have no house senate or state office candidates running for the 2020 election, at least until the lawsuit reaches resolution. Any individual acting in rude or suspicious behavior claiming to be collecting information on our behalf is not affiliated with our name and mission.

See, Finding of Sufficiency, *Luckey v. Advanced Micro Targeting*, No. COPP 2020-CFP-004, at 3 (June 25, 2020) (hereinafter *Luckey*).

19. Local news reporters discovered that on February 14, the Club for Growth Action, a political arm of a Washington D.C. SuperPAC, filed paperwork with the Commissioner of Political Practices (COPP) as a committee to petition to qualify a minor political party for primary elections, identifying the Green Party as the minor party. *Luckey* at 2.

20. In response to reporters' inquiries, however, a spokesman for Club for Growth Action denied that it was behind the signature gathering efforts. *Luckey*, at 2. The spokesman told MTN News on February 13 that Club for Growth Action had explored undertaking that effort for the Montana Green Party and then decided against it.

21. As a result, well after the circulators had finished collecting the petition signatures, Montanans still did not know who was financing the Montana Green Party petition effort. For example, one local news report published February 13 stated "A group other than the Montana Green Party has been attempting to qualify the party for the 2020 ballot in Montana – but it's not

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clear who." In a radio interview published February 21, one local reporter posed the following question to her colleague:

> [I]n the realm of shenanigans, some unknown group has gathered signatures and submitted petitions around the state to qualify the Green Party for the ballot, a move that is seen as possibly helping Republican candidates. The Green Party in Montana says it's not them. And a conservative PAC, the Club for Growth, says it's not them either. So who is it?

Her colleague, a local politics reporter, responded: "That's a really good question that I would like to find out the answer to. . . . [H]opefully we'll see some sort of paperwork filed soon to give us an idea of who's behind it."

22. During the 2019 legislative session, the Montana legislature passed legislation to require prompt disclosure of contributions and expenditures made to petition to qualify a minor political party for primary elections. Sections 13-37-601 to -607. These statutes became effective October 1, 2019. Despite these newly enacted statutes, Montanans did not know who was funding the petition to place the Green Party on the ballot. This 2019 legislative action was in response to a similar effort on the part of unknown individuals or groups in 2018 to petition to qualify the Montana Green Party for ballot access.

23. In 2018, Advanced Micro Targeting, a Nevada political consulting firm operating through thirteen paid signature gatherers, many from out of state, independently collected 9,461 signatures from four counties in support of the Montana Green Party petition. *Larson v. State By & Through Stapleton*, 2019 MT 28 ¶ 4, 394 Mont. 167, 434 P.3d 241. A representative of the Green Party testified that it did not commission or coordinate with this eleventh-hour paid signature gathering effort and was unaware of it until learning

of it through news media reports. *Id.* ¶ 4 n.2. Based on the failure of Advanced Micro Targeting to comply with statutory requirements applicable to political party petition signatures, this Court invalidated some of the affected signatures and enjoined the Secretary from affording the Montana Green Party ballot access in the 2018 general election. The Montana Supreme Court, by a six to one vote, affirmed this Court's decision on appeal. *Id.* ¶ 65.

24. Based on the events surrounding the 2018 Montana Green Party petition, MDP filed a campaign practices complaint with the COPP against Advanced Micro Targeting, alleging that the firm failed to register and report contributions and expenses for its electioneering activities performed through its petition campaign.

25. The COPP determined that Advanced Micro Targeting's activities did not qualify as expenditures under then-existing Montana campaign finance law. The COPP dismissed MDP's complaint. Dismissal and Sufficiency Decision, *Mont. Democratic Party v. Advanced Micro Targeting*, No. COPP 2018-CFP-004, at 4-5 (July 20, 2018).

26. As noted above, during the 2019 legislative session, the Montana legislature enacted new campaign finance disclosure requirements applicable to political party qualification petitions. As a result of the 2019 legislation, Montana law now imposes disclosure and reporting requirements on efforts to petition to qualify a minor political party for primary elections similar to the requirements applicable to efforts to petition to qualify initiatives and referenda. *See* §§ 13-37-601 *et seq.*, MCA.

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27. Among the disclosure requirements mandated by these statutes, organizations making efforts to qualify a minor political party for primary elections using a political party qualification petition are now required to file an organizational statement with the COPP within five days of spending or receiving $500 towards the effort. § 13-37-602, MCA; § 13-37-601(4)-(7), MCA.

28. The organizational statement is required to contain details about the minor party qualification committee, including its name and complete address, the identity of its treasurer and depository accounts, the names and addresses of its officers, and an organizational statement.

29. No entity filed an organizational statement under § 13-37-602, MCA, as a minor party qualification committee for the petition with the COPP until February 14, after almost all the petitions had been signed. The February 14th filing, however, still did not reveal the entity funding the petition. Club for Growth immediately denied that it was behind the signature gathering effort. *Luckey*, at 2.

30. According to the Secretary's pre-election calendar, the deadline for petition circulators to submit minor party qualification petitions to county elections offices was March 2nd.

31. On March 6, the Secretary announced to county elections officials and to the media that the Montana Green Party had submitted enough signatures to satisfy the requirements of § 13-10-601, MCA. The Secretary thus added the Green Party to the list of political parties on its website.

32. The Secretary's announcement did not identify in which house districts the petition had exceeded the minimum required number of signatures or the number of signatures in each of those districts.

33. At the time of the Secretary's announcement on March 6, Montanans still did not know who was financing the Montana Green Party petition effort. For example, a local news report published on March 7 stated "It's unclear who paid the out-of-state signature gatherers. Montana's Green Party has said it wasn't them."

34. As the news began to spread in late February and early March that the Montana Green Party had not sponsored the petition to qualify the Montana Green Party for ballot access, and that some unknown entity was behind the effort, signers began to demand that their names be removed from the petition. For example, Plaintiff Blossom attempted to withdraw his signature on March 6. Plaintiff Weed attempted to withdraw her signature on March 5. Blossom and Weed each filled out a signature withdrawal form the same day they learned that the Montana Green Party had disavowed the petition to put the Green Party on the ballot and submitted it shortly thereafter.

35. Montana law has long recognized the right of petition signers to withdraw their names from a petition. The Montana Legislature has not provided specific statutory requirements that signers of political party qualification petitions must follow to withdraw their names from such petitions.

36. By contrast, Montana law does specify a process by which signers of petitions for constitutional amendments, calls for constitutional a convention, initiatives, or referenda may withdraw their signatures: and grants to the Secretary the authority to prescribe the form to be used by an elector desiring to have the elector's signature withdrawn from such a petition. Section 13-27-301(3), MCA. This statute does not mention political party qualification petitions nor is this statute incorporated by reference in the statutes governing

political party qualification petitions. *Cf.*, § 13-10-601(2)(c), MCA, incorporating §§ 13-27-403 through 13-27-306, MCA, for process to be used in verifying signatures on a political party qualification petition.[3]

37. As noted, this statutory process for withdrawals from petitions for a "constitutional amendment, constitutional convention, initiative, or referendum" requires the Secretary to prescribe a form for the signer to use. Section 13-27-301(3), MCA.

38. The statutory process for withdrawals from petitions for a "constitutional amendment, constitutional convention, initiative, or referendum" also provides a deadline for withdrawals. That deadline is the same day that petitions for a "constitutional amendment, constitutional convention, initiative, or referendum" must be submitted to county elections officials. Section 13-27-301(1), (3), MCA:

> Signatures may be withdrawn from a petition for constitutional amendment, constitutional convention, initiative, or referendum up to the time of final submission of petition sheets as provided in subsection (1). The secretary of state shall prescribe the form to be used by an elector desiring to have the elector's signature withdrawn from a petition.

39. Based on this statutory authority, the Secretary has prescribed a withdrawal form for petitions for a "constitutional amendment, constitutional convention, initiative, or referendum." The withdrawal form expressly states that, "Signatures may be withdrawn from a petition for constitutional amendment, constitutional convention, initiative, or referendum up to the time of final submission of petition sheets to the county election office." *Id.*

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[3] This shows the legislature's ability and awareness to incorporate statutes into the political party qualification petition statutes if it desires to do so.

The form does not reference withdrawal of signatures from a political party qualification petition.

40. The withdrawal form also requires that the "signer must sign in the presence of a notary public or an officer of the office where the form is filed." *Id.* However, the statute authorizing the Secretary to prescribe such a form for withdrawals from petitions for a "constitutional amendment, constitutional convention, initiative, or referendum" does not mention a requirement that the form be notarized or signed in person in the presence of an election official. *Cf.*, § 13-27-301(3), MCA.

41. The Secretary did not present, and the Court cannot find, evidence that the Secretary's withdrawal form was prescribed through an administrative rulemaking process, pursuant to § 2-4-302, MCA.

42. Unlike § 13-27-301, MCA, governing the withdrawal of signatures from a petition for a constitutional amendment, constitutional convention, initiative, or referendum, no statute grants the Secretary authority to prescribe a form for withdrawing from political party qualification petitions. Austin James, as chief staff attorney for the Secretary, advised the Secretary that § 13-27-301(3) was not relevant to signature withdrawal from a political party qualification petition because the statutes expressly referenced by the political party qualification statute do not include Section 13-27-301, MCA.

43. Section 13-10-601(2)(a) directs and grants the Secretary the authority to prescribe a form for petition circulators to use when gathering signatures for a political party qualification petition. The Secretary has prescribed such a form. That petition form does not require that a petition signer sign in the presence of a notary or county elections official.

44. Nevertheless, the Secretary believed that petition signers who wanted to withdraw their names from the Green Party qualification petition must use the withdrawal form applicable to petitions for a constitutional amendment, constitutional convention, initiative, or referendum. The Secretary's election director testified that if a petition signer wishing to withdraw his or her signature submitted a different form or submitted a withdrawal form that was not notarized or signed by a county elections official, it would not be honored.

45. The Secretary has not prescribed any administrative rule or issued any publicly accessible statement of policy regarding withdrawals from a political party qualification petition. Likewise, the Secretary has not promulgated through administrative rulemaking a form for a signer of a political party qualification petition to use to withdraw their signature from such a petition.

46. The Secretary did not notify the public or issue any publicly-accessible statement regarding the Secretary's belief that petition signers who wanted to withdraw their names from the Green Party qualification petition must use the withdrawal form, or that if they submitted a different form, or submitted a withdrawal form that was not notarized or signed by a county elections official, it would not be honored. The Court has not found or been directed to any statute, administrative rule, or public policy statement from the Secretary in support of these positions of the Secretary.

47. The Secretary did not notify the public or issue any publicly accessible statement regarding the Secretary's belief that the deadline for signers of political party qualification petitions to withdraw would be at the moment the Secretary determined sufficiency and that the Secretary would not honor withdrawal requests received after that moment. The Court has not found or

been directed to any statute, administrative rule, or public policy statement from the Secretary in support of these positions of the Secretary.

48. The Secretary did not notify the public in advance or issue any publicly-accessible statement that he would on March 6, 2020 make a determination of sufficiency for the Green Party petition or that he would refuse to accept any signature withdrawal forms that were submitted after that moment. The Court has not found or been directed to any statute, administrative rule, or public policy statement from the Secretary in support of these positions of the Secretary.

49. The Secretary did not notify the public or issue any publicly accessible statement that the Secretary believed that a petition withdrawal request that is electronically signed is not valid and would not be honored. The Court has not found or been directed to any statute, administrative rule, or public policy statement from the Secretary in support of this position of the Secretary.

50. Regarding the Secretary's foregoing determinations as to processes for the withdrawal of a petitioner signer's signature, the Secretary did not provide any opportunity for public input or participation prior to adopting these various determinations.

51. On March 3, 2020, the same day the Secretary's Elections Director received a legal memorandum from the Secretary's chief counsel regarding signature withdrawal from a minor party petition, the Director sent an email to county elections officials on that topic, revising prior guidance:

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> There are questions about if an election office can accept a request from a signer of a petition to withdraw their signature. Yes, in reviewing this, any person signing the petition has the right to withdraw at any time before the person or body created by law to determine the matter submitted by the petition has finally acted.

52. The Director's March 3 email, however, did not identify the Secretary as "the person or body created by law to determine the matter submitted by the petition." Likewise, the Director's March 3 email did not identify the Secretary's act of announcing that a political party qualification petition contained a sufficient number of signatures as "the time the person or body created by law to determine the matter submitted by the petition has finally acted." The Director's March 3 email also did not contain any statement regarding the Secretary's belief that the deadline for signers of political party qualification petitions to withdraw their signatures was March 6, 2020.

53. The Director's March 3 email contained instructions for the process for withdrawals, including an instruction to time stamp withdrawal forms as they arrived in county election officials' offices, and that if there were no date stamp, to determine the arrival date of the form with the best data available to the county election official.

54. The Director's March 3 email did not instruct county elections administrators to review withdrawal forms for completeness or compliance with any specific requirements. For example, the March 3 email did not contain any instructions regarding whether a withdrawal form must be signed, or what kinds of signatures are acceptable. The March 3 email did not instruct county elections administrators to compare a signature on a withdrawal form to a voter's signature on file with the county elections office. *See,* § 13-27-303,

MCA, incorporated into political party qualification statute, requiring local county election officials to check the names and signatures of petition signers against county registration records of the office.

55. The March 3 email was not made public until July 14, when the Secretary disclosed it as an exhibit in this action.

56. The Secretary's March 3 internal memorandum from attorney Austin James opined that Section 13-27-301, MCA, which sets out the statutory process for withdrawals from petitions for a "constitutional amendment, constitutional convention, initiative, or referendum," is "not a relevant statute regarding signature withdrawal from a political party qualification petition" because the statutes expressly referenced by the political party qualification statute do not include Section 13-27-301, MCA.

57. Section 13-27-308, MCA, provides:

> When a petition for referendum, initiative, constitutional convention, or constitutional amendment containing a sufficient number of verified signatures has been filed with the secretary of state within the time required by the constitution or by law, the secretary of state shall immediately certify to the governor that the completed petition qualifies for the ballot.

This statute does not refer to §§ 13-10-601 through -605, MCA, the political party qualification statutes, nor do the political party qualification statutes refer to or incorporate this statute, regarding certification of a petition to the governor. No statute provides that, for a political party qualification petition, the Secretary is delegated authority to "certify to the governor" that a minor party qualification petition meets the threshold to get on the primary ballot.

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58. The Secretary did not introduce evidence that he certified to the Governor that the political party qualification petition "qualifies for the ballot."

59. The Secretary's March 3 internal memorandum was not made public until July 14, when the Secretary disclosed it as an exhibit in this action.

60. On March 24, more than two weeks after the Secretary announced on March 6 the petition contained enough valid signatures, it was revealed for the first time that the group funding the circulation of the petition was the MTGOP. One local news report published on March 24 stated: "A mystery of the 2020 election was solved Tuesday as it became clear the MTGOP paid for an effort to qualify the Montana Green Party for the ballot this election." Ex. 16, at 1.

61. Local reporters uncovered that the MTGOP Central Committee contracted directly with a Texas-based petition signature gathering firm, Advanced Micro Targeting, to hire paid circulators to gather signatures for the petition. As the COPP later found, the MTGOP Central Committee made an expenditure of $50,000 to Advanced Micro Targeting on January 21. *Luckey*, pp. 1-2.

62. The MTGOP Central Committee did not file an organization statement as a minor party qualification committee with the COPP within five days of spending $50,000 towards the effort, as required by §§ 13-37-602, and § 13-37-601(7), MCA. *Luckey*, p. 4.

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63. Instead, on January 24, an entity called Montanans for Conservation filed an organization statement with the COPP. Montanans for Conservation did not file an organization statement as a minor party qualification committee. Rather, it filed an organization statement as an independent political committee with the COPP. *Luckey*, p. 2. On February 3, Montanans for Conservation amended its organization statement. The amendment added a statement that the committee "would serve as the minor party qualification committee to qualify the Montana Green party to hold primary elections in Montana." The amendment did not request a committee status change from an independent committee to a minor party qualification committee. *Luckey*, p. 2.

64. By registering as an independent political committee instead of a minor party qualification committee, Montanans for Conservation concealed its role in funding the petition. There are hundreds of independent committees listed in the COPP's Campaign Electronic Reporting System database. By contrast, there are only two minor party qualification committees listed in the database. If an individual had at the time filtered the records in the Campaign Electronic Reporting System to show only minor party qualification committees, he or she would not have discovered the Montanans for Conservation filing.

65. It was not until March 23, seventeen days after the Secretary's March 6, announcement, that Montanans for Conservation filed another amended organization statement to change its committee type from independent committee to minor party qualification committee. *Luckey*, p. 2. The next day, local reporters ran articles revealing that Montanans for Conservation was the entity serving as the minor party qualification committee for the petition, and that the MTGOP Central Committee was the entity that

contracted with and paid Advanced Micro Targeting to gather signatures for the Green Party Qualification Petition.

66. The only contributions to Montanans for Conservation were a cash contribution of $800 from the MTGOP Central Committee to set up the committee, and an in-kind contribution from the MTGOP Central Committee of $100,000 for hiring Advanced Micro Targeting. *Luckey*, p. 4. No other entity contributed to Montanans for Conservation. *Id.*

67. Because the MTGOP Central Committee was the entity that contracted directly with Advanced Micro Targeting to gather signatures on the petition, the sole purpose of Montanans for Conservation was to serve as a shell group to which the MTGOP Central Committee could attribute its expenditures. This enabled the MTGOP Central Committee to avoid having to register as the minor party qualification committee within five days of expending funds on petition signature gathering activities.

68. COPP later determined that Montanans for Conservation, the MTGOP, and Club for Growth Action, violated Montana's campaign finance law. *Luckey*, p. 8-10. COPP found that Montanans for Conservation failed to timely file as a minor party qualification committee as required by Section 13-37-602, MCA. *Id.* According to the COPP, this delay in reporting its efforts in violation of Montana law "added to the confusion surrounding the Green Party qualification effort in February and March of 2020." *Luckey*, p. 8.

69. As confusion proliferated over the Green Party petition effort, MDP mobilized to inform signers that an unknown entity unaffiliated with

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the Montana Green Party—eventually revealed to be the MTGOP—was behind the petition, and assisted signers who wanted to withdraw their names from the Petition.

70. To determine who had signed the petition, and the number of signatures on the petition and in each house district, MDP downloaded from the Secretary's website a copy of the Petition Signers Report. The Secretary's website describes the Petition Signers Report as "a county-by-county record of a specific petition's signers" and contains fields for each signer, including the signer's "County, Submittal Number, Sheet, Line, Voter ID, Name, Residence, Status, Verification Reason (if the signature was rejected, the rejection reason selected by the county is included), House District, and Circulator."

71. It was difficult for MDP to reach signers of the petition. MDP did not have email addresses, cell phone numbers or phone numbers for many signers. Many phone numbers and addresses were incorrect or out of date.

72. When MDP organizers were able to reach signers and inform them that the Montana Green Party was not involved in the petition, and that the backers of the petition were unknown, some signers wanted to withdraw their names from the petition.

73. When it was revealed on March 24 that the MTGOP had sponsored, organized, and paid for the circulation of the petition, there was a significant increase in the number of signers who took steps to withdraw from the petition. Four times as many signers sought to withdraw in the first two weeks after March 24 as compared to the two weeks prior.

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74. Many signers reached by MDP were surprised to learn that the MTGOP was behind the Petition and that the Montana Green Party had nothing to do with the petition. For example, until she was reached by MDP in April, Plaintiff Neumeyer was not aware that the MTGOP had any involvement in the Petition.

75. Although MDP did not believe it was necessary for signers of a political party qualification petition attempting to withdraw their signature to complete the withdrawal form for signers of "constitutional amendment, constitutional convention, initiative, or referendum" petitions,[4] MDP advised signers that county elections officials would likely accept that form, and took steps to assist signers in completing and submitting such forms.

76. The withdrawal form states that it should be signed in the presence of a county elections official or a notary. Although some signers were able to make the trip to their county elections office to sign the form or were able to arrange a meeting with a notary to get the form notarized and submitted, for other signers, these steps were burdensome. MDP attempted to assist where possible by arranging for a notary to meet such signers at a convenient location

77. Shortly before the Governor issued the stay-at-home order in response to the COVID-19 pandemic, signers who wanted to withdraw their signatures told MDP organizers that they were unable or unwilling to travel to a county elections office or meet with a notary because of concerns about maintaining social distancing and attempting to eliminate non-essential travel.

78. MDP also arranged for online notary services for signers. Those services, however, require a computer, a high-speed internet connection,

[4] This is consistent with the opinion of the Secretary's chief counsel that the withdrawal form for constitutional amendment, constitutional convention, initiative, or referendum was not relevant to withdrawing of signatures on a political party qualification petition, a conclusion with which the Court agrees.

video conferencing capability, installing software, and navigating the software's user interface.

79. The online notary solution proved difficult and cumbersome for some signers, especially elderly voters who were unfamiliar with the technology. For some signers, the online notary solution did not work at all; for others, it took up to forty-five minutes to work.

80. Because the online notary service was not an option for many signers, and because MDP did not want to encourage signers to risk their health by venturing out, MDP set up a process that allowed signers to complete the withdrawal form electronically from their computers or smartphones and sign the document using the electronic document signature platform DocuSign.

81. DocuSign collects and records information about the signer and the signature, including the signer's email address, the signer's IP address, and the date and time the document was transmitted, opened, and signed. DocuSign collects the same information about the sender of the document—in this case, the name, email address, and IP address of the MDP organizer who sent a copy of the DocuSign withdrawal form to the signer of the petition. After the signer affixes an electronic signature to a PDF, the document is assigned a unique identifying code that allows for subsequent audits. DocuSign also provides an electronic copy of the signed document to the signer for their records.

82. MDP would receive copies of the electronically signed withdrawal forms from the signers and transmit them to county elections offices by email in batches.

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83. Plaintiff Neumeyer completed and signed a withdrawal form via DocuSign on April 28, and MDP transmitted her form to the Lewis and Clark County elections department on May 4.

84. Plaintiff Filz did not testify at the hearing. According to Bolger and Miller, Filz completed and signed a withdrawal form on DocuSign on April 3, and MDP transmitted his form to the Yellowstone County elections department on April 13. The Secretary claims it did not receive a withdrawal form from the Yellowstone County elections department on behalf of Filz.

85. MDP was not informed by any county elections official that the official would not accept DocuSign withdrawal forms because they were electronically signed. Expressed differently, MDP was not informed by any county elections official that withdrawal forms must have a "wet" signature.[5] Similarly, MDP was not informed by the Secretary that it would not accept DocuSign withdrawal forms because they were electronically signed. Likewise, the Secretary did not inform MDP or anybody who submitted a signature withdrawal form of any requirement that withdrawal forms must have a "wet" signature.

86. On April 13, the Yellowstone County Election Administrator stated that he was forwarding MDP's transmission of withdrawal forms with electronic signatures to the Secretary. On May 13, the Lewis & Clark County Election Administrator stated that she was sending MDP's transmission of withdrawal forms with electronic signatures to the Secretary.

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[5] A 'wet ink' signature is where the parties to the document write (sign) their names with their own hands upon a paper document by ink pen. Although some specific types of legal documents do still have to be signed by the traditional 'wet ink' method, most documents including commercial contracts can be signed by electronic signature." https://www.nextgearcapital.co.uk/help-centre/how-to-use-docusign/what-is-the-difference-between-an-electronic-signature-and-a-wet-ink-signature/

87. On May 4, 2020 and again on May 22, 2020, at the request of the Missoula County Election Administrator, MDP sent withdrawal forms with electronic signatures directly to the Secretary.

88. The Secretary's Petition Signers Report identifies each signer of the petition and whether the Secretary accepted and counted a signature towards the total number of verified signatures of registered voters required from each house district.

89. The Petition Signers Report identifies 116 signatures the Secretary rejected and did not count towards the total number of verified signatures because the signer withdrew his or her signature.

90. The Petition Signers Report indicated that the signatures of Plaintiffs Blossom, Filz, Neumeyer, and Weed were among the signatures accepted and counted towards the total number of required signatures.

91. The Petition Signers Report indicates that the Petition exceeded the required number of accepted signatures in forty-two house districts, including house districts 46, 53, 54, 68, 69, 80, 84, 96, and 97.

92. By late May, over 500 signers of the petition who were marked in the Petition Signers Report as accepted and counted towards the required number of accepted signatures had submitted requests to withdraw their signature. MDP obtained copies of withdrawal forms submitted to counties and to the Secretary through public records requests and by retaining copies of withdrawal forms that MDP transmitted to counties or to the Secretary on signers' behalf.

93. All but ten of these withdrawal forms were received by county elections offices no later than June 1, as demonstrated either by a stamp or

notation placed on the form, by the date that MDP transmitted the forms to the counties, or based upon metadata contained in the documents produced by counties and the Secretary in response to MDP's public records requests. Ten additional withdrawal forms were received by county elections offices no later than June 12.

94. After accounting for the withdrawal forms set out in Plaintiffs' Exhibits 4 and 5, the Petition contains signatures above the thresholds set by the Political Party Qualification Statute in no more than 33 House Districts, as set forth in Plaintiffs' Exhibit 7:

House District	Signatures Required	Signatures Accepted by Secretary (Petition Signers Report)	Signatures Withdrawn	Remaining Signatures Accepted by Secretary
46	138	161	At least 29	At most 132
53	129	160	At least 36	At most 124
54	130	166	At least 46	At most 120
68	106	136	At least 43	At most 93
69	109	141	At least 39	At most 102
80	132	180	At least 53	At most 127
84	150	208	At least 74	At most 134
96	150	229	At least 91	At most 138
97	138	195	At least 68	At most 127

95. Plaintiffs' Exhibit 7 uses the number of signatures withdrawn based on withdrawal forms received by county elections offices or the Secretary no later than June 12. If the chart used the number of signatures withdrawn based only on withdrawal forms received by county elections offices or the Secretary no later than June 1, the conclusion would not change: the petition contains

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signatures above the thresholds set by the political party qualification statute in no more than 33 House Districts.

96. As conceded by counsel for the Secretary in closing argument, if the Court determines that all the withdrawal requests contained in Plaintiffs' Exhibit 5 should be given effect, the petition does not meet the statutory threshold for qualification.

97. Kendra Miller, the former data director of MDP, obtained and relied upon Petition Signers Reports for numerous petitions in the past.

98. In 2018, in *Larson v. State By & Through Stapleton*, 2019 MT 28 ¶ 4, 394 Mont. 167, 434 P.3d 241, MDP requested a copy of the Petition Signers Report for the 2018 Green Party petition, and introduced into evidence numerous exhibits that expressly relied upon the data in the Petition Signers Report. *See, e.g.*, Apr. 24, 2018 Hrg. Tr. 48:20-66:10, *Larson et al v. Stapleton*, CDV 2018-295 (1st Jud. Dist. Ct. 2018). Counsel for the Secretary in the *Larson* case did not object to the introduction of these exhibits based upon Petition Signers Report data. Nor did the Secretary reveal that the Petition Signers Report was not the record of the petition's signers, and that a different record maintained by the Secretary contained the true record of the petition's signers. Corson, testifying on behalf of the Secretary in the *Larson* case, did not testify that the Petition Signers Report was not the record of the petition's signers, or that a different record maintained by the Secretary's office contained the record of the petition's signers. In rendering their decisions in *Larson*, this Court and the Montana Supreme Court relied upon those exhibits containing data from the Petition Signers Report.

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99. MDP first obtained a copy of the Petition Signers Report for the Green Party petition from the Secretary on March 12 and relied on it to determine how many withdrawal forms had not been honored by the Secretary and to calculate the effect on the Green Party petition's sufficiency if those withdrawals were honored.

100. During the July 14-15 evidentiary hearing, Elections Director Corson, testifying on behalf of the Secretary, stated for the first time that the Petition Signers Report was not the official record of the signers of the petition. Corson testified that the Secretary used a different decisional document to record the signers of the petition and whether their signatures were accepted or rejected, and to determine whether the petition contained a sufficient number of signatures under the political party qualification statute.

101. The Petition Signers Report indicates that Plaintiffs Weed's and Blossom's signatures were accepted and counted towards the thresholds set by the political party qualification statute in their House Districts. Elections Director Corson testified that withdrawal forms submitted by Weed and Blossom were received, and that their signatures were not counted towards the thresholds. Corson testified that the separate decisional document reflected this disposition of Weed's and Blossom's withdrawal forms.

102. The Secretary did not produce this separate decisional document to MDP in response to their public records request for the Petition Signers Report.

103. Until the July 14 evidentiary hearing, the Secretary had not informed MDP or the general public that a separate decisional document contained the record of the signers of the petition and whether their signatures

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were accepted or rejected. The Secretary did not offer this separate decisional document as an exhibit. The document is not part of the record before the Court.

104. Director Corson submitted a chart purporting to contain the number of accepted signatures in each house district. Plaintiffs' Exhibit 1 compares the number of accepted signatures in each house district as set forth in Director Corson's chart with the number of accepted signatures set forth in the Petition Signers Report. In twelve house districts, Corson's chart records fewer accepted signatures than the Petition Signers Report. In one house district, Corson's chart records more accepted signatures than the Petition Signers Report.

105. Plaintiffs' Exhibit 7 uses the number of signatures marked as accepted by the Secretary's Petition Signers Report. If Exhibit 7 instead used the number of signatures marked as accepted on the Corson chart, the conclusions would not change: the petition contains signatures above the thresholds set by the political party qualification statute in no more than thirty-three House Districts.

106. After filing an emergency request to continue the hearing,[6] the Secretary purported to compile records of withdrawal forms in his possession at the time and attempt to determine the effect of honoring such withdrawal forms. The Secretary's compilation, however, did not include all the withdrawal forms that had been submitted to county elections offices.[7] The Secretary's compilation purported to analyze the effects by house district, but the tabulation is inaccurate because the Secretary relied on current address information rather than address information at the time of petition signing and did not assign all individuals to a house district. The Secretary did not provide the Court with the underlying withdrawal forms on which his tabulation is based.

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[6] To be clear, the Court does not dispute that the Secretary's emergency motion to continue the hearing was filed in good faith.

[7] Corson testified that the Secretary could not count withdrawal forms it had not received. While this is true, the Secretary had advised county election officials that withdrawals received after March 6 should not be counted.

107. At least 562 signers of the Petition submitted requests to withdraw their signature that the Secretary has not honored, according to the Petition Signers Report.

108. The Secretary's failure to honor signers' requests to withdraw their signature injures these signers because their signatures are being counted in support of a petition that they no longer wished to support, as demonstrated by their submission of requests to withdraw their signature.

109. The Secretary's failure to honor signers' requests to withdraw their signatures also injures these signers because they continue to be associated with a petition and a petition sponsor with whom they no longer wish to be associated. For example, Plaintiffs Neumeyer, Weed, and Blossom testified they are not supporters of the MTGOP, do not support a petition whose purpose is harming the Democratic Party, and do not want to be associated with the MTGOP or its efforts relative to the petition.

110. If the Green Party qualifies for ballot access pursuant to the Petition, MDP would be harmed both financially and electorally. MDP would be harmed financially because it would need to spend additional funds on voter persuasion, voter education, and polling, and would have to expend additional time and resources to address an additional swath of center-left voters. MDP would be harmed electorally because voters who might otherwise vote for MDP candidates might vote instead for Green Party candidates.

111. MDP's mission is to elect Democratic Party candidates in local, county, state, and federal elections. MDP works to accomplish this mission through its efforts to educate, persuade, mobilize, assist, and turn out voters throughout the state.

112. In past elections, MDP expended millions of dollars to persuade and mobilize voters to support candidates who affiliate with the Democratic Party in Montana. MDP again intends to make substantial expenditures to support Democratic candidates in the 2020 general election and in future elections.

113. If candidates nominated in the primary election for the Green Party as a result of the petition are given ballot access in the 2020 General Election, MDP will incur additional expenditures and will divert resources from other MDP priorities.

114. These expenditures and diversions of resources would be caused by the need for MDP to educate voters about the differences between candidates from the Democratic Party and candidates nominated in the Green Party primary, and to persuade voters to vote for candidates from the Democratic Party over candidates nominated in the Green Party primary.

115. For example, MDP will need to calibrate their internal voter file differently to target a different ideological area of the universe of voters MDP needs to reach to convince them to vote for MDP candidates. This is not something that MDP has planned for and would require MDP to spend money and time to address.

116. MDP would also need to contact more voters for persuasion, which in turn requires more volunteers, staff, and campaign materials. MDP would need to put out more expensive and more complicated polling to determine which kinds of voters to target and what kinds of messages to use. All these efforts cost money, and MDP would need to devote additional time and effort to fundraising to accomplish them.

From the foregoing findings of fact, the Court draws the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction to grant declaratory and injunctive relief pursuant to the Montana Uniform Declaratory Judgments Act, Section 27-8-101 *et. seq.* MCA, and Sections § 27-8-201 *et seq.*, MCA, which authorize the Court to declare rights, status, and other legal relations among the parties. *See Larson*, ¶ 31.

2. As a court of general jurisdiction, this Court has authority to hear Plaintiffs' claims under the Montana Constitution. *See* Section 3-5-302, MCA.

3. The Court has subject matter jurisdiction to determine the validity of a political party qualification petition, like this one. *Larson*, ¶ 43.

4. MDP has standing to assert the claims in the Complaint because it is injured by the Secretary's failure to give effect to Montanans' withdrawal requests seeking to remove their names from the Petition. Allowing the Montana Green Party to qualify under the political party qualification statute, and thus obtain primary and general election ballot access, when it has not shown sufficient support as required by statute, would result in MDP having to expend additional funds and resources to educate and persuade voters to support Democratic candidates over candidates claiming to be affiliated with the Montana Green Party in the 2020 general election. *See Larson*, ¶ 43.

5. MDP also has standing to assert the claims in the Complaint because MDP, which performs the functions of a membership organization by providing the means by which Democratic voters in Montana express their collective views and protect their collective interest, is harmed because some of

its members or associates, including but not limited to Plaintiffs Blossom, Neumeyer, and Weed, are injured by being forced to associate with a petition of a political party with which they never wanted to be associated and by being deprived of their right to withdraw their names from that petition.

6. Plaintiffs Blossom, Neumeyer, and Weed have standing to assert the claims in the Complaint because they will suffer a concrete injury by being forced to be associated with a petition organized and funded by a political party with which they do not want to be associated, and by being deprived of their right to withdraw their names from the petition.

7. Montanans have the right to withdraw their signatures from a petition. *State ex rel. Lang v. Furnish*, 48 Mont. 28, 36, 134 P. 297, 300 (1913) ("signers of a petition have an absolute right to withdraw therefrom at any time before final action thereon"); *See also Ford v. Mitchell*, 103 Mont. 99, 61 P. 2d 815, 822 (1936) ("[T]he signers of an initiative petition may, in an appropriate manner and at the proper time if they so desire, withdraw from such petition."). The Montana Supreme Court has described this longstanding right as "a necessary inference from the very nature of the right of petition." *Lang*, 134 P. at 300.

8. Pursuant to this right, individuals can withdraw their signature so long as: (1) there is no express legal prohibition on doing so; and (2) individuals withdraw before final action is taken on a petition. *Lang,* 134 P. at 300; *Ford*, 61 P. 2d at 821 (finding right to withdraw in the absence of "an express sanction or prohibition of withdrawals").

9. Even after final action is taken on a petition, signers may still withdraw if signers learn that representations made to them as an inducement

to sign the petition, and on which they relied, were false. *State ex rel. Peck v. Anderson*, 92 Mont. 298, 306, 13 P.2d 231, 234 (1932).

10. The statutes governing political party qualification petitions do not contain any express prohibition against persons who have signed the petition from withdrawing their signatures.

11. The statutes governing political party qualification petitions do not define what constitutes final action for the purposes of those statutes. Nor do those statutes confer any express authority on the Secretary to certify that a minor political party has submitted sufficient signatures to qualify for the general ballot. This contrasts with the statute governing petitions for initiatives, referenda, constitutional amendments, or calls for constitutional conventions. Section 13-27-308, MCA, provides that the Secretary, after tabulating signatures for a "petition for referendum, initiative, constitutional convention, or constitutional amendment," "shall immediately certify to the governor that the completed petition qualifies for the [general election] ballot." This statute, by its plain terms, does not apply to political party qualification petitions. Although the political party qualification statutes incorporate by reference certain statutes applicable to ballot issues, Section 13-27-308, MCA is not among those statutes. *See* Section 13-10-601, MCA. The political party qualification statute makes no mention of certification by the Secretary, to the Governor or to anybody else, and no other statute delegates certification authority to him.

12. The process by which a political party not otherwise eligible for listing on the primary ballot under § 13-10-601(1), MCA, defines only a process by which a "minor" political party may nominate its candidates by a primary election. The statute is silent as to the general election. The purpose of

this statute is thus different than that for approval of an initiative, referendum, constitutional amendment, or constitutional convention. In these latter petitions, the proposed change to statute or constitution is to be voted on by the electorate at the general election. Initiatives, referenda, constitutional amendments, or constitutional conventions are placed directly upon the general election ballot so long as proponents submit enough valid signatures by the deadline—there is no requirement to first go through a primary election or to take any other preliminary steps. *See* Mont. Const. art. III, § 4. Once the Secretary certifies to the Governor that the initiative petition qualifies for the ballot, Section 13-27-308, MCA, there are no other procedural steps or contingencies that must occur before all voters are afforded the right to vote on the initiative.

13. Political party qualification petitions serve a different function than initiative, referenda, constitutional amendments, and constitutional conventions petitions. Final action for purposes of an initiative petition is not the same as final action for purposes of a political party qualification petition. The unique characteristics of petitions for political party qualification in Montana compel the conclusion that action on such a petition is not final until votes have been cast and canvassed in the primary election and certificates of nomination have issued.

14. Filing a political primary qualification petition is one of several initial steps in a process through which voters decide whether a political party's candidates in a primary election will obtain ballot access in the general election. Primary election voters make the ultimate decision whether to nominate candidates for office through this procedure, and the state canvassing board, which counts votes and issues certificates of nomination based on those votes, is

"the person or body created by law to determine the matter submitted by the petition[.]" *See State ex rel. O'Connell v. Mitchell*, 111 Mont. 94, 106 P.2d 180, 181 (1940) (citing *Ford*, 61 P.2d 815).

15. The filing of a political party qualification petition with the Secretary simply initiates this multi-step procedure that a party's voters may use to determine who to nominate, but no right to ballot access is acquired until primary votes have been cast and counted for candidates running for a party's nomination. Accordingly, no final action is taken on the petition until that time. *See Town of Blooming Grove v. City of Madison*, 253 Wis. 215, 33 N.W.2d 312 (1948). (Holding that tabulation of the signatures on a petition was a necessary step in a process that concluded with a vote on the ordinance proposed by the petition, but the court held that no final action had occurred, and no rights were acquired by anyone, until the vote on the ordinance was finally taken).

16. The Secretary's tabulation of the number of signatures on a political party qualification petition and announcement that the petition meets the requirements of the political party qualification statute confers no right to placement on the general election ballot. No statute so holds. The act of submitting a political party qualification petition simply authorizes a political party to use the state-administered procedure of a primary election to determine whether to nominate candidates and which candidates to nominate.

17. Many other procedural requirements and contingencies must first be met before a primary election can even take place: candidates for the nomination of the political party must: (1) timely file a declaration of nomination, Section 13-10-201, MCA; (2) not die or withdraw their candidacies, Section 13-10-326, MCA; (3) maintain their constitutional and statutory eligibility for the

offices in question, Section 13-12-201(3), MCA; and (4) file certain campaign finance and business disclosure statements and reports, Section 13-37-126, MCA.

18. In addition, candidates for a nomination must stand for primary election and receive voters from electors; the act of seeking a party's nomination has no legal significance until votes are canvassed and counted and until certificates of nomination are issued. Section 13-15-507, MCA (state canvassing board declares nominated the individual having the highest number of votes); *see also* Section 13-10-303, MCA (providing that candidates nominated by more than one party must choose one party or appear on the general election ballot without a party designation).

19. Montana statutes do not support the Secretary's claim that he has the authority to "certify" a political party qualification petition to the Governor, or that his act of determining and announcing sufficiency constitutes final action on the petition. A political party qualification petition confers no access to the general election ballot without additional procedural steps and contingencies. The Secretary could not have certified to the Governor that the petition "qualifies for the ballot," like an initiative petition or referendum would.

20. To illustrate the issue, if a petition is submitted and a primary election is held for which no qualified person[8] received any votes, would defeat the petition and the party would have no right to appear on the general election ballot. The Court concludes that under the unique procedures applicable to petitions for political party qualification, it is not until the Board of State

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[8] There is evidence before the Court that the Montana Green Party disavowed the signature gathering process and has also disavowed the persons filing under the Green Party banner as not being true Green Party members or adherents. *See,* § 13-10-602(1), MCA: "(1) Except as provided in subsection (3), a political party and its regularly nominated candidates, members, and officers have the sole and exclusive right to the use of the party name. A candidate for office may not use any word of the name of any other political party or organization other than that by which the candidate is nominated in a manner that indicates or implies the individual is a candidate of the nonnominating party."

Canvassers tabulates the votes that the process is final. Until that date, there is no final action on the petition. Therefore, the withdrawal requests at issue here—nearly all submitted prior to the June 2, 2020 primary election, and all before June 12, 2020—must be given effect because they were submitted to officials before final action was taken on the political party qualification petition.

21. Even assuming that the Secretary had authority to take "final action" on a political party qualification petition under some circumstances, the evidence at trial revealed that the Secretary's actions in connection with the petition, which were not revealed to the public, cannot constitute final action.

22. Article II, § 8 of the Montana Constitution requires that government agencies conduct a transparent process that allows for public input "prior to the final decision." Mont. Const. Art. II, § 8. *Bryan v. Yellowstone Cty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 39, 312 Mont. 257, 269, 60 P.3d 381, 390 (discussing "the constitutional mandate on open government.").

23. The Secretary has purported to issue "final action" on the petition without first announcing his cutoff date or the procedural requirements applicable to withdrawals, and without disclosing, even to this Court, the data underlying his decision, despite knowing that such data was squarely at issue in this litigation. The Secretary also announced for the first time during this case, in a motion for summary judgment, that he has a policy forbidding electronic signatures on petition withdrawal forms.

24. While the Montana Supreme Court has not definitely resolved what "final action" generally means in the context of a political party qualification petition, it cannot be what the Secretary contends it is under these circumstances: an announcement of sufficiency based upon a decisional

document not revealed to the public, made without prior notice that the Secretary would refuse to honor withdrawal requests past a certain date, which date was not revealed, and made without prior notice of purported procedural requirements that withdrawal requests would have to satisfy. *Cf., State ex rel. Lang v. Furnish,* 48 Mont. 28, 134 P. 297 (1913) (board of county commissioners set a hearing date to consider petition and counter-petitions supporting and opposing formation of a new county).

25. In addition, "final action" necessarily presupposes a final decision by "the person or body created by law to determine the matter submitted by the petition," so even if the Secretary were such person, the Secretary's choice to shield the process, applicable procedural requirements, and decisional documents from the public means that his decision cannot be a "final action" that precludes the withdrawal requests submitted in this case from being honored. "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Mont. Const. Art. II, § 8. "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. Art. II, § 9.

26. These constitutional limits on the Secretary's power comport with similar legal principles, like those codified in the Montana Administrative Procedure Act, Sections 2-4-101 *et seq.*, MCA. Under that statute, state agencies must "make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency

in the discharge of its functions." Section 2-4-103(1)(a), MCA. When an agency fails to do so, it exceeds its authority, and its interpretations have no legal effect. *See* Section 2-4-103(3), MCA ("No agency rule is valid or effective against any person or party whose rights have been substantially prejudiced by an agency's failure to comply with the public inspection requirement herein.").

27. The Legislature has not granted the Secretary authority to prescribe forms for withdrawing from political party qualification petitions.

28. The Legislature has not granted the Secretary the authority or directed him to certify, to the to the governor or otherwise, the results of a political party qualification petition.

29. The Legislature has not established a statutory deadline for submitting requests to withdraw signatures from a political party qualification petition.

30. The Secretary has not properly adopted rules or public policies to prescribe forms and requirements for withdrawing from political party qualification petitions or established a deadline for submitting requests to withdraw signatures from a political party qualification petition.

31. Therefore, the Secretary's determinations of a cut-off date for the withdrawal of signatures from the political party qualification petition and of forms and requirements for withdrawing signatures from the petition in this matter were without statutory authority and were arbitrary and capricious.

32. Further, the withdrawal requests at issue are valid because Plaintiffs and other petition signers withdrew after learning that representations made to induce them to sign the petition were false.

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33. The identity of the group that sponsored and organized the petition—the MTGOP—was not revealed until well after signers signed the petition and the Secretary found that the signatures satisfied the requirements of the political party qualification statute.

34. Montana law provides that even after final action is taken on a petition, signers can still withdraw if they learn that representations made to them as an inducement to sign the petition, and on which they relied, were false. *See, Anderson*, 92 Mont. at 298, 13 P.2d at 231, 234.

35. To determine when a misrepresentation justifies a signatory's withdrawal, courts often apply general common law and statutory principles of contract and tort law. *See Anderson*, 13 P.2d at 234 (citing contract principles); *see also Nelson v. Morse*, 91 N.H. 177, 177 (1940) (drawing on principles of tort law to disqualify signatures obtained by deception) ("[F]raud lies in silence or concealment which constitutes dishonesty as well as in actual misrepresentations[.]").

36. Montana law provides for an independent statutory prohibition on the willful deception of another with the intent to induce that person to act. *See, e.g.*, Section 27-1-712(2)(c), MCA (describing deception as including "the suppression of a fact by one who is bound to disclose it or who gives information of other facts that are likely to mislead for want of communication of that fact"); *Dewey v. Stringer*, 2014 MT 136, ¶ 15, 375 Mont. 176, 182, 325 P.3d 1236, 1241.

37. The doctrine of negligent misrepresentation imposes liability on those who make untrue representations about material facts with the intent to

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induce reliance. *See Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 45, 375 Mont. 38, 52, 324 P.3d 1167, 1180 (citing *Kitchen Krafters v. Eastside Bank*, 242 Mont. 155, 165, 789 P.2d 567, 573 (1990)).

38. The doctrine of constructive fraud provides both contractual and damages remedies—including the right of rescission—for the breach of a duty which, even without fraudulent intent, creates an advantage for the breaching party by misleading another person to that person's prejudice. *See Morrow*, ¶ 62; Section 28-2-406(1), MCA; *McGregor v. Mommer*, 220 Mont. 98, 109, 714 P.2d 536, 543 (1986) (noting that a material misrepresentation sufficient to constitute constructive fraud that can lead to rescission of a contract may be implicit, such as when a party "create[s] a false impression concerning . . . important matters and subsequently fail to disclose the relevant facts").

39. The doctrine of unilateral mistake justifies rescission of a contract when one party has a "belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed," and the other party knew or suspected the mistake. *See E.H. Oftedal & Sons, Inc. v. State ex rel. Mont. Transp. Comm'n, 2002 MT 1*, ¶ 47, 308 Mont. 50, 64-65, 40 P.3d 349, 358; Section 28-2-409(2), MCA.

40. The actions taken by the MTGOP and their agents to induce Montanans to sign the petition without disclosing their role in organizing and sponsoring the petition closely track the elements of each of these doctrines, and by analogy, justify the acceptance of withdrawal forms at issue in this case.

41. The MTGOP and its agents failed to properly and timely disclose its involvement in the petition in violation of Montana's campaign finance rules, and only made such disclosure weeks after signers had signed the

petition and even after it was submitted to officials. *See* 27-1-712(2)(c), MCA (deceit entails "the suppression of a fact by one who is bound to disclose it" or "giving facts that are likely to mislead for want of communication"); *Morrow*, ¶ 45 (negligent misrepresentation requiring an untrue representation made without any reasonable ground for believing it to be true); *Dewey*, ¶ 9 (constructive fraud requiring a false representation with knowledge of its falsity).

42. These misrepresentations and failures to disclose mattered to signers, who would not have signed the petition had they known who was sponsoring and organizing it, and who took action to withdraw their signature once they learned what had happened.

43. The actions of the MTGOP and its agents demonstrate that its misrepresentations and failures to disclose in violation of Montana campaign finance law were intentionally designed to create an advantage for the MTGOP at the expense of unwitting signers. The MTGOP's conduct regarding its disclosure obligations—under a disclosure regime enacted in direct response to the very same petitioning firm gathering signatures for the very same petition just two years earlier—further demonstrates that these misrepresentations and failures to disclose were designed to confer a strategic benefit.

44. The Secretary's failure to give effect to Plaintiffs' and other signers' withdrawal requests also violates Article II, Sections 6 and 7 of the Montana Constitution as applied to the circumstances of this case because it severely burdens Plaintiffs' and other signers' constitutional right to not associate with a petition sponsored by a political party with which they do not want to be associated.

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45. Article II, Section 6 of the Montana Constitution provides that "[t]he people shall have the right peaceably to assemble, petition for redress or peaceably protest government action." Article II, Section 7 provides that "[n]o law shall be passed impairing the freedom of speech or expression." Like the First Amendment, these provisions protect "the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Dorn v. Bd. of Trs. of Billings Sch. Dist. No. 2*, 203 Mont. 136, 145, 661 P.2d 426, 431 (1983).

46. Activities that involve associating to promote political preferences, like signing a petition, are protected conduct under the First Amendment. *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Filo Foods, LLC v. City of SeaTac*, 179 Wn. App. 401, 406, 319 P.3d 817, 819 (2014) (concluding that "an individual expresses a view on a political matter by signing an initiative petition," and "this expression of a view implicates the signer's First Amendment rights").

47. Under Montana law, state action that burdens fundamental rights, like those protected by Sections 6 and 7 of Article II of the Montana Constitution, must be justified by a compelling state interest narrowly drawn. *See, e.g., Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, 63, 296 Mont. 207, 225, 988 P.2d 1236, 1246 (holding that strict scrutiny applies to statutes infringing the rights protected under Article II of the Montana Constitution); *State v. Lilburn,* 1993 ML 78, *4 (Mont. Dist. Ct. 1993) ("Significant interference with First Amendment rights may be allowed only if a compelling government interest is shown, and all such infringements will be subject to close judicial scrutiny.") (citation omitted).

48. The right to associate is burdened not only when a law harms a voter's ability "to associate in the electoral arena to enhance their political effectiveness as a group," *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1980), but also when a voter's "right not to associate" is harmed, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (emphasis added); *See also Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (finding First Amendment rights burdened when a statute "'lock[ed]' the voter into his pre-existing party affiliation for a substantial period of time").

49. The Secretary's imposition of an arbitrary deadline for withdrawal requests, set well before the MTGOP's involvement was revealed, imposes a severe burden on Plaintiffs' associational rights in this case by "locking in" their association—and the consequences that flow from such association under statute—in support of a petition they no longer support, and a political party with whom they do not want to affiliate and whose political effectiveness they do not want to advance. *See Kusper*, 414 U.S. at 58 (holding statute prohibiting voter from changing pre-existing party affiliation substantially abridged her ability to associate effectively with the party of her choice).

50. The severity of this burden imposed by the Secretary's deadline and refusal to credit the withdrawal requests at issue in this case is heightened by the fact that Plaintiffs' association was "locked in" before they had any way to know that they were affiliating with, and advancing the interests of, the MTGOP.

51. The Secretary's refusal to give effect to Plaintiffs' withdrawal requests in this case is not justified by any weighty state interest—much less one narrowly tailored to advance a compelling state interest.

52. No statute, regulation, or policy statement requires that requests for withdrawal from political party qualification petitions contain the requestor's signature, nor does any statute afford the Secretary the authority to require signatures or prescribe what forms of signatures are sufficient.

53. All that is required is that the requestor clearly express their intent to withdraw by identifying the petition at issue. *See Ford v. Mitchell*, 103 Mont. 99, 61 P.2d 815, 822–23 (1936). The withdrawal forms at issue—which all contain an unambiguous request to withdraw their petition signature, include the requestor's name, address, and contact information, and include a signature captured electronically through the DocuSign platform—easily satisfy this requirement.[9]

54. Assuming that it was necessary for a voter to provide a signature in order to withdraw from a political party qualification petition, the submission of withdrawal requests to the Secretary are not "transactions" between the voter and the Secretary under the Montana Uniform Electronic Transactions Act, Section 30-18-101, MCA (UETA) that require the Secretary's consent to the use of electronic signatures. Withdrawing from a political party qualification petition is a unilateral act by the voter, not a "transaction" between the voter and the Secretary.

55. Taking it one step further, if one assumes that political party qualification petition withdrawals require a voter's signature and that such withdrawals are "transactions" between the voter and the Secretary for purposes of UETA, the context, surrounding circumstances, and the parties' conduct, specifically the failure to the Secretary to promulgate or announce the deadline

[9] Section 13-10-601(2)(c), MCA, delegates to county election administrators the authority to verify signatures on political party qualification petition, like the process used for other ballot issues under §§ 13-27-303 through -306, MCA. The statute does not delegate to the Secretary any authority to verify signatures.

for withdrawals and that certain requests for withdrawal would not be accepted, all demonstrate that the Secretary consented to receiving withdrawals from the Green Party political party qualification petition through electronic means. Accordingly, electronic signatures satisfy any purported signature requirement. *See* §§ 30-18-105, -106, MCA.

56. The Secretary's previously undisclosed opposition to the use of electronic signatures would also impose an unconstitutional burden as applied to the signers who, in the absence of contrary guidance from the Secretary, electronically signed their withdrawal request in the middle of a global pandemic. Failing to honor the withdrawal forms at issue here serves no state interest. Courts and other institutions have consistently recognized the security and validity of the DocuSign platform for electronic signatures across a wide variety of contexts. The DocuSign platform used in this case collected the same identifying information that would be collected by paper forms promulgated by the Secretary for withdrawals from other kinds of petitions, and its security, tracking, and its additional auditing features more than adequately serve any interest in preventing and investigating fraudulent activity.

57. As with the Secretary's adoption of a deadline for the submission of withdrawal forms, the Secretary's adoption of a rule or policy banning the submittal of electronic signatures was done without public input or proper notice to the public. Mont. Const. Art. II, § 8. No statute grants the Secretary the authority to adopt such a rule or policy. The Secretary has not properly adopted such a rule or policy.

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58. The Secretary's adoption of a rule or policy barring submittals of electronic signatures midway through this petition-gathering process is arbitrary and capricious.

59. When Plaintiffs' and other Montanans' valid and timely withdrawal requests are given effect, the petition fails to meet the requirements of Section 13-10-601(2), MCA. The statute requires that a political party qualification petition contain: (1) an overall signature count of the lesser of "5% or more of the total votes cast" for the last-elected governor, or 5,000 registered voters; and (2) a threshold number of signatures for each state house district in at least 34 districts. *See* Section 13-10-601(2)(b), MCA.

60. After accounting for the valid withdrawal forms set out in Plaintiffs' Exhibits 4 and 5, the Petition contains signatures above the thresholds set by the political party qualification statute in no more than 33 House Districts, as set forth in Plaintiffs' Exhibit 7.

Based on the foregoing findings of fact and conclusions of law, the Court enters the following

ORDER

1. The Secretary's motion for partial summary judgment on the acceptance of electronic signatures is **DENIED**. MDP's cross-motion for summary judgment regarding electronic signatures is **GRANTED**.

2. The withdrawal requests are valid under Montana law;

3. The Secretary's failure to accept and honor these withdrawal requests violates Mont. Const. Art. II, §§ 6 and 7;

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4. The Petition fails to satisfy the requirements of section 13-10-601(2)(b), MCA; in that the petition does not satisfy the requirement that the signatures come in sufficient numbers from at least 34 different legislative House Districts; and

5. The Secretary and all persons acting under his authority are enjoined from implementing or giving any effect to the Petition.

MEMORANDUM

It was presented to the Court that this is a unique situation, not likely to re-occur. Indeed, Dana Corson, the Secretary's Election Director, testified he had never encountered anything quite like the situation presented by this case. Further, the statutes governing the qualifications for minor political parties are new and untested, having been passed by the Legislature in 2019 and becoming effective only on October 1, 2019. As the various entities involved in these kinds of election processes become familiar with these statutes' requirements, the kinds of difficulties encountered in this case might be avoided.

Nonetheless, the Court concludes that the Secretary's *ad hoc* decision-making with regards to the petition defeats the purpose of these statutes. The Secretary took steps not authorized by statute or regulation, made decisions "on-the-fly" and without public input or knowledge as to the deadline and process for withdrawing signatures from the petition, and made those decisions based on documents not made public, even during this hearing. Such actions fly in the face of well-established principles for open governmental action requiring public participation and knowledge. The remedy for these actions is to set aside the Secretary's decisions as set forth above.

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It was represented by the Secretary that he will be making proposals to the next legislature about improvements and clarification to these statutes. The Court fully supports this effort.

DATED this 7 day of August 2020.

JAMES P. REYNOLDS
District Court Judge

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY, and TAYLOR BLOSSOM, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through its SECRETARY OF STATE COREY STAPLETON, Defendant.	Cause No.: DDV-2020-856 **ORDER ON SECONDARY AND POST-HEARING MOTIONS**

The Court heard this matter on July 14 and 15. As part of this proceeding, the Court has several secondary and post-hearing motions. The Court having issued its Findings of Fact, Conclusions of Law and Order in this

matter, issues the following summary order with regards to these secondary and post-hearing motions. In issuing this Order, the Court notes several considerations.

1. Challenges to political election matters must often be decided on an expedited schedule, due to election calendar requirements. *Larson v. State By & Through Stapleton*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241.

2. The Court has already conducted its evidentiary hearing, at which the parties had the opportunity to present witnesses and exhibits. The Court cannot envision a process whereby that hearing would be re-opened and still give this Court time to issue a decision in time for Supreme Court review.

3. The Court's ruling only affects proceedings in this Court. Should this matter be appealed, as it almost certainly will, various entities seeking to intervene may apply to the Supreme Court as they deem appropriate.

For the foregoing reasons, the Court enters the following Orders.

1. The Court **DENIES** the motions of the Montana Republican Party (MTGOP) and Lorrie Corette Campbell and Jill Loven to intervene. These parties were granted leave to participate as *amici curiae* if they desired.

2. The Court **GRANTS** Mark Mackin's unopposed motion for leave to file a brief as *amicus curiae*.

3. The Court has reviewed the *amici* briefs submitted by the Montana Republican Party (MTGOP) and Campbell and Loven. The fact is that while these entities may have rights with regards to this election, these rights arise only if the petition in support of the Green Party is properly submitted and supported. In other words, if 20,000 people sign petitions in support of the Green Party being on the ballot, but those 20,000 signatures do not satisfy the

distribution required by § 13-10-601 (2)(b), MCA, those signers have no associational rights to have the Green Party on the ballot.

4. The Court **GRANTS** MDP's motion to strike affidavits and documents attached to the amicus brief submitted by the MTGOP. The Republican Party responded to this motion, by arguing that its ability to have this information considered provides additional reasons why it should be allowed to intervene. MTGOP again requests leave to intervene. These materials and testimony could have been introduced through the Secretary of State (Secretary). The Court again denies MTGOP's request to intervene.

In doing so, the Court observes that this case is not so much about what MTGOP actually did or did not do about the Green Party petition effort. It is more about what people signing the petition knew or did not know about MTGOP's involvement – to paraphrase Senator Howard Baker during the Watergate hearings, what did signers know and when did they know it? Whether MTGOP violated Montana's campaign finance laws is not critical in this analysis, just as it was not critical whether the burglars in the Watergate had been convicted. It was when MTGOP's involvement was revealed – when signers would have discovered that MTGOP had admittedly funded the petition effort, prompting a signer's desire to withdraw his or her signature.

5. The Court **DENIES** Gary Marbut's (Marbut) *pro se* motion to intervene. Marbut identifies himself as Green Party candidate nominated in Montana Senate District 47. He filed his motion to intervene one week after the evidentiary hearing concluded. In his brief in support of his motion, Marbut asserts to the best of his understanding, there have been no hearings or judicial actions concerning the merits of this case. He asserts therefore there will be no

prejudice to the parties. Marbut's premise is inaccurate, as the Court has conducted two days of a merits hearing and oral argument on the merits of this case. Further, Marbut claims he learned of this litigation late but in his brief, he admits that he gave other proposed intervenors, specifically the MTGOP, an affidavit in support of its motion to intervene. Only after MTGOP was denied intervenor status did Marbut file his own motion to intervene. Marbut's motion is not timely under these circumstances.

6. The Court **DENIES** the Secretary's motion to take judicial notice of the Montana Republican Party's filing before the Federal Election Commission. M.R.Evid. 201 and 202 do not apply to these kinds of documents. Further, the Commissioner of Political Practices has determined this filing with the federal agency was unclear and did not satisfy Montana's campaign practices laws.

As to the Court's taking judicial notice of the COPP's sufficiency finding in *Luckey v. Advanced Micro Targeting*, No. COPP 2020-CFP-004, (June 25, 2020), the Court affirms its taking of judicial notice. Plaintiffs have pointed out that the COPP has now issued supplemental findings in an amended sufficiency decision on July 29, 2020. The Court does not take judicial notice of these supplemental findings, as these findings post-date the operative facts of this proceeding.

As discussed above, the Court concludes this case is not so much about what MTGOP may or may not have done as to Montana's campaign finance laws. It is about what signers on the petition would or would not have known when called upon to sign the petition. The record before the Court shows that the identity of the entity sponsoring the Green Party petition was concealed

from the public. Once the identity of this entity was disclosed in late March, three weeks after the Secretary had declared the petition had sufficient signatures, the number of petition signers wishing to withdraw their signatures increased exponentially.

To be clear, the Court takes judicial notice of the COPP's sufficiency findings not for the truth of those findings except as such findings are otherwise developed in the record, but for the fact of the decision being issued with its accompanying news media coverage.

DATED this 6 day of August 2020.

JAMES P. REYNOLDS
District Court Judge

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 20-0396 and DA 20-0397

MONTANA DEMOCRATIC PARTY and TAYLOR BLOSSOM, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED, individual electors,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, by and through its SECRETARY OF STATE, COREY STAPLETON,

Defendant and Appellant.

ORDER

Defendant and Appellant Secretary of State moves to consolidate these two appeals and to order an expedited briefing schedule in order to have the appeals decided prior to the August 20, 2020 deadline for the Secretary of State to certify for the November 2020 general election ballot the names and designations of statewide candidates to election administrators. Section 13-12-201(1), MCA. Both appeals are taken from an August 7, 2020 order of the First Judicial District Court directing the Secretary of State to strike from the general election ballot the names of Montana Green Party candidates who advanced after the June 2, 2020 primary election. Also at issue are the unsuccessful intervention motions of the Montana Republican Party, Lorrie Campbell, and Jill Loven. Plaintiff and Appellee the Montana Democratic Party opposes consolidation of the two appeals but agrees with the Secretary of State's proposed expedited briefing schedule in DA 20-0396 and indicates that it will comply with any briefing schedule set by the Court.

Having considered the parties' submissions, and good cause appearing,

IT IS HEREBY ORDERED that the Motion to Consolidate Appeals is DENIED.

IT IS FURTHER ORDERED that the request for an expedited briefing schedule is

GRANTED for both DA 20-0396 and DA 20-0397. In each case, the parties shall file their briefs according to the following schedule:

Appellant's opening brief shall be filed by August 12, 2020.

Appellees' response brief shall be filed by August 17, 2020.

Appellant's reply brief shall be filed by August 18, 2020.

IT IS FURTHER ORDERED that proposed intervenors the Montana Republican Party, Lorrie Campbell, and Jill Loven are GRANTED leave to file amicus briefs in accordance with M. R. App. P. 11(4)(a) and 12(7). Any amicus briefs must be filed by August 12, 2020.

IT IS FURTHER ORDERED that the Lewis and Clark County Clerk of District Court is directed to transmit the record immediately upon receipt of this Order.

The Clerk of this Court is directed to file this Order in each of the above-referenced cases and to provide immediate notice of its entry to all counsel of record and to the Lewis and Clark County Clerk of District Court.

DATED this 11th day of August, 2020.

Chief Justice

Justices

FILED
08/13/2020
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 20-0396

No. DA 20-0396

In the Supreme Court of the State of Montana

MONTANA DEMOCRATIC PARTY, *et al.*,

Plaintiffs-Appellees,

v.

SECRETARY OF STATE,

Defendant-Appellant,

and

LORRIE CORETTE CAMPBELL AND JILL LOVEN,

Proposed Intervenors-Appellants.

On Appeal from the First Judicial District, Lewis and Clark County
The Honorable James P. Reynolds, Presiding

Motion to Intervene

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Pursuant to Mont. R. Civ. P. 24, Petition Signers Lorrie Corette Campbell and Jill Loven move to intervene in Appeal No. DA 20-0396. In support of their motion, the Petition Signers state as follows:

1. On August 11, 2020, this Court denied the Motion to Consolidate Appeals DA 20-0396 and DA 20-0397.

2. Petition Signers, however, should be permitted to intervene in Appeal No. DA 20-0396 as a necessary party.

3. Intervention on appeal is permissible. Montana's Rule of Civil Procedure 24 is identical with the federal rule, and the 9th Circuit has authorized Federal Rule of Civil Procedure 24 to be used to grant intervention on appeal. *Bates v. Jones,* 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure.").

4. Intervention is necessary because the Motion to Consolidate was denied, and proceeding in this appeal as amicus is not sufficient to protect the Intervenors' federal constitutional rights. *See United States v. Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002) (holding that the district court's order granting the Police League amicus curiae status was insufficient when the Police League should have been permitted to intervene as a party to the action).

5. In the District Court, the Petition-Signer Intervenors attempted to assert as a defense their First Amendment rights to associate via an effective

petition process. The two Petition-Signer Intervenors argued that they and hundreds of others associated for purposes of securing ballot access for the Green Party in a federal and state election. They cited ample controlling authority that this right is protected by the First Amendment. They argued that this right was directly in opposition to the purported Montana constitutional right "not to associate" raised by the three Plaintiffs. (Two of the three Plaintiffs actually were allowed to withdraw by the Secretary of State, which would ordinarily defeat standing due to a lack of injury.)

6. The District Court denied intervention and refused to recognize Petition-Signer Intervenors' First Amendment rights precisely because their federal rights conflicted with the three Plaintiffs' purported state "constitutional right to withdraw" via DocuSign even after the underlying primary election.

7. Specifically, the Court found that the Plaintiffs, three petition signers who wanted to withdraw, had constitutional rights not to associate with the remainder of the petition signers, including Intervenors Campbell and Loven, and that vindication of this right required striking Plaintiffs' and all other withdrawal requests received by the Secretary, regardless of when or how the requests were made. The Court recognize several hundred purported withdrawals from absent parties. Based on these non-party withdrawals, the District Court held the petition did not have the requisite number of signatures. Finally, without citation to any

authority, the District Court held that in Montana, supporters of minor parties' federal ballot access have no First Amendment rights in effectively associating via petition to achieve that goal where their petition turns out to be numerically insufficient. Thus, the District Court engaged in circular reasoning designed to defeat federal constitutional rights: it kept the Petition-Signer Intervenors from entering the case to assert their First Amendment rights; relied only on the Plaintiffs' state constitutional "withdrawal" rights and not the First Amendment associational rights of non-withdrawing proponents to reach its decision on whether late, DocuSigned withdrawals would be allowed; and then held that because those withdrawals rendered the petition just barely numerically insufficient, the Petition-Signer Intervenors had no First Amendment associational rights to begin with.

8. Additionally, the District Court suggested that Petition-Signer Intervenors, as only two signers, could not intervene to assert the interest of proponents in effectively associating to qualify a minor party; but inconsistently held that the Plaintiffs, only three signers, could intervene to assert not only that they were entitled to withdraw, but that hundreds of other absent parties (for whom no evidence regarding their motive was offered or received, and whose "withdrawals" were simply hearsay) could do so as well. Yet these two groups of signers—the withdrawers and the loyalists—are in direct opposition on the law and

on their asserted state and federal constitutional rights. The rights of one group cannot be adjudicated in the absence of the other, but that is precisely what happened in the District Court and would happen here if intervention is not allowed.

9. Petition-Signer Intervenors constitutional claims are ripe for review, require no further factual development, and must be considered in weighing the merits of this appeal.

10. No other party has raised these constitutional claims and there is no reason to believe any other party will raise these claims on appeal.

WHEREFORE, Petition Signers respectfully move the Court to grant intervention as of right under Rule 24.

Dated this 11th day of August, 2020.

/s/ *Chris J. Gallus*
Attorney for Campbell and Loven

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is not more than 1,250 words, excluding the certificate of service and certificate of compliance.

Dated this 10th day of August, 2020.

/s/ *Chris J. Gallus*
Attorney for Campbell and Loven

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was served on each attorney of record by e-service on August 11, 2020:

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Counsel for Plaintiffs-Appellees

/s/ *Chris J. Gallus*
Attorney for Campbell and Loven

CERTIFICATE OF SERVICE

I, Chris J. Gallus, hereby certify that I have served true and accurate copies of the foregoing Motion - Intervene to the following on 08-13-2020:

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Dated: 08-13-2020

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 20-0396

STATE OF MONTANA, By and through its SECRETARY OF STATE, COREY STAPLETON,

Defendant and Appellant,

v.

MONTANA DEMOCRATIC PARTY, TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors,

Defendant and Appellant.

ORDER

Lorrie Corrette Campbell and Jill Loven have moved to intervene in this appeal. Campbell and Loven are Appellants in the related appeal, DA 20-0397. In our order of August 11, 2020, we denied consolidation of these appeals, given the different issues, but granted Campbell and Loven leave to appear as amici and, accordingly, to file briefing in this appeal, DA 20-0396, which they have now done. Campbell and Loven are signatories on petitions seeking to certify the Green Party on the ballot. They argue that intervention is necessary "because the Motion to Consolidate was denied, and proceeding in this appeal as amicus is not sufficient to protect the Intervenors' federal constitutional rights."

We acknowledge that intervention is permissible on appeal. However, the Court is here dealing with extraordinary circumstances involving two appeals, expedited briefing, and a very limited time for consideration and decision under election deadlines. While status as intervenors would normally grant Campbell and Loven an opportunity to file a reply brief, time does not permit additional briefing. The Court will carefully consider the arguments made by Campbell and Loven in their amicus brief. Therefore,

IT IS ORDERED the motion to intervene is DENIED.

The Clerk is directed to provide a copy hereof to counsel of record.

DATED this 13th day of August, 2020.

Chief Justice

Justices

IN THE SUPREME COURT OF MONTANA

DA 20-0396

STATE OF MONTANA, By and through its
SECRETARY OF STATE, COREY STAPLETON,
Appellant,
v.

MONTANA DEMOCRATIC PARTY, TAYLOR BLOSSOM,
RYAN FILZ, MADELEINE NEUMEYER,
and REBECCA WEED, individual electors,
Appellees.

APPELLANT'S OPENING BRIEF

On appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. CDV-2020-856, the Honorable James Reynolds, Presiding.

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1. When does the "Final Act" of § 13-10-601(2) occur which presented the deadline for all withdrawals from the Petition to be submitted?
2. Did the Plaintiffs demonstrate, clearly and convincingly, that material facts regarding the Petitions itself were misrepresented or fraudulent?
3. Do electronic signatures i.e. Docusign satisfy the formality requirements required to withdraw a signature from a Petition under state law?

STATEMENT OF THE CASE

Two years ago, this Court expressly stated that § 13-10-601(2), Mont. Code Ann., clearly defines precise statutory processes and standards for political parties to become eligible to nominate candidates for public office. The Court further stated the final act of the process was certification by the Secretary. State and county election officials rely upon the plain language of Title 13, and this Court's interpretation of Title 13 to administer the elections in this state.

When local administrators asked the Secretary for the final date a signer may withdraw from a petition authorizing a minor party to conduct a primary, Title 13 provided the answer for state election officials. Since

nearly statehood, this Court has been clear: the right to withdraw ends when the final action on the petition is complete. The final act occurs once statewide tabulation is complete, and the petition is certified. The precise statutory processes and standards have all completed in this particular case.

Following the completion of tabulation, the Secretary ensured that not a single request for removal remained in any of Montana's 56 counties—nor his office. Per the guidance of this Court, at that time, the allowable time to withdraw from the Petition concluded.

The District Court mistakenly analogized the current situation to an issue before the Wisconsin Supreme Court, which held the government prematurely cut off the right to withdraw from an annexation petition before a council's vote. On this basis, the District Court held that withdrawals must be allowed until after the primary election. However, under Wisconsin law, the final procedural step to annexation was the body's vote. Whereas here, the final procedure for primary eligibility in Montana is certification by the Secretary. The Wisconsin case follows the Montana procedure consistently reiterated by this Court which is that the signer has the right of withdrawal until the final. Where Wisconsin and Montana law differ is what the final act is. One such reiteration, rejected

withdrawals despite the allegation of fraud because they were too late. *State ex rel. Peck v. Anderson* 92 Mont. 298, 13 P.2d 231 (1932).

In *State ex rel. Peck v. Anderson,* the Court acknowledged that clear and convincing evidence of fraud in the contents of the petition could permit the judiciary to step in. *Id.,* at 306, 234. The Court provided examples such as the forgery of signatures.

The record from the underlying hearing is devoid of any evidence that the contents of the petition were misrepresented, or signatures were forged. The Court has never held that petition circulators are required to disclose financial backers of their efforts. In fact, the United States Supreme Court has held that requiring petition signature gatherers to wear badges disclosing their names, whether they were paid, and who their employer was violated the Constitution. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S. Ct. 636 (1999). Simply put, in this instance signers agreed with the contents of the petition, which was accurately relayed to them.

The State of Montana must appeal. If allowed to stand, the State will be inundated with lawsuits in addition to its obligations to administer

elections.[1] The District Court's decision cripples state and local election officials ability to send out military, overseas, and absentee ballots, to notify minor party candidates that they are eligible to file, provide prompt election results, and rein in election costs when withdrawals and signatures might necessitate multiple printing of ballots.

The right to withdraw is not limited to minor parties. In fact, the right to withdraw is not limited to elections. The right to withdraw applies to all actions by government requiring a number of citizens to endorse an action in order for the government to move forward, unless the legislature speaks otherwise. To be clear, the Secretary of State is not before the Court to represent a major political party against another major political party. The Secretary of State is here on behalf of the State of Montana to ask the Court to uphold a century old doctrine because the unprecedented ruling by the District Court reshaped the general rule, and will in turn produce lawsuits involving zoning, recall of public officials, petitions, and initiatives.

[1] Amidst working on this brief, the Secretary of State was already notified of a new federal lawsuit over this very issue.

STATEMENT OF FACTS

On Friday, March 6, 2020, staff of the State's Voter and Election Services division reported to their department head that they had completed a petition to qualify the Green Party as a minor party eligible for primary election under § 13-10-601 (2), Mont. Code Ann. ("Petition"). The Secretary does not have a way of knowing the exact time and day when the final forwarded sheet of any petition will arrive. Approximately 19,000 people signed the petition, of which approximately 13,000 were accepted as being valid and forwarded to the Secretary. Trs. vol. I 234:13-17.

Once the Petition is received, it is impossible to predict how long it will take to finalize statewide tabulation. But when that occurred for the Petition, the State tabulated all verified petition signatures and accounted for all that wanted to be removed. Before presenting the petition to the Secretary, the director ensured county offices did not have any remaining withdrawal requests in their possession. Trs. vol. I 233:1-24. With everything submitted accounted for, the Secretary was presented with a Petition satisfying the requirements for the minor party's eligibility to hold a primary. *Id.*

In February, the Montana Democratic Party ("MDP") hired an outreach team to contact petition signers, indicating that a conservative dark money group was behind the green party petition. Trs. vol. I 147-152.

The outreach effort resulted in over 150 signers removing their name from the Petition, before the Petition was certified.

Some county officials asked the Secretary whether withdrawal requests may be honored after the deadline to add additional signatures has passed. Trs. vol. II 316:10-14. The deadline to submit new signatures on the Petition occurred on March 2. Mont. Code Ann. § 13-10-601(2)(c). The Secretary instructed counties to time and date stamp all requests, as signers are entitled to remove themselves until final determination of the petition by the State. *Id.* Election officials accounted for all withdrawals submitted before, during, and after county and statewide tabulation. Trs. vol. II 584:12.

Once declared eligible on March 6, 2020, green party candidates had a single business day to file with the state. Trs. vol. I 232:10. By the close of business on March 9th, six individuals filed to run as green party candidates. Trs. vol. I 240:6. At that time, MDP requested all withdrawals in connection with the green party certification. Trs. vol. I 135. At trial, MDP testified to also purchasing a copy of the petition signers report[2], a

[2] The Petition Signers Report is a report generated by the counties. The Secretary of State does not have administrative capability to edit the report.

disclaimed,[3] generated report of the county tabulation, purchased online from the State. Trs. vol. I 63.

Statute requires the Secretary of State to determine whether a primary for a party eligible to conduct the same is necessary. Mont. Code Ann. § 13-10-209. Due to the number of declared green party candidates for the U.S. Senate race, it was. Had one fewer declared, a primary would have unnecessary, and the nomination of the candidates would instead have been certified to the general election ballot. Trs. vol. I 27-28.

Unexpectedly, in April, county election officials received emails from MDP staff containing electronically signed withdrawal forms. P's Ex. 4. In some cases, officials communicated the request was too late, in others the officials forwarded the email to the Secretary for archive purposes. Trs. vol. II 375. Occasionally, counties received similar emails after the fact including: a handful in May, and the day before the primary election. *Id.*

A few days after the primary election, the Secretary was served with this lawsuit along with an *ex parte* order to show cause. Dkt. No. 3, 4. The order, which says it was based upon the Complaint and "motion", was granted, despite that no motion or application for preliminary injunction

[3] The Petition Signers Report download link contains a disclaimer stating the report generated is a live system that changes as counties input data. While some counties updated the report based on withdrawals accepted after county certification, others did not.

was ever filed. *Id.* Under the UDJA, the lawsuit alleged the right to withdraw from a petition is absolute, and if considered, the Secretary was obligated to declare the green party no longer eligible to conduct a primary under § 13-10-601(2). Dkt. No. 1, ¶88-89. In later pleadings, MDP expanded their complaint to add that withdrawals precluded by law should be given effect upon a showing of evidence of fraud in the contents of the petition. Dkt. No. 14.

The Secretary's witness provided testimony at trial was about the convenience, security concerns, and of electronically signed withdrawals. Findings of Fact, Conclusions of Law and Order, Dkt. No. 85 (hereafter "FOF" for findings of fact or "COL" for Conclusions of Law), FOF ¶80-82. Trs. vol. I 268-273. As stipulated by the parties, requiring the agency to accept electronically signed withdrawals is dispositive. Individual plaintiffs testified wanting to allow the Green Party on the ballot even though all were planning on voting for MDP candidates. *Id.*, at 145.

STANDARD OF REVIEW

A District Court's conclusions and applications of law are reviewed *de novo* for correctness. *Montanans for Justice v. State*, 2006 MT 277, ¶ 20, 334 Mont. 237, 146 P.3d 759. A district court's conclusions of law are

reviewed for correctness. *Sandrock v. DeTienne*, 2010 MT 237, ¶ 13, 358 Mont. 175, 243 P.3d 1123. Likewise, the standard "pertaining to a declaratory judgment is to determine if the court's interpretation of law is correct." *Roe v. City of Missoula*, 2009 MT 417, ¶ 15, 354 Mont. 1, 221 P.3d 1200. We review district court findings of fact for clear error. *Montanans for Justice v. State*, 2006 MT 277, ¶ 19, 334 Mont. 237, 146 P.3d 759.

A finding of fact is clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or we are convinced upon our review of the record that the district court was mistaken. *Montanans for Justice*, ¶ 19 (citing *Petitioners I-549 v. Missoula Irrigation Dist.*, 2005 MT 100, ¶ 8, 326 Mont. 527, 111 P.3d 664). A district court's issuance of an injunction will be reversed if there has been a "manifest abuse of discretion." *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶¶ 11–12, 319 Mont. 132, 82 P.3d 912 "A 'manifest' abuse of discretion is one that is obvious, evident or unmistakable." *Id.* at ¶ 12.

ARGUMENT

I. THE SECRETARY HONORED THE ABSOLUTE RIGHT TO WITHDRAW BEFORE THE "FINAL ACT."

Over a century ago, the Montana Supreme Court adopted the general rule that where a certain number of electors is required to initiate proceedings for a public purpose, any person signing the petition has an

absolute right to withdraw his or her name at any time before the person or body created by law to determine the matter submitted by the petition has finally acted. *Ford v. Mitchell*, 103 Mont. 99, 114, 61 P.2d 815, 822 (1936); *State ex rel. Freeze v. Taylor*, 90 Mont. 439 4 P.2d 479, 481 (1931). The right to withdraw under the general rule (hereafter "The Rule") does not apply if the legislature expresses otherwise. *Id.*

The Secretary honored the right of a signer to withdraw at any time before the final act specified by this Court occurred. The District Court erred by holding that a right to appear on the general election ballot is defined by the statutory process set forth in § 13-10-601(2). However, the process set forth in § 13-10-601(2), Mont. Code Ann., is for primary eligibility alone.

A. Any person signing the petition had an absolute right to withdraw until the final act occurred. Under clear precedent, the final act in this matter is when the Secretary finally determined the subject political party was eligible to conduct a primary election.

Since 1913, under The Rule, the right to withdraw exists until final determination of the petition. *State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 P. 297 (1913); *Ford*, 103 Mont. at 117, P.2d at 823 ("We therefore hold the right to withdraw exists until the Secretary of State has finally determined, in the manner provided by statute, that the petition is sufficient.")

As indicated previously by this Court, § 13-10-601(2), Mont. Code Ann., clearly defines precise statutory processes and standards for political parties to become eligible for public office. *Larson v. State*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241. Two years ago, this Court noted:

> Upon receipt of the forwarded petition sheets, affidavits, and county certifications, the secretary of state must "consider and tabulate" the verified petition signatures and then, upon determining that the petition includes the requisite numbers of verified signatures, **certify the subject political party as eligible to nominate candidates for public office on the upcoming primary election ballot**.

Id., ¶ 3 (emphasis added).

Once a political party petition is presented to the Secretary in satisfaction of § 13-10-601(2)(b), the Secretary completes the final act of the duties prescribed:

> By express specification and incorporation by reference, § 13-10-601(2), MCA, clearly defines precise statutory processes and standards for political parties to become eligible to nominate candidates for public office. Section § 13-10-601(2), MCA, imposes specific administrative duties on county election administrators (signature verification, county tabulation, and certification) and the secretary of state (review of county certifications, statewide tabulation, and petition certification).

Larson, ¶ 26.

By holding the matter submitted upon the petition, rather than certification by the Secretary, the District Court concluded a person has an

absolute right to withdraw even after the Secretary—the person created by law to determine the matter—finally acted. The District Court is incorrect.

The District Court determined "[t]he political party qualification statute makes no mention of certification by the Secretary, to the Governor or to anybody else, and no other statute delegates certification authority to him." COL ¶11, p. 34, ¶11. This determination contradicts precedent and the application of The Rule. *Larson*, ¶ 25 (If upon tabulation the petition is sufficient, "the secretary shall certify the subject political party as eligible")(*emphasis added*).

The Rule does not permit a withdrawal of a signature after the final determination of the petition required by law to initiate a public process. As explained below, the final determination of the petition is whether a minor party is eligible to use the state primary procedure. The District Court acknowledged:

> The act of submitting a political party qualification petition simply authorizes a political party to use the state-administered procedure of a primary election to determine whether to nominate candidates and which candidates to nominate.

COL ¶16.

Despite the Court's own conclusion that a minor political party's eligibility to participate in the primary *is* the matter submitted by the

petition, the Court failed to recognize the Secretary's determination as the final procedure of the law which requires submission of the petition.

The Secretary accounted for all withdrawals submitted during signature verification, county tabulation and certification, the Secretary's review of county certifications, and statewide tabulation. Upon completion of statewide tabulation, the Secretary verified the accounting of all withdrawal requests submitted statewide, and certified the Petition, which constituted the final act by the final actor of the precise process and standard for political parties to become eligible.

The right to withdraw under the Rule is limited to "an appropriate manner and at the proper time." *Ford*, ¶ 114. As noted by this Court in 1931, "[n]one of the authorities recognize the right to withdraw from the petition after the same has been finally acted upon by the person or board." *State ex rel. Freeze,* 90 Mont. at 445, 4 P.2d at 481. Except for the lower court, no court has since.

It was not a choice or random chance that State and County election officials declined tabulating withdrawals submitted in the months after certification. Election officials bound by The Rule, acted accordingly in this case.

B. The District Court wrongly applied Wisconsin law over Montana law and confused eligibility to participate in the primary with appearance on the general election ballot

After concluding: (1) "The act of submitting a political party petition simply authorizes a political party to use the state-administrated procedure of a primary election", (2) "The Secretary does not have the authority to certify the results of a political party petition", the District Court concluded the final act referenced by § 13-10-601(2) occurs when the Board of Canvassers determines the right to placement on the general election ballot, up to 14 days after the primary election.

To support its conclusion, the Court cited Plaintiff's suggested authority, *Town of Blooming Grove v. City of Madison*, 253 Wis. 215, 33 N.W. 2d 312 (Wisc. 1948). The cited authority does not support the contention that the Board of Canvassers determine eligibility to conduct a primary because the Board of Canvassers are not the final actors of § 13-10-601. In *Town of Bloomington*, the Wisconsin court held that the government prematurely cut off the right to withdraw from an annexation petition before a council's vote. However, under Wisconsin law, the final procedural step to annexation was the body's vote.

The court's reliance on *Town of Bloomington* to interpret Montana law is misplaced. As the Wisconsin court states in the opinion,

> Courts in the various states are not in accord as to when the right to withdraw a signature from a petition terminates. There are courts holding that the right expires at the time of filing the petition, others when the sufficiency of the petition has been determined, some that it expires when jurisdiction attaches, and still others that the right continues until final action is taken upon the petition.
>
> *Town of Blooming Grove v. City of Madison,* 253 Wis. 215,218 33 N.W.2d 312,314 (Wis. 1948)

While Wisconsin caselaw regarding petitions for annexation of territory to a municipal unit states the final act was the vote[4] by the city council, in Montana for petitions for minor parties is the mere access to the ballot, the final act is the certification of the petition by the Secretary, as determined by this Court. *Larson v. State*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241. The holding of the court in *Town of Bloomington* is not inconsistent with the Secretary's position, and its holding is illustrative in this case.

[4] The material part of the statute involved follows: "62.07(1) Annexation procedure. Territory adjacent to any city may be annexed to such city in the manner following:
"(a) A petition therefor shall be presented to the council (1) signed by a majority of the electors in such adjacent territory and by the owners of one third of the taxable property thereof, according to the last tax roll, or (2) if no electors reside therein by the owners of one half of said taxable property, or (3) by a majority of the electors and the owners of one half of the real estate in assessed value; . . .
"(b) An ordinance annexing such territory to the ward or wards named therein shall be introduced at a regular meeting of the council after the filing of the petition, be published once each week for four successive weeks in the official paper and thereafter be adopted at a regular meeting by three fourths of all the members of the council."

The law at issue in the *Town of Bloomington* expressly states it is the duty of the council to determine the petition. In contrast, the law at issue in this case makes no mention of any duty by the Board of Canvassers for minor party eligibility to conduct a primary. Similarly, the expressly defined duties of the Board of Canvassers is absent any mention regarding determination of a minor party petition. Mont. Code Ann. § 13-15-501.

The District Court's reasoning is incorrect:

> To illustrate the issue, if a petition is submitted and a primary election is held for which no qualified person received any votes, [sic] would defeat the petition and the party would have no right to appear on the general election ballot. The Court concludes that under the unique procedures applicable to petitions for political party qualification, it is not until the Board of State Canvassers tabulates the votes that the process is final. Until that date, there is no final action on the petition.

COL ¶20.

The District Court's illustration is incorrect as a matter of fact and a matter of law for several reasons. First, the matter submitted by the petition is the eligibility of the minor party to hold a primary. The right to appear on the general election ballot is not the matter submitted by the petition. Under the Court's illustration, if a petition is submitted and a primary election is held for a minor party, the primary was held because the petition satisfied the statutory requirements for a minor party to hold a primary by way of petition.

The election results of a primary by a minor party are not determinative as to whether the party can conduct a primary. For example, if the primary resulted in a tie, that tie would have no bearing on if a primary could be conducted at all. In contrast, the results of the petition *are* determinative as to whether a minor party is eligible to conduct a primary. The District Court's analysis is incorrect. Under its own example, the petition was to hold a primary, and the primary was held. Thus, it cannot be said that the petition was defeated, regardless of whether the primary selects a candidate or not.

Second, the District Court's analysis that "the party would have no right to appear on the general election ballot" is directly undermined by statute on numerous fronts. Mont. Code Ann. § 13-10-327 provides an opportunity for the party to replace a candidate after the primary if a person is not qualified to appear on the general election ballot.

Candidates can automatically secure a right to appear on the general election ballot for a minor party that is eligible to conduct a primary if, after a sufficient petition is certified by the Secretary, a primary election is deemed unnecessary pursuant to Mont. Code Ann. § 13-10-209 (4). Moreover, Mont. Code Ann. § 13-10-501 provides a mechanism to

secure nomination of political party that did not meet the requirements of § 13-10-601 made by a petition for nomination.

Both statutes *depend* on final determination of the Petition, without a determination of eligibility renders the provisions of law unworkable. Both Mont. Code Ann. § 13-10-501 and § 13-10-209 expressly reference and hinge upon minor party eligibility under the requirements of § 13-10-601.

C. Legitimate state interests support requiring withdrawals to be submitted before the "Final Act"

Enforcement of the deadlines for submitting petitions ensures that election officials have time to verify the signatures, the manner and opportunity for candidates to register for office, any necessary judicial review can proceed, and the ballot is certified, printed, and sent to military and overseas voters in time. The state's justification is not a policy argument---it is a legitimate state interest upheld by the Court. The ink signature and in-person witnessing requirements, as well as the related deadlines, serve legitimate and compelling state interests in a fair and orderly election process. *Thompson v. Dewine* , 959 F.3d 804, 810-11(6th Cir. 2020).

The longstanding rule backed by well-established precedent which limits the withdrawal to the period before the Petition is deemed sufficient gives a

reasonable time for reconsideration to the signer and protects the petition when completed. As one court concluded:

> Great numbers of electors might desire to cast their ballots might be cheated and defrauded out of their right to have their names on the ballots by bad-faith pretended supporters procuring the opportunity to sign their petitions, and afterwards withdrawing names. *State ex rel. Harry v. Ice,* 207 Ind 65, 191 NE 155, 92 ALR 1508 (1934).

If allowed to stand, the decision below opens the door to gamesmanship to void petitions by removing signatures through March, April, May, and half of June.

II. THE RECORD DOES NOT CONTAIN CLEAR AND CONVINCING PROOF OF FRAUD REGARDING PETITION FACTS, AND THE FRAUD ASSERTED DOES NOT AUTHORIZE TARDY WITHDRAWALS EVEN IF SUPPORTED BY ADMISSIBLE EVIDENCE

Montana law does not permit overriding the final act doctrine absent clear and convincing evidence of fraud in the contents of the Petition on the record. The Montana Supreme Court stated that the right to withdraw a petition signature may be allowed upon clear and convincing proof of representations made to petition signers regarding material facts of the petition, if made with the intent to induct action, and timely made. *State ex rel. Peck v. Anderson*, 92 Mont. 298, 306, 13 P.2d 231, 234 (1932) (Holding that *even if the allegations of fraud were proven true*, the withdrawals were too late)(*Emphasis added*).

The testimony at trial conclusively establishes that signers understood and support the contents of the petition, namely, eligibility of the green party to participate. Plaintiffs argued that though the contents of the Petition were accurate and true, the fact that signature gathering was funded by conservative efforts somehow seeped fraud into the contents of the petition itself. To support this circuitous logic, Plaintiffs moved for admission of evidence that was clearly hearsay. *See,* FOF, p. 7, ¶ 21, (newspaper article) p. 11 ¶ 33 (newspaper article), p. 18, ¶ 60 (newspaper article), Miller Testimony (Trs. Vol. I. 74:3-7, Trs. Vol I 77:17-24, Trs. vol I. 74:24-75:15). The Court relied upon such hearsay in reaching its conclusions. COL, p. 41, ¶ 33 and COL, p. 43, ¶ 42. The District Court erred when it allowed the admission of this evidence.

A. The record does not show clear and convincing proof representations made to signers regarding material facts of the petition were fraudulent

All three individual Plaintiffs who attended the hearing testified that the representations made regarding the material facts of the petition were true.

Neumeyer:

> I had already made up my mind who I was going to support, and they were the Democratic candidates that I have always supported. But I didn't think it was wrong to also be willing to

allow other people to get their names out there, and their causes, you know, so that's why I signed it. Trs. vol. I 190:20-25.

Weed:

I generally feel like participation in elections is a healthy thing, and I instinctively thought, well, it can't hurt to have an open ballot.
Trs. vol. I 203:19-23.

Blossom:

. . . I wanted to support someone advocating [Green Party] ideas.
Trs. vol I 217:15-16.

The Court:

I heard no testimony that said the petition itself, the language of the petition itself that presented to people to sign was in accurate or misleading.
Trs. 503:4-7.

The court misapplies *Peck* to conclude that nondisclosure of petition sponsorship requires consideration of withdrawals after final determination of the petition. In rejecting the claim before the court that withdrawals must be accounted for due to fraud, the *Peck* Court provided examples of what would constitute fraud, the required standard of proof, and the timing for such a claim.

The *Peck* Court indicated that what may be considered fraud is an allegation that the clerk certified forged signatures or signers that do not meet residency requirements. *Id*. at 304. There, if proven true by clear and

convincing evidence, and the board nevertheless obeyed the statute, a court would be authorized to interfere and prevent the final act from becoming effective.

Here, the county clerks authenticated all signatures and the residency of the signers before certifying the sheets to the Secretary of State. Those that may have been forged and signers that did not meet residency requirements were rejected. Trs. vol. I 234:14-23. No evidence was presented otherwise. Nor was any proof offered of a false statement made by a circulator to petition signers about the contents of the petition. Where the testimony of a plaintiff clearly indicates that no representation was made, the evidence is not sufficient to warrant a finding of fraud. *Id*., 512 P.2d at 717.

In the end, the *Peck* court held that even if the fraud alleged were proven true, the withdrawals came too late. Circumstances of delay constitutes as laches. *Peck* at 306, 234. Allegations of deceptive election practices must therefore be raised, proven, and if necessary remedied, within the window of time allotted*. Montanans v. State*, 2006 MT 277, ¶31 334 Mont. 237, 146 P.3d 759 (Mont. October 26, 2006) (A person or group challenging the validity of a qualified ballot initiative must file suit within 30 days of the date the initiative is certified.)

III. MONTANA ADOPTED FORMALITY REQUIREMENTS ASSOCIATED WITH THE RIGHT TO WITHDRAW.

Under Montana law, withdrawal of a signature must be executed with the same formality as the initial signature on the petition. Since petitions for allowing a minor party on the ballot must be signed with "wet" signatures, withdrawals from the same petition must also be signed with wet signatures. The District Court erred when it overlooked this requirement.

The District Court further erred when it misinterpreted the UETA. Under the plain language of that statute, the state agency must agree to accept electronic signatures and promulgate polices to that effect. By incorrectly finding that the Secretary had "changed its policy", the District Court erred as a matter of fact and law. The Secretary has not changed its policy as it has never accepted electronic signatures.

B. Montana's petition process requires petition withdrawals must be received before sufficiency is certified and must observe the same formalities as petition signatures

Montana has adopted the rule that withdrawals must be proven with the same formality as the petition signatures they seek to remove. *Ford v. Mitchell* (1936), 103 Mont. 99, 115, 61 P.2d 815, 822 ("[The name] of each persons was certified to by the county clerk both on the initiative petition

and the withdrawal petition as of a person qualified to sign accompanied by the usual certificate as to the genuineness of their signatures.").

In *Ford*, the Montana Supreme Court cited *State ex rel. Westhues v. Sullivan* (1920), which reasoned:

> To get off of such a petition the action of the signer should be at least as formal. His request should at least be verified by his affidavit before some officer. This to the end that the Secretary of State might know that the signature to the request was genuine. A mere postal card or letter purporting to be signed by a signer of the petition is not sufficient. Such course would open wide the gates for fraud. These alleged withdrawals cannot be considered.

Westhues, 283 Mo. 546, 592, 224 S.W. 327, 339.

An electronically signed document delivered by a third party is just that, a letter purporting to be signed by the signer. Much has changed since the 1930's, although the arguments by both parties revolve around cases from that time. Today, county election officials have the technological capability to compare wet signatures, the same cannot be said about an IP address. State and county election officials might know that the signature to the request, if wet, is genuine. Election officials have established process and procedure to do so.

Thus, a wet signature, if called upon, *can* be verified. Upon objection to its authenticity, a challenge may be made. Just as MDP challenged the signatures on the Green Party petition in the last election. If fraud is alleged

that a withdrawal submitted contains a forged wet signature, the authenticity can be examined.

Today, the same cannot be said for the matching electronic signatures contained on the electronically signed withdrawal forms in this case. While this may be true in the future, it is not true for today.

The very right to withdraw comes from a declaration of the court, which also declared that the withdrawal must *at least* be verified. County and statewide verification, tabulation, and certification of petitions requires considerable time and manpower. In this case, county officials verified the authenticity of approximately 13,000 signatures of the 19,000 submitted by the Petition. Trs. vol. I. 234:13-17. Under the lower court's decision county and state election officials will be required to administer and verify withdrawal submissions while ballots are being counted. The reason the court seized the right to withdraw after final determination of the petition was to prevent this scenario.

C. Montana law expressly provides the Secretary with discretion regarding the use and reliance of digitally executed election documents

Chapter 30, Part 18, Montana Code Annotated expressly provides an agency is not required "to use or permit the use of electronic records or electronic signatures." § 30-18-117 (3). "[E]ach governmental agency shall

determine whether, and the extent to which, it will send and **accept electronic records and electronic signatures** to and from other persons and otherwise create, generate, communicate, store, **process, use, and rely upon electronic records and electronic signatures**." § 30-18-117 (1)(*emphasis added*). To the extent that an agency uses electronic records and electronic signatures, the Secretary, giving due consideration to security, is entitled to specify:

> (a) the manner and format in which the electronic records must be created, generated, sent, communicated, received,
> (b) the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process
> (c) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and
> (d) any other required attributes for electronic records that are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.
>
> § 30-18-117 (2), Mont. Code Ann. (*emphasis added*)

As the First Judicial Court recently held "the Court is not inclined to address the novelty of using DocuSign and force the widespread application of the service across the fifty-six (56) county clerks offices or the Secretary of State." *New Approach Montana v. State of Montana, Corey Stapleton*, Montana First Judicial District Court, Cause BDV-2020-444 (2020).

While the case concerned electronic signatures for initiative petitions, the holding of the Court regarding the statutory application of the agency's discretion in the acceptance or reliance of electronic signatures is applicable here.

MDP's position is contrary to both the UETA and the integrity of the election process. The UETA explicitly incorporates interactions with government entities in its definition section with the term "transaction." Such an incorporation is logical, because a voter must interact and exchange their vote or withdrawal with the county election office or Secretary. If such a withdrawal right were truly unilateral, a voter could dictate the terms of when, where, and how a vote could be made or a signature withdrawn. Such an interpretation has never been held to be the case.

Second, such a position, if adopted, would be determinantal to the integrity of Montana elections. This interpretation would permit anyone with an email address to claim they were a particular petition signer and act on said person's behalf in the election process. Would a text message suffice for a withdrawal? What about a tweet?

Mr. Dana Corson testified that DocuSign has been susceptible to hacking on numerous occasions. Trs. vol I, 268:20-270:10. Despite

claiming that DocuSign signatures *can* be verified, Ms. Miller testified that MDP did not actually meet with the majority of the persons who used DocuSign, and that they only verified the identify of persons submitting the withdrawal by verifying the address or phone number of the petition signer, and even used text messages as a form of verification. Trs. vol I 136:21-138:11. Notably, Mr. Corson testified there is simply no security system in place in the Secretary of State's Office to accept and verify that electronic signatures and withdrawals are truly coming from the person whose name is subscribed therein. Trs. vol I, 268:20-270:10; 276:14-17.

MDP feigned surprise that the Secretary would not accept electronic signatures. MDP argued numerous times that this policy was somehow new, and the District Court even attributed fault toward the secretary for the "adoption of a rule…midway through this petition gathering process." Montana has never permitted voting or the withdrawal of signatures or votes by electronic means. Ms. Miller testified that she was unaware of any point in the history of the state where electronic withdrawal forms had been accepted. Trs. vol. I 135:1-23.

MDP blames the Secretary for not announcing that electronic withdrawals would not be accepted, yet MDP never asked the Secretary of State's Office whether such electronic withdrawals would be accepted. Trs.

vol. I 135:24-136:3. MDP had notice of the Secretary's position through the *New Approach* case, which had settled this issue months prior to their lawsuit, and should have acted accordingly.

D. If the Secretary's Motion for Partial Summary Judgment is granted, then it is dispositive of the issues before the Court.

If granted, the Secretary's motion would be dispositive in favor of the Secretary because the majority of the withdrawal requests were submitted by DocuSign. Counsel for MDP conceded that the Petition would still have enough signatures to be certified if the electronic withdrawals were not counted. Trs. vol I. 146:6-11. Thus, if the Court finds that the Secretary was not required to accept electronic signatures, then it should reverse the District Court's decision on the motion and cross motion for partial summary judgment regarding election signatures, and may dismiss this matter in favor of the Secretary.

CONCLUSION

It is not unusual for the Court to see election cases the summer before a federal general election. For that reason, as November looms, across the country 2020 marks the most litigious election ever. For the second federal election in a row, whether or not the Green Party was eligible to conduct a

primary is in dispute. Generally, the parties' interest is the effect the decision will have at the ballot box.

The political effect of this case is irrelevant to state election officials. It is the administration of election and voter services that is of paramount importance. Regardless of the individual Secretary elected, public servants of the Office must carry out statutes adopted by the legislature in conjunction with guidance provided by the court.

It was the District Court that departed from statute and precedent, not state election officials at the Secretary of State. Thus, the Secretary respectfully requests this Court to reverse the Honorable Judge's decision and remand for issuance of an appropriate order.

Respectfully submitted this 12th day of August, 2020

/s/ Austin Markus James_____
Austin Markus James
SECRETARY OF STATE
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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Georgia typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my Microsoft Word software.

Dated this 12th day of August, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THE 12TH DAY OF AUGUST, 2020, A COPY OF THE FOREGOING DOCUMENT WAS SERVED ON COUNSEL OF RECORD BY ELECTRONIC SERVICE AS FOLLOWS:

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IN THE SUPREME COURT OF MONTANA

DA 20-0396

STATE OF MONTANA, By and through its
SECRETARY OF STATE, COREY STAPLETON,
Appellant,
v.

MONTANA DEMOCRATIC PARTY, TAYLOR BLOSSOM,
RYAN FILZ, MADELEINE NEUMEYER,
and REBECCA WEED, individual electors,
Appellees.

APPELLANT'S REPLY BRIEF

On appeal from the Montana First Judicial District Court
Cause No. CDV-2020-856, the Honorable James Reynolds, Presiding.

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INTRODUCTION

The Secretary of State ("Secretary") seeks clarity for citizens and public servants by vacating the lower court's decision to depart from established Montana law concerning the general rule for withdrawing from a petition. The lower court did not just depart from established law, it rewrote every element. The benefit of the right to withdraw is wholly dependent on the application of the right itself. The framework and structure of the general rule has facilitated equal application of whether the right to withdraw under unique circumstances is permitted or not. The Appellees argue that the Secretary deprived citizens of the right to withdraw from the Petition; they are incorrect.

When the first group of petition signers requested removal from the Green Party's minor party petition ("Petition") on February 13, 2020, the Secretary honored the signers' right to do so, which he did for approximately 150 others[1] that wished to withdraw over the weeks that followed. The Secretary ensured the rights of signers to withdraw at the

[1] Including individual Plaintiffs Weed and Blossom.

proper time, in the proper manner, as pronounced by this Court, were not infringed.

The moment in time that statewide tabulation and subsequent certification would occur by state election officials was not scheduled, nor could it be.

Montana law provides a deadline for county officials to forward verified petitions to the State. There is not an established time for counties to evaluate, verify, and forward petitions that are submitted other than the deadline. The Secretary can only tabulate the verified petitions that are received. The time required by the petition for state tabulation is unique for every petition. This Secretary does not have the luxury of predicting the timing associated with how the petition process unfolds.

State election officials completed statewide tabulation for the minor party petition at issue in this case near the close of business on March 6, 2020. At that time, state election officials verified with county counterparts that all Petition signatures and withdrawal requests were accounted for with certainty. As election offices closed their doors, and everything was accounted for, the Secretary announced the sufficiency of the Petition.

Appellees contend that the final determination of whether the Petition has achieved all requirements set forth in law, and the duties by

public actors complete, is still not a final determination of the Petition itself. Br. at 16. They contend that even if it is, the Petition at issue should be nullified retroactively because: (1) The Secretary does not have the authority to dictate the deadline and form of a withdrawal; (2) The Secretary failed to announce the deadline and form of a withdrawal; and, at any case, (3) the Secretary was obligated to accept withdrawals of any format at any time if a signer's desire to remove is based on disagreement with financial supporters of the Petition. *Id*. at 20, 25.

In similar vein, Appellees mistake the statutory requirement for an agency that affirmatively decides to use and rely upon electronic signatures for transactions between government and citizens to adopt rules and policy regulating the manner and extent authorized for use. Appellees allege the very opposite: Agencies are required to promulgate a rule that electronic signatures are *not* accepted or relied upon by the agency. The Secretary has not authorized the use of electronic signatures. As such, the Secretary has not promulgated rules regarding the manner, format, software authorized, and security precautions that are required to begin using and relying upon electronic signatures.

Appellees claim their right under the general rule, but simultaneously request to circumvent the general rule's requirements to be entitled to the right to withdraw.

ARGUMENT

I. THIS COURT DID NOT ARBITRARILY DECIDE THE GENERAL RULE REGARDING THE RIGHT OF A SIGNER TO TIMELY AND PROPERLY WITHDRAW FROM A PETITION REQUIRED BY LAW

The right to withdraw under the general rule is not at issue, nor is inference of the right.[2] Under plain terms, the right to withdraw must be at the proper time and in the proper manner. Departing from the Rule permits the right to withdraw outside of the proper time and by any manner that is at odds between the parties, and this is not allowable under Montana law.

The proper time under the right to withdraw exists until final action "either granting or denying the petition." *Ford v. Mitchell*, 103 Mont. 99, 116, 61 P.2d 815, 823 (1936).

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[2] The full sentence by the court regarding the inference referenced by Appellees Br. At 12 is: "Indeed, the above rule is a necessary inference from the very nature of the right of petition, and of necessity applies, not merely to the petitions themselves, but to the withdrawals, so as to authorize the withdrawal of a withdrawal." *State ex rel. Lang v. Furnish*, 48 Mont. 28, 36, 134 P. 297, 300 (1913). Much like the inferred right to withdraw, the inferred right to withdraw from a withdrawal is bound by limitation. *Ford v. Mitchell*, 103 Mont. 99, 113, 61 P.2d 815, 821(1936).

> It is contended that, conceding the right to withdraw, it may not be exercised at any time after the county clerk and recorder has affixed his certificate to the petition to which the signature of any given petitioner desiring to withdraw his name is affixed, and that upon the certificate being appended by the county clerk and recorder the action becomes final, and no subsequent withdrawal may occur. True, at some time the right to withdraw must cease, and this court held in the *Lang-Furnish* Case, that the right to withdraw from the petition there under consideration existed until final action by the board of county commissioners either granting or denying the petition. We think the rule there adopted is correct.

Appellees make a lot of noise that the petition at issue in *Ford* was a ballot initiative. Four pages are dedicated to the differences between a minor party petition and a ballot initiative petition. Appellees' argument is unpersuasive for several reasons: (1) This Court expressly rejected that a different rule should apply to initiative petitions; (2) This Court has cited *Ford* as the principle authority in applying the general rule to petitions to determine the moment of time that the right to withdraw cease; and (3) *Ford* concerns application of the general right to election law absent of expression by the legislature concerning withdrawals.

The same general rule applies with reference to a minor party petition as to petitions that have been before this court in the past. This Court in *Ford* expressly rejected that the type of petition is a factor in the application of the general rule to applicable petitions. *Ford*, 103 Mont. 99, 114, 61 P.2d

815, 822. ("We see no reason why a different rule should prevail with reference to a petition for the initiative of a measure and petitions such as have been before this court for consideration in the past.")

Second, this Court has consistently applied the general rule to a broad range of petitions. At no time has this court departed to a different general rule in the application reference to a certain petition from other petitions that applied the rule. Nor should it. The general rule has equally applied to:

- A landowner petition for the creation of a rural improvement district to improve the road system in the area.[3]
- A petition to repeal a County Resolution approving the location of a private correctional facility within the County[4]
- A petition requesting the creation of a planning and zoning district.[5]
- A petition to consolidate the county and all cities and towns into a municipal corporation.[6]
- An initiative Petition for the State Liquor Control Act of Montana

Whether the petition before the Court is a petition requesting eligibility by a minor party to conduct a primary, petition for a ballot initiative, or a petition create a county sewer district, if the right to withdraw from the petition is determined by the general rule, the right

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[3] *Buckley v. Wordal,* 262 Mont. 306, 865 P.2d 240 (1993).
[4] *Hellinger v. Toole County*, 1998 Mont. Dist. LEXIS 847
[5] 48 Op. Atty Gen. Mont. No. 5 (Mont. Att'y Gen. June 28, 1999)
[6] *State ex rel. Freeze v. Taylor*, 90 Mont. 439, 4 P.2d 479 (1931).

of a signer to withdraw ends upon final determination by the person or body on the petition. The similarities and differences of the petition subject matter is irrelevant.

If a petition is legally required—absent alternative legislative expression—the Court has been clear: signers have a right to withdraw before final determination of the petition; and, signers do not have a right to withdraw once the final actor under the law requiring the same has granted or rejected the petition.

a. The Secretary Properly Followed Determinations by the Legislature and This Court: The Secretary Simply Applied Established Law

Appellees' mischaracterization of the Secretary's opening brief and record below regarding the Secretary's purported "hidden" "determination" is just that: a mischaracterization. The Secretary fulfilled the statutory duties prescribed by § 13-10-601 (2) with careful consideration and by way of a transparent process.

1. The Secretary Faithfully Executed Decided Law

Appellees are correct that the District Court concluded the Secretary had not adopted rules or otherwise obtained public input related to (1) the date of sufficiency determination, (2) a formal deadline for submission of

withdrawals, (3) the manner and formalities required. By way of these determinations, the District Court concluded the Secretary acted arbitrarily and without public input, which the Court reasoned, abrogates any final action made by the Secretary.

The Secretary did not determine the date of sufficiency determination. The determination of sufficiency is not a discretionary choice by the Secretary. The requirements for the Petition are set forth by statute adopted by the legislature. The legislative process provides meaningful participation by citizens. The Secretary's role is ministerial: tabulating the verified petition statewide and identifying whether the results do or do not exceed the minimum number of signatures in the minimum number of legislative districts.

Consider the inverse scenario: The Secretary of State promulgated the date of determining sufficiency. This scenario would defy logic and constitute an *ultra vires* act. Montana law provides a deadline for circulators to submit minor party petitions to county election officials. All petitions must be presented to county officials at least 75 days before the primary. § 13-10-601 (2)(c), Mont. Code. Ann. . Montana law provides county election officials have, at most, 10 days to forward verified petitions

to the Secretary of State for tabulation after no additional signatures may be submitted. § 13-10-601(2)(d), Mont. Code Ann.

County election officials have no way of ascertaining whether a minor party petition will be filed in their office until after the deadline to submit petition signatures has expired. If filed, county officials have no way of determining the time duration any given petition sheet may require. The Secretary's duty to tabulate statewide is functionally dependent on the completion of county duties. All that is known to the Secretary is counties have up to ten days after the cutoff to submit additional petition signatures.

On March 6, 2020, finality of the statewide tabulation followed finality of county duties regarding the petition. The circumstances were not by arbitrary choice. Instead, it was the moment of time that, in this instance, on this Petition, the election officials finished the statutory duties asked of them.

In similar fashion, the contention that the deadline and formality requirements related to a signer's right to withdraw was the product of a whimsical decision of the agency that required a formally promulgated rule is without merit. County election officers are entitled by law to request advice from the Secretary based on election laws. § 13-1-202 , Mont. Code Ann. If requested, the Secretary has a statutory obligation to prepare and

deliver to the election administrators advice related to and based on the election laws.

When county election administrators asked state election officials for clarification as to whether or not a request to withdraw from a minor party petition may be considered after the deadline to submit signed petitions, the Secretary's office fulfilled its statutory duty by providing county officials with the longstanding Montana law, established by this court. For the sake of brevity, Appellant recites Argument I set forth above, and Argument III discussed below, concerning the timing, manner, and formalities established by this Court governing the right to withdraw. The Secretary carefully followed and faithfully executed Montana law pursuant to this Court's determinations throughout.

2. Appellees were provided with all requested documents in this action.

The filed action in this case did not contain a single allegation that the Secretary refused to make any public document available. The simple explanation for Appellees belief that anything "revealed for the first time" during the course of litigation is because the Secretary became aware of Appellees' mistaken position upon service of this *ex parte* matter.

The record below shows the opposite is true. The Secretary fulfilled the public records requests submitted by Appellees on March 9. requesting copies of all withdrawals in connection with certification of the green party petition. The Secretary offers the following truncated classification in response to the specific purported hidden documents discussed in Appellees brief, referencing Plaintiffs Proposed Findings of Fact, adopted by the Court nearly verbatim.

The Petition Signers Report is a live system module offered by MTVotes enabling users to unilaterally generate a static report of county petition tabulation as of the time the extract is produced. Trans. vol. I 254:6-20. Stated simply, it shows a report of counted petition signers at one given point in time, and is an ever-changing document based on tabulation and subsequent disqualifications. To that end, the website used by Appellees to extract a Petition Signers Report contains a disclaimer that data changes as county officials maintain the data.

The Petition Signers Report is not a "decisional document" of the Secretary. It is a featured tool offered by the platform used to maintain the voter registration system, that allows citizens to generate a live snapshot

based on the data imputed by county election administrators. [7] Nor was the Excel spreadsheet that was used to calculate statewide tabulation a decisional document.

The sole determination rendered by the spreadsheet was not a decision of the Secretary at all. The sole determination was the sum of all verified petitions, and sum of all districts above the threshold. The spreadsheet and the Petition Signer's report are merely tabulations of the decisional documents. It should not be forgotten that *all* of the petition withdrawal forms (the decisional documents) were submitted to the Plaintiffs in response to their specific request for that information pursuant

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[7] The District Court adopted Plaintiff's Prop. FOFCOL ¶102 as COL ¶98, verbatim. COL ¶98 is illustrative of the false light portrayed by Plaintiff/Appellees regarding the Secretary's "Secret" document in an improper and prejudicial manner to Appellee. The County and State Tabulation in *Larsen* did not account for a single withdrawal, particularly a withdrawal after county certification and prior to the Secretary's certification. *See*, Trs. I. 256:18-24. Moreover, Plaintiff/Appellees requested all petition sheets in the 2018 matter prior to filing initiating the case in April, 2018. At no time did Plaintiff/Appellees request this information or confer with the Secretary prior to serving this action on June 5, 2020.

to a Freedom of Information Act request. Thus, any claimed abuse is artificial.

The Statewide Tabulation was offered in the Secretary's initial filing in this matter, well before the show-cause evidentiary hearing. Had Appellees requested the statewide tabulation the Secretary would have produced it. Had Appellees communicated intent to file this matter prior to their *ex parte* filing, the Secretary would have certainly provided it to Appellees. The three months of silence by Appellees cannot be construed as secret keeping by the state's election office.

II. THE COURT ACKNOWLEDGED ABSENCE OF THE CLEAR AND CONVINCING PROOF REQUIRED.

At the end of the trial, the District Court acknowledged "[the court] heard no testimony that said the petition itself, the language of the petition itself that presented to people to sign was inaccurate or misleading." Trs. Vol II 503: 4:-7. The record is absent of any showing regarding misrepresented *material facts* of the Petition supported by proof of intent the misrepresentation was for fraudulent purposes. *State ex rel. Peck v. Anderson* (1932), 92 Mont. 298, 306, 13 P.2d 231, 234. If alleged, a showing must be timely made and supported by clear and convincing evidence. *Id.*

Appellees continue to muddle what the *Anderson* court held versus what it did not. The confusion of Appellees is illustrated by their brief. Contra. Br. P. 25. ("Montana law is clear that signers can withdraw even after final action if they learn that representations made to them as an inducement to sign the petition, and on which they relied, were false."); with Br. P. 28. ("[*Anderson Court*] never reached the issue of what kinds of misrepresentations would suffice.

Appellees are correct that the only court decision referencing the fraud limitation, the *Anderson* decision, did *not* render an opinion that misrepresentation permits signers to withdraw after final action. What the Court's opinion did *hold* is that a clear and convincing showing of forgery and/or false statements about contents of the petition is the proper limitation to the rule.

The Court also held that a signer's delay or failure to promptly to withdraw waives their right to withdraw and constitutes as laches based on the circumstances shown.

III. APPELLEES HAVE AN INSUFFICIENT NUMBER OF WITHDRAWALS DUE TO THEIR RELIANCE ON ELECTRONIC SIGNATURES.

The Appellees' silence on critical issues regarding electronic signatures is telling. First, nowhere in their brief do they address the fact that Montana has *never* accepted the use of electronic signatures for signing or withdrawing from a petition. Second, their brief is devoid of any response to the fact that MDP *knew* electronic signatures would not be accepted based on the First Judicial District Court's decision in *New Approach,* decided in April 2020 (and decided in the very same district in which they brought their case). Third, they offer no evidence that the county election officials have the ability or resources to verify electronic signatures, and instead only offer passing references to the fact that DocuSign *can* be verified, but even by Appellees' own admission, it was not verified here. Most significantly, Appellees do not dispute that this issue is dispositive, because if electronic withdrawals are not accepted, then the Petition still qualifies for certification.

a. Montana has never accepted electronic signatures for signing or withdrawing from a petition, and such a procedure would have to be adopted by the Secretary and administered by the county election administrators.

Appellees argue that no statue affords the Secretary the ability to require "wet signatures." Appellees have the issue backwards. Montana law requires the Secretary to adopt electronic signatures if they are to be used in elections. § 30-18-117 (3), Mont. Code. Ann. The Secretary does not have to adopt a rule saying electronic signatures are not to be used—that is the status quo.

In the absence of such a law or regulation, the general rule applies, which requires that withdrawals be proven with the same formality as the petition signatures they seek to remove. *Ford v. Mitchell*, 103 Mont. 99, 115, 61 P.2d 815, 822 (1936)[8]. Appellees avoid this issue, arguing

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[8] Appellees misstate the factual circumstances in *Ford* at Br. 37. In Ford, the Secretary contended that not *all* withdrawal forms submitted were properly certified. However, the number the number of withdrawals that were certified by the clerks as to authenticity of the signers reduced the Petition below the threshold. Therefore, certification of *all* signatures was determined unnecessary. *Ford v. Mitchell*, 103 Mont. 99, 115, 61 P.2d 815, 822 (1936). ("The name of each of these [] persons was certified to by the county clerk…as of a person qualified to sign accompanied by the usual certificate as to the genuineness of their signatures.)("Therefore, assuming that the Secretary of State did not compare the signatures as alleged nor determine whether they had signed …there were sufficient withdrawals from this one county alone to destroy the validity of the initiative petition.")

that the petition withdrawals were more comprehensive than the initial signatures, but the most basic requirement was missing: an actual legal signature. Appellants agree that the form promulgated by the Secretary is not the only form of acceptable withdrawal, but certainly the most basic requirement of a "wet signature" by the voter must be met as that is what was required on the original petition.

Appellees incorrectly assert that a signature withdrawal is a unilateral process, much like signing a will or power of attorney.[9] Voting has never been a unilateral process. It requires a voter to register to vote with the county election office. It requires a voter to fill out a ballot and return it to the county election office. The voter does not dictate these terms, the party entrusted to ensure the integrity of elections does. The First Judicial District Court correctly ruled on this issue in *New Approach*, holding:

> Next, Plaintiffs cannot show that they are entitled to the requested relief because the use of electronic signatures under the UETA requires the consent by both parties. Mont. Code Ann. § 30-18-104(2). Plaintiffs acknowledge that state agencies are not required to accept electronic signatures. Reply, p. 13. There is no evidence presented that the Secretary of State or county

[9] The Montana Legislature expressly exempted unilateral transactions, including the creation and execution of wills, codicils, or testamentary trusts. *See*, Mont. Code. Ann. § 30-18-103(2)(a).

> clerks have been consulted or consented to any use of electronic signature. Mont. Code Ann. § 30-18-104(2).

New Approach Montana v. State of Montana, Corey Stapleton, Montana First Judicial District Court, Cause BDV-2020-444 (2020), Attached hereto as Exhibit 1.

MDP's position in this litigation shows the danger of opening this door. MDP argued in briefing "[N]othing in Montana law would prevent a voter from withdrawing their signature from a political party qualification petition by sending an email to their county election administrator, writing their county election administrator a letter, or calling their county election administrator and requesting the same." Doc. 48, p. 7 (Plaintiff's Memorandum In Opposition to Defendant Secretary of State's Motion for Partial Summary Judgment).

Although a letter would at least permit a county election administrator to compare the signature, how would such information be verifiable by an email? Can a voter simply call the county election office and tell the election administrator who he or she wishes to vote for? Such a position evidences the policy behind vesting authority with the Secretary to create uniform rules and procedures to safeguard the integrity of elections. Such a position is also untenable with the duties of county election officials and the Secretary to verify the integrity of elections.

b. The Secretary's position was not new, and MDP had notice based on *New Approach*.

Appellees argue that the Secretary announced for the first time during this litigation that he would refuse to honor electronically signed withdrawal forms. Notably absent from Appellees' brief is any explanation or even a reference to the *New Approach* decision. At the time of filing their complaint, *New Approach* had already resolved the issue of electronic signatures. The Secretary was not required to re-pronounce established law, as "[t]he law neither does nor requires idle acts. § 1-3-223." Mont. Code Ann.

Ms. Miller testified that she was unaware of any point in the history of the state when electronic withdrawal forms had been accepted. Trs. vol. I 135:1-23. Mr. Trent Bolger testified that MDP never contacted county election administrators to ask whether they would accept electronic withdrawals. Trs. vol I. 179:12-15.

Appellees failed to respond to the position raised in the Appellant's opening brief, asserting that MDP could have simply asked whether such electronic signatures would be accepted; instead, MDP chose to rely upon its own misinterpretation of the law to its detriment. It should not be overlooked how unique the Appellees' position is: MDP attempted to use

electronic signatures, which had never been used *in any election matter* before, without verifying their use with any of the authorities involved in the process, assumed that such signatures would be accepted, and then feigned surprise when they were not. Had MDP read the District Court's order in *New Approach,* decided more than a month before MDP filed its suit, it would have been aware of the Secretary's position.

c. The electronic signatures at issue here are wholly unverifiable and Appellees offered no evidence that county election administrators have the ability to verify the authenticity of such signatures.

Appellees offered a plethora of evidence that DocuSign signatures *can* be verified, but no evidence that such signatures *were* verified in this case, or that any county election office could verify such signatures. Appellees' wording in its appeal brief is very careful in this regard, noting that the "DocuSign platform" collects the signer's personal information, but omitting the fact that none of this information was relayed to the county election officials. Appellees' Brief p. 36. In fact, MDP affirmatively removed the ability of the county election offices to verify votes when it converted the withdrawals to pdfs, without any of the associated voter data, and then emailed them to county election offices. Thus, in this case, a major political

party is the only entity who can authenticate the electronic withdrawals, not the public officials entrusted to do so.

Ms. Miller further testified that DocuSign can show information such as the user's IP address. Trs. vol. I 80:16-23. But, when she was asked about the very first withdrawal signature in the stack of withdrawals offered to the District Court, she admitted she had not actually verified the user's IP address, but that she *could have*. Trs. vol. I 137:2-12. She further admitted that the verification done by MDP was minimal, based on nothing more than addresses and/or phone numbers:

> Q. Okay. So let's talk about that. First, you said you talked to them over the phone. Again, had you ever met these people in person?
>
> A. No.
>
> Q. How do you know the person you spoke with on the phone was the person who signed the DocuSign signatures?
>
> A. Because they knew the information to fill out on the form. They knew the registration address, the phone number, things that they completed on the form.
>
> Q. So simply because they had the address of the person?
>
> A. Yes.
>
> Q. Okay. Any other way you were able to verify that this was, in fact, the person who signed the DocuSign form?
>
> A. No.

> Q. Okay. And as you testified today, the Exhibit 5, do you have personal knowledge that any of those withdrawal forms were actually signed by the person claiming to have signed them?
>
> A. Yes. I have personal knowledge. We have the forms that they submitted to us.
>
> Q. Did you meet with any of these people who signed those forms?
>
> A. No.

Trs. Vol. I 137:25-138:24.

It is important, too, that Ms. Miller admitted she only spoke to twelve people out of the five hundred who allegedly withdrew their signatures. Tr. vol. I 129:3-13.

Ms. Miller's testimony demonstrates the serious concerns with DocuSign.[10] According to the Appellees, someone on the other end of a phone or an email need only claim she is the person whose name is typed on the DocuSign form, and the receiving must thereafter trust that it is a true representation. Mr. Corson testified that creating such a secure system and implementing it across the 56 counties in Montana would be a

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[10] The Secretary raised the serious security concerns addressed by Mr. Corson in its opening brief, to which he testified at the evidentiary hearing. Trs. vol. I 268:20-270:10.

"lengthy" process and "would have to involve several divisions or bureaus of ITSD [Information Technology Division]to consult." Trs. vol. II 128:5-13.

The pandemic is certainly a threat, and the Secretary does not fail to appreciate that issue. Reasonable accommodations have been made, such as expanding mail in primary voting. The Secretary cannot, however, sacrifice the integrity of an election for convenience, and Appellees have failed to present any evidence that county election offices could have feasibly verified that the withdrawals at issue came from the actual petition signers. In fact, here, just the opposite was true: MDP provided pdfs of electronic signatures to county election administrators without ever asking, or independently verifying whether the county election officials would accept such withdrawals or whether they could verify their authenticity.

d. Deducting the invalid electronic signatures from the total number of withdrawals is dispositive.

Appellees do not dispute that this issue is dispositive. As admitted by Appellees, the Petition would still have enough signatures to be certified if the electronic withdrawals were not counted. Trs. vol I. 146:6-11.

V. THE LONGSTANDING LIMITATIONS OF A RIGHT TO WITHDRAW AT THE PROPER TIME AND IN THE PROPER MANNER DOES NOT VIOLATE PLAINTIFFS' RIGHT TO ASSOCIATE.

The District Court's determination regarding Plaintiffs' right to associate hinges on whether this Court upholds the District Court's departure from the general rule. To that end, whether this Court affirms the District Court's determination that under the framework which is applied to a law requiring a petition, final determination is certification of the right to appear on the general election ballot and the final actor of § 13-10-601 (2) is by the Board of Canvassers. This determination relies upon the authority offered by Plaintiffs/Appellants, adopted by the Court, in *Town of Blooming Grove v. City of Madison*, 9 Wis. 2d 443, 33 N.W. 2d 312 (1948). Plaintiffs refer the Court to Appellants Opening Brief, Pages 14-17, which Appellees declined to refute.

It was not an arbitrary determination by the Secretary that the right to withdraw ends upon completion of the final act--by the final actor--under the law requiring a petition. It was a rational and intelligent decision by the Secretary to faithfully execute declared Montana law.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's order.

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 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 words, excluding table of contents, table of authorities, and certificate of compliance.

DATED this 18th day of August, 2020.

/s/ Austin Markus James

Austin Markus James

CERTIFICATE OF SERVICE

I, Austin Markus James, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-18-2020:

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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 20-0396

MONTANA DEMOCRATIC PARTY, *et al.*,

Plaintiffs-Appellees,

v.

SECRETARY OF STATE,

Defendant-Appellant,

and

THE MONTANA REPUBLICAN PARTY, LORRIE CORETTE CAMPBELL, AND JILL LOVEN,

Proposed Intervenors-Appellants.

From the Montana First Judicial District, Lewis and Clark County
Court Cause No. CDV-2020-856
Honorable James P. Reynolds, Presiding

Brief of *Amici Curiae* Petition Signers Lorrie Campbell and Jill Loven

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I. ISSUES PRESENTED

1. Whether the District Court erred by failing to recognize or apply the First Amendment rights of minor party ballot access supporters to effectively associate by petition to achieve political change.

2. Whether the District Court erred by locating within the Montana Constitution a "right to withdraw" from a minor party qualification petition that is superior to petition proponents' First Amendment rights in effective association for minor party access to the federal ballot, and that (a) allows withdrawal even after the primary election is held and (b) allows withdrawal by DocuSign or even by phone call, which is far short of the formality required to sign the petition in the first place.

3. Whether the District Court erred in applying Montana's requirements that signatures withdrawals be before final action on a petition, that this only be relaxed for pure cases of fraud, that withdrawals use the same formalities used to gather signatures, and that all voters enjoy the protection of these judicially-declared rules regardless of whether they are emphasized through rulemaking or public service announcements.

II. STATEMENT OF THE CASE

This appeal stems from the District Court's declaratory judgment removing the Montana Green Party from the 2020 general election ballot and voiding thousands of votes cast for the Green Party in the primary election. The Green Party qualified for the ballot pursuant to Mont. Code Ann. § 13-10-601 (2019) on March 6, 2020, after enough petition signatures were gathered. As a result, the Green Party appeared on the primary ballot on June 2, 2020. One day prior to the primary election, however, the Montana Democratic Party ("MDP") sued to enjoin the Secretary from giving effect to the Green Party Petition and to have the Green Party removed from the ballot for the general election.

The Montana Republican Party ("MTGOP") along with two petition signers and proponents—Lorrie Corette Campbell and Jill Loven—moved to intervene in the lawsuit. Plaintiffs accused the MTGOP of deceiving Montana citizens into signing a "phony" petition. To defend itself, the MTGOP moved to intervene but the District Court denied the motion.

The individual Plaintiffs argued that they were entitled to withdraw from the signature petition months after the petition had been certified because the state constitution granted them a "right not to associate." Petition signers Campbell and Loven moved to intervene to assert a countervailing constitutional right: their First Amendment right to effectively associate via the petition. The petition signers

argued that granting the Plaintiffs' requested remedy would impede upon their federal constitutional right. But the District Court, again, denied the motion to intervene. The petition signers immediately moved to have this Court exercise its supervisory control to remedy the District Court's denial of intervention, but this Court exercised its discretion to decline extraordinary review. (Case No. OP 20–0630.)

Following a two-day hearing, the District Court issued an Order enjoining the Secretary from giving effect to the Green Party Petition, effectively removing the Green Party from the ballot. In its findings, the District Court concluded that MTGOP committed constructive fraud, negligent misrepresentation, and that it willfully deceived petition signers—all without any direct evidence from MTGOP witnesses and without providing MTGOP any opportunity to defend itself, cross-examine, or present rebuttal evidence at the hearing. Further, the court sanctioned an entirely new withdrawal procedure, permitting withdrawals to be filed via DocuSign months after the signature submission deadline has passed. The court reasoned that this procedure was necessary in order to preserve the Plaintiffs' "right to not associate," but the court gave no consideration to the competing First Amendment rights of Green Party ballot access proponents and petition signers like Campbell and Loven.

III. STATEMENT OF FACTS

In early 2020, over 13,000 Montana electors, including *amici curiae* Lorrie Campbell and Jill Loven ("Amici-Signers" or "Petition Signers"), validly signed a petition to qualify the Green Party to hold a primary election. (Tr. 234:14-17). The petition stated: "We, the undersigned and registered voters of the state of Montana hereby request that in accordance with 13-10-601, MCA, the names of the candidates running for public office from the Green Party be nominated as provided by law." The petition circulators turned in the signatures to county clerks by March 2, as required by law; the petition was certified on March 6; Green candidates filed nominating papers by the March 9 deadline; and the Secretary certified all of the Green primary ballots to county clerks by March 19. (Tr. 231:15 – 234:12). The Green primary ballots were then immediately designed and printed; they were mailed to overseas voters no later than April 17; by May 8, they were mailed to absentee list voters and all voters residing in areas where election authorities chose to vote by mail due to Covid; and only in-person voting remained to occur on June 2. (Tr. 240:10-14).

During this time, the MDP launched a massive withdrawal campaign to convince petition signers that the MTGOP had committed election fraud by submitting a "phony" petition. (*See, e.g.,* Tr. 84:11 – 86:4). This well-orchestrated political effort by MDP, however, did not generate sufficient withdrawals before the

Montana Secretary of State certified the minor party petition, under M.C.A. § 13-10-61, on March 6, 2020 or by March 9, 2020 when candidates needed to file their declarations of candidacy. (Tr. 233:1-11). Indeed, the campaign led to sufficient withdrawals only shortly before the June 2, 2020 primary election itself—long after candidates were declared, and ballots were printed, mailed, and cast. (Tr. 112:19 – 113:3; 115:11-17). In other words, the MDP continued collecting and submitting signature withdrawals after the Green Party had qualified to appear on the ballot, after candidates had filed to run and begun their campaigns, and after votes had been cast.

On June 1, 2020, one day before the primary election, MDP filed a lawsuit challenging the Green Party's qualification to appear on the primary and general election ballots. MDP, along with four individual plaintiffs, Taylor Blossom, Rebecca Weed, Ryan Filz, and Madeleine Neumeyer, sued the Montana Secretary of State seeking a declaratory judgment that the Green Party's qualifying petition was invalid under M.C.A. § 13-10-601, that all of their (and other voters') withdrawal requests were valid, that the Secretary of State's failure to accept all of those requests violated their "right not to associate" under Article II, Sections 6 and 7 of the Montana Constitution, and that the Secretary's certification of the Petition was invalid. They also asked for an order that the Secretary be enjoined from

implementing, enforcing, or giving any effect to the certification of the Green Party's petition.

The four individual plaintiffs were all electors who had signed the minor party petition but later moved to withdraw their signatures. At trial, only three of the individual Plaintiffs testified (Ryan Filz did not appear). Of the three, none stated they had ever planned to vote for a Green; instead, they viewed the Greens' message favorably. (Tr. 188:13-25; 200:15-22; 203:19-23; 217:12-16). And importantly, no Plaintiff testified that they were affirmatively misled by anything stated by a petition circulator, whose petitions stated: "The principle represented by the Party is Environmental and Social Justice."

Of the three testifying Plaintiffs, only one was actually "injured." The undisputed facts indicated that Plaintiff Weed's and Blossom's withdrawals were submitted on or before March 6 and, as a result, their original signatures were not counted by the Secretary. (Tr. 259:5-13; 26:21 – 261:11). Therefore, only Plaintiff Neumeyer's withdrawal was denied.

Plaintiff Neumeyer testified that she did not learn about the "phony" petition until March. (Tr. 190:8-12). She testified that she immediately went to the Lewis & Clark County Elections Office, but was told it was too late to withdraw. (Tr. 192:8-16). She reported this development to the MDP who emailed her a DocuSign form to fill out instead. (Tr. 192:18 – 193:8). She "immediately" signed the form and

returned it to the MDP, but in reality, the DocuSign withdrawal was not submitted to the Secretary until April 28, 2020. (Tr. 193:9-17; 197:9-10). Interestingly, Ms. Neumeyer testified that her DocuSign signature was likely not legible because she could not fit all the letters of her name on her "little cell phone." (Tr. 196:3-6).

The Amici-Signers were both electors who signed the minor party petition and wanted to see the Montana Green Party remain on the ballot. Amici Lorrie Campbell, like the four withdrawal Plaintiffs, is a strong Democratic Party supporter who plans to vote for the Democratic Party in the general election. (IA15). She supported Green Party ballot access, however, because she believes the Party's voice should be heard. (IA15). Amici Jill Loven, on the other hand, is a strong Republican Party supporter, who intends to vote with her own party this fall. (IA17). She also supported Green Party ballot access because she believes the Party's voice should be heard. (IA17). While the four withdrawer-Plaintiffs say they are among hundreds who changed their minds about supporting Green Party ballot access, Amici-Signers Campbell and Loven are among thousands who did not.

Where the withdrawer-Plaintiffs differ with the Amici-Signers is in their individualized assessments as to whether it matters that the Republican Party put money behind its own belief that the Green candidates' voices should be heard. The withdrawer-Plaintiffs who find this fact dispositive argue that it tips the scales against Green Party ballot access, because the signers had a right to believe the

signature gatherers were members of the Green Party. Thus, the withdrawer-Plaintiffs claim they should be able to withdraw their signatures because, upon retrospect, they realized their signature on the petition may ultimately benefit the Republican Party. And the withdrawer-Plaintiffs claim their Montana constitutional "right not to associate" trumps the conflicting First Amendment "right to effectively associate" that was asserted by the Amici-Signers in their attempted intervention.

On the other end of the spectrum are Amici-Signers Campbell and Loven. They urged in their Motion to Intervene, Amicus Brief, and urge again here, that this Court cannot sustain the District Court's mandate that the Secretary accept signature withdrawals for months after the signature deadline has passed, and via DocuSign, a level of formality that falls far below what is required to sign a petition in the first place. (IA1; IA317). If this is what Montana allows, it renders illusory the right of minor party ballot access supporters such as Campbell and Loven to meaningfully and effectively petition the state for ballot access.

The District Court issued Findings of Fact and Conclusions of Law on August 7, 2020, issuing an injunction enjoining the Montana Secretary of State from giving effect to the Green Party's petition, effectively removing the party from the ballot. (IA355). In its findings, the District Court concluded that MTGOP committed constructive fraud, negligent misrepresentation, and that it willfully deceived petition signers—all without any direct evidence from its own witnesses and without

providing MTGOP any opportunity to defend itself, cross-examine, or present rebuttal evidence at the hearing. (IA355, COL ¶¶ 33–43).[1] Further, the District Court refused to consider any of the evidence provided by MTGOP in its amicus brief, stating that it could have been introduced at the hearing, (IA405 at ¶ 4)—the same hearing in which the District Court denied MTGOP the opportunity to participate. (Tr. 8:9-11:16).

The District Court also sanctioned an entirely new withdrawal procedure, permitting withdrawals to be filed months after the final action has occurred on the petition. (IA355, COL ¶ 20). And the court required the Secretary to, for the first time ever, accept DocuSign withdrawal forms. (IA355, COL ¶¶ 52–55). The court reasoned that such actions were necessary in order to preserve the Plaintiffs' "right to not associate." (IA355, COL ¶ 44). The court, however, gave no consideration to the competing First Amendment rights of Green Party ballot access proponents and petition signers like Campbell and Loven.

IV. STANDARD OF REVIEW

"The standard of review of lower court findings of fact and conclusions of law is whether the findings of fact are clearly erroneous and whether the conclusions of law are correct." *Davis v. Westphal*, 389 Mont. 251, 257, 405 P.3d 73, 80 (2017).

[1] Petition-Signers Campbell and Loven were prepared to testify that, even if the MTGOP somehow committed fraud, they still wanted their signatures counted. Their goal was to place the Montana Green Party on the election ballot. The MTGOP's actions had no bearing on this goal.

Similarly, mixed questions of law and fact are reviewed to ensure "the lower court's determination of law is correct." *Smith v. General Mills, Inc.*, 291 Mont. 426, 430, 968 P.2d 723, 726 (1998).

V. ARGUMENT

The last-minute striking of Green Party federal and state candidates from Montana's general election ballot has become a summertime tradition. In both 2018 and 2020, a sufficient number of Green Party ballot access supporters seemed to have timely filed a qualification petition. In both years, Green Party voters elected federal and state candidates to stand in the November general election. In both years, Montana courts have relied on various state statutory or constitutional grounds to find that the party qualification petition was just barely numerically insufficient. And in both years—at least so far—courts' decisions have not considered the First Amendment rights of Green Party ballot access supporters to effectively associate to achieve political change. As this summer draws to a close and the time for mailing ballots approaches, Montana's state courts cannot and should not remain closed to minor party ballot access supporters who seek protection under the First Amendment.

Applying the First Amendment here, this Court should recognize that the promise of using the petition process to qualify minor parties for the primary will be wholly illusory and theoretical if the District Court's new withdrawal holdings

become the law of this state. They should not. Montana's longstanding rules for withdrawal, properly applied, mark a fair constitutional border between the rights of voters who need to rely on a stable petition process, and the rights of voters who decide they want to withdraw from a petition they had voluntarily signed.

Under those longstanding rules, signers can withdraw for any reason until the date of final action, which is the date the Secretary acts on the petition by finding it sufficient and certifying the party's federal and state nominees to compete in the primary election. It is *not* the date the primary results are certified—that is weeks after the primary, and would allow outsiders to meddle in the election by soliciting withdrawals after the primary results were publicly announced. Montana may perhaps allow a narrow extension of the window for true fraud—actual, proven misrepresentations by a circulator about the contents of the petition being signed. Voters' mistaken assumptions about the funding or political consequences of the petition, however, cross the line; allowing this as a factor not only invites last-minute withdrawal campaigns based on something short of fraud, it will involve courts in subjective debates about political intention and motivation.

Finally, Montana has always been clear that in the absence of statutory guidance, withdrawals must observe the same formalities as signatures. In no world is an emailed DocuSign equivalent to a witnessed, in-person signature in which the circulator swears that the person actually appeared and knew what they were signing.

It would be a bitter irony if, in *Larson*, the Greens' precise compliance with these rules was enforced against them to deny ballot access, but here, the Greens' opponents were able to engage in even more severe departures as part of a successful campaign to achieve precisely the same goal.

An effective First Amendment-compliant right of ballot access by voters' association through qualification petitions requires that these longstanding rules be observed. The petition process is useless if proponents must devote substantial resources to gather thousands of in-person signatures all across the state, only to surrender control of their petition on turn-in day and watch for months as ballot access opponents pressure, corner, and extract withdrawals from their supporters, one by one, by simple email exchanges or phone calls. Worse, in those months, the ballot-access-deniers will retain their unfettered right to associate with signers to achieve *their* political goal—striking all of the federal and state Green Party candidates—while Green Party proponents will be prohibited from gathering replacement signatures. If this is all the protection allowed minor party supporters by the Montana Constitution, then the party qualification process—and access to the federal and state ballots—is a sham.

As shown below, this Court can enforce the First Amendment and state law to avoid such a result. Those who wanted to withdraw had ample opportunity to do so for weeks after the GOP's public FEC filings confirmed the MDP's anti-

qualification media campaign. Those who waited even longer to change their minds now have a simple remedy: vote against the Greens in November. Their remedy is not to use the Courts to strike out at their fellow Montanans (and the Green Party itself), denying their rights to vote and associate in November. The District Court should be reversed and the Green Party's access to the federal and state ballots should be restored.

1. The District Court's Decision Ignores Montana Voters' First Amendment Rights to Effectively Associate to Qualify Minor Parties for Ballot Access in Federal and State Elections.

a. The First Amendment protects the right of the petition signers to effectively associate for political change, and the right of voters to qualify minor political parties to participate in federal and state elections.

Associating to promote political goals, including signing a petition, is protected under the First Amendment. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Norman v. Reed*, 502 U.S. 279, 288 (1992); *Anderson v. Celebrezze*, 260 U.S. 780, 793 (1980). More specifically, the First Amendment protects the right to make that association effective: "to associate in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 793.

This particular facet of the First Amendment—a guarantee that a state petition process will not impose undue burdens on gathering sufficient signatures—protects petition proponents like the Amici-Signers. *See Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (striking down restrictions that made it more difficult to amass petition

signatures, and holding that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (finding residency and filing deadline provisions of Arizona law unconstitutional because they unduly burdened process by which independent candidate gathered signatures to gain ballot access); *accord Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999) (invalidating Colorado requirements, including that petition circulators disclose funders to potential signers, and holding that First Amendment protection for the petition process is "at its zenith"). Thus, petition proponents like the Amici-Signers are protected from state law that renders petition procedures ineffective for achieving political change.[2]

This core First Amendment right to effectively associate for political change is at its apex given the particular goal of this association: the qualification of minor parties for the federal and state primary ballots. *Am. Party of Texas v. White*, 415 U.S. 767, 783 (1974) (citing *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)

[2] The First Amendment's coverage of this right is apparently a point of agreement among all parties; below, the Plaintiffs argued it protected their own rights to associate in a signature-withdrawal effort. (IA119, pp. 13-14). If the First Amendment protects the Plaintiffs' right to effectively join together to submit withdrawal signatures, it surely protects the Amici-Signers' right to effectively join together to submit signatures qualifying the Green Party in the first place.

("The Constitution requires that access to the electorate be real, not 'merely theoretical.'")).

As shown below, these First Amendment rights offer protection against the kind of procedures sanctioned by the District Court's rewrite of Montana petition law. That rewrite renders minor party ballot access "merely theoretical," not something that can realistically be achieved. While voters must strictly follow petition requirements, their opponents can now easily nullify those efforts using means as simple as a phone campaign targeted to the nearest-margin districts.[3] It is even easier where, as here, the campaign can last three whole months after the petition has been deemed sufficient.

That task is rendered even easier using DocuSign. Direct human contact is no longer necessary, and it is easy to pressure a stranger over email, text, or voicemail. Here, MDP's campaign from late February to late June was waged by serial texts and messages to thousands of targeted signers, claiming the petition was the result of a "fraud" and imploring them to "clear their names," as if the signers themselves stood accused of participating in the fraud. The District Court's rewrite of Montana's

[3] The District Court makes clear that moving forward an individual wishing to withdraw his or her signature from a petition merely needs to "express their intent to withdraw by identifying the petition at issue." (IA355, COL ¶ 52). In the MDP's Cross-Motion for Summary Judgment filed below, Plaintiffs admitted, as they must, that this standard for withdrawals is so lax that a mere email or phone call to a local election administrator is sufficient to remove an elector's name from a petition. (IA119, p. 7, n. 3). There is no requirement and no process for ensuring that the request is knowing and authentic.

nominating petition standards renders the process an easily-gamed sham. It therefore violates the First Amendment rights of voters like Ms. Campbell and Ms. Loven who had a right to expect an effective petition process.

b. Post-turn-in withdrawals make it impossible to mount an effective campaign to qualify a party for the ballot.

Across the country and across the decades, court after court has recognized that allowing withdrawals after the proponents' filing deadline – at which point no further signatures in support may be submitted – is "unworkable," making it so impossible to mount a petition campaign that it jeopardizes the petition right itself. *See Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. banc 1982) ("To permit withdrawals after the petition is completed and filed, and the work of securing signatures abandoned, seems to us to make the system wholly unworkable. We do not believe that this mere implied power of the signer, which is not expressly provided for in our Constitution or statutes, can be used so as to jeopardize the exercise of the constitutional right itself."). And California held long ago:

> …if the alleged right of withdrawal, based upon change of mind, is to be exercised to the destruction of the initiative procedure, then we may well question its justification. In order to accomplish anything, the proponents of a measure must be able to rely upon signatures obtained, and, if continually forced to seek new ones to take the place of withdrawals, may never be able to prepare a proper petition within the limited period which usually exists. To permit withdrawals after the petition is completed and filed, and the work of securing signatures abandoned, seems to us to make the system wholly unworkable.

Uhl v. Collins, 217 Cal. 1, 4, 17 P.2d 99, 100 (1932).

The problem is not merely that proponents will never know how many of their gathered, pre-validated signatures they can count on. The greater problem is that in a months-long post-submittal period, one party will have a free hand to cajole and threaten individual signers by name, privately subjecting each of them to a degree of pressure and attention that is completely lacking from a normal circulator-signer interaction in the everyday course of business. *See, e.g., State ex rel. Harry v. Ice*, 207 Ind. 65, 191 N.E. 155, 156 (1934) ("If nominating petitioners are permitted to withdraw their names after opportunity for supplying additional names, or filing new petitions, has passed, a very patent door to chicanery and fraud upon the voters and the community is provided."); *Commonwealth ex rel. Meredith v. Fife*, 288 Ky. 292, 156 S.W.2d 126, 127 (1941) (post-turn-in withdrawals were prohibited, since otherwise the right to a public vote could be defeated by deception and fraud in that after the advocates of an election had filed what they thought was a sufficient petition and it was too late to file a new petition, the election could be prevented by having signers of the original petition withdraw.). Unlike the petition-gathering process, in which counter-petition efforts frequently interact in the open with circulators and petition-signers, the issues are debated simultaneously, and petition supporters can gauge the effect of counter-efforts and if necessary persuade new groups of voters, the withdrawal process happens in private and in secret, with no further participation by the proponents.

A petition – which by definition requires an ascertainable, verifiable list of names – simply cannot work if an entire withdrawal campaign can be mounted after the proponents are required to stop gathering signatures.

c. Montana's petition process worked until now because it long ago aligned itself with every other state by holding that petition withdrawals must be submitted before petition sufficiency is determined and must observe the same formalities as petition signatures.

When citizen petitions were still a new innovation, Montana joined the many states that prohibit withdrawals after signature turn-in,[4] or at least after the official charged with accepting the petition has taken final action to determine its sufficiency. *Ford v. Mitchell,* 103 Mont. 99, 61 P.2d 815, 821-822 (1936) (collecting earlier Montana cases, and finding that "the right to withdraw exists until the secretary of state has finally determined, in the manner provided by statute, that the petition is sufficient."). In *State ex rel. O'Connell v. Mitchell*, 111 Mont. 94, 106

[4] In addition to the state court decisions cited above, *see also Healey v. Rank*, 82 S.D. 54, 58, 140 N.W.2d 850, 852 (1966) ("We think it is not unreasonable to hold, and in fact both good conscience and sound public policy dictate, that the signer of a purely political petition, such as one nominating a candidate for office or requesting the submission of a question at an election, is under an obligation to his fellow signers not to withdraw his name from such petition at a time when it is too late for the addition of names or the effective filing of a new petition."); *In re Initiative Petition No. 2, City of Chandler*, 170 Okla. 507, 41 P.2d 101, 102 ("Each petitioner acts on his own responsibility and if he should change his mind, or if he should have been induced to sign under misapprehension or through undue influence, he ought to have the right to correct his mistake, *if he does so before the rights of others have attached by final action* on the part of the officers or board to whom the petition is addressed") (emphasis added); 42 Am.Jur.2d, *Initiative and Referendum* § 31 (1969) ("[W]here a statute prescribes a certain time within which a referendum petition may be filed, generally signers of the instrument may withdraw therefrom at any time during the period allowed for filing but not after the expiration of that period.")

P.2d 180, 181 (1940), in the absence of an express deadline on signature withdrawals for an initiative petition, the Montana Supreme Court applied the "final act" rule. In doing so, it found that the rule did not render the initiative procedure "unworkable," implying that a withdrawal deadline which *does* render the process unworkable would be held in disfavor.

Montana also adopted the rule, again following authority from across the country, that withdrawals must be proven with the same formality as the petition signatures they seek to remove. *Ford,* 61 P.2d at 821 (holding that if withdrawals are to be allowed, they must be completed "in an appropriate manner," and finding that certification on withdrawal petition was sufficient because it was identical to the certification required on the underlying initiative petition). *Ford* cited *State ex rel. Westhues v. Sullivan*, 224 S.W. 327, 339 (Mo. banc 1920), in which the Missouri Supreme Court refused to recognize withdrawals via postcards that had been supplied by the person challenging the petition. It reasoned:

> To obviate fraud the statute… requires that each sheet of the petition shall be verified by the affidavit of the circulator… in which affidavit such circulator shall give the names of the signers thereon, and make oath that they signed it in his presence and other matters named in the statute, supra. The very purpose of the statute in requiring this formality was to obviate fraud. To get off of such a petition the action of the signer should be at least as formal. His request should at least be verified by his affidavit before some officer. This to the end that the secretary of state might know that the signature to the request was genuine. A mere postal card or letter purporting to be signed by a signer of the petition is not sufficient. Such course would open wide the gates for fraud. These alleged withdrawals cannot be considered.

Westhues, 224 S.W. at 339. Montana adopted the *Westhues* rule 80 years ago and until June 1, 2020, it has never been called into question.

d. The combined impact of the District Court's opinion will make the petition process a completely ineffective means of associating for political change.

The District Court has jettisoned two long-established protections for petitioning voters by (1) extending the allowable withdrawal period for months after the petition has been turned in and deemed sufficient; and (2) allowing DocuSign—the modern-day equivalent of postcards or phone calls—to suffice as proof of a withdrawal. This decision has rendered Montana's minor party ballot access by petition a "theory" rather than a usable system for winning voter support.

First, if withdrawals need not be received by the petition turn-in date, or at least within the few additional days it requires for the Secretary to find that the petition has sufficient signatures, a petition drive will consist of two separate campaigns. In the first campaign, circulators will have to follow strict rules regarding the form of the petition, all of which are meant to deter fraud. This includes a verification that the named individuals did indeed present themselves to the circulator and sign, and that they knew what they were signing. The circulator's affidavit is then notarized. Proponents keep careful track of the number of signatures gathered in different areas and validate those signatures by matching them to Montana's voter database, giving them some sense of where they stand in meeting

statutory requirements. Opponents are free to counteract circulators by following them and attempting to discourage voters from signing—a frequent tactic—and are free as the MDP did for weeks before turn-in to mount withdrawal campaigns. Proponents, in turn, can observe and respond to the opponents' message as they talk to voters in the field. Just as important, they can monitor their own petition results, and will have some sense of who has signed to become part of their association. Most petitioners now have access to state voter files, so that they can also determine which signatures are valid, and in what districts. If the opponents' counter-message begins to resonate and withdrawals begin to be filed, proponents can try to expand their efforts to gather even more signatures. It is this basic transparency and predictability—knowing who has signed on to join the team as the campaign draws to a close—that gives political supporters the confidence that a petition can be effective, and to commit their time and money to the petition process. Lacking this, what minor party ballot access supporter would rationally make the effort?

Under the District Court's judgment, every ballot access effort will now have a second phase. Unlike the first phase, only the opponents will hold the key to membership in the petition-association. The petition will essentially become theirs. Having gained the advantage of seeing the proponent's hand and reserving all of their resources for phase two, opponents have the luxury of running a targeted pressure campaign. Rather than approaching the general population, they will be

able to pick off specific individuals in specific areas where the proponents' margin was thinnest. Using modern data mining tools, they can obtain phone numbers and email addresses and continually pressure their targets in private and in secret, with no further participation by the proponents. Many former supporters, repeatedly pressed and presented with only the opponents' facts, may take the easy route and withdraw.

Once the campaign-after-the-campaign becomes the rule, petition proponents will never be able to predict how many people will change their minds or be pressured to change their position during this extended "withdraw-only" phase. In a real sense, a proponent can never gather enough signatures because opponents will have months to sit back and bombard signers with texts and emails, picking off voters one by one. This will certainly chill future ballot access efforts.

In conclusion, states do not need to use nominating petitions to allow minor party ballot access. But once they do so, states must afford proponents a process that gives real effect to their political association and speech. "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process ... the First Amendment rights that attach to their roles." *Republican Party of Minn. v. White,* 536 U.S. 765, 788 (2002) (internal quotation marks and ellipsis omitted). Because it thwarts an otherwise orderly and predictable process, the District Court's judgment infringes on petition proponents'

rights under the First Amendment to the United States Constitution and Article II, Sections 6 and 7 of the Montana Constitution by undermining their rights to petition, to vote, and to access the State's primary processes.

2. Any Constitutional Right to Withdraw is Defeated by the Petition Signers' Superior Constitutional Claims.

The District Court's authorization of untimely withdrawals comes at the expense of the petition proponents that dedicated their efforts and attached their names to the petition. As explained above, these groups enjoy a right to effective political association, a right they exercised by engaging in the petition process. *See Anderson v. Celebrezze*, 460 U.S. 780, 793 (1980). The District Court's opinion violates petition proponents' rights under the First Amendment by permitting petition opponents, like the Plaintiffs, to withdraw after petition certification and in a manner that has never been permitted under Montana law. Additionally, the District Court's opinion invalidating the Green Party's primary violates the rights of the candidates who qualified in the primary.

a. These facts do not implicate the right not to associate.

The District Court erred in ruling on Plaintiffs' claims regarding their right not to associate, because no justiciable controversy existed. Plaintiffs alleged no injury-in-fact arising from their theory that they have a "right not to associate." And Plaintiffs did not assert an injury via association with the *Green Party*, the party with which they voluntarily associated by signing the petition at issue. Instead, they

argued that they were being "forced" to associate with the Republican Party. That is simply incorrect. Their alleged connection with the Republican Party hinged solely on the fact that the Republican Party paid for petition circulators. Plaintiffs were free to dissociate with the petition when the petition was still an active association—*i.e.*, when it was being presented to and acted upon by the recipient state officials. And by Plaintiffs' own admissions, they had been free for months to exercise their rights to attack and disavow any association with the Republicans.

b. The "right not to associate" does not include the right to erase the consequences of an association after it is completed.

Even when the right not to associate is implicated, it is not absolute. Not a single case cited by the District Court holds that a person can retroactively disavow association with a group or effort after the purpose for which the group was formed or effort undertaken is accomplished, as the District Court allowed here. The consequences of an unlimited right to retroactively associate are particularly troubling in the election context, which relies on deadlines and specific time periods for making decisions and measuring political support. The right to not associate is prospectively applied to disentangle a citizen from an unwanted association, not retroactively to torpedo an election result that a voter regrets.

c. The District Court's remedy is disproportionate to Plaintiffs' injuries, and fails to account for both the petition proponents' right to effective association and the Green candidates' and voters' rights.

Even though the District Court held that Plaintiffs' "right not to associate" was infringed, the District Court's remedy goes far beyond Plaintiffs' actual injury—it extinguishes the rights of 13,000 valid petition signers, voids thousands of already-cast votes, and eliminates ballot access for Green candidates and voters. It is unjustifiable to sacrifice the constitutional rights of absent and innocent third parties merely to achieve Plaintiffs' goal of punishing the Republican Party for daring to legally support the Greens. Put another way, vindicating these Plaintiffs' "right not to associate" does not require that others' association be completely destroyed. The District Court's remedy is not properly constrained to Plaintiffs' actual injury.

d. The Plaintiffs' rights must yield to the proponent petition signers.

The rights of Plaintiffs and others who wish to untimely withdraw from the Green Party petition must yield to the Constitutional rights of the petition's proponents. Even if Plaintiffs were deemed to have "associated" with the Republican Party, any interest to be free from such association is adequately protected by allowing them to withdraw their support of the petition up to the point that the

signatures are filed.[5] The burden of withdrawing a signature before the filing deadline (just like the burden of obtaining a signature before the filing deadline) is not insignificant.

On the other hand, as noted above, the petition proponents have a strong First Amendment interest in an effective petition process, which requires a level of certainty and predictability in accessing the ballot so as not to render the petition process illusory.[6] That is particularly true here, given the District Court has changed longstanding rules retroactively, long after the proponents lost the chance to gather more signatures. Before reinterpreting Montana law and changing the result of the primary, the District Court was obligated to consider the superior First Amendment rights of the petition signers and the Green Party voters and candidates. Applying those rights, the District Court erred in holding Plaintiffs' rights not to associate permit their untimely withdrawals to be counted as valid.

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[5] *See State ex rel. Lang v. Furnish*, 48 Mont 28, 134 P. 297, 300 (1913) (finding signers' right to withdraw temporally restricted to period before final action taken); *see also Ford v. Mitchell*, 103 Mont. 99, 61 P.2d 815, 822 (1936) ("[T]he signers of an initiative petition may, in an appropriate manner and *at the proper time* if they so desire, withdraw from such petition."). Plaintiffs concede that their right to withdraw is limited in that it must be exercised before "final action" is taken on the petition. (IA140, pp. 12-13) ("Pursuant to this right, individuals can withdraw their signature so long as: … individuals withdraw before final action is taken on a petition…") (internal citations and quotations omitted).

[6] *See Am. Party of Tex. v. White,* 415 U.S. 767, 787, n. 18 (1974) (Recognizing state's interest in regulating petition process necessarily requires the imposition of some cutoff period to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges.) (internal quotations and citations omitted); *see also Powers v. Carpenter,* 203 Ariz. 116, 119, 51 P.3d 338, 341 (2002) ("…the right to withdraw is neither indefinite nor absolute; rather, at some point private rights must yield to society's interest in having a well ordered and functioning government..").

3. The District Court Judgment is Wrong on a Number of State Law Grounds.

a. There was no legal basis to allow months of late withdrawals.

The District Court properly held that signature withdrawals must generally be submitted before "final action is taken on a petition." (IA355, COL ¶ 8). But as a matter of law, the District Court erred in applying this principle to the statutes that govern minor party qualification petitions. The District Court held that final action on a minor party petition does not occur "until the Board of State Canvassers tabulates the votes" from the primary election. (IA355, COL ¶ 20). This is simply wrong as a matter of law: the final action is the Secretary's determination as to whether the petition is sufficient to place the Green Party on the primary ballots.

Montana first declared the right to withdraw from a signature petition in 1913. *State ex rel. Lang v. Furnish*, 48 Mont 28, 134 P. 297, 300 (1913). This Court stated: "signers of a petition have an absolute right to withdraw therefrom at any time before final action thereon." *Id.* In other words, withdrawals are acceptable up until "final action thereon"; meaning final action on the petition. Once the petition process is fully complete, withdrawals are no longer acceptable.

Montana precedent is consistent on this point. In *State v. Taylor*, the petition signers had the right to withdraw until the county clerk certified the petition to the board of county commissioners. 90 Mont. 439, 4 P.2d 479, 481 (1931). In *State v. Anderson*, the court again stated the petition signers could withdraw their signatures

up until the clerk certified the petition to the board of county commissioners. 92 Mont. 298, 13 P.2d 231, 234 (1932). And in *Ford v. Mitchell*, the court stated that "the right to withdraw exists until the secretary of state has finally determined, in the manner provided by statute, that the petition is sufficient." 103 Mont. 99, 61 P.2d 815, 823 (1936). Once the petition process is complete and the petition is passed to the next set of decision-makers, the Montana Supreme Court has consistently held that withdrawals are no longer acceptable.

Here, the final action on the minor-party petition occurs when it is certified by the Secretary. At that point in time, the minor party is permitted to participate in the state's primary election process. The District Court was tripped up by the fact that the applicable statutory authority does not explicitly state that the Secretary must certify the minor-party petition for placement on the primary election ballot. (IA355, COL ¶ 11). However, the surrounding statutory authority and this Court's precedent make clear that the Secretary's certification is necessary; without it, the Secretary could not have fulfilled his mandatory statutory duty of certifying the actual contents of the ballot to each election authority by March 19, 2020. *See* § 13-10-208.

Indeed, the Secretary's duty to make the final act of certifying the minor party's qualification is made clear in this Court's recent explanation of the minor party petition process. *See Larson v. State*, 394 Mont. 167, 176-77, 434 P.3d 241 (2019). This Court held that signature petitions must be submitted to the county

election authorities. *Id.* The local election authorities then "verify the submitted signatures" and forward "verified petitions" to the Secretary. *Id.* "Upon receipt of the forwarded petition sheets, affidavits, and county certifications, the secretary of state must 'consider and tabulate' the verified petition signatures." *Id.* If sufficient verified signatures are received, this Court held that the Secretary shall "certify the subject political party as eligible to nominate candidates for public office on the upcoming primary election ballot." *Id.* The District Court's holding that certification is not a part of the minor party petition process simply ignores this biding precedent.

The District Court instead held that even the primary election itself is just one of many steps that lead up to the general election, so that the petition is not "final" until the primary occurs and the canvassers announce the winners several weeks later, in late June. But the aim of using a qualification petition is very particular: *to use the mechanism of the state primary to select candidates*—not merely to have some candidate appear in the general election. Section 13-10-601, M.C.A, entitled "Parties eligible for primary election," provides a process by which a minor party may participate in the *primary* elections. It is not to use one of the many other ways of choosing a general election candidate. (The Party could have bypassed the primaries entirely and nominated candidates for general election through a process set out under Title 13, Chapter 10, Part 5, but chose not to do so.) Thus, once the Green Party was permitted to participate in the state's primaries (*i.e.*, the Secretary

certified that the Party had satisfied the statutory requirements and could participate in the primaries), the process was complete. The court erred in holding that withdrawals submitted after the petition was certified should be counted.

b. "Fraud" provides no basis for accepting the late withdrawals in this case.

The District Court properly held that fraud may permit the acceptance of untimely withdrawals. (IA355, COL ¶ 34). But the Court failed to properly apply this principle to the facts of this case.

First, the District Court erred in holding that fraud occurred here. The court held that "petition signers withdrew after learning that representations made to induce them to sign the petition were false" (IA355, COL ¶ 32) and that certain "misrepresentations and failures to disclose matter[ed] to signers." (IA355, COL ¶ 42). However, other than three plaintiffs who testified, not a scintilla of evidence was presented regarding the thoughts or beliefs of any petition signer. And none of those three plaintiffs—either in their affidavits or their live testimony—claimed that they were under any misapprehension about the contents of the petition, or that any circulator had made false statements of any kind in order to induce them to sign the petition. This is not a matter for dispute: the District Court's Findings of Fact, adopted from the Plaintiffs' own proposed Findings, contains none of this evidence. There was no evidence of fraud.

Moreover, the District Court arrived at its legal conclusion that fraud occurred by mistakenly adopting a broad definition of fraud that includes negligent misrepresentations, constructive fraud, and even unilateral mistake. (IA355, COL ¶¶ 37-39). No precedent has established that these distinct causes of action are sufficient grounds for permitting untimely withdrawals. In fact, this Court has held the opposite: a petition signer seeking an untimely withdrawal based on fraud must satisfy the ***normal*** fraud standard. *State v. Anderson*, 92 Mont. 298, 13 P.2d 231, 234 (1932) (citing *Emerson-Brantingham Implement Co. v. Anderson*, 58 Mont. 617, 194 P. 160 (1920)). To make a sufficient showing of fraud warranting the acceptance of untimely withdrawals, the movant must demonstrate with "reasonable certainty that the party against whom the fraud is alleged made a misrepresentation of a material fact; that he made it with the intent to induce the other party to act upon it; that the latter believed and relied upon it; and that he acted upon it to his damage." *Emerson,* 194 P. at 164. In other words, actual fraud must exist. This Court has never indicated that quasi-fraud principles are sufficient for permitting untimely signature withdrawals, and the District Court has failed to justify such a broad expansion of authority.

Finally, the District Court erred when it concluded that fraud existed in this case because "the MTGOP and their agents" failed to "disclos[e] their role in organizing and sponsoring the petition." (IA355, COL ¶ 40). The District Court

provided no authority supporting the proposition that such disclosures are required and failed to define what kind of disclosure was required. Whatever the District Court meant, imposing such requirements may well violate the First Amendment. *See Buckley v. Am. Const. Law Foundation, Inc*., 525 U.S. 182 (1999) (requirement that petition circulators wear badges with their names and payment status was unconstitutional).

In short, fraud did not occur in this case and the Secretary was not obligated to accept the individual Plaintiffs' late withdrawals.

c. DocuSign falls far short of the formality required for petition signatures and withdrawals.

The District Court erred in declaring that the Secretary was obligated to accept DocuSigned withdrawals submitted by petition signers. (IA355, COL ¶¶ 52-55). In late March or early April, the MDP began using DocuSign, an electronic document software, to collect withdrawals and withdrawal signatures. The Secretary refused to accept and count DocuSign withdrawals, and the District Court held that the Secretary was obligated to accept such withdrawals. The District Court, however, lacked authority to require the Secretary to accept such withdrawals.

First, this Court has previously held that a valid signature withdrawal must satisfy the same formalities required for the initial signature. *Ford,* 103 Mont. at 61 (holding that if withdrawals are to be allowed, they must be completed "in an appropriate manner," and finding that certification on withdrawal petition was

sufficient because it was identical to the certification required on the underlying initiative petition).

A signer must, of course, sign the petition. This requires a wet-ink signature that is "substantially the same" as the individual's signature on their voter registration form. M.C.A. § 13-27-103. But the signature must also be relayed to the proper election authorities by way of a petition certified by an affidavit from the petition circulator. The affidavit must state:

> I [name of person who is the signature gatherer], swear that I gathered the signatures on the petition to which this affidavit is attached on the stated dates, that I believe the signatures on the petition are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana's electors who are registered at the address or have the telephone number following the person's signature, and that the signers knew the contents of the petition before signing the petition.

M.C.A. § 13-27-303. Here, the DocuSigned withdrawals satisfied neither formality. First, there was no wet-ink signature that could be matched to the signer's voter registration form. In fact, Plaintiff Neumeyer testified that her DocuSign signature likely did not match her normal signature. Second, the MDP (the party that collected withdrawals and sent them to the proper election authorities) did not transfer the withdrawals to the Secretary with a sufficient affidavit (or any affidavit). Therefore, according to this Court's precedent, the Secretary was not required to accept the DocuSign withdrawals.

Equally important, the Montana legislature has contemplated the use of electronic signatures and determined that governmental agencies have the discretion to determine whether they will accept electronic signatures. M.C.A. § 30-18-117 ("each governmental agency shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures."). And here, the Secretary never adopted a policy stating he would accept electronic signatures, a decision well-within his discretion granted by the state legislature.

The District Court held that this statutory authority was not applicable because a signature withdrawal is not a "transaction" under the statute. (IA355, COL ¶ 54). But the District Court failed to acknowledge the definition of transaction: "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." M.C.A. § 30-18-102(18). The District Court failed to explain why the legislatively created minor party petition process overseen by the Secretary, a government officer, is not a "governmental affair" under this statutory section. And the Court failed to identify why a petition signer communicating with the Secretary or an appropriate county election official regarding the withdrawal of his or her petition signature is not an action "between two or more persons." Because the signature withdrawal process is a "transaction"

subject to the Montana Uniform Electronic Transactions Act, the Secretary has the right to determine whether he will accept electronic signatures. Because the Secretary does not accept electronic signatures, the DocuSign withdrawals were improper and the District Court erred by declaring such withdrawals valid.

Finally, to the extent the District Court held that DocuSigned or electronic petition withdrawals are constitutionally required due to Covid-19, it erred. On July 30, 2020, the United States Supreme Court decided there was a "fair prospect" that First Amendment speech and association rights *do not* compel electronic petition signature-gathering during this pandemic. For that reason, the Court took the extraordinary step of staying a preliminary injunction issued by an Idaho District Court that would have allowed the analogue of DocuSign for petition signatures. *See Little, et al. v. Reclaim Idaho, et al*., No. 20A18, 2020 WL 4360897 (July 30, 2020), *per curiam*. The Court explained that the state's insistence on enforcing its normal election protocols was "almost certainly justified by the important regulatory interests in combating fraud" and ensuring grassroots support, so that "the State's established verification procedure is no empty formality." *Id*. at *2. In fact, the Chief Justice explained, the State would suffer "irreparable harm" if it were unable to follow its ordinary real-signature verification procedure, "vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with

the First Amendment." *Id*. For the same reasons, the Plaintiffs have no special right to avoid Montana's rule of equal formality as between signatures and withdrawals.

d. The Secretary was not required to issue a public service announcement regarding withdrawals or his certification of the minor party petition.

The Secretary has no legal obligation to announce the performance of his constitutionally mandated duties or provide the public a chance to comment on his legal obligations. Although this issue was not pled by any party, the District Court held that the Secretary's decision to cut off withdrawals and certify the Green Party petition was not appropriate because the Secretary failed to provide notice and an opportunity to be heard prior to these decisions. (IA355, COL ¶¶ 21-31). But neither the constitution nor statutory authority requires such notice or an opportunity to be heard.

Sections 8 and 9 of the Montana Constitution are not applicable. The Montana Supreme Court considered and explained the effect of both provisions in its 2002 decision in *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002):

> What is intended by Section 8 is that any rules and regulations that shall be made and formulated and announced by any governmental agency, which of course are going to affect the citizens of this state and the common welfare, shall not be made until some notice is given so that the citizen will have a reasonable opportunity to participate with respect to his opinion, either for or against that particular administrative action.

Id. The rulemaking process is the central focus of Section 8. It is geared toward those "miniature legislatures who put together rules and regulations that affect us all." *SJL of Mont. Assoc's. Ltd. Part. v. City of Billings*, 263 Mont. 142, 148, 867 P.2d 1084 (1993).

Here, the Secretary was not exercising his rulemaking authority when he carried out his constitutional mandate to certify the minor party petition or when he determined that controlling precedent from this Court required him to stop accepting signature withdrawals after his final act (*i.e.*, when the petition was certified).[7] An internal memorandum was introduced at trial evidencing the fact that the Secretary's determination as to the cut-off date for withdrawals was not based on some internally-set deadline. Rather, the Secretary relied on legal counsel who determined that this Court's longstanding rule – from *Ford*, *O'Connell*, and earlier opinions – that the common law right to withdraw ends when an official performs the final action on a petition (*i.e.*, when the Secretary certified that the petition satisfied all statutory requirements). Because there was no rulemaking process, the public was not deprived of any right to participate.

[7] Similarly, the Montana Administrative Procedure Act is unavailing. The MAPA is simply a codification of constitutional sections 8 and 9. It was adopted to ensure notice and an opportunity to participate is provided in regards to agency rulemaking. M.C.A. § 2-4-101(2). Therefore, for the same reasons sections 8 and 9 are inapplicable, so is the MAPA.

Further, Section 9 encompasses "the right to examine documents and the right to observe the deliberations of public bodies or agencies." *Id.* at 267. Plaintiffs were not refused documents or the right to observe any deliberations of public bodies or agencies. Therefore, Section 9 is simply inapplicable.

Moreover, under M.C.A. § 2-3-114, any alleged violations of Sections 8 or 9 must be brought "within 30 days of the date of the [relevant] decision." *Id.* at 275; *Allen v. Lakeside Neighborhood Planning Comm.*, 371 Mont. 310, 319, 308 P.3d 956 (2013); *Willems v. State*, 374 Mont. 343, 348, 325 P.3d 1204 (2014). The Secretary's March 3, 2020, memo confirmed the Secretary would not accept withdrawals after certification. The Secretary emailed all county election officials on that same day, indicating that they should only process withdrawal forms up until the petition is certified. Further, Plaintiff Neumeyer testified that in March 2020 she was turned away from the Lewis & Clark County elections office because it was too late to withdraw; she reported this to the MDP, and the MDP sent her a DocuSign form to submit instead. Other evidence presented by Plaintiffs shows that they were aware of this "policy" no later than April 13, 2020. An email from the Yellowstone County Election Administrator sent to Trent Bolger indicated on April 13, 2020, that the deadline for filing withdrawals had passed. Therefore, when Plaintiffs filed their petition on June 1, 2020, the deadline for submitting a constitutional claim under Sections 8 and 9, if any such claim ever existed, had long passed.

More fundamentally, though, the Court must consider that, as shown below, the withdrawal deadline and formality-of-withdrawal rules not only define the limits of dissenting signers' right to withdraw, they also protect the First Amendment effective-association rights of petition proponents, signers, and the affected candidates and voters. If a procedural default by the Secretary in failing to provide immediate "notice" regarding deadlines or withdrawal formalities in this particular election year obliterates the rules that fix the competing rights of petition loyalists and petition dissenters, then one group gains at the expense of the other. An alleged failure of "notice" cannot become the means for eviscerating loyalists' First Amendment rights to effective association.

Nor should any after-the-fact rewrite of the rules be necessary. Here, all parties had the same information at the same time: the Secretary's public election calendar. The proponents themselves, viewing that calendar and knowing the law, had no reason to predict that the MDP might be allowed to continue its withdrawal campaign for months after the certification date.

A signer wanting to withdraw would have the same notice: the Secretary's public calendar. It clearly showed the deadlines for turning in petitions (March 2 to the clerks and March 9 to the Secretary), and those would have been very close to the expected decision date that, under controlling law, set the withdrawal deadline. This aside, other fast-approaching dates should have counseled that a three-month

withdrawal campaign was unreasonable: March 19, for certifying candidates for the primary ballots; the need to design and print those ballots quickly; April 17, for mailing them overseas; and even May 8, for mailing out all of the mail-in primary ballots. No PSA was required to inform voters (or a well-counseled major party campaign geared to engage those voters and with access to controlling caselaw) that a withdrawal campaign could simply blow through each of these deadlines.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's grant of declaratory and injunctive relief and allow the Montana Green Party to remain on the general election ballot.

Dated this 12th day of August, 2020.

/s/ *Chris J. Gallus*
Attorney for *Amicus Curiae*
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e), I certify that this Opening Brief is printed with proportionately-spaced, size 14 Times New Roman font, is double-spaced, and does not exceed 10,000 words, excluding the cover page, certificate of service, and certificate of compliance, and table of contents as calculated by Microsoft Word.

Dated this 12th day of August, 2020.

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY And TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through its SECRETARY OF STATE COREY STAPLETON, Defendant, LORRIE CORETTE CAMPBELL and JILL LOVEN, Intervenors-Defendants.	)	Case No. CDV-2020-856 Motion to Intervene by Petition Signers

COME NOW Lorrie Corette Campbell and Jill Loven (collectively the "proposed intervenors" or the "petition signers"), by and through counsel, and hereby move the Court to allow them to intervene as defendants in this action pursuant to Montana Rule of Civil Procedure 24.

1. Plaintiffs filed this action on June 1, 2020.

2. Rule 24(a) of the Montana Rules of Civil Procedure allows anyone to timely intervene as a right who "is given an unconditional right to intervene by state," or who "claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest."

3. As laid out more fully in the accompanying brief, the petition signers meet these intervention criteria. Petition signers—as the name implies—signed the petition to place the Montana Green Party on the primary ballot and Plaintiffs seek to invalidate the signature petition. As such, the petition signers have an "interest which would be affected by the declaration" sought by Plaintiffs and, therefore, the petition signers are a necessary party to participate in these proceedings. Section 27-8-301; Mont. R. Civ. P. 24(a)(1).

4. Moreover, the petition signers have timely filed this motion to intervene, they have an interest in the validity of the signature petition, their ability to protect their interests would be impaired if left out of this matter, and no current party adequately represents their interests. Therefore, intervention is necessary. Mont. R. Civ. P. 24(a)(2).

5. This motion is timely as this litigation is at the opening pleading stage, motions to dismiss remain, no substantive motions have been filed, no discovery has occurred, no substantive hearings have transpired, and no scheduling order has been entered.

6. The petition signers attach hereto their proposed Answer.

7. The petition signors agree with the proposed intervenor Republic Party's proposed scheduling order.

8. The petition signers have conferred with counsel of record. Plaintiffs did not respond to the communications, and Defendant does not oppose the Motion.

WHEREFORE, the petition signers respectfully move this Court to grant their Motion to Intervene.

Dated: July 2, 2020.

Respectfully submitted,

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY And TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through its SECRETARY OF STATE COREY STAPLETON, Defendant, LORRIE CORETTE CAMPBELL and JILL LOVEN, Intervenors-Defendants.	Case No. CDV-2020-856 Brief Supporting Petition Signers' Motion to Intervene

Petition Signers Lorrie Corette Campbell and Jill Loven (collectively the "proposed intervenors" or the "petition signers"), by and through counsel, hereby submit the following statements in support of their Motion to Intervene.

FACTUAL AND PROCEDURAL BACKGROUND

1. On March 2, 2020, circulators submitted a Political Party Qualification Petition to the Secretary of State pursuant Mont. Code Ann. § 13-10-601 (2017). The petition's stated intent was to qualify the Montana Green Party to hold a primary election.

2. On March 6, 2020, the Secretary certified the petition, thereby permitting the Montana Green Party to participate in the 2020 primary election.

3. The Secretary's certification declared the petition conformed with Section 13-10-601.

4. The Montana primaries were held on June 2, 2020.

5. The primary results were certified on June 26, 2020.

6. On June 1, 2020, the day before the Green Party held its primary, Plaintiffs filed the present litigation, seeking to invalidate the Secretary's certification of the petition that allowed the Green Party to hold its primary election.

7. The only named Defendant in Plaintiff's suit is the Montana Secretary of State.

8. The proposed intervenors are registered Montana voters who signed the petition to allow the Montana Green Party to hold a primary election (Campbell Declaration attached as Exhibit A; Loven Declaration attached as Exhibit B).

9. Intervenor Campbell is a longtime and continuing supporter of the Plaintiff Montana Democratic Party ("MDP"). She signed the petition because she believes the Green Party

deserves to be on the ballot. She believes the Green Party should be on the ballot even if the leadership of the MDP or other MDP supporters calculate that the Green Party's participation will cause the MDP to spend more money to convince voters to support MDP's candidate in the general election. She is disappointed and angry that the MDP opposes and has spent substantial resources to block the Green Party's access to the ballot and negate the effect of her own petition signature.

10. Intervenor Campbell does not in any way, shape or form support the Montana Republican Party. However, the Montana Republican Party's support for the Greens' ballot access does not affect or change her views on the merits of the petition.

11. Intervenor Loven is a supporter of the Montana Republican Party. She signed the petition because she believes the Green Party deserves to be on the ballot. She is disappointed and angry that the MDP opposes and has spent substantial resources to block the Green Party's access to the ballot and negate the effect of her own petition signature. She is deeply disappointed and completely disagrees with the MDP's legal insinuation that she acted improperly in signing the petition.

12. Intervenor Loven does not support the MDP. The fact that some MDP members support the Green Party and its access to the ballot, however, does not affect or change her views on the merits of the petition.

13. The proposed intervenors' signatures were counted as valid.

14. The MDP contacted many of the petition signers through phone calls and texts in an attempt to convince them to withdraw their signatures from the petition. These contacts were harassing.

15. Intervenor Loven received a text message from someone who identified himself as "Max" with the Montana Democratic Party. The message was received at 10:24 a.m. on February 29, 2020. "Max" claimed that Loven signed a "phony petition" circulated by "Republicans" and asked her to withdraw her signature. Loven denied this invitation.

16. The proposed intervenors have not attempted to withdraw their signatures.

17. The proposed intervenors are proponents of the petition and have an interest in ensuring their signatures are counted, as well as those of their fellow petition signers.

18. As proponents of the petition, the proposed intervenors also have an interest in protecting the Secretary's certification of the petition and ensuring the Montana Green Party remains on the election ballot.

19. Attached to the Motion to Intervene is the proposed Answer of the petition signers (Exhibit C).

ARGUMENT AND AUTHORITIES

I. The petition signers should be allowed to intervene as a right, pursuant to Rule 24(a).

Rule 24(a) states that, on timely motion, the court must permit anyone to intervene who: "claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." In other words, to qualify for intervention under Rule 24(a), an "application for intervention must: (1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of the interest may be impaired by the disposition of the action; and (4) show that the interest is not

adequately represented by an existing party. *JAS, Inc. v. Eisele*, 374 Mont. 312, 318, 321 P.3d 113 (MT 2014).

A. The motion to intervene is timely.

The present motion was timely filed. "Timeliness is determined from the particular circumstances surrounding the action." *Estate of Schwenke v. Becktold*, 252 Mont. 127, 131, 827 P.2d 808 (1992). In *Estate of Schwenke*, the Montana Supreme Court found a motion to intervene was untimely when it was filed (1) fifteen months after the suit was initiated, (2) at least 12 months had passed since the proposed intervenors were made aware of the suit, and (3) trial was in one week. *Id.* at 132. Allowing intervention in such a situation would create unduly delays—the prevention of which is the central focus of Montana precedent. In *Connell v. State Dept. of Soc. & Rehab. Servs.*, the Montana Supreme Court found that intervention had been properly denied in three different situations: (1) when filed 16 months after the original action was filed; (2) when 2.5 months had passed since the proposed intervenors received actual notice of the original action; and (3) when 3 years had passed since the original action was filed. 319 Mont. 69, 74, 81 P.3d 1279 (2003).

The present suit is materially different than the above situations because this suit remains in its infancy. Here, Defendant's initial responsive pleading (a motion to dismiss) remains outstanding and discovery has yet to commence. Besides the filing of initial pleadings, little has occurred in the case. Moreover, the petition signers only recently learned of this suit, because it has surprisingly received little media attention. The petition signers have, therefore, not sat on their rights. Thus, intervention is proper at this stage of the proceedings.

B. The petition signers have an adequate interest in this suit.

To satisfy the second prong of intervention as a matter of right, the proposed intervenors are required to make a "prima facie showing of a direct, substantial, legally protectable interest in the proceedings." *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Court*, 308 Mont. 189, 193, 40 P.3d 400 (2002) (internal quotations omitted). In *Sportsmen*, the Montana Supreme Court held that a group that had actively sponsored and supported a measure whose constitutionality was being litigated had an adequate interest in the litigation and intervention was proper. *Id.* Moreover, in *Devoe v. State*, the court considered a challenge by a landowner asserting the state's easement on the land had been abandoned and was no longer valid. 281 Mont. 356, 359-60, 935 P.2d 256 (1997). The court permitted the city to intervene because it had a legitimate interest in preserving its right to use the land for highway purposes. *Id.* at 363.

Here, signers have a legitimate and cognizable interest in this litigation because the litigation directly involves the validity of the petition to allow the Green Party to participate in the state's primary elections. The proposed intervenors signed the petition because they wanted the Green Party to have the opportunity to participate in the primary elections and their interest remains to this day—they have an interest in ensuring the Green Party remains on the ballot. The petition signers are, therefore, entitled to intervene and ensure their signatures are counted and ensure the certified petition is not invalidated.

C. The petition signers' interests will be impaired if they are not permitted to intervene.

The Court's denial of this motion to intervene will invariably impair the proposed intervenors' interests. Plaintiffs seek to invalidate the signature petition that the proposed intervenors signed and seek to exclude the Green Party from the election ballot. These are the exact

interests the proposed intervenors have supported and continue to support. If this Court invalidates the signature petition, the intervenors will have no other recourse to preserve their interests.

D. No existing party adequately represents the petition signers' interests.

The petition signers' interests are not adequately represented by an existing party. The Plaintiffs certainly do not represent, in any sense, the petition signers' interests in upholding the Green Party's ability to appear on the ballot. Just the opposite; it is the very reason (prohibiting the Green Party from appearing on the ballot) that Plaintiffs have brought this action. While the Defendant Secretary has a related interest, the Secretary does not adequately represent the petition signers in this case. The Secretary has an interest in maintaining orderly election processes; however, the petition signers have an express interest in ensuring their signatures are counted and ensuring the Green Party is able to participate in the election process—interests not in line with the Secretary. The ultimate outcome (whether the Green Party appears on the election ballot) is a political result that is beyond the interest of the Defendant Secretary. Hence, the Defendant Secretary does not adequately represent the petition signers' interests in this case. Therefore, the petition signers' interests are not adequately represented by an existing party.

The petition signers should be allowed to intervene pursuant to Rule 24(a). The motion is timely, and the petition signers have an interest in the subject matter of this litigation. Moreover, the petition signers have shown that the protection of their interests may be impaired by the disposition of this action, and the petition signers have shown that their interests are not adequately represented by an existing party in this action. The Court should, therefore, grant the Motion to Intervene.

II. Alternatively, the petition signers should be allowed to intervene permissively, pursuant to Rule 24(b).

Rule 24(b) controls when a court may grant intervention permissively. It states: "On timely motion, the court may permit anyone to intervene who: ... (B) has a claim or defense that shares with the main action a common question of law or fact." M.R.Civ.P. 24(b)(1)(B) (2017). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Rule 24(b)(3). As with Rule 24(a), Rule 24(b) requires that a motion to intervene permissively must be timely. *Estate of Schwenke*, 252 Mont. at 133.

Here, the proposed intervenors claim the signature petition is valid and contained sufficient signatures, directly related to Plaintiffs' first claim. Moreover, in Plaintiffs' second claim, Plaintiffs maintain their constitutional rights will be impaired if forced to associate with the signature petition—that is, with the intervenors. In reality, the proposed intervenors' First Amendment right to association will be impaired if Plaintiffs permissive theory of signature withdrawals is accepted. Plaintiffs' proposal will create a moving target that imposes significant burdens upon backers of a minority party who choose to associate for ballot access. These claims and defenses are directly related to the current litigation and the resolution of these claims involve common questions of law or fact.

Permissive intervention is proper because, as stated above, this motion to intervene was timely filed. This suit remains in its infancy, Defendant's responsive motion remains to be determined, no discovery has commenced, and the proposed intervenors only recently learned of this litigation. Moreover, no prejudice will befall the existing parties by granting this motion to intervene and permitting interested stakeholders from joining the litigation. Litigation works best

when all interested parties are involved (and is required by Section 27-8-301 in order to grant Plaintiff's request for declaratory relief). On the other hand, the proposed intervenors will be significantly prejudiced if they are denied intervention and are unable to present their unique legal arguments in this litigation. There will be no subsequent opportunity for the proposed intervenors to defend their rights or assert their claims.

CONCLUSION

For the reasons set forth above, the Court should grant the petition signers' Motion to Intervene under Rule 24(a) or, alternatively, under Rule 24(b).

Dated: July 2, 2020

Respectfully submitted,

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY And TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through its SECRETARY OF STATE COREY STAPLETON, Defendant, LORRIE CORETTE CAMPBELL and JILL LOVEN, Intervenor-Defendants.	)	Case No. CDV-2020-856 **Declaration of Lorrie Corette Campbell**

1. My name is Lorrie Corette Campbell. I am over 18 years of age. I make this declaration based upon my personal knowledge and expertise.

2. I am a registered voter in the State of Montana and a longtime supporter of the Montana Democratic Party.

3. Sometime in February of 2020, I was approached by a petition circulator and was asked to sign a petition to allow the Montana Green Party to participate in the primary election. The petition circulator did not make any representations to me or conceal anything from me.

4. I signed the petition.

5. I did not and will not submit a withdrawal of my signature on the petition.

6. I believe the Montana Green Party should be on the ballot.

7. It is irrelevant to me who funded or organized the efforts to get the Montana Green Party on the election ballots. The Republican Party's funding of the circulation effort does not affect my decision on whether it makes sense to have the Green Party on the ballot.

8. I believe allowing minor parties to participate in the election process is good for our democracy. Additionally, if the Green Party's presence on the ballot causes the Montana Democratic Party and its candidates to speak about issues to appeal to voters drawn to the Green Party, I believe that this actually benefits both the Democratic and Green parties.

9. It is irrelevant to me that the current leadership or some other supporters of the Montana Democratic Party believe the Green Party's participation in the elections will harm the Democratic Party in any way.

10. I am aware that the Montana Democratic Party contacted many of my fellow petition signers through phone calls and text messages in an attempt to convince them to withdraw their signatures from the petition. I believe these communications were improper and harassing.

11. I am angry and disappointed that the Montana Democratic Party is attempting to block the Montana Green Party's access to the ballot.

12. I want to ensure the petition I signed remains valid and ensure the Green Party is able to participate in Montana's elections.

I declare under penalty of perjury that the foregoing is true and correct.

Lorrie Corette Campbell

STATE OF Montana)

) ss

COUNTY OF Butte-Silver Bow)

On this 2nd day of July, 2020, before me personally appeared Lorrie Corette Campbell, to me known to be the person described herein, who executed the foregoing instrument and acknowledged that that person executed said instrument as her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal in 2 NO, the day and year last above written.

SHERRIE R. WALSH
NOTARY PUBLIC for the
State of Montana
Residing at Butte, Montana
My Commission Expires
August 29, 2020

SEAL

Notary Public

My commission expires: 8-29-2020

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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1. My name is Jill Loven. I am over 18 years of age. I make this declaration based upon my personal knowledge and expertise.

Exhibit B

2. I am a registered voter in the State of Montana and a supporter of the Montana Republican Party.

3. Sometime in February of 2020, I was approached by a petition circulator and was asked to sign a petition to allow the Montana Green Party to participate in the primary election. The petition circulator did not make any representations to me or conceal anything from me.

4. I signed the petition.

5. I did not and will not submit a withdrawal of my signature on the petition.

6. I believe the Montana Green Party should be on the ballot.

7. It is irrelevant to me who funded or organized the efforts to get the Montana Green Party on the election ballots. The Republican Party's funding of the circulation effort does not affect my decision on whether it makes sense to have the Green Party on the ballot.

8. I believe allowing minor parties to participate in the election process is good for our democracy because their voices should be heard.

9. I am aware that the Montana Democratic Party contacted many of my fellow petition signers through phone calls and text messages in an attempt to convince them to withdraw their signatures from the petition. I believe these communications were improper and harassing.

10. In fact, I received a text from someone identifying himself as "Max" with the Montana Democratic Party at 10:24 a.m. on February 29, 2020. "Max" claimed to have learned that I may have signed what he called a "phony petition" being circulated by "Republicans" and asked that I withdraw my signature. I responded, "no."

11. I am angry and disappointed that the Montana Democratic Party is attempting to block the Montana Green Party's access to the ballot.

Exhibit B

12. I want to ensure the petition I signed remains valid and ensure the Green Party is able to participate in Montana's elections.

I declare under penalty of perjury that the foregoing is true and correct.

Jill Loven

Jill Loven

STATE OF Montana)
) ss
COUNTY OF Yellowstone)

On this 2nd day of July, 2020, before me personally appeared Jill Loven, to me known to be the person described herein, who executed the foregoing instrument and acknowledged that that person executed said instrument as her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal in Montana, the day and year last above written.

[notarial seal]

SHEENA STENBERG NOTARIAL SEAL STATE OF MONTANA

SHEENA STENBERG
NOTARY PUBLIC for the
State of Montana
Residing at Billings, Montana
My Commission Expires
December 31, 2023

Sheena Stenberg

Notary Public

My commission expires: December 31, 2023

Exhibit B

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
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MONTANA DEMOCRATIC PARTY And TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through its SECRETARY OF STATE COREY STAPLETON, Defendant, LORRIE CORETTE CAMPBELL and JILL LOVEN, Intervenors-Defendants.	Case No. CDV-2020-856 Intervenors' Answer to Plaintiffs' Complaint for Declaratory and Injunctive Relief

INTRODUCTION

1. Intervenors admit hundreds of Montana voters signed a petition to place Montana Green Party candidates on the primary election ballot. Intervenors are without sufficient

knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 1, and Intervenors thereby deny the allegations.

2. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 2, and Intervenors thereby deny the allegations.

3. Intervenors admit certain petition signers submitted signature withdrawals after signing the petition to place Montana Green Party candidates on the primary election ballot. The remaining allegations are largely legal conclusions that do not require a response. To the extent Paragraph 3 includes any additional allegations of fact, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

4. Intervenors admit the Secretary of State did not remove the Montana Green Party from the primary election ballot and the Montana Green Party remains eligible for placement on the general election ballot. The remaining allegations are largely legal conclusions that do not require a response. To the extent Paragraph 4 includes any additional allegations of fact, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

5. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 5, and Intervenors thereby deny the allegations.

6. Paragraph 6 is largely comprised of legal conclusions to which a response is not required. To the extent Paragraph 6 contains any allegations of fact, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

7. Intervenors admit that the Montana courts issued an opinion in 2018 regarding candidates of the Montana Green Party's right to be placed on the primary election ballot. The Court ultimately determined that a sufficient number of the petition signatures were not valid and the petition failed to satisfy the statutory requirements to place the Montana Green Party's candidates on the primary election ballot. To the extent any factual allegations remain in Paragraph 7, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

8. Intervenors maintain that Plaintiffs' Complaint speaks for itself. Plaintiffs present no factual allegations in Paragraph 8. To the extent Paragraph 8 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

9. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 9, and Intervenors thereby deny the allegations.

FACTUAL BACKGROUND

I. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Heading I, and Intervenors thereby deny the allegations.

10. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 10, and Intervenors thereby deny the allegations.

11. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 11, and Intervenors thereby deny the allegations.

12. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 12, and Intervenors thereby deny the allegations.

13. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 13, and Intervenors thereby deny the allegations.

14. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 14, and Intervenors thereby deny the allegations.

15. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 15, and Intervenors thereby deny the allegations.

16. Intervenors maintain that the Montana Green Party's statement posted to its Facebook account speaks for itself. Plaintiffs present no factual allegations in Paragraph 16. To the extent Paragraph 16 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

17. Intervenors maintain that the news article cited by Plaintiffs speaks for itself. To the extent Paragraph 17 contains any additional factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

18. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 18, and Intervenors thereby deny the allegations.

19. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 19, and Intervenors thereby deny the allegations.

20. Intervenors maintain that the news article cited by Plaintiffs speaks for itself. To the extent Paragraph 20 contains any additional factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

21. Intervenors admit Senate Bill 363 (codified at Section 13-37-601) was passed during the 2019 legislative session. Intervenors maintain that this legislation speaks for itself. To the extent Paragraph 21 contains any additional factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

II. The referenced court opinions and legislative bills speak for themselves. To the extent Heading II contains any factual allegations, Plaintiff is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

22. The court's opinion in *Larson v. State*, 394 Mont. 167, 434 P.3d 241 (2019) speaks for itself. To the extent Paragraph 22 contains any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

23. The court's opinion in *Larson v. State*, 394 Mont. 167, 434 P.3d 241 (2019) speaks for itself. To the extent Paragraph 23 contains any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

24. The court's opinion in *Larson v. State*, 394 Mont. 167, 434 P.3d 241 (2019) speaks for itself. To the extent Paragraph 24 contains any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

25. The court's opinion in *Larson v. State*, 394 Mont. 167, 434 P.3d 241 (2019) speaks for itself. To the extent Paragraph 25 contains any factual allegations, Intervenors are without

sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

26. The court's opinion in *Larson v. State*, 394 Mont. 167, 434 P.3d 241 (2019) speaks for itself. To the extent Paragraph 26 contains any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

27. The court's opinion in *Larson v. State*, 394 Mont. 167, 434 P.3d 241 (2019) speaks for itself. To the extent Paragraph 27 contains any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

III. The referenced legislative bills speak for themselves. Heading III contains no factual allegations.

28. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 28, and Intervenors thereby deny the allegations.

29. The decision rendered by the Montana Commissioner of Political Practices in *Mont. Dem. Party v. Advan. Micro Targeting*, No. 2018-CFP-004 speaks for itself. To the extent Paragraph 29 contains any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

30. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 30, and Intervenors thereby deny the allegations.

31. Intervenors admit Senate Bill 363 was passed during the 2019 legislative session. To the extent Paragraph 31 is interpreted to include any factual allegations, Intervenors are without

sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

32. Intervenors admit Senate Bill 363 has been codified at Section 13-37-601. This provision speaks for itself. To the extent Paragraph 32 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

33. The hearing report cited in Paragraph 33 speaks for itself. Plaintiffs present no factual allegations in Paragraph 33. To the extent Paragraph 33 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

34. The hearing report cited in Paragraph 34 speaks for itself. Plaintiffs present no factual allegations in Paragraph 34. To the extent Paragraph 34 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

35. The hearing report cited in Paragraph 35 speaks for itself. Plaintiffs present no factual allegations in Paragraph 35. To the extent Paragraph 35 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

36. The statutory sections cited in Paragraph 36 speak for themselves. Plaintiffs present no factual allegations in Paragraph 36. To the extent Paragraph 36 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

37. The statutory sections cited in Paragraph 37 speak for themselves. To the extent Paragraph 37 contains any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

IV. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations made in Heading IV, and Intervenors thereby deny the allegations.

38. Intervenors admit certain petition signers submitted signature withdrawals to county election offices. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 38, and Intervenors thereby deny the allegations.

39. Intervenors maintain that the referenced statutory provisions speak for themselves. Paragraph 39 contains no factual allegations. To the extent Paragraph 39 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

40. Intervenors maintain that the referenced statutory provisions speak for themselves. Paragraph 40 contains no factual allegations. To the extent Paragraph 40 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

41. Intervenors maintain that the referenced form speaks for itself. Paragraph 41 contains no factual allegations. To the extent Paragraph 41 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

42. Intervenors maintain that the referenced form speaks for itself. To the extent Paragraph 42 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

43. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 43, and Intervenors thereby deny the allegations.

44. Intervenors admit that petition signers were contacted by representatives for the MDP attempting to convince Intervenors to withdraw their signatures from the petition. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 44, and Intervenors thereby deny the allegations. Further answering, Intervenors state that for many signers, MDP's repeated contacts via phone calls and text messages were unwanted, unauthorized, and harassing.

45. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 45, and Intervenors thereby deny the allegations.

46. Intervenors admit the allegations contained in Paragraph 46.

47. Intervenors admit the Secretary certified the petition on March 6. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 47, and Intervenors thereby deny the allegations.

48. Intervenors admit six candidates filed to run in the Montana Green Party primary elections. The referenced Facebook post speaks for itself. To the extent Paragraph 48 is interpreted to contain any further factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

49. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 49, and Intervenors thereby deny the allegations.

V. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Heading V, and Intervenors thereby deny the same.

50. Intervenors maintain the referenced news articles speak for themselves. To the extent Paragraph 50 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

51. Intervenors maintain the referenced news articles and federal campaign finance filings speak for themselves. To the extent Paragraph 51 is interpreted to include any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations, and Intervenors thereby deny the allegations.

52. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 52, and Intervenors thereby deny the allegations.

53. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 53, and Intervenors thereby deny the allegations.

54. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 54, and Intervenors thereby deny the allegations.

55. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 55, and Intervenors thereby deny the allegations.

56. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 56, and Intervenors thereby deny the allegations.

57. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 57, and Intervenors thereby deny the allegations.

58. Intervenors admit that petition signers were contacted by representatives for the MDP attempting to convince Intervenors to withdraw their signatures from the petition. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 58, and Intervenors thereby deny the allegations. Further answering, Intervenors state that for many signers, MDP's repeated contacts via phone calls and text messages were unwanted, unauthorized, and harassing.

59. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 59, and Intervenors thereby deny the allegations.

60. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 60, and Intervenors thereby deny the allegations.

61. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 61, and Intervenors thereby deny the allegations.

62. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 62, and Intervenors thereby deny the allegations.

63. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 63, and Intervenors thereby deny the allegations.

VI. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Heading VI, and Intervenors thereby deny the allegations.

64. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 64, and Intervenors thereby deny the allegations.

65. Denied.

66. Intervenors maintain the referenced statutory section speaks for itself. To the extent Paragraph 66 is interpreted to contain any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

67. Intervenors maintain the referenced statutory section speaks for itself. To the extent Paragraph 67 is interpreted to contain any factual allegations, Intervenors are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations, and Intervenors thereby deny the allegations.

68. Denied.

69. Denied.

70. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 70, and Intervenors thereby deny the allegations.

71. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 71, and Intervenors thereby deny the allegations.

72. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 72, and Intervenors thereby deny the allegations.

73. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 73, and Intervenors thereby deny the allegations.

74. Denied.

PARTIES

75. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 75, and Intervenors thereby deny the allegations.

76. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 76, and Intervenors thereby deny the allegations.

77. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 77, and Intervenors thereby deny the allegations.

78. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 78, and Intervenors thereby deny the allegations.

79. Intervenors are without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 79, and Intervenors thereby deny the allegations.

80. Intervenors admit the allegations in Paragraph 80.

JURISDICTION AND VENUE

81. Intervenors admit that the referenced statutes and cases grant Montana courts the power to issue declaratory judgments, but deny that these Plaintiffs have standing to seek such relief.

82. Intervenors deny that these Plaintiffs have alleged an injury that can be remedied by the relief they seek, and therefore deny that the Court has jurisdiction to hear their claims.

83. Intervenors admit this venue is proper in this Court. The Intervenors deny the remaining allegations of Paragraph 83.

COUNT I: DECLARATORY RELIEF

84. Intervenors reallege and incorporate by reference all prior responses as though fully set forth herein.

85. Intervenors admit that Plaintiffs seek declaratory relief.

86. Intervenors admit the allegations in Paragraph 86.

87. Intervenors deny the allegations in Paragraph 87.

88. Intervenors maintain the referenced cases speak for themselves. Intervenors admit that timely withdrawals filed before the final action occurs should be given effect, but deny that Plaintiffs' withdrawal requests, which were almost entirely received after the final action occurred, should be given effect.

89. Intervenors deny the allegations in Paragraph 89.

COUNT II: INFRINGMENT ON STATE CONSTITUTIONAL RIGHTS

90. Intervenors reallege and incorporate by reference all prior responses as though fully set forth herein.

91. Intervenors maintain the referenced constitutional provisions speak for themselves and deny any allegation that these provisions give the Plaintiffs or anyone else the right to withdraw their petition signatures after the petition has been certified. To the contrary, the First Amendment controls here, and prohibits the state from imposing undue burdens on those—like Intervenors—who exercise their speech and association rights by signing a petition to achieve a political goal such as the qualification of a party for the primary ballot.

92. Intervenors maintain the referenced cases speak for themselves and deny any allegation that these cases give the Plaintiffs or anyone else the right to withdraw their petition signatures after the petition has been certified. To the contrary, the First Amendment controls here, and prohibits the state from imposing undue burdens on those—like Intervenors—who exercise their speech and association rights by signing a petition to achieve a political goal such as the qualification of a party for the primary ballot. Allowing the MDP to sabotage the petition by

pressuring hundreds of citizens to withdraw their signatures after the petition has been submitted and certified would create an undue burden on the right to political association and speech via the petition process. The right to petition, if a state grants it, also includes the right to effectively petition. The petition process is impossible for proponents like Intervenors to use, however, if opponents like the MDP can mount statewide withdrawal campaigns to pressure signers after signature gathering ends and the petition is certified. Even if a right to withdraw is required by the "right not to associate," that right ends where it infringes upon the rights of proponents (like Intervenors) to effectively exercise their own right to associate.

93. Intervenors maintain the referenced cases speak for themselves. Paragraph 93 solely contains legal conclusion to which a response is not required. Further answering, they deny any allegation that these cases give the Plaintiffs or anyone else the right to withdraw their petition signatures after the petition has been certified. To the contrary, the First Amendment controls here, and prohibits the state from imposing undue burdens on those—like Intervenors—who exercise their speech and association rights by signing a petition to achieve a political goal such as the qualification of a party for the primary ballot. Allowing the MDP to sabotage the petition by pressuring hundreds of citizens to withdraw their signatures after the petition has been submitted and certified would create an undue burden on the right to political association and speech via the petition process. The right to petition, if a state grants it, also includes the right to effectively petition. The petition process is impossible for proponents like Intervenors to use, however, if opponents like the MDP can mount statewide withdrawal campaigns to pressure signers after signature gathering ends and the petition is certified.

94. Intervenors maintain the referenced cases speak for themselves. Further answering, they deny any allegation that these cases give the Plaintiffs or anyone else the right to withdraw

their petition signatures after the petition has been certified. To the contrary, the First Amendment controls here, and prohibits the state from imposing undue burdens on those—like Intervenors—who exercise their speech and association rights by signing a petition to achieve a political goal such as the qualification of a party for the primary ballot. Allowing the MDP to sabotage the petition by pressuring hundreds of citizens to withdraw their signatures after the petition has been submitted and certified would create an undue burden on the right to political association and speech via the petition process. The right to petition, if a state grants it, also includes the right to effectively petition. The petition process is impossible for proponents like Intervenors to use, however, if opponents like the MDP can mount statewide withdrawal campaigns to pressure signers after signature gathering ends and the petition is certified.

95. Intervenors maintain the referenced cases speak for themselves. The First Amendment controls here, and prohibits the state from imposing undue burdens on those—like Intervenors—who exercise their speech and association rights by signing a petition to achieve a political goal such as the qualification of a party for the primary ballot. Allowing the MDP to sabotage the petition by pressuring hundreds of citizens to withdraw their signatures after the petition has been submitted and certified would create an undue burden on the right to political association and speech via the petition process. The right to petition, if a state grants it, also includes the right to effectively petition. The petition process is impossible for proponents like Intervenors to use, however, if opponents like the MDP can mount statewide withdrawal campaigns to pressure signers after signature gathering ends and the petition is certified.

96. Intervenors deny the allegations in Paragraph 96. Further answering, the Secretary's action in refusing to honor late withdrawal requests not only fails to violate the

Montana Constitution, it was required in order to avoid infringing Intervenors' rights of speech and association as set forth in Intervenors' responses to paragraphs 91 to 95.

PRAYER FOR RELIEF

Intervenors respectfully request the Court deny Plaintiffs the relief requested.

AFFIRMATIVE DEFENSES

1. Plaintiffs failed to state a claim for relief under Counts I and II by failing to establish the necessary elements required for relief.

2. Plaintiffs are not entitled to declaratory relief because all necessary parties to be affected by the requested declaratory relief are not parties to these proceedings, as required by Section 27-8-301.

3. Individual Plaintiffs lack standing to adjudicate the rights and obligations of petition signers not present in this litigation. "[A] litigant may only assert her own constitutional rights or immunities." *Hefferman v. Missoula City Council*, 360 Mont. 207, 221, 255 P.3d 80 (2011). Plaintiffs essentially attempt to bring a class action to declare the rights and obligations of an entire class of persons (those signers who have sought to withdraw their signatures) without satisfying the requirements of a class action.

4. Individual Plaintiffs' claims under Count I are moot because their signature withdrawals have, in fact, been counted by the Secretary.

5. Plaintiff MDP lacks standing to bring Count I, because Plaintiff MDP has failed to allege any sufficient injury. The only injury alleged by Plaintiff MDP is theoretical rather than concrete and particular. *See Schoof v. Nesbit*, 373 Mont. 226, 232, 316 P.3d 831 (2014) (holding an adequate injury must be "concrete, and not abstract"). Further, feeling that one is compelled to engage in political speech to oppose a rival political party is not a legally cognizable injury.

6. Plaintiff MDP lacks standing to bring Count II, because Plaintiff MDP has failed to allege any sufficient injury or stake in this litigation. "A party must demonstrate a personal stake in the outcome of the controversy." *Jones v. Mont. Univ. Sys.*, 337 Mont. 1, 13, 155 P.3d 1247 (2007). Here, the Complaint includes no allegations demonstrating how the Defendant Secretary has violated the MDP's constitutional rights. Only the individual Plaintiffs are named in Count II. Therefore, Plaintiff MDP lacks standing to proceed with Count II.

7. Plaintiff MDP should be prohibited from seeking relief due to the doctrine of unclean hands. MDP and its out-of-state surrogates continually and repeatedly solicited the petition signers by text and phone calls in an effort to pressure them to withdraw their signatures. MDP's solicitation efforts were harassing and an attempt to coerce, overwhelm, and exercise undue influence over signers, many of whom, on information and belief, agreed to electronically "withdraw" their signatures merely to end harassment from out-of-state callers. Moreover, MDP engaged in the same conduct of which it accuses the Republican Party, secretly backing its own Green Party candidate, when in fact its effort—a last-minute candidacy in the Greens' primary race for U.S. Senate—was an effort to win the primary and then drop out of the race, keeping the Green Party off the general election ballot altogether. MDP, therefore, comes to this litigation with unclean hands.

8. Plaintiffs' claims are barred by the doctrine of laches and waiver in that Plaintiffs did not timely present their claims to the court for adjudication. Plaintiffs learned of their claimed injuries and then waited months to bring their claims, waiting until the eve of the primary election to file their Complaint. Plaintiff MDP waited to bring their claims until after their secretly-backed Green Party candidate appeared to be losing the primary. The Green Party voters heard from one candidate who said she wanted to be on the general election ballot, and

one candidate who suggested he would back the MDP's interests in torpedoing a Green Party general election candidacy. The Green Party's voters rejected the argument of the Democrats' surrogate. Having attempted to use the Greens' primary election to achieve their desired political result and having failed, the MDP asks this Court to effectuate legally what it could not convince the Greens to do politically. The time for relief was before the primary election occurred when Plaintiffs were made aware of their supposed injuries. Plaintiffs have now waived their rights to bring the current claims.

9. Plaintiffs' Count II does not present a justiciable controversy because they have failed to allege an injury-in-fact. Plaintiffs do not assert that they have suffered an injury via association with the Green Party, the party with which they voluntarily associated by signing the petition at issue. Plaintiffs likewise do no assert that they have ideological differences with the Green Party, such that association with the Green Party violates their "right not to associate." Instead, they argue that they are being forced to associate with the Republican Party. That is simply incorrect. Their alleged connection with the Republican Party is highly attenuated and hinges solely on the fact that the Republican Party paid for petition circulators. Plaintiffs have not been forced to associate with the Republican Party. In their own Complaint, they admit that they have been free for months to exercise their rights to attack and disavow any association with the Republicans. Here, when they signed the petitions, the Plaintiffs freely associated with those of all ideologies who shared their goal of placing the Greens on the ballot. Even now, Plaintiffs do not allege an unwillingness to support the Green Party. Instead, they allege bitterness in supporting the Green Party *who is also supported by the Republican Party*. As shown below, avoiding the bitter feeling of having supported a political goal that also happens to be supported

by one's ideological enemies is not a right protected by any federal or state constitutional provision.

The "right not to associate" is most often implicated when a political party exerts influence over who may be a member of that party or participate in its primaries. Indeed, the case Plaintiffs cite for the proposition that they have a right not to associate with the Republican Party by supporting the Green Party makes clear that "the Court has recognized that the First Amendment protects the freedom to join together in furtherance of common political beliefs…which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only…That is to say, a corollary of the right to associate is the right not to associate." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (internal quotations and citations omitted); *see also Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986) (closed primary); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989) (primary endorsements and internal party governance); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (anti-fusion laws). In no case has this negative "corollary" ever been held to apply to individual voters whose only alleged "association" is signing a petition along with thousands of others whose underlying political views and ideologies the signers can never hope to have learned. Plaintiffs' constitutional interests in avoiding "forced association," if they are individual rights at all, are simply not implicated by having their signatures on a petition supporting the party which they chose to support: the Green Party.

10. Further, even if Plaintiffs were deemed to have "associated" with the Republican Party, and this Court were to become the first in the country to find that Plaintiffs have a constitutional interest in not being "associated" with the Republican Party under these facts, that

interest is adequately protected by allowing them to withdraw their support of the petition up to the point that the signatures are filed. If, as Plaintiffs assert, individuals have an unfettered right to withdraw their signatures from a political party qualification petition until some ambiguous "final act" is performed, such a right would infringe upon the rights of petition proponents and signers under the First Amendment to the United States Constitution and Article II, Sections 6 and 7 of the Montana Constitution. That right is the right to effectively associate through the petition process. *See Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("…[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"); *see also Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (finding residency and filing deadline provisions of Arizona law unconstitutional because they unduly burdened process by which independent candidate gathered signatures to gain ballot access). Plaintiffs' theory is immediately suspect because they are unable to point to a date certain at which a political party qualification petition signer's "right" to withdraw his support ceases. The Complaint fails to identify such a date, but makes clear that Plaintiffs believe that the "final act" occurs well after the deadline for submission of signatures on March 2nd, after the Secretary of State announced that the Green Party had submitted sufficient signatures to qualify to hold a primary on March 6th, and even after the candidate filing deadline on March 8th passed. Plaintiffs' Complaint impliedly acknowledges that the "final act" for all other petitions – the date which also serves as the deadline for a signatory to withdraw his signature – is the date on which the petitions must be submitted to county election officials. Section 13-27-301(1)(3), MCA; Section 13-27-104, MCA.

In *State ex rel. O'Connell v. Mitchell*, 111 Mont. 94, 106 P.2d 180, 181 (1940), in the absence of an express deadline on signature withdrawal for an initiative petition, the Montana

Supreme Court applied the "final act" rule. In doing so, it found that the rule did not render the initiative procedure "unworkable", implying that a withdrawal deadline which does render the process unworkable would be held in disfavor. *Id.*; *Cf. Uhl v. Collins,* 217 Cal. 1, 4, 17 P.2d 99, 100 (1932) ("But, if the alleged right of withdrawal, based upon change of mind, is to be exercised to the destruction of the initiative procedure, then we may well question its justification. In order to accomplish anything, the proponents of a measure must be able to rely upon signatures obtained, and, if continually forced to seek new ones to take the place of withdrawals, may never be able to prepare a proper petition within the limited period which usually exists. To permit withdrawals after the petition is completed and filed, and the work of securing signatures abandoned, seems to us to make the system wholly unworkable."). Since *O'Connell* and many of the other cases on which Plaintiffs rely were decided, the Montana legislature enacted Section 13-27-301(1)(3), which provides a specific deadline for the withdrawal of signatures on petitions for constitutional amendments, constitutional conventions, initiatives, and referendums. The "final act" requirement fulfills the same purpose as the statutory withdrawal deadline in Section 13-27-301(1)(3): to create an adequate, orderly process to govern the timeframe in which a signature may be withdrawn. However, Plaintiffs' theory is anything but orderly and fails to establish the same level of temporal certainty by leaving unanswered the question of what constitutes the "final act" after which withdrawal is no longer permitted. If the Plaintiffs do have a date in mind, it is apparently long after the point at which the primary has been held, and even longer after the point at which proponents must stop gathering signatures. For weeks and months after their petition is certified, proponents are powerless to add signatures, but their opponents can mount a relentless statewide campaign to pressure proponents' co-signers to withdraw their signatures. The opponents are doubly

advantaged: whereas the proponents must gather signatures from 5% of registered voters in 1/3 of the legislative districts before the filing deadline, a withdrawal campaign like that mounted by Plaintiffs need only focus on the weakest geographic districts that supported the petition in order to sabotage the petition altogether. The lack of finality creates a moving target because proponents can never know how many people will change their minds during the months-long "withdraw-only" phase. A proponent can never gather enough signatures because opponents will have months to sit back and bombard signers with texts and emails, picking off voters one by one.

To avoid this lack of finality and provide an orderly process, many states – including Montana with regards to petitions for constitutional amendment, constitutional convention, initiative, or referendum – require withdrawals to occur at the same time as the filing deadline for proponents' signatures in order to avoid a situation in which opponents of the petition can continue to work to defeat it via signature withdrawal campaigns, while the petition's proponents can no longer gather signatures in support due to the filing deadline. *See, e.g., State ex rel. Harry v. Ice*, 207 Ind. 65, 191 N.E. 155, 156 (1934) ("If nominating petitioners are permitted to withdraw their names after opportunity for supplying additional names, or filing new petitions, has passed, a very patent door to chicanery and fraud upon the voters and the community is provided."). Because it fails to provide an orderly or predictable process, Plaintiffs' theory, if this Court were to now adopt it as the law of Montana, would infringe on electors' and petition proponents' rights under the First Amendment to the United States Constitution and Article II, Sections 6 and 7 of the Montana Constitution.

11. Even if the Court were to grant Plaintiffs the ability to submit untimely signature withdrawals, the petition still contains sufficient signatures to satisfy the certification

requirements because local election officials—and therefore the Secretary—failed, on information and belief, to count numerous valid signatures in the affected districts. Therefore, Plaintiffs will not be able to successfully invalidate the certification.

Dated: July 2, 2020

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record in this matter on July 2, 2020 as follows:

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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY And TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through its SECRETARY OF STATE COREY STAPLETON, Defendant, LORRIE CORETTE CAMPBELL and JILL LOVEN, Intervenors-Defendants.	)	Case No. CDV-2020-856 **Order Granting Petition Signers' Motion to Intervene**

Lorrie Corette Campball and Jill Loven ("petition signers") have filed a Motion to Intervene. The Court now having reviewed the motion and briefing thereof,

IT IS ORDERED that the motion is **GRANTED**. The Clerk shall enter Ms. Campbell and Ms. Loven as Intervenor-Defendants in this matter and enter their Answer, submitted as an exhibit, into the record as a separately filed entry.

The Clerk is directed to provide copies of this order to all counsel of record.

SO ORDERED this _____ day of _____, 2020.

_____
District Court Judge

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY,

and

TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors,

Plaintiffs,

vs. CAUSE NO. DDV-2020-856

STATE OF MONTANA, by and through its SECRETARY OF STATE COREY STAPLETON,

Defendant.

TRANSCRIPT OF THE PROCEEDINGS, VOL. I
ORDER TO SHOW CAUSE, PRELIMINARY INJUNCTION

Heard before the Honorable James P. Reynolds
Lewis and Clark County Courthouse
228 Broadway
Helena, Montana

July 14, 2020

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WHEREUPON, the proceedings were had as follows:

THE COURT: We are here in Cause DDV-2020-856. It's the Montana Democratic Party and others against the State of Montana by and through the Secretary of State Corey Stapleton. This is the time set for the hearing on the application for preliminary injunction.

Why don't we have everybody introduce yourselves for the sake of our court reporter.

MR. MELOY: Mike Meloy for the Plaintiffs, Your Honor.

MR. GORDON: Good morning, Your Honor. Matthew Gordon for the Plaintiffs.

MR. JAMES: Good morning, Your Honor. Austin James for the Defendants.

MR MEADE: Your Honor, Matthew Meade on behalf of the Secretary of State.

THE COURT: All right. So I think there are a few preliminary matters that we probably need to address here. And I'm going to tell you, I've been thinking about it and reading the various documents that have been filed, and I have some conclusions.

First of all, with regard to the proposed intervenors, I've got a motion to intervene from the Montana Republican Party and also a proposed intervention by a couple of the petition signers. And so I am going to deny both of those

motions to intervene.

I don't think -- The Republican Party wants to intervene because they have been accused in this proceeding with improperly circulating the petition that's at stake here. I don't think this is the proceeding for the Republican Party to defend itself against those accusations. In my understanding, there are proceedings before the Commissioner of Political Practices that are ongoing, and that is the place for that particular debate to be had.

With regard to the two proposed intervenors who signed the petition who wish to have the petition remain as an accepted petition, I'm also going to deny that. There is no effort, as I read these pleadings here, to remove those folks as valid signers of the petition, and I don't think -- I mean, I don't know how many people signed this ultimately, but I don't think individual signers under those circumstances are entitled to intervene here; or otherwise, I could have 500 more people in here.

So I'm going to deny both of those motions to intervene. I will allow both parties to participate as amicus in the case if they wish to submit briefs.

So that brings me to a second part, and that's -- Mr. Greim, you have applied to be admitted pro hac vice here, and since I'm not going to allow you to participate

as a party, you may want to withdraw that and preserve your ability to apply at a future point. Is that a consideration for you?

MR. GREIM: Well, Your Honor, I'm already over my -- my firm is over our two-person limit, and so we applied two years ago for good cause to the Montana Supreme Court because we were already over the limit then. They allowed it. So I think there's nothing left to preserve, so we would want to stand on that. Because even as amici, we would have to be admitted.

THE COURT: Okay. Well, I'll leave it up to you. I'm not going to deny your application to appear here. I read through your application, and you certainly would be eligible to participate in this, but only as amicus.

Mr. Gallus.

MR. GALLUS: I was just standing ready, Your Honor.

THE COURT: Okay.

MR. GREIM: So, Your Honor, I'm sorry to delay things. Do I understand you're granting my motion to appear pro hac vice, but with the understanding we're here as amicus?

THE COURT: Right. Right. Not as a party. Of course, anybody can participate in the proceedings if they want to as a witness. That's not being barred. But as

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MONTANA DEMOCRATIC PARTY, TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through COREY STAPLETON, SECRETARY OF STATE, Defendants.	Cause No. CDV-2020-856 Hon. Kathy Seeley **DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES PURSUANT TO RULE 12(b)(7), M.R.Civ.P.**

COMES NOW, the State of Montana, by and through Corey Stapleton, Secretary of State, by and through its counsel of record, and respectfully moves the Court, to dismiss the Plaintiff's Complaint for failure to join a necessary parties pursuant to Rules 12(b)(7) and 19, M.R.Civ.P.

This Motion is supported by Defendant's Brief in Support of Motion to Dismiss for Failure to Join Necessary Parties Pursuant to Rule 2(b)(7), M.R.Civ.P., filed contemporaneously herewith.

Dated this 22 day of June, 2020.

Austin James
Chief Legal Counsel
Secretary of State's Office

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered by email and US Postal mail to the following on June 22, 2020.

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MONTANA DEMOCRATIC PARTY, TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through COREY STAPLETON, SECRETARY OF STATE, Defendants.	Cause No. CDV-2020-856 Hon. Kathy Seeley **DEFENDANT'S BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND DEMONSTRATING CAUSE WHY RELIEF SHOULD NOT BE GRANTED**

COME NOW, the Defendant State of Montana, by and through Corey Stapleton as the Secretary of State ("SOS"), and submits the following combined Brief in support of their Motion to Dismiss and Demonstrating Cause[1] as to why Plaintiffs' Declaratory Relief should not be granted.

[1] As required by the Court's June 4, 2020, Order to Show Cause.

INTRODUCTION

Every election year, public servants are tasked with administering a fair election for this state pursuant to Montana's election laws. Local and state election officials find comfort in following their legally prescribed duties. Although voluminous, Plaintiffs' filings fail to overcome Montana statutes and established precedent regarding signature withdrawals.

The statute, MCA § 13-10-601(a), requires a threshold showing of support for minor party access to the ballot. The law does not require all supporters of minor party ballot access to agree with the financial support behind signature gathering efforts. Plaintiffs admit they understood the contents of the petition. Their objection to the petition stems not from its contents, but rather from the fact that Plaintiffs claim they did not know, and did not ask, who sponsored the clipboard. Disclosure and financial compliance and enforcement is a duty of the Commissioner of Political Practices, not the Secretary of the State. The proper forum to litigate these concerns rests with Plaintiffs' pending case before the Commissioner, where Plaintiffs allege the same concerns as alleged in this case.

This is a case about certifying a minor party as eligible for the ballot, per MCA § 13-10-601. The statutory requirements for a minor party to demonstrate sufficient support via petition are not disputed. Plaintiffs' principal claim is that the State arbitrarily created a withdrawal deadline and failed to incorporate timely withdrawal requests by petition signers in the certification. The undisputed record shows that the final act of certifying the petition occurred on March 6, 2020, and the tally count by SOS accounted for all withdrawn signatures, including timely submission by Plaintiffs.

The Secretary of State certified the Green Party petition contained legally sufficient signatures from more than enough districts, as required by § 13-10-601(2)(b), on March 6, 2020. In addition to signature verification, election clerks and state election officials processed several

withdrawal forms submitted in response to an advocacy campaign by the Montana Democratic Party. The duties of county election officials and the Secretary of State remain unaltered by Republican efforts toward qualifying the Green Party, or Democrat efforts to prevent or eliminate Green Party eligibility. The salient issue is whether the petition to qualify the Green Party met the threshold of § 13-10-601. After all withdrawn signatures were removed, the Green Party petition meets the statutory eligibility threshold.

Plaintiffs' existing rights are rooted in century-old authority, precisely followed by the Secretary of State. Plaintiffs have not shown why the Montana Supreme Court's guidance should be overruled, and they are unlikely to succeed in doing so. Even if Plaintiffs timely brought suit with clean hands and without delay, the balance of equities is in Defendant's favor.

On the other hand, Defendants, along with nominated Green Party candidates, Green Party voters, and local election officials will suffer irreparable harm under Plaintiffs' requested relief. The public interest is served by the preparation and administration of elections under consistent statutory requirements. Four months after the filing as a candidate for the Green Party, weeks after securing the Green Party nomination, Plaintiffs belatedly ask the Court to strip these candidates from the ballot.

The Montana Democratic Party, after a lengthy campaign advocating against signing the Green Party petition and soliciting withdrawal forms from those that did, asserts that signature withdrawals must be processed at any unidentified point after the petition is deemed sufficient, despite their campaign's urgency around the deadline. In support of their position they claim that statutory silence guarantees indefinite removal of petition signatures.

This is a right no court has ever recognized. It has little to recommend it. If accepted, it would dramatically alter the requirements for demonstrating sufficiency by a minor party for access to the ballot and open the floodgates to an entire new arena for major party gamesmanship. By extension, it would threaten not just minor party petitions, but referendums, county commissioner actions, and other acts by public officials or bodies requiring a demonstration of signatures.

Accordingly, this case is not—and never has been—about the actors involved in promoting or opposing the minor party petition for the Green Party or whether signers were aware of major party participation on both sides. Instead, the question is whether Title 13 confers upon the Montana Secretary of State the unprecedented entitlement to disregard neutral and generally applicable certification of a minor party by petition rules whenever signers of a petition incidentally change their mind at any point after the final act occurred. The answer is "no."

ARGUMENT

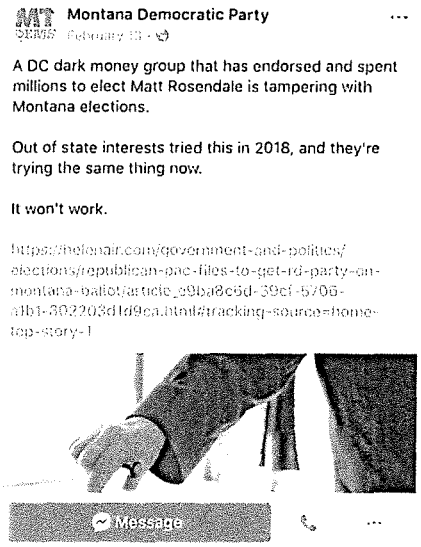
I. WAIVER

A. Plaintiffs' conduct is evidence of waiver, which is a question of fact.

The Montana Supreme Court expressly declared that a party's right to rescind a petition signature is waived by failing to promptly act upon learning of the fraud. *State ex rel. Peck v. Anderson* (1932), 92 Mont. 298, 306, 13 P.2d 231, 234. Plaintiffs' "Trial Brief" contends, at 7:

> Without relief declaring the withdrawal requests valid and the Petition invalid and enjoining the Secretary from giving effect to the Petition, Plaintiffs and hundreds of other Montanans will be deprived of their right to withdraw their signature and will signing that was promoted by a political party they never wanted to associate with and a cause – siphoning Democratic votes – that they never supported. The Montana Republican Party will be rewarded for its misleading conduct . . ..

The Montana Democratic Party has been aware of this alleged misdeed since the second week of February. Upon learning of the misdeeds they allege, the MDP and the individual plaintiffs waived their claim by waiting until June to act upon.

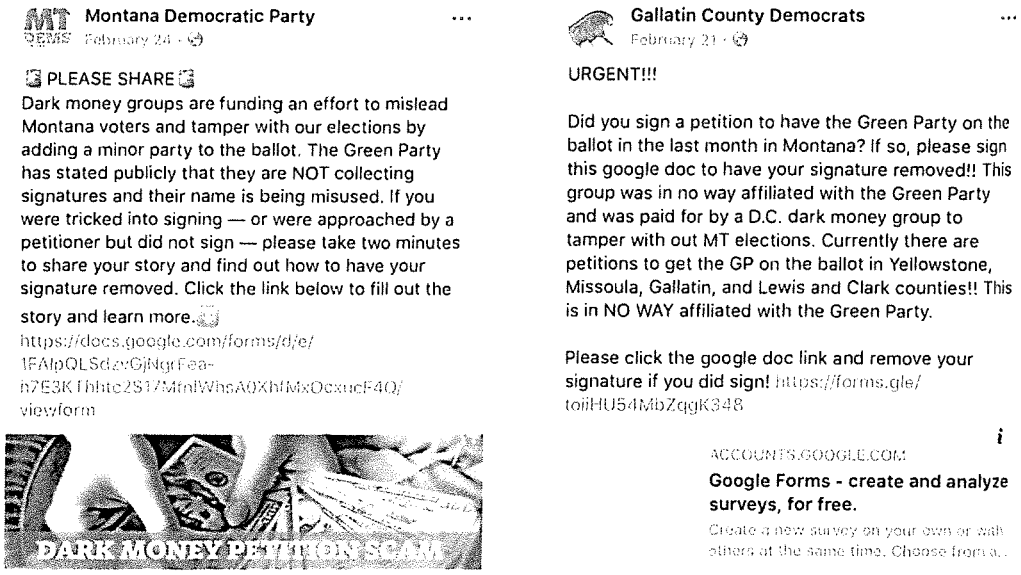


By the date the Complaint herein was filed on the eve of the election, ballots had been composed, printed, distributed, voted and returned. "Green" candidates had garnered votes without objection by either the Montana Green Party or the MDP. The Secretary was not even served with the lawsuit until June 5, 2020, three days after the primary.

The MDP's and Green Party's inaction is dispositive. After petitions are returned to and signatures are verified by the county clerks and forwarded to the Secretary of State, and certified as sufficient, the ballot is made.

Also by mid-February 2020, MDP knew that the Montana Green Party purportedly "disavowed any involvement in the petition." *Kendra Miller Aff.* at ¶ 12. By their own admission, MDP obtained copies of signature records to individually contact signers of the Petition stating that individual signers were duped.

After the deadline to submit signed petitions to election clerks passed, MDP sounded the alarms of immediacy for withdrawal form submission.



Plaintiff Blossom knew as of February 29, 2020 (*Blossom Decl.* at ¶ 7), Plaintiff Filz knew sometime in March 2020 (*Filz Decl.* at ¶ 7) and Plaintiff Weed knew during the first week of March 2020 (*Weed Decl.* at ¶ 6). Plaintiff Blossom and Weed's alleged harm could have been vindicated had either inquired with the Secretary of State regarding the status of their withdrawal. Nonetheless, their status has not changed since March 6. Any urgency of relief by Plaintiffs now is attributed to their own delay.

In its Complaint to the Montana Commissioner of Political Practices dated March 16, 2020, the MDP affirmatively asserted that they knew of the petition effort and that the Montana Green Party "has repeatedly and publicly condemned this gathering effort."[2]

[2] Complaint, *Luckey v. Advanced MicroTargeting, Inc.,* Montana Commissioner of Political Practices No. COPP-2020-CFP-004; *James Decl.* Ex. 3.

Then, MDP waited until mid-April 2020 to restart feeding signed withdrawal forms to various county clerks. *Bolger Decl.* Ex. A. When they did, county clerks repeatedly responded that the withdrawals were too late. Yet MDP did not object, and remained silent as the ballot including Green Party candidates was compiled and issued. At no time did anyone contact the Secretary of State.

It appears MDP waited to serve the Secretary until after their initial attempt was made to thwart the Green Party's primary election. It was publicly reported that MDP recruited a Green Party Candidate for the Senate as an attempt to thwart the primary election, and subsequently withdraw. *James Decl*, at Ex. 4. When the attempt did not go as planned, MDP turned to this Court with unclean hands. MDP should not be permitted to benefit from its delay. MCA § 1-3-208.

In doing so, MDP waived their claims. Waiver is defined as the intentional and voluntary relinquishment of a known right, claim or privilege. *Reiter v. Yellowstone County,* 192 Mont. 194, 627 P.2d 845, 850 (Mont. 1981). While the definition of waiver is a question of law, whether the facts of a particular case constitute waiver is a question of fact. *Masters Group Int'l, Inc. v. Comerica Bank,* 2015 MT 192, ¶ 91, 380 Mont. 1, 352 P.3d 1101.

A plaintiff may waive a claim by conduct. *Pipe Indus. Ins. Fund Trust of Local 41 v. Consolidated Pipe Trades Trust,* 233 Mont. 162, 170, 760 P.2d 711, 716 (Mont. 1988). Specifically, once a plaintiff has notice of its claim it must act. A plaintiff waives its

claim by doing nothing to enforce its rights once facts of the claim are known. *Seifert v. Seifert,* 173 Mont. 501, 508, 568 P.2d 155, 159 (Mont. 1977).

Plaintiffs are not entitled to the relief that they claim by summary proceeding. At the very least a trial is necessary to determine whether Plaintiffs waived their claims by waiting months to assert them while the Montana election process continued and election officials state-wide worked diligently to provide ballots based upon petitions presented and information certified pursuant to the party qualification statutes. After discovery, waiver may indeed be the proper subject of a summary judgment motion by Defendants. However, at this time it would be premature to grant Plaintiffs the relief that they seek.

B. The Office of Commissioner of Political Practices Is The Proper Forum for Complaints regarding Ballot Petition Efforts And Campaign Activities, And The process after the petition filing deadline is far from simple.

Local and State Election officials face a heavy workload and demanding schedule between the deadline for a minor party petition and the election. Elections Officials must be able to rely on certifications and timelines to fulfill the statutory and administrative requirements demanded by an election. Corson Dec. ¶3-34.

Even if the Secretary of State had received a complaint from either the MDT or Green Party concerning the alleged activities by the Montana Republican Party, it would have been referred to the Commissioner of Political Practices.[3] Neither the Secretary of

[3] The only complaint filed with the Secretary of State was filed against Plaintiffs, the Montana Democratic Party, alleging improper interference with an election because Plaintiffs sent an unsolicited text message demanding a signature withdrawal by the Petition signer. The Election Clerk for the County of the Complainant notified the Montana Democratic Party that the deadline had passed the following week. See *James Decl.* Ex. 5.

State nor any of his officers are statutorily tasked with the responsibility of investigating complaints concerning campaign finance for ballot petition efforts or political parties. *Corson Decl.* at ¶ 35. If the Secretary of State's Office does receive such a complaint, the complaining party is referred to the Office of the Commissioner of Political Practices. *Id.*

As further indication of MDP's deficient claims, MDP's filings wholly fail to address the issue of what, if anything, this Court can or should do relative to "Green" candidates who have already proceeded through the primary election and actually received votes. MDP's position, if accepted, would be tantamount to disenfranchising the votes of many Montana citizens who cast ballots with the expectation that their votes would be considered. Not only did "Green" candidates win votes, but county clerks across Montana have acted on the certification of the Green Party's qualification. The ends of justice are served by finding waiver in such a case. *Seifert,* 173 Mont. at 508.

II. A minor party must be eligible to conduct a primary in the first place.

A minor party does not become eligible to conduct a primary after the primary election concludes. A minor party becomes eligible to ***conduct*** a primary election pursuant to § 13-10-601. The Green Party qualified pursuant to §13-10-601 (2), after all withdrawals and signatures were properly accounted for. All parties eligible for a primary election conducted a primary election before this lawsuit was served.

A. Signers Exercised Their Right to Withdraw Their Signatures from the Petition Under Montana Law

Over a century ago, the Montana Supreme Court adopted the well-established rule that, in the absence of legislative expression to the contrary, signers of a petition have a right to withdraw before the petition is acted upon. *State v. Furnish*, 48 Mont. 28, 134 P. 297, 300 (1913). Final

action on a minor party petition occurs when the Secretary finally determines that the "petition is sufficient". 41 Atty Gen. 94. The final act of § 13-10-601 (2) is when it is determined that § 13-10-601 (2)(b) has been satisfied. §13-10-601(2)(b) was satisfied on March 6, 2020. At that time, all withdrawals received by the Secretary of State and/or County Election Clerks were accounted for.

B. The Final Act: Certification of Sufficiency

There is no set time period mentioned in the statute providing for petition by minor parties to conduct a primary election is the Board of Canvassers mentioned. Plaintiffs ask this Court to arbitrarily insert a limitation into statute that a minor party's ability to conduct a primary election is not finalized until after the primary election itself. Established case precedent requires a different conclusion.

In *State ex rel. O'Connell v. Mitchell*, 111 Mont. 94, 106 P2d 180 (1940), the Montana Supreme Court entertained a familiar issue: when is the right to withdraw from a petition cut-off? In that case, after the clerks verified signatures, the initiative was forwarded and filed by then Secretary of State Sam Mitchell. Then, just as now, statute required the petition to be signed by enough signatures. If so, the Secretary of State was to certify the petition enabling the electorate to vote on the initiative.

At the time Secretary Mitchell received the petition at issue, the initiative contained sufficient signatures. However, after the petition had been filed, but before the Secretary of State certified the petition, the number of withdrawal petitions received by the Secretary of State reduced the number below what was legally required for certification to the ballot. The Supreme

Court held that the right of withdrawal exists until the Secretary of State has determined that the petition is sufficient, in the absence of legislative expression to the contrary. [45]

Here, at the time of certification by the Secretary, the Green Party petition met statutory requirements. Petition signers that submitted withdrawal requests prior to certifying that the Green Party was eligible to hold a primary election were ***NOT*** included in the threshold determination of sufficiency, nor should they have been. This includes but is not limited to Plaintiff Taylor Blossom's withdrawal[6], and one of the two withdrawals submitted by Rebecca Weed.[7] *Corson Dec., ¶37-41.*

Once a political party petition is presented to the Secretary of State in satisfaction of §13-10-601 (2)(b), eligibility pursuant to §13-10-601 is final. *Ford v. Mitchell* (1936), at 117,823. ("We therefore hold the right to withdraw exists until the Secretary of State has finally determined, in the manner provided by statute, that the petition is sufficient.") The Secretary of State's action was already final, and the function of the Green Party's eligibility ended. Plaintiff Madeleine Neumeyer had a right to withdraw from the Green Party Petition any time before the certification, but she declined to do so. See also, 41 Op. Atty Gen. Mont. No. 94 (1986) ("Signatures may be withdrawn from a recall petition up to the time when the filing officer finally determines that the petition is sufficient and so notifies the official named in the petition.") ("Logically, somewhere there has to be an end to the conflict and a count taken.")

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[4] Thereafter, the legislature addressed the deadline for withdrawal submission from a petition for constitutional amendment, constitutional convention, initiative, or referendum. Mont. Code Ann. § 13-27-301 (3). Withdrawal forms in these instances may be submitted no later than 4 weeks before the final date for filing the petition with the Secretary of State.

[5] If §13-27-301 (3) applied to minor party petitions, the deadline for withdrawal would have occurred on March 2, 2020. Withdrawal forms were accepted up until the time of certification on March 6, 2020.

[6] Submitted on the day of, March 6, but prior to, certification.

C. All signers that withdrew their signature received before the certification of minor party eligibility were appropriately removed from the count on the minor party petition.

The right to withdrawal expires upon certification of the petition. In *State ex rel. Freeze v. Taylor* (1931), 90 Mont. 439, the day after a petition containing the requisite number of signatures had been certified, 118 withdrawal forms were filed. The Montana Supreme Court declared "the withdrawal [forms] came too late." *Id.*, at 445, 481.

Those signing the original petition had a right to withdraw at any time before final action, but not afterward. The Secretary, statutorily authorized to determine the petition, finally acted. "None of the authorities recognize the right to withdraw from the petition after the same has been finally acted upon by the person or board." *Id.*, at 445, 481.

D. The Final Act Qualifying The Green Party to Hold a Primary Election Cannot Be Based On Tabulation of the Primary Elections Result

According to Plaintiffs, finality of the minor party's right to conduct a primary election does not occur until after the primary election results are canvassed. Plaintiffs confuse certification of election results with certification of minor party eligibility for a primary election. Plaintiffs ask this Court to declare that the Green Party was ineligible to have a primary at all. The Board of Canvassers duty to certify the results of a primary has nothing to do with whether a minor party is eligible to have a primary in the first place. The law prescribes reasonable statutory interpretations, not interpretations that produce absurd results. MCA §§ 1-2-101; 1-3-233.

E. Plaintiffs' Theory Contradicts MCA § 13-10-601

Construing § 13-10-601 (2)(b) as Plaintiffs suggest would directly conflict with Title 13 requirements. For instance, the Secretary of State was required to certify the primary election ballot of eligible parties by March 19, 2020, pursuant to §13-10-208. Local election officials must be able to rely upon finality to perform their duties. According to MDP, a minor party may

be stripped of their eligibility to conduct a primary election at any time before the Board of Canvassers certify the primary election results. This would result in uncertainty and massive expenses to the county and state in administering elections.

Likewise, according to MDP's position, the most ideal Green Party Candidate for Green Party voters that declares candidacy upon certification of eligibility, only to be stripped of that right sometime before the primary, or, as requested here, after the nominee selected by Green Party voters has moved on to the general election.

How could a party's sufficient eligibility to conduct a primary election remain fluid until the Board of Canvassers act, when statute provides a mechanism to declare that a primary is unnecessary for an eligible party to conduct the same? It cannot because such construction would lead to absurd results. The primary election for a party eligible to conduct a primary can be statutorily deemed unnecessary pursuant to § 13-10-201. If the Green Party met the conditions under § 13-10-209 in the 2020 election, Montana law would have required certification for the general election as of March 19, 2020. Such a statutory construction would lead to an absurd result.

The Board of Canvassers certifying primary election results is no different than the numerous other statutory requirements contained in Title 13 by county and state election officials. The final act of the Secretary declaring sufficiency is required because in the absence of the Secretary's certification as a final act, the numerous statutes thereafter fall in limbo.

While MDP claims that a candidate may individually gather signatures if the party is ineligible, the statute clearly states that this is only permissible *if* a political party does not qualify pursuant to §13-10-601. *See*, §13-10-604 (*emphasis added*). If the finality of qualification under the provisions of § 13-10-601 remains in question until the Board certifies, as

Plaintiffs suggest, the ability of a candidate to qualify under this provision would fall months too late. An absurd result, indeed.

III. Plaintiffs' Requested Relief Should Not Be Issued Because Their Offered Statutory Construction Leads to An Absurd Result

MDP asserts that the court in Wisconsin has adjudicated the meaning of "final action" in an annexation dispute analogous to this case, citing *Town of Blooming Grove v. City of Madison,* (1957), 275 Wis. 342, 81 N.W.2d 721. In *Town of Blooming Grove*, the court held withdrawals may be accepted after the petition submission deadline to the clerk, but only until the petition is acted upon. If anything, that approach supports the Secretary of State's acceptance of withdrawals after the petition submission deadline to the clerk up until the final act.

This case is distinguishable from *Town of Bloomington* in key aspects. First, unlike the Wisconsin City Council, the Montana Secretary of State does not have the vested authority to vote to adopt a sufficient petition. Wisconsin law does not even require authentication of signatures in Wisconsin for an annexation petition. Second, a proposal for consideration by a city council is not analogous to eligibility of a minor party to participate in the primary election.

The mere *implied* power of the signer, which is not expressly provided for in the Montana Constitution or statutes, cannot be used to jeopardize the exercise of the constitutional right to petition itself. If the alleged right of withdrawal, based upon a change of mind, is to be exercised to the destruction of the initiative procedure, its justification must be questioned.

In order to accomplish anything, the proponents of a minor party's eligibility for the ballot must be able to rely on upon the signatures obtained, and if forced to combat well-funded efforts to obtain withdrawals by a major political party after no more signatures may be gathered, even beyond the primary election nominated the representing candidates in the general election, the minor party may never obtain eligibility. The longstanding rule backed by well-established

precedent which limit the withdrawal to the period before the Petition is deemed sufficient gives a reasonable time for reconsideration to the signer, and also protects the petition when completed. As one Indiana court concluded:

> "Great numbers of electors might desire to cast their ballots might be cheated and defrauded out of their right to have their names on the ballots by bad-faith pretended supporters procuring the opportunity to sign their petitions, and afterwards withdrawing names."
>
> *State ex rel. Harry v. Ice* (1934) 207 Ind 65, 191 NE 155, 92 ALR 1508.

In fact, under the rule Plaintiffs ask this Court to adopt, it would create an impossibility of reaching the final act. To count the primary votes that have been cast and counted for candidates running for a party's nomination, candidates must have the ability to file for candidacy for the party's nomination. Primary votes cannot be cast for a party's nomination of a minor party unless and until the minor party has been certified as eligible per MCA § 13-10-601.

The Secretary of State is obligated to certify the ballot names and designations by March 19. Mont. Code Ann. § 13-10-208. The Secretary is unable to do so if any Green Party candidate's eligibility remains in limbo.

A. Plaintiffs Own Conduct Acknowledges the Deadline

MDP began a widespread effort using all platforms to broadcast the narrative included in their complaint months before the Green Party was certified as eligible to participate in the 2020 election. MDP's campaign was redistributed by affiliates and members throughout the lengthy campaign.

The closer the deadline for withdrawing signatures neared, the urgency of MDP's actions escalated. In the final days before certification, MDP's campaign included red siren emojis, "URGENT" in all capital letters, "Alert", and/or a graphic containing a red triangle surrounding an explanation point with bolded letters reading "IMPORTANT" in all capital letters. *See, James*

Decl. Exs. 1. The campaign was redistributed by local affiliates, candidates, and elected board officers of the MDP.

In response, several original signatories withdrew their signature from the minor party petition. Similarly, the campaign motivated some individuals to submit withdrawal forms despite never signing the minor party petition in the first place. However, even *after* subtracting the withdrawing signers, the petition overwhelmingly received signatures sufficiently satisfying statutory requirements. Plaintiffs' filings ignore this fundamental, crucial fact.

IV. Plaintiffs' Are Not Entitled To Equitable Relief

A. The Equities Do Not Support Plaintiffs' Position

Look no further the merits of the authority cited by Plaintiffs, and it is clear they are unlikely to succeed in this case. The alleged injury claimed by Plaintiffs of being associated with the Green Party is undermined by Plaintiff's own complaint depicting active association, advocacy, and involvement with MDP—including their involvement in this lawsuit. Especially considering the Plaintiff individuals that filed timely withdrawals were removed as signatories of the petition and not included in the certification.

Plaintiffs emotional reaction about financial backers of signature gathering is far outweighed by the tremendous amount of resources involved by state and local election officials preparing and printing the ballot under contractual obligations and administering the election. Among other reasons, the public interest demands defending against an attempt to silence the thousands of Montanans that cast a ballot to select Green Party candidates in the primary election, and the personal investment and interest by Green Party candidates in all races to make their case to the voters leading up to the 2020 Election.

B. Equitable Principles Such as Laches And Unclean Hands Further Precludes Plaintiffs' Requested Relief

The equitable affirmative defenses of "Laches" and "Unclean Hands" bar Plaintiff's flawed attempt at obtaining equitable relief. They sat for over three months until after voters selected Green Party candidates in the June 2020 primary election before serving this lawsuit with the plea of expediency. In doing so, they cried foul over alleged expenditures by a major party in minor party politics.

i) Laches

This case exemplifies application of the maxim that "one who seeks the help of a court of equity must not sleep on his rights". The lack of diligence by the Democratic Party is evident. Within hours of certification the Montana Democratic Party retained Mr. Meloy as counsel, who then filed the first of several public records requests to obtain the signature report. *Corson Decl.* ¶55. Despite this, MDP and the Green Party slept as citizens paid the filing fee to seek nomination as a Green Party candidate in numerous races. MDP and the Green Party remained silent as state and county public resources paid by the taxpayer facilitated the Green Party's primary election and remained so when voters received their ballot. MDP allowed time to continue to disburse as some county election officials tabulated write-in nominations and tallied votes by contested races.

ii) Alternatively, "Unclean Hands"

MDP enters the court with unclean hands. is an unclean litigant. MDP funded and filed this lawsuit to remove the Green Party from the ballot, crying foul that a party allegedly funded efforts to qualify the Green Party for the ballot, while MDP funded efforts encouraging citizens

not to originally sign the petition and obtain withdrawals of signature to campaign against Green Party qualification.

Moreover, MDP solicited individuals to file as Green Party candidates immediately after the Green Party had been certified rather than timely challenge the certification. As was publicly reported, MDP put up a US Senate candidate for the Green Party as an attempt to thwart the election. MDP hoped their candidate would with the Green Party primary, then pull out, stripping the Green Party from having a candidate in the US Senate Race.[8] After MDP's third attempt at eliminating the Green Party from having a candidate in the race failed, MDP filed this lawsuit seeking to eliminate the Green Party's eligibility for the 2020 election entirely. MDP has unclean hands. Remarkably, the "real" Green Party did absolutely nothing.

CONCLUSION

Plaintiff's Complaint should be dismissed without hearing or additional proceedings. In the alternative, because Defendant has shown ample cause why Plaintiffs are not entitled to injunctive and other relief they request, a process including discovery and trial on the merits would be afforded.

Submitted this 19th day of June, 2020.

Austin James
Chief Legal Counsel
Secretary of State's Office
P.O. Box 202801
Helena, MT 59620-2801
406-444-2034
Austin.james@mt.gov
Assistant Attorney General

[8] *See*, "MT Green Party candidates: One says, 'don't vote for me' But wants to win Green Party U.S. Senate primary", *KTVH*, Dennison, Mike (06/01/2020).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered by email and US Postal mail to the following on June 19, 2020.

Hon. Kathy Seeley
228 Broadway, Room 104, Helena, MT, 59601
PO Box 158, Helena, MT, 59624-0158

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
(406) 442-8670
mike@meloylawfirm.com

Matthew Gordon
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
mgordon@perkinscoie.com

Declaration of Austin James

AUSTIN JAMES
Chief Legal Counsel
Secretary of State's Office
P.O. Box 202801
Helena, MT 59620-2801
406-444-2034
Austin.james@mt.gov

MATTHEW T. MEADE
Smith, Oblander & Meade, PC
PO Box 2685
Great Falls, MT 59403-2685
406-453-8144
CO-COUNSEL FOR DEFENDANTS

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY, TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, individual electors, Plaintiffs, v. STATE OF MONTANA, by and through COREY STAPLETON, SECRETARY OF STATE, Defendants.	Cause No. CDV-2020-856 Hon. Kathy Seeley **Declaration of Austin James**

I, Austin James, make the following Declaration under penalty of perjury:

1. I am co-counsel for Defendants in the above action. I am over the age of 18 years, am competent to testify as to the matters set forth herein, and make this declaration based upon my own personal knowledge and/or belief. I am generally familiar with the claims,

materials, documents, pleadings, and public records regarding this matter.

2. Attached hereto as Exhibit 1 are true and correct copies of Facebook posts by the Montana Democratic Party and affiliated entities referenced in the *Defendants' Brief in Support Of Defendants Motion To Dismiss And Memorandum Demonstrating Good Cause.*

4. Attached hereto as Exhibit 2 are true and correct copy of the Complaint filed with the Commissioner of Political Practices by the Montana Democratic Party, *Luckey v Advanced Micro Targeting* - COPP-2020-CFP-004.

5. Attached hereto as Exhibit 3 is a true and correct copy of Dennison, Mike, *MT Green Party candidates: One says, 'don't vote for me'*, KRTV (March 25, 2020). https://www.krtv.com/news/montana-news/mt-green-party-candidates-one-says-dont-vote-for-me

6. Attached hereto as Exhibit 4 is a true and correct copy of an Election Complaint against the Montana Democratic Party received by the Secretary of State's Office March 25, 2020.

7. I hereby declare under penalty of perjury under the laws of the State of Montana that the foregoing is true and correct to the best of my knowledge.

DATED this 19th day of June, 2020.

Austin James
Counsel for Defendants

Exhibit

1

Teton County Democrats-Montana
March 2 ·

Gallatin County Democrats
March 2 ·

Alert!

There are dark money groups funding... See More

IMPORTANT

1

Like Comment Share

Donavon Hawk
March 2 ·

Alert!

There are dark money groups funding an effort to mislead Montana voters and tamper with our elections by adding a minor party to the ballot. The Green Party has stated publicly that they are NOT collecting signatures and their name is being misused.

Good Democrats have been deceived into signing these petitions — if you were tricked into signing, or were approached by a petitioner but did not sign, please take two minutes to share your story and then go to your county Elections Office to submit a form to get your signature removed.

https://docs.google.com/.../1FAIpQLSdzvGjNgrFea-h7E3.../viewform

The Butte Silver-Bow County Elections Office is at 155 W.Granite, Room 208. It's open 8am-5pm on weekdays.

Gallatin County Democrats
March 2 ·

Alert!

There are dark money groups funding ... See More

Butte-Silver Bow Burros Club
March 2 ·

Alert!

There are dark money groups funding an effort to mislead Montana voters and tamper with our elections by adding a minor party to the ballot. The Green Party has stated publicly that they are NOT collecting signatures and their name is being misused.

Good Democrats have been deceived into signing these petitions — if you were tricked into signing, or were approached by a petitioner but did not sign, please take two minutes to share your stor... See More

Show Attachment

2

Like Comment Share

Butte-Silver Bow Democratic Central Committee
March 2 ·

Alert!

There are dark money groups funding an effort to mislead Montana voters and tamper with our elections

Butte-Silver Bow Democratic Central Committee

March 2 ·

Alert!

There are dark money groups funding an effort to mislead Montana voters and tamper with our elections by adding a minor party to the ballot. The Green Party has stated publicly that they are NOT collecting signatures and their name is being misused.

Good Democrats have been deceived into signing these petitions — if you were tricked into signing, or were approached by a petitioner but did not sign, please take two minutes to share your story and then go to your county Elections Office to submit a form to get your signature removed.

https://docs.google.com/.../1FAIpQLSdzvGjNgrFea-h7E3.../viewform

The Butte Silver-Bow County Elections Office is at 155 W.Granite, Room 208. It's open 8am-5pm on weekdays.

Show Attachment

Verizon 3:29 PM 68%

Gallatin County Democrats

Home Posts Events Photos Videos Abc

Gallatin County Democrats
February 21 ·

URGENT!!!

Did you sign a petition to have the Green Party on the ballot in the last month in Montana? If so, please sign this google doc to have your signature removed!! This group was in no way affiliated with the Green Party and was paid for by a D.C. dark money group to tamper with out MT elections. Currently there are petitions to get the GP on the ballot in Yellowstone, Missoula, Gallatin, and Lewis and Clark counties!! This is in NO WAY affiliated with the Green Party.

Please click the google doc link and remove your signature if you did sign! https://forms.gle/toiiHU54MbZqgK348

ACCOUNTS.GOOGLE.COM

Google Forms - create and analyze surveys, for free.

Create a new survey on your own or with others at the same time. Choose from a...

Contact Us

Sue Frazier
February 21 ·

ACCOUNTS.GOOGLE.COM
Google Forms - create and analyze surveys, for free.
Create a new survey on your own or with others at the same time. Choose from a...

Like Comment Share

Adam Schafer
February 21 ·

ACCOUNTS.GOOGLE.COM
Google Forms - create and analyze surveys, for free.
Create a new survey on your own or with others at the same time. Choose from a...

Like Comment Share

Vote Blue Montana
February 21 ·

URGENT!!!

Verizon 3:30 PM 68%

Search Facebook

Cameron Kroetz
February 21 ·

About this website
ACCOUNTS.GOOGLE.COM
Google Forms - create and analyze surveys, for free.
Create a new survey on your own or with others at the same time. Choose from a...

Like Comment Share

Jeri Doherty Lessley
February 21 ·

ACCOUNTS.GOOGLE.COM
Google Forms - create and analyze surveys, for free.
Create a new survey on your own or with others at the same time. Choose from a...

Like Comment Share

Jacob Dolan
February 21 ·

URGENT!!!

Jacob Dolan
February 21 ·

URGENT!!!

Did you sign a petition to have the Green Party on the ballot in the last month in Montana? If so, please sign this google doc to have your signature removed!! This group was in no way affiliated with the Green Party and was paid for by a D.C. dark money group to tamper with out MT elections. Currently there are petitions to get the GP on the ballot in Yellowstone, Missoula, Gallatin, and Lewis and Clark counties!! This is in NO WAY affiliated with the Green Party.

Please click the google doc link and remove your signature if you did sign!

About this website
ACCOUNTS.GOOGLE.COM
Google Forms - create and analyze surveys, for free.
Create a new survey on your own or with others at the same time. Choose from a...

3 5 Comments 3 Shares

Like Comment Share

Missoula County Democrats

February 13 ·

COMMISSIONER OF POLITICAL PRACTICES
1209 Eighth Avenue
Post Office Box 202401
Helena, MT 59620-2401
TELEPHONE: 406-444-2942
FAX NUMBER: 406-444-1643
WEBSITE: www.politicalpractices.mt.gov

Date Received and Postmark Date

RECEIVED
2020 FEB -6 P 4:13

FORM C-2 (Revised 02/20)
STATEMENT OF ORGANIZATION
TO BE FILED BY (Check One)

☑ Minor Party Qualification Committee

ORIGINAL FILING ☑ AMENDED FILING ☐

TYPE OR PRINT IN INK ALL INFORMATION ON THIS FORM EXCEPT FOR CERTIFICATION SIGNATURE

FULL NAME OF COMMITTEE
CLUB FOR GROWTH ACTION

COMPLETE MAILING ADDRESS 2001 L ST NW, SUITE 600, WASHINGTON DC 20036

MISSOULIAN.COM

Republican PAC files to get 3rd party on Montana ballot

7 1 Comment

Like Comment Share

Message

Events Videos Posts Groups Notes C

Montana Democratic Party
February 24 - 🌎

PLEASE SHARE

Dark money groups are funding an effort to mislead Montana voters and tamper with our elections by adding a minor party to the ballot. The Green Party has stated publicly that they are NOT collecting signatures and their name is being misused. If you were tricked into signing — or were approached by a petitioner but did not sign — please take two minutes to share your story and find out how to have your signature removed. Click the link below to fill out the story and learn more.

https://docs.google.com/forms/d/e/1FAIpQLSdzvGjNgrFea-h7E3KThhtc2S17MfnlWhsA0XhfMxOcxucF4Q/viewform

Message

Connie Sharp ▶ Valley County Democratic Party (Montana)
March 5 ·

Montana Democratic Party
February 24 ·

PLEASE SHARE

Dark money groups are funding an effort to mislead Montana voters and tamper with our elections by adding a minor party to the ballot. The Green Party has stated publicly that they are NOT collecting signatures and their name is being misused. If you were tricked into signing — or were approached by a petitioner but did not sign — please take two minutes to share your story and find out how to have your signature removed. Click the link below to fill out the story and learn more.

https://docs.google.com/forms/d/e/1FAIpQLSdzvGjNgrFea-h7E3KThhtc2S17MfnlWhsA0XhfMxOcxucF4Q/viewform

Lewis and Clark County Democrats
February 25 ·

Montana Democratic Party
February 24 ·

PLEASE SHARE

Dark money groups are funding an effort to mislead Montana voters and tamper wi... See More

3 1 Share

Like Comment Share

Montana Democratic Party

February 22 ·

PLEASE SHARE

There are dark money groups funding an effort to mislead Montana voters and tamper with our elections by adding a minor party to the ballot. The Green Party has stated publicly that they are NOT collecting signatures and their name is being misused.

Good Democrats have been deceived into signing these petitions, and these dark money interests only need 5000 signatures before they can place a shill candidate on the ballot. If you were tricked into signing — or were approached by a petitioner but did not sign — please take two minutes to share your story and find out how to have your signature removed.

https://docs.google.com/forms/d/e/1FAIpQLSdzvGjNgrFea-h7E3KThhtc2S17MfnlWhsA0XhfMxOcxucF4Q/viewform

Message

Montana Democratic Party

February 13 ·

A DC dark money group that has endorsed and spent millions to elect Matt Rosendale is tampering with Montana elections.

Out of state interests tried this in 2018, and they're trying the same thing now.

It won't work.

https://helenair.com/government-and-politics/elections/republican-pac-files-to-get-rd-party-on-montana-ballot/article_e9ba8c6d-39cf-5706-a1b1-802203d1d9ca.html#tracking-source=home-top-story-1

Message

Exhibit

2

THE STATE OF MONTANA

Commissioner of Political
Practices 1209 Eighth Avenue
Post Office Box 202401
Helena, MT 59620-2401
Phone: 406-444-2942
Fax : 406-444-1643
www.politicalpractices.mt.gov

FOR OFFICE USE ONLY

RECEIVED
2020 MAR 16 P 4:27
COMMISSIONER OF POLITICAL PRACTICES

HAND DELIVERED

SIGNED/NOTARIZED

Campaign Finance and Practices

Complaint Form (08/17)

Type or print in ink all information on this form except for verification signature

Person bringing complaint (Complainant):

Complete Name: Sandi Luckey

Complete Mailing Address: PO Box 2238
E Helena MT 59635

Phone Numbers: Work 406 442 9520 Home

Person or organization against whom complaint is brought (Respondent):

Complete Name: Advanced Micro Targeting, LLC

Complete Mailing Address: P.O. Box 803167
Dallas, TX 75380

Phone Numbers: Work 214-555-6666 Home

Please complete the second page of this form and describe in detail the facts of the alleged violation.

Verification by oath or affirmation

State of Montana, County of Lewis & Clark

I, Sandi Luckey, being duly sworn, state that the information in this Complaint is complete, true, and correct, to the best of my knowledge and belief.

(SEAL) KYMBERLY TRUJILLO
NOTARY PUBLIC for the
State of Montana
Residing at East Helena, Montana
My Commission Expires
August 02, 2020

Signature of Complainant

Subscribed and sworn to before me this 16th day of March 2020.

Notary Public

My Commission Expires:

MONTANA DEMOCRATS

HAND DELIVERED

RECEIVED

2020 MAR 16 P 12:05

COMMISSIONER OF POLITICAL PRACTICES

March 16, 2020

Commissioner of Political Practices
1205 Eighth Avenue
Post Office Box 202401
Helena, MT 59620-2401

Commissioner Mangan;

As you may be aware, an entity known as Advanced Micro-Targeting (AMT) has engaged in a signature gathering campaign on petitions to qualify the Green Party as a minor political party in Montana. This, despite the fact that the actual Montana Green Party has repeatedly and publicly condemned this gathering effort. Some group has funded these activities, which commenced in January of this year.

As you are also aware, § 13-37-602 MCA requires a signature gathering entity to certify an organization statement with your office within 5 days of making an expenditure. Neither AMT nor any other group funding this gathering effort has identified itself to your office. Accordingly, those funding this effort to place the Green Party on the primary ballot remain anonymous despite the recent changes enacted by the Montana legislature to achieve disclosure of this information.

It is respectfully requested that you conduct an investigation to determine the source of funds used to place the Green Party on the ballot, and to impose civil penalties upon the group accountable for the expenditures for failure to comply with Montana campaign financing disclosure laws.

Sincerely

Sandi Luckey
Executive Director
Montana Democratic Party

Subscribed and sworn before me this 16 day of March 2020

County: Lewis & Clark City – Helena MT

DEBORAH L. BELFORD
NOTARY PUBLIC for the
State of Montana
Residing at Helena, Montana
My Commission Expires
July 16, 2023

Deborah L Belford

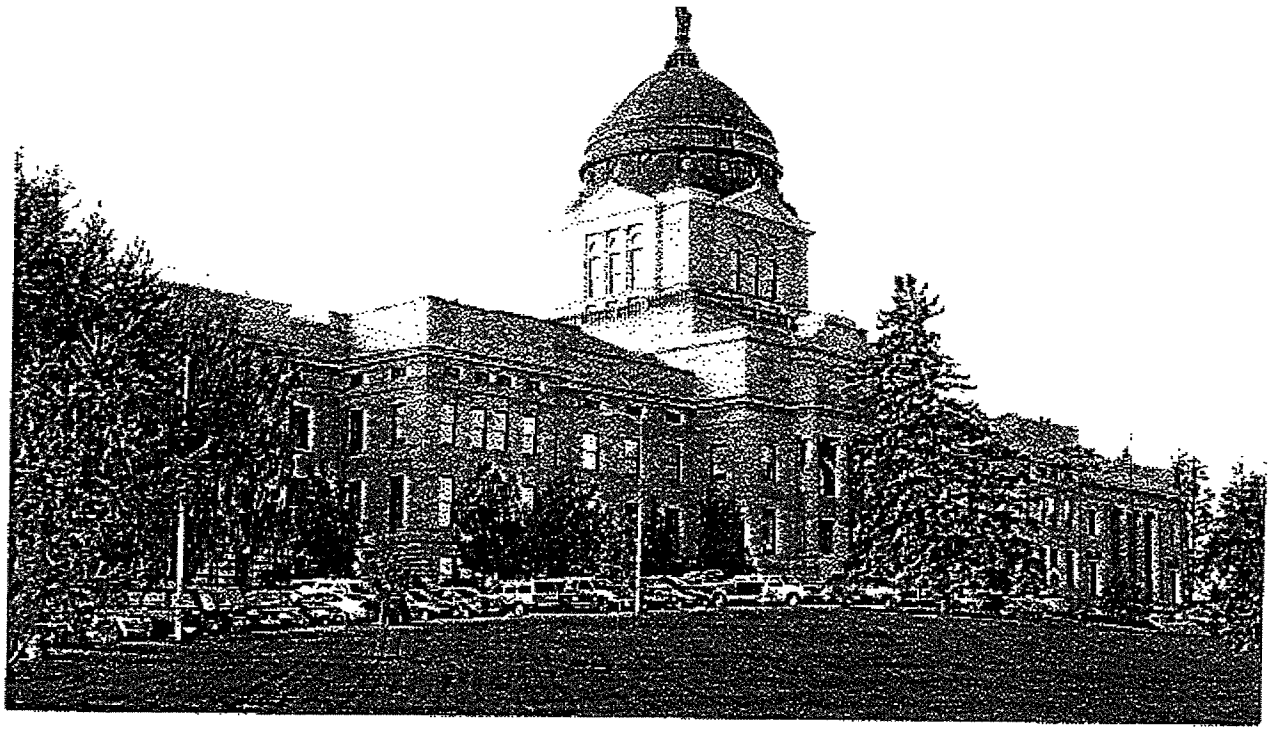
Notary Public Residing: Lewis & Clark City
Helena MT
Commission Expires: 7/13/2023
Deborah L. Belford (print)

Exhibit

3

MT Green Party candidates: One says, `don't vote for me'

But wants to win Green Party U.S. Senate primary



Green Party candidates running for Montana state offices run the gamut.

By: Mike Dennison

Posted at 1:06 PM, Mar 25, 2020 and last updated 9:15 AM, Mar 26, 2020

Dennis Daneke, one of two Green Party candidates in Montana's 2020 U.S. Senate race, has a message you won't hear from many candidates: "Please do not vote for me."

Democrats in the general election.

Daneke, a retired professor of sustainable construction technology who lives in Lolo, says he was essentially recruited by Democrats to defeat Frederickson in the Green Party primary – and, then, once on the general election ballot, he might withdraw from the race.

"There is no reason for me to be on the ballot," he told MTN News in a recent interview. "I don't want anybody wasting their vote."

Such are the oddities of the last-minute qualification of the Green Party for Montana's 2020 ballot – an effort, as revealed this week, that was financed by the Montana Republican Party.

The Montana Green Party has said it had nothing to do with the qualification of its party, and the state Democratic Party denounced the effort as "election

Meanwhile, six people – including Daneke and Frederickson – have filed to run as Green Party candidates.

John Gibney of Hamilton, a retiree, is running for the U.S. House; Robert Barb of Billings is the Green Party candidate for governor; Roy Davis of Helena is running for attorney general; and Gary Marbut of Missoula is running for a state Senate seat.

The highest-profile contest is the U.S. Senate race, where Republican U.S. Sen. Steve Daines is expected to face off this fall against Democratic Gov. Steve Bullock.

Libertarian Susan Good Geise, a Lewis and Clark County commissioner, is also in the race – and, the Greens will have a June 2 primary contest between Daneke and Frederickson, to pick their nominee.

Daneke told MTN News that on March 9, the last day of candidate filing, a Democratic friend called and told him that Republicans had recruited a Green Party candidate in the Senate race, with the intent to hurt Bullock.

"We didn't want that Green Party candidate to get on the general-election ballot because she was unopposed, so I went online and filed," he said.

Frederickson is a former auditor at the state Department of Public Health and Human Services, who has said the Bullock administration created a "hostile work environment" for employees who raised questions about alleged fraud and mismanagement of public money.

Daneke said he understands that she believes she was treated unfairly by the Bullock administration before leaving her job, but that "the polling booth is not the place to fight grievances."

Daneke said he's a member of the Green Party, agrees with its platform, grows most of his own food, and powers his home with solar power.

"If you really want to vote green, vote for the green guy," he said.

Still, Daneke said if he wins the primary election, he may withdraw from the general election ballot, so he doesn't pull any votes away from Bullock in a close race.

Davis, the attorney general candidate, told MTN News that he's been a registered Democrat, has worked on Democratic campaigns in Montana and "believes strongly in many principles of the Democratic Party."

But, he said the party has "mellowed" and "deviated from the needs of the time" and that he believes the Green Party is the "wave of the future, in many respects." He said he lives in a home that is heated without fossil fuels or electricity.

Davis said he's never run for office before, and is still formulating his campaign plans.

Gibney, the House candidate, told MTN News that he's not a fan of Democrats, "Republican in name only" or, for that matter, parts of the Green Party platform.

"They conflict with of (my) views, but that's OK," he said. "I have my own ideas."

Gibney said candidates shouldn't have to "toe the party line," and that he'll be rolling out some of his ideas soon.

Marbut, who's running in Senate District 47, which includes parts of Missoula and Lake counties, is known primarily as the president of the Montana Shooting Sports Association, a gun-rights group.

that he built himself, with solar power, and has perhaps more "green" credentials than any other candidate.

But, in emails to supporters, he's also poked fun at his own candidacy, saying that gun owners are doing their part for climate change by using "smokeless powder."

Barb did not return telephone or email messages.

Exhibit

4

Corey Stapleton
MONTANA SECRETARY OF STATE

Potential Election Law Violation Report

Fields marked with an asterisk (*) are required fields.

LAST NAME*: Youde
FIRST NAME*: Ronald
MIDDLE NAME: E.
ADDRESS*: 5015 Middle Valley Drive
CITY*: Billings
COUNTY*: Yellowstone
ZIP CODE*: 59105
PHONE*: 406-252-5400
EMAIL: ryoude@youdelaw.com
DATE OF SUSPICIOUS ACTIVITY*: March 25, 2020
LOCATION OF SUSPICIOUS ACTIVITY*: Text message received on my cell phone
COUNTY WHERE ACTIVITY WAS WITNESSED*: Yellowstone
CITY/TOWN WHERE ACTIVITY WAS WITNESSED*: Billings

1) Did you report the incident to local law enforcement?* ☐ Yes ☐ No
2) Did you report the incident to the local election administrator?* ☐ Yes ☒ No
3) Did the incident involve signature gathering for a proposed ballot issue?* ☒ Yes ☐ No

If "Yes," to 3), which ballot issue did the incident involve: Green Party attempt to get on Montana ballot

Please describe what you witnessed (use back page if necessary)

Today at 2:04pm, I received a text message from an alleged volunteer with the Montana Democratic Party. The phone number associated with the text message was 406-510-2472. The message stated as follows:

Hi Ronald!

My name is Shelby and I'm a volunteer with the Montana Democratic Party. Recently you signed a petition to put the Green Party on the ballot. but it turns out the petition was an effort funded by out-of-state Republican dark money groups trying to interfere with our elections. Already the Montana Green Party claims they didn't have anything to do with the signature collection!

But, I have good news, we CAN help you REMOVE YOUR SIGNATURE today.

My complaint is that the Montana Democratic Party is intentionally misleading people in an effort to keep the Green Party off the ballot and protect its own candidates. (Cont.)

SIGNATURE*: [signature] TODAY'S DATE*: March 25, 2020

MONTANA ELECTION LAW CAN BE FOUND TITLE 13 OF THE MONTANA CODE ANNOTATED CHAPTERS 1-38

This form is available for Montana citizens to report suspicious election activity and/or any activity surrounding the collection of signatures for ballot measures. This completed report will allow the Montana Secretary of State to create a record of possible election violations, so that the office may document allegations and refer any questionable actions to the appropriate County Attorney, or the County Election Administrator. You may be contacted to provide additional information about the alleged incident. If this complaint involves signature gathering for a ballot issue, the sponsor of the ballot issue in question may be sent a copy of this complaint.

The Office of the Montana Secretary of State is not responsible for campaign or lobbying issues. A separate agency, the Commissioner of Political Practices, has jurisdiction over campaign finance and campaign activity. The commissioner also monitors and enforces laws relating to lobbying disclosure and ethical standards of conduct for legislators, public officers, and state employees. If your complaint involves campaign finance or campaign activity, the complaint should instead be filed with the Commissioner of Political Practices.

SUBMIT this form to fairelections@mt.gov

1 of 2

Corey Stapleton
MONTANA SECRETARY OF STATE

Potential Election Law Violation Report

Fields marked with an asterisk (*) are required fields.

Please describe what you witnessed (cont'd)

The Green Party of Montana's efforts to get on the ballot are well documented in the media and on its own home page (mtgreenparty.org). According to the Montana Secretary of State's own website, the Green Party of Montana is a qualified political party.

I would like the Montana Democratic Party investigated for this conduct. The individual who sent this text and those acting in concert with him/her are intentionally misleading voters in order to undermine the Green Party's efforts to appear on the ballot and the Green Party's status as a qualified political party.

Thank you.

2 of 2

Edward D. Greim, *pro hac vice*
GRAVES GARRETT, LLC
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
Tel.: (816) 256-3181
Fax: (816) 222-0534
edgreim@gravesgarrett.com

Chris J. Gallus
GALLUS LAW
1423 Otter Rd.
Helena, Montana 59602
Tel.: (406) 459-8676
chrisjgalluslaw@gmail.com

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA DEMOCRATIC PARTY, TAYLOR BLOSSOM, RYAN FILZ, MADELEINE NEUMEYER, and REBECCA WEED, **Plaintiffs,** **v.** **STATE OF MONTANA, by and through its SECRETARY OF STATE, COREY STAPLETON,** **Defendant.**	**Case No. CDV-2020-856** **Brief of Amici Curiae- Petition Signers Lorrie Campbell And Jill Loven**

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TABLE OF AUTHORITIES

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OTHER

INTRODUCTION

Amici Curiae Campbell and Loven signed the petition to qualify the Green Party for primary ballot access. Loyalists of opposing major parties, they both believe the Green Party deserved to have its voice heard, and both found it irrelevant that the Republican Party funded a petition effort that gave voice to over 1,000 Green Party primary voters and a slate of Green Party general election candidates. Like 13,000 other petition signers, they were glad to see the Secretary of State certify the petition, and for the next three months, resisted an intense push by the Montana Democratic Party (MDP) to withdraw their signatures. They appeared here to assert First Amendment rights that directly oppose those asserted by the Individual Plaintiff-signers.

The Individual Plaintiffs claim their Montana constitutional rights "not to associate" with Republicans should be enforced *not against the Republicans*, but against absent non-dissenting petition signers like Amici, absent Green Party candidates, and Green Party voters who cast primary ballots in their favor and would support them in the general election. All parties agree that when the Supreme Court created the common law right to withdraw, it imposed limits. They are immovable because they mark the dividing line between the state-protected rights of the Individual Plaintiffs and the First Amendment rights to effective association enjoyed by these Amici, Green candidates, and thousands of other absent parties with real interests at stake. Other non-legal factors—such as notice given by the Secretary—affected both sides of this dispute, and ultimately cannot become a basis for retroactively rewriting the rules on a grand scale, long after the petitioners could have reacted to protect their own rights. In short, there is no basis for the Court to grant preliminary relief eliminating the Greens' ballot access and destroying the effectiveness of Amici's First Amendment-protected association.

FACTS

In early 2020, over 13,000 Montana voters, including Lorrie Campbell and Jill Loven, ("Amici-Signers") signed a petition to qualify the Green Party to hold a primary, stating: "We, the undersigned and registered voters of the state of Montana hereby request that in accordance with 13-10-601, MCA, the names of the candidates running for public office from the Green Party be nominated as provided by law." Circulators turned in the signatures to county clerks by March 2; the petition was certified on March 6th; Green candidates filed nominating papers by March 9; and the Secretary certified all of the Green Party ballots to county clerks by March 19.

The Green Party primary ballots were immediately designed and printed; mailed to overseas voters after printing, no later than April 17; and mailed to absentee list voters, and to all voters where election authorities chose to vote by mail due to Covid (see Exhibit 1, referencing the Governor's Executive Order allowing this) by May 8. Only in-person voting remained for June 2. *See* Defendants' Exhibit 1. Between April 17 and June 2, over a thousand voters picked the Green Party primary ballot (disqualifying them from choosing any other ballot), qualifying several Green Party candidates for the general election for Montana state and federal offices.

On June 1, 2020, Plaintiffs filed this action seeking not only to invalidate the four individual Plaintiffs' signatures, but also to nullify the ongoing primary election by giving effect to all purported "withdrawals" harvested by the MDP. Plaintiffs introduced no evidence on why they waited until June 1 to file. The MDP began its campaign over three months earlier, in late February, a few weeks before petition proponents' March 2 deadline to submit their petitions. From the very start, the MDP persuaded signers to withdraw their support for Green Party ballot access by stating that the petition was a fraudulent, non-Green effort. At trial, the MDP introduced two purported Green Party Facebook posts: one from February 13 (Ex. 10) stating that the Greens were not collecting signatures; and one from April 14 (Ex. 14) telling voters to "ask" Green candidates "to account for their belief in a platform." Plaintiffs called no Green witnesses to establish basis of these statements or the authority for assuming they were held by most Greens. Yet the MDP used these posts, and articles quoting them, for its campaign. Likewise, the MDP's evidence regarding signers' reactions to this message was hearsay (as to the twelve calls made by its operative Kendra Miller) or double-hearsay (as to Miller's claims about how signers reacted during MDP staff's thousands of other calls).

Of the four withdrawer-Plaintiffs, none testified they had ever planned to vote for a Green; rather, they viewed the party's message favorably. Nor did Plaintiffs testify they heard a false statement from the petition circulators, whose petitions stated: "The principle represented by the Party is Environmental and Social Justice." Plaintiff Filz did not appear or testify. Plaintiffs Weed and Blossom testified that they sought to withdraw after the MDP told them in February 2020 that the Greens were not behind the effort. The facts showed that their withdrawals were submitted on or before March 6 and their original signatures were not counted toward the total. Plaintiff Neumeyer testified that the MDP did not contact her until March, and she agreed to withdraw after being told the Republicans had hidden their support for the effort.

She testified that she immediately went to the Lewis & Clark County Elections Office, but was told it was too late to withdraw. After she reported this to the MDP that same March day, it emailed a DocuSign form that she immediately signed and returned to the MDP. It stated: "I want to remove my name from the Green Party Political Qualification Petition. However, due to public health concerns regarding COVID-19 and the need to minimize nonessential travel and maintain social distancing, I am unwilling at this time to obtain notary services or go to the county elections office to submit the attached Request for Withdrawal of Signature form."

Lorrie Campbell, like the four Plaintiffs, is a strong Democratic Party supporter, supported Green Party ballot access because she believes its voice should be heard, and intends to vote for Democratic candidates this fall. Jill Loven is a strong Republican Party supporter, supported Green Party ballot access because she believes its voice should be heard, and like all of the other individuals on both sides of the case, still intends to vote with her own party this fall. While the four withdrawer-Plaintiffs say they are among hundreds who changed their minds about supporting Green Party ballot access when learning it had either outside support or Republican support, Amici-Signers Campbell and Loven are among thousands who did not.

The Green Party and its candidates were not brought into the case by Plaintiffs. No Plaintiff testified that they had actually acquainted themselves with the Green candidates' positions, believed that they were inconsistent with that of the Green Party, or believed that the candidates' or Green Party's positions should disqualify them from ballot access. Therefore, where the withdrawing Plaintiffs differ with the Amici-Signers is in their estimation as to whether it matters that the Republican Party put money behind its own belief that these candidates' voices could help Republicans. The two remaining Plaintiffs who find this fact dispositive argue that it tips the scales against Green Party ballot access, regardless of whether their fellow petition-signers such as Campbell and Loven agree with them, and regardless of whether the actual Green Party candidates and voters who participated in the primary also share that belief. Specifically, the individual Plaintiffs claim that their Montana constitutional "right not to associate" trumps the conflicting First Amendment "right to effectively associate" that was asserted by Campbell and Loven in their attempted intervention, but that—in contrast to these two remaining Plaintiffs' claimed rights—cannot be asserted in this Court.

Directly opposing these two remaining Plaintiffs' positions are Amici-Signers Campbell and Loven. They urged in their Motion to Intervene, and urge again here, that this Court cannot

sustain Plaintiffs' claimed rights to withdraw signatures until June 1, and via DocuSign, a degree of formality far below what is required to sign a petition in the first place. If this is what Montana allows, it renders illusory the right of minor party ballot access supporters such as Campbell and Loven to meaningfully and effectively petition the state for ballot access. Here, this Court has two individual Plaintiffs and two Amici-Signers, all original petition signers who now come to this Court from two different camps: one camp of hundreds that chose to withdraw and one camp of thousands that did not waver. If this Court reviews the Plaintiffs' Cross-Motion for Summary Judgment on the DocuSign issue, it will find that the Plaintiffs rely on the same First Amendment case law to support their claimed right to withdraw (late, via DocuSign) that the Amici-Signers cite to support their right *not* to have the petition undermined by late, DocuSigned withdrawals. The parties' claims of constitutional rights could not be more directly opposed.

Even though this Court denied intervention to Campbell and Loven and has decided to proceed without the Green Party or its candidates, it must consider all of these parties' First Amendment rights to effective association in deciding whether to allow months-after-the-fact withdrawals by DocuSign. The evidence showed that the Plaintiffs can only prevail if *both* (1) withdrawals through late May are allowed; and (2) DocuSigned withdrawals are allowed. As shown below, even if this Court becomes the first Montana court to find that state law allows this, the absent parties' First Amendment right to effectively associate prohibits it.

ARGUMENT

I. The proponents of Green Party ballot access, including the absent Green Party candidates and the Amici-Signers, have a First Amendment right to effectively associate through Montana's party qualification petition process.

Associating to promote political goals, including signing a petition, is protected under the First Amendment. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Norman v. Reed*, 502 U.S. 279, 288 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1980). More specifically, the First Amendment protects the right to make that association effective: "to associate in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 793. This particular facet of the First Amendment—a guarantee that a state petition process will not impose undue burdens on gathering sufficient signatures—protects petition proponents like the Amici-Signers. *See Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (striking down restrictions that made it more difficult to amass petition signatures, and holding that "…[T]he circulation of a petition

involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (finding residency and filing deadline provisions of Arizona law unconstitutional because they unduly burdened process by which independent candidate gathered signatures to gain ballot access); *accord Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87, 119 S. Ct. 636, 639–40, 142 L. Ed. 2d 599 (1999) (invalidating Colorado requirements, including that petition circulators disclose funders to potential signers, and holding that First Amendment protection for the petition process is "at its zenith"). Thus, petition proponents like the Amici are protected from state law that renders petition procedures ineffective for achieving political change.

The First Amendment's coverage of this right is apparently a point of agreement among all parties; Plaintiffs argue it protects their own rights to associate in a signature-withdrawal effort. See Plffs' Br. Support Cross-Motion for Summary Judgment and in Opp. to Defendant's Motion for Summary Judgment, pp. 13-14. If the First Amendment protects the Plaintiffs' right to effectively join together to submit withdrawal signatures, it surely protects the Amici-Signers' right to effectively join together to submit signatures qualifying the Green Party in the first place.

II. Accepting Plaintiffs' proposed post-turn-in withdrawals renders the Applicants' association ineffective, violating their First Amendment rights.

Accepting Plaintiffs' theories renders illusory the right Montana granted to qualify minor parties by the petition process. *Am. Party of Texas v. White*, 415 U.S. 767, 783, 94 S. Ct. 1296, 1307, 39 L. Ed. 2d 744 (1974) (citing *Jenness v. Fortson*, 403 U.S. 431, 439, 91 S.Ct. 1970, 1974 (1971) ("The Constitution requires that access to the electorate be real, not 'merely theoretical.'"). As shown below, Plaintiffs' rewrite of Montana law would render minor party ballot access "merely theoretical," not something that can realistically be achieved. While voters must strictly follow petition requirements, their opponents could easily nullify those efforts using means as simple as a phone campaign[1] targeted to the nearest-margin districts. It is even easier where, as here, the campaign can last three whole months after the petition has been deemed sufficient.

[1] In their Cross-Motion for Summary Judgment, Plaintiffs admit, as they must, that their proposed standard for withdrawals is so lax that a mere email or phone call to a local election administrator is sufficient to remove a petition name. Plffs' Br. Support Cross-Motion for Summary Judgment and in Opp. to Defendant's Motion for Summary Judgment, p. 7, n. 3. There is no requirement and no process for ensuring that the request is knowing and authentic.

That task is rendered even easier using DocuSign. Direct human contact is no longer necessary, and it is easy to pressure a stranger over email, text, or voicemail. Here, MDP's campaign from late February to late June was waged by serial texts and messages to thousands of targeted signers, claiming the petition was the result of a "fraud" and imploring them to "clear their names," as if the signers themselves stood accused of participating in the fraud. Taken separately, as shown below, each of Plaintiffs' proposals for loosening existing requirements regarding withdrawals can and should be rejected as a matter of state law. But considering their cumulative effect—as the Court must, since Plaintiffs must win on nearly every issue in order to cross the finish line—Plaintiffs' proposed rewrite of Montana's nominating petition standards renders the process an easily-gamed sham. It therefore violates the First Amendment rights of voters like Ms. Campbell and Ms. Loven who had a right to expect an effective petition process.

a. Post-turn-in withdrawals make it impossible to mount an effective campaign to qualify a party for the ballot.

Across the country and across the decades, court after court has recognized that allowing withdrawals after the proponents' filing deadline – at which point no further signatures in support may be submitted – is "unworkable," making it so impossible to mount a petition campaign that it jeopardizes the petition right itself. *See Rekart v. Kirkpatrick*, 639 S.W.2d 606, 608 (Mo. banc 1982) ("To permit withdrawals after the petition is completed and filed, and the work of securing signatures abandoned, seems to us to make the system wholly unworkable. We do not believe that this mere implied power of the signer, which is not expressly provided for in our Constitution or statutes, can be used so as to jeopardize the exercise of the constitutional right itself."). And California held long ago:

> …if the alleged right of withdrawal, based upon change of mind, is to be exercised to the destruction of the initiative procedure, then we may well question its justification. In order to accomplish anything, the proponents of a measure must be able to rely upon signatures obtained, and, if continually forced to seek new ones to take the place of withdrawals, may never be able to prepare a proper petition within the limited period which usually exists. To permit withdrawals after the petition is completed and filed, and the work of securing signatures abandoned, seems to us to make the system wholly unworkable.

Uhl v. Collins, 217 Cal. 1, 4, 17 P.2d 99, 100 (1932).

The problem is not merely that proponents will never know how many of their gathered, pre-validated signatures they can rely on. In a months-long post-submittal period, one party will

have a free hand to cajole and threaten individual signers by name, privately subjecting each of them to a degree of pressure and attention that is completely lacking from a normal circulator-signer interaction in the everyday course of business. *See, e.g., State ex rel. Harry v. Ice*, 207 Ind. 65, 191 N.E. 155, 156 (1934) ("If nominating petitioners are permitted to withdraw their names after opportunity for supplying additional names, or filing new petitions, has passed, a very patent door to chicanery and fraud upon the voters and the community is provided."); *Commonwealth ex rel. Meredith v. Fife*, 288 Ky. 292, 156 S.W.2d 126, 127 (1941) (post-turn-in withdrawals were prohibited, since otherwise the right to a public vote could be defeated by deception and fraud in that after the advocates of an election had filed what they thought was a sufficient petition and it was too late to file a new petition, the election could be prevented by having signers of the original petition withdraw.). Unlike the petition-gathering process, in which counter-petition efforts frequently interact in the open with circulators and petition-signers, the issues are debated simultaneously, and petition supporters can gauge the effect of counter-efforts and if necessary persuade new groups of voters, the withdrawal process happens in private and in secret, with no further participation by the proponents.

In conclusion, a petition —which by definition requires an ascertainable, verifiable list of names—simply cannot work if an entire withdrawal campaign can be mounted after the proponents must stop gathering signatures.

b. Montana's petition process worked until now because it long ago aligned itself with every other state by holding that petition withdrawals must be before sufficiency is determined and must observe the same formalities as petition signatures.

When citizen petitions were still a new innovation, Montana joined the many states[2] who prohibit withdrawals after signature turn-in, or at least after the official charged with accepting

[2] In addition to the state court decisions cited above, see also *Healey v. Rank*, 82 S.D. 54, 58, 140 N.W.2d 850, 852 (1966) ("We think it is not unreasonable to hold, and in fact both good conscience and sound public policy dictate, that the signer of a purely political petition, such as one nominating a candidate for office or requesting the submission of a question at an election, is under an obligation to his fellow signers not to withdraw his name from such petition at a time when it is too late for the addition of names or the effective filing of a new petition."); *In re Initiative Petition No. 2, City of Chandler*, 1935 OK 139, 170 Okla. 507, 41 P.2d 101, 102 ("Each petitioner acts on his own responsibility and if he should change his mind, or if he should have been induced to sign under misapprehension or through undue influence, he ought to have the right to correct his mistake, *if he does so before the rights of others have attached by final*

the petition has taken final action to determine its sufficiency. *Ford v. Mitchell,* 103 Mont. 99, 61 P.2d 815, 821-822 (1936) (collecting earlier Montana cases, and finding that "the right to withdraw exists until the secretary of state has finally determined, in the manner provided by statute, that the petition is sufficient.") In *State ex rel. O'Connell v. Mitchell*, 111 Mont. 94, 106 P.2d 180, 181 (1940), in the absence of an express deadline on signature withdrawals for an initiative petition, the Montana Supreme Court applied the "final act" rule. In doing so, it found that the rule did not render the initiative procedure "unworkable", implying that a withdrawal deadline which *does* render the process unworkable would be held in disfavor.

Montana also adopted the rule, again following authority from across the country, that withdrawals must be proven with the same formality as the petition signatures they seek to remove. *Ford v. Mitchell,* 61 P.2d at 821 (holding that if withdrawals are to be allowed, they must be completed "in an appropriate manner," and finding that certification on withdrawal petition was sufficient because it was identical to the certification required on the underlying initiative petition). *Ford* cited *State ex rel. Westhues v. Sullivan*, 224 S.W. 327, 339 (Mo. banc 1920), in which the Missouri Supreme Court refused to recognize withdrawals via postcards that had been supplied by the person challenging the petition. It reasoned:

> To obviate fraud the statute… requires that each sheet of the petition shall be verified by the affidavit of the circulator… in which affidavit such circulator shall give the names of the signers thereon, and make oath that they signed it in his presence and other matters named in the statute, supra. The very purpose of the statute in requiring this formality was to obviate fraud. To get off of such a petition the action of the signer should be at least as formal. His request should at least be verified by his affidavit before some officer. This to the end that the secretary of state might know that the signature to the request was genuine. A mere postal card or letter purporting to be signed by a signer of the petition is not sufficient. Such course would open wide the gates for fraud. These alleged withdrawals cannot be considered.

Westhues, 224 S.W. at 339. Montana adopted the *Westhues* rule 80 years ago and until June 1, 2020, it has never been called into question.

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action on the part of the officers or board to whom the petition is addressed") (emphasis added); 42 Am.Jur.2d, *Initiative and Referendum* § 31 (1969) ("[W]here a statute prescribes a certain time within which a referendum petition may be filed, generally signers of the instrument may withdraw therefrom at any time during the period allowed for filing but not after the expiration of that period.")

c. The combined impact of Plaintiffs' requested concessions will make the petition process a completely ineffective means of associating for political change.

Here, Plaintiffs can *only* prevail if Montana retroactively jettisons two long-established protections for petitioning voters by (1) extending the allowable withdrawal period for months after the petition was turned in and deemed sufficient; and (2) allowing DocuSign—the modern-day equivalent of postcards or phone calls—to suffice as proof of a withdrawal. Montana's courts cannot now change the rules, as it will render minor party ballot access by petition a "theory" rather than a usable system for winning voter support.

First, if withdrawals need not be received by petition turn-in, or at least within the few additional days it requires for the Secretary to find that the petition has sufficient signatures, a petition drive will consist of two separate campaigns. In the first campaign, circulators will have to follow strict rules regarding the form of the petition, all of which are meant to deter fraud. This includes a verification that the named individuals did indeed present themselves to the circulator and sign, and that they knew what they were signing. The circulator's affidavit is then notarized. Proponents keep careful track of the number of signatures gathered in different areas and validate those signatures by matching them to Montana's voter database, giving them some sense of where they stand in meeting statutory requirements. Opponents are free to counteract circulators by following them and attempting to discourage voters from signing—a frequent tactic—and are free as the MDP did for weeks before turn-in to mount withdrawal campaigns. Proponents, in turn, can observe and respond to the opponents' message as they talk to voters in the field. Just as important, they can monitor their own petition results, and will have some sense of who has signed to become part of their association. Most petitioners now have access to state voter files, so that they can also determine which signatures are valid, and in what districts. If the opponents' counter-message begins to resonate and withdrawals are filed, proponents can gather even more signatures. It is this basic transparency and predictability—knowing who has signed on to join the team as the campaign draws to a close—that gives political supporters the confidence that a petition can be effective, and to commit their time and money to the petition process. Lacking this, what minor party ballot access supporter would rationally make the effort?

If Plaintiffs have their way, every ballot access effort will now have a second phase. Unlike the first phase, only the opponents will hold the key to membership in the petition-

association. The petition will essentially become theirs. Having gained the advantage of seeing the proponent's hand and reserving all of their resources for phase two, opponents have the luxury of running a targeted pressure campaign. Rather than approaching the general population, they will be able to pick off specific individuals in specific areas where the proponents' margin was thinnest. Using modern data mining tools, they can obtain phone numbers and email addresses and continually pressure their targets in private and in secret, with no further participation by the proponents. Many former supporters, repeatedly pressed and presented with only the opponents' facts, may take the easy route and withdraw.

Once the campaign-after-the-campaign becomes the rule, petition proponents will never be able to predict how many signers will change their minds or succumb to pressure during this extended "withdraw-only" phase. In a real sense, a proponent can never gather enough signatures because opponents will have months to sit back and bombard signers with texts and emails, picking off voters one by one. This will certainly chill future ballot access efforts.

In conclusion, states do not need to use nominating petitions to allow minor party ballot access. But once they do so, states must afford proponents a process that gives real effect to their political association and speech. "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process ... the First Amendment rights that attach to their roles." *Republican Party of Minn. v. White,* 536 U.S. 765, 788, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (internal quotation marks and ellipsis omitted). Because it fails to provide a predictable process, Plaintiffs' theory, if this Court were to now adopt it as Montana law, would infringe on proponents' rights under the First Amendment to the United States Constitution and Article II, Sections 6 and 7 of the Montana Constitution by undermining their rights to petition, to vote, and to access the State's primary processes.

III. Plaintiffs' asserted right to withdraw is defeated by Amici-Signers' superior constitutional claim.

a. Plaintiffs' claims fail as a matter of state statutory and common law.

All parties agree that withdrawals must be submitted before "final action is taken on the petition." *State v. Mitchell*, 111 Mont. 94, 106 P.2d 180, 181 (1940). Final action here was March 6, 2020, when the Secretary certified the Green Party petition, thereby permitting its

candidates and voters to participate in the primary election. No more was necessary.[3] Here, this deadline is dispositive as to all claims, because the Party easily qualified after accounting for all withdrawals through March 6, 2020. With respect to individuals, Plaintiffs Filz and Neumeyer failed to submit withdrawals before final action was taken on March 6, 2020.[4] Plaintiffs Blossom and Weed did in fact sign withdrawals that were accepted and honored by the Secretary. Since being included on the petition and not having their withdrawals process was the basis for their complaint, it is now clear that they have suffered no injury and lack standing to assert the claims alleged. The claims of all four Plaintiffs should be dismissed.

Plaintiffs also ask the Court to require the Secretary to accept withdrawals executed using DocuSign, electronic document software the MDP began to use in late March or early April, long after the petition was certified. Aside from the timeliness issue, the DocuSign withdrawals fail because the common law right to withdraw requires (as this Court observed at the hearing) use of at least the same formality required for the initial signature. *Ford v. Mitchell,* 61 P.2d at 821 (holding that if withdrawals are to be allowed, they must be completed "in an appropriate manner," and finding that certification on withdrawal petition was sufficient because it was identical to the certification required on the underlying initiative petition).[5] Plaintiffs' claim that *Ford* allows any affirmative act, such as a phone call, is simply wrong.

Here, the requisite formalities can be found on the original petition form and attached affidavit. They are strictly enforced: in the 2018 campaign, the Green Party's last petition failed because, among other reasons, 36 otherwise-valid signatures were stricken due to the circulator's

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[3] Though section 13-10-601 does not specifically task the Secretary with certifying the minor party petition, he is to collect the verified petitions from the county election authorities and thereafter determine the contents of the state's primary ballots. Therefore, in effect, the Secretary must certify the petition for its placement on the primary ballots. The Montana Supreme Court's 2019 decision in *Larson* supports this proposition by stating the Secretary must "consider and tabulate" the verified petition signature and thereafter "certify the subject political party as eligible to nominate candidates for public office." *Larson v. State*, 394 Mont. 167, 177, 434 P.3d 241 (2019).

[4] Neumeyer's DocuSign withdrawal was not signed until April 28, 2020. Filz's withdrawal was not signed until April 2, 2020. *See* Plaintiffs' Ex. 5.

[5] The Secretary's form for withdrawal from all types of petitions other than minor party petitions includes the same formalities as are required to place ones name on the petition, including the requirement that the withdrawal form be notarized. *See* https://sosmt.gov/Portals/142/Elections/Documents/Officials/Request-for-Withdrawal-of-Petition-Signature.doc

statement that he had witnessed all of the signatures, when in fact he had not witnessed two. *See Larson v. State of Montana*, 434 P.3d 241, 265-266 (Mont. 2019). Other signatures were stricken because they didn't match the voter file, didn't have handwritten names, or were missing dates. *Id*. Thus, not only must petitioners "sign" the petition as a matter of law,[6] the circulator's affidavit must be true in every respect: "I [name of person who is the signature gatherer], swear that I gathered the signatures on the petition to which this affidavit is attached on the stated dates, that I believe the signatures on the petition are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana's electors who are registered at the address or have the telephone number following the person's signature, and that the signers knew the contents of the petition before signing the petition." Section 13-27-303, MCA. As the Court found, it is the circulator himself, not some other person, who must make this certification to the local election official. Even demonstrably valid signatures are stricken without this formality.

Regardless of whether the MDP's DocuSign-and-email system resembles the Secretary's form, it falls far short of the strict rule of *Larson*. Testimony (albeit hearsay) suggested MDP staffers remotely contacted petition signers, solicited withdrawals, and then used email addresses to send DocuSign forms. The form was completed remotely and an audit document was created, but it only showed that the form had come from an email address and a given IP address. There was no testimony that each staffer followed this process. There was no testimony that each staffer satisfied himself or herself that the signer had personally appeared—nor could there have been, because at most there was a remote connection occurring over phone, text, or email. Nor did each staffer actually swear out an affidavit that this was the case. Finally, no staffer swore that he satisfied himself that the withdrawers understood what they were signing. Regardless of whether actual fraud occurred with the DocuSign signatures, it is certain that these steps were not followed. Because they do not follow the formalities required when a petition signer decides to add his or her name to a signature, withdrawals submitted by DocuSign are not valid.

Finally, Plaintiffs have failed to present sufficient evidence of fraud to support a decision to ignore the final act rule in this case. A petition signer seeking an untimely withdrawal based on fraud must satisfy the normal fraud standard. *State v. Anderson*, 92 Mont. 298, 13 P.2d 231, 234 (1932) (citing *Emerson-Brantingham Implement Co. v. Anderson*, 58 Mont. 617, 194 P. 160

[6] See Section 13-27-103 ("A signature may not be counted unless the elector has signed in substantially the same manner as on the voter registration form.").

(1920)). To make a sufficient showing of fraud: "it must appear with reasonable certainty that the party against whom the fraud is alleged made a misrepresentation of a material fact; that he made it with the intent to induce the other party to act upon it; that the latter believed and relied upon it; and that he acted upon it to his damage." *Emerson,* 194 P. at 164. There is no evidence of a material misrepresentation by petition circulators to petition signers.[7] Plaintiffs' fraud claims fail.

b. The Two Remaining Individual Plaintiffs' constitutional claims to withdraw by DocuSign, long after the Secretary's final act, must yield to petition proponents' right of effective political association.

Any concession made to allow the Individual Plaintiffs[8] to withdraw after final action comes at the expense of the petition proponents that dedicated their efforts and attached their names to the petition. As explained in Parts I and II, these groups enjoy a right to effective political association, a right they exercised by engaging in the petition process. *See Anderson v. Celebrezze*, 460 U.S. 780, 793 (1980). Petition proponents' rights under the First Amendment are violated if opponents, like the Plaintiffs, are permitted to withdraw after final action or in a manner which has never been permitted under Montana law. Additionally, Plaintiffs' request relief—invalidation of the Green Party's primary—that violates the rights of the candidates who qualified in the primary.

i. Plaintiffs lack standing to seek the requested relief.

Because the withdrawals of Plaintiffs Weed and Blossom were accepted and the MDP does not plead its own constitutional claim, the only Plaintiffs that may have standing to assert constitutional rights are Plaintiff Filz (who never appeared) and Plaintiff Neumeyer, individually. Yet these Individual Plaintiffs seek not just the withdrawal of their own signatures, but the wholesale invalidation of the primary results and elimination of ballot access relief for over a dozen state and federal candidates. For this result to obtain, the Court would have to treat them as class representatives for hundreds of other Montana electors not before the Court who signed

[7] Even if the individual Plaintiffs could have produced sufficient evidence of fraud – which they did not – the Court's remedy would be limited to striking Filz's and Neumeyer's names from the Petition. Plaintiffs cannot speak as to the state of mind or reasonable reliance of the thousands of other petition signers, as they purport to do via their requested relief.

[8] The MDP does not, and cannot, assert its own constitutional "right not to associate." Thus, only the Individual Plaintiffs can seek relief for themselves under this theory.

the withdrawals at different times, under different methods, for different reasons.[9] Alternatively, if Plaintiffs are before this Court as merely two of a mass of late-withdrawing signers seeking to wield their constitutional rights to negate an entire primary, then this Court must apply the same rule it applied in denying intervention to the Amici-Signers: they are just two of a mass of non-withdrawing signers asserting their First Amendment rights not to have the petition and primary nullified. Either way, these two individual Plaintiffs lack standing to seek the wholesale invalidation of the petition and the Green candidates' and voters' ballot access.

ii. These facts do not implicate the right not to associate.

Plaintiffs' Count II does not present a justiciable controversy because they allege no injury-in-fact arising from their theory that they have a "right not to associate." Plaintiffs do not assert an injury via association with the *Green Party*, the party with which they voluntarily associated by signing the petition at issue. Instead, they argue that they are being "forced" to associate with the Republican Party. That is simply incorrect. Their alleged connection with the Republican Party hinges solely on the fact that the Republican Party paid for petition circulators. Plaintiffs were free to dissociate with the petition when the petition was still an active association—i.e., when it was being presented to and acted upon by the recipient state officials. And by Plaintiffs' own admissions, they have been free for months to exercise their rights to attack and disavow any association with the Republicans. Plaintiffs really seek a right to file a late withdrawal—a right unprotected by any federal or state constitutional provision. [10]

1. The "right not to associate" does not include the right to erase the consequences of an association after it is completed.

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[9] Plaintiffs themselves differ as to whether the material fact that triggered their withdrawal was the fact of a third party funding the Green Party effort, or the fact that this third party was the Montana Republican Party.

[10] *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23, 104 S. Ct. 3244, 3252, 82 L. Ed. 2d 462 (1984) ("Government actions that may unconstitutionally infringe upon [the freedom to associate] can take a number of forms. Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, e.g., *Healy v. James*, 408 U.S. 169, 180–184, 92 S.Ct. 2338, 2345–2347, 33 L.Ed.2d 266 (1972); it may attempt to require disclosure of the fact of membership in a group seeking anonymity, e.g., *Brown v. Socialist Workers '74 Campaign Committee*, supra, 459 U.S. 87, 91–92, 103 S.Ct. 416, 419–421, 74 L.Ed.2d 250 (1982); and it may try to interfere with the internal organization or affairs of the group, e.g., *Cousins v. Wigoda*, 419 U.S. 477, 487–488, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975).").

Even when the right not to associate is implicated, it is not absolute. Not a single one of Plaintiffs' "right not to associate" cases holds that a person can retroactively disavow association with a group or effort after the purpose for which the group was formed or effort undertaken is accomplished, as Plaintiffs attempt here. The consequences of an unlimited right to retroactively associate are particularly troubling in the election context, which relies on deadlines and specific time periods for making decisions and measuring political support through votes, petition signatures, and candidate filings. The right is prospectively applied to disentangle a citizen from an unwanted association, not retroactively to torpedo an election result that a voter regrets.

2. Plaintiffs' requested relief is disproportionate to their injury, and fails to account for petition proponents' right to effective association and the Green candidates' and voters' rights.

Even if the Court adopts Individual Plaintiffs' theory that their "right not to associate" has been infringed, their requested relief does far more than remedy their actual injury—it strikes out to extinguish the rights of 13,000 valid petition signers and eliminate ballot access for Green candidates, and voters. Plaintiffs' grievance is with the Republican Party, not with their fellow petition signers or with the Greens. It is unjustifiable to sacrifice the constitutional rights of absent and innocent third parties merely to achieve Plaintiffs' goal of punishing the Republican Party for daring to legally support the Greens. Put another way, vindicating these Plaintiffs' "right not to associate" does not require that others' association be completely destroyed. Nor is the MDP—granted standing only because its injury consists of having to engage in additional speech with possible Green voters—within the zone of those whom the "right not to associate" is meant to protect. At bottom, the extraordinary judicial intervention these Plaintiffs request goes beyond remedying their own injury and would harm nearly every other party involved. It should be denied.

3. The Plaintiffs' rights must yield to the proponent petition signers.

The rights of Plaintiffs and others who wish to untimely withdraw from the Green Party petition must yield to the Constitutional rights of the petition's proponents. Even if Plaintiffs were deemed to have "associated" with the Republican Party, any interest to be free from such association is adequately protected by allowing them to withdraw their support of the petition up

to the point that the signatures are filed.[11] The burden of withdrawing a signature before the filing deadline (just like the burden of obtaining a signature before the filing deadline) is not insignificant. But even if neither the MDP nor the journalists who relied on it for sources read the Montana Republican Party's timely February 20, 2020 filing disclosing that it had paid AMT for its petitioning, there was ample media coverage and the MDP started its well-resourced withdrawal campaign in February. These Plaintiffs did not take note of the MDP's public communications push in the latter half of February, and then waited until three weeks (Filz, April 2) and seven weeks (Neumeyer, April 28) after March 9th, the last date shown on the Secretary's public election calendar (Defendant's Ex. 1) for receiving minor party petitions and candidate filings. Further, the only Plaintiff who came to testify, Neumeyer, did not establish that DocuSign was necessary to process her late withdrawal. Rather, she visited the elections office at least once, and on the very day of that visit filled out the MDP-drafted statement that due to Covid, she was "unwilling" to visit an elections office or notary. These Plaintiffs did not establish a right to use DocuSign.

On the other hand, as noted above, the petition proponents have a strong First Amendment interest in an effective petition process, which requires a level of certainty and predictability in accessing the ballot so as not to render the petition process illusory.[12] That is particularly true here, where Plaintiffs seek a court order that would change longstanding rules retroactively, long after the proponents lost the chance to gather more signatures. If the Court decides it would have to reinterpret Montana law or resort to applying the Montana constitutional

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[11] *See State ex rel. Lang v. Furnish*, 48 Mont 28, 134 P. 297, 300 (1913) (finding signers' right to withdraw temporally restricted to period before final action taken); *see also Ford v. Mitchell*, 103 Mont. 99, 61 P.2d 815, 822 (1936) ("[T]he signers of an initiative petition may, in an appropriate manner and *at the proper time* if they so desire, withdraw from such petition."). Plaintiffs concede that their right to withdraw is limited in that it must be exercised before "final action" is taken on the petition. *See* Plaintiffs' Trial Brief, 12-13 ("Pursuant to this right, individuals can withdraw their signature so long as: … individuals withdraw before final action is taken on a petition…") (internal citations and quotations omitted).

[12] *See Am. Party of Tex. v. White,* 415 U.S. 767, 787, n. 18, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974) (Recognizing state's interest in regulating petition process necessarily requires the imposition of some cutoff period to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges.) (internal quotations and citations omitted); *see also Powers v. Carpenter,* 203 Ariz. 116, 119, 51 P.3d 338, 341 (2002) ("…the right to withdraw is neither indefinite nor absolute; rather, at some point private rights must yield to society's interest in having a well ordered and functioning government..").

rights of the two remaining Plaintiffs to change the result of the primary, it should consider the superior First Amendment rights of the Amici-Signers, the other petition signers, and the Green Party voters and candidates. Applying those rights, it must deny the requested relief.

IV. The requested relief is not an appropriate remedy for the lack of a public service announcement by the Secretary stating the deadline for submitting withdrawals.

At the close of the hearing, the Court raised for the first time the potential that the Secretary may have violated the public's right to know about and participate in government deliberations and rulemaking when the Secretary confirmed that under controlling law, it could not accept withdrawals after the petition was certified.[13] For several reasons, that cannot be the basis of a preliminary injunction eliminating ballot access for Green Party voters and candidates.

First, Plaintiffs have never claimed their rights were violated under these provisions. The Court should exercise judicial restraint and avoid deciding issues of constitutional law and matters of first impression that have not been raised by the parties, especially at this preliminary injunction stage of the proceedings. *See Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 450 (2008) (holding that the Court should adhere to "the fundamental principle of judicial restraint" and should neither "anticipate a question of constitutional law" nor make "unnecessary pronouncement[s] on constitutional issues.").

Moreover, Sections 8 and 9 are not applicable. The Montana Supreme Court considered and explained the effect of both provisions in its 2002 decision in *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002):

> What is intended by Section 8 is that any rules and regulations that shall be made and formulated and announced by any governmental agency, which of course are going to affect the citizens of this state and the common welfare, shall not be made until some notice is given so that the citizen will have a reasonable opportunity to participate with respect to his opinion, either for or against that particular administrative action.

Id. The rulemaking process is the central focus of Section 8. It is geared toward those "miniature legislatures who put together rules and regulations that affect us all." *SJL of Mont. Assoc's. Ltd. Part. v. City of Billings*, 263 Mont. 142, 148, 867 P.2d 1084 (1993). Here, the Secretary was not exercising his rulemaking authority when election staff confirmed with in-house counsel that it would adhere to the Supreme Court's longstanding rule, from *Ford*, *O'Connell*, and before, that the common law right to withdraw extends only to the final act of the official who acts on the

[13] See Montana Constitution, Article 2, Sections 8 and 9.

petitions—here, the Secretary's sufficiency decision. Because there was no rulemaking, the public was not deprived of any right to participate in the rulemaking process. Section 9 encompasses "the right to examine documents and the right to observe the deliberations of public bodies or agencies." *Id.* at 267. Plaintiffs were not refused documents or the right to observe any deliberations of public bodies or agencies. Therefore, Section 9 is simply inapplicable.

Finally, under Section 2-3-114, MCA, any alleged violations of Sections 8 or 9 must be brought "within 30 days of the date of the [relevant] decision." *Id.* at 275; *Allen v. Lakeside Neighborhood Planning Comm.*, 371 Mont. 310, 319, 308 P.3d 956 (2013); *Willems v. State*, 374 Mont. 343, 348, 325 P.3d 1204 (2014). The Secretary's March 3, 2020, memo confirmed the Secretary would not accept withdrawals after certification. The Secretary emailed all county election officials on that same day, indicating that they should only process withdrawal forms up until the petition is certified. Further, as noted above, Plaintiff Neumeyer testified that in March 2020 she was turned away from the Lewis & Clark County elections office because it was too late to withdraw; she reported this to the MDP, and the MDP sent her a DocuSign form to submit instead. Other evidence presented by Plaintiffs shows that they were aware of this "policy" no later than April 13, 2020. An email from the Yellowstone County Election Administrator sent to Trent Bolger indicated on April 13, 2020, that the deadline for filing withdrawals had passed. Therefore, when Plaintiffs filed their petition on June 1, 2020, the deadline for submitting a constitutional claim under Sections 8 and 9, if any such claim ever existed, had long passed.

More fundamentally, though, the Court must consider that, as shown above, the withdrawal deadline and formality-of-withdrawal rules not only define the limits of dissenting signers' right to withdraw, they also protect the First Amendment effective-association rights of petition proponents, signers, and the affected candidates and voters. Here, all parties had the same information at the same time: the Secretary's public election calendar. The proponents themselves, viewing that calendar and knowing the law, had no reason to predict that the MDP might be allowed to continue its withdrawal campaign for months after the certification date, eventually harvesting withdrawals for over two months using DocuSign, far easier to use and with far less formality than legal, in-person petition circulation. Had there been a hint of any of this, they could have focused their effort to insulate themselves against the change in law.

A signer wanting to withdraw would have had the same notice: the Secretary's public calendar.[14] It clearly showed the deadlines for turning in petitions (March 2 to the clerks and March 9 to the Secretary), very close to the expected decision date that, under controlling law, set the withdrawal deadline. This aside, other fast-approaching dates should have counseled that a three-month withdrawal campaign was unreasonable: March 19, for certifying candidates for the primary ballots; the need to design and print those ballots quickly; April 17, for mailing them overseas; and even May 8, for mailing out all of the mail-in primary ballots.

No PSA was required to inform voters, or a well-counseled major party campaign geared to engage those voters and with access to controlling caselaw, that a withdrawal campaign could blow through each of these deadlines. And even if courts had jurisdiction to craft a remedy for the fact that the Secretary did not issue a PSA that the "final act" would be on March 6th, that remedy would have to account for the fact that: (1) everyone received notice that the final act did occur on March 6, and it was important to move quickly since they were now seeking to reverse those decisions; and (2) the petition signers, proponents, and affected candidates and voters themselves had no notice that their opponents would have a free hand to harvest withdrawals for three months using DocuSign—far less formality than would be expected when consulting the Secretary's forms but also less than required under *Ford.* In other words, whatever the effect of lack of "notice" immediately on March 6, it cannot be used to retroactively make major, unexpected changes in the law in a manner that is just sufficient to reverse the Green Party's results.

CONCLUSION

For the foregoing reasons, Plaintiffs' requested relief should be denied.

Dated: July 17, 2020

Respectfully submitted,

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[14] Here, of course, one Plaintiff is the MDP, a political party mounting a heavily-staffed, multi-month withdrawal campaign and advised throughout by local and national counsel.

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Certificate of Service

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the Montana Democratic Party or MDP learned that the Green Party disavowed any involvement in the petition-gathering efforts, you communicated that information to petition signers?

A. Yes. I did.

Q. And the information that's in Plaintiffs' Exhibit 10, is that some of the information that you communicated to petition signers?

A. Yes. This is, this is one piece that we referenced when we were talking to people.

Q. Can you turn to Exhibit 11, please? Do you recognize this document?

A. Yes. This is a news article that discusses the fact that no one knew who had funded the Green Party effort.

Q. And is this information that you conveyed to petition signers as well, the information in Exhibit 11?

A. Yes. Until more reports came out that clarified information, yes.

Q. Did you send links to voters, links to this article and other articles?

A. Yes. When voters asked for more information, we often sent them these articles via e-mail or text.

Q. Turn to Exhibit 12, please. What's Exhibit 12, Ms. Miller?

A. This is another news article that walks through the fact that the Green Party wasn't involved and that it was a mystery, according to the headline, who had organized and funded the petition.

Q. Is this another article that you sent links to and information you conveyed to petition signers?

A. Yes.

Q. Exhibit 13, please.

A. Okay.

Q. Is Exhibit 13 similarly another article that you reviewed and that the information in it, you conveyed to petition signers?

MR. MEADE: Objection; leading.

THE WITNESS: Yes. This is another --

THE COURT: Wait a minute.

MR. GORDON: Hold on.

THE WITNESS: Sorry.

THE COURT: What was the objection?

MR MEADE: Leading.

THE COURT: Why don't you rephrase?

MR. GORDON: I'll rephrase. Sure.

Q. (By Mr. Gordon) Can you describe Exhibit 13, please?

A. This is another news article that walks through some of the information that was and wasn't known about

the Green Party petition in early March, and we referenced information in these, in these news articles as well as sent the news articles themselves to people who wanted more information.

Q. Exhibit 14, Ms. Miller. What is this exhibit?

A. This is a Facebook post from April where the Montana Green Party says that the Greens aren't actually Green and that the candidates running had nothing to do with the Green Party.

Q. And is this information that you reviewed and communicated to petition signers?

A. Yes. It is.

MR. GORDON: Your Honor, I move the admission of Exhibits 10 through 14.

MR. MEADE: We'll object again, Your Honor, on the basis of hearsay.

THE COURT: Overruled.

Q. (By Mr. Gordon) Ms. Miller, let's go back to Exhibit 3, please. And before we broke, I believe you were talking about how you e-mailed the withdrawal forms, an example of which is in Exhibit 26, to county elections officials; is that accurate?

A. Yes. That's correct.

Q. What is Exhibit 3?

A. Exhibit 3 is a copy of one of those examples of

As to Counsel's objection as to part of Exhibit 6, Counsel is certainly accurate that the metadata for each of these documents, the fields are not all the same and they don't all include -- But the first page does say creation date April 13. And as Ms. Miller testified, some of these documents had been scanned in via copier and some had been in a, in a PDF file.

So all we're trying to do is to say that the entity from whom these came, the metadata showed that they scanned it or created the PDF or uploaded the PDF -- sorry, not uploaded, scanned or created the PDF no later than the date that's shown in the metadata.

THE COURT: Okay. I think I'm going to overrule the objection. I have all kinds of interesting evidentiary rulings for the Supreme Court.

MR. GORDON: So Exhibits 4, 5, and 6 are admitted?

THE COURT: 4, 5, and 6 are admitted.

Q. (By Mr. Gordon) Ms. Miller, did you reach any conclusion about the dates by when the withdrawal forms listed in Exhibits 4 and 5 were received by county elections officials?

A. Yes. The overwhelming majority were received by mid to late May. There were seven that were stamped in in June in two different counties.

Q. And what was the last date that one was stamped on?

A. June 12th.

Q. Now, do you know if Exhibits 4 and 5 reflect all of the withdrawal forms that have been submitted to county elections offices relative to the Green Party petition?

A. I don't know for certain. We made public records requests, quite a few along the way, both to counties and to the Secretary of State. When we received records, the records provided by the Secretary of State and the county didn't have complete overlap. There was a lot of overlap, but sometimes there was one in one public records request and not the other. So if there are some missing, I would not know about them.

Q. And I believe you previously testified that you understood that there were also withdrawal forms that some signers attempted to turn in but were rejected?

A. That's correct.

Q. Turn now to Exhibit 7, please, Ms. Miller. What is Exhibit 7?

A. Exhibit 7 is a table that I prepared that shows the nine house districts that initially have enough signatures to meet qualification thresholds, but after accounting for all of the withdrawals submitted, they would no longer meet threshold.

Q. Let's go through this column by column. The second column, "Signatures Required"?

A. That comes from the Secretary of State's information, which is laid out in Montana Code.

Q. And that was also Exhibit C to Dana Corson's declaration?

A. I don't remember the exhibit number, but it was in Dana Corson's declaration. Yes.

Q. Third column, "Signatures Accepted by Secretary (Petition Signers Report)," what does that represent?

A. That shows the number of accepted signatures per the Secretary of State's petition signers report on March 12th and April 13th.

Q. So this shows the number that, according to the petition signers report, were counted towards Green Party qualification?

A. Yes.

Q. Fourth column, "Signatures Withdrawn," what does that reflect?

A. That reflects the number of withdrawal forms in Exhibit 5 that were submitted to counties for each of these house districts.

Q. And these are also summarized in Exhibit 4?

A. Yes.

Q. Why does it say "At least"?

A. If there were more, as I said earlier, I wouldn't necessarily know about them. These are only the ones we have copies of.

Q. Fifth column says, "Remaining Signatures Accepted by Secretary"?

A. So if you removed -- or if you accounted for the withdrawal forms that had been submitted, removing them from the initial number of accepted signatures, at most, these are the number of remaining signatures in each house district.

Q. What conclusions did you reach from your analysis as reflected in this chart on Exhibit 7, Ms. Miller?

A. That the Green Party no longer qualifies for the ballot. They only qualify in 33, not 34 house districts.

Q. If you account for all of the withdrawal forms in Exhibits 4 and 5?

A. Yes.

Q. The third column again references the petition signers report. And I believe you testified that's where that information came from; is that correct?

A. Yes.

Q. Ms. Miller, if you use the numbers -- instead of numbers from the petition signers report, use numbers from Mr. Corson's declaration, that table in his declaration, would your conclusion change?

March, was the Governor's directive regarding elections. So we had to adjust dates that had been previously published because it turned into a mail ballot election. But we wanted to preserve the original, so we just did the interlining.

MR. MEADE: And I apologize, Your Honor. Was that admitted?

THE COURT: It is admitted.

MR MEADE: Okay.

Q. (By Mr. Meade) Now, Mr. Corson, when can candidates begin filing for office?

A. It's January 9th.

Q. Is that deadline set by statute?

A. Yes.

Q. When is the deadline to submit new political qualification petitions to county election administrators?

A. That's March 2nd.

Q. Is that deadline set by statute?

A. Yes.

Q. What is the process for a minor political party to qualify for the ballot in Montana?

A. The party qualifications, they must achieve a minimum of 5,000 signatures overall and then qualify in at least a third of the house districts.

Q. And how many is one-third of the house districts

that they must qualify in?

A. Since there's 100, so 34 or greater.

Q. Lawyers aren't good at math. I appreciate that.

When is the deadline for candidates to file for office?

A. For candidates to file for office?

Q. Yes.

A. Is that January 9th date.

Q. I'm sorry. When is the deadline?

A. I'm sorry. The deadline for candidates to file is March 9th.

Q. If a candidate wishes to appear on a primary ballot, must they file by this deadline?

A. Correct. Yes.

Q. When is the deadline for the Secretary of State to receive verified new political party qualification petitions from county election administrators?

A. For the Secretary of State to receive those is March 9th.

Q. Were there any minor parties who qualified for the general election this year?

A. Green Party.

Q. And how many house districts did the Green Party qualify in?

A. I believe it was 42.

Q. When did the Secretary of State certify that the Green Party had qualified to appear on the general election ballot?

A. On March 6th.

Q. Why did the Secretary certify on that date?

A. Because after going through the petitions and accumulating them by house district, looking for any errors or omissions or any other potential problems, and taking into account everything that was on the petition together with any withdrawals, there was sufficiency on March 6th.

Q. And how did your office know there were enough signatures at that time?

A. Say again?

Q. How did your office know that there were enough signatures on the petition at that time?

A. Those are collected at the counties. We know what house districts that people belong in. The signatures were accepted. It was spoke earlier in Miller's testimony regarding rejected signatures, things like that. So those that were accepted within the house district, those were tallied up and certified by our office based on what appeared on the petitions and withdrawal forms.

Q. And how does your office actually receive the

forms?

A. They are submitted, you know, through the county. The county does their work. The county sends them to us.

Q. When did you receive those from the counties?

A. We started receiving them early March, maybe late February.

Q. When did you receive the final submittal from a county?

A. I believe the final submittal was received on the 6th. I'd have to check for sure.

Q. And that was the date that you certified?

A. Correct.

Q. How many people signed the Green Party petition?

A. Overall, there was, like, 19,000 signatures, give or take.

Q. And how many were accepted?

A. The 13,000 number that was spoken of earlier.

Q. And why is there a discrepancy between the two?

A. Sometimes there's duplicates. Sometimes the people don't live in the district. Sometimes they're not even registered voters. Sometimes they're unreadable; you know, you can't determine who the voter is in order to compare the signature.

Q. How long did Green Party candidates have to file for office from the time that the Green Party qualified

A. No. Not at this time.
Q. And why is that?
A. The candidate filing deadline has passed, and so has the petition process, on May 26th, I think it is.
Q. Which statewide races would be affected?
A. Well, we had candidates at the U.S. Senate, U.S. House level, governor, attorney general. We even had a lower house district race, I believe, in the mix of this too.
Q. When is the deadline for election administrators to send ballots to military and overseas electors?
A. For the primary, it was back on April 8th -- woops. Make sure I got that right. April 17th. I'm sorry.
Q. And is it your office's understanding that the first ballots had been mailed to voters by that time?
A. Correct.
Q. Is there a way to remove a person from a primary ballot after the ballot has been sent?
A. No.
Q. May a voter in Montana vote in multiple primaries?
A. No.
Q. So once a voter decides that she is going to vote in the Green Party primary, she cannot vote in the