No. _____

In the Supreme Court of the United States

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, TERESA HARSCH,

Applicants,

v.

COREY STAPLETON, in his official capacity as Montana Secretary of State, MONTANA DEMOCRATIC PARTY, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED,

Respondents,

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

Directed to the Honorable Elena Kagan
Associate Justice of the United States Supreme Court
And Circuit Justice for the Ninth Circuit

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To the Honorable Elena Kagan, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

INTRODUCTION

In March 2020, the Montana Green Party filed a ballot-qualification petition containing sufficient, valid signatures to qualify for Montana's primary election. The Party and its voters subsequently participated in the primary, thereby qualifying the Party's winning candidates for inclusion on the general-election ballot.

But Montana is planning in seven (7) days to begin distributing general-election ballots from which the names of Green Party nominees have been removed. This would invalidate every ballot cast during the primary by every Green Party voter in Montana, including Applicants Tom Harsch and Teresa Harsch.

The Ninth Circuit denied Appellants' emergency motion for an injunction pending appeal. Relief from this Court is therefore needed to avert an impending statewide disenfranchisement of Green Party voters.

This case has arisen as a result of a post-election rule created out of thin air by a state court on August 7, 2020. The state court ruled that a minor party's ballot-qualification petition "is not final until votes have been cast and canvassed in the primary election and certificates of nomination have issued." App. 112.[1] The final canvass occurs 27 days after Election Day. Mont. Code Ann. § 13-15-502. Thus, under this state-court rule, ballots cast by a minor party's voters are valid only at the sufferance of the signers of the party's ballot-qualification petition. The rule enables

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[1] "Dkt." refers to docket entries in the District Court. "9th Cir Dkt." refers to Ninth Circuit docket entries. "App." refers to the appendix to this Application.

these signers to withdraw their signatures *after* voting is underway and, indeed, up to 27 days *after* Election Day, thereby extinguishing the party, its nominees, and all primary-election ballots cast by its voters.

No rational election system can function this way. And no voter casting his or her ballot for Green Party candidates in April or May 2020 could have anticipated that ballot later being invalidated because (1) a small group of Party petition signers would subsequently demand to withdraw their signatures and (2) a state court would create a new rule – months after the election – allowing such withdrawals.

Lower courts have held that a state's mailing of a ballot to an elector is an inducement to cast it – and a post-election rule change resulting in the ballot's invalidation violates substantive due process. See, *e.g.*, *Hoblock v. Albany County Bd. of Elections,* 422 F.3d 77, 97-98 (2d Cir. 2005) (upholding injunction prohibiting state officials from certifying county election in which state court had invalidated absentee ballots subsequent to the election); *Griffin* v. *Burns,* 570 F.2d 1065, 1074 (1st Cir. 1978) ("Rhode Island could not, constitutionally, invalidate the absentee and shut-in ballots that state officials had offered to the voters in this primary, where the effect of the state's action had been to induce the voters to vote by this means rather than in person.").

This Court has not considered whether substantive due process is implicated by a post-election rule change that invalidates lawfully cast ballots. This case provides an ideal vehicle to address the issue and differs markedly from the application denied by this Court two weeks ago in *Stapleton v. Montana Democratic*

Party, et al. (Case No. 20A33). The Secretary's application in that case arose from state court proceedings initiated by the Montana Democratic Party, which sought an injunction to force the Secretary to remove Green Party candidates from the ballot. The Secretary unsuccessfully defended the case on state-law grounds, resulting in a state district court ordering removal of the Green candidates as requested by Democrats. The Secretary sought relief in the Montana Supreme Court but raised only state-law issue.[2] That court affirmed on a 5-2 ruling. 9th Cir. Dkt. 2-2. The Secretary's application to this Court asserted, for the first time, that Montana was violating the First Amendment rights of the signers of the Green Party's ballot-qualification petition. But because the Secretary never presented a First Amendment claim to Montana courts, and because this Court is a "court of review, not of first view," *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018), denial of the Secretary's application was inevitable.

Unlike that case, this case originated in federal district court when the Green Party Applicants[3] filed suit days after the state court ordered the Secretary on August 7, 2020, to remove Green Party candidates from the ballot. The Green Voters sought a federal injunction prohibiting the Secretary from removing their nominees from the ballot. Montana Democrats intervened shortly thereafter. Unlike the Secretary in Case No. 20A33, the Green Voters presented a federal due process claim to the federal

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[2] The Secretary's opening brief to the Montana Supreme Court can be found at 9th Cir. Dkt. 2-3 and his reply brief to that court is at 9th Cir. Dkt. 15-2.

[3] The Applicants shall be hereinafter collectively referred to as the "Green Voters" unless otherwise dictated by context.

district court and the Ninth Circuit – the same claim they present now in this Application. Although the Secretary is a nominal Respondent in this matter, he has made clear in court filings that he, like the Green Voters, strongly opposes the state court's eleventh-hour disenfranchisement of Green Party voters. It is Montana Democrats who seek these voters' disenfranchisement.

Unfortunately, time is of the essence. The Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20302(a)(8)(A), requires Montana officials to send ballots to military and overseas electors by **September 18, 2020**. The Green Voters note that the statute contains an exception for delays relating to legal contests, 52 U.S.C. § 20302(g)(2)(B)(ii), and that Montana successfully printed ballots at a later date in the election cycle four years ago (September 22, 2016) after the untimely death of a candidate. 9th Cir. Dkt. 14-1 at 3.

That said, relief is needed very soon to avert a statewide disenfranchisement of Green Party voters. Accordingly, the Green Voters respectfully ask the Court to enter an injunction against Respondents under the All Writs Act, 28 U.S.C. § 1651, during the pendency of their appeal.

Finally, at a minimum, the Green Voters request a temporary injunction to allow for full briefing and consideration of this Application. *See, e.g., Wheaton College v. Burwell*, 134 S. Ct. 2898 (2014).

JURISDICTION

The Green Voters filed a verified complaint in federal district court on August 11, 2020, seeking an injunction prohibiting Montana's Secretary of State from

removing from the general election ballot the nominees selected by Green Party voters during Montana's primary. App. 57. They filed on that same day a motion for preliminary injunction and a brief in support of the motion. Dkt. 3 & 4.

The District Court correctly noted that it has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983 because the Green Voters' claim under the Due Process Clause of the Fourteenth Amendment raises a federal question. App. 17. The District Court denied the motion on August 19, 2020. App. 28. The Green Voters filed a notice of appeal later that day. App. 5.

The Ninth Circuit has jurisdiction over the Green Voters' appeal from the District Court's denial of their motion for a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). The Ninth Circuit denied the Green Voters' motion for an injunction pending appeal on September 8, 2020. App. 1-2.

This Court has jurisdiction over the Green Voters' Application under 28 U.S.C. § 1254(1) and has authority under 28 U.S.C. § 1651, to grant the relief they seek.

BACKGROUND AND PROCEDURAL HISTORY

I. Rules For Political Parties to Qualify for Montana Primary Elections

Montana provides two methods by which a political party can qualify for the ballot. A party qualifies if it had a candidate for statewide office in either of the prior two general elections who received at least 5% of the vote received by the successful candidate for governor. Mont. Code Ann. § 13-10-601(1). The Democratic, Republican, and Libertarian parties qualify under this rule.

Other parties may seek ballot qualification by submitting to the Secretary of State a petition 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. Mont. Code Ann. § 13-10-601(2)(b). This number must include registered voters in at least 34 of Montana's 100 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. *Id.*

II. Qualification of the Green Party

Montana voters began signing a petition in January 2020 to qualify the Green Party for the ballot. App. 62, ¶31; App. 39, ¶31. Petition signatures were timely submitted to election officials by the deadline of March 2, 2020. App. 63, ¶32. Of the 19,000 signatures submitted, Montana's Secretary of State found that 13,000 were valid. Dkt. 18-1 at 2. On March 6, 2020, the Secretary publicly announced that the Green Party had qualified for the ballot. App. 63, ¶33; App. 40, ¶33; Dkt. 15 at 2.

Several qualified Green Party candidates filed nomination papers the following week, including Appellant Royal Davis, who filed for state Attorney General. App. 63, ¶37. He paid a candidate filing fee of $1,410.23. App. 63, ¶38. Davis had spent decades working for Democratic candidates for governor prior to filing as a Green Party candidate. App. 63, ¶¶40-42. Appellant Gary Marbut filed as a Green candidate for a Montana Senate seat. App. 64, ¶45. He has run as a Democrat,

Republican, and Independent in prior election cycles, and has sought for decades to live by his ecological ideals. App. 64-65, ¶¶47-52.

The press reported on March 24, 2020, that the Montana Republican Party had financed signature gathering in support of the Green Party's ballot qualification petition. App. 96-97. Montana Democrats sought to persuade petition signers to withdraw their signatures. App. 97-98, ¶69.

III. Casting of Ballots by Montana Green Party Voters

Montana has an "open" primary system and does not register voters' party affiliation. Rather, election officials provide to every primary voter a ballot for each ballot-qualified political party. Mont. Code Ann. § 13-10-301. A voter is free to cast a primary election ballot for any party and select party candidates listed on that ballot, but must then discard the ballots for the other parties. *Id.* Montana's open primary was conducted entirely by mail this year due to the coronavirus outbreak. App. 65, ¶55; App. 44, ¶55; Dkt 15 at 3, ¶¶ 4-5.

Election officials mailed ballots to military and overseas voters on April 17, 2020 and the rest of the electorate on May 8, 2020. Dkt. 15 at 3, ¶¶4-5. Included with the ballots were instructions advising voters that the "Postal Service recommends mail at least one week before the election" and that "Ballots must be received at the election office by 8 p.m. on Election Day, June 2, 2020." Dkt. 1-2.

Appellants Tom Harsch and Teresa Harsch received their ballots shortly after May 8, 2020. App. 66, ¶65. They each chose a Green Party ballot, marked their

selection of candidates, promptly mailed back their ballots, and discarded the other party ballots. App. 66, ¶66.

On election night, vote totals showed that Wendie Fredrickson, the Green candidate for United States Senator, received 504 votes, compared to 255 votes for her opponent, and therefore prevailed in the primary. App. 67, ¶67. Appellant Royal Davis, who was the only candidate seeking the Green Party's nomination for Attorney General, received 752 votes and is therefore the Green Party nominee for that office. App. 67, ¶68. Appellant Gary Marbut ran unopposed in the Green Party primary for Montana Senate District 47. App. 67, ¶69. The Harschs intend to vote for Green Party candidates in the general election in November 2020. App. 67, ¶70.

IV. The Lower Court Proceedings

In late May 2020, the Montana Democratic Party had obtained over 500 requests from persons who had signed the Green Party's ballot qualification petition to withdraw their signatures. App. 102, ¶92. Democrats filed suit in state court against the Secretary of State on June 1, 2020, (one day before Election Day) arguing that the number of remaining Green Party petition signers who had not sought to withdraw their signatures had fallen below the state's legal threshold. Dkt. 1-3. The state district court agreed and, on August 7, 2020, ordered that the Secretary of State and his agents "are enjoined from implementing or giving any effect to the [Green Party's] Petition." App. 126. The court emphasized, however, that "I heard no testimony that said the petition itself, the language of the petition itself that was presented to people to sign was inaccurate or misleading." Dkt. 18-1 at 4.

The Secretary of State immediately appealed to the Montana Supreme Court. The Secretary did not raise any federal claims in that court. 9th Cir. Dkt. 2-3; 9th Cir. Dkt. 15-2. The Montana Supreme Court affirmed the state court's ruling on a 5-2 vote. 9th Cir. Dkt. 2-2. The Secretary filed an application in this Court on August 24, 2020, which the Court denied on August 25, 2020. Case No. 20A33

The Green Voters, who were not parties to the state court action, filed a complaint against the Secretary in federal district court on August 11, 2020, as well as a motion for a preliminary injunction that same day. App. 57; Dkt. 3 & 4. The court granted the Montana Democratic Party's motion to intervene on August 17, 2020. App. 30-31. The court denied the Green Voters' preliminary injunction motion on August 19, 2020. App. 28. The Green Voters filed a notice of appeal in the Ninth Circuit later that day. App. 5.

The following morning on August 20, 2020, the Green Voters filed a motion in the district court for an injunction pending appeal. Dkt. 22. The district court denied the motion later that morning. App. 3-4. Later in the day, the Green Voters filed an emergency motion in the Ninth Circuit for an injunction pending appeal. 9th Cir. Dkt. 2-1. On August 27, 2020, the Montana Green Party moved to intervene in the appeal in support of the Green Voters. 9th Cir. Dkt. 9.

On September 8, 2020, the Ninth Circuit granted the Montana Green Party's motion to intervene in support of the Green Voters, but denied the Green Voters' motion for an injunction pending appeal. App. 1-2.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent," (2) the legal rights at issue are "indisputably clear," and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers); *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); and 28 U.S.C. § 1651(a)) (alterations in original). The Green Voters recognize that the relief they seek "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts," and therefore "demands a significantly higher justification than that described in [ ] stay cases." *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1313. The Green Voters satisfy this heightened standard.

I. The Green Voters Face Critical and Exigent Circumstances Because Montana is About to Invalidate the Green Party As Well As the Ballots Cast By Its Voters

The right to vote is a "precious" and "fundamental" right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (finding that the right to vote is "preservative of all rights"). "[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the

jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The federal constitutional right of citizens to vote includes the right to "cast their ballots *and* have them counted." *United States* v. *Classic,* 313 U.S. 299, 315 (1941) (emphasis added). This right applies to both primaries and general elections. *Clingman* v. *Beaver,* 544 U.S. 581, 610 (2005) ("When the State makes the primary an integral part of the procedure of choice, every eligible citizen's right to vote should receive the same protection as in the general election."). A state that removes from the general-election ballot the names of a party's candidates lawfully nominated during the primary violates this right. A primary is "not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." *Storer* v. *Brown,* 415 U.S. 724, 735 (1974). The very purpose of primary elections is to determine the candidates who are entitled to general election ballot access as their party's nominee. See, *e.g.,* Mont. Code Ann. § 13-10-601(2)(a). This purpose is defeated when primary ballots cast by a party's voters – along with the party itself – are extinguished soon after the primary election. This is especially true in an open primary like Montana's in which Green Party voters sacrificed their right to participate in a different party primary as a condition to participating in the Green Party primary.

Montana is scheduled to begin sending ballots to military and overseas electors no later than September 18, 2020. If the state omits from those ballots the names of Green Party nominees, the damage to the Green Party voters' fundamental right to

vote will be total – and irreparable. The ballots these voters lawfully cast during Montana's primary in order to place Green Party nominees on general election ballot will be invalidated.

The only way to prevent this impending statewide disenfranchisement is for this Court to issue the injunction the Green Voters request. This injunction would allow both the Ninth Circuit and this Court, if necessary, to review the actions of Respondents and address the harms suffered by Applicants.

II. The Green Voters Have an Indisputably Clear Right to Have Their Ballots Counted

Both the First and Second Circuits have held that voters' rights to substantive due process are violated when a state mails government-printed ballots to voters, the voters cast the ballots, and the state subsequently invalidates them. *Hoblock v. Albany County Bd. of Elections,* 422 F.3d 77 (2d Cir. 2005)*; Griffin* v. *Burns,* 570 F.2d 1065 (1st Cir. 1978). The facts in *Griffin* and *Hoblock* are almost identical to those in this case and illustrate the kind of acts that violate due process.

In *Griffin*, election officials advertised and issued absentee ballots for use in a Democratic primary for a vacant city council seat. *Griffin,* 570 F.2d at 1067. Ten percent of the electorate opted to vote via absentee ballot. *Id.* After the primary, the losing candidate contested the absentee ballots in state court, and the Rhode Island Supreme Court ultimately invalidated them as being unauthorized under state law. *Id.* at 1068. Other candidates and voters subsequently filed suit in federal court and later appealed to the First Circuit. That court analyzed the case as one involving "the

constitutional rights of voters who, relying upon official inducements and using ballots printed and furnished by the state, cast their votes in this primary only to have them nullified." *Id.* at 1071. State law issues are not paramount in such cases because "[t]he right to vote remains, at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order." *Id.* at 1077. The court accepted the plaintiffs' claim that the city's primary was fundamentally unfair:

> Rhode Island could not, constitutionally, invalidate the absentee and shut-in ballots that state officials had offered to the voters in this primary, where the effect of the state's action had been to induce the voters to vote by this means rather than in person. The state's action is said to amount – in result, if not in design – to a fraud upon the absent voters, effectively stripping them of their vote in the primary.

Id. at 1074.

The Second Circuit in *Hoblock* relied upon the First Circuit's decision in *Griffin* when confronted with a similar invalidation of absentee ballots by a state court. That case involved election officials sending absentee ballots to electors who had not made a formal request for such ballots as required by New York law, resulting in a state court invalidating the ballots. Several electors then brought suit in federal court, which preliminarily enjoined election officials from certifying the election without tallying the challenged absentee ballots. The Second Circuit affirmed and held that the electors were likely to succeed on the merits of their due process claim. *Hoblock*, 422 F.3d at 97.

This case also involves a post-election rule change by a state court that threatens to disenfranchise a large class of voters who cast ballots by mail. Montana's Secretary of State publicly announced on March 6, 2020, that the Green Party had qualified for the ballot. App. 63, ¶33; App. 40, ¶33; Dkt. 15 at 2. The State then mailed Green Party ballots (along with ballots for the other qualified political parties) to Montana voters in April and May. Dkt. 15 at 3, ¶¶4-5.

Appellants Tom Harsch and Teresa Harsch, along with nearly 800 other Montana voters, chose Green Party ballots, selected and marked their candidates on these ballots and, in accordance with Montana law, timely mailed them back to election officials. App. 66, ¶¶65-66. In doing so, they necessarily sacrificed their right to cast ballots in one of the other party primaries.

In turn, the Harschs and all other Montana voters who selected Green Party ballots were entitled to rely upon the Secretary of State's pronouncement in March 2020 that the Green Party was ballot qualified and that government-printed Green Party ballots provided directly by the government could be lawfully cast. And when they cast their ballots, Green voters were entitled to rely upon state election procedures in place at that time. For example, they were entitled to rely upon the State "declar[ing] nominated ... the individual having the highest number of votes cast for each office." Mont. Code Ann. § 13-15-507. They were also entitled to rely upon the State certifying the winners of the Green Party primary and preparing general election ballots accordingly. Mont. Code Ann. § 13-12-201. Instead, on August 7, 2020, months after Montana voters lawfully cast Green Party ballots, a

state court ruled that Secretary Stapleton is "enjoined from implementing or giving any effect to the [Green Party's] Petition." App. 126.

The District Court held that, when casting their ballots, Green Party voters should have anticipated signers of the Party's ballot-qualification petition being allowed to subsequently withdraw their signatures and extinguish the Party. App. 23. But Montana's inclusion of Green Party ballots in its mailings to voters in April and early May was a promise from the State that the Green Party would not later be arbitrarily invalidated. *Griffin*, 570 F.2d at 1074 ("the effect of the state's action [in providing absentee ballots] had been to induce the voters to vote by this means rather than in person."); *Hoblock*, 422 F.3d at 98 ("when election officials refuse to tally absentee ballots that they have deliberately (even if mistakenly) sent to voters, such a refusal may violate the voters' constitutional rights.").[4]

The District Court rejected the Green Voters' claims of disenfranchisement because "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder," App. 23, quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), and "[c]andidates do not have an absolute right to appear on a ballot." App. 23, citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). But neither *Timmons* nor *Anderson*, both of which involved First Amendment claims, are on point. While the First Amendment allows states, *before* ballots are cast, to "enact reasonable

[4] The District Court made no reference to *Griffin* and *Hoblock* despite the Green Voters' extensive reliance on those cases in its briefs to the court.

regulations of parties, elections, and ballots," *Timmons*, 520 U.S. 351, 358 (1997), the Due Process Clause of the Fourteenth Amendment bars states, *after* ballots are cast, from changing those regulations if electors are left disenfranchised. Montana is threatening to do the latter, and this case thus "amount[s] — in result, if not in design — to a fraud upon the absent voters, effectively stripping them of their vote in the primary." *Griffin*, 570 F.2d at 1074.

The District Court further erred by characterizing Montana's impending invalidation of Green Party ballots as a "garden variety election irregularit[y]." App. 24. The First and Second Circuits have firmly rejected this characterization of mass invalidations of absentee ballots. *Griffin*, 570 F.2d at 1068 (state supreme court's invalidation of 123 absentee ballots cast in city council primary election violated due process); *Hoblock*, 422 F.3d at 97 (state court's invalidation of 40 absentee ballots cast in election for county legislature resulted in voters having a likelihood of success on their due process claim). The Green Voters have an even stronger due process claim than those successfully advanced in *Griffin* and *Hoblock* because this case involves a statewide invalidation of absentee ballots – one that affects elections not only for local offices but state and federal offices as well.

Finally, the District Court faulted the Green Voters for not attempting to intervene in the state court matter. App. 27. But the Montanans who cast Green Party ballots, most of whom are of modest means, had neither a legal nor an equitable duty to seek intervention in the state court matter. As this Court has held, "the law does not impose upon any person absolutely entitled to a hearing the burden of

voluntary intervention in a suit to which he is a stranger." *Richards v. Jefferson County*, 517 U.S. 793, 800 n.5 (1996), quoting *Chase Natl' Bank v. Norwalk*, 291 U.S. 431, 441 (1934). This is particularly true for plaintiffs like the Green Voters who choose to bring their federal constitutional claims to a federal tribunal. *Knick v. Township of Scott*, 139 S. Ct. 2126, 2172-73 (2019) ("plaintiffs may bring constitutional claims under § 1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.").

None of the reasons given by the District Court remotely justify the statewide disenfranchisement of every Green Party voter in Montana. Instead, these voters have an indisputably clear right to "cast their ballots *and* have them counted," *United States* v. *Classic,* 313 U.S. 299, 315 (1941) – and have them counted under the election rules in place when they cast their ballots.

III. Injunctive Relief Would Aid This Court's Jurisdiction

Issuing an injunction under the All Writs Act in this case would be "in aid of" this Court's certiorari jurisdiction. 28 U.S.C. § 1651(a). The Court's authority under the Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to

protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals."). This authority certainly applies to cases involving the impending removal of candidates from the ballot. *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (ordering the names of third-party candidates placed on the ballot pending appeal).

Cases involving circuit splits are ones over which this Court traditionally assumes jurisdiction. *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014). Cases raising issues of national importance are also good candidates for review. See, *e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 371-72 (2000).

There is a potential circuit split regarding the issue of whether a state's mailing of ballots to electors, followed by a post-election rule change resulting in the invalidation of those ballots, violates substantive due process under the Fourteenth Amendment. Both the First Circuit in *Griffin* and Second Circuit in *Hoblock* have answered in the affirmative. By denying the Green Voters' motion for an injunction pending appeal, the Ninth Circuit has strongly suggested that it disagrees. App. 1-2.

Review by this Court is also critical because the substantive due process issue presented in this case is of national importance. The Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). But the lower courts have been expanding substantive due process for the past several decades when confronted with

post-election rule changes that result in voter disenfranchisement. *Hoblock*, 422 F.3d at 97; *Griffin,* 570 F.2d at 1074; see also *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("[s]everal appellate courts, including our own, have held that an election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair"). This Court should weigh in for purposes of providing the bench and bar with guidance as to the circumstances in which post-election rule changes constitute a violation of substantive due process.

Because ballots are scheduled to begin being sent to electors on September 18, 2020, the Court must act now or it will lose the ability to effectively review this case. At the very least, a temporary injunction prohibiting the Secretary from sending to electors ballots without Green Party nominees is appropriate to enable full briefing by the parties and analysis by this Court. Beyond that, a simple, equitable remedy would be to restore the *status quo ante* as it existed prior to the issuance of the state court's order on August 7, 2020, that enjoined the Secretary from placing Green Party nominees on the general elections ballot. See *Hoblock v. Albany County Bd. of Elections*, 487 F. Supp. 2d 90, 98 (N.D.N.Y. 2006) (unconstitutional invalidation of absentee ballots prompted court to order New York's election board to "count the disputed ballots, and certify winners."). The Secretary has already canvassed ballots and declared the winners for all party primaries, including the Green Party primary. He simply needs to include the names of the winning Green candidates on the general election ballot, a task he has not undertaken solely because of the state court's order. No other remedy is more practical, equitable, or capable of providing meaningful

relief to Appellants and all other Green Party voters throughout Montana.

CONCLUSION

For all of the foregoing reasons, Applicants respectfully ask this Court to enter an injunction against Respondent Secretary of State Corey Stapleton under the All Writs Act during the pendency of this appeal enjoining him from omitting the names of Green Party nominees from the general election ballot.

Finally, at a minimum, Applicants request a temporary injunction to allow for full briefing and consideration of this Application.

DATED: September 11, 2020

Respectfully submitted,

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Directed to the Honorable Elena Kagan
Associate Justice of the United States Supreme Court
And Circuit Justice for the Ninth Circuit

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September 11, 2020

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 8 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROYAL DAVIS; et al.,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

and

MONTANA DEMOCRATIC PARTY, a Montana domestic nonprofit corporation; et al.,

Intervenor-Defendants-Appellees.

No. 20-35734

D.C. No. 6:20-cv-00062-DLC
District of Montana, Helena

ORDER

Before: O'SCANNLAIN, RAWLINSON, and CHRISTEN, Circuit Judges.

Defendant-appellee's motion to file an addendum to his response to appellants' motion for injunctive relief (Docket Entry No. 14) is granted. The addendum has been filed.

Appellants' emergency motion for injunctive relief (Docket Entry No. 2) is denied.

The motion to intervene by proposed intervenors The Montana Green Party and the Howie Hawkins 2020 presidential campaign in support of appellants (Docket Entry No. 9) is granted.

Appellants' opening brief and excerpts of record remain due not later than September 16, 2020. Intervenors' opening brief is due within 14 days after service of appellants' opening brief. Defendant-appellee and intervenor-appellees' answering briefs remain due October 14, 2020, or 28 days after service of appellants' opening brief, whichever is earlier. Appellants' optional reply brief is due within 21 days after service of the last-served answering brief. *See* 9th Cir. R. 3-3(b), 28-5.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, and THERESA HARSCH, Plaintiffs, vs. COREY STAPLETON, in his official capacity as Montana Secretary of State, Defendant And MONTANA DEMOCRATIC PARTY, a Montana domestic nonprofit corporation, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED, individual electors, Intervenor-Defendants.	CV 20–62–H–DLC ORDER

Plaintiffs have filed an emergency motion for injunction pending appeal. (Doc. 22.)

For the reasons given in this Court's order denying Plaintiffs' previous motion for a temporary restraining order or preliminary injunction, the motion is DENIED.

DATED this 20th day of August, 2020.

Dana L. Christensen, District Judge
United States District Court

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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, TERESA HARSCH, Plaintiffs, v. COREY STAPLETON, in his official capacity as Montana Secretary of State, Defendant. and MONTANA DEMOCRATIC PARTY, *et al*., Intervenor-Defendants.	)	Case No. CV 20-62-H-DLC **NOTICE OF APPEAL** **PRELIMINARY INJUNCTION APPEAL**

TO THE CLERK AND ALL PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiffs hereby appeal to the United States Court of Appeals for the Ninth Circuit from an order denying their Motion for a Temporary Restraining Order and Preliminary Injunction on August 19, 2020.

Plaintiffs' Representative Statement is attached to this Notice as required by Ninth Circuit Rule 3-2(b).

DATED: August 19, 2020

Respectfully submitted,

/s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 19th day of August, 2020, that a copy of the foregoing will be delivered this day to all parties via the Court's ECF system.

DATED: August 19, 2020

Respectfully submitted,

/s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, and THERESA HARSCH, Plaintiffs, vs. COREY STAPLETON, in his official capacity as Montana Secretary of State, Defendant And MONTANA DEMOCRATIC PARTY, a Montana domestic nonprofit corporation, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED, individual electors, Intervenor-Defendants.	CV 20–62–H–DLC ORDER

This lawsuit, filed on August 11, 2020, alleges a violation of voters' and political candidates' federal due process rights. Plaintiffs comprise two candidates for state office, Royal Davis and Gary Marbut, and two voters, Tom Harsch and

Theresa Harsch. Davis and Marbut are running as Green Party candidates[1] for the offices of, respectively, Montana Attorney General and State Senator. Tom Harsch and Theresa Harsch are voters who cast ballots in the 2020 Montana Green Party primary. (Doc. 1 at 2.)

Plaintiffs also filed a motion for a preliminary injunction and temporary restraining order on August 11, 2020. (Doc. 4.) They seek relief on or before August 20, 2020, the date by which Defendant, Montana Secretary of State Corey Stapleton, must certify ballots for the 2020 general election. Secretary Stapleton does not express an opinion as to the relief sought by Plaintiffs, stating only that he "will fully comply with the ultimate [judgment] of this court regarding the merits of this case." (Doc. 15 at 4.)

The Montana Democratic Party and voters Ryan Filz, Madeline Neumeyer, and Rebecca Weed moved to intervene in this lawsuit (Doc. 8), and the Court granted their motion (Doc. 11). Filz, Neumeyer, and Weed signed a petition to qualify Green Party candidates for the 2020 general ballot, but they later moved to

[1] As detailed elsewhere in this Order, the legitimacy of Davis's and Marbut's Green Party affiliation is disputed. The Court notes that it does not believe Davis and Marbut sought candidacy in bad faith, although it appears to be undisputed that the Montana Green Party does not recognize either candidate as a member or provide an endorsement. *See infra* p. 6–8.

withdraw their signatures. (Doc. 9 at 14, 16.) Intervenor-Defendants vigorously oppose the relief sought by Plaintiffs. (Doc. 16.)

The Montana Republican Party ("MTGOP") has filed an amicus brief in support of Plaintiffs. (Docs. 12-1, 13.) The Court addresses its arguments where helpful throughout this Order.

The Court denies Plaintiffs' motion, finding that Plaintiffs are not entitled to the "extraordinary remedy" of a preliminary injunction or temporary restraining order. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008).

BACKGROUND[2]

I. Legal Background

The Green Party has not "had a candidate for statewide office in either of the last two general elections who received a total vote that was 5% of more of the total votes cast for the most recent successful candidate for governor." Mont. Code Ann. § 13-10-601(1). Accordingly, it did not automatically have the option to "nominate its candidates for public office . . . by a primary election" for the 2020 general election ballot.

[2] Because this matter is proceeding on a highly expedited schedule, the Court is unable to decide this matter on a full record. It generally relies on the state district court's factual findings in *Montana Democratic Party v. Montana*, No. DDV-2020-856 (Aug. 7, 2020 Mont. 1st Jud. Dist. Court, Lewis & Clark Cty.), but it has made best efforts to clarify when facts are legitimately in dispute in the parallel state court proceeding. Most notably, the Court does not adopt any finding that the MTGOP violated state campaign finance law or engaged in fraud.

Under Montana law, the Green Party could nonetheless qualify for access to the general ballot "by presenting a petition . . . requesting the primary election." Mont. Code Ann. § 13-10-601(2)(a). To succeed,

> 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.

Mont. Code Ann. § 13-10-601(2)(b). Montana has 100 legislative districts, and so the petition was required to include both: (1) 5,000 or more signatures[3]; and (2) a sufficient number of signatures in at least 34 districts, the minimum number required to meet the threshold of "more than one-third of the legislative districts." Mont. Code Ann. § 13-10-601(2)(b). (Doc. 1-4 at 5.) There is no statute setting forth a procedure by which signers may withdraw their signatures. (Doc. 1-4 at 14–15.)

II. The State Court Proceeding

Intervenor-Defendants sued Secretary Stapleton in state court on June 1, 2020, just prior to the primary election, seeking to block Green Party candidates

[3] The successful candidate for governor in 2016, Steve Bullock, received 255,933 votes. Mont. Sec'y of State, *Official Election Results*, https://sosmt.gov/elections/results/. Five percent of the votes received therefore is significantly greater than 5,000.

from appearing on the ballot. (Doc. 1-4.) Plaintiffs were not parties to that matter; although Plaintiff Gary Marbut filed a pro se motion to intervene, the motion was denied as untimely. (Docs. 9 at 110–12 & 12-2 at 58–59.)

The state district court held a two-day evidentiary hearing in mid-July. (Doc. 1-4 at 4.) On August 7, 2020, the court entered its findings of fact and conclusions of law. It ordered that Secretary Stapleton must give effect to the signature withdrawal requests. (Doc. 1-4 at 49.) With the signatures withdrawn, the district court concluded that "the petition does not satisfy the requirement that the signatures come in sufficient numbers from at least 34 different legislative House Districts." (Doc. 1-4 at 49.) Thus, absent injunctive relief from this Court or a reversal by the Montana Supreme Court, the Green Party will not appear on the 2020 general ballot.

Secretary Stapleton immediately appealed the district court order, and his appeal is currently pending before the Montana Supreme Court, *Mont. Democratic Party v. Stapleton*, No. DA 20-396 (filed Aug. 7, 2020). That appeal is proceeding on an expedited briefing schedule parallel to that which has been set by this Court. Order, *Mont. Democratic Party v. Stapleton*, No. DA 20-0396 (Aug. 11, 2020).

III. Factual & Procedural Background

The Green Party did not make an organized attempt to gain ballot access for the 2020 general election. (Doc. 1-4 at 7.) However, someone else did. (Doc. 1-4 at 5–6.) Advanced Micro Targeting, a Texas-based petition signature gathering firm, hired and paid individuals to gather signatures in support of ballot access; these individuals began canvassing the state in early 2020. (Doc. 1-4 at 5–6.) At the time, the public was unaware of who was paying for the drive. (Doc. 1-4 at 5–7, 11.)

The petition was successful, and nearly all of the signatures eventually turned in were collected by mid-February. (Doc. 1-4 at 6.) However, funding for the petition remained unknown. (Doc. 1-4 at 6.) The Montana Green Party attempted, through its Facebook page, to notify members that it had taken no part in the effort, posting:

> 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[4] 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

[4] The Court assumes that the reference to a "legal battle" pertains to a lawsuit filed in the District of Montana, *Montana Green Party v. Stapleton*, ___ F. Supp. 3d ___, 2020 WL 1316816 (D. Mont. March 20, 2020). In that case, which is now on appeal to the Ninth Circuit, the Montana Green Party alleged that the petition-gathering statutory scheme unconstitutionally bars access to the ballot. The district court rejected the argument, granting summary judgment to the state.

> 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.

(Doc. 1-4 at 6–7 (ellipses in original).) As a local journalist said on the radio on February 21, "[I]n the realm of shenanigans, some unknown group has gathered signatures and collected petitions around the state to qualify the Green Party for the ballot, a move that is seen as possibly helping Republican candidates. . . . [W]ho is it?" (Doc. 1-4 at 8.)

Secretary Stapleton certified the petition on March 6, 2020, finding that it met the requirements of Montana Code Annotated § 13-10-601. It was not until two and a half weeks later, on March 24, 2020, that journalists were able to follow the money trail. (Doc. 1-4 at 18.) The MTGOP had paid for the signature drive, in part through a shell group named "Montanans for Conservation," funded solely by the MTGOP. (Doc. 1-4 at 18–20.)[5] The MTGOP had contracted with Advanced

[5] The MTGOP disputes any suggestion that the difficulty in determining who funded the drive was attributable in part to noncompliance with Montana election law. (Doc. 12-1.) The Court expresses no opinion on this issue, although it notes that the campaign finance law allegedly violated arose from a 2018 signature drive with marked factual similarities to that which gave rise to this proceeding. *See Larson v. Montana ex rel. Stapleton*, 434 P.3d 241 (2019). In 2018, the Green Party was able to round up only approximately 700 signatures in support of access to the 2018 general ballot, but Advanced Micro Targeting collected an additional 9,461. *Id.* at 248. It was unclear then, too, who paid Advanced Micro Targeting. As a result, the Montana Legislature passed SB 363 in 2019, adding reporting, disclosure, and registration requirements for entities spending money to qualify minor parties for ballot access. Mont. Code Ann. §§ 13-37-601 through 13-37-607.

Micro Targeting, a Texas-based petition signature gathering firm, to send paid signature gatherers throughout Montana. (Doc. 1-4 at 18–20.)

After learning what had occurred, The Montana Democratic Party made efforts to notify petition-signers of the MTGOP's involvement in the drive and to assist interested signers in withdrawing their signatures. (Doc. 1-4 at 20–24.) 562 petition-signers submitted requests for withdrawal prior to the primary election, but Secretary Stapleton did not honor all of the requests. (Doc. 1-4 at 25, 30.)

The Montana Green Party disclaimed the candidates running under its banner, posting an update to its Facebook page:

> This is to confirm, for those considering voting for the Green Party in the primaries, none of those running under the Montana Green Party ticket this season are actual Greens as far as we can tell. They have not been involved in Montana Green Party activities. Before voting for any of them, it would be wise to ask them to account for their belief in a platform, especially the Green Party requirement that we not take any corporate dollars.

(Doc. 9 at 88.) Ultimately, Green Party primary ballots were mailed[6] to voters,[7] and approximately 800 were returned. (Doc. 1 at 4.)

[6] Montana held an all-mail primary on June 2, 2020. *See* Eric Dietrich, *Counties Will Have Option to Conduct All-mail Elections in November*, August 6, 2020. Montana holds open primaries; all primary ballots are offered to each voter, regardless of the voter's registration status. The voter must select which ballot to complete, as she may return only one party's ballot. *See Ravalli Cty. Republican Cent. Comm. v. McCulloch*, 154 F. Supp. 3d 1063, 1065 (D. Mont. 2015).

[7] Montana law requires the Secretary of State to determine whether a primary is necessary, dependent upon the number of individuals who declare as candidates. Mont. Code Ann. § 13-10-

JURISDICTION

Plaintiffs argue that, because it brought suit under 42 U.S.C. § 1983, "this Court has jurisdiction notwithstanding the general prohibition contained in the Anti-Injunction Act, 28 U.S.C. § 2283, against federal injunctions staying proceedings in state courts," citing *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). (Doc. 4 at 11). The Court is reluctant to exercise jurisdiction while the appeal of the state court order is pending before the Montana Supreme Court. For one thing, the Montana Supreme Court could, at any time, issue a ruling mooting this controversy. And, for another, this Court's decision could disrupt a matter of significant importance to the State. However, the Court's reluctance does not override jurisdiction.

Intervenor-Defendants argue that the Court lacks jurisdiction under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984). *Pennhurst*, grounded in the Eleventh Amendment, provides that federal courts may not "instruct[] state officials on how to conform their conduct to state law." *Id.*

Pennhurst does not bar jurisdiction in this matter. Plaintiffs allege that, by operation of the state court order entered August 7, 2020, their federal

209. Because two candidates declared for the U.S. Senate race, the determination was made that a Green Party primary was necessary. *Id.*

constitutional rights will be violated. The Court has not been called on to interpret state law or to tell Secretary Stapleton how to fulfill his official role; it is asked only to determine whether the Constitution will be violated if Secretary Stapleton complies with the district court order currently in effect (and, of course, with which Intervenor-Defendants agree). The pending appeal of that ruling to the Montana Supreme Court certainly adds a procedural wrinkle. But it does not alter that Plaintiffs ask the Court to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States,'" not to order Secretary Stapleton to appropriately fulfill his duties under state law. *Pennhurst State Sch. Hosp.*, 465 U.S. at 105 (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). Whether Plaintiffs have actually alleged an infringement of a federal constitutional right is a separate question, and it is analyzed under the first *Winter* factor below.

ABSTENTION

Intervenor-Defendants next argue that, even if this Court may exercise jurisdiction, it should nonetheless abstain under the *Pullman* doctrine. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941). Abstention is therefore appropriate "[w]here there is an action pending in state court that will likely resolve the state-

law questions underlying the federal claim." *Harris Cty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975). "*Pullman* abstention does not exist for the benefit of either of the parties but rather for 'the rightful independence of the state governments and for the smooth working of the federal judiciary." *San Remo Hotel v. City & County of S.F.*, 145 F.3d 1095, 1105 (quoting *Pullman*, 312 U.S. at 501).

"*Pullman* abstention is appropriate only when three concurrent criteria are satisfied: (1) the federal plaintiff's complaint must require resolution of a sensitive question of federal constitutional law; (2) that question must be susceptible to being mooted or narrowed by a definitive ruling on state law issues; and (3) the possibly determinative state law must be unclear." *United States v. Morros*, 268 F.3d 695, 703–74 (9th Cir. 2001). "Because the federal courts' obligation to adjudicate claims within their jurisdiction is 'virtually unflagging,' abstention is permissible only in a few 'carefully defined' situations with set requirements." *Id.* at 703.

The Court agrees that the principle of comity underlying the *Pullman* doctrine supports abstention, but it nonetheless finds that *Pullman* is not a perfect fit. First, the Court assumes without deciding that the complaint raises "a sensitive question of federal constitutional law," even though—as addressed below under

the first *Winter* factor—that question is unlikely to be resolved in Plaintiffs' favor. *Id.*

Second, this proceeding *could* be mooted by a ruling by the Montana Supreme Court. However, there is also a current, operative ruling on the state law issues. Further, there is no guarantee (although there is every indication) that the appeal will be decided prior to August 20, 2020, on which date Plaintiffs' constitutional rights will allegedly be irrevocably infringed. And, in the event that the Montana Supreme Court affirms the district court—which, of course, Intervenor-Defendants hope comes to pass—this controversy will remain very much alive, and the deadline for ballot certification will remain in place.

Third, the "possibly determinative state law [is not] unclear." *Id.* The trial court ruling currently is in effect and will remain so unless and until the Montana Supreme Court issues a reversal or vacatur.

The Court notes that it would be somewhat more inclined to abstain if the *Winter* factors were indifferent to the principles of comity that counsel in favor of abstention. But, because *Winter* demands consideration of the equities and the public interest, the test is expansive enough to allow for a full consideration of the Court's appropriate role in our federalist system. Given the procedural posture of this just-filed case, the Court's denial of Plaintiffs' motion for emergency

injunctive relief is not meaningfully different from a decision to abstain. Thus, the Court will consider whether Plaintiffs are entitled to the relief sought.

LEGAL STANDARD

Whether a plaintiff seeks a temporary restraining order or preliminary injunction, the standard is the same. *Stuhlbarg Intern. Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). The plaintiff must show: (1) "that he is likely to succeed on the merits"; (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "that the balance of equities tips in his favor"; and (4) "that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Under Ninth Circuit law, "a stronger showing of one element may offset a weaker showing of another." *HiQ Labs, Inc. v. Linkedin Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). "So, when the balance of equities tips sharply in the plaintiff's favor, the plaintiff need demonstrate only 'serious questions going to the merits.'" *Id.* (quoting *Cottrell*, 632 F.3d at 1131).

I. Likelihood of Success on the Merits

Plaintiffs allege that the relief ordered by the state district court on August 7, 2020 violates their Fourteenth Amendment right to substantive due process because the election was "conducted in a manner that is fundamentally unfair."

Bennett v. Yoshina, 140 F.3d 1218, 1226 (9th Cir. 1988). The Fourteenth Amendment guarantees that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Intervenor-Defendants attack Plaintiffs' claim at its foundation, arguing that Plaintiffs have failed to allege a violation of their Fourteenth Amendment rights. The Court is not unsympathetic to this argument, but in the interest of a full consideration of Plaintiffs' motion, it addresses whether Plaintiffs are likely to succeed on their claim that a failure to place Green Party candidates on the general ballot would be "fundamentally unfair." *Bennett*, 140 F.3d at 1226.

Bennett provides a framework by which an election or procedure may be declared invalid; "a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Id.* at 1226–27. Plaintiffs argue that they relied on Montana's petition process and that a "significant disenfranchisement" will result if the candidates selected in the Green Party primary are not placed on the general ballot. The Court disagrees on both points.

Under the first *Bennett* prong, the question is whether there is an "unforeseeable departure from past election practices"—an "unfair" "surprise." *Id.* at 1225–26. Here, there was no such departure because Montana voters did not "rel[y] on an established election procedure." *Id.* at 1226. Before this case, there was no clear procedure by which signers supporting ballot access could withdraw their signatures, likely because there was no precedent for a situation in which signers would seek to withdraw their signatures *en masse*.[8] Voters did not reasonably rely on the absence of a procedure for signature withdrawal as decisive proof that signatures cannot be withdrawn.

Nor, even if there had been "reliance" and "a change in the election procedures," would the Court find anything approaching "significant disenfranchisement" here. *Id.* at 1226–27. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Candidates do not have an absolute right to appear on a ballot. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) ("The State has the

[8] Relevant to the state court proceeding, but not here, are questions regarding whether Secretary Stapleton imposed the wrong standards on potential withdrawers, including his obligation to accept signatures verified by DocuSign during a pandemic. It would be improper for the Court to weigh in on any such questions under *Pennhurst*, *see supra* p. 9, and the Court addresses only whether Secretary Stapleton, in complying with the state court ruling, will violate voters' Fourteenth Amendment rights.

undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.") And voters do not have an "absolute right to support a specific candidate regardless of whether he or she has satisfied reasonable eligibility requirements." *Stiles v. Blunt*, 912 F.2d 260, 266 (8th Cir. 1990); *see also Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding state law limiting right to participate in primary to those who meet deadline).

The due process clause is unconcerned with "garden variety election irregularities." *Bennett*, 140 F.3d at 1226. At the very most, that is what Plaintiffs have suffered; this case does not present "the long-odds exception to the rule of nonintervention." *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 75–76 (1st Cir. 2001); *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) ("The Due Process Clause is implicated, and § 1983 relief is appropriate, in the exceptional case where a state's voting system is fundamentally unfair.").

For its part, Amicus MTGOP argues that the Court must apply strict scrutiny because the state court's action threatens the fundamental right to vote. (Doc. 12-1 at 3–4.) However, they cite to nothing which suggests that a party need only allege a violation of voting rights to get to strict scrutiny. And such a rule would

immediately call into doubt any number of state election schemes, not to mention decades of settled precedent.

MTGOP further contends that the state district court ruling violates the federal constitution because that court denied its motion to intervene. Whether the state court erred in denying MTGOP's motion to intervene is a matter for the Montana Supreme Court to suss out; the federal court is generally indifferent to a state court's administration of its own docket.

Plaintiffs have not shown a likelihood of success on the merits, defeating their motion. The Court nonetheless addresses the remaining *Winter* factors.

II. Likelihood of Irreparable Harm

"[U]nlike monetary injuries, constitutional violations cannot be adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009. "[O]nce [an] election occurs, there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F. 3d 224, 247 (4th Cir. 2014). Because both sides of this litigation have significant interests at stake, the Court finds that both face potential irreparable harm.

Certification must take place on August 20, 2020. When the ballots are certified, the Green Party candidates will either appear on the ballot or not. If they do, then petition signers who moved to withdraw their signatures will see their

withdrawal requests go unhonored, and the Democratic Party and its voters may see votes for Democratic candidates siphoned by seemingly progressive candidates who would not be on the ballot but for the efforts of the MTGOP. On the other hand, if the Green Party candidates are not there, approximately 800 Montanans who voted in the primary will have missed the opportunity to vote in another party's primary.

The Court finds that Plaintiffs have demonstrated a likelihood of irreparable harm. It notes, though, that the Court could not issue injunctive relief without causing equivalent harm to Intervenor-Defendants.

III. Balance of the Equities

Plaintiffs contend that the balance of equities "tips sharply" in their favor. They argue that they and other voters face disenfranchisement, but that "[t]he State . . . will suffer no prejudice if relief is granted because it has no legitimate interest in disenfranchising an entire class of voters who lawfully cast their ballots." (Doc. 4 at 17.) But it hardly needs saying that "disenfranchisement" is not a legitimate interest.

Rather, the Court finds that the balance of equities counsels heavily against granting injunctive relief. It is not that equitable considerations necessarily favor

Intervenor-Defendants, it is that they support refusing to interfere with the state's administration of its own election laws.

Further, Plaintiffs cannot rightly contend that the equities support their position when they chose not to attempt intervention in the state court matter and instead waited until the final hour to raise their constitutional claims. "A party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curium). "That is as true in election law cases as elsewhere." *Id.*

IV. Public Interest

The public interest also weighs against Plaintiffs' request for emergency relief. "While . . . federal courts have a duty to ensure that national, state and local elections conform to constitutional standards, [they must] undertake that duty with a clear-eyed and pragmatic sense of the special dangers of excessive judicial interference with the electoral process." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1182–83 (9th Cir. 1988). Here, there is an overwhelming public interest in allowing the state judiciary and legislature to function without unnecessary federal intervention.

Although the Court has determined that none of the abstention doctrines are precisely on point, the principle of comity weighs heavily against granting

Plaintiffs' motion. Ours "is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Where necessary, "[f]ederal courts, exercising a wise discretion, [must] restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943) (quoting *Pullman*, 312 U.S. at 501) (internal quotation marks omitted).

"[T]he normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger*, 401 U.S. at 45. Even if the merits favored Plaintiffs—and they do not—an injunction would nonetheless be inappropriate, given the parallel proceeding before the Montana Supreme Court.

Accordingly, IT IS ORDERED that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 3) is DENIED.

IT IS FURTHER ORDERED that the parties shall file notices apprising the Court of whether a case or controversy remains in this matter on or before August 21, 2020.

IT IS FURTHER ORDERED that the Clerk of Court shall immediately send an electronic copy of this Order to the Clerk of the Montana Supreme Court.

DATED this 19th day of August, 2020.

Dana L. Christensen, District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, and THERESA HARSCH, Plaintiffs, vs. COREY STAPLETON, in his official capacity as Montana Secretary of State, Defendant And MONTANA DEMOCRATIC PARTY, a Montana domestic nonprofit corporation, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED, individual electors, Intervenor-Defendants.	CV 20–62–H–DLC ORDER

The Montana Democratic Party, Ryan Filz, Madeline Neumeyer, and Rebecca Weed move to intervene in this matter. (Doc. 8.) Plaintiffs have withdrawn their opposition to the motion. (Doc. 10.)

Accordingly, IT IS ORDERED that the motion to intervene (Doc. 8) is GRANTED. Intervenor-Defendants shall file a response to Plaintiffs' motion for a temporary restraining order on or before August 17, 2020.

IT IS FURTHER ORDERED that Plaintiffs may file an optional reply brief on or before August 18, 2020.

DATED this 14th day of August, 2020.

Dana L. Christensen, District Judge
United States District Court

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Attorneys for Proposed Intervenor-Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, and TERESA HARSCH,

Plaintiffs,

v.

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

Defendant,

and

MONTANA DEMOCRATIC PARTY, a Montana domestic nonprofit corporation, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED, individual electors,

Proposed Intervenor-Defendants.

Case No. 6:20-cv-00062-DLC

PROPOSED INTERVENOR DEFENDANTS' ANSWER TO VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Proposed Intervenor-Defendants the Montana Democratic Party ("MDC"), Ryan Filz ("Filz"), Madeline Neumeyer ("Neumeyer") and Rebecca Weed ("Weed," and together with MDC, Filz, and Neumeyer, "Intervenor-Defendants"), through their attorneys, hereby answer the Verified Complaint for Declaratory and Injunctive Relief (the "Complaint") filed by plaintiffs Royal Davis ("Davis"), Gary Marbut ("Marbut"), Tom Harsch ("Mr. Harsch"), and Teresa Harsch ("Ms. Harsch," and together with Davis, Marbut, and Mr. Harsch, "Plaintiffs").

Intervenor-Defendants respond to Plaintiffs' Complaint as follows:

PRELIMINARY STATEMENT

1. The allegations in paragraph 1 are legal conclusions to which no response is required. To the extent that a response is required, Intervenor-Defendants admit that, on March 6, 2020, the Secretary announced to county elections officials and to the media that he had determined that the Montana Green Party had submitted enough signatures to satisfy the requirements of § 13-10-601, MCA. Intervenor-Defendants deny each other or different allegation in paragraph 1.

2. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 and therefore deny them.

3. Intervenor-Defendants admit that every county in Montana conducted a mail ballot election for the June 2, 2020 Primary Election. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 3 and therefore deny them.

4. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 and therefore deny them.

5. Intervenor-Defendants admit that they filed a complaint in state court on June 1, 2020, captioned *Montana Democratic Party, et al. v. State of Montana by and through its Secretary of State Corey Stapleton*, Cause No. DDV-2020-856 (referred to herein as the "State Court Action"), and further state that the complaint speaks for itself. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 5 and therefore deny them.

6. In response to the allegations in paragraph 6, Intervenor-Defendants state that the order issued on August 7, 2020 in the State Court Action speaks for

itself. Intervenor-Defendants deny each other or different allegation in paragraph 6.

7. In response to the allegations in paragraph 7, Intervenor-Defendants state that the order issued on August 7, 2020 in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 7.

8. In response to the allegations in paragraph 8, Intervenor-Defendants state that the order issued on August 7, 2020 in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 8.

9. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 that Plaintiffs Harschs and other Montana voters lawfully cast Green Party ballots in May and therefore deny them. As to the remaining allegations, Intervenor-Defendants state that the order issued on August 7, 2020 in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 9.

10. The allegations in paragraph 10 are legal conclusions to which no response is required. To the extent that a response is required, Intervenor-Defendants deny the allegations in paragraph 10.

11. The allegations in paragraph 11 are legal conclusions to which no response is required. To the extent that a response is required, Intervenor-Defendants deny the allegations in paragraph 11.

12. Intervenor-Defendants deny the allegations in paragraph 12.

13. The allegations in paragraph 13 are legal conclusions to which no response is required. To the extent that a response is required, Intervenor-Defendants deny the allegations in paragraph 13.

14. Intervenor-Defendants deny the allegations in paragraph 14.

JURISDICTION AND VENUE

15. The allegations in paragraph 15 are legal conclusions to which no response is required.

16. The allegations in paragraph 16 are legal conclusions to which no response is required. To the extent that a response is required, Intervenor-Defendants deny the allegations in paragraph 16.

17. Intervenor-Defendants admit that the office of the Montana Secretary of State is located in Helena. The remaining allegations in paragraph 17 are legal

conclusions to which no response is required. To the extent that a response is required, Intervenor-Defendants deny each other or different allegation in paragraph 17.

PARTIES

18. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 and therefore deny them.

19. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 and therefore deny them.

20. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 and therefore deny them.

21. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21 and therefore deny them.

22. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 and therefore deny them.

23. Intervenor-Defendants admit that Defendant Corey Stapleton is Montana's elected Secretary of State and was elected to that position in November 2016. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23 and therefore deny them.

24. The allegations in paragraph 24 are legal conclusions to which no response is required.

STATEMENT OF FACTS

A. Rules for Political Parties to Qualify for Montana Primary Elections

25. In response to paragraph 25, Defendant-Intervenors state that Montana law speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 25.

26. In response to the allegations in paragraph 26, Defendant-Intervenors state that Montana law speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 25.

27. Intervenor-Defendants admit that the Democratic Party, the Republican Party, and the Libertarian Party are currently eligible to nominate their candidates for public office by a primary election. Intervenor-Defendants deny each other or different allegation in paragraph 27.

28. In response to the allegations in paragraph 28, Defendant-Intervenors state that Montana law speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 28.

29. In response to the allegations in paragraph 29, Defendant-Intervenors state that Montana law speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 29.

30. In response to the allegations in paragraph 30, Defendant-Intervenors state that Montana law speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 30.

B. Qualification of the Green Party for the 2020 Primary and Casting of Green Party Ballots by Voters

31. Intervenor-Defendants admit that, on or around January 24, 2020, some registered Montana voters began signing petitions bearing the name of the Montana Green Party. Intervenor-Defendants deny each other or different allegation in paragraph 31.

32. Intervenor-Defendants admit that some petitions bearing the name of the Montana Green Party were submitted to county elections administrators on or before March 2, 2020. Intervenor-Defendants deny each other or different allegation in paragraph 32.

33. Intervenor-Defendants admit that on March 6, 2020, 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. Intervenor-Defendants deny each other or different allegation in paragraph 33.

34. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34 and therefore deny them.

35. Intervenor-Defendants admit that "Wendie Fredrickson" is listed as a candidate on the Montana Secretary of State's 2020 Candidate Filing List with the designations "Office: US Senate" and "Party: Green." Intervenor-Defendants deny each other or different allegation in paragraph 35.

36. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36 and therefore deny them.

37. Intervenor-Defendants admit that "Roy Davis" is listed as a candidate on the Montana Secretary of State's 2020 Candidate Filing List with the designations "Office: Attorney General" and "Party: Green." Intervenor-Defendants deny each other or different allegation in paragraph 37.

38. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38 and therefore deny them.

39. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39 and therefore deny them.

40. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40 and therefore deny them.

41. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41 and therefore deny them.

42. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42 and therefore deny them.

43. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43 and therefore deny them.

44. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44 and therefore deny them.

45. Intervenor-Defendants admit that Gary Marbut is listed as a candidate on the Montana Secretary of State's 2020 Candidate Filing List with the designations "Office: Senate District 47" and "Party: Green." Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of any remaining allegations in paragraph 45 and therefore deny them.

46. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46 and therefore deny them.

47. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47 and therefore deny them.

48. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48 and therefore deny them.

49. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49 and therefore deny them.

50. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50 and therefore deny them.

51. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51 and therefore deny them.

52. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52 and therefore deny them.

C. Casting of Green Party Ballots By Montana Voters

53. In response to the allegations in paragraph 53, Intervenor-Defendants state that Montana law speaks for itself. To the extent that a response is required, Intervenor-Defendants deny the allegations in paragraph 53.

54. Intervenor-Defendants admit that Governor Steve Bullock issued a directive on March 25, 2020, and further state that the March 25, 2020 directive

speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 54.

55. Intervenor-Defendants admit that every county in Montana conducted a mail ballot election for the June 2, 2020 Primary Election. Intervenor-Defendants deny each other or different allegation in paragraph 55.

56. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 56 and therefore deny them.

57. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57 and therefore deny them.

58. Paragraph 58 contains no allegations to which a response is required. To the extent that a response is required, Intervenor-Defendants state that Exhibit 1 and the information found on the Secretary of State's website speaks for itself.

59. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59 and therefore deny them.

60. Paragraph 60 contains no allegations to which a response is required. To the extent that a response is required, Intervenor-Defendants state that Exhibit 2 and the information found on the Secretary of State's website speaks for itself.

61. In response to the allegations in paragraph 61, Intervenor-Defendants state that the instruction sheet speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 61.

62. In response to the allegations in paragraph 62, Intervenor-Defendants state that the instruction sheet speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 62.

63. In response to the allegations in paragraph 63, Intervenor-Defendants state that the instruction sheet speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 63.

64. In response to the allegations in paragraph 64, Intervenor-Defendants state that the instruction sheet speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 64.

65. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65 and therefore deny them.

66. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66 and therefore deny them.

67. Intervenor-Defendants admit that the Secretary's 2020 Statewide Primary Election Canvass lists 504 votes cast for Wendie Fredrickson and 255 votes cast for Dennis Daneke. Intervenor-Defendants deny the remaining allegations in paragraph 67.

68. Intervenor-Defendants admit that the Secretary's 2020 Statewide Primary Election Canvass lists 752 votes cast for Roy Davis. Intervenor-Defendants deny the remaining allegations in paragraph 68.

69. Intervenor-Defendants admit that the Secretary's 2020 Legislative Primary Election Canvass lists 14 votes cast for Gary Marbut. Intervenor-Defendants deny the remaining allegations in paragraph 69.

70. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70 and therefore deny them.

D. The Democratic Party's Suit Challenging the Green Party Filed the Day Before the Primary Election

71. Intervenor-Defendants admit that, on June 1, 2020, they filed a Complaint in the State Court Action. Intervenor-Defendants state that the

complaint filed in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 71.

72. Paragraph 72 contains no allegations to which a response is required. To the extent that a response is required, Intervenor-Defendants state that the complaint filed in the State Court Action speaks for itself.

73. Intervenor-Defendants admit that the complaint filed in the State Court Action named as plaintiffs four persons who had signed the petition at issue. Intervenor-Defendants deny the remaining allegations in paragraph 73.

74. In response to the allegations in paragraph 74, Intervenor-Defendants state that the complaint and summons filed in the State Court Action speak for themselves.

75. Intervenor-Defendants state that the filing in the State Court Action styled "Motion to Intervene of Gary Marbut" bearing the date July 17, 2020 speaks for itself. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 75 and therefore deny them.

76. In response to the allegations in paragraph 76, Intervenor-Defendants state that the August 7, 2020 Order on Secondary and Post-Hearing Motions issued

in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 76.

77. In response to the allegations in paragraph 77, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 77.

78. In response to the allegations in paragraph 78, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 78.

79. In response to the allegations in paragraph 79, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 79.

80. In response to the allegations in paragraph 80, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 80.

81. In response to the allegations in paragraph 81, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 81.

82. In response to the allegations in paragraph 82, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 82.

83. In response to the allegations in paragraph 83, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 83.

84. In response to the allegations in paragraph 84, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 84.

85. In response to the allegations in paragraph 85, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 85.

86. In response to the allegations in paragraph 86, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 86.

87. Intervenor-Defendants admit that Defendant Stapleton filed a notice of appeal from the State Court Action to the Montana Supreme Court on August 7, 2020.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Violation of Plaintiffs' Right to Due Process under the Fourteenth Amendment to the United States Constitution (42 U.S.C. 1983)

88. Intervenor-Defendants incorporate by reference their responses to paragraphs 1 through 87, as though fully set forth herein.

89. The allegations in paragraph 89 are legal conclusions to which no response is required.

90. The allegations in paragraph 90 are legal conclusions to which no response is required.

91. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 91 and therefore deny them.

92. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 92 and therefore deny them.

93. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 93 and therefore deny them.

94. In response to paragraph 94, Defendant-Intervenors state that Montana law speaks for itself. Defendant-Intervenors deny each other or different allegation in paragraph 94.

95. Intervenor-Defendants deny the allegations in Paragraph 95.

96. Intervenor-Defendants deny the allegations in Paragraph 96.

97. Intervenor-Defendants deny the allegations in Paragraph 97.

98. In response to the allegations in paragraph 98, Intervenor-Defendants state that the order issued in the State Court Action speaks for itself. Intervenor-Defendants deny each other or different allegation in paragraph 98.

99. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 99 and therefore deny them.

100. Intervenor-Defendants deny the allegations in Paragraph 100.

101. Except as specifically admitted herein, Intervenor-Defendants deny each and every allegation of Plaintiffs' Complaint.

AFFIRMATIVE DEFENSES

By way of further answer, Intervenor-Defendants allege the following defenses and affirmative defenses without assuming the burden of proof, where such burden is otherwise on Plaintiffs under applicable law. Intervenor-

Defendants reserve the right to add additional affirmative defenses and additional facts supporting their defenses after conducting further discovery, investigation, research, and analysis.

102. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

103. Plaintiffs' claims are barred in whole or in part by the doctrines of laches and unclean hands.

104. Plaintiffs' claims are barred in whole or in part by the doctrines of res judicata, claim preclusion, and/or issue preclusion.

105. Plaintiffs' claims are barred in whole or in part by the doctrine of abstention under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) and *Pennhurst State Sch. v. Halderman*, 465 U.S. 89 (1984).

106. Plaintiffs' claims are barred in whole or in part because Plaintiffs contributed to or caused their own damages, the existence of which Intervenor-Defendants specifically deny, by their own actions, omissions, misconduct, and/or negligence.

107. Plaintiffs' claims are barred in whole or in part to the extent their actions were fraudulent and/or illegal.

108. Plaintiffs' claims are barred in whole or in part by the doctrines of estoppel and/or waiver.

RESPONSE TO PLAINTIFFS' PRAYER FOR RELIEF

Intervenor-Defendants deny all allegations in Plaintiffs' prayer for relief and deny that Plaintiffs are entitled to any relief.

INTERVENOR DEFENDANTS' PRAYER FOR RELIEF

WHEREFORE, having fully answered Plaintiffs' Complaint, Intervenor-Defendants pray for relief as follows:

A. That Plaintiffs' Complaint be dismissed with prejudice;

B. That all of Plaintiffs' requests for temporary or permanent injunctive relief, declaratory judgment, and other equitable relief be denied;

C. That Plaintiffs' request for an award of costs, expenses, and attorneys' fees be denied;

D. That Intervenor-Defendants be awarded their legally recoverable costs, disbursements, and reasonable attorneys' fees; and

E. That Intervenor-Defendants be awarded such other and further relief as the Court deems just and equitable.

DATED: August 13, 2020

By: */s/ Peter M. Meloy*

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Attorneys for Proposed Intervenor-Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following counsel of record by the means designated below this 13th day of August, 2020.

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DATED: August 13, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, TERESA HARSCH, Plaintiffs, v. COREY STAPLETON, in his official capacity as Montana Secretary of State, Defendant.	Case No. _____ **VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

PRELIMINARY STATEMENT

1. On March 6, 2020, Montana Secretary of State Corey Stapleton declared a ballot qualification petition submitted to election officials had garnered sufficient signatures under Montana law to qualify the Green Party for the ballot.

2. Shortly thereafter, several candidates filed for Green Party nominations, including Plaintiff Royal Davis (who filed as a candidate for Montana Attorney General) and Plaintiff Gary Marbut (who filed for a seat in the Montana Senate).

3. The State conducted an all-mail primary election and mailed ballots to the electors on May 8, 2020.

4. Plaintiffs Tom Harsch and Teresa Harsch, along with approximately 800 other Montana voters, marked Green Party ballots and timely returned them to election officials.

5. On June 1, 2020, *the day before the primary election*, and weeks after most Green Party voters had mailed in their ballots, the Montana Democratic Party filed suit in state court to invalidate the Green Party qualification petition and remove the Green Party from the ballot.

6. In an order issued August 7, 2020, the state court did not find any defects in the wording of the petition or reasons that would have disqualified any of the signers from signing the petition.

7. Rather, the state court determined that several petition signers had become dismayed upon learning that Republicans had funded signature-gathering efforts.

8. The state court further ruled that, by late May 2020, enough of these signers had requested withdrawal of their signatures that the number of remaining signers had fallen below the legal threshold needed to qualify a party for the ballot.

9. So on August 7, 2020, nearly three months after the Harschs and other Montana voters lawfully cast Green Party ballots in May, and nearly five months after Secretary Stapleton declared in March that the Green Party was ballot-

qualified, the state court ruled that the Secretary Stapleton is "enjoined from implementing or giving any effect to the [Green Party's] Petition."

10. A denial of substantive due process occurs if an election is "conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998).

11. An election is fundamentally unfair and violates substantive due process if two elements are present:

> (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and
>
> (2) significant disenfranchisement that results from a change in the election procedures.

Bennett, 140 F.3d at 1226-27, citing *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978).

12. The buyer's remorse suffered by some of the Green Party petition signers well after the Party qualified for the ballot -- and well after many of the Green Party voters had cast ballots -- did not justify the state court's cavalier disenfranchisement of Plaintiffs and nearly 800 other Green voters months after they had lawfully cast ballots in Montana's primary election.

13. Montana law requires state election officials to certify for the general election ballot the names and party designations of candidates no later than ***August 20, 2020.*** Mont. Code Ann. § 13-12-201(1)

14. Without immediate relief from this Court, Plaintiffs and approximately 800 other Green Party voters will suffer irreparable injury to their constitutional rights, including disenfranchisement, despite having lawfully cast ballots during Montana's primary election.

JURISDICTION AND VENUE

15. This Court has jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343, 42 U.S.C. §1983, and the Fourteenth Amendment to the United States Constitution.

16. Because this action arises under 42 U.S.C. §1983, this Court has jurisdiction notwithstanding the general prohibition contained in the Anti-Injunction Act, 28 U.S.C. § 2283,[1] against federal injunctions staying proceedings in state courts. *Mitchum v. Foster*, 407 U.S. 225, 243 (1972).

17. Defendant Stapleton resides in the Helena Division of the Court and, therefore, venue for this action properly lies in the Helena Division.

PARTIES

18. Plaintiff Royal Davis is now and has been for over 40 years a resident of Lewis and Clark County, Montana.

---

[1] The Anti-Injunction Act states as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283

19. Plaintiff Davis meets all of the legal requirements to serve as Attorney General of Montana.

20. Plaintiff Gary Marbut is a resident of Missoula County, Montana, and meets all of the legal requirements to serve in the Montana Senate.

21. Plaintiff Tom Harsch is a resident of Yellowstone County, Montana, and at all times pertinent to this lawsuit has been registered to vote in Yellowstone County.

22. Plaintiff Teresa Harsch is a resident of Yellowstone County, Montana and at all times pertinent to this lawsuit has been registered to vote in Yellowstone County.

23. Defendant Corey Stapleton was elected Secretary of State in November 2016 and, since that time, has resided in Lewis and Clark County, Montana.

24. Secretary Stapleton is sued in his official capacity only.

STATEMENT OF FACTS

A. Rules For Political Parties to Qualify for Montana Primary Elections

25. Montana law provides two methods by which a political party can qualify for the ballot in a primary election.

26. First, a political party will appear on the primary ballot if it had a candidate for statewide office in either of the prior two general elections who received at

least 5% of the total vote received by the successful candidate for governor. Mont. Code Ann. § 13-10-601(1).

27. Under this rule, the Democratic Party, the Republican Party, and the Libertarian Party are ballot-qualified parties.

28. Parties that are not ballot-qualified under Mont. Code Ann. § 13-10-601(1) may seek qualification under Mont. Code Ann. § 13-10-601(2)(b) by submitting to the Secretary of State a petition 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.

29. This number must include registered voters in at least 34 of Montana's 100 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. Mont. Code Ann. § 13-10-601(2)(b).

30. The deadline to submit new political party qualification petitions to county election administrators was March 2, 2020. Mont. Code Ann. § 13-10-601(2)(c).

B. Qualification of the Green Party For the 2020 Primary and Casting of Green Party Ballots By Voters

31. Sometime in January or February 2020, registered Montana voters began signing a petition to qualify the Green Party for the 2020 primary election.

32. In accordance with Montana law, petition signatures and affidavits of circulation were timely submitted to county election administrators on or before the deadline of March 2, 2020.

33. On March 6, 2020, Secretary Stapleton publicly announced that the Green Party had submitted sufficient signatures to qualify for the ballot.

34. During the following week, several Green Party candidates timely filed nomination papers with the Secretary.

35. One candidate was Wendie Fredrickson, who filed as a Green Party candidate for United States Senator.

36. Fredrickson paid a candidate filing fee of $1,740.00.

37. Plaintiff Royal Davis filed as a Green Party candidate for Montana Attorney General.

38. Davis paid a candidate filing fee of $1,410.23.

39. Davis has been licensed to practice law in Montana since 1996.

40. Davis had spent decades supporting Democratic candidates for governor prior to filing as a Green Party candidate.

41. These efforts included serving twice as the Lewis and Clark County Campaign Coordinator for former Democratic Governor Tom Judge.

42. Davis was also involved in the campaigns of other Democratic gubernatorial candidates such as Mike McGrath and Brian Schweitzer.

43. Davis has collected wind generators since he was in high school and also owns solar panels.

44. Davis heats his home and mountain cabin exclusively with renewable resources.

45. Plaintiff Gary Marbut filed as a Green Party candidate for the Montana Senate in a Missoula-area senate district.

46. Marbut paid a candidate filing fee of $15.

47. Marbut has in prior election cycles filed for both Democratic and Republican nominations for various offices.

48. Prior to 2020, Marbut's most recent campaign was as an Independent candidate for Montana House District 94 in 2014.

49. Marbut believes the Green Party aligns with his ecological ideals.

50. Marbut has long been active in conservation efforts, starting with his appointment in the 1980s to the Governor's Advisory Council for Residential Energy Conservation.

51. Marbut lives in a home he built 40 years ago that receives thermal solar, electrical solar, and passive solar energy, and is highly insulated and partially earth-sheltered, thereby requiring him to spend only about $10 each year for electric backup heat.

52. Marbut has been an organic gardener for 40 years and currently cultivates approximately ½ acre of land in order to produce locally grown food.

C. Casting of Green Party Ballots By Montana Voters

53. The Secretary provides party ballots to every voter during a Montana primary election – the voter then casts votes on only one of the party ballots and discards the others. Mont. Code Ann. § 13-10-301.

54. Governor Steve Bullock issued a directive on March 25, 2020, permitting Montana counties to conduct mail-ballot elections in response to the state of emergency created by the outbreak of COVID-19 Novel Coronavirus.

55. In response to Governor Bullock's directive, every Montana county implemented a mail-ballot election.

56. Election officials mailed ballots to Montana voters on May 8, 2020.

57. The mailings to each voter included four ballots representing each of the four ballot-qualified parties: Democratic, Republican, Libertarian, and Green.

58. A sample ballot for the Green Party can be found on the Secretary's website at https://app.mt.gov/voterinfo/ballot/1664CG.pdf and is attached as **Exhibit 1**.

59. Election officials included an instruction sheet in the mailings sent to each voter as well as a return signature envelope.

60. A copy of the instruction sheet can be found on the Secretary's website at https://sosmt.gov/wp-content/uploads/attachments/Absentee-Voting-Instructions.pdf?dt=1519325225636 and is attached as **Exhibit 2**.

61. The instruction sheet directed voters to "Vote only one party ballot."

62. Consistent with Montana law, the instruction sheet further directed voters to "Place party ballot that you VOTED in the SECRECY ENVELOPE and seal the envelope" as well as "Discard and DO NOT return your UNVOTED party ballot(s)." (Capitalizations in original).

63. The instruction sheet further advised voters that the "Postal Service recommends mail at least one week before the election."

64. It also included this instruction:

> **Ballots must be received at the election office by 8 p.m. on Election Day, June 2, 2020**. A postmark is not accepted. If you mail your ballot make sure there is enough time for it to reach your election office.

(Emphasis in original).

65. Plaintiffs Tom Harsch and Teresa Harsch received the Secretary's election mailing shortly after May 8, 2020.

66. The Harschs each chose a Green Party ballot, marked their selection of Wendie Fredrickson for U.S. Senate as well as Green candidates for other offices, promptly mailed their Green ballots in the return signature envelopes, and discarded the other party ballots.

67. After the primary election on June 2, 2020, Fredrickson received 504 votes, compared to 255 votes for her opponent, and therefore prevailed in the primary.

68. Plaintiff Royal Davis, who was the only candidate seeking the Green Party's nomination for Attorney General, received 752 votes and is therefore the Green Party nominee for Attorney General.

69. Plaintiff Gary Marbut, who was the only candidate seeking the Green Party's nomination for Montana Senate District 47, received 14 votes and is therefore the Green Party nominee for that district.

70. Plaintiffs Tom Harsch and Teresa Harsch intend to vote for Green Party candidates in the general election in November 2020.

D. The Democratic Party's Suit Challenging the Green Party Filed the Day Before the Primary Election

71. On June 1, 2020 -- one day before the primary election -- the Montana Democratic Party filed suit in the Montana First Judicial District Court seeking to invalidate the Green Party's ballot-qualification petition and enjoin Secretary Stapleton from implementing it.

72. A copy of the complaint filed in *Montana Democratic Party, et al. v. State of Montana by and through its Secretary of State Corey Stapleton*, Cause No. DDV-2020-856, is attached as **Exhibit 3.**

73. The lawsuit also named as plaintiffs three persons who had signed the petition to qualify the Green Party for the primary election.

74. The state court plaintiffs did not name any Green Party candidates or voters as parties and did not serve copies of the complaint on any of them.

75. Plaintiff Marbut filed a *pro se* motion to intervene in the state court matter on July 17, 2020.

76. The state court denied the motion on August 6, 2020.

77. The state court issued an order the next day granting the Democratic Party's motion for summary judgment and ordered that Secretary Stapleton and his agents "are enjoined from implementing or giving any effect to the [Green Party's] Petition." **Exhibit 4** at 49.

78. The order stated that, in the months after Secretary Stapleton declared in March that the Green Party had qualified for primary election, the Montana Democratic Party "mobilized to inform signers that an unknown entity unaffiliated with 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." **Exhibit 4**, ¶ 69.

79. The state court ruled that several signers became dismayed upon hearing that Republicans had provided funding to signature-gatherers and that "[b]y late May,

over 500 signers of the petition…had submitted requests to withdraw their signature." **Exhibit 4,** ¶ 92.

80. The court determined that, after accounting for the withdrawal requests, the number of remaining petition signatures satisfied the legal threshold in 33 Montana legislative districts, not 34 as required under Mont. Code Ann. § 13-10-601(2)(b). **Exhibit 4,** ¶ 94.

81. The order makes no mention of the fact that, weeks before the Democratic Party had obtained the 500 withdrawal requests in late May, voters had been marking and returning Green Party ballots sent to them by the State.

82. The order does not explain what legal authority the state court had to disenfranchise the nearly 800 Montana voters that had lawfully cast Green Party ballots well before the Democratic Party had bothered to file its lawsuit on June 1, 2020.

83. Indeed, the order makes no mention of Green Party voters at all.

84. The order does not cite any Montana statute authorizing the withdrawal of signatures from a party-qualification petition, let alone one authorizing withdrawal *after* voters had begun casting ballots for the party.

85. The order contains no assertions about the Green Party petition itself being defective or containing misleading wording.

86. The order contains no assertions about any of the petition signers being unregistered to vote or any other assertions about the signers being unqualified to sign the petition.

87. Later in the day on August 7, 2020, Secretary Stapleton filed a notice of appeal in the Montana Supreme Court. *Montana Democratic Party et al v. State of Montana*, Case No. DA 20-0396.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Violation of Plaintiffs' Right to Due Process under the Fourteenth Amendment to the United States Constitution (42 U.S.C. 1983)

88. Plaintiffs reallege and incorporate by reference each allegation set forth above.

89. A denial of substantive due process occurs if an election is "conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998).

90. An election is fundamentally unfair and violates substantive due process if two elements are present:

> (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and
>
> (2) significant disenfranchisement that results from a change in the election procedures.

Bennett, 140 F.3d at 1226-27, citing *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978).

91. The State of Montana mailed primary election ballots to Montana voters on May 8, 2020.

92. These mailings included ballots for the four ballot-qualified political parties: Democratic, Republican, Libertarian, and Green.

93. Plaintiff Tom Harsch and Plaintiff Teresa Harsch chose Green Party ballots, selected and marked their candidates on these ballots and, in accordance with Montana law, timely mailed the ballots in the return signature envelopes provided by the State.

94. Montana law required the Harschs and all other voters who selected Green Party ballots to forgo casting ballots in other party primaries.

95. In turn, the Harschs and all other Montana voters who selected Green Party ballots were entitled to rely upon the State to count their ballots.

96. When they cast their ballots, the Harschs and other Green Party voters, as well as Green Party candidates such as Plaintiff Royal Davis and Plaintiff Gary Marbut, were entitled to rely upon the State "declar[ing] nominated … the individual having the highest number of votes cast for each office." Mont. Code Ann. § 13-15-507.

97. When they cast their ballots, the Harschs and other Green Party voters, as well as Green Party candidates such as Plaintiff Royal Davis and Plaintiff Gary Marbut, were entitled to rely upon the State to "certify to the election administrators the name and party or other designation of each candidate who filed with the Secretary of State and whose name is entitled to appear on the ballot" as well as rely upon the State to have "official ballots prepared" containing the names of candidates nominated in the primary election. Mont. Code Ann. § 13-12-201.

98. On August 7, 2020, nearly three months after the Harschs and other Montana voters lawfully cast Green Party ballots, and nearly five months after Secretary Stapleton declared the Green Party to be ballot-qualified, a state court ruled that the Secretary Stapleton is "enjoined from implementing or giving any effect to the [Green Party's] Petition."

99. The purpose of casting a Green Party ballot in a primary election is to nominate Green Party candidates to appear on the general election ballot.

100. If Secretary Stapleton is prevented from placing on the general election ballot the names of Green Party candidates duly nominated by the voters, the Green Party ballots cast by the Harschs and approximately 800 other Montana voters during the Montana primary election will become nullities and these voters will become disenfranchised.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief from this Court:

a) A declaration stating that Secretary of State Corey Stapleton is lawfully required to place on the general election ballot the names of the Green Party candidates nominated by Plaintiffs and other Green Party voters during Montana's primary election;

b) An injunction prohibiting Secretary of State Corey Stapleton and all persons acting under his authority from omitting from the general election ballot those Green Party candidates nominated by Plaintiffs and other Green Party voters during Montana's primary election;

c) An award to Plaintiffs of costs of litigation, including attorneys' fees and expenses pursuant to 42 U.S.C. § 1988; and

d) Any other relief to which Plaintiffs may be entitled or as this Court deems necessary and proper.

DATED: August 11, 2020

Respectfully submitted,

/s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Plaintiffs

VERIFICATION BY GARY MARBUT

I, Gary Marbut, declare as follows:

1. I am a Plaintiff in this action.

2. I have reviewed the attached Complaint and declare that the facts and allegations contained therein are true, except so far as they are stated to be on information, and that, so far as they are stated to be on information, I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America that the statements contained in this Verification are true and correct.

Executed on August 10, 2020, in Missoula County, Montana.

Gary Marbut
Declarant

I, Royal Aubrey Davis, declare as follows:

1. I am a Plaintiff in this action.

2. I have reviewed the attached Complaint and declare that the facts and allegations contained therein are true, except so far as they are stated to be on information, and that, so far as they are stated to be on information, I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America that the statements contained in this Verification are true and correct.

Executed on August 10, 2020, in Helena, Montana.

Royal Aubrey Davis
Declarant

VERIFICATION BY TOM HARSCH

I, Tom Harsch, declare as follows:

1. I am a Plaintiff in this action.

2. I have reviewed the attached Complaint and declare that the facts and allegations contained therein are true, except so far as they are stated to be on information, and that, so far as they are stated to be on information, I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America that the statements contained in this Verification are true and correct.

Executed on August 10, 2020, in Billings Montana.

Tom Harsch
Declarant

VERIFICATION BY TERESA HARSCH

I, Teresa Harsch, declare as follows:

1. I am a Plaintiff in this action.

2. I have reviewed the attached Complaint and declare that the facts and allegations contained therein are true, except so far as they are stated to be on information, and that, so far as they are stated to be on information, I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America that the statements contained in this Verification are true and correct.

Executed on August 10, 2020, in Billings, Montana.

Teresa Harsch
Declarant

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

[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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