

No. 17-35310

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS BRECK, et al.,
Plaintiffs-Appellants,
v.
COREY STAPELETON, in his official capacity
as Secretary of State of the State of Montana
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

REPLY BRIEF IN SUPPORT OF
EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

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REPLY

I. The district court imposed a retroactive signature requirement.

The Secretary of State's brief does not address one of the central issues in this emergency motion: whether it was an abuse of discretion for the district court to impose a retroactive signature requirement that was literally impossible for the plaintiffs to meet. In its April 8 order, the district court granted ballot access to any independent or minor-party candidate who had already submitted 400 signatures by March 6. The court did so after hearing testimony from plaintiff Doug Campbell that he had collected "several hundred" signatures but did not turn them in because, after talking with the Secretary of State's office, he realized that doing so would be futile. TRO Hearing Tr., ECF No. ** at ** (hereinafter "Tr.").¹ The district court could thus be certain that its retroactive standard would afford no relief.

"A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). The retroactive signature requirement in this case is a legal error because "[t]he law does not require a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other*

¹ The district court cites to the hearing transcript draft. Plaintiffs' counsel requested the draft from the court reporter, but was denied. Plaintiffs ordered an official transcript for use in this appeal. Despite assurances that the transcript would be available by this morning, it remains unavailable at 9:30 p.m. Mountain Time. This brief therefore refers to testimony without citation based on the notes and recollection of those present at the hearing.

grounds, Crawford v. Washington, 541 U.S. 36 (2004). It would have been futile for any independent or minor-party candidate to turn in a petition with 400 or 1,000 or 10,000 signatures on it. Such a petition would have fallen far short of the existing signature requirement demanded by the Secretary of State. Oestreicher Decl., ECF 15-3 at 14 (2017 U.S. Representative Special Election Information). Ballot-access remedies cannot require these or future plaintiffs to engage in such futility.

The futility of the district court's retroactive signature requirement is underscored by an important but overlooked fact. The Secretary of State's office initially indicated that March 3 was the signature deadline. ECF 1 at 6. That was an error under Montana law, but the Secretary of State's office did not correct the error on its website until after March 6. When plaintiff Thomas Breck became the Green Party's nominee on March 4, the published deadline had already passed. There would have been no reason for him to turn in any signatures on March 6. In fact, the Green Party members discussed the signature requirement at the party's convention on April 4 and decided that it would be futile to try to gather 14,268 signatures because the deadline had already passed. Ex. 1 (Danielle Breck Decl.) at 2.

The Secretary of State's brief does not defend the retroactive nature of the district court's injunction. Neither the Secretary nor the district court has cited a

case approving a retroactive signature requirement, and plaintiff's counsel is unaware of any.

The imposition of retroactive standards raises serious issues of fairness and due process. *Cf. Rogers v. Tennessee*, 532 U.S. 451 (2001) (Scalia, J., dissenting). This case illustrates why. No party asked for such a standard. The district court imposed the retroactive standard *sua sponte*, without precedent, after hearing testimony that no plaintiff had gathered more than several hundred signatures. The court could thus be sure that no plaintiff would get relief for a clear constitutional violation. Fairness and due process require more.

II. *Jones* does not support the scope of the district court's injunction.

The Secretary of State's brief relies heavily on *Jones v. McGuffage*, 921 F.Supp.2d 888 (N.D. Ill. 2013), for the proposition that the district court did not abuse its discretion. Response to Emergency Motion at 5-7 ("Response"). But *Jones* does not support the scope of the district court's injunction.

In *Jones*, the court granted a preliminary injunction against Illinois' 5% signature requirement in the context of a special election to fill the vacancy created by the resignation of Congressman Jessie Jackson, Jr. on November 21, 2012. The Illinois General Assembly passed a one-off bill to set the election for April 9, 2013, because a Chicago municipal election was already scheduled for that date. The other deadlines set in the bill meant that independent candidates were afforded only

62 days to collect 15,682 signatures. *Id.* at 893. The court granted a preliminary injunction, finding that the burden of collecting so many signatures in such a brief time was too high to pass constitutional muster. *Id.* at 901. As a remedy, the court lowered the number of signatures required to 3,444, which it derived through a formula based on the number of signatures that it deemed reasonable for the state to require in 62 days. *Id.* at 902-03.

The district court's remedy in *Jones* was not retroactive. The petition deadline had not expired, and plaintiffs in that case had time to collect additional signatures and to submit those signatures by the statutory deadline in order to meet the court's new standard. *Id.* at 903. Plaintiffs here had no such opportunity. The five-day window within which to gather signatures under Montana law was already closed by the time the district court ruled. *Jones* does not support the imposition of a retroactive signature requirement. No case of which plaintiffs' counsel is aware supports a retroactive signature requirement. The retroactive scope of the district court's injunction was a clear abuse of discretion.

III. The evidence in the record establishes that plaintiffs have support.

As noted in Appellants' motion, the district court's legal analysis is based on an erroneous finding of fact that plaintiffs do not have sufficient community support to warrant placement on the ballot. Specifically, the district court found that the plaintiffs could not point to evidence "similar" to the evidence that Justice Powell

relied upon in *McCarthy v. Briscoe* when he ordered Eugene McCarthy's name onto the ballot as a candidate for President in 1976. ECF 19 at 21. The Secretary of State did not contend below and does not contend in his response here that plaintiffs lack community support in Montana. Rather, he argues that the district court "did not abuse its discretion in concluding that none of the plaintiffs here were similarly situated to former Senator Eugene McCarthy." Response at 8.

The district court's order on this point is not clear. It can be read, as the Secretary apparently does, to suggest that a ballot-access plaintiff can qualify for placement on the ballot only if he or she can demonstrate past electoral success or national name recognition similar to the former senator. *See* ECF 19 at 21, 23. To the extent that the district court applied that standard, it was legal error. *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J., in chambers), does not stand for the proposition that a would-be candidate must have a long history of electoral success or national name recognition. Rather, it stands for the proposition that "a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support." *Id.* at 1323. The requisite support is not "as much support as Senator McCarthy" but rather "enough to ensure that the candidate is not frivolous." *See Lubin v. Panish*, 415 U.S. 709, 715 (1974) (discussing the state's interest in deterring frivolous candidacies); *Bullock v. Carter*, 405 U.S. 134 (1972) (same). The point of looking

for community support, Powell observed, is to avoid “‘laundry list’ ballots” that could confuse voters and discourage participation. *McCarthy*, 429 U.S. at 1322 (citing *Lubin v. Panish*, 415 U.S. at 715).

The better reading of the district court’s order in this case is more straightforward. The district court found that none of the plaintiffs have enough community support to ensure that the candidate is not frivolous. If *that* was the district court’s finding, then it was also an abuse of discretion. A district court abuses its discretion if it “rests its decision on a clearly erroneous finding of material fact.” *Bateman v. United States Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000). Any finding that none of the plaintiffs have the requisite community support is not supported by this record.

All of the plaintiffs were asked about their support at the hearing. Both Danielle and Thomas Breck testified about the activities of the Green Party, noting that party volunteers had collected enough signatures to get presidential candidate Jill Stein on the Montana ballot in 2016 and were excited about carrying that momentum forward. They also testified about early indications of support for Breck’s young candidacy. While Thomas Breck does not have past electoral success or widespread name recognition yet, he is the duly nominated candidate of a well-known national political party whose presidential candidate appeared on the ballot last year. He has the support of the national Green Party and of Green Party

sympathizers in Montana. He is not a frivolous candidate.

Steve Kelly testified about his 1994 campaign for Congress, during which he gathered more than 10,000 signatures to qualify for Montana's ballot as an independent candidate. He got 9% of the vote in that contest and 33% of the vote in a later county commission contest. Kelly has demonstrated ample community support on multiple occasions in the past.

The third plaintiff, Doug Campbell, is a political neophyte who does not have the same track record, but is a business professional running on a serious platform of campaign finance reform. He testified about his efforts to generate support using social media, and he noted that he had heard from hundreds of Montanans interested in his campaign.

The Secretary of State called no witnesses and offered no evidence that the plaintiffs lack support. The court made no credibility determinations discounting the plaintiffs' testimony. On the basis of the record before the district court, a reasonable factfinder could not have reached the conclusion that all of the plaintiff candidates were frivolous. To the contrary, the evidence in the record established that they have support.

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IV. The Green Party has gathered more than 400 signatures since Sunday.

The Green Party of Montana has now gathered more than 400 certified signatures in support of its nominee, Thomas Breck, in the short time since the district court issued its ruling on Saturday night, April 8. Breck Dec. at 4. On Sunday, April 9, Green Party volunteers mobilized statewide to gather signatures, turned in almost 600 signatures to county officials on April 10, and turned in another 90 on April 11. By the close of business on April 12, county officials had validated 481 signatures. *Id.* Not surprisingly, the Secretary of State has refused to accept these signatures because they were submitted after the March 6 deadline. *Id.*

Nonetheless, the signatures demonstrate that the Green Party candidate has a significant modicum of support in Montana. The signatures are also consistent with the evidence, discussed above, before the district court that the Green Party has support in Montana and could gather a reasonable number of signatures in a reasonable amount of time.

V. There is still time to grant meaningful relief.

Time is often an issue in ballot-access cases, and this case is no exception. Montana law requires a special congressional election within 85 to 100 days of a vacancy, MCA §10-25-203, and the Governor chose the shortest possible time. Plaintiffs filed suit promptly and immediately sought a temporary restraining order. The district court then took 17 days to resolve it. Fortunately, there remains time

for this Court to grant the plaintiffs meaningful relief.

The timing here is not a matter of dispute. Montana's Elections Director, Derek Oestreicher, testified that it takes seven to ten days for counties to prepare, print and receive their ballots "[u]nder normal circumstances." ECF15-3 at 9. He did not say how quickly it could be done on an expedited basis. The Secretary does not contend in his brief that there is no longer enough time for counties to reprint the ballots before April 25, when state law requires them to be made available to voters. *See* Response at 13. Time is plainly short, but there remains enough time for counties to print their ballots with the plaintiffs' names on them.

Instead, the Secretary argues that this Court simply should not interfere with an election that is halfway through its 85-day life cycle, where over 400,000 ballots have already been printed, and where 4,800 ballots have been transmitted to military and overseas citizens. Response at 11. But courts have frequently ordered state and local jurisdictions to reprint ballots when necessary to correct a clear violation of the law. *See, e.g., Norman v. Reed*, 502 U.S. 279, 287 (1992), *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J., in chambers), *Williams v. Rhodes*, 89 S.Ct. 1 (1968) (Stewart, J., in chambers); *see also Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers) (enjoining an election). In *Norman*, the Supreme Court's order required the State of Illinois to reprint millions of ballots after they had already been printed. The relief sought here is hardly

unusual.

What is unusual here is that the Secretary of State's office did not warn county officials about the possibility of litigation when it became aware of it. At the April 4 hearing, Danielle Breck testified that she told Alan Miller and Derek Oestreicher on March 8 and 10, respectively, that the Green Party intended to challenge the signature requirement in federal court. Tr. at **. No ballots had been printed at that point. *See* ECF 15-3 at 7. The Secretary of State's office could have warned county officials about the litigation threat, as it did last year when a similar issue arose. *See* TRO Hr'g Ex. 2, ECF 18-1 at 2. But the Secretary chose not to, and, oblivious of the impending litigation, many county officials printed ballots well ahead of the deadline. Even after plaintiffs filed this litigation, the Director of Elections suggested to county officials that they continue their preparation as though "nothing has changed." TRO Hr'g Ex. 9, ECF 18-6 at 18. He did not ask them to stop printing ballots until five days after he learned of the lawsuit. ECF 15-3 at 8. Thus the Secretary, not plaintiffs, is responsible for the fact that many ballots have already been printed.

The fact that 4,800 ballots have been sent out to overseas voters also does not foreclose the possibility of relief. That number represents less than 1% of all ballots printed for the special election. *See* ECF 15-3 at 8 (estimating 410,000 total ballots). The remaining 99% of ballots, if printed with the plaintiffs' names on

them, would provide meaningful relief for a clear constitutional violation. Military and overseas voters would still have the option to vote for the plaintiffs electronically through Montana's Electronic Absentee System,² or through the Federal Write-in Absentee Ballot mandated by federal law.³

To be sure, courts in recent years have been cautious about issuing injunctions during an election season. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). As the Supreme Court has explained, the reason for this caution is that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Id.* But the risk of voter confusion here is minimal, since over 99% of ballots will be uniform if the Court grants relief. Concern for voter turnout is also not an issue that weighs against relief here because there is no reason to believe that adding candidates to the ballot will cause fewer voters to vote. To the contrary, voters unenthused by the three existing candidates could be more likely to vote if the Court grants relief because they may find a candidate whose platform is more to their liking.

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Respectfully submitted this 13th Day of April, 2017.

² *See* Military and Overseas Voters at https://sos.mt.gov/elections/military_overseas.

³ *See* Montana at <https://www.fvap.gov/montana>.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is no more than 2600 words excluding the captions, signature blocks, Certificates of Compliance and Service, and Tables of Contents and Authorities.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 13, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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No. 17-35310

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS BRECK, et al.,
Plaintiffs-Appellants,
v.
COREY STAPELETON, in his official capacity
as Secretary of State of the State of Montana
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

DECLARATION OF DANIELLE BRECK
IN SUPPORT OF MOTION FOR EMERGENCY RELIEF

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Pursuant to 28 USC §1746, I declare as follows:

1. My name is Danielle Breck. I am a plaintiff-appellant in this matter.
2. I am more than 18 years of age and competent to make this declaration.
3. I am a member of the Montana Green Party and a registered voter in Missoula County, Montana.
4. Montana Rep. Ryan Zinke resigned on Wednesday, March 1, 2017. That same day Montana Governor Steve Bullock announced that the special election to fill the seat would be held May 25, 2017.
5. The Montana Green Party held its convention on Saturday, March 4, 2017 in Missoula and nominated Thomas Breck to be the Green Party candidate for the special election to fill the seat of Montana's lone representative to the US House of Representatives.
6. At the March 4 convention, Green Party members discussed and recognized that it would be futile to try to gather 14,268 signatures, since the deadline of March 3, 2017 posted by the Montana Secretary of State on his official website had already passed.
7. By March 10, 2017, the Montana Secretary of State had changed the deadline on his official website for submitting signatures from March 3, 2017 to March 6, 2017.

8. Thomas Breck submitted a declaration and oath of candidacy and statement of indigency to the Montana Secretary of State on March 10, 2017, and I and Thomas Breck agreed to sue the Montana Secretary of State in order for Thomas Breck to be included on the ballot for the special election.
9. Our attorneys filed the Complaint against the Secretary of State in the district court on March 22, 2017.
10. Late on Saturday, April 8, 2017, the district court ruled that 400 signatures would be an appropriate number of signatures to qualify for the special election.
11. On Sunday, April 9, 2017, Montana Green Party volunteers mobilized statewide to collect signatures to qualify Thomas Breck for the special election ballot.
12. Volunteers had to wait until 1:00pm on Sunday, April 9, 2017 for the Missoula Public Library to open to get the oath of candidacy notarized, then began to collect signatures. We continued to collect signatures in public places in Missoula County, Lake County, Cascade County, Gallatin County, and Yellowstone County until about 10:00pm on Sunday, April 9.
13. On Monday, April 10, 2017, I turned in approximately 450 signatures to Missoula County election officials, and emailed copies of the signatures to the Montana Secretary of State. Green Party volunteers turned in

approximately 40 signatures to Lake County, 55 signatures to Gallatin County, and 30 signatures to Yellowstone County.

14. On Tuesday, April 11, 2017 I spoke with Missoula County election officials who informed me that they had certified 83 of the signatures and rejected 9. Being unsure of the rejection rate, Green Party volunteers in Missoula collected an additional 90 signatures and turned them in to the Missoula County election officials on Wednesday, April 12.

15. By close of business of Wednesday, April 12, 2017, Missoula County had certified 412 signatures, Gallatin County had certified 46 signatures, and Yellowstone County had certified 23 signatures. Lake and Cascade Counties had not started certifying any signatures. Thus the Montana Green Party collected 481 certified signatures, with about 50 signatures pending certification, by April 12.

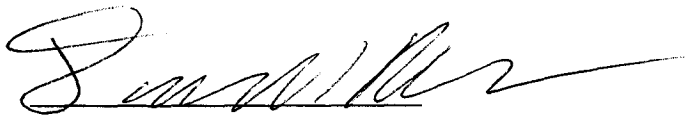
16. The Green Party's ability to obtain these signatures in such a short time frame displays the "modicum of support" in the State of Montana that the district court required.

17. The Montana Secretary of State refused to accept the signatures for the purpose of allowing Thomas Breck to be on the special election ballot because the signatures were submitted after the March 6, 2017 deadline.

18. Support for the Montana Green Party is largely made up of millennials and members of our indigenous communities who do not feel that either of the two major parties represent them. Montana Green Party supporters tend to be part of the one-third of Montana voters who did not vote in the last election, and as such, traditional polling methods are largely unrepresentative of them.

Under penalty of perjury, I declare the foregoing is true and correct.

Dated April 13, 2017

A handwritten signature in black ink, appearing to read 'Danielle Breck', with a long horizontal flourish extending to the right.

Danielle Breck

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 13, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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