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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA GREEN PARTY, DANIELLE BRECK, CHERYL WOLFE, HARRY C. HOVING, DOUG CAMPBELL, STEVE KELLY, ANTONIO MORSETTE, TAMARA R. THOMPSON, and ADRIEN OWEN WAGNER, Plaintiffs, v. COREY STAPLETON, in his official capacity as Secretary of State for the State of Montana, Defendant.	Cause No. CV-18-87-H-BMM-JTJ **PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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Plaintiffs' Exhibit 3	Amended Expert Report of Richard Winger
Plaintiffs' Exhibit 4	Deposition of Richard Winger
Plaintiffs' Exhibit 5	Answer of Defendant Corey Stapleton
Plaintiffs' Exhibit 6	Deposition of Danielle Breck
Plaintiffs' Exhibit 7	2020 Primary and General Election Calendar Montana Secretary of State
Plaintiffs' Exhibit 8	Findings of Fact, Conclusions of Law, and Order filed on July 9, 2018, in Larson, et al. v. State of Montana, etc., in Cause No. DDV-2018-295 Montana First Judicial District Court Lewis and Clark County
Plaintiffs' Exhibit 9	Order filed on August 21, 2018, in Larson, et al. v. State of Montana, etc., in Case No. DA 18-0414 In the Supreme Court of the State of Montana
Plaintiffs' Exhibit 10	Pages 1 and 10 of the Opinion in the Supreme Court of the State of Montana, Case No. DA 18-0414, 2019 MT 28 (January 30, 2019)

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs' first amended complaint herein challenges Montana election laws requiring an unnecessarily early petition signature deadline, a relatively high petition signature requirement, and a unique and counterproductive unequal distribution requirement that are unconstitutionally burdensome and serve no compelling state interest, while having a serious effect on a minor political party and its potential candidates and voters. In 2018, the Montana statewide primary election date was June 5, 2018, and the statewide general election date was November 6, 2018. The Montana Green Party sought to qualify candidates to be on Montana's 2018 primary and general election ballot in accordance with Mont. Code Ann. § 13-10-601. The Montana Green Party undertook a signature-gathering effort to collect enough signatures to be on the ballot in Montana in 2018. For the 2018 election, the deadline to submit signed political party qualification petitions and affidavits of signature gatherers to county election administrators was March 5, 2018. The Montana Green Party obtained 10,160 petition signatures, and state election officials verified 7,386 of the petition signatures as valid. These petition signature were collected from 47 of the 100 State House Districts. (Plaintiffs' Statement of Undisputed Facts—hereinafter P.S.U.F., Nos. 1-4, 8, and 9).

The instant case is a ballot access case on behalf of eight registered Montana voters and the Montana Green Party in regard to what had been an initially successful petition drive in 2018, to have the Montana Green Party recognized in Montana pursuant to the requirements of Mont. Code Ann., § 13-10-601(2)(a), (b), (c), and (d). (P.S.U.F., Nos. 29-36). After being removed from the Montana ballot by a Montana Trial Court for insufficient petition signatures in at least 34 State House Districts, and as subsequently affirmed by the Montana Supreme Court, the Plaintiffs filed the instant case challenging the constitutionality of the aforesaid ballot access law because of the petition signature deadline and the State House petition distribution requirement. (P.S.U.F., Nos. 10-18, 23, and 26).

Plaintiffs seek declaratory and injunctive relief from the Court and ask that the Court state that the laws in question are unconstitutional both facially and as applied, and permanently enjoin the enforcement of said laws, and place the Montana Green Party on the Montana ballot for the current general election cycle as a recognized political party in the State of Montana for 2019-2020.

The laws in question in the instant case, Mont. Code Ann., § 13-10-601(2)(a), (b), (c), and (d), are as follows, to-wit:

Montana Code Annotated 2017, Title 13, Elections; Chapter 10, Primary Elections and Nominations; Part 6, Nominations by Primary Election

(2) (a) A political party that does not qualify to hold a primary election under subsection (1) may qualify to nominate its candidates by primary election by presenting a petition, in a form prescribed by the secretary of state, requesting the primary election.

(b) 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.

(c) At least 1 week before the deadline provided in subsection (2)(d), the petition and the affidavits of circulation required by 13-27-302 must be presented to the election administrator of the county in which the signatures were gathered to be verified under the procedures provided in 13-27-303 through 13-27-306.

(d) The election administrator shall forward the verified petition to the secretary of state at least 85 days before the date of the primary.

II. CONCISE STATEMENT OF MATERIAL FACTS TO WHICH NO GENUINE ISSUE EXISTS

The Plaintiffs to the instant case submit that there is no genuine issue as to the sixty (60) material facts set forth in Plaintiffs' Statement of Undisputed Facts filed contemporaneously with Plaintiffs' Motion for Summary Judgment and this Brief. (P.S.U.F., Nos. 1-60).

III. STANDARD OF REVIEW

A ballot access case requires the use of a standard of review which weights the effects of the election law challenged. The United States Supreme Court has held in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) what the standard is to be

used in determining whether election laws are unconstitutionally oppressive of potential voters' rights. The Supreme Court held that such constitutional challenges to specific provisions of a state's election laws cannot be resolved by any litmus-paper test that will separate valid from invalid restrictions, but rather that the Trial Court ". . . must resolve such a challenge by an analytical process that parallels its work in ordinary litigation." *Anderson v. Celebrezze*, 460 U.S. at 789. In a three-prong balancing test, the U.S. Supreme Court stated that the Trial Court must

> . . . first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interest put forth by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. *Anderson v. Celebrezze,* 460 U.S. at 789.

Under this test, the trial court must apply a level of scrutiny which varies on a sliding scale with the extent of the asserted injury to Plaintiffs' constitutional rights. When, at the low end of that scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, the 'State's important regulatory interests are generally sufficient to justify'

the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. at 788, 788-789 n.9. But when the law places "severe" burdens on the rights of political parties, candidates or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). In fact, ". . . because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Anderson v. Celebrezze*, 460 U.S., at 793, n. 16. After all, "the State may not be a 'wholly independent or neutral arbiter' as it is controlled by the political parties in power, 'which presumably have an incentive to shape the rules of the electoral game to their own benefit.'" *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006) (quoting from *Clingman v. Beaver*, 544 U.S. 581 (2005) (O'Conner, J., concurring). Since this case involves election laws that burden a minor political party, and the corresponding constitutional right of individuals to political expression and association, the appropriate standard of review which should be required for this Court is strict scrutiny, so that state laws cannot stand unless they "further compelling state interests . . . that cannot be served equally well in significantly less burdensome ways." *American Party of Texas v. White*, 415 U.S. 767, at 780-781 (1974).

Montana's challenged election laws for political party formation burden the rights of individuals supporting the formation of a new political party in "two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). Further, the appropriate standard for the Trial Court to apply in deciding a motion for summary judgment requires the Trial Court to ". . . grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); and Fed. R. Civ. P. 56(c). In essence, the inquiry for the Trial Court is ". . . whether there is the need for a trial . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250.

IV. ARGUMENT AND AUTHORITIES

It is perhaps best to consider what the Plaintiffs are asking for in the case at bar and the particular facts which will be presented to the Court in considering Plaintiffs' Motion for Summary Judgment. The Montana Green Party is the only minor political party to obtain recognition for ballot status by petitioning in Montana for the 2018 election cycle, and then be derecognized by action of State

Courts in applying the state house district petition distribution requirement. (P.S.U.F., Nos. 2, 3, 8-18).

Plaintiffs would have sought preliminary injunctive relief for the 2018 Montana general election if the Attorney General's office had been willing to enter into certain joint stipulations of fact early on. Unfortunately, because the Attorney General's office was not willing at the time to do so, and because the ballots for Montana had been printed and were being made available to military and overseas voters, the preliminary injunctive relief for the 2018 election became impractical. However, declaratory relief as to the unconstitutionality of the election laws in question, injunctive relief against future enforcement of said election laws, and recognition of the Montana Green Party for the current election cycle are still within the power of the Court to grant. The instant case and the requested relief are not moot because election law cases such as the case at bar have been recognized by the U. S. Supreme Court to be an exception to the usual mootness rule because the issues contained therein are "capable of repetition, yet evading review." *Anderson v. Celebrezze*, 460 U.S. at 784 n.3; *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 332 n.2 (1972); and *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). As the U.S. Supreme Court has noted:

> The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges we well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held. *Storer v. Brown*, 415 U.S. at 737, n.8.

The individual Plaintiffs in the case at bar are residents and registered voters of Montana, citizens of Montana and the United States of America, officers and/or supporters of the Montana Green Party, and signers and/or supporters of a petition for recognition of the Montana Green Party as a Montana political party in 2018. Several of the Plaintiffs (Campbell, Kelly, and Wagner) were nominated by primary as Montana Green Party candidates for elective office in Montana in 2018. The individual Plaintiffs wish to have the Montana Green Party recognized as a political party in Montana and wish to have the right to cast their votes effectively for Montana Green Party candidates in future Montana elections. (P.S.U.F., Nos. 29-36, 38).

Defendant Corey Stapleton is the Secretary of State for Montana and is the state elected official of Montana who is statutorily responsible in his official capacity for, *inter alia*, administering the election laws of the State of Montana pursuant to Mont. Code Ann., § 13-1-201, *et seq*. (P.S.U.F., Nos. 39-40). Under current Montana law, along with certain other specific requirements as to the distribution requirement as to a minimum number of petition signatures from at least 34 of the 100 state house

districts, at least 5,000 valid petition signatures of registered Montana voters are required for the formation of a new political party in Montana pursuant to Mont. Code Ann. § 13-10-601(2)(a), (b), (c), and (d). (P.S.U.F., Nos. 4, 6, and 7).

In regard to the petition drive to place the Montana Green Party on the ballot in Montana in 2018 as a recognized political party, by March 5, 2018, the Montana Green Party supporters had turned in a total of 10,160 petition signatures for the recognition of the Montana Green Party, pursuant to Mont. Code Ann., § 13-10-601(2) (b), of which 7,386 were verified by various State election officials as valid Montana registered voters. These petition signatures were collected from 47 of the 100 State House Districts in Montana. Initially there were sufficient petition signatures collected in 38 of the State House Districts to comply with the 34 State House Districts distribution requirement.[1] (P.S.U.F., Nos. 2-10).

However, following legal action by three Montana electors and the Montana Democratic Party in state court,[2] on or about July 9, 2018, a State Court Judge found that a total of 87 petition signatures in eight of the State House Districts were invalid for various reasons. (P.S.U.F., Nos. 11-13). The state court invalidated a number of signatures from House Districts 20, 21, 43, 54, 56, 80, 83, and 84, after finding that

[1] The Montana Green Party, therefore, had more than the 5,000 petition signatures required by law and more than the required number of signatures needed under the distribution requirement for the minimum requirement 5% of the previous vote for the winning candidate in at least 34 of the 100 State House Districts.

[2] The suit named the Secretary of State as the defendant and the Montana Green Party as an interested party.

a signature gatherer had submitted a false affidavit, that voter signatures did not match the corresponding voter registration card, that some signatures had been improperly verified, that signatures were matched to the wrong registered voters, that petition entries contained no date or were postdated or altered, and that some petition entries did not contain a printed name. (P.S.U.F., No. 14). The state district court concluded that in House Districts 20, 21, 43, 54, 56, 80, 83, and 84, the numbers of required petition signatures were, respectively, 140, 135, 105, 130, 101, 132, 150, and 150--even though the population of all these State House Districts was approximately the same according to the 2010 census in Montana, (P.S.U.F., Nos. 15, 19, and 20) while the number of valid petition signatures in the aforesaid eight House Districts were, respectively, 138, 128, 103, 127, 95, 125, 144, and 140.[3] (P.S.U.F., Nos. 15-17). The state court's invalidation of signatures from these districts resulted in the Montana Green Party not qualifying in the required minimum of 34 House Districts, but only having sufficient petition signatures under the Montana distribution requirement so as to qualify in 30 House Districts, rather than the 38 State House Districts the Montana Green Party had had

[3] It is significant to note that if the 101 petition signature distribution requirement for State House District 56 had been in effect for State House Districts 20, 21, 43, 54, 80, 83, and 84, the Montana Green Party would have been found to have been successful in meeting the distribution requirement for the aforesaid seven State House Districts because in those seven State House Districts, the State Court found that the number of valid petition signatures were 138, 128, 103, 127, 125, 144, and 140, respectively.

previously.[4] The Montana Green Party was therefore removed from the election ballot even though there were still 7,299 valid petition signatures statewide and only a total of about 87 petition signatures had actually been invalidated. (P.S.U.F., Nos. 13, 17, 18, and 23). Therefore, under current state law, the Montana Green Party was four State House Districts short of the 34 State House Districts required under the petition distribution requirement of Mont. Code Ann. § 13-10-601(2)(b) and denied political party recognition even though the Montana Green Party had previously participated in the nomination of candidates in the primary election.

Both the Secretary of State and the Montana Green Party filed notices of appeal with the Montana Supreme Court. On July 25, 2018, the Montana Green Party moved to dismiss its cross-appeal. On August 13, 2018, while its motion to dismiss was pending before the Montana Supreme Court, the Montana Green Party filed this federal court action. On August 16, 2018, the Montana Supreme Court granted the Montana Green Party's motion to dismiss its cross-appeal. On August 21, 2018, the Montana Supreme Court affirmed the state court ruling and stated

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[4] The State case, *Larson, et al. v. State of Montana, etc.*, Montana First Judicial District Court, Lewis and Clark County, Cause No. DDV-2018-295, and Supreme Court of Montana Case No. DA-18-0414, has been concluded and has been published at 2019 MT 28 (January 30, 2019). However, the issue of the constitutionality of the Montana petition distribution requirement was not at issue and was neither briefed nor argued in the State case.

that it would issue a full opinion at a later date. The Opinion may now be found at 2019 MT 28 (January 20, 2019). (P.S.U.F., Nos. 18, 24-28).

The distribution requirement as to petition signatures requires that a new political party seeking state recognition obtain not just 5% of the statewide vote for the winning candidate for governor in the last general election in Montana (but not more than 5,000 petition signatures), but also 5% of that candidate's vote for governor in at least 34 of the State House Districts. Since the law caps the number of signatures required in a State House District at no more than 150, the current requirement varies from one State House District to another from a low of 55 petition signatures to the aforesaid high of 150 petition signatures, thus violating equal protection and the constitutional principle of one-person, one-vote. The 150 petition signature cap currently exists for 26 State House Districts, with 53 State House Districts having a requirement of between 100 and 140 petition signatures, and the remaining 21 State House Districts having a petition signature requirement of between 55 and 95 petition signatures.[5] (P.S.U.F., Nos. 6, 7, 21, and 22).

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[5] As an example of what is wrong with Montana's State House District distribution requirement under equal protection principles, if the 21 State House Districts where the distribution requirement is between 55 and 95 petition signatures had 95 signatures from each House District for a total of 1,995 signatures, while the 53 State House Districts where the distribution requirement is between 100 and 140 petition signatures had 99 signatures from each House District for a total of 5,247 signatures, while the 26 State House Districts where the distribution requirement is 150 petition signatures had 149 signatures from each House District for a total of 3,874 signatures, then there would have been a total of 11,116 Montana voters who wish the new political party to be recognized, but only 21 State House Districts where the distribution requirement would have been met.

In regard to Montana's State House district distribution requirement, compared to other states, nine states, including Montana, have distribution requirements for either a statewide independent petition, or a petition to create a new party. Except for Montana and Arizona, all the other such states use U.S. House districts instead of state legislative districts: (1) Michigan requires 100 signatures in each of half the districts, which currently means seven districts, Mich. Stat. Ann. §168.685(1); (2) Nebraska's party petition requires 1% of the last gubernatorial vote in each of its three U.S. House districts, Neb. Rev. Stat. § 32-716; (3) New Hampshire's party petition has no distribution requirement, but its statewide independent petition requires 1,500 signatures from each of its two U.S. House districts, N.H. Rev. Stat. § 655.42(I); (4) New York requires 100 signatures from each of half its U.S. House districts, which currently means 14 districts, N.Y. Elec. Law § 6-136(1); (5) North Carolina's party petition requires 200 signatures from three U.S. House districts, N.C. Gen. Stat. § 163A-950(2); (6) Ohio requires 500 signatures in half its U.S. House districts, which now means eight districts, Ohio Rev. Code § 3517.01(A)(1)(b)(ii); (7) Virginia requires 200 signatures in each of its eleven districts, for minor party and independent presidential petitions, and other statewide petitions need 400 in each U.S. House District, Va. Code Ann. §§ 24.2-543(A) and 24.2-506(A)(1). (P.S.U.F., Nos. 51 and 53). As the U.S. Court of Appeals for the Third Circuit has remarked recently, "[C]ongressional

districts must have populations that are 'as nearly as practical' equal in population; thus, requiring a minimum number of signatures to be gathered from different congressional districts serves the interest of requiring candidates to show support across different geographical areas **but does not dilute anyone's voting power.**" [Emphasis added]. *Constitution Party of Pennsylvania v. Cortes*, 877 F.3d 480, 485 (3rd Cir. 2017).

Other than the aforesaid seven states which use Congressional Districts, and the State of Montana which uses State House Districts, the distribution requirement for the State of Arizona requires petition signatures for the formation of a new political party to be gathered from at least five of Arizona's 15 counties—although there is no minimum number of petition signatures required from each of the five counties. Also, no more than 90 percent of the petition signatures may come from counties that have a population of at least half a million people or more—with Arizona having only two counties with a population of 500,000 or more (viz.: Maricopa and Pima). Finally, at least 10% of the total petition signatures required must be gathered from the 13 Arizona counties which have a population of less than 500,000 people. The total number of petition signatures which is currently required in Arizona is 31,686, which represents 1 1/3 percent of the total vote case in the last gubernatorial election in Arizona. (P.S.U.F., No. 55; also see Arizona Rev. Stat. §§ 16-801, 16-803, and 16-804). Of course, if a

distribution requirement like Arizona's was in effect in Montana currently, the Montana Green Party would easily have met the distribution requirement in 2018.

Montana is the only state in which the in-district requirement is greater than 1% of the last vote cast.[6] However, even though each state house district has approximately the same population, the signature requirement in the various state house districts varies from a low of 55 petition signatures to a high of 150 petition signatures depending on how many people in that district voted for the last winning gubernatorial candidate. Thus, the disparity in petition signatures required is almost three times as great from the lowest requirement to the highest. No other state has this particular difference in the number of signatures required. (P.S.U.F., Nos. 5 and 6). Montana also requires signatures from many more districts than any other state. No other state requires in-district signatures from more than fourteen districts or requires a different number of signatures from its districts. (P.S.U.F., No. 57). While Montana's ballot access laws have changed significantly over time, the petition signature requirement when it was less stringent or even nonexistent did not result in an overcrowded ballot. (P.S.U.F., Nos. 41-49). However, unlike all other states which have a petition distribution requirement, Montana is unique in that the percentage within the district for the

[6] Considering that the distribution requirement in Michigan, Nebraska, New Hampshire, New York, North Carolina, Ohio, and Virginia use Congressional House Districts, the severity of Montana's distribution requirement using State House Districts is particularly obvious.

district distribution requirement is a higher percentage than required for the statewide petition. (P.S.U.F., No. 52). Further, while Montana is the only state in which the in-district requirement is greater than 1% of the last vote cast, generally, the Montana in-district requirement in each of the minimum required 34 State House Districts amounts to 3% of the last vote cast. (P.S.U.F., No. 56).

While Montana is the fourth largest state in geographical area in the United States, it is only the 43rd[7] out of 50 states in population, the third least densely populated state, and is one of only seven states in the United States that has a single representative in the U.S. House of Representatives. (P.S.U.F., No. 58). Only a few states have a distribution requirement spread over a designated number of congressional districts—although none of them base their petition requirement on an unequal signature requirement of a percentage of the winning candidate for any statewide office. (P.S.U.F., Nos. 51 and 53).

If not for the State House District distribution requirement, the Montana Green Party would have had more than enough petition signatures for political party recognition in Montana in 2018. (P.S.U.F., No. 60). In the election cycle for Montana for the year 2018, the opening of candidate filing for the primary election was January 11, 2018, the close of candidate filing for the primary election was March 12, 2018,

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[7] While Montana was 44th in population of the 50 states at the time of the filing of the complaint in this case, since then, Montana has passed Rhode Island in population to move up to the 43rd spot.

while the political party Federal Primary Election was on June 5, 2018, and the Federal General Election was on November 6, 2018. (P.S.U.F., Nos. 1-5). As to the current election cycle, the deadline to submit new political party qualification petitions to county election administrators is March 2, 2020 (i.e., 92 days before the statewide primary election); the deadline for the Secretary of State to receive verified new political party qualification petitions from county election administrators is March 9, 2020 (i.e., 85 days before the statewide primary election); the Montana statewide primary election date is June 2, 2020; and the Montana general election is November 3, 2020. (P.S.U.F., No. 59).

Plaintiffs seek declaratory and injunctive relief from the Court. Plaintiffs specifically seek to have Mont. Code Ann., § 13-10-601(2)(a), (b), (c), and (d), on its face and as applied to the Plaintiffs herein for all subsequent general elections in Montana and the facts and circumstances relating thereto, declared unconstitutional. Besides declaratory and injunctive relief as to the election laws in question, specifically, what the Plaintiffs are asking for in affirmative relief from the Court is that they be placed on the Montana ballot and that the Montana Green Party be recognized in Montana for the next general election cycle. This remedy is necessary because of the unnecessary and unequal State House distribution requirement whose application resulted in the Montana Green Party losing party recognition and ballot access in 2018.

While this case is specifically concerned with asking for declaratory relief holding the election laws in question unconstitutional and injunctive relief in placing the Montana Green Party on the Montana ballot for the next General Election cycle, it particularly concerns the requirement in future election cycles after 2018 that will still require a new minor political party to petition at an unnecessarily early petition deadline date and meet a relatively high petition signature requirement, and an unconstitutional petition signature distribution requirement for a minimum of 34 State House districts which require unequal and differing numbers for said 34 State House districts in violation of equal protection and the constitutional principle of one-person, one-vote.

It is undisputed that restrictions on access to the election ballot burden two distinct and fundamental rights, ". . . the right of individuals to associate for the advancement of political beliefs, the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). "The freedom to associate as a political party, a right we have recognized as fundamental [*Williams v. Rhodes*, 393 U.S. at 30-31], has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, 'Voters can assert their preferences only through candidates or

parties or both,' *Lubin v. Panish*, 415 U.S. 709, 716 (1974); "*Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, at 814 (1979).

When these fundamental, constitutionally protected rights are unreasonably or unfairly limited or denied, relief is available to set aside restrictions or denial in an action such as the instant case. It is the contention of the Plaintiffs urging this lawsuit that Montana has gone too far in infringing the Plaintiffs' rights to political association and ballot access for general elections. The teaching of the United States Supreme Court is that:

> "even when pursuing a legitimate interest, a state may not choose means that **unnecessarily restrict** constitutionally protected liberty," *Kusper v. Pontikes*, 414 U.S. 51 (1973), and we have required that states adopt the **least drastic means** to achieve their end. *Lubin v. Panish*, 415 U.S. at 716. . .; *Williams v. Rhodes*, 393 U.S. at 31-33 . . .. **This requirement is particularly important where restrictions on access to the ballot are involved**. The state's interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the development of the nation. [Emphasis added] *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 185.

"As our past decisions have made clear, the significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest [citations omitted]. If the State has open to it a least drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental liberties. *Shelton v. Tucker*, 364 U.S. 479 [1960]." *Kusper v. Pontikes*, 414 U.S. at 58-59. In deciding what the "least

drastic or restrictive means," is, it is necessary for the Court to ". . . consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification." *Storer v. Brown*, 415 U.S. at 730, citing *Williams v. Rhodes, Id.*, and *Dunn v. Blumstein*, 405 U.S. 330 (1974). Also see, *Mandel v. Bradley*, 432 U.S. 173 (1977).

Montana's unnecessarily early petition deadline (almost three months before Montana's primary election), coupled with the relatively high petition signature requirement, and the unequal petition distribution requirement in at least 34 State House Districts is unconstitutional, lacks any compelling interest, and unequally and unfairly impacts in a discriminatory manner the right of small, minor, unrecognized political parties in Montana who have collected more than the required number of 5,000 petition signatures for party formation in Montana. *Moore v. Ogilvie,* 394 U.S. at 819 ("It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities." *Moore v. Ogilvie*, 394 U.S. at 818); also see *Blomquist v. Thomson*, 739 F.2d 525, 527-528 (10th Cir. 1984)(declaring unconstitutional a petition distribution requirement which stated that the majority of the 8,000 petition signatures required for a new political party's recognition could not be of Wyoming voters who resided in the

same county). Montana's petition signature- distribution requirement gives disproportionate influence to voters in State House Districts who least supported the previous winning candidate for Montana governor. Further, while Montana might have some sort of rational interest (but not a compelling state interest) in ensuring reasonable widespread support in a petition signature drive for new political party recognition, the actual effect of the petition signature distribution requirement was to result in 53 of the 100 State House Districts being ignored. Particularly the Court should consider that it is the unequal signature requirement in at least 34 State House Districts for petitioning that makes the law unconstitutional under the principle of one-person, one-vote because it is based on an unequal signature requirement in State House Districts of approximately the same population. This would not be so if it were based on Congressional Districts where the signature requirement was the same. See, e.g., *Angle v. Miller*, 673 F.3d 1122, 1129 (9th Cir. 2012); *Libertarian Party v. Bond*, 764 F.2d 538, 544 (8th Cir. 1985); *Libertarian Party of Virginia v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985); *Udall v. Bowen*, 419 F.Supp. 746, 748-749 (S.D. Ind.), *aff'd mem.*, 425 U.S. 947 (1976). While Montana's early petition deadline and signature requirement are relatively severe compared to other states[8], it is the combined effect of the State

[8] The Supreme Court has spoken on at least one occasion of 1% of the vote for governor as "within the outer boundaries of support the State may require before according political parties ballot position." American Party of Texas v. White, 415 U.S. 767, at 783 (1974). See also, McLain v. Meier, 637 F.2d 1159, 1163-1164 (8th Cir. 1980).

House distribution requirement using an unequal number of signatures which renders the Montana law in question without any justifiable basis that would serve any compelling state interest that would make constitutional sense.

The laws in question challenged herein, when considered with the facts set forth in Plaintiffs' Statement of Undisputed Facts are unconstitutional on their face and as applied to Plaintiffs because the Plaintiffs were able to have sufficient statewide signatures for political party recognition in Montana, but had their State House District distribution signatures reduced from 38 State House Districts (where they had the requisite number of signatures) to 30 State House Districts—which was four short of the 34 required. This result is because there is an unequal requirement for the number of signatures required in the requisite 34 State House Districts so as to violate Plaintiffs' equal protection rights under the Fourteenth Amendment and the Constitutional principle of one-person, one-vote, and because said requirements give greater weight to the votes of some citizens and, thereby, cause inequality in voting power. *Moore v. Ogilvie, Id.*; *Communist Party v. State Board of Elections of Illinois*, 518 F.2d 517 (7th Cir. 1975), *cert. den.*, 423 U.S. 986 (1975); also see *Blomquist v. Thomson, Id.; McCarthy v. Garrahy*, 460 F.Supp. 1042, 1046 (D.R.I. 1978); *Baird v. Davoren*, 346 F.Supp. 515 (D.Mass. 1972); and *Socialist Workers Party v. Hare*, 304 F.Supp. 534 (E.D. Mich. 1969). Montana's State House District distribution requirement discriminates against the State House

Districts which gave a larger vote to the previous winning candidate for governor as opposed to the State House Districts which gave a lesser vote to the winning candidate for governor. There is no compelling state interest for such a requirement. However, this problem would have been partly avoided if the Montana Legislature had at least made the same number of petition signatures required for each of the 34 required State House districts required under the petition distribution requirement. See *Montana Public Interest Research Group v. Johnson*, 361 F.Supp.2d 1222, 1230 (2005) for a proposal for a geographical distribution requirement that does not violate equal protection.

The effect of the election laws challenged herein has resulted in the removal of a political party from the Montana ballot and the elimination of political choice for the Montana Green Party's supporters and Montana voters in general. While the Montana Green Party more than met the petition signature requirement statewide, a clearly unconstitutional political party distribution requirement resulted in the Montana Green Party being excluded from the ballot after the disqualification of only 87 petition signatures. In fact, when one looks at the deficit in only four of the eight State House Districts (viz.: Districts 20, 43, 54, and either 56 or 83 (in which the Montana Green Party dropped below the number of petition signatures required, it can be seen that the petition signature deficit was a mere 13 petition signatures. (This is particularly made clear by looking at the

charts on page 10 of the Opinion in the Supreme Court of the State of Montana, Case No. DA 18-0414, 2019 MT 28 (January 30, 2019), which is attached to Plaintiffs' Statement of Undisputed Facts as Plaintiffs' Exhibit "10"). As the United States Supreme Court has stated in regard to ballot access laws:

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties [citation omitted]. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity in competition in the marketplace of ideas. *Anderson v. Celebrezze*, 460 U.S. at 793-794.

V. CONCLUSION

The instant federal court action challenges petition signature requirement for the formation of a new political party in Montana based on the combined effect of a petition deadline almost three months before the primary election, the 5,000 petition signature requirement, and—especially—the petition signature distribution requirement of at least sufficient petition signatures to equal or exceed 5% of the vote cast for the winning candidate for Montana governor in the previous election in each of at least 34 State House Districts. Plaintiffs are asking for declaratory relief as to the unconstitutionality of the combined aforesaid election laws along with injunctive relief as to future enforcement as well as recognition of the Montana Green party as a political party in the next election cycle. While the

petition signature deadline is rather early, and the number of petition signatures required relatively high compared to other states, these requirements individually are not unconstitutional. However, when put together and then considered with the distribution requirement, the law is unconstitutional both facially and as applied in its combined effect. It simply makes no logical sense for the distribution requirement to be based on votes for the winning gubernatorial candidate in each of at least 34 State House Districts. Because the distribution requirement varies widely from 53 to 150 petition signatures per district, discriminates against petition signers in State House Districts where the winning candidate for governor received a higher percentage of the vote, because there is no distribution requirement for a statewide independent candidate petition (P.S.U.F., No. 50), and because the challenged laws could and did prevent ballot access for a political party that achieved significantly more than the 5,000 petition signatures required statewide (P.S.U.F., No. 60), the challenged election laws are unconstitutional as a violation of the equal protection clause and the principle of one-person, one-vote.

WHEREFORE, premises considered, Plaintiffs respectfully request the Court grant Plaintiffs' motion for summary judgment, declare the laws in question unconstitutional, issue an injunction barring their enforcement, and placing the Montana Green Party on the Montana ballot for the next election cycle.

Respectfully submitted this 18th day of September, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d) (2), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,499 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that a true and exact copy of the foregoing has been served on all counsel of record via the Court's CM/ECF e-mail notification system on the 18th day of September, 2019.

/s/ James C. Linger
James C. Linger