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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' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

STATEMENT OF THE CASE

The instant case is a ballot access case on behalf of Montana voters and the Montana Green Party (hereinafter sometimes referred to as "MGP") in regard to what had been an initially successful petition drive in 2018, to have the MGP recognized in Montana pursuant to the requirements of Mont. Code Ann., § 13-10-601(2)(a), (b), (c), and (d), which requires, along with certain other specific requirements as to the distribution requirement of an unequal 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 in order to form a new Montana political party.

While most states do not have a distribution requirement in addition to the total number of signatures required, Montana is the only state to have a distribution requirement to be gathered from State House districts rather than congressional districts or limitations on how many petition signatures can be gathered from certain counties. The distribution requirement as to petition signatures requires that a new political party seeking state recognition obtain not just 5,000 petition signatures, but also petition signatures of at least 5% of the winning candidate's vote for governor in at least 34 of the State House districts (Mont. Code Ann. § 13-10-601 (2)(b)). 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.

The 2018 petition drive initially resulted in the submission of 7,386 valid petition signatures of Montana registered voters who had indicated they wished the MGP to be recognized as a Montana political party. These petition signatures were collected from 47 of the 100 Montana State House districts. Initially there were sufficient petition signatures collected in 38 of the State House districts to comply with the 34 State House districts distribution requirement. Therefore, the MGP had more than the 5,000 petition signatures required and more than the required number of signatures needed under the distribution requirement in at least 34 of the 100 State House districts.

Thereafter, on July 9, 2018, in a state lawsuit filed by several individuals and the Montana Democratic Party, a Court found that a total of 87 petition signatures in eight of the State House districts were invalid because of irregularities. 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, while the number of valid petition signatures in the aforesaid eight State House districts were, respectively, 138, 128, 103, 127, 95, 125, 144, and 140. The state court's invalidation of signatures from these districts resulted in the MGP not qualifying in the required minimum of 34 districts, but only having sufficient petition signatures under the Montana distribution requirement so as to qualify in 30 districts, rather than the 38 State House districts the MGP had had previously.

The State Court's decision was subsequently affirmed by the Montana Supreme Court. *Larson v. State*, 434 P.3d 241 (Mont. 2019). The MGP was therefore removed from the election ballot even though there were still 7,299 valid petition signatures statewide. 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 MGP dropped below the number of petition signatures required, it can be seen that the petition signature deficit was a mere 13 petition signatures—i.e., a deficit of two in Districts 20 and 43, a deficit of three in District 54, and a deficit of six in Districts 56 and 83. This is set forth in the charts done by the Supreme Court of Montana in *Larson v. State*, 434 P.3d at 250-251. If the 105 or 101 petition signature requirements for State House districts 43 or 56, respectively, had been in effect for the eight House districts found wanting, seven of the House

districts would have complied with the 101 requirement and six House districts with the 105 requirement. Therefore, the crux of this case is the unequal number of petition signatures required in various State House districts.

On September 18, 2019, the Plaintiffs and the MGP filed a Motion for Summary Judgment, Statement of Undisputed Facts, and Brief in Support of Motion for Summary Judgment (Docs. 36, 37, and 38). The aforesaid Motion for Summary Judgment and supporting pleadings argue that the combined effect of the early petition signature deadline, number of signatures required, and State House District distribution requirement demonstrate that the petition signature requirements for political party recognition in Montana impose a severe burden because the signature requirement, the distribution requirement, and the filing deadline are severe burdens and there is an equal protection violation. Secretary Stapleton filed a Brief in opposition to Plaintiffs' Motion for Summary Judgment and a Statement of Disputed Facts on October 9, 2019 (Docs. 45 and 46).

ARGUMENT AND AUTHORITIES

Montana's petition signature distribution requirement gives disproportionate influence to voters in State House districts that least supported the previous winning candidate for Montana governor and diminished influence to voters in State House districts that most supported the winning candidate for governor. While Montana might argue it had a rational 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. 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 and thereby causes inequality in voting power and is therefore unconstitutional under *Moore v. Ogilvie,* 394 U.S. 814 (1969).

Nowhere in Secretary Stapleton's Brief does he cite to *Moore v. Ogilvie* or mention its significance to the case at bar. "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 not mentioned at all in Secretary Stapleton's Brief are a number of similar cases which follow *Moore v. Ogilvie,* apply to the instant case, and were set forth in Plaintiffs' Brief in Support of their Motion for Summary Judgment. See *Blomquist v. Thomson*, 739 F.2d 525, 527-528 (10th Cir. 1984) (declaring unconstitutional a Wyoming ballot access law involving 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); and *Communist Party v.*

State Board of Elections of Illinois, 518 F.2d 517 (7th Cir. 1975), *cert. den.*, 423 U.S. 986 (1975); *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).

However, Secretary Stapleton does set forth a number of cases in his Brief which do not concern requirements for petition distribution by districts. *Arizona Libertarian Party v. Reagan*, 798 F.3d 723 (9th Cir. 2015) (which concerned voter registration forms); *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019) (which concerned a requirement of petitions for 1% of the voters eligible to participate in a party's primary in order to appear on the primary ballot); *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119 (9th Cir. 2016) (which concerned a facial challenge to an open primary system); *Arizona Green Party v. Reagan*, 838 F.3d 983 (9th Cir. 2016) (which concerned a challenge to a petition deadline); and *Libertarian Party of Washington v. Monroe*, 31 F.3d 759 (9th Cir. 1994) (which concerned a speculative challenge not involving a distribution requirement). Thus, Secretary Stapleton has not justified Montana's State House district distribution requirement which 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 petition distribution requirement.

Montana's ballot access law for recognition of new political parties is a severe burden upon the constitutional rights of the Plaintiffs herein and also imposes an unreasonable and discriminatory restriction on Plaintiffs because of the combined effect of the petition signature requirement, early deadline, and petition distribution requirement in at least 34 State House districts. Secretary Stapleton's Brief does not really address the key question presented by the instant case. If so many petition signatures (viz.: between 55 to 95 petition signatures) satisfy the State's interest in 21 of the State House districts in Montana, why does there have to be a higher petition signature requirement (i.e., 150 petition signatures) in 26 of the State House districts or a middle requirement (i.e., 100 to 140 petition signatures) in 53 State House districts. This question is never addressed or satisfactorily answered by Secretary Stapleton in his Brief. The challenged ballot access law involving the State House distribution requirement for at least 34 out of 100 State House districts with an unequal requirement for the individual State House districts of between 55 up to 150 petition signatures is not just unconstitutional, but also nonsensical.

On page 7 of Secretary Stapleton's Brief, argument is made that the "Plaintiffs devote several pages to discussing the signature gathering requirements of other states, apparently inviting this Court to compare Montana's ballot access

laws with those of other states and find Montana's wanting." However, this argument shows a misunderstanding of why the seven other states that have petition signature distribution requirements by districts were mentioned to the Court. The reason was because there are no states that have a comparable distribution requirement for petition signatures like Montana's State House district distribution requirement. Each of the aforesaid seven states has a distribution requirement that is not in violation of the Equal Protection Clause because the number of petition signatures required in each of the required number of districts is equal and does not diminish the rights of some voters when compared with other voters.

Not only do each of the seven states use equal petition signature requirements for congressional districts having approximately the same population rather than unequal petition signature requirements by Montana State House districts, but the number of required petition signatures in five of the states number between 100 to 500 petition signatures in the required number of congressional district (viz.: only 100 petition signatures from half of the congressional districts in Michigan—i.e., 7 districts, Mich. Stat. Ann. § 168.685(1); and New York—i.e., 14 districts, N.Y. Elec. Law § 6-136(1); 200 petition signatures from at least 3 districts out of 13 districts in North Carolina, N.C. Gen. Stat. § 163A-950(2); and all 11 districts in Virginia for a minor party or independent candidate for

President—but 400 petition signatures from each district for other Virginia statewide candidates, Va. Code Ann. §§ 24.2-543(A) and 24.2-506(A)(1); and 500 petition signatures from half of the congressional districts in Ohio—i.e., 8 districts, Ohio Rev. Code §3517(A)(1)(b)(ii). In the two remaining states, New Hampshire requires 1,500 petition signatures from each of its two congressional districts for statewide independent candidates—but has no distribution requirement for a petition for political party recognition, while Nebraska requires 1% of the gubernatorial vote in petition signatures from each of its three congressional districts—approximately 2,327 signatures per congressional district.

Once again, the point is that the number of petition signatures required from each of the districts in the above seven states is equal. This contrasts with Montana and its requirement of between 55 to 150 petition signatures from its State House districts. While the law on its face seems to be equal because it uses a percentage of the vote cast for the winning candidate for governor, the "as applied effect" deviates by almost as much as three times from the districts which gave a lower percentage of their vote to the statewide winning candidate for governor to the districts which gave a higher percentage of their vote to the statewide winning candidate for governor. Of further consideration is the fact that requiring 100, 200, 500, or even 1,500 to 2,327 petition signatures from congressional districts is a rather minor percentage of the number of voters in each of these congressional

districts compared to 55 to 150 petition signatures from each of 100 State House districts in Montana with only a single congressional district.

Finally, the distribution requirement for Arizona requires petition signatures for the formation of a new political party to be gathered from at least five counties, with no more than 90 percent of the petition signatures coming from counties that have a population of half a million people or more, and at least 10% of the total petition signatures required coming 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. (Arizona Rev. Stat. §§ 16-801, 16-803, and 16-804). However, the aforesaid requirement in Arizona is even less intrusive than the distribution requirement held unconstitutional by the Tenth Circuit in *Blomquist v. Thomson, Id.*, and could have no practical application to Montana.

Under the *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) 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)). However, the Montana State House district distribution requirement imposes an unreasonable and discriminatory restriction by diminishing the voters in State House districts which gave a higher percentage of their vote to the statewide winning candidate for governor compared to State House districts that gave a lower percentage of their vote to the statewide winning candidate for governor.

It simply makes no sense for the distribution requirement to be based on votes for the winning gubernatorial candidate in each of at least 34 State House districts. As the U.S. Supreme Court has stated, it is no justification that a new political party must have a fairly broad base of support since that justification was specifically rejected in *Moore v. Ogilvie*, 394 U.S. at 818.

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, requires in-district signatures from more than fourteen districts, or requires a different number of signatures from its districts. 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. 424, at 730 (1974). Secretary Stapleton has shown no compelling State interest, or even a rational basis, for the unequal petition signature distribution requirement for at least 34 State House districts.

Montana's early petition deadline in March and signature requirements are relatively difficult compared to other states because 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). However, it is the "combined effect" of the State 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.

No other state has tried a distribution plan similar to Montana's unequal signature requirement for State House districts probably because it is obvious that such a distribution plan would be unconstitutional. It is the State House distribution requirement that makes Montana's ballot access law for new political party recognition severe. (Doc. 42-1, Defendant's Exhibit C, deposition of Danielle Breck, p. 48, line 6-p. 51, line 20).

CONCLUSION

While Defendant Secretary Stapleton and the State of Montana have an important governmental interest in regulating elections, the combined effect of the ballot access laws challenged herein—particularly the distribution requirement for 34 State House districts--is not necessary or the least drastic means to serve a compelling state interest. In fact, Montana's distribution requirement of at least 5% of the winning gubernatorial vote in at least 34 State House districts is in violation of equal protection because it discriminates against voters and petition signers in State House districts which gave a higher percentage of the vote to the winning candidate for governor as opposed to State House districts that gave a lower percentage of the vote to the winning candidate for governor.

But for the State House district distribution requirement, the MGP would have had more than enough petition signatures for political party recognition. 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 MGP's 7,299 valid petition signers and registered voters. While the MGP more than met the petition signature requirement statewide, a clearly unconstitutional political party distribution requirement resulted in the MGP being excluded from the ballot. *Larson v. State, Id.*

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 23rd day of October, 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 3,238 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 23rd day of October, 2019.

/s/ James C. Linger
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