Case No. 20-35734

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROYAL DAVIS, GARY MARBUT, TOM HARSCH, TERESA HARSCH,
Plaintiffs-Appellants,

v.

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

and

MONTANA DEMOCRATIC PARTY, RYAN FILZ, MADELINE NEUMEYER, and REBECCA WEED,
Intervenor-Defendants.

On Appeal From An Order Denying A Preliminary Injunction Motion
District of Montana, Helena Division
The Honorable Dana Christensen, Presiding
Case No. CV-20-62-H-DLC

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL

RELIEF REQUESTED ON OR BEFORE SEPTEMBER 8, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

A. Montana Democrats Have Misrepresented the Record 1

B. The Green Voters Satisfy All of the *Winter* Elements 5

I. Green Voters Are Likely to Succeed on the Merits Because the State Seeks to Invalidate Their Lawfully Cast Ballots 5

II. The Impending Statewide Invalidation of All Green Party Ballots Constitutes Irreparable Harm 9

III. The Balance of Equities Tips Sharply in Favor of the Green Voters Because Counting Lawfully Cast Ballots Enhances the Integrity of the State's Election 10

IV. Democrats Fail to Show How Counting Lawfully Cast Ballots Undermines the Public Interest 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Alaskan Independent Party v. Alaska,
545 F.3d 1173 (9th Cir. 2008) 3

Bennett v. Yoshina,
140 F.3d 1218 (9th Cir. 1998) 1, 5

Chase Natl' Bank v. Norwalk,
291 U.S. 431 (1934) 10

Griffin v. *Burns*,
570 F.2d 1065 (1st Cir. 1978) 1, 6, 9

Illinois Bd. of Elections v. *Socialist Workers Party*,
440 U.S. 173 (1979) 9

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 4

Knick v. Township of Scott,
139 S. Ct. 2126 (2019) 10

Richards v. Jefferson County,
517 U.S. 793 (1996) 10

Storer v. Brown,
415 U.S. 724 (1974) 8

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 8

Winter v. *Natural Res. Def. Council, Inc.*,
555 U.S. 7 (2008) 9

Statutory Provisions

UNITED STATES CODE
42 U.S.C. § 1983 10

MONTANA CODE ANNOTATED
§ 13-10-601(2)(b) 8
§ 13-12-201 5
§ 13-15-502 ..... 1, 5
§ 13-15-507 5

INTRODUCTION

Montana Democrats contend that Green Party voters should have anticipated a state court ruling 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." State Court Order, ECF No. 1-4 at 35. The final canvass occurs 27 days after Election Day. Mont. Code Ann. § 13-15-502.

Under this state-court rule, ballots cast by a minor party's voters are valid only at the sufferance of the party's petition signers. Small numbers of signers of a ballot-qualification petition may later disapprove of party candidates nominated in the primary or, as in this case, come to regret ever establishing the party. The state court's rule enables 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 ballots cast by its voters.

No rational election system can function this way. And no rational voter could have anticipated the state court going off the rails as it did.

And no federal court should allow the impending statewide invalidation of every ballot lawfully cast by Green voters. This would clearly violate their right to substantive due process. *Bennett v. Yoshina*, 140 F.3d 1218 (9th Cir. 1998); *Griffin v. Burns,* 570 F.2d 1065 (1st Cir. 1978).

ARGUMENT

A. Montana Democrats Have Misrepresented the Record

The Montana Democrats' response is riddled with misrepresentations. They contend, for example, that because of "the Secretary's refusal to accept [signers'] withdrawals, purported Green Party candidates were included on the primary ballot." DktEntry 11-1 at 21.[1] Not so. There were 13,000 valid petition signatures when the Secretary declared the Green Party ballot qualified on March 6, 2020. ECF No. 18-1 at 2. Democrats do not allege that there were insufficient signatures on that date – or on March 9, when Green Party candidates filed for the primary, or when voters began casting their ballots in April and May. Not until Democrats sued in state court on June 1, 2020, did they claim to have acquired sufficient signature withdrawals to invalidate the Green Party.

Thus, to be clear, Green voters who mailed in their ballots between late April and May (which was when nearly all ballots were mailed in) did so when the Green Party was indisputably a ballot-qualified party and Appellants Davis and Marbut were indisputably qualified candidates. These candidates remain qualified despite Democrats' repeated references to them as "unqualified." Neither of them

[1] Citations to page numbers in court filings refer to those assigned by the Court's ECF system.

has withdrawn, died, moved out of state, or committed any other act or omission that would disqualify them.

Democrats include in their brief a long-winded bill of particulars against Republicans. In short, Democrats were shocked, shocked, to find politicking was going on during the primary. Dkt. 11-1 at 17-22. What was not going on was any deceit arising from the petition itself. As the state court noted, "I heard no testimony that said the petition itself, the language of the petition itself that was presented to the people to sign was inaccurate or misleading." ECF No. 18-1 at 4. The signers of the Green Party's ballot-qualification petition literally got what they signed up for: a ballot-qualified Green Party.

Democrats claim they were aghast when GOP financing of signature efforts became public on March 24. But the Harsches and 800 other voters had access to this information when they later received their ballots. They still voted Green.

Montana Democrats rely upon a Facebook entry suggesting the Green Party candidates are not truly Green. DktEntry 11-1 at 18. This "evidence" is irrelevant – not just because it is inadmissible hearsay, and not just because the Green Party supports Appellants. DktEntry 9. The purpose of Montana's primary is to "provide a neutral mechanism for resolving party nominating decisions that reduces the role of party leadership and *gives ultimate authority to party voters.*" *Alaskan Independent Party v. Alaska,* 545 F.3d 1173, 1178 (9th Cir. 2008)

(emphasis added). Appellants Davis and Marbut are Green nominees because Green voters like Appellants Tom and Teresa Harsch said so with their ballots.

Montana Democrats claim that the Secretary lost his recent appeals because "both the Montana Supreme Court and the U.S. Supreme Court rejected similar arguments" as those being made by the Green Voters. DktEntry 11-1 at 8. This is simply false. The Secretary's briefing in the Montana Supreme Court made no mention of voter rights or any other federal claims.[2] His application to the U.S. Supreme Court asserted, for the first time, that the First Amendment rights of petition signers were being violated.[3] But because the Secretary never presented a First Amendment claim to Montana courts, and because the U.S. Supreme Court is a "court of review, not of first view," *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018), the Court's summary denial of the Secretary's application was entirely predictable. That rejection of the Secretary's questionable, unpreserved First

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[2] The Secretary's opening brief to the Montana Supreme Court has been filed in this Court. DktEntry 2-3. His reply to that court is attached as **Exhibit A** and can also be found at:
https://appecm.mt.gov/PerceptiveJUDDocket/APP/connector/1/347/url/321Z48L_0RXBTR33H00002T.pdf

[3] A copy of the Secretary's application to the U.S. Supreme Court is attached as **Exhibit B** and can also be found at:
https://www.supremecourt.gov/DocketPDF/20/20A33/151079/20200824154710865_Pldg%208-24-20_Application%20for%20Stay_SOS.pdf

Amendment claim of petition signers sheds no light on the due process claims of Green voters who lawfully cast ballots during the primary.

B. The Green Voters Satisfy All of the *Winter* Elements

I. The Green Voters Are Likely to Succeed on the Merits Because the State Seeks to Invalidate Their Lawfully Cast Ballots

Montana Democrats wrongly contend that the first element of the *Bennett* test has not been satisfied because Green voters did not rely upon "an established election procedure and/or official pronouncement about what the procedure will be in the coming election." *Bennett*, 140 F.3d at 1226-27. Voters who participated in the Green primary, and thereby sacrificed their right to participate in another party primary, were entitled to the same election procedures as voters in other party primaries. These included having the State declare nominated the winning candidates and including their names on the general election ballot. Mont. Code Ann. §§ 13-12-201; 13-15-507.

Montana Democrats contend voters should have anticipated the state court's post-election ruling that a political 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." State Court Order, ECF No. 1-4 at 35. The final canvass occurs 27 days after Election Day. Mont. Code Ann. § 13-15-502.

It is difficult to overstate the absurdity of this rule, which enables a small fraction of signers of a minor party's ballot-qualification petition to withdraw their signatures as late as 27 days after Election Day, thereby invalidating the party and all of its ballots. The ballots of minor party voters are thus hostage to the whims of a few petition signers until well after Election Day.

The *Griffin* decision is directly on point. As with voters in *Griffin*, voters in this case received government-printed absentee ballots directly from the government. They were therefore entitled to assume that lawfully casting one of those ballots, and thereby participating in the party primary designated by the ballot, would result in the State's election procedures being applied to that ballot and every other ballot cast in that party primary.

Montana Democrats argue that *Griffin* is distinguishable because the Rhode Island Democratic Party was "eligible under state law to hold that primary election to select between those candidates and the winner of that primary election was entitled to general election ballot access as the nominee of that party." DktEntry 11-1 at 28. But the same is true of the Green Party. When voters received and mailed in ballots in April and May 2020, the Green Party was ballot-qualified. The government's inclusion of Green ballots in mailings to voters was a promise from the government that the Green Party would not be subsequently invalidated based upon the whims of some party petition signers later having a change of heart.

No reasonable voter could have anticipated the State breaking this promise. The Green Voters therefore satisfy *Bennett's* first element.

Montana Democrats argue that electors do not get to vote in the general election for candidates who withdraw after prevailing in the primary, so the Green Voters should not complain about the State invalidating their primary ballots and their candidates' nominations. DktEntry 11-1 at 25-26. But withdrawal by an individual candidate after Election Day is an inherent risk every voter in every election must anticipate when casting a ballot. What a voter should not have to anticipate when casting a minor party ballot is the entire ballot, and the entire party, being invalidated based upon a later change of heart by the party's petition signers – an outcome the state court's bizarre ruling makes possible.

Montana Democrats also contend that the Green Voters cannot show disenfranchisement under the second element of *Bennett's* test. A valid general election can occur, according to Montana Democrats, even if all ballots lawfully cast by a minor party's voters in the primary are subsequently invalidated and party nominees are stricken from the general election ballot. DktEntry 11-1 at 26-27.

This is not how elections work. Montana's 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. Mont. Code Ann. § 13-10-601(2)(a). This purpose is defeated when ballots cast by a party's voters – along with the party itself – are extinguished. This is especially true in an open primary like Montana's in which voters sacrifice the right to participate in a different party primary as a condition to participating in the Green primary. Democrats err in portraying the impending invalidation of every Green Party ballot in Montana as anything other than disenfranchisement.

Montana Democrats cite several First Amendment cases for the proposition that "political candidates do not have a legally protected 'right' to be on the ballot and voters do not have a legally-protected 'right' to have their preferred candidate on the ballot." DktEntry 11-1 at 16-18. None are on point. While the First Amendment allows states, *before* votes are cast, to "enact reasonable regulations of parties, elections, and ballots," DktEntry 11-1 at 30, quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), the Due Process Clause of the Fourteenth Amendment bars states, *after* votes are cast, from changing those regulations if electors are left disenfranchised.

Montana is doing 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 Green voters therefore satisfy the second element of the *Bennett* test.

II. The Impending Statewide Invalidation of All Green Party Ballots Constitutes Irreparable Harm

The Supreme Court has long held that "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979). Montana's violation of the Green Voters' right to vote clearly constitutes irreparable harm.

Montana Democrats concede that the Green Voters can show irreparable harm if they show a violation of their right to vote. DktEntry 11-1 at 31. But they insist that the irreparable-harm element is a "draw" because they themselves will suffer irreparable harm if the Green Voters' right to vote is vindicated by this Court. DktEntry 11-1 at 32. This argument has two problems.

First, the irreparable-harm element looks only to the *plaintiff's* irreparable harm, not the defendant's. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("a plaintiff seeking a preliminary injunction must establish that … *he* is likely to suffer irreparable harm….") (emphasis added). Second, Montana Democrats do not identify any irreparable (or even colorable) injury they will suffer if the Court grants relief and requires Green ballots to be counted under the same rules as other party ballots.

The irreparable-harm element is not a "draw." Rather, it strongly favors the Green Voters.

III. The Balance of Equities Tips Sharply in Favor of the Green Voters Because Counting Lawfully Cast Ballots Enhances the Integrity of The State's Election

Montana Democrats claim none of the nearly 800 Montanans who cast Green ballots are entitled to relief because none intervened in the Democrats' state action. DktEntry 11-1 at 32. They fail to cite any authority even remotely suggesting that individual voters, most of whom are of modest means, are obliged to lawyer up whenever a political party seeks to invalidate their ballots. On the other hand, the Supreme Court has long held that "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.").

The Green Voters had no obligation to seek intervention in the Democrats' state court action. Four days after that court issued its bizarre ruling, the Green

Voters sought relief in federal district court. The day after the federal district court denied their preliminary injunction motion, the Green Voters filed an appeal in this court, followed by their emergency motion a day later. They have proceeded with extreme diligence.

Besides being legally and factually unsound, the Montana Democrats' lack-of-diligence argument does not pass the smell test. The expedited schedule in this appeal results entirely from months of Democrats attempting to game the system by harvesting signature withdrawal requests and then suing in state court the day before the primary election – after almost all voters had mailed in their ballots.

Montana Democrats argue that "the State has an interest in preserving the integrity of its elections and enforcing its reasonable laws regarding candidate eligibility." DktEntry 11-1 at 32. The Green Voters couldn't agree more, which is why they seek to have the ballots they lawfully cast processed according to Montana law in effect when they voted. Invalidating those ballots because some party petition signers had a change of heart after voting was underway would undermine the integrity of Montana's elections, not preserve it. *Winter's* balance-of-equities element thus tips sharply in favor of the Green Voters.

IV. Democrats Fail to Show How Counting Lawfully Cast Ballots Undermines the Public Interest

Montana Democrats' final argument for disenfranchising the state's Green voters is that the Secretary cannot reprint ballots at this point in time. DktEntry 11-1 at 33. The Secretary himself disagrees.

While ballot preparation can take up to two weeks, the Secretary's office can proceed more quickly when necessary, and at a later point in the election cycle. DktEntry 14-2 at 2. This is particularly true when, in a case like this, only slight modifications need to be made to an already prepared ballot. *Id.* For example, the Secretary's office was able to reprint ballots on September 22, 2016, in response to the untimely death three days earlier of the Libertarian candidate for Montana's at-large congressional seat. *Id.* If the Secretary of State can redesign and reprint ballots as late in an election cycle as September 22, it follows *a fortiori* that he can do so on September 8.

CONCLUSION

For all of the foregoing reasons, Appellants respectfully requests this Court grants its motion for an injunction pending appeal.

DATED: August 31, 2020

Respectfully submitted,
Monforton Law Offices, PLLC

By: /s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Plaintiffs-Appellants

CERTIFICATE REGARDING BRIEF SIZE

Under 9th Circuit Rule 27-1(1)(d), a reply to a motion may not exceed 10 pages. Under 9th Circuit Rule 32-3(2), Appellants may comply with this limit by filing a document in which the word count divided by 280 does not exceed the designated page limit.

As calculated by the word counting feature in Microsoft Word, this brief consists of 2724 words. When divided by 280, that number equals 9.73. Appellants' reply brief therefore complies with the size limitation rules established by this Court.

DATED: August 31, 2020

Respectfully submitted,

Monforton Law Offices, PLLC

By: /s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 31st day of August, 2020 that a copy of the foregoing will be delivered this day via the Court's ECF system to counsel of record for all parties.

DATED: August 31, 2020

Respectfully submitted,

Monforton Law Offices, PLLC

By: /s/ Matthew G. Monforton
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