No. 20-35340

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA GREEN PARTY, DANIELLE BRECK, CHERYL WOLFE, HARRY C. HOVING, DOUG CAMPBELL, STEVE KELLY, ANTONIO MORSETTE, TAMARA R. THOMPSON, and ADRIEN OWEN WAGNER,
Plaintiffs – Appellants

v.

COREY STAPLETON, in his official capacity as Secretary of State for the State of Montana,
Defendant – Appellee

On Appeal from the United States District Court
For the District of Montana, Helena Division

Honorable Brian Morris, Chief District Judge
D.C. No. CV- 18-87-H-BMM-JTJ

APPELLANTS' REPLY BRIEF

JAMES C. LINGER
1710 South Boston Avenue
Tulsa, Oklahoma 74119-4810
Tel.: (918) 585-2797
Fax: (918) 583-8283
bostonbarristers@tulsacoxmail.com
Counsel for Appellants

QUENTIN M. RHOADES
Rhoades, Siefert & Erickson, PLLC
430 N. Ryman
Missoula, MT 59802
Tel: (406) 721-9700
qmr@montanalawyer.com
Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Cases:

Statutes and Code:

Other Authorities:

STATEMENT OF THE CASE

The Plaintiffs-Appellants (hereinafter referred to collectively as "MGP"), commenced a timely appeal in this Court from a decision rendered in a Judgment and Order below on March 20, 2020 (ER, p. 7; ER, pp. 8-22) by the United States District Court for the District of Montana. MGP's Opening Brief was submitted to the Court on August 24, 2020, and filed on August 28, 2020. After being granted an extension of time, the Brief of Defendant-Appellee, Corey Stapleton, in his official capacity as Secretary of State for the State of Montana (hereinafter referred to as "Secretary Stapleton") was submitted to the Court on October 23, 2020, and filed on October 26, 2020. Plaintiffs MGP now submit their Reply Brief.

SUMMARY OF THE ARGUMENT

Secretary Stapleton in his Brief of Appellee in the case at bar engages in a number of statements of fact and arguments involving immaterial facts and conclusionary statements. Chief among these is the conclusion that the Montana State House "unequal" distribution requirement for petition signatures in at least 34 of the 100 State House districts is not a severe burden for recognition of new political parties. However, the "not a severe burden" assertion is belied by the fact that the unequal distribution requirement is the reason that the MGP was removed from the Montana ballot for the general election, after being recognized and choosing candidates in a primary election, in both 2018 and—recently again—

2020[1]. Further, while there was no showing that any new political party had ever managed to have statewide ballot petition signatures of five percent of the winning candidates vote for Governor (which would have been 12,797 petition signatures—five percent of 255,933 for the winning candidate for Governor in the 2016 gubernatorial election), the 5,000 maximum signature requirement was the one that was attempted and used statewide and which amounted to 1.95% of the votes cast for the statewide successful gubernatorial candidate in 2016. (ER, pp. 51-52, stipulation 52).

The instant appeal involves primarily questions of constitutional law, and the crux of the argument and disagreement between the briefs and positions of MGP and Secretary Stapleton is the equal protection question resulting from the differing and unequal petition signature requirements in the individual Montana State House districts which results from a five percent requirement being applied to the vote cast in each district for the candidate who won statewide for Governor rather than

[1] The recent case of Davis v. Stapleton, CV 20-62-H-DLC (D. Mont. 2020) appealed in 9th Cir. Case Number 20-35734 (9th Cir. 2020) did not raise the question of the constitutionality of the Montana State House district distribution requirement, but did concern the removal of the Montana Green Party from the 2020 Montana General Election ballot after having sufficient signatures challenged and revoked in enough State House districts to drop below the 34 required, even though the number of petition signatures statewide was more than double the 5,000 required. However, the Appellants filed a motion to dismiss on September 15, 2020, which was granted by the 9th Circuit on September 22, 2020. Also see the state case before the Supreme Court of Montana, Montana Democratic Party v. State, 220 MT 244 (Mont. 2020).

being applied to the number of total votes cast for all candidates for Governor in the district or the total number of registered voters in the district or even a single equal and set number for each district. Montana Code Ann., §§ 13-10-601(2)(a), (b), (c), and (d) as those provisions applied to the MGP below for the 2018 Montana general election cycle, and all subsequent Montana general election cycles, set an unconstitutional requirement for ballot access for new political parties by requiring at least 5,000 petition signatures statewide, of which petition signatures of registered voters in more than one-third of the legislative districts (i.e., 34 out of 100 State House districts) must be collected equal to at least 5 percent of the total votes cast for the successful statewide candidate for Governor in the last general election in those districts or 150 petition signatures in those districts, whichever is less. Since the law caps the number of petition 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 and, thus, violates equal protection and the constitutional principle of one-person, one-vote. The 150 petition signature cap existed prior to the 2020 general election 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. (ER, p. 50, stipulation 46). Why should the

5,000 statewide petition signature requirement amount to 1.95% of the votes for the successful gubernatorial candidate while in 26 State House Districts the percentage requirement is near 5% and in the other 74 State House Districts the requirement is 5% of the vote cast in the State House District for the statewide successful gubernatorial candidate?

Because the aforesaid State House district distribution requirement varies widely from 55 to 150 petition signatures per district, discriminates against petition signers in State House districts where the winning candidate for Governor received a higher number of votes, because there is no distribution requirement for a statewide independent candidate petition (ER, p. 50, stipulation 47), and because the challenged laws could and did prevent ballot access for the MGP that had significantly more than the 5,000 petition signatures required statewide (ER, p. 47, stipulation 22; ER, p. 252), the challenged election laws are unconstitutional as a violation of the equal protection clause and the principle of one-person, one-vote by unequally and unfairly impacting in a discriminatory manner the right of unrecognized minor political parties in Montana who have more than the required statewide number of 5,000 petition signatures for political party formation in Montana. *Moore v. Ogilvie,* 394 U.S. 814 (1969) ("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); and *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). Therefore, the Montana laws in question are unconstitutional because Montana's petition signature distribution requirement gives disproportionate influence to voters in State House districts who least supported the previous statewide winning candidate for Montana Governor and diminished influence to voters in State House districts who most supported the statewide winning candidate for Governor. Thus, the Montana's State House district distribution requirement discriminates against the State House districts which gave in their district a larger vote to the statewide winning candidate for Governor as opposed to the State House districts which gave in their district a lesser vote to the statewide winning candidate for Governor.

ARGUMENT

A. Standard of Review.

As noted in the summary of the argument in MGP's Appellants' Opening Brief, and as set forth in Secretary Stapleton's Brief of Appellee, in reviewing a decision of a trial court in granting a summary judgment motion, the appeals court conducts appellate review on a *de novo* basis. In exercising *de novo* review, the

appellate court not only affords no deference to the trial court's interpretation of the law, but examines the evidence submitted by the parties to determine if there exists any genuine issue of material fact and, if not, whether the law was correctly applied by the trial court.

B. Discussion.

This case involves a unique petition distribution requirement because most states do not have a distribution requirement in addition to the total number of statewide petition signatures required and 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. In the section of Secretary Stapleton's Brief of Appellee which covers the Statement of the Case, it is asserted in section II on page 7 that the MGP was ". . . removed from the 2018 ballot after a court determined that numerous petition signatures were invalid." This statement is a great exaggeration since the so-called "numerous petition signatures" were a total of 87 out of what Secretary Stapleton and his office had previously found to be 7,386 valid petition signatures of Montana registered voters. While there were 87 petition signatures found to be invalid for a number of reasons, they still represented a very small percentage of the previously found 7,386 valid petition signatures and tend to show how the consequences of the unequal State House

district distribution requirement for 34 State House districts can be used to disqualify a new political party and the Montana voters who signed petitions expecting that party to appear on the Montana ballot. In fact, while there were only 87 petition signatures found to be invalid as noted above, the MGP had only, in effect, a deficiency of 13 valid petition signatures short of the total and combined required number in four of the disqualified State House districts (ER, pp. 45 and 47, stipulation 14 and 21; ER, p. 252). *Larson v. State*, 2019 MT 28, 434 P.3d 241, 250-251 (Mont. 2019).

Montana is the only state in which the in-district requirement is greater than 1% of the last vote cast. 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. Of the few states that do have a petition signature distribution requirement for new political party recognition, no other state has this great of difference in the number of signatures required (ER, p. 189, ¶ 8). Secretary Stapleton in his Brief of Appellee does not really address the fact that only a few states have a distribution requirement spread over a designated number of congressional districts, and that

none of them base their petition requirement on an unequal signature requirement of a percentage of the winning candidate for any statewide office. It is the State House district distribution requirement that makes Montana's ballot access law for new political party recognition severe because of the difficulty caused by the law, see, Plaintiffs' Exhibit 6, deposition of Danielle Breck, p. 48, line 6--p. 51, line 20 (ER, pp. 227-230). Both Secretary Stapleton and the District Court take the position that the restriction as to petition signatures required statewide and in at least 34 House Districts is not severe because minor political parties have in the past been successful in their petitioning efforts. However, unlike in the instant case, no previously successful minor party petitioning effort was challenged after recognition by the Secretary of State as to the number of petition signatures collected in individual State House districts.

Secretary Stapleton on pages 7 and 8 of the Brief of Appellee makes the point about the assistance and collection efforts of Advanced Micro Targeting (AMT) in the petitioning collection efforts on behalf of the Montana Green Party in 2018. While this is an interesting fact, it is an example of a fact which is immaterial to the main issue in this case. While AMT was not controlled by MGP or its members, it is totally immaterial who collects petition signatures for candidates or political parties in Montana. What is important and material are the valid petition signatures of 7,299 registered Montana voters who signed the

petitions to obtain ballot access for the MGP for the 2018 election cycle in Montana. It is their right to cast their vote effectively and have their First and Fourteenth Amendment rights protected by having their political choice as to political parties and candidates appear on the Montana ballot.

In Secretary Stapleton's Brief of Appellee, it is argued in section II of the Argument portion of the Brief at page 36 that "Montana's statutory formula allowing new parties to obtain signatures from legislative districts based on a percentage of votes cast or 150 signatures, whichever is less, does not violate equal protection." However, the reality of the law is different from the heading in Secretary Stapleton's Brief of Appellee because the percentage is not based on the total of votes cast in the State House district, but on the votes received in the State House district for the candidate who won statewide for Governor in the last gubernatorial election. Because the number of votes received from State House district to State House district for the candidate who won the Governor's race statewide varies greatly, there is not only significant differences in the number of petition signatures required, but there is no consistent or rational relationship for the unequal petition signatures required to the number of voters in the last election who voted for Governor in the district or the number of registered voters in the district that could have voted for Governor. These facts are glossed over and ignored in Secretary Stapleton's Brief of Appellee.

Under the test in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), 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 trouble for Secretary Stapleton is that the Montana State House district distribution requirement at issue herein was neither reasonable or nondiscriminatory and, further, resulted in a great injury to the MGP and its supporters and voters by removing it from the Montana general election ballot after the completion of the MGP's primary election. Certainly, this was a significant injury to First and Fourteenth Amendment rights of voters. What this Court once said in another ballot access case could well be applied to the situation affecting the MGP herein: "It is evident that the infringement upon constitutional rights involved in this case is serious in character. The magnitude of the restraint—the extent to which it has inhibited minor party access to the ballot—is dramatic." *Socialist*

Workers Party v. Secretary of State of Washington, 765 F.2d 1417, 1419 (9th Cir. 1985). If not for the State House district distribution requirement, the MGP would have had more than enough petition signatures for political party recognition in Montana in 2018 (ER, pp. 44-47, stipulations 6, 7, 14, 16, 17, 18, 19, 20, 21, and 22).

While Secretary Stapleton also argues that Plaintiffs MGP have changed their theories as to equal protection violation of the State House district distribution requirement by arguing that the requirement requires a higher percentage of signatures in the State House districts than are required statewide, Secretary Stapleton simply misses the point that this is a fact and in no way changes MGP's argument about the unequal signature requirement in the State House districts as a result of not using a figure based on total vote for Governor or number of registered voters in the district. The law in question regarding the Montana State House district distribution requirement is unconstitutional because it violates the teaching of the U.S. Supreme Court in *Moore v. Ogilvie, Id.*, of one person-one vote.

Secretary Stapleton makes an argument on pages 37 and 38 of the Brief of Appellee that Plaintiffs' MGP lack standing because they cannot show that they have suffered an injury in fact, that Secretary Stapleton caused the injury, and that a court decision could address the injury. Considering that it is beyond dispute that the existence of the State House district unequal distribution requirement resulted

in the MGP being removed from the ballot after Montana voters had participated in a MGP primary election, it is obvious that Secretary Stapleton's argument is without merit and that the Plaintiffs MGP had and continue to have standing. The party itself has associational standing "[e]ven in the absence of injury to itself" because it is representative of its members, see *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The primary concern is the law's impact on voters who choose to associate together to express their support for a candidate, not the impact on the candidate. *Anderson v. Celebrezze*, 460 U.S. at 806. Of material significance, the U.S. Supreme Court even allowed the American Independent Party and the Socialist Labor Party to challenge election laws without first even attempting compliance and found they had standing. *Williams v. Rhodes*, 393 U.S. 23, 28 (1968); also see *Id*. at 45-46 (Harlan, J., *concurring*), and *Id*. at 65 (Warren, C.J., *dissenting*). As to injury from the law at issue, not only did it result in the removal of the MGP from the Montana ballot, but going beyond that point the mere existence of the law constituted a harm and injury to registered Montana voters who support Green Party candidates and wish to cast their vote effectively. *Anderson v. Celebrezze*, 460 U.S. at 786. It is well established precedent that standing is assessed as to the facts as they exist as of the date of filing. *Lujan v. Defenders of Wild Life*, 504 U.S. 555, 569 (1992); *Davis v. Fed. Election Comm'n.*, 554 U.S. 724, 732-734 (2008)("[T]he standing inquiry remains focused on whether the party invoking

jurisdiction had the requisite stake in the outcome when the suit was filed.")(citing, *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., (TOC), Inc*., 528 U.S. 167, 180-189 (2000), and *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997).

Further, Secretary Stapleton on page 43 of the Brief of Appellee misunderstands the application of the cases of *Moore v. Ogilvie* and *Blomquist v. Thomson* to the case at bar. In *Moore*, Secretary Stapleton states there was a question of "equal political power to counties of unequal populations." However, contrary to Secretary Stapleton's view, the case at bar does not involve "allocating equal political power to legislative districts of equal populations." It is simply incomprehensible how Secretary Stapleton could contend that the State House districts have equal political power for their registered voters as to the State House district distribution requirement for petitioning for a new political party. The issue in the instant case involves an application of *Moore v. Ogilvie* because there is no significant constitutional difference for an equal protection violation or the principle of one person-one vote in having the same requirement for counties of different populations as opposed to having different requirements for State House districts of approximately the same populations.

Additionally, the *Blomquist* case is an example of the application of *Moore* to a distribution requirement much less severe that the challenged Montana State

House district distribution requirement in this case. Just as in *Blomquist* the limiting of petition signatures for new party recognition so that no more than half could come from a single county was found unconstitutional under the holding of *Moore v. Ogilvie*, so too to not allow all of the 5,000 valid petition signatures of Montana registered voters to come from only 33 or 30 or even just several State House districts is unconstitutional under the teachings of *Moore v. Ogilvie* and *Blomquist v. Thomson*. Such a conclusion is particularly called for when the State House districts in Montana have significantly different petition signature requirements. In Montana, therefore, it is a violation of equal protection in having higher requirements for petition signatures for one State House districts compared to other State House districts.

Finally, Secretary Stapleton in the Brief of Appellee at pages 43 to 48 misunderstands and misapplies the holdings and implications in the cases of *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), *Libertarian Party of Missouri v. Bond*, 764 F.2d 538 (8th Cir. 1985), and *Semple v. Griswold*, 934 F.3d 1134 (10th Cir. 2019), none of which take a percentage of just the winning candidate's vote in districts. In considering the foregoing three cases, this Court should first 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 U.S. House of Representatives districts where the signature requirement was the same as in *Angle v. Miller*, 673 F.3d at 1129; and *Libertarian Party of Missouri v. Bond*, *Id*.; also see, *Libertarian Party of Virginia v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985); and *Udall v. Bowen*, 419 F.Supp. 746, 748-749 (S.D. Ind.), *aff'd mem*., 425 U.S. 947 (1976).

First, the *Angle* case, unlike in the case at bar, uses a percentage of the voters who voted in the last election in the district. *Angle v. Miller*, 673 F.3d at 1129. Secondly, the case of *Libertarian Party of Missouri v. Bond* is also not a similar case to the case at bar because the *Bond* case considers a ballot access law that takes a percentage of the total votes cast for Governor in Missouri in a congressional district rather than only the number of votes in a State House district cast for the gubernatorial candidate in that State House District who won the statewide election for governor in Montana. What was required in Missouri in 1984 was, unlike Montana, a percentage that applied to the total vote cast in each congressional district for governor ("votes for governor"), not the vote total in the district cast for the winning statewide candidate for Governor as in Montana). *Libertarian Party of Missouri v. Bond*, 564 F.2d at 544. It is for this reason that the U.S. Court of Appeals for the Eighth Circuit in *Libertarian Party of Missouri v. Bond, Id.,* stated that the percentage of votes cast was a reasonable means to

measure how many petition signers were in each district and that it was a better measurement of potential petition signers than the population of the district. This is a significant distinction between the case at bar and the situation in Missouri which was missed by Secretary Stapleton in his Brief of Appellee. Therefore, while Missouri had an equal requirement based on the total number of people in each Congressional District who had voted for Governor, Montana has a significantly varying requirement from 55 to 150 petition signatures in its State House districts so as not to be representative in the same way as Missouri in regard to the available registered voters available to sign petitions.

Lastly, the U.S. Court of Appeals for the Tenth Circuit in *Semple v. Griswold*, 934 F.3d at 1141-1142, which involved an initiative petition law rather than a petition drive for the recognition of a new political party, considered an initiative petition law that required a percentage of the total registered voters in Colorado legislative districts (in contrast to the number of votes cast in a State House district for the gubernatorial candidate who won the statewide election for Montana Governor). Once again, the Colorado requirement in *Semple* is a reasonable measurement of the number of registered voters who are available to sign petitions as opposed to a varying number based on a percentage of the vote in each district for the winning statewide candidate for Montana Governor.

Nowhere in Secretary Stapleton's Brief of Appellee does he credibly explain why the State House distribution requirement should be based on the votes cast for the winning statewide gubernatorial candidate in each of at least 34 State House districts. No other state has come up with such a ballot access law for a new political party to obtain recognition. The variance in the number of votes cast in each Montana State House district for the winning statewide gubernatorial candidate is the nub of the problem. Why should some State House districts have a petition signature requirement either almost three times greater or one third the number required of other districts? Because the distribution requirement varies widely from 55 to 150 petition signatures per State House district, discriminates against petition signers in State House districts where the winning candidate for governor received a higher percentage of the total vote, because there is no distribution requirement for a statewide independent candidate petition, 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, the challenged election laws are unconstitutional as a violation of the equal protection clause and the principle of one-person, one-vote.

CONCLUSION

WHEREFORE, premises considered, the Plaintiffs MGP request that, upon full consideration of this appeal, the Court of Appeals reverse the decision of the

United States District Court for the District of Montana, Helena Division, in the case below, declare the relief prayed for herein by instructing the District Court upon remand to deny the Defendant Secretary Stapleton's Motion for Summary Judgment, grant Plaintiffs' Motion for Summary Judgment, and grant such other and further relief as to which Plaintiffs MGP may be entitled, and which this Court may deem equitable and just.

Respectfully submitted this 13th day of November, 2020.

Montana Green Party, Danielle Breck, Cheryl Wolfe, Harry C. Hoving, Doug Campbell, Steve Kelly, Antonio Morsette, Tamara R. Thompson, and Adrien Owen Wagner, Appellants

JAMES C. LINGER, OBA#5441

s/ James C. Linger

James C. Linger
1710 South Boston Avenue
Tulsa, OK 74119-4810
(918) 585-2797 Telephone
(918) 583-8283 Facsimile
bostonbarristers@tulsacoxmail.com

Quentin M. Rhoades
State Bar No. 3969
Rhoades Siefert & Erickson, P.L.L.C.
430 North Ryman
Missoula, Montana 59802
(406) 721-9700 Telephone
(406) 728-5838 Telefax
qmr@montanalawyer.com
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a) (7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,356 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word 13, Times New Roman 14-point font.

Date: November 13, 2020

JAMES C. LINGER, OBA#5441

s/ James C. Linger
James C. Linger

Counsel for Appellants
Montana Green Party, Danielle Breck, Cheryl Wolfe, Harry C. Hoving, Doug Campbell, Steve Kelly, Antonio Morsette, Tamara R. Thompson, and Adrien Owen Wagner

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2020, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: November 13, 2020

JAMES C. LINGER, OBA#5441

s/ James C. Linger
James C. Linger
Counsel for Appellants
Montana Green Party, Danielle Breck, Cheryl Wolfe, Harry C. Hoving, Doug Campbell, Steve Kelly, Antonio Morsette, Tamara R. Thompson, and Adrien Owen Wagner