Cause No. 21-35173
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATHAN PIERCE, MONTANA COALITION FOR RIGHTS, MONTANANS FOR CITIZEN VOTING, LIBERTY INITIATIVE FUND, and SHERRI FERRELL,

Plaintiffs-Appellants,

v.

CHRISTI JACOBSEN, in her official capacity as the Secretary of State for the State of Montana, AUSTIN KNUDSEN, in his official capacity as the Attorney General of Montana, JEFF MANGAN, in his official capacity as the Commissioner of the Montana Commission on Political Practices,

Defendants-Appellees.

Brief of Appellees

On Appeal from the United States District Court
for the District of Montana
(Hon. Charles C. Lovell) CV-18-63-CCL

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The official capacity defendants, Montana Secretary of State Christi Jacobsen, Montana Attorney General Austin Knudsen, and Montana Commissioner of Political Practices Jeff Mangan (collectively, "Montana"),[1] file this brief in opposition to Appellants' appeal of the district court order denying their motion for summary judgment and granting summary judgment in favor of Montana.

INTRODUCTION

In enacting the 1972 Montana Constitution, the people of Montana reserved the right and power to enact laws by initiative. Mont. Const. art. III, § 4. In 2006, the initiative process was permeated by pervasive fraud by more than 40 nonresident circulators who were paid by the signature. *See Montanans for Justice v. State*, 146 P.3d 759, 770–75 (Mont. 2006). To address the specific abuses that it experienced, Montana enacted a narrow statute that limited circulators to residents and prohibited payment by the signature. Mont. Code Ann. § 13–27–102(2).

[1] Pursuant to Fed. R. App. P. 43(c)(2), Christi Jacobsen and Austin Knudsen are automatically substituted for Corey Stapleton and Tim Fox as reflected in the caption.

At issue is whether Montana's law is appropriately tailored. The district court determined it is after the parties filed cross-motions for summary judgment on an extensive record. 1–ER–1–33. The detailed Order specifically examined the petitioning fraud that occurred in Montana in 2006, the history of § 13–27–102(2) (enacted in 2007 as Senate Bill 96, "SB 96"), and Montana's petitioning process. It also examined the Appellant parties, [2] their organizations, and the haphazard approach they employed in this case. 1–ER–6–10. Importantly, the district court explained why the evidentiary record created by MCV was inadequate to trigger a strict scrutiny analysis. 1–ER–26–27.

Undeterred, MCV filed a "Motion to Amend or Correct Judgment of the Court," an eight-page screed based on alleged "conclusive new evidence" in the form of a declaration by Plaintiff Paul Jacob.[3] SER–11–25. MCV argued that the district court's decision was wrong and

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[2] Nathan Pierce, Montana Coalition for Rights, Montanans for Citizen Voting, Sherri Ferrell, and Liberty Initiative Fund, collectively referred to throughout this brief as "MCV" or "Montanans for Citizen Voting."

[3] Jacob does business around the country as president of Liberty Initiative Fund, which provides funding for ballot measures, and as president of Citizens in Charge, which assists with funding lawsuits, including this one. 2–ER–52, 62–63.

attempted to distinguish other successful Montana initiative efforts as less "cerebral" than MCV's proposed "citizen voting" initiative.[4] Jacob's Declaration was an attempt to backfill the gaping holes found by the district court in their summary judgment record with speculation and conclusory statements. That motion was denied.

SER–3–10.

This appeal is MCV's third swing at the same argument. It presents neither novel analysis nor new authority. In fact, a great deal of MCV's opening brief is "cut-and-paste" from its summary judgment briefing. MCV contends that the district court did not understand the law, while ignoring the dearth of evidence supporting its contentions.

The undisputed facts and the evidence presented below establish that Montana's residency requirement and payment-per-signature prohibition do not impose a severe burden, and that the law is narrowly tailored to advance Montana's compelling interests. This Court should

[4] MCV writes: "The fact that the issue of marijuana legalization may have a latent, chemically based, [sic] population of pot-heads [sic] who have been foaming at the mouth for years to legalize marijuana in Montana, and may not need any extended convincing to sign a petition . . .." SER–15–16. Fifty-seven percent of Montana voters favored I–190 in 2020, regardless of their level of sophistication. *See* https://sosmt.gov/wp-content/uploads/State_Canvass_Report.pdf at 19.

hold that Montana's law meets constitutional scrutiny and affirm the district court's summary judgment ruling against MCV and in favor of Montana.

STATEMENT OF ISSUES

1. Whether the district court correctly determined that Montana Code Annotated § 13–27–102(2) does not pose a severe burden on MCV.

2. Whether the district court correctly determined that Montana Code Annotated § 13–27–102(2) satisfies constitutional scrutiny.

STATEMENT OF JURISDICTION

Because MCV raised federal constitutional claims, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Montana agrees that the district court's summary judgment ruling entered on December 4, 2020, disposed of all parties' claims and constitutes a final order; thus, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

1. Signature-gathering fraud in 2006.

In 2006 out-of-state "professionals"—paid by the signature—descended on Montana. They gathered the vast majority of the required signatures for three ballot initiatives and made hundreds of thousands of dollars. Every single circulator (43 total) provided a false address on

the certification affidavit required of petition signature gatherers. They also submitted affidavits swearing to personally gathering each signature when in fact some of the signatures had been gathered by others outside the circulators' presence. Some even employed "bait-and-switch" tactics, misrepresenting the content of the petition to the prospective signer. These so-called "professional" signature gatherers gamed Montanans only to vanish into the ether. *See* 1–ER–4–6; SER–3–4 (citing *Montanans for Justice*, 146 P.3d at 768).

Following trial, a Montana district court invalidated the ballot initiatives, finding that the signature gathering process was "permeated by a pervasive and general pattern and practice of fraud and procedural non-compliance perpetrated by paid, out of state, migrant signature gatherers." SER–103. The court further found that the industry practices for professional circulators included using "migrant" circulators with no ties to a state; "conceal[ing], withhold[ing], or misrepresent[ing]" their identifying and contact information; and "mov[ing] on to the next state without leaving a trace" to prevent accountability or a way to "verify the integrity" of the process. SER–97. The court also determined that it was common practice to pay

professional signature gatherers per signature, which created "an incentive and profit motive to engage in deceptive, fraudulent, and procedurally irregular signature gathering practices." SER–97–98.

On appeal, the Montana Supreme Court affirmed, holding that the district court's findings and conclusions that the out-of-state signature gatherers engaged in pervasive fraud and deception was based on substantial evidence. *Montanans for Justice*, 146 P.3d at 776.

2. The Legislature responds.

The law MCV challenges was the direct result of this experience, passing the Montana Legislature with bipartisan support. 1–ER–6; SER–4. The bill's sponsor explained that "steps needed to be taken to maintain the integrity of our initiative process." Mont. S. Comm. on State Admin., *Hearing on SB 96*, 60th Reg. Sess. (Feb. 7, 2007), 08:04:48–08:04:54 (opening statement by sponsor Sen. Carol Williams).[5] Senator Williams took aim at the nonresident circulators who were paid per signature, testifying that Montana "must maintain the integrity of the petition process by prohibiting paying signature gatherers per

[5] The recordings of the Senate committee hearing are available on the Montana Legislature's website at: http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20070207/-1/24793.

signature [and] making sure that gatherers are Montana residents." *Id.* at 08:05:05–08:05:20.

Numerous witnesses echoed Senator Williams's concerns, including Montana Attorney General Mike McGrath who testified that SB 96 would provide Montana voters with "some confidence that this process will work appropriately" and would "promote the integrity" of the initiative process. *Id.* at 08:09:05–08:09:30, 08:11:00–08:11:25. Attorney General McGrath explained that the residency requirement was aimed at preventing what had happened in 2006 where circulators were unavailable and could not be found to address fraud allegations. *Id.* at 08:12:00–08:13:00.

Regarding the prohibition on payment per signature, he clarified that the provision did "not prohibit paying signature gatherers, but it prohibits paying them by the signature they gather" to reduce the incentive to commit fraud. Mont. H. Jud. Comm., *Hearing on SB 96*, 60th Reg. Sess. (Mar. 20, 2007), 11:34:50–11:35:30. Other witnesses emphasized that the underlying purpose of citizens' initiatives is to provide a process for citizens to engage in statewide discussions, and that this goal was being undermined by nonresident signature

gathering groups: "nationally organized campaigns and signature gathering teams have transferred this from a homegrown approach to a well-oiled machine that often comes with its share of fraud and other problems in the process." *E.g.*, *id*. at 11:42:30–11:43:00 (testimony of Brad Griffin).

3. MCV's bids.

Sometime in 2017 or early 2018, Jacob and MCV's "consultant" Tim Mooney, 3–ER–343–44, discussed different states and determined that Montana was ripe for a "citizens voting" initiative, 2–ER–120, 329–32. The initiative, later numbered CI–117, was Mooney's idea. 2–ER–329. After finding respected locals with name recognition, Jacob obtained bids from signature gathering firms. 2–ER–219–31. Advanced Micro Targeting (AMT) bid on MCV's petition project at a cost of $500,000. 6–ER–1248–51. Dated March 26, 2018, AMT's bid proposed to launch the CI–117 petition effort by April 15, with completion by June 15 (well ahead of the June 22, 2018 petition submission deadline). *Id*. AMT planned to collect 80,000 total signatures to meet the requirement of 50,936 valid signatures. *Id*. The bid noted AMT's previous success in Montana and warned:

> "AMT does not pay by the signature because it encourages fraud. Across the nation, pay-by-the-signature efforts are regularly stung by massive fraud."

6–ER–1249 (emphasis in original).

A second bid was prepared by Mooney under the banner of his business "Silver Bullet." Neither Mooney nor Silver Bullet have any initiative petitioning experience in Montana. 2–ER–316. The bid was prepared at Jacob's request solely for this litigation. 3–ER–345–47. Notably, Jacob specifically asked Mooney for "cost savings" if Montana's prohibitions on pay-per-signature and nonresident circulators were stricken, and Mooney obliged, "knowing there would be a lawsuit challenging this . . . we thought the likelihood of us winning this case are pretty darn good." 2–ER–230–31, 3–ER–346, 6–ER–1246. Mooney admitted that he would honor his bid with resident circulators, 3–ER–395–96, but "only because it's this issue.[6] Which is my issue. I created

[6] What MCV describes as "citizen voting"—what became CI–117—was a proposed Montana constitutional amendment by initiative petition to amend the definition of "qualified elector" to individuals 18 years of age or older who are United States citizens and who have resided in Montana for at least 30 days before the election. 7–ER–1378. Even though not a party, Mooney has obvious pride of ownership of the issue and lawsuit. 3–ER–329, 396.

the issue. So, only because of that. If it were for some other campaign, I wouldn't do it." 3–ER–396.

4. This lawsuit.

Mooney and Jacob both testified that the idea of the citizen voter initiative was hatched in October 2017. 2–ER–136, 219, 329–30. The initiative was Mooney's idea, 2–ER–329, while MCV was Jacob's "baby," 2–ER–150. Even though MCV had two bids for the petitioning project, MCV did nothing to collect signatures, instead waiting seven months from Mooney's idea to filing suit. As they admit, they had time to gather the required signatures before the June 22, 2018 deadline. 2–ER–220–21. To this day not a single signature has been gathered for MCV's CI–117. This lawsuit was MCV's first and only effort to advance the initiative. 2–ER–149.

For example, MCV claims that it withdrew a temporary restraining order ("TRO") motion because it lost eight days of signature gathering time, from May 14 to May 22, making it impossible to meet

the June 22, 2018 petition submission deadline.[7] App. Br. at 12–14. But the transcript of the hearing on the TRO motion shows that the real reason MCV withdrew its motion was that it came to court unprepared. It had neither scheduled time for witnesses nor informed the court or defense counsel which witnesses, or how many, would be presented on May 14. 7–ER–1308–09, 1323–24.

To accommodate, the court invited a proffer, 7–ER–1310, which MCV eventually did. The court informed MCV's counsel "if you do get a TRO, we're going to have to follow that up in ten days with the hearing [including witnesses]." *Id*. MCV stated that they were "okay with that." 7–ER–1311. The district court did not foreclose witnesses proffered to support a TRO. *See also* 7–ER–1340–41, 1343, 1349–50. Two days later, MCV withdrew the TRO motion, opting to instead press on through discovery and summary judgment. SER–51–56.

[7] MCV also claims that it was unable to begin a signature-gathering drive before the 2020 election because the district court took too long to decide the competing summary judgment motions. App. Br. at 14. Other than MCV's admitted decision to wait, there is no evidence of any other factor preventing it from beginning the signature-gathering process at any time in 2019, 2020, or thereafter.

Both parties moved for summary judgment, and the district court issued a 33-page order setting out its rationale for the decision to deny MCV's motion and to grant Montana's motion. 1–ER–1–33. The district court determined that MCV provided only speculative claims and failed to meet its burden. 1–ER–14, 27. Applying less exacting scrutiny, the district court found Montana's law constitutional. 1–ER–15, 27.

SUMMARY OF THE ARGUMENT

Montana requires petition circulators to be residents and prohibits payment by the signature. Mont. Code Ann. § 13–27–102(2). These requirements were enacted after paid out-of-state circulators engaged in widespread fraud gathering signatures for Montana initiatives, and they are vital to prevent fraud and to restore integrity to Montanans' constitutional right to enact laws by initiative.

MCV should not be rewarded for its complete lack of effort to gather signatures. Jacob and Mooney hatched the "citizen voting" scheme in October 2017 but waited until May 9, 2018, to take any action. Even then they didn't try to gather signatures, instead suing Montana a mere six weeks before the initiative petition deadline despite having received bids demonstrating the ability to gather sufficient

signatures to put CI–117 on the 2018 ballot. Any hardship claimed by MCV was the result of its own strategy.

Because MCV failed to show a severe burden, strict scrutiny review is not warranted, and Montana's regulatory interests are more than sufficient to uphold the law. Even under strict scrutiny, Montana's law is narrowly tailored to serve its compelling interests in preventing actual fraud by out-of-state, mercenary signature gatherers. There are no genuine issues of fact, and Montana is entitled to judgment as a matter of law. This Court should uphold Montana's laws and affirm the district court's summary judgment ruling against MCV and in favor of Montana.

STANDARD OF REVIEW

This Court reviews de novo a grant of summary judgment and, in First Amendment cases, conducts an independent review of the facts. *Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012). Summary judgment is proper if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it could "affect the outcome" of a lawsuit, and an issue is "genuine" only if "a reasonable jury could return a verdict for

the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party need not disprove its opponent's claims, but must only show or "point[] out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In cases like this one, where the opposing party has the burden of proof at trial, a court must grant summary judgment if the nonmoving party fails to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. A party's failure "renders all other facts immaterial." *Id.* at 323. Moreover, a "scintilla of evidence" is insufficient; the question is whether a jury could find for the nonmoving party on the evidence presented. *Anderson*, 477 U.S. at 252.

ARGUMENT

There is no federal constitutional right to place initiatives on the ballot, and laws that make it more difficult or expensive to qualify a ballot initiative do not necessarily directly burden First Amendment rights. *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012). States that allow "ballot initiatives have considerable leeway to protect the

integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 191 (1999); *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 529 (9th Cir. 2015) (en banc). While the Supreme Court has held that petition circulation is core political speech, it has also recognized that "because it involves interactive communication concerning political change . . . there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley*, 525 U.S. at 186–87 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)) (internal quotation marks omitted).

In election law challenges, courts balance the severity of the burden the law imposes on a plaintiff's First Amendment rights against the interests advanced by the State as justifications, taking into account the "extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citation omitted). Courts will uphold an election law that imposes a severe burden if the law is narrowly tailored to serve a compelling state interest. *Id.* Courts apply less exacting review to laws

that impose lesser burdens and generally will uphold them based on the State's important regulatory interests. *Id.*; *Norris*, 782 F.3d at 529. There are no "bright-line" rules in this area: "no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." *Prete v. Bradbury*, 438 F.3d 949, 961 (9th Cir. 2006) (quoting *Buckley*, 525 U.S. at 192) (internal quotation marks omitted).

I. The district court correctly determined that Montana Code Annotated § 13–27–102(2) does not pose a severe burden on MCV.

The severity of the burden that election laws impose is "a factual, not a legal, question." *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1122–23 (9th Cir. 2016). MCV bears the burden of proving that Montana's laws severely burden its rights. *Id.* Generalized grievances and conclusory statements that the law is burdensome "on its face" are insufficient; instead, MCV must "provide evidence of the specific burdens imposed by the law at issue." *Arizona Green Party v. Reagan*, 838 F.3d 983, 989 (9th Cir. 2016); *see also Prete*, 438 F.3d at 967 ("Absent proof that such barriers to entry [in the signature procurement

market] existed and had the claimed result, [the Court is] not left with a 'definite and firm conviction that a mistake has been made' by the district court.").

The district court twice examined the record submitted by MCV and found that it had failed to support its position with actual evidence, instead relying on conclusory and speculative claims. 1–ER–14–32; SER–7–8. The district court correctly determined that MCV failed to meet its factual burden.

A. Montana's prohibition on nonresident circulators does not impose a severe burden.

The heart of MCV's case is the claim: "On its face the residency requirement reduced the pool of circulators such that *Nader v. Brewer*, [531 F.3d 1028 (9th Cir. 2008),] controls adjudication that Mont. Code Ann. § 13–27–102(2)(a) imposes a severe burden . . .." App. Br. at 17. MCV asserts that the residency requirement makes it less likely that initiative proponents will obtain the required signatures, reduces the pool of circulators, eliminates from the pool those who can best convey a proponent's message, reduces the size of their audience, and increases signature gathering costs. App. Br. at 17–18, 20–21, 47–48. Rather than offering any data, surveys, expert opinion, comparison information, or

other specific evidence to meet its evidentiary burden, MCV simply repeats this numbered list of alleged burdens three times throughout its brief. In support, it cites not to any objective evidence but to select deposition citations where MCV's witnesses discussed their opinions or recounted anecdotal experiences from other states. On this record, MCV fails to show a severe burden. The alleged burdens are not caused by the statute; rather, they are self-inflicted.

Montana law does not prohibit professional circulators. What it prohibits is nonresidents gathering signatures. To the extent MCV claims that the residency requirement "eliminates the persons who are best able to convey the initiative and referendum proponents' message," it is arguing that nonresidents are the best people to convince Montanans about ballot issues in Montana. App. Br. at 33. This is not only unsupported but contradicted by the record evidence. For example, Montana's expert witness, C.B. Pearson, who reviewed all the initiatives since the challenged law was enacted, testified that "[h]iring Montanans to talk to Montanans has brought success to multiple issues." 6–ER–1277.

Pearson further testified that initiatives have regularly qualified since the passage of § 13–27–102(2), belying MCV's claims of a severe burden. According to Pearson, proponents of ballot initiatives have obtained the required number of signatures using a combination of volunteers and paid Montanans. 6–ER–1115–16. Even Appellant Pierce acknowledged that proponents have successfully qualified initiatives for the ballot using Montanans who are paid circulators. 4–ER–671.

Further, nothing precludes nonresidents from communicating their views about initiatives. Ferrell, Jacob, Mooney, and all other nonresidents can advocate for or against Montana initiatives. They can run signature-gathering campaigns. They can engage in traditional advocacy, including door-to-door campaigning, running phone centers, and writing letters to the editor. They can also advocate the merits of an initiative to voters. And they can be paid for all these activities. The only thing they cannot do is personally gather signatures.

Finally, MCV relies on the two bids it received to support its argument that the residency requirement increases the costs of signature gathering. App. Br. at 32. But both AMT and Silver Bullet bid the MCV CI–117 petition project at roughly the same cost; the bids are

only about $30,000 apart when following the applicable legal requirements. *Compare* 6–ER–12486–51 (AMT Proposal) *with* 6–ER–1246 (Mooney Proposal). The bids instead demonstrate that a successful initiative petition was likely in Montana in 2018 if MCV had only tried.

Importantly, the record reveals the firms prepared their proposals for different purposes. While AMT could prepare its bid based on its previous success circulating petitions in Montana, Mooney could draw on no such experience. Instead, his bid was prepared with this litigation in mind. 3–ER–344–47. Notably, Jacob specifically asked Mooney for "cost savings" if they could get a court to strike Montana's prohibitions on pay-per-signature and nonresident circulators, and Mooney obliged. 2–ER–230–31, 6–ER–1246. Further, Mooney clarified that his bid was purposely low and that he would honor it "[b]egrudgingly. And only because it's this issue. Which is my issue. I created the issue. So, only because of that. If it were for some other campaign, I wouldn't do it." 3–ER–396.

MCV presented no other evidence of the projected cost of the project so there was little to compare. MCV failed to even consult M+R Strategic Solutions—a national firm with an office in Missoula,

Montana—which it claimed would "only circulate initiative petitions advocating a liberal agenda," with no evidence to support that conclusion. App. Br. at 16. In fact, M+R's Montana office director and Senior Vice President Pearson testified that M+R had no aversion to conservative issues. 6–ER–1017, 1074–75. Moreover, Pierce had used M+R with success in the past, 4–ER–659–60, describing M+R as "one of the top resources," 4–ER–656. "The resulting in-state monopoly" referenced must be AMT, another national firm based in Dallas, Texas. 6–ER–1247–51. MCV's claim of hardship (to the point of impossibility) simply does not stand up in light of the evidence produced.

MCV failed to show that Montana's residency requirement imposes a severe burden on its rights; the record instead shows the opposite. Despite the demonstrated ability of like groups to get other issues on the ballot, MCV has gathered no signatures in support of its initiative since 2018. Any burden is the product of MCV's own strategy. This Court should affirm the district court's finding that the residency requirement imposes only a lesser burden on the circulation of initiative petitions.

B. The cases MCV cites do not require strict scrutiny, but instead require a case-by-case factual analysis as to the severity of the burden.

MCV devotes several pages to citing cases ostensibly for its claim that "every Court of Appeals" to address residency requirements like Montana's has found them unconstitutional. App. Br. at 32–39. Even if this were true (it is not), it is irrelevant because the severity of the burden is a factual, not legal, question. *Nago*, 833 F.3d at 1123. This Court has specifically rejected the idea that a party can show a burden by simply relying on laws or decisions from other jurisdictions. *Reagan*, 838 F.3d at 990 ("Analogy and rhetoric are no substitute for evidence, particularly where there are significant differences between the cases the [plaintiff] relies on and the [state] election system it challenges."). In any event, a review of the cited cases does not support MCV's assertion that the cases conflict with or call into question Montana law.

All but two of the cases cited on pages 35 through 39 of MCV's brief addressed residency requirements for *candidate* petitions, not ballot initiatives. These cases have no relevance. MCV is not challenging the ballot requirements for candidates. More importantly, Montana has no residency requirement for candidacy petitions. *See, e.g.*,

Mont. Code Ann. §§ 13–10–501, –502, –504. These cases, therefore, do not conflict with or call into question Montana law.

After excluding the irrelevant cases, what remains are two preliminary injunction orders, one from Pennsylvania and the other from Maine. Of course, the legal standards and evidentiary burdens for preliminary relief and summary judgment differ. Regardless, review of the orders is instructive; these are two instances where courts found sufficient *factual* records to justify preliminary relief. For example, in granting a preliminary injunction to the plaintiffs, the Pennsylvania court noted that one of the plaintiffs "demonstrated that prior to seeking relief here, it attempted to utilize only in-state, registered elector circulators." *OpenPittsburgh.org v. Wolosik*, No. 2:16-cv-1075, 2016 U.S. Dist. LEXIS 203090, at *6 (W.D. Pa. Aug. 9, 2016). The court further found that plaintiffs "sufficiently demonstrated that these efforts to comply with the statutory law have caused them to fall short of the required signature mark—and surely not for want of effort." *Id.* The Pennsylvania plaintiffs, unlike MCV, created "a record that expanding the pool of circulators will make a real difference in meeting the signature mark." *Id.*

The factual showing made by the Maine plaintiffs is similarly robust. The Maine case involves another citizen-only voting initiative petition; indeed, Liberty Initiative Fund, Jacob, and Mooney (as well as MCV's counsel) participated in the case. *We the People PAC v. Bellows*, No. 1:20-cv-00489-JAW, 2021 U.S. Dist. LEXIS 28501, at **1, 4, 7 (D. Me. Feb. 16, 2021). In Maine, however, unlike in Montana, the plaintiffs recruited 50 volunteer circulators who collected 2,000 petition signatures. *Id.* at *22. The plaintiffs secured over $350,000 in funding to support the petition drive. *Id.* at *23. They advertised for petition circulators online and eventually recruited 55 professional circulators. *Id.* at **23–25. Based on the plaintiffs' experience, the parties, and the court, could compare the average number of signatures gathered by an out-of-state professional petition circulator versus a Maine resident circulator. *Id.* at **30–31. Noting that "the constitutional analysis here is fact-intensive," the court thoroughly analyzed the evidence. *Id.* at **62–74. Based on the record, the court determined the plaintiffs met their burden of showing a severe burden. *Id.*

Here, in contrast, there is no such showing. As discussed above, the record is devoid of *any* efforts to gather signatures under Montana's

law, nor is there any record of "actual impairment of the constitutionally-protected interests" of MCV. *See OpenPittsburgh.org* at *6. Moreover, Montana has shown significant evidence of fraud by nonresident circulators, a key fact lacking in *OpenPittsburgh.org* and *We the People PAC*.

Finally, even if a "consensus" may have emerged about which standard generally applies to petitioning restrictions, *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 317 (4th Cir. 2013), strict scrutiny does not automatically apply. As these cases acknowledge, the rule remains that "the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Id.* (quoting *Brewer*, 531 F.3d at 1034). For example, the Eighth Circuit applied a lesser standard and upheld a North Dakota law that, like Montana's, required circulators to be residents and that also prohibited paying circulators on a per-signature basis. *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614, 615 (8th Cir. 2001). The *Jaeger* Court determined that the state laws protected the integrity of signature gathering, did not unduly hinder petition circulating, and comported with *Buckley*. *Id*. The court reasoned that the high success rate of

petitions qualifying for the ballot demonstrated that the laws did not impose a severe burden, and the court further observed that nonresidents had numerous ways to associate other than collecting signatures. *Id*. at 617.

Other courts have reached similar conclusions. *See, e.g.*, *Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1163–64 (D. Idaho 2001) (upholding Idaho's residency requirement for initiative petitions); *Kean v. Clark*, 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999) (upholding residency requirement for initiative circulators as narrowly tailored to preventing fraud); *see also Nader v. Blackwell*, 545 F.3d 459, 477 (6th Cir. 2008) (invalidating residency requirement but noting that appellate courts had reached different conclusions and observing: "Clearly, *Buckley* has not resulted in the automatic invalidation of residency requirements for petition circulators."); *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916, 926 (D. Neb. 2011) (invalidating residency requirement but noting that "[s]everal other district courts have recently found that similar restrictions do not violate the First Amendment").

The Ninth Circuit disagreed with *Jaeger*, applied strict scrutiny, and determined that an Arizona law could not be upheld based on the record. *Brewer*, 531 F.3d at 1037–38. The Court repeatedly stated that its decision was based on the record before it. *Id.* at 1038, 1040.

That courts have reached different conclusions on residency requirements is not cause for concern and does not even signal a circuit split. Rather, these different outcomes illustrate that the propriety of ballot access laws depends on the particular facts of each case: whether plaintiffs demonstrate a severe burden and whether states present sufficient justifications. This is so because, as the Supreme Court has explained, "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *also Buckley*, 525 U.S. at 192 ("We have several times said 'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'") (quoting *Storer*, 415 U.S. at 730).

In summary, MCV cannot sidestep its burden to present factual "evidence of the specific burdens imposed by the law at issue" by resting on legal determinations made by other courts reviewing other states' laws under different facts. *Reagan*, 838 F.3d at 989.

C. Prohibiting pay-per-signature does not impose a severe burden.

MCV asserts that prohibiting paying circulators by the signature creates the same burdens as the residency requirement. App. Br. at 47–48. The Ninth Circuit has already considered and rejected similar alleged burdens. In *Prete*, as here, the circulators claimed that the prohibition on pay-per-signature would reduce the pool of circulators, result in higher costs, and reduce the number of valid signatures. 438 F.3d at 963–66. The court rejected these arguments and affirmed that restricting payment on a per-signature basis did not constitute a severe burden. *Id.* The court determined that the state had "asserted an important regulatory interest in preventing fraud and forgery in the initiative process" and had "supported that interest with evidence that signature gatherers paid per signature actually engage in such fraud and forgery." *Id.* at 970.

MCV acknowledges the existence of *Prete* but attempts to distinguish it by alleging it has developed better facts. App. Br. at 47. These "facts" are woefully insufficient. In addition to pointing to the five conclusory statements citing deposition testimony, MCV relies on a document it represents to be a California veto statement made by California's governor regarding California legislation, Mooney's agreement with this statement, and Pierce's experience with one circulator. An unauthenticated hearsay document that it represents to be a veto statement and Mooney's related opinion are irrelevant to any analysis of the burden Montana law imposed on MCV. MCV must "provide evidence of the specific burdens imposed by the law at issue." *Reagan*, 838 F.3d at 989. Neither statement regarding California's process relates to the burden imposed by Montana's law or is even analogous.

Pierce alleged that he "discover[ed] a lady, being paid $15.00 per hour in her home, doing nothing." App. Br. at 49 (citing 7–ER–1433 at ¶ 117 but misquoting the actual testimony; *see* 4–ER–669). This does not demonstrate any burden, much less a severe one, caused by Montana's law. Instead, it again suggests the burden is self-inflicted:

this time by a poor hiring decision and poor oversight. Many employees, of course, are very productive working for hourly wages. Moreover, it is noteworthy that after being involved with initiatives since 2007 and personally working on thirteen ballot initiatives, Pierce was unable to identify a single other instance of a circulator engaging in this type of behavior. 4–ER–727.

Contrary to MCV's assertion, its "evidence" is no better, and perhaps less robust, than that considered and rejected in *Prete*. That case involved a challenge to Oregon's prohibition on paying circulators by the signature in initiative campaigns. There, just as here, plaintiffs relied heavily on the testimony of witnesses who "had little, if any, experience in initiative-petition circulation in Oregon" before or after the enactment of the law for their claim that the law increased initiative costs. *Prete*, 438 F.3d at 965. Because the witnesses lacked state-specific experience, this Court agreed with the district court that those witnesses could not "offer a reliable comparison on the added costs, if any, imposed" by the law. *Id*. The same is true here of Jacob, Mooney, and MCV's other witnesses.

Additionally, like MCV here, the *Prete* plaintiffs asserted that circulators paid hourly have "more of an incentive to defraud" because they get paid regardless of the validity of their signatures. 438 F.3d at 966. But again, given the witnesses' limited experience in the state working on initiatives, the court determined that these assertions "carr[ied] little weight." *Id*. The same is true of Jacob, Mooney, Hurst, and Ferrell here.[8] On the other hand, Montana has demonstrated that paying circulators by the signature does result in fraudulent gathering practices. Under the analogous facts and circumstances in *Prete*, this Court held that plaintiffs failed to show a severe burden requiring strict scrutiny. *Id*. at 963, 967. The Court should find the same here.

MCV, desperate to evade *Prete*, relies on *Meyer v. Grant*, 486 U.S. 414 (1988), and a handful of district court decisions from around the country, all of which are distinguishable. *See* App. Br. at 45–47, 49–53. First, unlike in *Meyer*, Montana's law does not completely prohibit paying circulators; rather, it prohibits only the kind of payment that was associated with fraud—payment per signature. Second, while MCV

[8] Henry "Albie" Hurst is an out-of-state petition circulator called as a witness by MCV. 5–ER–756–57.

argues that it created a record "virtually identical" with the one presented during a Colorado district court trial in *Independence Institute v. Gessler*, 936 F. Supp. 2d 1256 (D. Colo. 2013), App. Br. at 49, it ignores a major distinction. The *Gessler* plaintiffs supported their claimed burdens of Colorado's law with testimony from *Colorado* petition entities and *Colorado* witnesses, including Hurst. *See id*. at 1264. The *Gessler* plaintiffs did not rely on witnesses with no experience in the state to demonstrate the burdens of the state's law. Here, however, that is exactly what MCV is attempting, and this Court should give this type of evidence "little weight." *Prete*, 438 F.3d at 965.

Finally, MCV would have this Court follow district court decisions that this Court has already considered and distinguished. *See* App. Br. at 46–47, 50–53; *Prete*, 438 F.3d at 970 n.29. The *Prete* Court noted that, in these cases, "the states presented no evidence to support their assertions that a per-signature ban was necessary to promote the state interest in preventing fraud and forgery in the initiative process." 438 F.3d at 970 n.29. Oregon, however, had provided evidence to support its interest in preventing fraud. *Id*. Likewise, Montana has presented evidence to support its state interests. *Prete*'s rationale

applies here, and this Court should follow its own precedent, rather than distinguishable, nonbinding district court cases. Neither the law nor the facts advanced by MCV support applying strict scrutiny in this case.

Moreover, MCV's characterization of Montana's law as a "pay per hour compensation model," App. Br. at 49, demonstrates its misunderstanding. Nothing in Montana Code Annotated § 13–27–102(2)(b) requires hourly compensation. Initiative proponents may pay circulators on a per diem, weekly, monthly, or other time basis. Proponents could also contract for the duration of the initiative. Proponents could pay salaries, and they could adjust salaries based on validity rates. Or they could pay bonuses if certain benchmarks are met. In other words, the law limits only the one form of payment that was identified with fraud: payment per signature. Other than this narrow limitation, proponents and circulators may enter whatever payment structure they like.

In addition to mischaracterizing the law, MCV's claims about the supposed burdens are little more than conclusory assertions. For example, Pierce acknowledged that he did not know if paying a higher

wage or a daily wage might increase the numbers of available circulators. 4–ER–703. And he admitted that he had never even looked at paying circulators under a daily pay rate or a weekly pay rate. 4–ER–672. Nor had he asked nonresident circulators if they would work on an hourly basis. 4–ER–725. Further, Jacob agreed that they could pay circulators with bonuses and other forms of payment: "Yes, you could bonus, you can do all kinds of things, and you will do everything you can think of to get [circulators] more focused on signatures." 2–ER–126.

MCV's claimed burdens are also undercut by the number of signature-gathering firms and paid circulators that use payment structures other than pay-per-signature. For example, Pierce admitted that "[t]here are plenty of firms out of state who would definitely gather signatures on an hourly basis or on a contract basis." 4–ER–723. Hurst testified that in states allowing pay-per-signature, some firms nevertheless choose to pay hourly. 5–ER–796. Further, Pearson explained that there are several ways that ballot initiative proponents have successfully placed an initiative on the ballot: some hired outside firms to manage a campaign; some hired Montana residents; some used

a combination of paid staff and volunteers; some hired temporary employees; and some hired Montana firms to run an initiative campaign. 6–ER–1267–78. The proponents of the dozen initiatives that qualified for the ballot since 2008 used combinations of these payment structures. *Id.*

The bottom line is that the burdens related to the pay-per-signature ban are slight. MCV just does not want to pay circulators any other way, and Ferrell does not want to be paid any other way. Those are their respective business decisions to make, but they are not matters of constitutional concern. While MCV's desire to pay per signature is preferable to MCV, Montana's prohibition does not impose severe burdens, and this Court should decline to constitutionalize MCV's preferred business model based on the dearth of evidence of any burden here.

II. In any case, Montana Code Annotated § 13–27–102(2) satisfies constitutional scrutiny.

As the district court correctly determined, Montana's regulatory interest in protecting its ballot initiative process is sufficient to uphold Montana's law. 1–ER–24–25, 32. Even if the Court applies strict scrutiny, which it should not on this record, the statute should be

upheld because a "state's interest in ensuring the integrity of the election process and preventing fraud is compelling." *Brewer*, 531 F.3d at 1037; *see* SER–27–28 (conceding Montana's interest in protecting the integrity of the election process is compelling). The only element Montana would need to establish, even under strict scrutiny, is that the statute is narrowly tailored.

A. The residency requirement is narrowly tailored to addressing actual fraud.

The residency requirement serves the purposes of preventing fraud by targeting the specific abuses that Montana has experienced: fraud committed by nonresident circulators in the context of a ballot initiative. The statute's narrow tailoring is evident from its text, which establishes that it applies only to initiatives, referenda, and calls for a constitutional convention. It does not apply to candidate elections and instead is focused on the narrow context in which the Legislature (and the Montana Supreme Court) found pervasive fraud. Moreover, initiative petitions, if challenged, must be challenged within extraordinarily tight timeframes, as the Montana Supreme Court noted in *Montanans for Justice*, 146 P.3d at 768. And "[t]he sufficiency of the initiative petition shall not be questioned after the election is held."

Mont. Const. art. III, § 4(3). These tight challenge timelines require proactive fraud prevention.

Further, the United States Supreme Court's decision striking a requirement that circulators be registered voters appeared to be premised on the existence of a constitutional residency requirement. *See Buckley*, 525 U.S. at 197 ("[A]ssuming that a residence requirement would be upheld as a needful integrity-policing measure . . . the added registration requirement is not warranted."); *id.* at 230 (Rehnquist, C.J., dissenting) ("I would not quarrel" with a holding "that a State may limit petition circulation to its own residents."); *id.* at 211 (Thomas, J., concurring in the judgment) (assuming "the State has a compelling interest in ensuring that all circulators are residents," and agreeing that "the State's asserted interest could be more precisely achieved through a residency requirement"); *id.* at 217 (O'Connor, J., joined by Breyer, J., concurring in the judgment in part and dissenting in part) ("I believe that the requirement that initiative petition circulators be registered voters is a permissible regulation of the electoral process.").

The Ninth Circuit has also suggested that a residency requirement could meet strict scrutiny under circumstances like Montana has experienced. In *Brewer*, the Court addressed an Arizona residency requirement that broadly applied to nearly all petitions, including petitions to gain access to the presidential ballot. 531 F.3d at 1038. The Court applied strict scrutiny and, after recognizing Arizona's compelling interest in preventing election fraud, struck the law because the state failed to show that the requirement was narrowly tailored. *Id.* at 1037–38. The Court reasoned that Arizona had never "contend[ed] that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents." *Id.* at 1037; *see also Krislov v. Rednour*, 226 F.3d 851, 866 n.7 (7th Cir. 2000) ("[I]f the use of non-citizens were shown to correlate with a high incidence of fraud, a State might have a compelling interest in further regulating non-citizen circulators.").

Here, in contrast to *Brewer* and *Krislov*, the record demonstrates that Montana's experience with fraud in the initiative process *is* related to nonresidents. Indeed, the fraudulent bait-and-switch tactics by nonresidents were the primary impetus for the law MCV challenges,

which was intended to "maintain the integrity of the petition process by prohibiting paying signature gatherers per signature [and] making sure that gatherers are Montana residents." Mont. S. Comm. on State Admin., *Hearing on SB 96*, 60th Reg. Sess. (Feb. 7, 2007), 08:05:05–08:05:20. Even Pierce agrees that the law responded to "bad players" coming into Montana and engaging in "a bunch of activities that did not meet with our law and the legislature immediately did something to try to correct that." 4–ER–690.

Based on MCV's testimony, there remains good reason to be concerned about nonresident circulators. According to Ferrell,[9] a self-described signature gathering coordinator: ". . . there is not a season go by that somebody [petition circulator] doesn't try to commit fraud." 3–ER–548–49. Ferrell even described an industry "blacklist" that identified known petition circulator fraudsters that "have been caught at it," apparently requiring two-steps to make the blacklist: committing the fraud and *then* being caught. 3–ER–546–47.

[9] Hurst described Ferrell as "the cream of the crop" of petition circulators. 5–ER–866–67.

While MCV claims that professional circulators, including Ferrell, will submit to the jurisdiction in which they work "for any post-filing investigation/prosecution of signatures," App. Br. at 15, the record suggests otherwise. Ferrell has never returned to a state after collecting signatures there. 3–ER–566. [10] In fact, Ferrell was specifically accused of circulator fraud in Wisconsin in 2011 but skipped town. Upon discovering her Wisconsin peril Ferrell sought counsel only from Jacob, who told her "not to worry about it." 3–ER–567–74, 588. She apparently did not.

Jacob was indicted with others in Oklahoma in 2007 for "knowingly, willfully, fraudulently, and feloniously [causing] to be filed initiative petitions knowing the same to be falsely made." 2–ER–189–90. The indictment alleged that the signature-gatherers for a "taxpayers bill of rights" petition were people from outside Oklahoma who used phony Oklahoma identifications to circumvent Oklahoma's residency requirement. 2–ER–190. While the indictment was dropped

[10] Ferrell also will not work a signature-gathering project if required to work with a witness. 3–ER–614.

after Ferrell and others challenged the residency requirement, 2–ER–193–95,[11] the "taxpayers" petition effort in which Jacob participated, 2–ER–199, was thrown out by the Oklahoma Supreme Court because:

> The record in this case is replete with credible, unchallenged instances of actual fraud in the circulation of petitions. Not only were numerous petition circulators non-residents of this State, they engaged in outright fraud by using false addresses purportedly to satisfy Oklahoma law.
>
> Furthermore, some circulators were encouraged to further the fraud and to hide true residential status by obtaining Oklahoma identification cards. [The circulating company's] admitted activities include bringing in numerous out-of-state circulators, contracting with out-of-state firms to come into Oklahoma and collect signatures, allowing at least one foreign national to circulate a petition and having another out-of-state circulator turn in and sign that petition, and encouraging circulators to obtain Oklahoma identification to circumvent any questions regarding their residency while collecting signatures.

In re Initiative Petition No. 379, 155 P.3d 32, 46 (Okla. 2006).

Finally, in 2016 a lawsuit was filed against MCV's "consultant" Mooney, alleging that the Michigan Bureau of Elections had determined that a significant number of signatures gathered by Mooney's

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[11] Ferrell was also a plaintiff in a petition circulator residency challenge in Michigan even though she had no idea of her status as a party. 3–ER–480–82. *See Humane Society Legislative Fund v. Johnson*, No. 14-10601, 2014 U.S. Dist. LEXIS 16892 (E.D. Mich. Feb. 11, 2014), in which Jacob's "Citizens In Charge" organization, 2–ER–52–53, was also a plaintiff.

circulators were invalid due to lack of voter registration, duplicate signatures, and fraudulent signatures by the circulators themselves. SER–33–50. The case was settled as a compromise by both sides. 3–ER–388–390.

Evidence of the very fraud that § 13–27–102(2) is intended to prevent permeates the trial court record. In contrast, MCV's so-called record is nothing but speculation and conclusions, as the district court twice found. 1–ER–14–25; SER–5–6.

Moreover, preventing fraud is not Montana's only compelling interest. Montana's law also advances and protects First Amendment interests of the citizens of Montana—in particular the constitutional right to self-government. As the Ninth Circuit has recognized, a state's interest in "securing the people's right to self-government" is "an important interest—indeed, a compelling one." *Norris*, 782 F.3d at 531. And the initiative system, in particular, furthers this right to self-government because the "initiative system is, at its core, a mechanism to ensure that the people, rather than corporations or special interests, maintain control of their government." *Id*. at 533.

In *Norris*, the Court recognized that the initiative process is a legislative power, and it held that a state could constitutionally require a proponent to be a natural person and elector, not a corporation. *Id.* at 530–31. The Court had "no doubt that states and cities may, wholly consistent with the First Amendment, require that those who seek to propose legislation—and to play a special role with unique responsibilities and powers in the legislative process—be electors." *Id.* at 531. In discussing self-government, *Norris* followed the United States Supreme Court in "'recogniz[ing] a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within the basic conception of a political community. We recognize, too, the State's broad power to define its political community.'" *Norris*, 782 F.3d at 531 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973)). The same principles apply here. Montana's requirement that those who seek to propose legislation by gathering signatures for initiatives be Montana residents—part of Montana's political community—withstands constitutional scrutiny.

B. The pay-per-signature prohibition is narrowly tailored to addressing actual fraud.

MCV conceded the State's interest in preventing fraud and in orderly elections, SER–27–28, but it contends that Montana's law is not narrowly tailored if circulators are willing to agree to submit to the State's jurisdiction. App. Br. at 53. MCV's arguments miss the mark. First, Montana demonstrated the problems with MCV's approach above when discussing the residency requirement. Second, and more importantly, as discussed above, Montana has actual experience with fraud committed by nonresident circulators who were paid per signature.

The payment limitation is directly related to Montana's experience with fraud. As Montana courts have found, paying circulators by the signature creates a "profit motive" to engage in fraud. SER–97. And this concern was squarely presented to the Legislature by Montana Attorney General Mike McGrath, who explained that "[i]f a person gets paid by the number of signatures they gather, then you have a situation where there is a great deal of incentive to maybe have signatures on the petitions that aren't valid signatures, and, in fact, that was one of the issues in at least three of the cases that were dealt

with in the courts." Mont. H. Jud. Comm., *Hearing on SB 96*, 60th Reg. Sess., 11:34:50–11:35:30. Even professional circulators recognize the problems inherent in paying circulators by the signature. For example, AMT expressly warned Jacob that "pay-by-the-signature efforts are regularly stung by massive fraud" and that AMT did not use this pay structure because it encourages fraud. 6–ER–1249.

Montana has "asserted an important regulatory interest in preventing fraud and forgery in the initiative process" and has "supported that interest with evidence that signature gatherers paid per signature actually engage in such fraud and forgery." *Prete*, 438 F.3d at 970. Montana's law is narrowly tailored to prevent the specific type of fraud Montana experienced: fraud committed by nonresident signature gatherers paid by the signature. Therefore, this Court should affirm the district court's decision denying MCV's motion for summary judgment and granting Montana's motion.

CONCLUSION

MCV failed to present record evidence that Montana's initiative regulation creates a severe burden in Montana, and Montana's law is directly based on the compelling interest in preventing the specific

initiative fraud that occurred in Montana. This Court should affirm the district court's order upholding Montana's initiative regulation as constitutional.

DATED this 1st day of September, 2021.

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 21-35173.

I am the attorney or self-represented party.

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