

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 24-0524

MONTANA DEMOCRATIC PARTY,

Petitioner,

v.

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK
COUNTY, HON. MICHAEL F. MCMAHON, Presiding,

Respondent.

**SUMMARY RESPONSE OF INTERVENOR ROBERT BARB IN
OPPOSITION TO MONTANA DEMOCRATIC PARTY'S EMERGENCY
PETITION FOR WRIT OF SUPERVISORY CONTROL**

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INTRODUCTION

Petitioner Montana Democratic Party (“MDP”) asks this Court to strip Robert Barb of his lawful nomination as the Montana Green Party’s candidate for United States Senate and to force counties across the State to reprint tens of thousands of ballots at the eleventh hour and violate federal law all so the Democratic candidate may avoid “competition on the ballot.” Pet. 15. But that is not how elections are decided. The Court should reject MDP’s extraordinary invitation to limit Montanans’ “voice in the election of those who make the laws under which, as good citizens, we must live.” *Montana Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 22, 416 Mont. 44, 545 P.3d 1074 (quoting *Reynolds v. Sims*, 377 U.S. 533, 560 (1964)).

MDP lacks a cause of action as Judge McMahon rightly held. The Montana Legislature created express and exclusive contest procedures for challenging “the right of any person to any nomination.” MCA § 13-36-101(1). MDP concedes it is challenging Barb’s right to the Montana Green Party’s nomination for U.S. Senator and that it did not follow the statutory process for such contests. That ends this case and provides a clear reason to affirm. The Court need go no further.

Yet there are more reasons. MDP alleges the Montana Green Party violated its internal rules (and thus the statute) when it appointed Barb. That is wrong. And it would be inappropriate for this Court to adopt a novel and atextual interpretation of the Montana Green Party’s internal rules when MDP failed to name the Party as

a defendant or to otherwise seek evidence from Barb, the Green Party, or its members.

The Court also lacks jurisdiction because MDP lacks standing and its claims are moot. The injunction MDP seeks would irreparably harm Barb, the Montana Green Party, and the public.

ANTICIPATED LEGAL ISSUES

1. Whether MDP has met its burden for an injunction.
2. Whether this Court has jurisdiction.

BACKGROUND

On June 4, 2024, the Montana Green Party held a primary election to select its candidate for U.S. Senator. Michael Downey won; Robert Barb finished second. On August 12, Downey withdrew from the U.S. Senate race. That was the last day he could withdraw. MCA § 13-10-327(2). Downey later bragged that he waited “to give the [Montana Green Party] as little time as possible” to nominate his replacement. Ex. 5 at 10.

Montana law required the Montana Green Party to appoint a replacement. MCA § 13-10-327(1). Following all requisite procedures, its state central committee timely appointed Barb as its nominee and notified the Secretary. Ex. 5 at 10; Ex. 5-A.

MDP sued to enjoin the Secretary from certifying the ballot. Although it

theorized “on information and belief” that the Montana Green Party had violated its internal rules, Ex. 1 ¶ 35, MDP did not name the Party as a defendant, nor attempt to offer evidence about the Party’s actions or interpretation of its rules. And although MDP challenged Barb’s nomination, it did not follow the mandatory process to “contest the right of any person to any nomination.” MCA § 13-36-101.

Despite these deficiencies, MDP obtained an *ex parte* temporary restraining order halting certification at 7:57 PM on August 22. Ex. 3 at 2. By that time, however, certification had already been completed, and 56 counties had been instructed to prepare their ballots. Ex. 6-A ¶ 5. Barb intervened. On September 3, Judge McMahon denied MDP’s motion for preliminary relief and dissolved the temporary restraining order. Ex. 8 at 9. The court held MDP could not succeed on the merits because it failed to invoke the “express and exclusive statutory process for contesting nominations such as Mr. Barb’s under Mont. Code Ann. § 13-36-102.” *Id.* at 7.

ARGUMENT

I. MDP CANNOT SUCCEED ON THE MERITS.

A. MDP Lacks A Cause Of Action.

The Montana Legislature “has the exclusive authority to provide, define, and limit the procedures, standards, and remedies available for enforcement of compliance with Montana’s election laws.” *Larson v. State By & Through Stapleton*, 2019 MT 28, ¶ 21, 394 Mont. 167, 434 P.3d 241 (quoting Mont. Const.

arts. III, § 1, and V, § 1).

The Legislature has provided an exclusive, “express statutory process for contesting a nomination.” *Mont. Republican Party v. Graybill*, 2020 WL 4669446, at *2 (Mont. Aug. 11, 2020). “An elector may contest the right of any person to any nomination or election to public office for which the elector has the right to vote.” MCA § 13-36-101. Under this procedure, “[f]ive days or less after a candidate has been certified as nominated, a person wishing to contest the nomination to any public office shall give notice in writing to the candidate whose nomination the person intends to contest, briefly stating the cause for the contest.” § 13-36-102(1).

Those procedures apply here. The Montana Green Party “nominated” Downey through its primary election. *See* § 13-1-103. When Downey withdrew, the Party had a statutory obligation to “appoint someone to replace” Downey and “fill” the “vacancy.” § 13-10-327(1), (2). The Party “substituted” Barb. § 13-10-327(3). To “substitute” or to “‘replace’ means to ‘take the place of.’” *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 458-59 (D.C. Cir. 2017) (quoting dictionaries). Therefore, when Barb was chosen, he was “nominated” as the Party’s candidate. Indeed, the Certificate of Appointment declares “the committee *nominated*” Barb “*as the Green Party nominee* for the office of U.S. Senator.” Ex. 5-A (emphases added).

MDP’s complaint contests whether Barb was “properly nominated.” Ex. 1,

¶ 1. Yet despite seeking to “contest the nomination,” MCA § 13-36-102(1), MDP concedes it did not follow the contest procedures. It failed to include an “elector” plaintiff, MCA §§ 13-36-101, 13-1-101(20), or to “give notice in writing to” Barb, let alone within “Five days,” § 13-36-102(1). MDP’s failure to follow the exclusive contest procedures is fatal—as the district court correctly held.

Although MDP suggests (at 4-5) that these procedures are not exclusive, that cannot be squared with precedent. In *Graybill*, this Court rejected a challenge by the Montana Republican Party asserting that a candidate was “not entitled to appear on the general election ballot.” 2020 WL 4669446, at *1-2. The Court explained that the “Legislature has provided a process for bringing” such challenges, and the Montana Republican Party had not followed it. *Id.* at *2. Just like the Montana Republican Party there, the Montana Democratic Party here may not “bypass the express statutory process for contesting a nomination or election to office.” *Id.* At a minimum, MDP has failed to “explain why this Court” should allow evasion of the express contest procedures. *Id.*

The statutory text and structure confirm that this Court was right to treat the contest procedures as exclusive. Where, as here, an “express” provision grants a “cause of action” in “discrete” circumstances, “allowing a private right of action” beyond those circumstances “is inconsistent with the statute as a whole.” *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 2016 MT 111, ¶ 47, 383 Mont. 346, 371

P.3d 446; *see id.* ¶ 50 (holding statute with “express” and “limited private right of action” “does not imply a [broader] private right of action”). An express cause of action shows “the intent of the legislature” was to “limit” who may challenge a candidate’s nomination and the procedures to do so. *See id.* ¶ 48.

Indeed, allowing challenges to a candidate’s nomination outside of this procedure would create “absurd results,” *id.*, and render “meaningless” the limits in the Legislature’s contest scheme, *contra State v. Ohl*, 2022 MT 241, ¶¶ 10-11, 411 Mont. 52, 521 P.3d 759. For example, a challenger could sue without an “elector” plaintiff, MCA § 13-36-101, more than “[f]ive days” after a candidate is “certified as nominated,” § 13-36-102(1), absent “notice” to the affected candidate, *id.*, and pursue relief without a replacement “declared nominated by the court.” § 13-36-104. Bypassing these constraints would “defeat” the Legislature’s “object [and] purpose.” *In re H.M.*, 2023 MT 180, ¶ 18, 413 Mont. 382, 536 P.3d 429.

MDP next claims the contest procedures cannot apply because Barb was not “nominated.” It says “nomination” only happens through “a *primary election*.” Pet. 5-6 (emphasis in original). The Legislature disagrees. Part 5 of Chapter 10 of the Election Code is entitled “Methods of Nomination *Other than by Primary Election*.” (MCA § 13-10, pt. 5) (emphasis added). And Montana law provides that when a “political party” fills a vacancy “as provided in 13-10-327,” that appointee is the “party *nominee*.” § 5-2-406(1)(b) (emphasis added); *see also* § 13-36-207

(providing “nomination ... declared vacant” in contest can “be filled by” “appointment”).

MDP argues the contest procedures “presuppose” an election. Pet. 6-7. But the contest procedures authorize challenges to “the *right of any person to any nomination.*” MCA § 13-36-101 (emphasis added). The Legislature’s focus on the “right” of the nominee—and its repeated use of “any”—makes clear that the statute covers challenges to all alleged deficiencies (not just electoral deficiencies) with all nominations (not just electoral nominations). Indeed, MDP is challenging Barb’s “right” to a “nomination.”

Although MDP notes that the statute’s example-complaint provision references an “election,” Pet. 6, that is only an example as the statute itself makes clear, *see* MCA § 13-36-203(1) (requiring complaint “in *substantially* the following form”) (emphasis added). Thus, the Legislature contemplated that a contestant would sometimes need to modify the form—as here, because the contestee was nominated via a vacancy appointment.

MDP similarly errs when it observes that some contest grounds reference an election, § 13-36-101(2), (3), and ignores that the statute authorizes challenges for “violation[s] of any provision of the law relating to *nominations or elections,*” § 13-36-101(1) (emphasis added). The phrase “nominations or elections” only makes sense if non-electoral nominations are included. Otherwise, “elections” alone would

cover the waterfront. *See* § 13-1-101(13) (defining “election” to include both “general” and “primary election”). At bottom, an election is *one* method of nomination—but it is not the *only* method of nomination.

MDP next claims a “nomination” cannot result from an “appointment.” Pet. 6-8. But that is the literal definition of “nomination.” *See Nominate*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/nominate> (“to appoint or propose for appointment to an office or place”); *see also* Intervenor Ex. 1 (“Tr.”) at 20:4-8 (MDP’s counsel observing that Montana Green Party may “nominate a replacement”). And Montana law confirms that whatever process a political party uses to “choose a candidate” is a “Nomination[]” by the party, MCA § 13-25-205(1), including appointing a “nominee” under the vacancy statute, §§ 5-2-406(1)(b); 13-36-207. The Montana Democratic Party’s own rules say the same, permitting it to “nominate a candidate for statewide office” through its central committee. Ex. 7-B, Rule 16.

MDP next cites *Larson*, Pet. 9-10, but that case *confirms* MDP lacks a cause of action. There, the Court found an implied cause of action where there was only “an administrative process” and “not ... a judicial remedy.” *Larson*, ¶ 27. Absent an express judicial remedy, the Legislature had not “limited the procedures and remedies available for enforcing compliance.” *Id.* ¶ 21. Here, unlike in *Larson*, there *is* an express judicial remedy: the contest procedure. And as explained above,

allowing MDP to evade that judicial remedy would wreak havoc on the Legislature’s carefully crafted scheme. Thus, unlike in *Larson*, the “express provision of legal enforcement remedies” acts to “preclude private enforcement” beyond those remedies. *Id.* ¶ 27 (citing *Ibsen*, ¶¶ 47-51).

For all these reasons, the Court should affirm.

B. MDP Is Wrong On The Merits.

Even with a cause of action, MDP’s suit fails. The Montana Green Party was statutorily *required* to appoint someone to replace Downey as the Party’s nominee after he withdrew. Specifically, the Montana Election Code provides that if a party candidate withdraws after a primary election, “the affected political party *shall* appoint someone to replace the candidate.” MCA § 13-10-327(1) (emphasis added).

The Montana Election Code also specifies who within an affected political party shall make the required appointment. “For offices to be filled by the state at large”—including the U.S. Senate seat at issue here—“the state central committee shall make the appointment as provided by the rules of the party.” § 13-10-327(1)(a). MDP concedes that the Montana Green Party officers who appointed Barb are its state central committee. Tr. 60:17-23. And MDP concedes that the Party’s rules say nothing about an “appointment.” *Id.* 58:1-4.

Despite conceding that the Montana Green Party rules are silent and that its state central committee appointed Barb, MDP contends Barb’s appointment is

invalid because, in its view, the Montana Green Party’s rules divest its state central committee of its statutorily assigned responsibility by implication. As an initial matter, the argument fails because a party rule that contradicts the statute’s assignment of the appointment function to the state central committee would be void ab initio. *Cf. Keystone, Inc. v. Triad Sys. Corp.*, 1998 MT 326, 292 Mont. 229, 971 P.2d 1240 (voiding contract provision that violated state law).¹ At minimum, the rules cannot be read to depart from the statute sub silentio.

Nor do the rules purport to do what MDP says. MDP cites Article III, but that provision states only that Montana Green Party membership “shall be responsible for decision-making on statewide issues and endorsement of statewide candidates.” Ex. 1-A. MDP now says an appointment “clearly is” either “a ‘statewide issue’ *or* [an] ‘endorsement of a statewide candidate.’” Pet. 12 (brackets omitted) (emphasis added). But, tellingly, MDP will not say which—fatally undermining its contention that the rules are so “clear” that this Court must deprive Barb of his right to the nomination.

The truth is that Barb’s appointment was neither a “statewide issue” nor an “endorsement of a statewide candidate.” As to the first, the Montana Election

¹ Contrary to MDP’s position, “as provided by the rules of the party” simply obligates the state central committee to observe any procedures it may have adopted. For example, MDP’s rules authorize “the Montana Democratic State Central Committee” to “hear presentations by candidates” before it “shall vote.” Ex. 7-B, Rule 16.

Code—like the Party’s rules—distinguishes “issues” from “candidates.” *See, e.g.*, MCA § 13-12-201(1) (requiring separate certifications for “candidates” and “issues”); *compare* § 13-1-101(6) (“‘issue’ means a proposal submitted to the people at an election for their approval or rejection”) *with* § 13-1-101(8) (“‘Candidate’ means ... an individual who has filed [appropriate papers]”). So, when Article III uses the phrase “statewide issues” in the same sentence as the phrase “endorsement of statewide candidates,” the former clearly refers to matters like ballot initiatives, referendums, and proposed constitutional amendments. By the same token, it clearly excludes candidates. Indeed, under MDP’s broad reading, “issues” would also encompass “endorsements,” impermissibly rendering the latter “surplusage.” *See Travelers Cas. & Sur. Co. v. Ribi Immunochem Rsch., Inc.*, 2005 MT 50, ¶ 26, 326 Mont. 174, 108 P.3d 469. Barb’s appointment was not an “issue.”

Barb’s appointment was also not an “endorsement of a statewide candidate.” “Appoint” and “endorse” have different meanings. To “appoint” someone is “to name officially.” *Appoint*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/appoint>. When someone is “appointed,” he is named to a position—here, the Party’s nominee, MCA § 13-10-327(1), or, in other cases, an “office,” § 13-25-206(4)(a). An endorsement is different. To “endorse” someone is

“to express support or approval of publicly and definitely.”² *Endorse*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/endorse>. If a party “appoints” someone as a nominee, he *is* the nominee. If a party “endorses” someone to be the nominee, he has only the party’s favor. He is not—and may never be—the nominee.

MDP offers nothing to support its position that “appointment” and “endorsement” are interchangeable. To the contrary, MDP elsewhere claims that “appointment” is a “distinct term[]” that cannot be used “interchangeably” with other terms. Pet. 8. Nor do MDP’s cases hold otherwise. For example, *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008), simply observes that a state allowed candidates to “appear with party endorsement on the general-election ballot.” *Id.* at 203. But “nonendorsed candidates” may also win their party’s nomination and appear on the general-election ballot. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228 n.18 (1989). Just because a party *can* both endorse and appoint a candidate does not mean every appointment is also an endorsement. They are two separate actions.

Contrary to MDP’s position (at 12-13), there are good reasons to permit the state central committee to appoint replacement candidates while requiring the rank-

² For example, MDP’s own rules use “endorsement” to mean “the expenditure of funds and tactical support” on behalf of a candidate in a contested primary. Ex. 7-B, Rule 11.

and-file membership to endorse. For one, endorsements in contested primaries are more controversial and thus benefit from greater party unity. *See Eu*, 489 U.S. at 227. For another, replacements must be made on an accelerated timeline—as this case illustrates. Downey says he withdrew at the deadline “to give [the Montana Green Party] as little time as possible” to appoint a replacement. Ex. 5 at 10. Under section 13-10-327(2), the Party had just nine days. There simply was not time for the Party to call a general meeting “14 days in advance” as it would for endorsements. Ex. 1-A, art. III. And that is exactly why the rules do not require it.

MDP’s strained interpretation of the Montana Green Party rules underscores its true position—that the Party does not “get to nominate a replacement at all.” Tr. 67:5-6. That position may serve MDP’s political and electoral interests, but the Montana Green Party did not draft its own rules to deny itself representation. To the extent MDP believed there was any doubt about that—and to be clear, there is none—then it should have named the Montana Green Party as a necessary party, or at least put on evidence from the Party regarding the proper interpretation of its rules. *See* Mont. R. Civ. P. 19; *Hill v. Ellinghouse*, 2024 MT 158, ¶ 46, 553 P.3d 365 (“When a contract is ambiguous, a court may consider extrinsic evidence of the parties’ intent”). That MDP has failed to involve the Montana Green Party in a case about the proper interpretation of the Party’s rules is yet another reason why it cannot succeed on the merits.

C. MDP Urges Federal Violations.

It would violate federal law for this Court to depart from the clear meaning of the Montana statutes. The Elections Clause authorizes “the Legislature” to “prescribe[]” the “Times, Places, and Manner of holding Elections for Senators.” U.S. Const., art. I, § 4. Implying a broad cause of action would eviscerate the express cause of action in section 13-36-101, and removing Barb would undo the mandatory vacancy-appointment provision in section 13-10-327. Both would violate the Elections Clause by “arrogat[ing] to” this Court “the power vested in [the] state legislature.” *See Moore v. Harper*, 600 U.S. 1, 34-36 (2023). And both would undermine the Legislature’s design to “ensure that there will be a candidate” on the general-election ballot from all parties holding a primary. *See Ward v. Office of Sec’y of State*, 2008 Mont. Dist. LEXIS 338, *6-*7 (Mont. Dist. Ct. Aug. 26, 2008).

The Elections Clause also authorizes Congress to “at any time by Law make or alter such Regulations” adopted by the State. U.S. Const., art. I, § 4. Congress exercised that authority by requiring Montana to send ballots to eligible overseas and military voters “at least 45 days before an election,” 52 U.S.C. § 20302(a)(8)(A)—that is, by *next Friday*. An injunction would cause the State to miss the federal deadline. Tr. 29:17-31:1. This Court should reject MDP’s invitation to violate federal law.

D. MDP Cannot Establish Jurisdiction.

This Court also lacks jurisdiction. *First*, MDP’s case is moot. MDP asks the Court to stop the State from “[c]ertifying a Green Party candidate.” Pet. 16. But Montana “has already certified” Barb, so MDP’s request “to delay certification ... [is] moot.” *Wood v. Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020). MDP also asks to “enjoin[] the State and Secretary from allowing a[ny] Green Party candidate to appear on the ballot.” Pet. 16. But the time to adjudicate the candidates on the ballot was *before* ballot certification. *See, e.g., Graybill*, 2020 WL 4669446, at *2. Indeed, the State says there is no longer time to reprint the ballots.

Second, MDP lacks standing because it cannot establish “redressability.” *Barrett v. State*, 2024 MT 86, ¶ 30, 416 Mont. 226, 547 P.3d 630. Its alleged harms stem from having to contend with *any* Montana Green Party candidate on the ballot. Pet. 14-15. But if MDP prevails on its theory that Barb’s appointment was procedurally improper, the remedy would be to order a procedurally proper appointment, not to remove the Montana Green Party from the ballot entirely. The Montana Election Code mandates that when there is a pre-certification vacancy, “the affected political party *shall* appoint someone to replace the candidate.” MCA § 13-10-327(1) (emphasis added); *see also* § 13-36-104 (requiring replacement nominee). “Shall” makes replacement “mandatory,” *see In re City of Columbus Police Dep’t*, 265 Mont. 379, 877 P.2d 470 (1994), and “ensure[s] that there will be a candidate”

on the general-election ballot from all parties that held a primary, *Ward*, 2008 Mont. Dist. LEXIS 338, *6-*7.

MDP's claim (at 14) that the vacancy-appointment deadline forecloses a Montana Green Party appointment is irreconcilable with its position on the ballot-certification deadline. MDP says (at 14 n.3) this Court *must* order the Secretary to certify a different ballot to comply with the Election Code even though the ballot-certification deadline has passed. But MDP also says this Court is *foreclosed* from appointing a different candidate to comply with the Election Code because the vacancy-appointment deadline has passed. MDP cannot have it both ways. If the Court orders the Secretary to perform a do-over to comply with the law, then it must order the Montana Green Party to do the same.

II. THE REMAINING FACTORS FORECLOSE RELIEF.

MDP fails to prove irreparable injury. Its assertion (at 14-15) that combatting Barb's candidacy will cause it to expend additional resources is unsupported. And, as the court below recognized, MDP's "resources [were] already allocated prior to" Barb's nomination. Tr. 15:14-19; *see id.* 52:6-54:5; 63:9-14.

MDP's speculative injury pales in comparison to the certain and substantial harm that Barb, the Montana Green Party, and the public will experience under an injunction. If Barb is removed, he will lose his "right" to the Party's nomination for U.S. Senate. MCA § 13-36-101(1); *see Yang v. Kosinski*, 960 F.3d 119, 128 (2d Cir.

2020) (holding candidate would be irreparably harmed by removal). Once lost, that right is gone forever. If Barb is not replaced, the Party will lose its “standard bearer.” *N. Carolina Green Party v. N. Carolina State Bd. Of Elections*, 620 F. Supp. 3d 407, 415 (E.D.N.C. 2022) (holding stay would irreparably harm North Carolina Green Party). Meanwhile, all Montana voters, including Barb, will suffer as MDP denies them “greater choice” at the ballot box. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000).

An injunction would also throw the election into chaos. MDP filed this lawsuit mere hours before the ballot-certification deadline. Then, when the district court denied its request for preliminary relief, MDP delayed another day before filing this petition. The petition itself, though styled as an “emergency,” does not seek relief by any particular date and fails to mention the deadlines for printing ballots. *See* MCA § 13-13-205(2); 52 U.S.C. § 20302(a)(8)(A). Although this Court has acted expeditiously, MDP’s delay has put the Court in the impossible position where any relief would be at best ineffective and at worst risks “voter confusion” and “election administrator confusion” on a massive scale. *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring); *see Graybill*, 2020 WL 4669446, at *2 (refusing “to engage in ‘hasty pre-election review’”). The Court should deny the petition for these independent reasons. *See Winter v. NRDC*, 555 U.S. 7, 26-33 (2008).

CONCLUSION

The Court should deny the petition.

DATED: September 9, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Rob Cameron
Rob Cameron

Intervenor Exhibit 1

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MONTANA FIRST JUDICIAL DISTRICT

COUNTY OF LEWIS AND CLARK

* * * * *

MONTANA DEMOCRATIC)	
PARTY,)	
)	
PLAINTIFF,)	
)	CAUSE NO. BDV 2024-542
VS.)	
)	
STATE OF MONTANA, ET AL,)	
)	
DEFENDANTS.)	
)	

TRANSCRIPT OF PROCEEDINGS
TEMPORARY ORDER OF PROTECTION

Before the Honorable Michael F. McMahon
Judge Presiding

Date and time: FRIDAY, AUGUST 30, 2024
8:49 A.M.

Place: Lewis and Clark
County Courthouse
228 East Broadway Street
Helena, Montana 59601

Mark Nikkel
Official Court Reporter, First Judicial District
228 East Broadway Street
Helena, Montana 59601
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APPEARANCES

For the Plaintiff:

Caitlin Boland Aarab
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For the Defendant:

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Austin James
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Helena, Montana 59601-3875

Also Present:

Thane Johnson, Assistant Attorney General

BDV 2024-542 / AUGUST 30, 2024

1 Helena, Montana; Friday, August 30, 2024

2 8:49 a.m.

3

4 THE COURT: Good morning. The Court will
5 now call Cause No. BDV 2024-542. This is the
6 Montana Democratic Party as the plaintiff, versus the
7 State of Montana and Christi J. Jacobsen in her
8 official capacity as the Montana Secretary of State,
9 as the defendants, and Robert Bard [SIC] as the
10 intervenor.

11 This is the time set by the Court for a
12 hearing on Plaintiff's temporary restraining order
13 and preliminary injunction motion.

14 Miss Boland, you -- you appear today on
15 behalf of the plaintiff?

16 MS. BOLAND: Yes, Your Honor.

17 THE COURT: Mr. James, you appear today on
18 behalf of Secretary of State along with Mr. Johnson?

19 I thought I saw Mr. Johnson.

20 MR. JOHNSON: I'm -- Your Honor, I am -- I'm
21 probably going to be a witness in this matter. So
22 Ms. Alwyn is going to --

23 THE COURT: Okay. I apologize. Thank you.
24 Good morning.

25 MR. JOHNSON: My -- my apologies,

1 Your Honor.

2 MS. LANSING: Good morning. Alwyn Lansing
3 for the State.

4 THE COURT: Thank you.

5 MR. CAMERON: Robert Cameron with --

6 THE COURT: Mr. Barb?

7 MR. CAMERON: For Mr. Barb.

8 THE COURT: Is Mr. Barb here?

9 MR. CAMERON: He is not, Your Honor.

10 THE COURT: Is he on Zoom?

11 MR. CAMERON: He is not, Your Honor.

12 THE COURT: All right. All right.

13 miss Boland, under the controlling law your client
14 has the burden of proof.

15 You may call your first witness.

16 MS. BOLAND: Your Honor, we are choosing to
17 proceed on the verified complaint and affidavits on
18 file with the Court rather than through evidentiary
19 testimony this morning. And I am prepared to address
20 the -- the merits of our application for a
21 preliminary injunction to -- to be entered following
22 today's hearing.

23 THE COURT: How does Mr. Barb or
24 Secretary of State's office cross-examine an
25 affidavit?

1 MS. BOLAND: They don't, Your Honor. The --
2 the statute governing preliminary injunctions
3 specifically says that the -- the Court can make the
4 findings that it needs to make on the basis of
5 affidavits or oral testimony. The -- the purpose is
6 that the facts must be presented to the Court under
7 oath.

8 THE COURT: Well, there is a lot of, and I
9 mean a lot of what I would call political rhetoric in
10 this matter already. This Court is really only
11 interested in finding out whether the Green Party's
12 membership endorsed this candidate.

13 And how does -- How does your client say the
14 membership didn't endorse it?

15 MS. BOLAND: Well, Your Honor, I -- I
16 respect the Court's interest in those points, but I
17 will remind the Court that at a preliminary
18 injunction stage, the question before the Court is
19 not the merits of the argument, it is the likelihood
20 of success on the merits.

21 THE COURT: And I agree with that. I mean,
22 the Montana legislature in 2023 was very clear of
23 what it expected when Courts now entertain motions
24 for preliminary injunctions.

25 But I have got to have some evidence that

1 this Green Party did not properly endorse Mr. Bard
2 [SIC] when his nomination was submitted to the
3 Secretary of State's office.

4 MS. BOLAND: Your Honor, the information
5 before the Court that would allow you to draw that
6 conclusion is set forth in -- in the following:

7 In the verified complaint filed by the
8 plaintiff, which is -- is verified under oath by the
9 -- Robyn Driscoll, Chairwoman of the Democratic
10 Party, the complaint sets out the -- the relevant
11 timeline. And that -- The timeline is that
12 Mr. Downey, Michael Downey won the Green Party
13 primary on -- in June, and he withdrew by the
14 statutory deadline of August 12th.

15 The deadline, also set by statute to replace
16 him, was 76 days before the election, which in this
17 case was August 21. And so the Green Party had until
18 then to follow its own bylaws to appoint a
19 replacement for the candidate who withdrew. The --
20 Robert Barb is alleging that the Green Party duly
21 appointed him to replace Mr. Downey.

22 THE COURT: Yeah. I got that point from
23 Mr. Cameron's brief.

24 MS. BOLAND: But the statute that tells
25 everyone how to interpret -- or -- or, excuse me --

1 how -- how a party goes about appointing a
2 replacement. The statute says the parties' own
3 bylaws govern that replacement process because
4 presumably the legislature and the Court don't want
5 to intervene in the choice that a party makes about
6 who to replace their candidate with.

7 And so what the Court needs to do is look at
8 the Green Party bylaws that are on file with the
9 Secretary of State and that are attached as an
10 exhibit to the complaint to see -- And they are only
11 a page and a half -- to see if the bylaws govern or
12 explain how the Green Party selects a candidate for
13 office, a candidate for statewide office. And the
14 bylaws do not specify in the way that the bylaws for
15 the Democratic Party or the Republican Party or the
16 Libertarian Party do.

17 The Green Party bylaws do not have a -- a
18 clause or a section about specifically what the Green
19 Party does in the event their primary candidate dies
20 or withdraws before the general.

21 So what we are left to do is to read the
22 page-and-a-half-long bylaws and see if we can discern
23 what the bylaws require. And the only reference to
24 endorsement or appointment of candidates, and -- and
25 the bylaws use the word "endorsement," not

1 "appointment," is that the Green Party shall meet
2 annually, and efforts shall be made to inform all
3 members of the meeting, which, of course, you know,
4 means if -- if there is an exigent circumstance. We
5 are not saying they had to this at -- at a particular
6 time in the year, but it says the membership shall be
7 responsible for decision-making on statewide issues
8 and endorsement of statewide candidates. And that's
9 all it says.

10 The officers of the Green Party are
11 specifically prohibited by the Green Party's own
12 bylaws from endorsing statewide candidates without a
13 vote of the general membership.

14 And the Court has not just the verified
15 complaint from -- from the plaintiff, but also in the
16 suit that Robert Barb filed four or five days before
17 our suit was filed, he submitted his own sworn
18 affidavits in that suit, in which he complained,
19 essentially, that the Green Party hadn't nominated
20 anybody and specifically hadn't nominated him.

21 And so the -- the Court has a factual basis
22 on which to conclude, in sort of a weather-vane
23 manner, who is more likely to prevail on the merits
24 of this argument when we get to the merits stage.
25 And right now, the Court is simply -- is tasked with

1 deciding, "Are we more likely than not going to
2 succeed in proving that?"

3 And -- and of course, there is the -- The
4 reason that the standard is different at the
5 preliminary injunction stage is we haven't conducted
6 depositions of -- of Green Party members, for
7 example. We -- we haven't had the discovery in this
8 case. And so the Court simply has to look at the
9 verified facts before it and decide more likely than
10 not the plaintiff is -- is likely to succeed.

11 And I hope that -- I hope that addressed the
12 Court's question on that first point.

13 THE COURT: Not really. I still want to
14 know if the membership did it and do you have that
15 proof or it didn't.

16 MS. BOLAND: Well --

17 THE COURT: All you are doing is giving me,
18 in what the Court considers, is fluff. We don't
19 know.

20 MS. BOLAND: Well, I think we do know,
21 Judge, from -- from Mr. Barb's own pleadings. I
22 think it's page 10 of -- of his motion, once he
23 became an intervenor, where he -- he is trying to
24 claim that we don't -- I think it's an issue of
25 mootness.

1 Hang on. Let me pull it up.

2 Yeah. Page 10 of -- of Mr. Barb's motion to
3 dismiss our -- our preliminary injunction. He -- His
4 counsel states that on August 19, Steve Kelley, an
5 officer of the Green Party and a member of its
6 central committee, confirmed Barb's willingness to
7 run and verified his continued adherence to
8 Green Party principles.

9 Later that day, Kelley and the other members
10 of the committee voted to appoint Barb to replace
11 Downey and commuted that -- communicated that
12 decision to the Montana Secretary of State.

13 So it's my impression that it's -- it's been
14 quite conclusively stated by Robert Barb the manner
15 in which he was appointed -- or, purported to be
16 appointed by the Green Party, and it's in
17 contravention of the bylaws.

18 To -- I guess, begin from the beginning,
19 what -- I appreciate that there are potential
20 political consequences to -- to the lawsuit that we
21 filed here. But the legal issue before the Court is
22 actually quite straightforward and -- and is not a
23 novel proposition.

24 We are asking the Court simply to declare
25 that any candidate who wishes to appear on the

1 general election ballot in November is qualified to
2 be there under Montana law. And that's it.

3 And the corollary to that is if the
4 Secretary of State certifies a candidate to be on the
5 ballot who isn't eligible under Montana law, is the
6 Secretary's action there somehow immune from judicial
7 review? And I think those are the issues that the
8 Court needs to -- to address at a very high level.

9 And before I discuss the -- the elements of
10 a preliminary injunction, I do want to address the
11 timing or mootness issue that's been -- as it's been
12 variously characterized. And the argument there, I
13 think, is that the -- the Secretary of State
14 certified the ballot at 7:06 p.m. August 22.

15 And so when Judge Seeley entered the TRO in
16 this case at 7:57, essentially, "Too bad. So slow.
17 You can't undo that," I -- I think is the -- the gist
18 of the timing argument here. And that argument, that
19 -- I guess I have three responses to that.

20 The -- the first is that it ignores the
21 purpose of a preliminary injunction, which is to
22 return the parties to the status quo ante. And the
23 Supreme Court has defined that as the -- the actual
24 -- the last actual peaceable, non-contested condition
25 that preceded the pending controversy.

1 And so in this case, returning us to the
2 status quo would be probably the expiration -- or
3 close of business on August 21, when the Green Party
4 had failed, according to its bylaws, to nominate
5 someone to replace Mr. Downey but before the
6 Secretary had certified Mr. Barb. That -- that is
7 the point at which the Court is empowered to return
8 us if -- if it grants a preliminary injunction.

9 It is also black letter law as far back as
10 **Marbury versus Madison** that statutes or actions of an
11 executive are subject to judicial review. And it --
12 it has to be the case that executive actions and
13 enforcing the law are subject to judicial review
14 because, otherwise, no law that ever passes the
15 legislature could be subjected to constitutional
16 scrutiny if it was signed into law before the Courts
17 got involved, and that simply isn't how our system
18 works. It cannot be the case that if the
19 Secretary of State just hurries to perform an action.
20 She immunizes herself from judicial review.

21 And so the -- the remedy that we are seeking
22 here is an injunction to prevent her from allowing
23 Robert Barb to appear on the ballot as the candidate
24 for U.S. Senate. And in order to issue the
25 injunction, the Court must determine that an

1 injunction is appropriate based on four factors. One
2 is the likelihood of success on the merits, which we
3 have discussed.

4 And the second is the likelihood of
5 irreparable harm. And so it begs the question, how
6 do we know if the -- the harms that the
7 Democratic Party fears are indeed irreparable?

8 And one of the ways that Courts have
9 answered this question is by asking if money would be
10 complete remedy. And if money is a complete remedy,
11 then the harm is not irreparable. And in this case,
12 money is not a remedy. All the money in the world
13 will not give the Democratic Party more time between
14 now and election day to educate Montana voters about
15 a brand-new candidate and to try to persuade them --
16 excuse me -- to vote for the Democratic candidate
17 over Mr. Barb.

18 Courts also, in an election context,
19 routinely recognize that organizations suffer
20 irreparable harm when they lose opportunities to
21 conduct election-related activities, such as voter
22 persuasion.

23 But the other way to look at the irreparable
24 harm question is to ask hypothetically if -- if the
25 conduct that we are seeking to enjoin here in proper

1 certification, if the occurrence of the improper
2 certification happens, would a -- would a victory on
3 the merits down the line be utterly meaningless for
4 the plaintiff? And it would here. I mean, if -- if
5 we don't get preliminary injunction, then the harm
6 that the Democratic Party is facing will occur
7 between now and November 5. And if we ultimately
8 succeed on the merits of the declaratory judgment
9 action on November 6, that victory is utterly
10 meaningless.

11 And so those are the two ways Courts have
12 thought about irreparable harm in the context of
13 election cases, and I think, you know, it is --

14 THE COURT: Well, in your supporting brief,
15 you rely upon the -- the additional resources that
16 have to be allocated, and funds would have to be
17 allocated against Mr. Barb's candidacy, weren't those
18 resources already allocated prior to him coming
19 onboard or Downey stepping out?

20 MS. BOLAND: In -- in one sense I see what
21 the Court means by that. Absolutely. When you run
22 in a -- in an election, you have opponents, and --
23 and the Democratic Party knew since June, at least,
24 that there would be a Green Party candidate on the
25 ballot most likely.

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1 But Montana is sort of famous for ticket
2 splitting. And the Democratic Party does not assume
3 that anyone who votes for Mr. Downey would
4 necessarily vote for Robert Barb or even that
5 Robert Barb would be the lawfully appointed
6 replacement candidate for Mr. Downey.

7 And so from -- from the perspective of a
8 political party that is seeking to persuade voters,
9 the -- the resources being spent and the -- the
10 persuasion opportunities for each individual voter
11 are not necessarily just the Democrats versus the
12 Greens, it is Democratic Party wishes each voter to
13 choose Jon Tester over Michael Downey or now,
14 potentially, over Mr. Barb.

15 And so the -- the question isn't just
16 doesn't the -- doesn't the political party have to
17 spend time and resources on educating voters, because
18 of course it does. That -- that is its purposes, and
19 that -- that's what elections are all about.

20 The question is about the equities. Is it
21 inequitable to require the Democratic Party to spend
22 those time and resources and to lose the opportunity
23 to persuade voters because of the shortened timeline
24 here when the person who seeks to get on the ballot
25 has done so in contravention of our election laws?

1 The third issue that the Court has to look
2 at in deciding about a preliminary injunction is --
3 is the balance of the equities, and that, I think,
4 generally, is between the parties to the suit as
5 opposed to -- to non-parties. And that, actually, is
6 just sort of the point I was discussing with the
7 Court, is -- it is inequitable to require the
8 Democratic Party to spend its finite time, resources,
9 staff hours, and persuasion opportunities on
10 educating voters about a brand-new candidate to the
11 race when that candidate has entered the race
12 unlawfully in violation of our election laws.

13 So you -- you compare that harm in this
14 third prong with the harm imposed on the Secretary if
15 a preliminary injunction were to issue. And frankly,
16 there isn't any. The Secretary's interest is set by
17 statute. She must obtain and maintain uniformity in
18 the application, operation, and interpretation of
19 Montana's election laws. It creates no harm to the
20 Secretary to issue a preliminary injunction let alone
21 irreparable harm. And for that reason, the balance
22 of equities tips decidedly in favor of the plaintiff.

23 And to the extent the Secretary comes up
24 here and makes a resources argument, where she says,
25 "Oh. No." You know, "We've started printing

1 ballots," for example, that in itself indicates that
2 the equities largely favor the Democratic Party
3 because what the Democratic Party seeks to lose is
4 not some paper and some toner. So when you put this
5 on a scale, there is no harm to the Secretary.

6 THE COURT: If the ballots have already been
7 printed, and I don't know if they are not, isn't the
8 relief you're seeking as a mandatory injunction
9 saying Secretary or the election administrators
10 remove that individual from the ballot? It's not a
11 preliminary injunction, it's a mandatory injunction,
12 and now you have a higher burden.

13 MS. BOLAND: Well, Your Honor, it would be a
14 -- a preliminary injunction in the sense that we need
15 urgent involvement from the Court. The preliminary
16 injunction can be in force essentially as long as the
17 -- the merits of the dispute persist.

18 And so if we succeed in getting a
19 preliminary injunction, we will absolutely follow
20 whatever timeline the Court wishes for us to seek a
21 permanent injunction, to seek summary judgment on the
22 merits of the declaratory judgment action.

23 I don't know if the Secretary would intend
24 to try to appeal the issuance of a preliminary
25 injunction so that there is some procedural elements

1 of this that remain in play after today, but it is
2 the issuance of a preliminary injunction that -- that
3 is essential on an expedited timeline.

4 And the -- the fourth and final element of a
5 -- of a preliminary injunction is that public
6 interest piece, and so the Court would have to weigh
7 issuance of a preliminary injunction as with respect
8 to non-parties and -- and with respect to the public
9 at large.

10 And simply put, the plaintiff is asking for
11 the Court to enforce the law. And it cannot be the
12 case that enforcement of the law is against the
13 public interest. In this case the interest of the
14 plaintiff and the interest of the public are squarely
15 aligned in that respect. And the Supreme Court has
16 over and over again recognized the importance of
17 strict application of our election law, and it's to
18 ensure a fair playing field for everybody.

19 The Court said in Larson that compliance
20 with Montana's clear and unambiguous election laws is
21 essential to the fairness and integrity of our
22 elections and the exercise of the reserved power of
23 the people.

24 So with respect to the public interest, it's
25 interests and the plaintiff's interests are squarely

1 aligned, and the Court is left, perhaps, with the
2 question of fairness to the Green Party. And the
3 Green Party, like all other parties and all other
4 citizens, enjoys the freedom of association. They
5 can get together and try to nominate a candidate to
6 appear on a general election. They also enjoy the
7 freedom not to associate. And it is entirely up to
8 the Green Party whether to nominate a replacement for
9 Mr. Downey according to their own rules or whether or
10 not to.

11 So the public interest here at stake for the
12 Green Party is not whether the Court is depriving the
13 Green Party of its desire to appear on the ballot,
14 that's up to them, but rather whether the Court
15 should reward their noncompliance with Montana
16 election laws.

17 And that -- that brings me to sort of a --
18 an absurd hypothetical that -- that I want the Court
19 to consider that is possible if the Secretary and
20 Mr. Barb's position prevails. And that is, why do we
21 have election laws at all? Why do we have an
22 executive official whose job is to enforce those
23 laws?

24 If Mr. Kelley, a member of the Green Party
25 or an officer, can sign a piece of paper saying, "I

1 nominate" or "We the officers of the Green Party
2 nominate Donald Duck to replace Mr. Downey," and the
3 Secretary, with no oversight, certifies Donald Duck
4 for the ballot and, by doing so, has immunized
5 herself from judicial review? That scenario is
6 possible if the Secretary and Mr. Barb's arguments
7 prevail today.

8 So in short, I am simply asking the Court to
9 invoke its inherent judicial power to ensure us that
10 the election laws of our state are upheld because the
11 Secretary is refusing to do so.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 Well --

15 Hold on. Ladies first in this courtroom.

16 Miss Lansing?

17 MS. LANSING: Thank you, Your Honor.

18 I am here to address the motion to dissolve
19 the temporary restraining order, if the Court would
20 hear that. At this point, that's what the State has
21 a witness for, and I would offer oral argument on
22 that motion.

23 THE COURT: All right. We'll get to that
24 one last.

25 MS. LANSING: Thank you.

1 THE COURT: Sir? Mr. James?

2 MR. JAMES: Good morning, Your Honor.

3 THE COURT: Good morning.

4

5 ARGUMENT BY MR. JAMES

6 MR. JAMES: The legislature specifically
7 provided election law to prevent cases like this. I
8 draw the Court's attention to 13-10-201(4). And
9 13-10-201(4) is exactly what Your Honor was alluding
10 to earlier in the sense that we've always required a
11 declaration of nomination be filed when you file for
12 office.

13 And the legislature, which just over a
14 decade ago, put a specific in there that you must
15 file an oath signing that says, "I meet the
16 qualifications based on Montana statutory law and
17 constitutional law and, upon the execution of that
18 oath," much like a voter registration form or many
19 other things that we do under penalty of perjury and
20 election law, they specifically provided language
21 that says, "The candidate affirmation included in
22 this oath is presumed to be valid unless proven
23 otherwise in a court of law."

24 Today, we have no proof that the affirmation
25 that was filed by Mr. Barb and Mr. Kelley to replace

1 their candidate was not done pursuant -- pursuant to
2 law. The Secretary of State has no duty to prove a
3 negative in election law. In fact, it's the direct
4 opposite for both the Secretary of State and the
5 Court. We have a statutory duty to presume the
6 validity of the replacement until it is proven that
7 it was not so.

8 Plaintiff today relied upon the evidence of
9 their verified complaint which articulates that, upon
10 information and belief, they don't feel as though the
11 bylaws were -- were followed.

12 Well, the Secretary of State does not check
13 into somebody's house to make sure that their
14 residency requirement has been met. They don't look
15 on old Facebook posts to see if somebody's legal bar
16 qualifications are met for officers that require
17 licensing, for example. We don't look at birth
18 certificates for their age, and we don't look through
19 bylaws to see if qualifications have been met through
20 a party.

21 We rely upon an affirmative statement that
22 the law provides and requires a candidate to do that
23 then is given a statutory onus that the -- under
24 Montana law, as a matter of law, is presumed to be
25 valid until proven otherwise. And I think that at

1 this point in the hearing we know that that proof is
2 not there.

3 And I -- I will actually bring Your Honor as
4 well to -- I believe it's the plaintiff's -- the
5 intervenor's -- the intervenor's response, proposed
6 brief, Exhibit 1, which is the -- the filing form
7 itself.

8 And if -- if you don't mind, Your Honor, I
9 can just provide you with a copy of this part.

10 THE COURT: I have it right here on my
11 screen.

12 MR. JAMES: Perfect.

13 As you will see on the very top of that,
14 where it's Steve Kelley, the officer of the
15 Green Party, the very first sentence is that, "I, the
16 presiding officer"; right? "Hereby certify that the
17 committee nominated in accordance with
18 Section 13-10-327," which is the very statute that
19 Plaintiffs say has been violated here, "under penalty
20 of perjury, before a notary," that the law had been
21 complied with.

22 And indeed, in -- in addition to that
23 certificate of appointment and that acceptance of
24 oath of candidacy, within 13-10-327, (4) says the
25 officer receiving the certificate of appointment,

1 which is the Secretary of State, accompanied by the
2 statement of acceptance and the filing fee, shall
3 certify the name of the appointee for the ballot.
4 Secretary of State has a mandatory duty under the
5 presumption of law to do exactly what she did, which
6 was certify the ballot.

7 And to the extent that in the oral argument
8 it was meant that we were trying to hurry to perform
9 an action, Your Honor knows Montana statute requires
10 the Secretary of State to certify a ballot by 75 days
11 before the election.

12 75 days before the election, we had the
13 accounting department and the notary department as
14 long as -- as well as the elections department in
15 after hours working overtime to get the certification
16 done because it's -- it's not just a signing of a
17 piece of paper, it's completing three ballot issues
18 that had -- to -- to see whether they qualified for
19 ballot and as well as going through all of the
20 candidate names and making sure that spelling is the
21 same, each county is right. And so it's -- it's an
22 extensive process.

23 And to be frank, the 75 days before is
24 already a really narrow window for the counties to
25 flip forward. And I -- And I think that we'll get to

1 that in terms of the balancing of the harms later.

2 But I think on the first argument what's
3 critically important is the statute specifically
4 requires the filing officer to certify for the
5 ballot, and it specifically says that once this
6 candidate filing form has been made and it's -- it's
7 been certified under penalty of perjury, that it was
8 done according to law, that this Court as well as the
9 Secretary of State is required to presume that
10 validity until we have affirmative proof by a Court
11 of law.

12 And thus far, there have been no Court that
13 have made by affirmative of proof anything out of the
14 alternative. In fact, Plaintiffs have offered no
15 evidence to the contrary, simply just speculation and
16 implication.

17 And next, I would like to -- to move --
18 Although it's really uncomfortable for the
19 State of Montana and the Secretary of State's
20 institution to -- to look at the party rules and see
21 if as to whether they have been complied with, I
22 think that from plain language and a basic reading of
23 the law standpoint it's important for us to make this
24 argument.

25 As Plaintiff's counsel mentioned, this

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1 entire theory is based on the -- the bylaws do not
2 specifically provide a process for the appointment.
3 And it is implied by that that you have to have
4 something in your bylaws or otherwise the party can
5 do as it may. Instead, they moved towards the
6 process for an endorsement.

7 Now, the Helena IR and the Free Press might
8 be here today, and they -- they do endorsements.
9 Lots of candidates get endorsements. When the
10 Helena IR does an endorsement, that does not mean
11 they are appointing anybody to the ballot or -- or
12 appointing a replacement.

13 There is a fundamental distinction between
14 an endorsement and a -- completing a statutory
15 process which is outline with the statutory form.
16 And conflating those two completely renders the
17 common understand and the plain language, which the
18 Court should -- should simply look to do so.

19 By its plain language, the references -- the
20 endorsement procedure is related to that endorsement
21 of process. And whether they choose to endorse a
22 ballot issue or a policy platform, or a Republican or
23 a Democrat for that matter, is their own prerogative,
24 but that's a separate case and not one that we are
25 here before to discuss.

1 I'd next like to move to -- to kind of two
2 threshold arguments, and I think the first one is
3 particularly important, and that's mootness,
4 Your Honor.

5 For one, the Secretary of State has
6 statutory duty to certify the ballot. You certify
7 the ballot already. And I want Your Honor to
8 understand what that means for -- for the rest.

9 So when the Secretary of State appeared
10 before -- for -- for the Association of Clerk and
11 Recorders conference, the beginning of August,
12 counties were already wondering "When are we going to
13 certify the ballot?" because they have already began
14 approving process.

15 A little interesting trivia, I suppose, or a
16 factoid is when voters go to the ballot box in
17 November, the 700,000 different voters that will be
18 voting, they are going to be voting on 4,400,
19 roughly, different ballot types. There are 4,400
20 different types of ballots. Because you got folks
21 that are in the irrigation district, they are in the
22 school district, they are in this precinct and they
23 are in that precinct, and you have -- it's not like
24 you just hit the backspace and remove a candidate
25 from the ballot.

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1 Plaintiff's position is entirely reliant
2 upon this aspect as though the certification process
3 is the very first step of making sure that ballots go
4 out on time, and it is indeed the last step.
5 Counties are -- have begin [SIC] preparing for this
6 process in August.

7 And whence 5:00 o'clock passed, and we were
8 ordering pizza for working -- for workers for
9 overtime, candidates are already bugging us,
10 wondering when the certification's out because they
11 got duties with contracted printers, duties with mail
12 houses and others that they have to get those ballots
13 out to. And the moment that there is certification,
14 they instantly go to print, which has been the case.
15 Counties are already at print. And that's
16 particularly important.

17 The certification timeline is -- is
18 understood and well understood. And that's why in
19 the Graybill decision, 11 days before certification,
20 the Supreme Court said, "We're too close." Because
21 we, under federal law, and as a matter of policy, we
22 got till September 20th to get military ballots to
23 them in their hands. And that means that from the
24 point of when we certify, the printer, which --

25 My father was a printer in Butte.

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1 Greenfield Printers. It -- it was the
2 longest-running printing company in Montana. We
3 don't have local printers anymore, but they don't --
4 they certainly don't print ballots. Some counties
5 they do. But most of the time you got -- you got a
6 mail timeline involved.

7 So you say, "My proof is ready to go." You
8 then have to print. They are then mailed back to
9 counties. The counties then have to assemble the
10 envelopes and the ballot instructions, which are
11 sometimes printed at different spots. You might have
12 your county printer do your -- your instructions and
13 the ballots printed at, like, a ballot house. You
14 have to assemble those all together. You -- you got
15 to send them out, get them to Germany so that they
16 can then distribute them to a naval ship outside of
17 Japan by September 20th.

18 This is -- Frankly, it's impossible to -- to
19 make a -- a change to 4,400 different -- different
20 ballot types at this stage of the game.

21 And, in fact, whether the statute is already
22 based on our compliance with federal law too close,
23 with the way mail timelines are right now is already
24 problematic. Counties are requesting expedited right
25 off the gate, and that's just where we are at at this

1 point.

2 So it is not just a matter that the
3 Secretary of State has already certified. There
4 certainly was no hurry to get it done. We were after
5 hours on the last statutory day to certify when it
6 was certified, making sure that it happen. And after
7 that point, balls are rolling for -- for this
8 election.

9 To -- to go back to the election clerk's
10 August duties now in September would wreak havoc on
11 our elections. It would -- puts a -- a new position
12 where you are focused on doing your August duties
13 rather than looking at polling-place workers and
14 training materials and everything else that are the
15 September duties to get ready for not just any
16 election, but a massive federal presidential
17 election, which is a ton of work, and election
18 officials already very exhausted from a long petition
19 summer into -- into the general election. I think
20 mootness is -- There is -- There is no more clear
21 aspect to mootness.

22 I also want to make a quick argument on the
23 relations to standing only because Plaintiff's
24 counsel brought it up, and I think that it's really
25 important for the Court to know on the record.

1 So this idea that standing is the exact same
2 as previous cases where the Democratic Party or
3 MDP versus Stapleton in '20 or Larson in -- in '18 is
4 analogous to this is simply not so. The Second
5 Circuit decisions in both of those cases relate to
6 this idea of competitive standing.

7 And in the complaint, Plaintiff's complaint
8 today, they discuss that MDP will be required to
9 divert staff time to develop new messagings to appeal
10 to voters choosing between Democratic and Green Party
11 candidates. The distinction between those cases, in
12 both the Montana and the Second Circuit, is the
13 difference would be whether there would be
14 Green Party candidates or not, not one Green Party
15 candidate in one race.

16 The Democratic Party is going to have
17 Green Party candidates in races all across the ballot
18 no matter what in addition to the fact that they were
19 expecting to have a Green Party candidate in the
20 senate race all along.

21 And to say, "Well, now we don't have much
22 time because there is a new candidate with the
23 withdrawal portion and we have to replace," well,
24 that sounds to me like a statutory challenge that
25 they should make, that the withdrawal timeline is too

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1 close to certification or something. But it's no
2 onus on the Secretary of State, and it's certainly no
3 individual harm.

4 I question whether they're -- they have a
5 harm at all, but it's certainly not irreparable
6 [SIC] one, and I believe the competitive standing
7 argument, particularly on the complete standing
8 theory, is unsupported by any case law in elections
9 and has no ground in this case.

10 Finally, we'll go to the -- the, I think,
11 fatal issue, which is just -- and I hope I do a good
12 enough job for the election officials on this one.
13 We are not parties to the case and probably should be
14 necessary parties to the case because we don't have
15 contracts with printers. We don't deliver ballots.
16 The -- Our job was to say, "All the work you got
17 ready is good to go."

18 The Secretary of State's duties are now
19 done, but who you will harm is people that are
20 serving abroad on naval ships; who you will harm is
21 people who want to vote for the Green Party
22 candidate; who you will harm is exhausted county
23 election employees who -- who will have to redo their
24 duties on --

25 I mean, imagine your clerk adding 4,400

1 documents over the next -- It's -- it's extensive.
2 And I want to make sure the Court also knows what
3 that looks like.

4 When you have a ballot, and you remove a
5 party and a name from that ballot, that shift,
6 depending on the ballot, could mean you now have a
7 race on the bottom that at once was on the next page
8 and has been moved up. And you have the race and a
9 candidate or two on the bottom right corner; right?
10 And because of that deletion, now the -- the other
11 candidates are on the back.

12 So a voter gets that, and they think there
13 is only two candidates. They vote for one, they see
14 the person on the back, they then have spoiled their
15 ballot if they voted again, or otherwise their
16 choices were, "We're stuck." And because it's not
17 just about removing the race, it -- it messes with
18 the whole formatting of the ballot.

19 So it takes work to make sure that voters
20 are given a ballot, that their constitutional rights
21 can be exercised in a proper manner, and that takes
22 an inordinate amount of time and resources, not just
23 for the counties that have already gone to print and
24 would need an order mandating that they reprint,
25 which to -- to Plaintiff's argument, "Well, we'll

1 just hold the status quo because what if we prove?"
2 Their responsibility was to show up in court today
3 and prove that they overcome a statutory burden that
4 -- that something is given a presumption of validity.
5 They didn't do that.

6 If -- if all of a sudden Steve Kelley comes
7 here, and he says, "Yes, we got -- We had minutes,
8 and we -- we went on Zoom," or "We met at the coffee
9 shop and we -- we did our regular thing," then what?
10 We've ordered counties to spend thousands of dollars
11 replacing ballots. Do you then have to replace the
12 ballots again? It's crazy. And it's exactly why you
13 have a Purcell principle that prevents from this type
14 of disruption at the end of the election.

15 If you want to contest the nomination at --
16 at the end, there is probably a recourse there. But
17 asking the Court for the relief that they have asked
18 at this stage of the game, at this point of -- of
19 where it's moot, with the tremendous costs and harms
20 that it has in the face of a statutory requirement to
21 certify upon those things and a statutory requirement
22 for both the Secretary of State and the Court presume
23 the validity, with the only evidence in this case, a
24 sworn affidavit that someone certified pursuant to
25 the statute that they challenge, I believe that this

1 case is very one-sided and should -- the preliminary
2 injunction should be denied.

3 My -- my co-counsel will argue why the TRO
4 should be dissolved, although as we appear today at
5 the hearing, I think that it will. And I hope that
6 Your Honor sees through the arguments, both from a
7 threshold level, a statutory level, statutory
8 interpretation level, and also a human level,
9 Your Honor. This would place tremendous consequences
10 to election officials.

11 THE COURT: So, Mr. James, are you telling
12 the Court that the ballots have been prepared?

13 MR. JAMES: Yes, Your Honor. There have
14 been counties who have already gone to print, and
15 they printed them.

16 THE COURT: So hasn't the Montana
17 legislature provided the remedy for election
18 administrators under 13-12-204 in that regard?

19 MR. JAMES: One moment, Your Honor.

20 (Pause in the proceedings)

21 MR. JAMES: I -- I trust Your Honor has --
22 has the case. I do see that it looks like there is a
23 -- If the appointment has been made for certain
24 candidates --

25 THE COURT: Which specifically mentions

1 13-10-327.

2 MR. JAMES: It does, Your Honor.

3 Then -- And after ballots have been prepared
4 but before the election, they may correct the manner
5 and consistent with rules or have the entire ballot
6 redone.

7 You're right, Your Honor, you could
8 certainly order that -- that they have overcome their
9 statutory presumption and therefore the counties need
10 to spend that cost that --

11 And -- and I will just note that in doing
12 so, we will -- we're going to run some afoul some
13 federal laws related to overseas voters, but it is
14 certainly possible.

15 THE COURT: Thank you.

16 MR. JAMES: Yes, Your Honor.

17 THE COURT: Mr. Cameron?

18

19 ARGUMENT BY MR. CAMERON

20 MR. CAMERON: Good morning, Your Honor. And
21 may --

22 THE COURT: Good morning.

23 MR. CAMERON: -- it please the Court.

24 THE COURT: Thank you.

25 MR. JAMES: For the record, my name is

1 Rob Cameron, and I represent Robert Barb.

2 Rather than replowing ground already plowed,
3 I think I would like to focus on one overriding legal
4 principle here that the Court is well aware. That in
5 construing a statute or a legal document, the office
6 of the judge is not to insert what has been omitted
7 or to omit what has been inserted. Yet the
8 plaintiff's case entirely rests on the principles of
9 asking this Court to insert what's been omitted in
10 the bylaws and insert what's been omitted in the
11 statutes.

12 I would like to focus specifically on the
13 bylaws themselves. The word "appointment" appears
14 nowhere in the bylaws of -- of the Green Party. The
15 bylaws do discuss endorsements. And as Mr. James
16 pointed out, the concepts of endorsement and
17 appointment are radically different. They have
18 completely different legal significance.

19 As he indicated, newspaper parties, they
20 could -- they are perfectly free to endorse, which
21 simply means to express support or public approval
22 of, according to Websters. So it's one thing to say
23 "I endorse this candidate. I -- I am going to vote
24 for him, and I hope you do, too," that's an
25 endorsement.

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1 An appointment, in contrast, is a mandatory
2 legal act imposed by the statutes and imposed by the
3 rules, and that's what we are talking about here.

4 There is a process for -- in the bylaws for
5 endorsing a candidate. However, Robert Barb never
6 asked for the Green Party's endorsement. They've
7 never asked the -- He's never asked the Green Party,
8 "Please go out and publicly make statements of how
9 the Green Party supports him, and we hope you do,
10 too." And the Green Party, in fact, has not endorsed
11 Robert Barb. So this argument "Well, endorsements
12 require a -- a membership vote" has no application at
13 all to the concept of appointment.

14 Not only that, they insist that there be a
15 -- a members' meeting to take care of this problem.
16 Their -- their position is the appointment should be
17 done by an entire vote of the membership. That's an
18 impossibility. That's an absolute impossibility, and
19 here is why.

20 First of all, the bylaws don't say that.
21 They don't anything of the sort.

22 What the bylaws do say is that if there is
23 going to be a membership meeting, all members of the
24 -- of Green Party must be provided with a proposed
25 agenda 14 days in advance of the membership meeting.

1 A mere seven days of -- of seven business days
2 occurred between the withdrawal of Mr. Downey and the
3 deadline for appointment.

4 Had the Green Party actually tried to
5 convene a members' meeting in that window, it would
6 have violated -- Now, that would have been a
7 violation of the bylaws because the bylaws expressly
8 say you can't have a membership meeting unless you've
9 given 14-days notice to the members. That's in
10 Article III of the bylaws.

11 Therefore, because of the lateness in which
12 Mr. Downey withdrew, giving the Green Party a mere
13 seven business days to get an appointment in place,
14 it would have been a violation of the bylaws to try
15 to convene a membership meeting without the requisite
16 14 days. And in the final analysis, there is no
17 requirement for a membership meeting or a membership
18 vote for the express purpose of appointment.

19 THE COURT: Well, let's go back to
20 Article III of the bylaws.

21 MR. CAMERON: Yes, Your Honor.

22 THE COURT: Doesn't it also provide that the
23 membership will be responsible for the
24 decision-making on a -- on statewide issues and
25 endorsement of statewide candidates?

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1 MR. CAMERON: That's correct, Your Honor.
2 That's exactly what it says. And -- and again,
3 endorsement of statewide candidates has not occurred.

4 Now, with respect to the argument that,
5 "Well, is the appointment of Robert Barb a statewide
6 issue?" If that's Your Honor's concern?

7 Well, the reason it's not is that when -- In
8 this case, when the Green Party bylaws mean to say,
9 "Statewide candidate," that's what they say, and they
10 do in that very sentence.

11 So the fact that they used a different term,
12 "Statewide issues," that necessarily does not mean
13 statewide candidates. Because if they -- if they
14 meant that, they would say, "The membership shall be
15 responsible for decision-making on statewide
16 candidates and endorsement of statewide candidates."

17 So the fact that they use the term
18 "statewide candidates" at the end excludes the -- the
19 interpretation that an issue could be a candidate.
20 They've said "candidate" in -- in that -- in the
21 latter part of the sentence, and they could have said
22 that in the first part of the sentence, and they
23 didn't.

24 So that's why that sentence does not control
25 or impose a duty. That's why Robert Barb is not a

1 statewide issue, he's a statewide candidate, and they
2 clearly could have said "statewide" if that's what
3 they meant.

4 By another point about this whole voting
5 business, one could even argue that on -- on June 4th
6 the membership of the Green Party did, in fact, vote.
7 They voted in the primary. And -- and in that
8 primary, we know that Mr. Downey got over 60 percent.
9 Mr. Downey received 66 percent of the votes, and
10 Mr. Barb received 34. That was a vote, and that was
11 a vote where Mr. Barb came in second, and the person
12 who came in first suddenly withdrew at the last
13 minute of the last day.

14 So it makes perfect logical sense to say a
15 vote in fact did occur. "The -- the first-place guy
16 dropped out, so let's move the second-place guy into
17 that slot." So --

18 THE COURT: Well, Article V provides
19 consensus is preferred if not possible. General
20 decisions are passed by simple majority of members
21 attending a general meeting.

22 MR. CAMERON: Yes, Your Honor, consensus is
23 preferred. But again, we have that problem because
24 of the timing here. A general meeting was not
25 possible because the -- the bylaws very expressly

1 require 14 days advance notice, which would have been
2 impossible in light of the truncated timing created
3 by Mr. Downey's abrupt withdrawal on the last
4 possible day.

5 Again, they only had seven days to get a
6 replacement candidate certified, and there would not
7 have been time under the bylaws. It would have been
8 a violation of the bylaws to have a meeting within
9 that seven-day window because they hadn't given the
10 requisite 14 days.

11 THE COURT: Well, let's go to Key Value 1
12 under the Montana Green party bylaws. It says,
13 "Every human being deserves a say in the decisions
14 that affect their lives and not subject to the will
15 of another. Therefore, we will work to increase
16 public participation in every level of government.

17 Continuing, "We will work -- We will also
18 work to create to new types of political
19 organizations which expand the process of
20 participatory democracy by directly including
21 citizens in the decision-making process."

22 MR. CAMERON: Yes, Your Honor. That's
23 exactly what it says.

24 THE COURT: So let's go to your election
25 results.

1 MR. CAMERON: Okay.

2 THE COURT: One, he didn't get a majority.

3 MR. CAMERON: Correct.

4 THE COURT: Your client.

5 Two, don't other members of the Green Party
6 have the same right that he does to say "I want to
7 step in? I want to be the nominee -- nominated
8 individual for the United States Senate"?

9 MR. CAMERON: Yes, Your Honor.

10 THE COURT: But here we have, essentially,
11 what I would generally describe as a committee member
12 -- or, a committee member is making that decision.

13 MR. CAMERON: Big picture, that's what
14 happened. Again, the -- a -- There is no -- no
15 prohibition against the committee making this
16 decision, particularly here where a membership
17 meeting would be a clear violation of the bylaws.

18 So, in fact, that --

19 THE COURT: So if the bylaws are silent as
20 to nominations, if I understand your argument --

21 MR. CAMERON: Correct.

22 THE COURT: -- the bylaws aren't silent as
23 to endorsements.

24 MR. CAMERON: That's correct, Your Honor.

25 THE COURT: But if I understand your

1 argument, the bylaws are silent as to nominations.

2 So then we look at 13-10-327(1)(a), "For
3 offices to be filled by the state at large, the
4 state's central committee shall make the appointment
5 as provided by the rules of the party."

6 MR. CAMERON: That's correct.

7 THE COURT: So are you telling me that the
8 state's central committee for the Green Party made
9 this appointment?

10 MR. CAMERON: Yes, Your Honor.

11 THE COURT: And does the Green Party have a
12 central committee?

13 MR. CAMERON: Yes. And I think Plaintiff's
14 brief actually acknowledges the fact that it was a
15 central committee that made this appointment.

16 And please correct me if I am wrong.

17 But I believe that is also the plaintiff's
18 position as well.

19 THE COURT: So under your argument, the
20 certification was made -- And I'll just pull it up
21 again -- On August 19, 2024, certificate of
22 appointment to the placement candidate, declaration
23 of acceptance and oath of candidacy, signed on the
24 19th, filed on the 20th, you're saying that the
25 presiding officer of the committee, having the

1 qualifications to appoint a replacement candidate,
2 hereby certify that the committee nominated in
3 accordance with Section 13-10-327, that's a correct
4 statement?

5 MR. CAMERON: Well, that's exactly what
6 Mr. Steve Kelley, who is, in fact, the Green Party
7 Elections Coordinator, that's what he has declared,
8 yes. That's correct.

9 THE COURT: Well, when I read the bylaws,
10 and correct me if I am wrong, that these offices are
11 entirely ministerial and granted no executive power
12 whatsoever by the bylaws. The Secretary Treasure and
13 coordinator's job is to conduct the meeting. Article
14 III. Each of the three officers has two duties under
15 the bylaws. The Secretary keeps minutes of meetings
16 and keeps records the Montana Green Party. The
17 treasure maintains the checking account and prepares
18 quarterly reports. The coordinator is to be the
19 contact person with the Green Party of the
20 United States and be the contact person for statewide
21 issues projects. And that's Article VI.

22 MR. CAMERON: Yes, Your Honor, and that
23 coordinator is Mr. Steve Kelley, who, in fact,
24 completed the -- the certificate of appointment on
25 behalf of the party as -- in his capacity as the

1 Elections Coordinator.

2 THE COURT: So are you asking this Court to
3 infer that he had the authority to sign that
4 document?

5 MR. CAMERON: Yes, Your Honor. There is no
6 prohibition against this either. I mean, this does
7 not purport to be a complete list of all the duties
8 of the officers, it identifies the key roles that
9 they will function. There is nothing in here that
10 says this is the exclusive power. Again, that's back
11 to the "let's not insert what's been omitted here"
12 with respect to express restrictions.

13 Now, I would like to also call the Court's
14 attention to what we believe is a simple controlling
15 statute that ends the case completely. In fact, the
16 case -- the Court really need go no further than 30
17 -- 13, rather, -36-102. This statute is dispositive.
18 This statute, from our perspective, ends the case.

19 This statute provides, (1): "Five days or
20 less -- Five days or less after a candidate has been
21 certified as nominated, a person wishing to contest
22 the nomination to any public office shall give notice
23 in writing to the candidate whose nomination the
24 person intends to contest."

25 That did not happen here. Without question,

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1 this -- on -- on August 20th, we know that the
2 candidate had been certified as a replacement. Here,
3 the -- the direct language is, "I, the undersigned
4 presiding officer of the committee, having the
5 qualifications to appoint a replacement candidate,
6 hereby certify the committee nominated in accordance
7 with the statute, Rob Barb."

8 That started the five-day clock ticking on a
9 challenge because that statute applies specifically
10 to five days after a candidate has been certified as
11 nominated. That happened August 20th at the latest.
12 The deadline for any such written notification to
13 Mr. Barb was last Monday. That -- that notification
14 in writing --

15 Now, there is some question in the law as to
16 what that notification is. One District Court
17 struggled, "Does that mean a lawsuit has to be
18 filed? Does that mean a certified letter --" It
19 doesn't matter what that notice looks like. It's
20 noticed in writing "shall be given no less than five
21 days" after the certification happens.

22 And again, the certification happened on the
23 20th. That ship has sailed. There is no basis for
24 any person or party to maintain a challenge based on
25 their failure to provide notice in writing to the

1 candidate. That -- That's done. That -- that ship
2 has sailed.

3 Now, in their brief, the plaintiff argued
4 that, "Well, Chapter 36 governs election contests."
5 That is, challenges to the result of a primary or
6 general election.

7 What they are doing here? Inserting what
8 has been omitted from this statute. The statute says
9 nothing about limiting certification to the -- the
10 actual primary or the general election. It just says
11 -- It says what it says. And it's -- it's
12 irrefutable that that certification happened no later
13 than August 20th and that no notice was given as
14 absolutely mandated by the statute.

15 The other -- The other point I think that is
16 worth emphasizing, too, is it's -- it's vital to keep
17 in mind that operative statute we have been talking
18 about, 13-10-327, imposes an absolute mandatory duty
19 on the party to appoint a replacement.

20 This is not discretionary. They don't have
21 the right under the statute to say, "Well we don't
22 have a lot of time here. We don't have time for a
23 membership meeting under the bylaws, so let's just
24 not do anything." That's what Plaintiff's argument
25 would have us believe, that as if -- as if the

1 Green Party had the discretion to say, "Well, our
2 time is short. We don't know enough about this
3 Robert Barb guy, so let's just let it ride and not
4 appoint anyone."

5 The -- the statute, I don't think there is
6 any dispute about it. The affected political party
7 shall appoint someone to replace the candidate in
8 this circumstance.

9 So they couldn't -- They couldn't conduct a
10 general meeting because that would be a violation of
11 the bylaws, so the officers got together. They
12 pushed hard. They -- they required Robert Barb to
13 file a affidavit -- or, a -- a declaration in the
14 prior lawsuit attesting to all his qualifications.
15 And that's on record in the previous case that was
16 filed. They required it. There was an original
17 declaration.

18 That wasn't good enough for the Green Party.
19 They did their due diligence and pushed hard and
20 said, "We want to know more about this guy." And
21 that's why he filed a second affidavit -- or, a
22 second a declaration that finally convinced the
23 Green Party officials that he's the real deal.

24 And not only -- Just as an aside,
25 Your Honor, I asked about the presence of Mr. Barb in

1 the courtroom today, Mr. Barb is such an
2 environmentalist, he spends all his time in the
3 mountains.

4 THE COURT: Good for him.

5 MR. CAMERON: And he's living a lifestyle
6 like kind of a envy.

7 The last communication I've had from
8 Mr. Barb was Monday. And it was a text. And in that
9 text he said, "I am on the top of a mountain in Idaho
10 picking huckleberries and looking for bears."

11 That's the last communication I've had with
12 Mr. Barb.

13 THE COURT: And I wasn't trying to impugn
14 Mr. Barb. He is -- It's a civil matter. He doesn't
15 have to be here. I just -- If he was here, I wanted
16 to make sure his name was on the record. So --

17 MR. CAMERON: Fair enough.

18 THE COURT: Take no offense, please.

19 MR. CAMERON: None taken at all, Your Honor.

20 Now, I would also like to briefly talk about
21 the fundamental fairness and equities as it -- as it
22 applies to Mr. Barb, in particular in the injunction
23 context, as the Court is well aware.

24 The third and fourth mandatory factors under
25 the 2023 statute require the plaintiff to prove that

1 the balancing of the equities as between the parties
2 favors their position.

3 Now, the equities in this case are
4 overwhelmingly in favor of Mr. Barb in keeping his
5 name on the ballot. The force this process to go --
6 Because the burden on the -- on the plaintiffs going
7 forward would arguably be some expenditures to
8 campaign against Mr. Barb. And as Your Honor pointed
9 out correctly at the beginning, they have those
10 burdens anyway.

11 So the financial burdens of having to defend
12 against a Green Party candidate -- Because we have to
13 presume, and I -- I will presume this, and -- that
14 the -- that the Democratic Party did not know that
15 Mr. Downey would -- would withdraw at the last
16 minute, leaving no candidate. I will presume they
17 didn't know it. Therefore, I think it's safe to
18 presume they -- the Democratic Party believed there
19 would be, in fact, a Green Party candidate.

20 So expenditure is to defeat -- or, to try to
21 siphon votes to -- to avoid siphoning votes away
22 from, well, frankly, Mr. -- Senator Tester. That was
23 a challenge they have been open about. And it's a --
24 I am not going to criticize that position at all. I
25 mean, I am -- I am like you, Your Honor. I don't

1 think politics has any place in the analysis the
2 legal issues here. And I am not going there at all.

3 But the fact of the matter is -- So I
4 presumed that the Democratic Party knew all along
5 there would be Green Party candidate all the way up
6 to election day. And they probably had no reason to
7 presume otherwise.

8 THE COURT: Well, doesn't that county
9 argument in 13-10-327, that when Mr. Downey said, "I
10 am not doing it," that the Democratic Party should
11 have assumed under 13-10-327(1) that the Green Party
12 was required -- appoint a replacement? Shall. Just
13 -- I am just quoting here: "Shall appoint someone to
14 replace."

15 MR. CAMERON: Yes. Actually, Your Honor,
16 that reinforces the notion that the Democratic Party
17 has known all along that there would be a Green Party
18 candidate in -- even in the event of a -- of a -- a
19 withdrawal like Mr. Downey. That statute should have
20 put the Green -- the Democratic Party on notice.

21 There is going to be a Green Party candidate
22 from begin to end, from June to November, because
23 there was a statutory duty on the Green Party to
24 mandating an appointment of a replacement. So that
25 actually cuts in favor of Mr. Downey -- or, I mean

1 Mr. Barb and against them when -- when they are
2 complaining about additional expenditures of funds
3 because they -- they knew there would be Green Party
4 candidate all along, or at least they should have
5 under the statute.

6 So again, just to circle back to the theme.
7 We -- we request that the Court not insert what was
8 omitted in the bylaws and create a -- a requirement
9 of membership vote for appointments. That's not in
10 the bylaws, and we request that the Court not insert
11 that.

12 Then --

13 THE COURT: Now, you mentioned they were
14 inserting something 13-10-227 in your opening
15 arguments. And --

16 MR. CAMERON: Oh.

17 THE COURT: -- perhaps it's early in the
18 morning for me, but I -- I didn't hear it.

19 MR. CAMERON: Yes. With respect to what
20 they have inserted that's been omitted from that
21 statute is the notion that it has to be done by --
22 that the appointments would have to be done by a
23 majority vote of members. But because, again, that's
24 not in the bylaws, and it's also not in the statute
25 specifically.

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1 So -- And that's all I have at this time.

2 THE COURT: All right. Thank you.

3 MR. CAMERON: Thank you.

4 THE COURT: I presume there is no one else
5 from the defendants that's going to argue as for the
6 preliminary injunction issue.

7 MR. JAMES: No, Your Honor.

8 THE COURT: Okay. You get the last word,
9 Miss Boland.

10

11 ARGUMENT BY MS. BOLAND

12 MS. BOLAND: Thank you, Your Honor. I -- as
13 I was listening, I -- I think I counted about ten
14 arguments raised by -- by the other two parties, and
15 I am going to do my -- my best to address them
16 succinctly.

17 THE COURT: Thank you.

18 MS. BOLAND: The first is Mr. James
19 represented that it is not the Secretary of State's
20 job to check the validity of candidate nominations.

21 THE COURT: Well, he talked about a
22 presumption.

23 MS. BOLAND: Yes.

24 THE COURT: And --

25 MS. BOLAND: Yes.

1 THE COURT: -- that's a fair reading of the
2 statute, isn't it?

3 MS. BOLAND: It -- it is a fair reading of
4 -- of that statute. I would draw the Court's
5 attention 13-12-201, which confers an obligation on
6 the Secretary to ensure --

7 Actually, I'll just read it:

8 "The Secretary of State shall certify to the
9 election administrators the name and party or other
10 designation of each candidate who filed with the
11 Secretary of State and whose name is entitled to
12 appear on the ballot."

13 And so our response to that is twofold. The
14 Secretary should determine whether someone is
15 entitled to appear on a ballot before she certifies
16 to election administrators that that is the case.

17 But if she didn't, as it appears she didn't
18 do here, then the remedy is the one that the -- the
19 plaintiff is seeking. It's judicial review of her
20 failure to review the eligibility of this candidate.

21 The -- the second issue, I suppose, is let
22 -- let's take them -- let's grant that assumption,
23 that the Secretary is not responsible to ensure that
24 only eligible candidates appear on the ballot. That
25 then is an argument in favor of -- of filing the suit

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1 that we have filed because if there is a problem with
2 the eligibility of a candidate on the ballot that has
3 been certified by the Secretary, our only recourse is
4 judicial review of that determination.

5 THE COURT: Well, Mr. Cameron talks about
6 you also have recourse under 13-36-102.

7 MS. BOLAND: I will hop to that issue,
8 Your Honor.

9 And succinctly, we don't. 13-36-102 governs
10 elections, not nominations internal to a party.

11 And if you -- If you hop up one statute
12 before that, 13-36-101, it clarifies that this part
13 of the statute determines -- or, governs the
14 nomination of election to public office, not
15 nominations internal to a political party. Mr. Barb
16 hasn't been elected to anything.

17 It also specifies that in order to have the
18 -- the remedy available in that statutory section,
19 you have to be an elector, which is defined in
20 13-36-101. The Democratic Party is not an elector.
21 The party cannot cast a vote in a general or primary
22 election. And so the statute simply doesn't apply.

23 There is also the -- the issue of the sort
24 of semantics between appointment and endorsement in
25 the Green Party bylaws. And --

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1 THE COURT: Well, would you agree that there
2 is no mention of "appointment" in the bylaws?

3 MS. BOLAND: The word "appointment" does not
4 appear. The word "appointment" does not --

5 THE COURT: The word "appointment" does
6 appear in 13-10-327?

7 MS. BOLAND: I'm happy to look. I -- I do
8 not remember off the top of my head.

9 THE COURT: "The affected political party
10 shall appoint someone to replace --"

11 MS. BOLAND: Thank you. Yes. If I could
12 put a pin in that and come back to the -- to the verb
13 "shall appoint" for just a moment?

14 That statute says that the committee shall
15 appoint a nominee -- or, replacement nominee
16 according to the terms of the bylaws.

17 THE COURT: Would you agree here that the
18 bylaws for the Green Party are silent as to
19 appointment of a party of a candidate that dies or
20 withdraws?

21 MS. BOLAND: No, Your Honor.

22 THE COURT: So show me in the bylaws where
23 it says how an appointment for a Green Party member
24 who -- how the Green Party appoints a substitute
25 candidate for a candidate who withdraws or withdraws

1 -- or, dies or withdraws. Excuse me.

2 MS. BOLAND: The bylaws for the Green Party
3 are not nearly as specific and detailed as they are
4 for the other three parties. And the Court has those
5 bylaws for reference as exhibits and attached to the
6 brief I filed yesterday. Just --

7 THE COURT: But all I -- All I -- All I can
8 be concerned with is the Green Party's bylaws --

9 MS. BOLAND: Correct.

10 THE COURT: -- in this case.

11 MS. BOLAND: Correct. And they --

12 THE COURT: I don't get to look at the
13 others.

14 MS. BOLAND: Correct.

15 THE COURT: I mean, if the others like
16 they're better than the Green Party, so be it. But
17 all I can look at is the Green Party's.

18 MS. BOLAND: Well, Your Honor, one way to
19 think about it is perhaps if -- if I grant your
20 interpretation that -- or their interpretation that
21 the bylaws are silent about appointment of a
22 replacement candidate between a primary and a
23 general, if they are silent, then has the Green Party
24 written itself out of the ability to appoint someone
25 at all in this context?

1 And I -- I think that is an uncharitable
2 reading. I think the better reading is to say the
3 only reference to statewide candidates at all in the
4 bylaws is to endorsement of a statewide candidate.
5 And that has to be done by a vote of the general
6 membership.

7 That's my take the appointment versus
8 endorsement issue.

9 THE COURT: Would you agree, as Mr. Cameron
10 indicated, that the Green Party does have a central
11 committee?

12 MS. BOLAND: I -- I think so. Yes,
13 Your Honor. I have not looked at the statute that
14 distinguishes a central committee from a political
15 party itself. There is one, and I -- I can't
16 remember its provisions.

17 But it -- it appears from the bylaws that
18 there are three officers of the Green Party,
19 according to their bylaws, and those apparently are
20 the people who have purported to -- to nominate
21 Mr. Barb.

22 Yeah. So I don't think I have a basis to
23 say that that's not a central committee.

24 THE COURT: Thank you.

25 MS. BOLAND: Yeah.

1 The -- the fourth issue I caught was the --
2 the timing issue, essentially that it is impossible
3 at this late stage to correct the ballots. And the
4 Court can simply look at what happened four years
5 ago, the last general election. The Green Party was
6 enjoined -- or, the Secretary was enjoined from
7 putting the Green Party on the ballot by a District
8 Court. That order was taken up on appeal, and the
9 Supreme Court did not affirm the injunction until
10 September 23 of 2020, a month later in time towards
11 the election than we are today.

12 And there -- there was no -- no issues in
13 terms of having the ballots printed, sent overseas to
14 our military voters. The 2020 election happened.
15 And we have about four more weeks of lead time now
16 than we did in that case.

17 But also, as the Court noted, 13-12-204, we
18 have statutory procedures for how to correct an error
19 on a ballot. This would not be the first time there
20 has been an error on a ballot.

21 We also have case law about what happens
22 when a candidate is determined not to be qualified
23 for a ballot and the ballots have to be reprinted.

24 I have that cite here, Your Honor. That is
25 the **State ex rel. Governor Racicot versus the Seventh**

1 **Judicial District Court**, 244 Mont. Reporter 521. So
2 that's when an independent candidate for
3 County Attorney was ordered off the ballot in
4 September.

5 So my point is here that this is not the
6 latest election law case ever to be heard, and there
7 is certainly no -- no basis to state that we have no
8 practical remedy at this point.

9 With respect to standing. The -- the harm
10 that the Democratic faces in the absence of a
11 preliminary injunction here is -- is both the -- the
12 lost persuasion opportunity given the shortened
13 timeframe and potentially the loss of votes to
14 someone who is ineligible for the ballot.

15 And the issue here is whether -- is -- is
16 not whether the Democracy Party has to expend
17 resources it may have had to expend anyway, because
18 it's running an election against other candidates,
19 but rather whether the -- the time and resources and
20 persuasion it has to expend is inequitable under the
21 circumstances, because it's being forced to expend it
22 against a candidate who has circumvented our election
23 laws.

24 THE COURT: And that's hard statement
25 against Mr. Barb.

1 MS. BOLAND: Well, he is insisting that he
2 has a right to appear on the ballot. And I think he
3 is interested in appearing on the ballot, but I -- I
4 can find -- I can conceive of no constitutional or
5 statutory authority that would allow him to feel
6 entitlement to appear on a ballot. The issue -- And
7 -- and it simply cannot be the case that it is a
8 hardship to someone to comply with the law.

9 THE COURT: Well, under that same argument,
10 ma'am, isn't it fair to assume under 13-10-327(1)
11 that the Democratic Party was on notice that the
12 Green Party was going to have to appoint somebody?
13 Not maybe, it's a shall. And I'd really like to hear
14 your interpretation of that word.

15 MS. BOLAND: Thank you, Your Honor. I will
16 go right there in that case.

17 13-10-327 does not impose a duty on a
18 political party to participate in an election. The
19 legislature cannot compel political parties to
20 participate in elections if they don't wish to. They
21 have a first amendment right to associate and a first
22 amendment right not to associate.

23 The word "shall" there means if the
24 political party chooses to nominate someone, it shall
25 do so in compliance with its own bylaws. "Shall"

1 means that complying with the bylaws is mandatory,
2 not that nominating a replacement is mandatory. The
3 legislature simply cannot compel a political party to
4 act in that way.

5 On the issue of interpreting the bylaws, I
6 would also like to point out to the Court that
7 Mr. Cameron's argument that a meeting of the general
8 members of the Green Party was impossible or would
9 have been in contravention of the bylaws, it isn't
10 the case. Article III of the bylaws says efforts
11 shall be made to inform all members of the meeting
12 and proposed agenda at least 14 days in advance.

13 THE COURT: So what is your position when
14 Mr. Cameron says you're inserting what's been omitted
15 in those bylaws as to the -- a membership as to vote
16 on this appointment?

17 MS. BOLAND: I'm -- I am not inserting that
18 at all, Your Honor. The Article III --

19 Hang on.

20 THE COURT: Do you want me to read it for
21 you?

22 MS. BOLAND: Yeah. I'm -- If you want to --
23 If you find it faster than me.

24 THE COURT: "The Green Party membership
25 shall be responsible for decision-making on statewide

1 issues and endorsements of statewide candidates."

2 That's Article III.

3 Is that what you are looking for?

4 MS. BOLAND: Yes. And then the -- the other
5 provision that it must be done by a majority vote.

6 THE COURT: That's Article V. Consent --
7 "Consensus is preferred if not possible. General
8 decisions are passed by simple majority and members
9 attending a general meeting."

10 MS. BOLAND: Thank you. You beat me to it.

11 So I -- I have not inserted either the
12 requirement the endorsement of statewide candidates
13 is left to the general membership nor have I inserted
14 the requirement that decisions --

15 THE COURT: Well, you're -- you're inserting
16 appointment in lieu of endorsement.

17 MS. BOLAND: Well, Your Honor, I am assuming
18 that the bylaws will entitle the Green Party to
19 nominate a -- a replacement in this factual scenario.
20 Because if we don't, if it doesn't say "appointment,"
21 if it doesn't say "replacement" or -- or replace a
22 nominated candidate between a primary and general,
23 then -- then perhaps the answer is the Green Party
24 isn't allowed to do that because their bylaws don't
25 tell them how do it and don't entitle them to do it.

1 So my interpretation --

2 THE COURT: Well, let's just go to
3 13-10-327(1)(a). "For offices to be filled by the
4 state at large, the state central committee shall
5 make the appointment as provided by the rules of the
6 party."

7 If there is no rules of the party, isn't the
8 state central committee appointing?

9 MS. BOLAND: Well, it wouldn't be in
10 compliance of any rules, and -- and that can't be the
11 case under the statute. It has --

12 THE COURT: It's -- it's in compliance with
13 the statute.

14 MS. BOLAND: Well, no. The statute --

15 THE COURT: If -- if the rules are silent,
16 doesn't the committee have the -- the right to -- to
17 proceed in its, what's somewhat described as
18 administrative duties?

19 MS. BOLAND: Absolutely not, Your Honor.
20 The bylaws are on file with the Secretary of State.
21 It cannot be the case that there is a secret list of
22 things that the party can do if it wishes that -- it
23 -- that is not on file with the Secretary of State
24 and that are not in the bylaws.

25 My reading of the bylaws is charitable in

1 the sense that I am -- I am reading the phrase
2 "endorsement of a statewide candidate" to mean simply
3 putting the -- the imprimatur of the party behind
4 this statewide candidate.

5 If you don't read it that way, then -- then
6 perhaps I don't get to nominate a replacement at all.
7 And -- and I haven't made that --

8 THE COURT: That's not -- That's not what
9 the statute says.

10 MS. BOLAND: The statute says you follow the
11 bylaws.

12 THE COURT: As provided. It doesn't say,
13 "Follow the bylaws," it says, "As provided." If it's
14 not provided, isn't the -- going back to the state's
15 central committee's decision "this is who we are
16 going to appoint"?

17 MS. BOLAND: No, Your Honor, because I think
18 the bylaws say that endorsement of a statewide
19 candidate belongs to a majority vote of a general
20 membership.

21 You made the point with Mr. Cameron that the
22 officers of the Green Party, according to their
23 bylaws, have administrative functions. They are
24 specifically prohibited from endorsing statewide
25 candidates. And there isn't a section that says --

1 THE COURT: It doesn't say they are
2 prohibited from nominating.

3 MS. BOLAND: Well, it -- it also doesn't say
4 they are prohibited from demanding that the members
5 eat chocolate ice cream at all membership meetings.
6 There is a lot of things it doesn't say. All we are
7 left to do is to read what it does say, and the
8 central committee is not empowered to endorse
9 statewide candidates.

10 I -- I think I will leave the Court with a
11 return to the equities here. It is inequitable to
12 the Democratic Party to have to educate voters about
13 a brand-new candidate in the race, especially a
14 candidate who as qualified or appears to have
15 qualified for the ballot in violation of election
16 laws. You compare that with the equities to the
17 Secretary, and -- and there is no harm to the
18 Secretary if the Court enjoins the conduct here. The
19 Secretary should celebrate the strict enforcement of
20 our election laws.

21 And then you compare it to Mr. Barb, the
22 intervenor, who is not entitled as a matter of right
23 to appear on any ballot, and it cannot be the case
24 that the hardship to Mr. Barb is strict compliance
25 with election laws.

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1 So we ask the Court to issue the preliminary
2 injunction today. Thank you.

3 THE COURT: Thank you.

4 Mr. James? Mr. Cameron? I am assuming that
5 there is not going to be any stipulation to the
6 affidavit submitted by the plaintiff -- or,
7 petitioner in this matter; correct? You don't
8 stipulate to those facts?

9 MR. JAMES: No. No, Your Honor.

10 MR. CAMERON: Definitely not, Your Honor.

11 THE COURT: Okay. Thank you. All right.
12 So that's that issue.

13 Miss Lansing?

14 MS. LANSING: Thank you, Your Honor. The
15 State calls as a witness Thane Johnson.

16 THE COURT: Thank you.

17 Mr. Johnson, you are an officer of the
18 Court.

19

20 THANE JOHNSON

21 called as a witness, and having been first
22 duly sworn, was examined and testified as follows:

23 THE WITNESS: I do.

24 THE CLERK: Thank you.

25 THE COURT: She was too quick. Normally,

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1 officer of the court we don't have to swear in,
2 but --

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Thank you.

5

6 DIRECT EXAMINATION

7 MS. LANSING: Good morning.

8 THE WITNESS: Good morning.

9 BY MS. LANSING:

10 Q. Can you please state your name for the
11 record?

12 A. Thane Johnson.

13 Q. What is your occupation?

14 A. I am an attorney with the Civil Service
15 Bureau. I am the Assistant Attorney General. I
16 guess I call -- they call me "senior counsel" because
17 I got gray hair. So --

18 Q. What was your work history before that job?

19 A. I was in private practice for 30 years. I
20 was also a part-time deputy county attorney with
21 Larry Epstein and -- and Justice Nelson, believe it
22 or not. So that -- that's my private history.

23 Q. Did that private practice include
24 litigation?

25 A. It did.

1 MS. LANSING: May I approach, Your Honor?

2 THE COURT: Please. Thank you. Thank you,
3 ma'am.

4 BY MS. LANSING:

5 Q. I am handing you what's been marked as
6 Exhibit A.

7 Do you recognize this?

8 A. Well, I do as of yesterday, when I reviewed
9 the response brief to my motion to declare the
10 temporary restraining order dissolved.

11 Q. What is that exhibit I just handed you?

12 A. It is purportedly an email from an email
13 address cbaarab@bolandaarab.com. It's copied to
14 myself and Mr. Austin James.

15 Q. Is it addressed to anyone in particular?

16 A. Flooney@lewisandclarkcountymt.gov [SIC].

17 Q. What is the date of the email?

18 A. It is August 22nd, 2024.

19 Q. What time?

20 A. At 4:10. And I -- I received it on --
21 according to my email at 4:14, or at least that --
22 that's when it was delivered to my email box.

23 Q. Is that 4:10 p.m.?

24 A. Yes.

25 Q. Is this exhibit a true and accurate

1 depiction of the email you received?

2 A. It's -- it's a true and accurate depiction
3 of what was on my email as of yesterday.

4 Q. What is the subject line of the email?

5 A. It's "Montana Democratic Party v. State of
6 Montana and Christi Jacobsen."

7 Q. Does it have a cause number?

8 A. It -- The cause number is CDV 2024-542.

9 Q. Are there any attachments purportedly
10 attached to this email?

11 A. A brief in support of a motion for a
12 temporary restraining order and a motion for
13 temporary restraining order and proposed order.

14 Q. What kind of proposed order does the
15 attachment purport to be?

16 A. The temporary restraining order.

17 Q. Can you read this email?

18 A. Yeah, I certainly can. I don't know if the
19 Court wants me to, but it -- it gave me -- It was
20 supposed to give me notice of the fact that the -- I
21 assume that the restraining order had been filed.

22 The problem is on August 22nd, 2024. I was
23 en route with my wife to our house in Essex, with the
24 plan of getting up early the next morning and hiking
25 into Medicine Grizzly Lake in Glacier Park, which we

1 did. And I didn't open up my computer until Monday.

2 Q. We'll get to that in just a moment.

3 But before we move on from this, the content
4 of the email, it -- is it addressed to you in the
5 salutation at the top of the email? Or who is it
6 addressed to?

7 A. It is sent to -- or, addressed to "flooney."

8 Q. But the body of the email; what does --

9 A. "Ms. --"

10 Q. -- that say?

11 A. "Ms. Looney."

12 Q. And does the body of the email mention
13 notice or service?

14 A. It does not.

15 Q. What does it appear to discuss?

16 A. It -- it just as a courtesy to the -- you
17 know, to the -- I guess the Court's chambers. They
18 are attaching the -- the temporary restraining order
19 and motion and proposed order.

20 Q. Does it say anything about attorneys of
21 record?

22 A. It does not.

23 Q. Okay. Do you -- At that time that this
24 email was purportedly sent, did you know the person
25 that sent it or that email address?

1 A. No. And it goes back to me. I am -- I am
2 old school. I -- If I don't see -- If I don't
3 recognize an email, because I get a multitude of
4 them, I'm -- I'm -- there is a good chance I am not
5 going to open it or even -- won't even jump in my
6 eyes. And that's -- that's -- I -- That's the
7 problem.

8 Q. At this point, the State would request to
9 move Exhibit A into evidence.

10 THE COURT: Miss Boland?

11 MS. BOLAND: No objection.

12 THE COURT: Exhibit A is admitted.

13 Thank you.

14 (Defendant's Exhibit A was admitted into
15 evidence by the Court)

16 MS. LANSING: Thank you.

17 BY MS. LANSING:

18 Q. Mr. Johnson, what is your usual practice
19 with email?

20 A. Well, if -- I mean, if -- if it's a case I
21 recognize that I am on, and it's a -- it's a name
22 that I am familiar with, yes, I try to -- I try to
23 open them up.

24 But it's kind of like my former partner Paul
25 Sandry said, "Don't ever assume I opened an email,"

1 because you can't. I'm -- It's just -- It's just not
2 a good way of -- of practicing. And it's not fair to
3 counsel. I mean, there is no way Max Davis, I mean,
4 somebody I hold in high regard, would ever do that to
5 me. It is -- Just assume that I got it. I mean, if
6 he -- He didn't -- If he saw that I didn't open it or
7 didn't respond to it, Max would give me a call. I
8 mean, it's just -- It's -- it's common courtesy among
9 practicing attorneys in Montana. And it's just not
10 right or fair.

11 And in 30 years of private practice, it
12 never happened to me until I got to the State, and
13 this is the second time it's happened to me. And it
14 -- It's just not -- It's not appropriate.

15 Q. Did you ever get a call about this email or
16 about the proposed temporary restraining order?

17 A. No.

18 Q. Did you --

19 A. I got -- I got a call from --

20 And -- and I am sorry. I am going to mess
21 up your name. Miss -- ma'am.

22 I got a call from her, I believe, on
23 Wednesday asking what our intentions were, how to
24 handle this hearing. That's all.

25 Q. And would that be Wednesday of this week?

1 A. Yes.

2 Q. So that would be August 28th?

3 A. Correct.

4 Q. Okay. And you're referring to Miss Boland
5 Aarab; is that right?

6 A. Yes.

7 And I am sorry. I didn't -- I don't want to
8 screw up your name.

9 Q. So getting back to the date of this
10 purported email.

11 Where were you on Thursday, August 22nd, at
12 4:10 p.m.?

13 A. I was probably somewhere between Augusta and
14 Choteau.

15 And by the way, Your Honor, if you never go
16 hiking into Medicine Grizzly, it is outstanding.

17 Q. Where were you going?

18 A. We were going to -- My house is at Essex,
19 Montana. And -- and it's -- it's my happy place.
20 And that's where we were headed.

21 Q. Were you checking email?

22 A. No. In fact, you know, when I get away from
23 the job, and I am -- I put my 40 hours in, I am -- I
24 am -- the last thing I want to do is check my email
25 or my cell phone, as everybody knows.

1 Q. Do you have Outlook or email on your phone
2 to access email that way?

3 A. No. And I wouldn't even know how to do
4 that.

5 Q. Did you have your laptop with you?

6 A. I did have my laptop with me just in case --
7 Sometimes you call me or somebody calls me, and then
8 I need to something. But --

9 Q. But you weren't opening it that day?

10 A. I -- I was not. I was --

11 Q. At that point?

12 A. I was outside of -- of cell range and -- and
13 computer range.

14 Q. So did you see this email on
15 Thursday, August 22nd?

16 A. No.

17 Q. When did you see it?

18 A. I saw it yesterday when it came to my
19 attention via the -- the reply.

20 Q. On Thursday, August 22nd, were you the
21 attorney of record in this case that's referenced in
22 the email?

23 A. No. I didn't even know this case existed.

24 Q. Are there cases in your office, your current
25 office at Department of Justice, where you are not

1 the attorney of record?

2 A. Several.

3 Q. Is there any way someone suing the State
4 would know prior to attorneys entering appearances
5 who the attorneys of record were?

6 A. No.

7 Q. Did you have an agreement in writing with
8 Miss Boland Aarab, who sent that email to return --
9 to receive service by email?

10 A. No. I -- I didn't even know --

11 Q. Or receive notice by email?

12 A. I didn't know who she was prior to this,
13 prior to this case.

14 Q. Had you ever discussed the proposed
15 temporary restraining order with her?

16 A. No.

17 Q. How did you eventually become aware of this
18 motion?

19 A. I -- By the -- Once we got back on Monday --
20 I got back into the office Monday, and I became aware
21 of the -- this case had been filed and that there was
22 a -- a temporary restraining order. That's the --
23 That's the way I became aware.

24 Q. In your experience, what was your practice
25 with respect to written notice?

1 A. I -- You -- If -- I mean -- And I'm old
2 school, and I'm -- Thank God I am because written
3 notice means I provide notice, and I -- I hand it to
4 somebody or mail it to somebody. In this day and
5 age, yes, it's email. But if -- if I don't get a
6 response from somebody, I -- I get -- I pick up the
7 phone and do a courtesy call. It's just the right
8 thing to do.

9 Q. In your experience where there has been
10 electronic service such as by email, has there been
11 an agreement in writing to allow such notice?

12 A. I mean, I -- I make that practice because I
13 think it's -- I think that's really important, that
14 there be an agreement that we -- I -- "Okay. I am --
15 I am going to accept email service," then I know it.

16 But, I mean, you just can't get shot by this
17 stuff. It's not -- It's not right.

18 Q. And you have no such random agreement in
19 this case?

20 A. Correct.

21 Q. What was your practice with respect to
22 service?

23 A. Well, if -- if I -- My practice would have
24 been I would put the -- the TRO motion and -- and the
25 brief and the proposed order with the summons and

1 complaint and had it served. That's -- I mean, I
2 have learned the hard way about ex parte motions.
3 And once you have learned the hard way and you have
4 been educated by opposing counsel, you -- you try to
5 avoid them, frankly. There -- And there is a reason
6 for the -- that they should be strict.

7 Q. What is that reason?

8 A. Because there is a lot of pitfalls. And
9 you're -- you're having the Court issue an order
10 without notice. And -- and I get there is times when
11 that's appropriate. But -- And there is a reason why
12 there is so much scrutiny in ex parte orders. It's
13 because you are doing something without notice. I
14 mean -- And the notice comes after the fact, and
15 there has already been an action by the Court.

16 So when -- My practice has been -- And
17 frankly, Cliff Hayden educated the heck out of me on
18 -- on ex parte orders, is -- is give notice. Give
19 actual notice to opposing counsel.

20 And -- and it -- I mean, it's easy to --
21 Even if I wasn't in the office, we have a -- we have
22 people at the front desk that are always there. Call
23 us. They know how to get ahold of me. They would
24 have -- They would have texted me on my phone, and I
25 would have said, "Okay. Yeah. Okay. I appreciate

1 that." Then I would have got on my computer.

2 Q. Do you know of any such call was made?

3 THE COURT: Miss Lansing, I am sorry to
4 interrupt.

5 How much longer do you have for direct?

6 MS. LANSING: I'm almost done.

7 THE COURT: Okay. Thank you.

8 MS. LANSING: Like, a couple questions.

9 THE COURT: Thank you.

10 BY MS. LANSING:

11 Q. Were you aware of any such phone calls about
12 this motion?

13 A. No, I was not.

14 MS. LANSING: Okay. Thank you. I have no
15 further questions.

16 THE COURT: All right. Mark, 15 minutes?

17 THE REPORTER: That would be great. Thank
18 you, Judge.

19 THE COURT: Okay. So we'll -- we'll, for
20 Mark's benefit, we'll reconvene at 10:47, please, and
21 then Miss Boland can start cross-examination.

22 (Proceedings were in recess from 10:32 a.m.
23 to 10:49 a.m.)

24 THE COURT: Go back on the record in
25 BDV 2024-542. Plaintiff is present through its

1 counsel. Defendant is present through their counsel.

2 Intervenor is present through its counsel.

3 Mr. Johnson, I am not trying to impugn your
4 integrity. I have to say this to every witness.

5 After a break, you are still under oath.

6 Thank you.

7 Miss Boland?

8 MS. BOLAND: Thank you, Your Honor. We'll
9 keep it brief.

10

11 CROSS-EXAMINATION

12 MS. BOLAND: Good morning, Mr. Johnson.

13 THE WITNESS: Good morning.

14 BY MS. BOLAND:

15 Q. When you were hiking with your wife, would
16 you have had cell coverage?

17 A. No.

18 Q. And would you have been -- Would a
19 process server have been likely to find you somewhere
20 in the mountains?

21 A. God, I hope not.

22 Q. You have since read the temporary
23 restraining order signed by Judge Seeley; is that
24 right?

25 A. I read it on Monday.

1 MS. BOLAND: Okay.

2 THE WITNESS: The -- I guess I -- I'm trying
3 to think what day that would have been, but -- of
4 this week.

5 BY MS. BOLAND:

6 Q. Okay. And so you're aware that -- And I am
7 just going to read this sentence to you. I want to
8 know if -- if this is your awareness of what the
9 order says.

10 "The Secretary of State, her agents,
11 officers, employees, successors, and all persons
12 acting in concert with each or any of them, and the
13 State of Montana are hereby temporarily stayed and
14 enjoined from certifying a Green Party candidate or
15 otherwise allowing a Green Party candidate to appear
16 on the ballot for the 2024 general election for
17 U.S. Senate until and unless this Court orders
18 otherwise following the below ordered hearing."

19 Is that your recollection of what was
20 enjoined?

21 A. I mean, I -- I read the order. So then I
22 think the order speaks for itself.

23 Q. And are you aware that the order was entered
24 at 7:57 p.m. on Thursday, August 22nd?

25 A. I -- I was aware on Monday morning when --

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1 when I read it. I -- I believe it was even at our
2 meeting at 11:00 until I -- that's when I learned of
3 the -- of the lawsuit.

4 Q. Well, but your awareness is different than
5 -- than the time it was actually signed.

6 Do you have any reason to dispute that it
7 was signed according to the file stamp at 7:57 p.m.
8 on Thursday, August 22?

9 A. I respect Judge Seeley, and I -- I respect
10 her very much, and I think when she signed it, she
11 signed it. And I respect the Court. And the Court
12 would have a filing date and filing time.

13 MS. BOLAND: Very well.

14 Thank you, Your Honor.

15 THE COURT: Mr. James?

16 MR. JAMES: No questions, Your Honor.

17 THE COURT: Mr. Cameron?

18 MR. CAMERON: No questions, Your Honor.

19 THE COURT: Miss Lansing, any re-direct?

20 MS. LANSING: No re-direct, Your Honor.

21 THE COURT: Thank you, sir.

22 Was he subpoenaed?

23 THE WITNESS: No.

24 MS. LANSING: No.

25 THE COURT: Okay. Thank you.

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1 Any other witnesses?

2 MS. LANSING: No, Your Honor.

3 THE COURT: All right. So we'll take up
4 argument on the motion.

5 MS. LANSING: Thank you.

6

7 ARGUMENT BY MS. LANSING

8 MS. LANSING: Notice is a critical component
9 of fairness in litigation. It allows a litigant to
10 put on his defense of his position. And without it,
11 he is prejudiced without hope of returning to a fair
12 and level playing field to the litigation. The State
13 did not have notice. The ex parte TRO must be
14 dissolved.

15 There is a clear process to follow. It is
16 set forth in Montana Code Annotated,
17 Section 27-19-315. (2) provides if the State, the
18 state's departments, agencies, or political
19 subdivisions or officers of the state or political
20 subdivision acting in their official capacities or
21 the adverse party, a temporary restraining order may
22 not be granted unless, "A," notice could not be
23 provided through no fault of the moving party, or the
24 suit is brought pursuant to Title 40.

25 No such notice was provided to the State or

1 the Secretary of State. A belated email after the
2 filing was already filed, the filing being the motion
3 for the temporary restraining order, the brief in
4 support and the proposed restraining order, a belated
5 email after the filing addressed to the clerk is not
6 written notice.

7 Plaintiffs contend that because Mr. Johnson
8 and Mr. James were happened to be cc'd on this email
9 that that was written notice. Mr. Johnson and
10 Mr. James were not attorneys of record at that time,
11 and it would be nothing but speculation for Plaintiff
12 to assume that they were. There were no attorneys of
13 record at that time nor any agreement in writing to
14 receive electronic service.

15 The evidence shows that neither
16 Thane Johnson nor Austin James saw the email or
17 became aware of it until after the temporary
18 restraining order had been erroneously issued without
19 notice to the State or the Secretary of State.

20 Mr. Johnson, as was his practice, didn't
21 open an email from an unfamiliar address on an
22 unknown case when he returned from Madison Grizzly
23 Lake. Mr. James did not see it either, as he was
24 working diligently to get the ballot certified by the
25 statutory deadline.

1 Suffice it to say an email sending a
2 courtesy copy of a TRO motion to the clerk cc'ing
3 random state attorneys who are not attorneys of
4 record at that time regarding an unknown case where
5 there was no electronic service agreement is not
6 notice.

7 Plaintiff's brief claims that the
8 certificate of service said the motion in brief for
9 the temporary restraining order were duly served by
10 electronic mail, but the State and the
11 Secretary of State never agreed to that.

12 Maybe if Mr. Johnson or Mr. James had
13 responded to the email, Plaintiff could claim there
14 was notice. Or if Plaintiff's counsel had spoken to
15 Mr. Johnson and Mr. James on the phone and notified
16 them of the motion for the temporary restraining
17 order or determined who the counsel of record was and
18 spoken to them because, as noted, Mr. Johnson and
19 Mr. James were not counsel of record at the time of
20 that email.

21 None of these things occurred, and this is
22 not a Title 40 case or an instance where Plaintiff
23 could not give notice for some reason. The statute
24 is clear. Plaintiff needed to give the State notice
25 of the motion for the TRO, and Plaintiff did not. To

1 allow this ex parte TRO to stand in the face of a
2 clear violation of the statute and the procedure
3 would be an injustice.

4 The TRO must be dissolved.

5 THE COURT: So let's just move it down the
6 road. Let's say the Court agrees and grants the
7 motion. All they have to do is refile this action,
8 and we're back to square one.

9 For judicial economy purposes, I find it to
10 be a little difficult especially since the hearing
11 was set so quickly. I didn't change the hearing
12 date. Judge Seeley set the hearing date.

13 I mean, let's just be practical about this.
14 I understand the motion. I certainly agree that
15 27-19-315(2) probably wasn't followed. But let's
16 just be practical if we can. Somehow, some way the
17 Court's going to make a decision. I mean, this is
18 going to be brought back up. If I dissolved it, say
19 "You're done," all it takes is, what is it? \$120 now
20 to file another case? And we're right back here.

21 So tell me from judicial economy standpoint
22 -- You may have won the -- the battle, but, you know,
23 we still got the war to fight.

24 MS. LANSING: I can --

25 THE COURT: Am I missing something?

1 MS. LANSING: I can appreciate that
2 perspective, Your Honor. Absolutely understand
3 judicial economy.

4 However, there is countervailing
5 consideration here that can't be overstated, which is
6 the fairness underlying the rules. There's a reason
7 why we have rules and procedure, and it really
8 creates a slippery slope if on this one case we just
9 let it slide even though Plaintiff clearly didn't
10 follow the rules.

11 And this couldn't be more serious. This is
12 a case involving a candidate being on the ballot or
13 not.

14 THE COURT: No. I mean, I -- I get all
15 that. But Mr. James just got done telling me all the
16 deadlines that his office has to file, the election
17 administrators have to file, and all I am doing is
18 kicking the can down the road to have another day.
19 And bow season starts on September 7th. That's all I
20 am saying.

21 MS. LANSING: I understand, Your Honor. I
22 think that actually highlights the issue of
23 Plaintiff's position and TRO and any injunctive
24 relief, really, in this case, and that goes back to
25 some of the substantive arguments that Mr. James and

1 Mr. Cameron both made earlier, including the mootness
2 argument. There is a significant mootness issue at
3 this point. The ballot has already been certified
4 and -- and sent out and is in the process of getting
5 into the hands of our military voters.

6 And to -- to get back to some of the
7 equitable arguments earlier, they -- they're also at
8 play here, and that's always a consideration the
9 Court can consider.

10 To undue, essentially undue the
11 certification at this point and try to claw back
12 untold ballots from our military voters overseas
13 would absolutely wreak havoc, and that would be the
14 effect of allowing Plaintiff's suit to move forward
15 and get the -- the injunctive relief that it's
16 seeking.

17 And so I understand what Your Honor is
18 saying, that you could dissolve the TRO, the
19 plaintiff could simply refile, and then we would
20 still have the same arguments that we are making
21 today. And that may be true, but it would be an even
22 more egregious time for Plaintiffs to bring that when
23 the ballots are already out and on their way to the
24 voters. And that's simply not -- not something that
25 is supported by evidence or the law or the facts of

1 this case for the Court to do. And Plaintiffs don't
2 have any of that support for their argument.

3 THE COURT: Okay. Let's --

4 MS. LANSING: As for --

5 THE COURT: Let's take it -- Let's take it
6 one step farther.

7 If the Court denies the preliminary
8 injunction request, and if I do that, then the TRO is
9 out.

10 Are you saying I shouldn't even do that? I
11 should just grant the motion to dismiss and let you
12 guys start all over again?

13 MS. LANSING: No, Your Honor. I -- I think
14 that why the motion to dissolve is so important here
15 is, as I was saying earlier, this is about holding
16 Plaintiff, like all other litigants, to the rules so
17 that we have fairness and litigation. And this a due
18 process issue.

19 THE COURT: I get all that. I -- I
20 understand. I --

21 MS. LANSING: Yes.

22 THE COURT: I really do. I am not arguing
23 with you. I'm just --

24 MS. LANSING: I understand that, Your Honor.
25 I'm -- I'm trying to -- to address Your Honor's

1 question.

2 THE COURT: You were probably here when we
3 had -- I had to continue a criminal trial. And that
4 poor man has to wait till March. The Courts are
5 busy.

6 MS. LANSING: Absolutely understand that,
7 Your Honor.

8 Well, I think that the Court should dissolve
9 the TRO and deny the preliminary injunction because
10 for the reasons already stated about the TRO.

11 And as my colleagues have argued about the
12 preliminary injunction, the -- the plaintiff can't
13 succeed on the merits here, but we also have
14 significant procedural defects that can't be ignored.
15 That's why the motion to dissolve is important in
16 this instance. And it really does come back to
17 fairness and notice and all of those fundamental
18 precepts of our system, which Your Honor has
19 addressed.

20 THE COURT: And please don't get me wrong.
21 I am not trying to play light with your -- your
22 motion. I am just trying to take the blinders off
23 here and see where we will be if I grant it, okay?
24 So I appreciate your understanding in that regard.

25 MS. LANSING: Thank you, Your Honor. I have

1 nothing further unless the Court has further
2 questions.

3 THE COURT: Thank you.

4 MS. LANSING: Thank you.

5 THE COURT: Miss Boland?

6

7 ARGUMENT BY MS. BOLAND

8 MS. BOLAND: Thank you, Your Honor. Very
9 simply, the restraining order that Judge Seeley
10 signed was granted without notice.

11 No. Let me back up.

12 It is of the kind of TRO that can be granted
13 without notice. But rather than explain to the Court
14 why I wasn't able to give the Secretary or the
15 attorney general notice, I instead gave them notice
16 as fast as I could. And the fastest way to do it --

17 THE COURT: How?

18 MS. BOLAND: -- was email.

19 THE COURT: Okay. Who did you email?

20 MS. BOLAND: I emailed Mr. James and
21 Mr. Johnson.

22 THE COURT: You copied them on the email to
23 Miss Looney, who was Judge Seeley's scheduling clerk.

24 MS. BOLAND: That's right. And I -- I --

25 I --

1 THE COURT: So you're saying that's the
2 notice of the Montana legislature in 2023 in
3 revamping the injunctive law in Montana? That's --
4 That satisfies 27-19-315(2)?

5 MS. BOLAND: Notice is notice, Your Honor.
6 And -- For context -- In the context of a -- of a
7 e-filing system, when you file a complaint and the
8 proposed summons, it takes an hour or so for the
9 clerks to process it.

10 So after you file the complaint, you don't
11 know your judge or your cause number or, certainly
12 not, you know, the attorneys who might be on the
13 opposing side. You don't have that that information
14 yet. So it is not the case that I could have filed
15 the motion for a TRO in conjunction with the
16 complaint. The system doesn't allow that.

17 As soon as I get the complaint --

18 THE COURT: Hold on. Hold on. Hold on.

19 What about before you filed you pick up the
20 phone, call Secretary State's office, speak to its
21 counsel, call the attorney general's office, speak to
22 its counsel, they've got lots of them, and say, "This
23 is what I am doing"?

24 Wouldn't that have been -- Wouldn't that
25 have satisfied the statute?

1 MS. BOLAND: Your Honor, I'm sure there are
2 multiple ways to satisfy the requirement of notice.
3 We hand served them with a complaint and a summons in
4 this case. They knew at whatever the time in the
5 briefing says, 4:00 o'clock something, that this suit
6 was out there. And before they -- or -- or at least
7 in conjunction with the receipt of the suit by
8 process server, they also get the email from me that
9 says, "Also, here's this motion for -- for a
10 preliminary injunction and a TRO."

11 Returning to the equities as a -- as a final
12 point, Your Honor, this TRO is in place, and it will
13 be in place until the Court issues its order on the
14 preliminary injunction. And the Court should issue
15 that order because the -- the concern about the
16 certification of ballots and the printing that may
17 already have happened, that came after the TRO was
18 issued in this case, enjoining the Secretary from
19 certifying or putting Robert Barb on the ballot.

20 And so this is a -- a fiasco of the
21 Secretary's own making, and a preliminary injunction
22 would return us to the status quo prior to her
23 certification.

24 Thank you.

25 THE COURT: Thank you.

1 Mr. James, I know it's not your motion, but
2 I -- just for the record, I have to see if you have
3 any arguments you want to make.

4 MR. JAMES: Unless you have any questions
5 from me, Your Honor, I -- I do not.

6 THE COURT: Okay. Mr. Cameron?

7 MR. CAMERON: Very briefly, if I may?

8

9 ARGUMENT BY MR. CAMERON

10 MR. CAMERON: Counsel just indicated that
11 she gave notice as fast as she could. Well, it
12 wasn't notice because it was an email, which doesn't
13 meet the requirements of Rule 5.

14 I just want to point out, as counsel
15 indicated, at four -- the email went to
16 Judge Seeley's clerk at 4:10 p.m. That's in the
17 record. At 4:19 p.m., the same day, counsel sent a
18 process server to the Secretary of State's office
19 with a summons and complaint and no application for a
20 TRO and none of that. So it seems --

21 I'm -- I'm having trouble understanding how
22 counsel can say notice was provided as fast as
23 possible when counsel sent a process server over at
24 4:19 p.m. but did -- but did not include in that
25 package the request for TRO and the -- and the draft

1 TRO.

2 And one other final point. The -- yeah --
3 deadlines and procedures do exist for a reason. And
4 if we -- If we start down the slippery slope counsel
5 referred to, then perhaps we should also say, "Well,
6 let's give the Green Party a -- an additional two
7 weeks in order to certify a name for a ballot, have a
8 meeting if that's what the Court would order," but we
9 can't do any of that.

10 So that's all I have.

11 THE COURT: Thank you.

12 Miss Lansing, you get the final word, ma'am.

13 MS. LANSING: I have nothing further. Thank
14 you, Your Honor.

15 THE COURT: Thank you.

16 Mr. Cameron, have we addressed all your
17 motions as well, sir?

18 MR. CAMERON: We have a pending motion to
19 dismiss --

20 THE COURT: Would you --

21 MR. CAMERON: -- which is -- which is not
22 fully briefed yet. But I -- I think the merits
23 arguments have been made today.

24 THE COURT: Okay. I know -- I even know
25 that Miss Lansing's motion is not fully briefed. But

1 if you want to have argument, this would be the time,
2 I would suggest.

3 MR. CAMERON: I think that --

4 THE COURT: Is the -- Is -- Are you ready
5 for arguments on -- I mean, you filed the response
6 brief. I saw that.

7 MS. BOLAND: Your Honor, I think we have
8 adequately addressed the merits of Mr. Cameron's
9 motion to dismiss.

10 MR. CAMERON: I agree. And I -- I believe
11 at this point it could be considered submitted on
12 briefs.

13 THE COURT: Thank you.

14 I am just searching -- We have this new
15 FullCourt Enterprise system on document management.

16 When that motion for temporary restraining
17 order was filed, the time -- I don't have the time.
18 I do see that it was represented that written notice
19 was provided to the defendants. And as I understand
20 your argument, the written notice is the email to
21 Ms. Looney; correct?

22 MS. BOLAND: Yes, Your Honor.

23 THE COURT: All right. Anything else from
24 the plaintiff that needs to be addressed before we
25 close the hearing?

1 MS. BOLAND: No, Your Honor. Thank you.

2 THE COURT: Mr. James?

3 MR. JAMES: No, Your Honor.

4 THE COURT: Miss Lansing?

5 MS. LANSING: No, Your Honor.

6 THE COURT: Mr. Cameron?

7 MR. CAMERON: Nothing further, Your Honor.

8 THE COURT: All right. Thank you so much
9 for your hard work and your diligence in meeting the
10 strict deadlines that were set for purposes of this
11 hearing. I applaud counsel's efforts. I appreciate
12 your hard work, and we'll get an order out as soon as
13 possible.

14 Thank you.

15 (The proceedings concluded at 11:08 a.m.)

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REPORTER'S CERTIFICATE

I, Mark Nikkel, an Official Court Reporter,
residing in the City of Helena, State of Montana,
hereby certify:

That prior to being examined, the witnesses
named in the foregoing proceeding were sworn to
testify to the truth, the whole truth, and nothing
but the truth;

That the said proceeding, taken down by me
in stenotype, was thereafter reduced to typewriting
by computer-aided transcription under my direction
and is a true record of the testimony given.

I further certify that I am not in any way
interested in the outcome of this action and that I
am not related to any of the parties thereto.

Witness my hand this 6th day of
September 2024.

/s/ Mark Nikkel

CERTIFICATE OF SERVICE

I, Robert Cameron, hereby certify that I have served true and accurate copies of the foregoing Brief - Intervenor to the following on 09-09-2024:

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