FILED
08/12/2020
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 20-0396

IN THE SUPREME COURT OF MONTANA

DA 20-0396

STATE OF MONTANA, By and through its
SECRETARY OF STATE, COREY STAPLETON,
Appellant,
v.

MONTANA DEMOCRATIC PARTY, TAYLOR BLOSSOM,
RYAN FILZ, MADELEINE NEUMEYER,
and REBECCA WEED, individual electors,
Appellees.

APPELLANT'S OPENING BRIEF

On appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. CDV-2020-856, the Honorable James Reynolds, Presiding.

AUSTIN JAMES
Chief Legal Counsel
Secretary of State's Office
P.O. Box 202801
Helena, MT 59620-2801
406-444-2034
Austin.James@mt.gov
Attorney for Defendant/Appellant

MATTHEW T. MEADE
Smith Oblander & Meade, PC
P.O. Box 2685
Great Falls, MT 59403-2685
matt@bigskylaw.com
Attorney for Defendant/Appellant

Matthew Gordon
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
mgordon@perkinscoie.com
Attorney for Plaintiffs/Appellees

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
mike@meloylawfirm.com
Attorney for Plaintiff/Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUES PRESENTED

1. When does the "Final Act" of § 13-10-601(2) occur which presented the deadline for all withdrawals from the Petition to be submitted?
2. Did the Plaintiffs demonstrate, clearly and convincingly, that material facts regarding the Petitions itself were misrepresented or fraudulent?
3. Do electronic signatures i.e. Docusign satisfy the formality requirements required to withdraw a signature from a Petition under state law?

STATEMENT OF THE CASE

Two years ago, this Court expressly stated that § 13-10-601(2), Mont. Code Ann., clearly defines precise statutory processes and standards for political parties to become eligible to nominate candidates for public office. The Court further stated the final act of the process was certification by the Secretary. State and county election officials rely upon the plain language of Title 13, and this Court's interpretation of Title 13 to administer the elections in this state.

When local administrators asked the Secretary for the final date a signer may withdraw from a petition authorizing a minor party to conduct a primary, Title 13 provided the answer for state election officials. Since

nearly statehood, this Court has been clear: the right to withdraw ends when the final action on the petition is complete. The final act occurs once statewide tabulation is complete, and the petition is certified. The precise statutory processes and standards have all completed in this particular case.

Following the completion of tabulation, the Secretary ensured that not a single request for removal remained in any of Montana's 56 counties—nor his office. Per the guidance of this Court, at that time, the allowable time to withdraw from the Petition concluded.

The District Court mistakenly analogized the current situation to an issue before the Wisconsin Supreme Court, which held the government prematurely cut off the right to withdraw from an annexation petition before a council's vote. On this basis, the District Court held that withdrawals must be allowed until after the primary election. However, under Wisconsin law, the final procedural step to annexation was the body's vote. Whereas here, the final procedure for primary eligibility in Montana is certification by the Secretary. The Wisconsin case follows the Montana procedure consistently reiterated by this Court which is that the signer has the right of withdrawal until the final. Where Wisconsin and Montana law differ is what the final act is. One such reiteration, rejected

withdrawals despite the allegation of fraud because they were too late. *State ex rel. Peck v. Anderson* 92 Mont. 298, 13 P.2d 231 (1932).

In *State ex rel. Peck v. Anderson,* the Court acknowledged that clear and convincing evidence of fraud in the contents of the petition could permit the judiciary to step in. *Id.,* at 306, 234. The Court provided examples such as the forgery of signatures.

The record from the underlying hearing is devoid of any evidence that the contents of the petition were misrepresented, or signatures were forged. The Court has never held that petition circulators are required to disclose financial backers of their efforts. In fact, the United States Supreme Court has held that requiring petition signature gatherers to wear badges disclosing their names, whether they were paid, and who their employer was violated the Constitution. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S. Ct. 636 (1999). Simply put, in this instance signers agreed with the contents of the petition, which was accurately relayed to them.

The State of Montana must appeal. If allowed to stand, the State will be inundated with lawsuits in addition to its obligations to administer

elections.[1] The District Court's decision cripples state and local election officials ability to send out military, overseas, and absentee ballots, to notify minor party candidates that they are eligible to file, provide prompt election results, and rein in election costs when withdrawals and signatures might necessitate multiple printing of ballots.

The right to withdraw is not limited to minor parties. In fact, the right to withdraw is not limited to elections. The right to withdraw applies to all actions by government requiring a number of citizens to endorse an action in order for the government to move forward, unless the legislature speaks otherwise. To be clear, the Secretary of State is not before the Court to represent a major political party against another major political party. The Secretary of State is here on behalf of the State of Montana to ask the Court to uphold a century old doctrine because the unprecedented ruling by the District Court reshaped the general rule, and will in turn produce lawsuits involving zoning, recall of public officials, petitions, and initiatives.

[1] Amidst working on this brief, the Secretary of State was already notified of a new federal lawsuit over this very issue.

STATEMENT OF FACTS

On Friday, March 6, 2020, staff of the State's Voter and Election Services division reported to their department head that they had completed a petition to qualify the Green Party as a minor party eligible for primary election under § 13-10-601 (2), Mont. Code Ann. ("Petition"). The Secretary does not have a way of knowing the exact time and day when the final forwarded sheet of any petition will arrive. Approximately 19,000 people signed the petition, of which approximately 13,000 were accepted as being valid and forwarded to the Secretary. Trs. vol. I 234:13-17.

Once the Petition is received, it is impossible to predict how long it will take to finalize statewide tabulation. But when that occurred for the Petition, the State tabulated all verified petition signatures and accounted for all that wanted to be removed. Before presenting the petition to the Secretary, the director ensured county offices did not have any remaining withdrawal requests in their possession. Trs. vol. I 233:1-24. With everything submitted accounted for, the Secretary was presented with a Petition satisfying the requirements for the minor party's eligibility to hold a primary. *Id.*

In February, the Montana Democratic Party ("MDP") hired an outreach team to contact petition signers, indicating that a conservative dark money group was behind the green party petition. Trs. vol. I 147-152.

The outreach effort resulted in over 150 signers removing their name from the Petition, before the Petition was certified.

Some county officials asked the Secretary whether withdrawal requests may be honored after the deadline to add additional signatures has passed. Trs. vol. II 316:10-14. The deadline to submit new signatures on the Petition occurred on March 2. Mont. Code Ann. § 13-10-601(2)(c). The Secretary instructed counties to time and date stamp all requests, as signers are entitled to remove themselves until final determination of the petition by the State. *Id.* Election officials accounted for all withdrawals submitted before, during, and after county and statewide tabulation. Trs. vol. II 584:12.

Once declared eligible on March 6, 2020, green party candidates had a single business day to file with the state. Trs. vol. I 232:10. By the close of business on March 9th, six individuals filed to run as green party candidates. Trs. vol. I 240:6. At that time, MDP requested all withdrawals in connection with the green party certification. Trs. vol. I 135. At trial, MDP testified to also purchasing a copy of the petition signers report[2], a

[2] The Petition Signers Report is a report generated by the counties. The Secretary of State does not have administrative capability to edit the report.

disclaimed,[3] generated report of the county tabulation, purchased online from the State. Trs. vol. I 63.

Statute requires the Secretary of State to determine whether a primary for a party eligible to conduct the same is necessary. Mont. Code Ann. § 13-10-209. Due to the number of declared green party candidates for the U.S. Senate race, it was. Had one fewer declared, a primary would have unnecessary, and the nomination of the candidates would instead have been certified to the general election ballot. Trs. vol. I 27-28.

Unexpectedly, in April, county election officials received emails from MDP staff containing electronically signed withdrawal forms. P's Ex. 4. In some cases, officials communicated the request was too late, in others the officials forwarded the email to the Secretary for archive purposes. Trs. vol. II 375. Occasionally, counties received similar emails after the fact including: a handful in May, and the day before the primary election. *Id.*

A few days after the primary election, the Secretary was served with this lawsuit along with an *ex parte* order to show cause. Dkt. No. 3, 4. The order, which says it was based upon the Complaint and "motion", was granted, despite that no motion or application for preliminary injunction

[3] The Petition Signers Report download link contains a disclaimer stating the report generated is a live system that changes as counties input data. While some counties updated the report based on withdrawals accepted after county certification, others did not.

was ever filed. *Id.* Under the UDJA, the lawsuit alleged the right to withdraw from a petition is absolute, and if considered, the Secretary was obligated to declare the green party no longer eligible to conduct a primary under § 13-10-601(2). Dkt. No. 1, ¶88-89. In later pleadings, MDP expanded their complaint to add that withdrawals precluded by law should be given effect upon a showing of evidence of fraud in the contents of the petition. Dkt. No. 14.

The Secretary's witness provided testimony at trial was about the convenience, security concerns, and of electronically signed withdrawals. Findings of Fact, Conclusions of Law and Order, Dkt. No. 85 (hereafter "FOF" for findings of fact or "COL" for Conclusions of Law), FOF ¶80-82. Trs. vol. I 268-273. As stipulated by the parties, requiring the agency to accept electronically signed withdrawals is dispositive. Individual plaintiffs testified wanting to allow the Green Party on the ballot even though all were planning on voting for MDP candidates. *Id.*, at 145.

STANDARD OF REVIEW

A District Court's conclusions and applications of law are reviewed *de novo* for correctness. *Montanans for Justice v. State*, 2006 MT 277, ¶ 20, 334 Mont. 237, 146 P.3d 759. A district court's conclusions of law are

reviewed for correctness. *Sandrock v. DeTienne*, 2010 MT 237, ¶ 13, 358 Mont. 175, 243 P.3d 1123. Likewise, the standard "pertaining to a declaratory judgment is to determine if the court's interpretation of law is correct." *Roe v. City of Missoula*, 2009 MT 417, ¶ 15, 354 Mont. 1, 221 P.3d 1200. We review district court findings of fact for clear error. *Montanans for Justice v. State*, 2006 MT 277, ¶ 19, 334 Mont. 237, 146 P.3d 759.

A finding of fact is clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or we are convinced upon our review of the record that the district court was mistaken. *Montanans for Justice*, ¶ 19 (citing *Petitioners I-549 v. Missoula Irrigation Dist.*, 2005 MT 100, ¶ 8, 326 Mont. 527, 111 P.3d 664). A district court's issuance of an injunction will be reversed if there has been a "manifest abuse of discretion." *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶¶ 11–12, 319 Mont. 132, 82 P.3d 912 "A 'manifest' abuse of discretion is one that is obvious, evident or unmistakable." *Id.* at ¶ 12.

ARGUMENT

I. THE SECRETARY HONORED THE ABSOLUTE RIGHT TO WITHDRAW BEFORE THE "FINAL ACT."

Over a century ago, the Montana Supreme Court adopted the general rule that where a certain number of electors is required to initiate proceedings for a public purpose, any person signing the petition has an

absolute right to withdraw his or her name at any time before the person or body created by law to determine the matter submitted by the petition has finally acted. *Ford v. Mitchell*, 103 Mont. 99, 114, 61 P.2d 815, 822 (1936); *State ex rel. Freeze v. Taylor*, 90 Mont. 439 4 P.2d 479, 481 (1931). The right to withdraw under the general rule (hereafter "The Rule") does not apply if the legislature expresses otherwise. *Id.*

The Secretary honored the right of a signer to withdraw at any time before the final act specified by this Court occurred. The District Court erred by holding that a right to appear on the general election ballot is defined by the statutory process set forth in § 13-10-601(2). However, the process set forth in § 13-10-601(2), Mont. Code Ann., is for primary eligibility alone.

A. Any person signing the petition had an absolute right to withdraw until the final act occurred. Under clear precedent, the final act in this matter is when the Secretary finally determined the subject political party was eligible to conduct a primary election.

Since 1913, under The Rule, the right to withdraw exists until final determination of the petition. *State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 P. 297 (1913); *Ford*, 103 Mont. at 117, P.2d at 823 ("We therefore hold the right to withdraw exists until the Secretary of State has finally determined, in the manner provided by statute, that the petition is sufficient.")

As indicated previously by this Court, § 13-10-601(2), Mont. Code Ann., clearly defines precise statutory processes and standards for political parties to become eligible for public office. *Larson v. State*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241. Two years ago, this Court noted:

> Upon receipt of the forwarded petition sheets, affidavits, and county certifications, the secretary of state must "consider and tabulate" the verified petition signatures and then, upon determining that the petition includes the requisite numbers of verified signatures, **certify the subject political party as eligible to nominate candidates for public office on the upcoming primary election ballot**.

Id., ¶ 3 (emphasis added).

Once a political party petition is presented to the Secretary in satisfaction of § 13-10-601(2)(b), the Secretary completes the final act of the duties prescribed:

> By express specification and incorporation by reference, § 13-10-601(2), MCA, clearly defines precise statutory processes and standards for political parties to become eligible to nominate candidates for public office. Section § 13-10-601(2), MCA, imposes specific administrative duties on county election administrators (signature verification, county tabulation, and certification) and the secretary of state (review of county certifications, statewide tabulation, and petition certification).

Larson, ¶ 26.

By holding the matter submitted upon the petition, rather than certification by the Secretary, the District Court concluded a person has an

absolute right to withdraw even after the Secretary—the person created by law to determine the matter—finally acted. The District Court is incorrect.

The District Court determined "[t]he political party qualification statute makes no mention of certification by the Secretary, to the Governor or to anybody else, and no other statute delegates certification authority to him." COL ¶11, p. 34, ¶11. This determination contradicts precedent and the application of The Rule. *Larson*, ¶ 25 (If upon tabulation the petition is sufficient, "the secretary shall certify the subject political party as eligible")(*emphasis added*).

The Rule does not permit a withdrawal of a signature after the final determination of the petition required by law to initiate a public process. As explained below, the final determination of the petition is whether a minor party is eligible to use the state primary procedure. The District Court acknowledged:

> The act of submitting a political party qualification petition simply authorizes a political party to use the state-administered procedure of a primary election to determine whether to nominate candidates and which candidates to nominate.

COL ¶16.

Despite the Court's own conclusion that a minor political party's eligibility to participate in the primary *is* the matter submitted by the

petition, the Court failed to recognize the Secretary's determination as the final procedure of the law which requires submission of the petition.

The Secretary accounted for all withdrawals submitted during signature verification, county tabulation and certification, the Secretary's review of county certifications, and statewide tabulation. Upon completion of statewide tabulation, the Secretary verified the accounting of all withdrawal requests submitted statewide, and certified the Petition, which constituted the final act by the final actor of the precise process and standard for political parties to become eligible.

The right to withdraw under the Rule is limited to "an appropriate manner and at the proper time." *Ford*, ¶ 114. As noted by this Court in 1931, "[n]one of the authorities recognize the right to withdraw from the petition after the same has been finally acted upon by the person or board." *State ex rel. Freeze,* 90 Mont. at 445, 4 P.2d at 481. Except for the lower court, no court has since.

It was not a choice or random chance that State and County election officials declined tabulating withdrawals submitted in the months after certification. Election officials bound by The Rule, acted accordingly in this case.

B. The District Court wrongly applied Wisconsin law over Montana law and confused eligibility to participate in the primary with appearance on the general election ballot

After concluding: (1) "The act of submitting a political party petition simply authorizes a political party to use the state-administrated procedure of a primary election", (2) "The Secretary does not have the authority to certify the results of a political party petition", the District Court concluded the final act referenced by § 13-10-601(2) occurs when the Board of Canvassers determines the right to placement on the general election ballot, up to 14 days after the primary election.

To support its conclusion, the Court cited Plaintiff's suggested authority, *Town of Blooming Grove v. City of Madison*, 253 Wis. 215, 33 N.W. 2d 312 (Wisc. 1948). The cited authority does not support the contention that the Board of Canvassers determine eligibility to conduct a primary because the Board of Canvassers are not the final actors of § 13-10-601. In *Town of Bloomington*, the Wisconsin court held that the government prematurely cut off the right to withdraw from an annexation petition before a council's vote. However, under Wisconsin law, the final procedural step to annexation was the body's vote.

The court's reliance on *Town of Bloomington* to interpret Montana law is misplaced. As the Wisconsin court states in the opinion,

> Courts in the various states are not in accord as to when the right to withdraw a signature from a petition terminates. There are courts holding that the right expires at the time of filing the petition, others when the sufficiency of the petition has been determined, some that it expires when jurisdiction attaches, and still others that the right continues until final action is taken upon the petition.
>
> *Town of Blooming Grove v. City of Madison,* 253 Wis. 215,218 33 N.W.2d 312,314 (Wis. 1948)

While Wisconsin caselaw regarding petitions for annexation of territory to a municipal unit states the final act was the vote[4] by the city council, in Montana for petitions for minor parties is the mere access to the ballot, the final act is the certification of the petition by the Secretary, as determined by this Court. *Larson v. State*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241. The holding of the court in *Town of Bloomington* is not inconsistent with the Secretary's position, and its holding is illustrative in this case.

[4] The material part of the statute involved follows: "62.07(1) Annexation procedure. Territory adjacent to any city may be annexed to such city in the manner following:
"(a) A petition therefor shall be presented to the council (1) signed by a majority of the electors in such adjacent territory and by the owners of one third of the taxable property thereof, according to the last tax roll, or (2) if no electors reside therein by the owners of one half of said taxable property, or (3) by a majority of the electors and the owners of one half of the real estate in assessed value; . . .
"(b) An ordinance annexing such territory to the ward or wards named therein shall be introduced at a regular meeting of the council after the filing of the petition, be published once each week for four successive weeks in the official paper and thereafter be adopted at a regular meeting by three fourths of all the members of the council."

The law at issue in the *Town of Bloomington* expressly states it is the duty of the council to determine the petition. In contrast, the law at issue in this case makes no mention of any duty by the Board of Canvassers for minor party eligibility to conduct a primary. Similarly, the expressly defined duties of the Board of Canvassers is absent any mention regarding determination of a minor party petition. Mont. Code Ann. § 13-15-501.

The District Court's reasoning is incorrect:

> To illustrate the issue, if a petition is submitted and a primary election is held for which no qualified person received any votes, [sic] would defeat the petition and the party would have no right to appear on the general election ballot. The Court concludes that under the unique procedures applicable to petitions for political party qualification, it is not until the Board of State Canvassers tabulates the votes that the process is final. Until that date, there is no final action on the petition.

COL ¶20.

The District Court's illustration is incorrect as a matter of fact and a matter of law for several reasons. First, the matter submitted by the petition is the eligibility of the minor party to hold a primary. The right to appear on the general election ballot is not the matter submitted by the petition. Under the Court's illustration, if a petition is submitted and a primary election is held for a minor party, the primary was held because the petition satisfied the statutory requirements for a minor party to hold a primary by way of petition.

The election results of a primary by a minor party are not determinative as to whether the party can conduct a primary. For example, if the primary resulted in a tie, that tie would have no bearing on if a primary could be conducted at all. In contrast, the results of the petition *are* determinative as to whether a minor party is eligible to conduct a primary. The District Court's analysis is incorrect. Under its own example, the petition was to hold a primary, and the primary was held. Thus, it cannot be said that the petition was defeated, regardless of whether the primary selects a candidate or not.

Second, the District Court's analysis that "the party would have no right to appear on the general election ballot" is directly undermined by statute on numerous fronts. Mont. Code Ann. § 13-10-327 provides an opportunity for the party to replace a candidate after the primary if a person is not qualified to appear on the general election ballot.

Candidates can automatically secure a right to appear on the general election ballot for a minor party that is eligible to conduct a primary if, after a sufficient petition is certified by the Secretary, a primary election is deemed unnecessary pursuant to Mont. Code Ann. § 13-10-209 (4). Moreover, Mont. Code Ann. § 13-10-501 provides a mechanism to

secure nomination of political party that did not meet the requirements of § 13-10-601 made by a petition for nomination.

Both statutes *depend* on final determination of the Petition, without a determination of eligibility renders the provisions of law unworkable. Both Mont. Code Ann. § 13-10-501 and § 13-10-209 expressly reference and hinge upon minor party eligibility under the requirements of § 13-10-601.

C. Legitimate state interests support requiring withdrawals to be submitted before the "Final Act"

Enforcement of the deadlines for submitting petitions ensures that election officials have time to verify the signatures, the manner and opportunity for candidates to register for office, any necessary judicial review can proceed, and the ballot is certified, printed, and sent to military and overseas voters in time. The state's justification is not a policy argument---it is a legitimate state interest upheld by the Court. The ink signature and in-person witnessing requirements, as well as the related deadlines, serve legitimate and compelling state interests in a fair and orderly election process. *Thompson v. Dewine* , 959 F.3d 804, 810-11(6th Cir. 2020).

The longstanding rule backed by well-established precedent which limits the withdrawal to the period before the Petition is deemed sufficient gives a

reasonable time for reconsideration to the signer and protects the petition when completed. As one court concluded:

> Great numbers of electors might desire to cast their ballots might be cheated and defrauded out of their right to have their names on the ballots by bad-faith pretended supporters procuring the opportunity to sign their petitions, and afterwards withdrawing names. *State ex rel. Harry v. Ice,* 207 Ind 65, 191 NE 155, 92 ALR 1508 (1934).

If allowed to stand, the decision below opens the door to gamesmanship to void petitions by removing signatures through March, April, May, and half of June.

II. THE RECORD DOES NOT CONTAIN CLEAR AND CONVINCING PROOF OF FRAUD REGARDING PETITION FACTS, AND THE FRAUD ASSERTED DOES NOT AUTHORIZE TARDY WITHDRAWALS EVEN IF SUPPORTED BY ADMISSIBLE EVIDENCE

Montana law does not permit overriding the final act doctrine absent clear and convincing evidence of fraud in the contents of the Petition on the record. The Montana Supreme Court stated that the right to withdraw a petition signature may be allowed upon clear and convincing proof of representations made to petition signers regarding material facts of the petition, if made with the intent to induct action, and timely made. *State ex rel. Peck v. Anderson*, 92 Mont. 298, 306, 13 P.2d 231, 234 (1932) (Holding that *even if the allegations of fraud were proven true*, the withdrawals were too late)(*Emphasis added*).

The testimony at trial conclusively establishes that signers understood and support the contents of the petition, namely, eligibility of the green party to participate. Plaintiffs argued that though the contents of the Petition were accurate and true, the fact that signature gathering was funded by conservative efforts somehow seeped fraud into the contents of the petition itself. To support this circuitous logic, Plaintiffs moved for admission of evidence that was clearly hearsay. *See,* FOF, p. 7, ¶ 21, (newspaper article) p. 11 ¶ 33 (newspaper article), p. 18, ¶ 60 (newspaper article), Miller Testimony (Trs. Vol. I. 74:3-7, Trs. Vol I 77:17-24, Trs. vol I. 74:24-75:15). The Court relied upon such hearsay in reaching its conclusions. COL, p. 41, ¶ 33 and COL, p. 43, ¶ 42. The District Court erred when it allowed the admission of this evidence.

A. The record does not show clear and convincing proof representations made to signers regarding material facts of the petition were fraudulent

All three individual Plaintiffs who attended the hearing testified that the representations made regarding the material facts of the petition were true.

Neumeyer:

> I had already made up my mind who I was going to support, and they were the Democratic candidates that I have always supported. But I didn't think it was wrong to also be willing to

> allow other people to get their names out there, and their causes, you know, so that's why I signed it. Trs. vol. I 190:20-25.

Weed:

> I generally feel like participation in elections is a healthy thing, and I instinctively thought, well, it can't hurt to have an open ballot.
> Trs. vol. I 203:19-23.

Blossom:

> . . . I wanted to support someone advocating [Green Party] ideas.
> Trs. vol I 217:15-16.

The Court:

> I heard no testimony that said the petition itself, the language of the petition itself that presented to people to sign was in accurate or misleading.
> Trs. 503:4-7.

The court misapplies *Peck* to conclude that nondisclosure of petition sponsorship requires consideration of withdrawals after final determination of the petition. In rejecting the claim before the court that withdrawals must be accounted for due to fraud, the *Peck* Court provided examples of what would constitute fraud, the required standard of proof, and the timing for such a claim.

The *Peck* Court indicated that what may be considered fraud is an allegation that the clerk certified forged signatures or signers that do not meet residency requirements. *Id*. at 304. There, if proven true by clear and

convincing evidence, and the board nevertheless obeyed the statute, a court would be authorized to interfere and prevent the final act from becoming effective.

Here, the county clerks authenticated all signatures and the residency of the signers before certifying the sheets to the Secretary of State. Those that may have been forged and signers that did not meet residency requirements were rejected. Trs. vol. I 234:14-23. No evidence was presented otherwise. Nor was any proof offered of a false statement made by a circulator to petition signers about the contents of the petition. Where the testimony of a plaintiff clearly indicates that no representation was made, the evidence is not sufficient to warrant a finding of fraud. *Id*., 512 P.2d at 717.

In the end, the *Peck* court held that even if the fraud alleged were proven true, the withdrawals came too late. Circumstances of delay constitutes as laches. *Peck* at 306, 234. Allegations of deceptive election practices must therefore be raised, proven, and if necessary remedied, within the window of time allotted*. Montanans v. State*, 2006 MT 277, ¶31 334 Mont. 237, 146 P.3d 759 (Mont. October 26, 2006) (A person or group challenging the validity of a qualified ballot initiative must file suit within 30 days of the date the initiative is certified.)

III. MONTANA ADOPTED FORMALITY REQUIREMENTS ASSOCIATED WITH THE RIGHT TO WITHDRAW.

Under Montana law, withdrawal of a signature must be executed with the same formality as the initial signature on the petition. Since petitions for allowing a minor party on the ballot must be signed with "wet" signatures, withdrawals from the same petition must also be signed with wet signatures. The District Court erred when it overlooked this requirement.

The District Court further erred when it misinterpreted the UETA. Under the plain language of that statute, the state agency must agree to accept electronic signatures and promulgate polices to that effect. By incorrectly finding that the Secretary had "changed its policy", the District Court erred as a matter of fact and law. The Secretary has not changed its policy as it has never accepted electronic signatures.

B. Montana's petition process requires petition withdrawals must be received before sufficiency is certified and must observe the same formalities as petition signatures

Montana has adopted the rule that withdrawals must be proven with the same formality as the petition signatures they seek to remove. *Ford v. Mitchell* (1936), 103 Mont. 99, 115, 61 P.2d 815, 822 ("[The name] of each persons was certified to by the county clerk both on the initiative petition

and the withdrawal petition as of a person qualified to sign accompanied by the usual certificate as to the genuineness of their signatures.").

In *Ford*, the Montana Supreme Court cited *State ex rel. Westhues v. Sullivan* (1920), which reasoned:

> To get off of such a petition the action of the signer should be at least as formal. His request should at least be verified by his affidavit before some officer. This to the end that the Secretary of State might know that the signature to the request was genuine. A mere postal card or letter purporting to be signed by a signer of the petition is not sufficient. Such course would open wide the gates for fraud. These alleged withdrawals cannot be considered.

Westhues, 283 Mo. 546, 592, 224 S.W. 327, 339.

An electronically signed document delivered by a third party is just that, a letter purporting to be signed by the signer. Much has changed since the 1930's, although the arguments by both parties revolve around cases from that time. Today, county election officials have the technological capability to compare wet signatures, the same cannot be said about an IP address. State and county election officials might know that the signature to the request, if wet, is genuine. Election officials have established process and procedure to do so.

Thus, a wet signature, if called upon, *can* be verified. Upon objection to its authenticity, a challenge may be made. Just as MDP challenged the signatures on the Green Party petition in the last election. If fraud is alleged

that a withdrawal submitted contains a forged wet signature, the authenticity can be examined.

Today, the same cannot be said for the matching electronic signatures contained on the electronically signed withdrawal forms in this case. While this may be true in the future, it is not true for today.

The very right to withdraw comes from a declaration of the court, which also declared that the withdrawal must *at least* be verified. County and statewide verification, tabulation, and certification of petitions requires considerable time and manpower. In this case, county officials verified the authenticity of approximately 13,000 signatures of the 19,000 submitted by the Petition. Trs. vol. I. 234:13-17. Under the lower court's decision county and state election officials will be required to administer and verify withdrawal submissions while ballots are being counted. The reason the court seized the right to withdraw after final determination of the petition was to prevent this scenario.

C. Montana law expressly provides the Secretary with discretion regarding the use and reliance of digitally executed election documents

Chapter 30, Part 18, Montana Code Annotated expressly provides an agency is not required "to use or permit the use of electronic records or electronic signatures." § 30-18-117 (3). "[E]ach governmental agency shall

determine whether, and the extent to which, it will send and **accept electronic records and electronic signatures** to and from other persons and otherwise create, generate, communicate, store, **process, use, and rely upon electronic records and electronic signatures**." § 30-18-117 (1)(*emphasis added*). To the extent that an agency uses electronic records and electronic signatures, the Secretary, giving due consideration to security, is entitled to specify:

> (a) the manner and format in which the electronic records must be created, generated, sent, communicated, received,
> (b) the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process
> (c) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and
> (d) any other required attributes for electronic records that are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.
>
> § 30-18-117 (2), Mont. Code Ann. (*emphasis added*)

As the First Judicial Court recently held "the Court is not inclined to address the novelty of using DocuSign and force the widespread application of the service across the fifty-six (56) county clerks offices or the Secretary of State." *New Approach Montana v. State of Montana, Corey Stapleton*, Montana First Judicial District Court, Cause BDV-2020-444 (2020).

While the case concerned electronic signatures for initiative petitions, the holding of the Court regarding the statutory application of the agency's discretion in the acceptance or reliance of electronic signatures is applicable here.

MDP's position is contrary to both the UETA and the integrity of the election process. The UETA explicitly incorporates interactions with government entities in its definition section with the term "transaction." Such an incorporation is logical, because a voter must interact and exchange their vote or withdrawal with the county election office or Secretary. If such a withdrawal right were truly unilateral, a voter could dictate the terms of when, where, and how a vote could be made or a signature withdrawn. Such an interpretation has never been held to be the case.

Second, such a position, if adopted, would be determinantal to the integrity of Montana elections. This interpretation would permit anyone with an email address to claim they were a particular petition signer and act on said person's behalf in the election process. Would a text message suffice for a withdrawal? What about a tweet?

Mr. Dana Corson testified that DocuSign has been susceptible to hacking on numerous occasions. Trs. vol I, 268:20-270:10. Despite

claiming that DocuSign signatures *can* be verified, Ms. Miller testified that MDP did not actually meet with the majority of the persons who used DocuSign, and that they only verified the identify of persons submitting the withdrawal by verifying the address or phone number of the petition signer, and even used text messages as a form of verification. Trs. vol I 136:21-138:11. Notably, Mr. Corson testified there is simply no security system in place in the Secretary of State's Office to accept and verify that electronic signatures and withdrawals are truly coming from the person whose name is subscribed therein. Trs. vol I, 268:20-270:10; 276:14-17.

MDP feigned surprise that the Secretary would not accept electronic signatures. MDP argued numerous times that this policy was somehow new, and the District Court even attributed fault toward the secretary for the "adoption of a rule…midway through this petition gathering process." Montana has never permitted voting or the withdrawal of signatures or votes by electronic means. Ms. Miller testified that she was unaware of any point in the history of the state where electronic withdrawal forms had been accepted. Trs. vol. I 135:1-23.

MDP blames the Secretary for not announcing that electronic withdrawals would not be accepted, yet MDP never asked the Secretary of State's Office whether such electronic withdrawals would be accepted. Trs.

vol. I 135:24-136:3. MDP had notice of the Secretary's position through the *New Approach* case, which had settled this issue months prior to their lawsuit, and should have acted accordingly.

D. If the Secretary's Motion for Partial Summary Judgment is granted, then it is dispositive of the issues before the Court.

If granted, the Secretary's motion would be dispositive in favor of the Secretary because the majority of the withdrawal requests were submitted by DocuSign. Counsel for MDP conceded that the Petition would still have enough signatures to be certified if the electronic withdrawals were not counted. Trs. vol I. 146:6-11. Thus, if the Court finds that the Secretary was not required to accept electronic signatures, then it should reverse the District Court's decision on the motion and cross motion for partial summary judgment regarding election signatures, and may dismiss this matter in favor of the Secretary.

CONCLUSION

It is not unusual for the Court to see election cases the summer before a federal general election. For that reason, as November looms, across the country 2020 marks the most litigious election ever. For the second federal election in a row, whether or not the Green Party was eligible to conduct a

primary is in dispute. Generally, the parties' interest is the effect the decision will have at the ballot box.

The political effect of this case is irrelevant to state election officials. It is the administration of election and voter services that is of paramount importance. Regardless of the individual Secretary elected, public servants of the Office must carry out statutes adopted by the legislature in conjunction with guidance provided by the court.

It was the District Court that departed from statute and precedent, not state election officials at the Secretary of State. Thus, the Secretary respectfully requests this Court to reverse the Honorable Judge's decision and remand for issuance of an appropriate order.

Respectfully submitted this 12th day of August, 2020

/s/ Austin Markus James_____
Austin Markus James
SECRETARY OF STATE
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Georgia typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my Microsoft Word software.

Dated this 12th day of August, 2020.

/s/ Austin Markus James
Austin Markus James
SECRETARY OF STATE
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THE 12TH DAY OF AUGUST, 2020, A COPY OF THE FOREGOING DOCUMENT WAS SERVED ON COUNSEL OF RECORD BY ELECTRONIC SERVICE AS FOLLOWS:

Matthew Gordon
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
mgordon@perkinscoie.com
Attorney for Plaintiffs/Appellees
Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
mike@meloylawfirm.com
Attorney for Plaintiff/Appellees

/s/ Austin Markus James
Austin Markus James
SECRETARY OF STATE
Attorney for Appellant

Helena MT 59602
Representing: Lorrie Corette Campbell, Jill Loven
Service Method: eService

Electronically Signed By: Austin Markus James
Dated: 08-12-2020