No. DA 20–0397

In the Supreme Court of the State of Montana

MONTANA DEMOCRATIC PARTY, *et al.*,

Plaintiffs-Appellees,

v.

THE MONTANA REPUBLICAN PARTY, LORRIE CORETTE CAMPBELL, AND JILL LOVEN,

Proposed Intervenors-Appellants.

On Appeal from the First Judicial District, Lewis and Clark County
Cause No. DDV 20–856, The Honorable James P. Reynolds, Presiding

Appellants Montana Republican Party, Lorrie Corette Campbell, and Jill Loven's Opening Brief

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STATEMENT OF ISSUES

I. Whether the District Court erred in denying intervention to the Montana Republican Party where the District Court granted Appellees declaratory and injunctive relief based on allegations of fraud and deception by the Montana Republican Party that were unproven by Plaintiffs, and where the Montana Republican Party was denied any opportunity to present evidence, cross-examine witnesses, or rebut Plaintiffs' allegations.

II. Whether the District Court erred in denying intervention to petition signers Campbell and Loven where it invalidated hundreds of petition signatures based on three Appellees' claimed "right *not* to associate," but denied non-withdrawing signers like Campbell and Loven an opportunity to assert their opposing—and superior—First Amendment rights to effectively associate to support a minor party's federal ballot access.

INTRODUCTION

The Montana Republican Party ("MTGOP") financially contributed to the Montana effort to qualify the Montana Green Party ("Green Party") for the 2020 primary ballot. In January, it made an in-kind contribution and timely made that contribution publicly known in its February federal campaign finance reporting to the Federal Election Commission ("FEC").[1] In February, it made another contribution to the effort, which it timely publicly disclosed in its March state campaign finance reporting to the Commissioner of Political Practices ("COPP"). Despite these timely public disclosures, the Montana Democratic Party ("MDP") has for months alleged that MTGOP engaged in fraudulent, "deceptive practices," sufficient to justify the nullification of the Green Party primary results, the disenfranchisement of Green Party primary voters, and the denial of ballot access to 2020 general election Green Party candidates. MDP's allegations are at least misleading if not simply false.

Nevertheless, the district court denied MTGOP's request to participate in the proceedings below, adopting nearly verbatim MDP's facts and legal theory while disallowing MTGOP's efforts to intervene, dispute MDP's claims, present

[1] FEC reports for the MTGOP are filed electronically and are readily available at www.fec.gov for viewing and downloading. Political actors regularly access this information, and reporters regularly publicize the information filed publicly with the FEC.

evidence, and cross-examine MDP witnesses. This denial was a manifest abuse of discretion and incorrect.

Petition signers Lorrie Corette Campbell and Jill Loven signed the Minor Party Qualification Petition to permit the Green Party to participate in Montana's primary processes ("Green Party Petition"), because they saw value in associating with the Green Party Petition and because it advanced their own views and interests. Their signatures and thousands of others were duly verified and counted by the Montana Secretary of State ("Secretary") as supporting the petition. But the petition signers later learned that the MDP had mounted a months-long campaign to convince several hundred other petition signers to withdraw their signatures via DocuSign long after the Secretary had acted on the Green Party Petition. On July 2, 2020, the petition signers moved to intervene in this litigation pursuant to Mont. R. Civ. P. 24.

Along with their Motion to Intervene, the petition signers submitted a proposed Answer asserting their involvement was necessary because the resolution of Plaintiffs' claims (*i.e.*, seeking to greatly expand the right to withdraw under the guise of a newly conceived state constitutional "right not to associate") would directly contravene the First Amendment rights of the petition-signer intervenors and other Green Party ballot access supporters to effectively associate via the petition process. The District Court, however, denied the request to participate in

the proceedings below and greatly expanded the right to withdraw. Precisely because the District Court's recognition of Plaintiffs' proffered state constitutional rights to withdraw rendered the Green Party Petition numerically insufficient—just barely—the District Court concluded that non-withdrawing Green Party ballot access supporters like Loven and Campbell could have no First Amendment rights to effectively associate for political change. Accordingly, the District Court held that Plaintiffs' state constitutional rights to withdraw defeated the First Amendment rights of the petition-signer-intervenors to effectively associate to achieve federal ballot access.

Because insufficient time exists for remand before general election ballots must be certified on August 20, 2020, this Court should consider the evidence and arguments presented by MTGOP and the petition signers in the companion appeal No. DA 20–0396 and reverse the District Court's orders below.

STATEMENT OF THE CASE

For the second election cycle in a row, the MDP has sued the Secretary to have the Green Party removed from the ballot. *See Larson v. State*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241. The Green Party qualified for the ballot pursuant to Mont. Code Ann. § 13-10-601 (2019) on March 6, 2020, after enough petition signatures were gathered. As a result, the Green Party appeared on the primary ballot on June 2, 2020. One day prior to the primary election, however, the MDP

sued to enjoin the Secretary from giving effect to the Green Party Petition and to have the Green Party removed from the ballot for the general election. (R. 1.)

The petition signature gathering effort was undertaken by a properly disclosed minor party qualification committee, Montanans for Conservation, who hired Advanced Micro Targeting, Inc. ("AMT") to undertake the signature gathering effort. (R. 57, Ex. A (Merwin Aff.) and Ex. B (Wenetta Aff.).) MTGOP contributed to this effort, and publicly disclosed its January contribution in February. (*Id.* at ¶ 10 and Ex. A.) Despite MTGOP's proper public disclosures, reporters and MDP alleged they did not know who was funding the signature gathering effort and published various reports that the effort was backed by "dark money" groups attempting to mislead Montanans. (R. 8 at Ex. 1.) MDP undertook a coordinated effort to persuade Montanans to withdraw their signatures from the petitions. (Hrg. Tr. vol. 1, 61:13–25.)

Despite MDP's efforts, the Green Party qualified for the primary election and the Secretary certified the same on March 6, 2020. (*Id.* at 233:1–24.) Nonetheless, MDP continued to gather signatures via the form prescribed by the Secretary as well as by MDP's own means. (R. 1 at 16.) On March 24, 2020, reporters finally found the public disclosures made by MTGOP over a month previously and reported that MTGOP funded the petition signature gathering effort. (R. 5, Gordon Dec., Ex. 8; Hrg. Tr. vol 1, 67:5–8.)

In its Complaint for Declaratory and Injunctive Relief, filed the day before the primary election, MDP alleged that MTGOP hid its involvement from Montanans. (R. 1.) MDP accused MTGOP of committing deceit, fraud, constructive fraud, and negligent misrepresentation. (*Id.*) Additionally, MDP argued these actions justified invalidating the Green Party qualification petition because petition signatures were fraudulently induced. (*Id.*) Such fraud, Plaintiffs' claim, merits legal nullification of the Green Party's ballot eligibility. Despite these serious allegations, MDP did not include MTGOP as a party to the case and opposed MTGOP's motion to intervene so that MTGOP could defend itself against MDP's claims and present evidence to the Court that the petition signature gathering effort was properly conducted and MTGOP's involvement was properly disclosed. (R. 1, R. 42.)

MDP also asserted that the right to withdraw should be expanded to permit the filing of signature withdrawals months after a petition has been certified, campaigns have been run, and votes have been cast. (R. 1.) MDP even asserted that the formalities required for submitting petition signatures should not be enforced as to withdrawals. (R. 1.) Thus, the petition signers moved to intervene in order to demonstrate how this expansion the right to withdraw would impermissibly interfere with their First Amendment right to effectively associate via the petition. (R. 33 and 34.)

The District Court held a two-day hearing on July 14 and 15, 2020, denying both Motions to Intervene on the first day of the hearing. (Hrg. Tr. vol. 1, 5:22–6:22.) The petition signers immediately moved to have this Court exercise its supervisory control to remedy the district court's denial of intervention, but this Court exercised its discretion to decline extraordinary review. (Case No. OP 20–0630.) During the hearing, MDP presented testimony and argument continually accusing MTGOP of deceptive behavior. (*See e.g.*, Hrg. Tr. vol 1, 16:18–24, 23:6–16, 191:10–16, 199:25–200:10; Hrg. Tr. vol. 2, 498–500.) Because MTGOP's Motion to Intervene had been denied, MTGOP was unable to put forth rebuttal evidence or argument and was not afforded an opportunity to cross-examine the witnesses who accused MTGOP of wrongdoing.

Throughout the hearing, Plaintiffs argued for an expanded right to withdraw. They asserted that withdrawals should have been accepted months after the petition was certified as sufficient and the Green Party was placed on the ballot. (*See, e.g., id.* at vol. 1, 59:15–60:1; 86:25–87:14; vol. 2, 508:6–516:3.) And they asserted that withdrawals should have been accepted that were submitted through DocuSign, an electronic document software. (*See, e.g., id.* at vol 1, 82:7–24; 100:7–17; 165:24–166:14, vol. 2, 525–526.) Because the petition signers' Motion to Intervene had been denied, they were unable to demonstrate or argue how these expansions on

the right to withdraw directly contravened the petition signers' competing First Amendment right to effectively associate via the petition.

In post-trial *amicus* briefing, MTGOP attempted to place before the court public records regarding the timeliness and completeness of its campaign finance filings, but the District Court refused to take judicial notice, stating that such evidence could have presented such evidence at the hearing. (R. 86 at 3.) After striking MTGOP's rebuttal evidence, the District Court proceeded to issue Findings of Fact and Conclusions of Law in which it concluded that MTGOP had deceived and constructively frauded petition signers. (R. 85 FOF ¶¶ 29, 33, 60–68 and COL ¶¶ 33–43.) These legal conclusions served as a basis for enjoining the Secretary from including the Green Party on the ballot in the upcoming general election. (*Id.* at 48–49.)

MTGOP and the petition signers timely appealed from the District Court's denial of their Motions to Intervene. MTGOP and the petition signers further joined the Secretary in his appeal of the district court's Findings of Fact and Conclusions of Law and Order. The Court denied consolidation of these appeals, but expedited briefing in both appeals in light of the urgent nature of this matter.

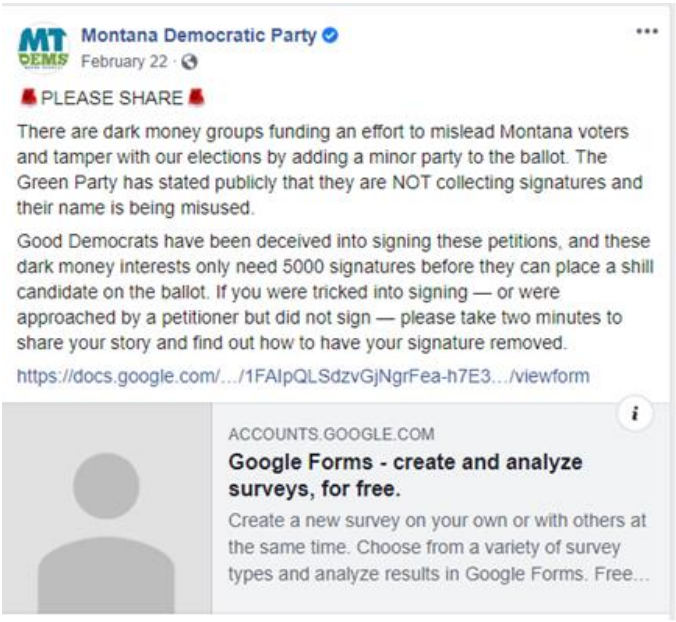
STATEMENT OF FACTS

In 2018, the Green Party initially qualified to appear on the ballot for the primary election pursuant to § 13-10-601. The Green Party's appearance on the

ballot, however, was successfully challenged by a Plaintiff in this case—the MDP. *Larson*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241. The Green Party was removed from the general election ballot. *Id*. In that case, the District Court and this Court strictly enforced Montana's statutory formalities for counting qualification petition signatures, rejecting constitutional arguments that those formalities were unnecessary for advancing Montana's interest in signature validity. Specifically, the Court found that even otherwise-valid signatures should be stricken where the circulator's affidavit was false (he had not witnessed two of the signatures, and the Court allowed the inference that all of his signatures were invalid); where a signer did not sign in cursive; where a signer signed in cursive but did not print his or her name; or where there was a mistake in the date a signer wrote on the signature line. *Id.* at ¶¶ 53–59. As a result, not one Green Party vote was cast in the 2018 general election.

On January 24, 2020, Montanans for Conservation filed an organizational statement with COPP, in which it identified that its purpose was, in part, "to qualify the Green Party to hold primary elections in Montana." (R. 57, Ex. B (Wenetta Aff.) at ¶¶ 5–6 and Ex. A.) Montanans for Conservation was unable to select "minor party qualification committee" as a classification because the COPP website did not offer that option, so it chose "independent." (*Id.* at ¶ 9 and Ex. B.)

On January 21, 2020, MTGOP paid AMT $50,000.00 to gather signatures for a petition to qualify the Green Party for the 2020 ballot. (R. 57, Ex. A (Merwin Aff.) at ¶ 9.) It funded this expenditure from its federal account. (*Id.* at Ex. A at 31.) On February 20, 2020, MTGOP filed its federally required FEC report covering the January 1, 2020, to January 31, 2020, reporting period disclosing its $50,000.00 expenditure to AMT was an in-kind contribution to Montanans for Conservation. (*Id.*; R. 57, Ex. B (Wenetta Aff.) at ¶¶ 11-12.) Also on February 20, 2020, MTGOP paid $100,000.00 from its state account to AMT. (*Id.* at Ex. A, ¶ 11 and Ex. B at 3.) It publicly reported this payment to COPP on its timely March 31, 2020, report. (*Id.* at Ex. A, ¶ 12 and Ex. B at ¶ 16; Hrg. Tr. vol. 1, Pls. Ex. 8 at 4.) Montanans for Conservation reported the resulting in-kind contribution on April 15, 2020. (R. 57, Ex. B (Wenetta Aff.) at ¶ 16.) Nonetheless, despite MTGOP's timely and public disclosure of its January payment to AMT for signature gathering efforts, two days later, on February 22, 2020, MDP posted on its public Facebook page:



(R. 57 at 4.) As shown, this post included a link to a Google Form, which the MDP used to gather signatures for withdrawal. Two days later, on February 24, 2020, MDP posted on its public Facebook page:

(*Id.* at 5.) Thus, MDP continued to maintain that "dark money" was funding "an effort to mislead Montana voters and tamper with our elections", despite the many public disclosures made by MTGOP. Indeed, MDP and its affiliates continued to publicly represent the above misleading information to signers, voters, and the public through at least March 2, 2020. (R. 8 at Ex. 1.) Further, MDP coordinated a concerted effort to contact petition signers and request that they remove their signatures from the Green Party Petition predicated on this false representation of the facts. (Hrg. Tr. vol. 1, 61:13–25.)

In the meantime, enough signatures were once more gathered to qualify the Green Party to appear on the ballot for the primary and general elections. Two

such petition signers were Lorrie Corette Campbell and Jill Loven. (R. 35 and 36.) Both signed the petition to allow the Green Party to participate in the primaries because both believed in the Green Party's right to appear on the ballot and saw value in their presence on the ballot. (*Id.*) After sufficient signatures were gathered and verified by local election authorities, the Secretary certified the Green Party's qualification on March 6, 2020. (Hrg. Tr. vol. 1, 233:1–24.)

On March 23, 2020, COPP reclassified Montanans for Conservation's registration into a minor party qualification committee. (R. 57, Ex. B (Wenetta Aff.) at ¶ 14.) On March 24, 2020, the Helena Independent Record published an article that identified MTGOP had paid for the petition signing effort and accused MTGOP of not filing the correct paperwork. (Hrg. Tr. vol 1, 67:5–8.) MDP had its staff give interviews for similar stories, and then used the stories in its ongoing withdrawal campaign, telling petition signers that the MTGOP had committed election fraud by submitting a phony petition. (*Id.* at 84:11–86:4.) This well-orchestrated political effort by MDP did not generate sufficient withdrawals before the § 13-10-610 certification by the Secretary on March 6, 2020, or by March 9, 2020, when candidates needed to file their declarations of candidacy. (*Id.* at 233:1–11.) Indeed, the campaign led to sufficient withdrawals only shortly before the June 2, 2020 primary election itself—long after candidates were declared, and ballots were printed, mailed, and cast. (*Id.* at 112:9–113:3; 115:11–17.)

On June 1, 2020, one day before the primary election, MDP once again filed a lawsuit challenging the Green Party's qualification to appear on the primary and general election ballots. (R. 1.) MDP, along with four individual plaintiffs, Taylor Blossom, Rebecca Weed, Ryan Filz, and Madeleine Neumeyer, sued the Secretary seeking a declaratory judgment that the Green Party Petition was invalid under § 13-10-601, that all of their (and other voters') withdrawal requests were valid, that the Secretary's failure to accept all of those requests violated their "right not to associate" under Article II, Sections 6 and 7 of the Montana Constitution, and that the Secretary's certification of the petition was invalid. (*Id.*) They also asked for an order that the Secretary be enjoined from implementing, enforcing, or giving any effect to the certification of the Green Party Petition. (*Id.*) On June 2, 2020, bona fide Green Party candidates were nominated in the primary to advance to the 2020 general election. (*See, e.g.*, R. 57, Ex. C (Marbut Aff.), Ex. D (Davis Aff.), and Ex. E (Fredrickson Article).)

On June 25, 2020, in response to a campaign finance complaint filed by MDP Executive Director Sandi Luckey against AMT, COPP issued findings of campaign finance violations against MTGOP and Montanans for Conservation for their petition-related reporting. (Hrg. Tr. vol. 1, Pls. Ex. 8.) COPP did not contact either MTGOP nor Montanans for Conservation regarding the facts relating to the underlying complaint or COPP's findings. (R. 57, Ex. A (Merwin Aff.) at ¶ 15; *id.*

Ex. B (Wenetta Aff.) at ¶ 18.) Although it concluded that MTGOP's state reporting was timely, COPP determined that MTGOP's petition spending was not properly reported. (Hrg. Tr. vol. 1, Pls. Ex. 8 at 9.) COPP was apparently unaware of MTGOP's FEC report because COPP relied solely on the MDP's Complaint and provided no notice or hearing to MTGOP. For that reason, MTGOP responded on July 1, 2020, with a hand-delivered letter explaining COPP's factual and legal errors in reaching its conclusions. (R. 57, Ex. A (Merwin Aff.) at ¶ 18 and Ex. C.)

The district court took judicial notice of COPP's findings, even though COPP did not consider the FEC report, relied solely on the MDP's Complaint, and provided no notice or hearing to MTGOP before issuing a sufficiency decision against it. (Hrg. Tr., vol. 1, 68:12–69:17.) However, the district court refused to take judicial notice of MTGOP's FEC filing. (*Id.* at 155:16–159:8; R. 86 at ¶ 6.)

MTGOP and petition signers Campbell and Loven sought to intervene in the matter on June 30, 2020, and July 2, 2020, respectively, but the district court orally denied their motions at the July 14 hearing, allowing them to only file briefs as *amici*. (*Id.* at 5:22–6:22.) In denying the Motions to Intervene, the District Court stated that it did not believe "that the motive of the people circulating the petition" was important, and that who was responsible for circulating the petition was "irrelevant[.]" (*Id.* at 8:9–11:16.) The Court accordingly did not believe MTGOP's participation was necessary. (*Id.*) Similarly, the District Court did not

believe that individual signers had a right to intervene to assert their First Amendment rights in effective association through the petition; otherwise, hundreds of persons may attempt to intervene. (*Id.* at 6:11–19.) Thus, the court proceeded with no petition signers (other than those sought to withdraw). A two-day hearing commenced in which Plaintiffs continuously presented testimony and argument accusing MTGOP of committing deceit, fraud, and intentionally misleading petition signers. And Plaintiffs Neumeyer, Weed, and Blossom continuously argued that their "right to not associate" required an expansion on the right to withdraw of Plaintiffs and hundreds of others, directly undermining the First Amendment association rights of the remaining, non-withdrawing signers such as Campbell and Loven.

At the hearing, Plaintiffs testified regarding their experiences signing the petition to qualify the Green Party for the ballot. (*See generally* Hrg. Tr., vol. 1.) Plaintiff Filz never appeared. (*Id.*) Plaintiff Neumeyer testified she was in a hurry when she was approached at the public library in Helena, and she thought that the Green Party "should have the right to put their name out there for environmental causes," and that she "would be happy for them to have a chance to run." (*Id.* at 188:13–25, 200:15–22.) She did not testify that the petition signature gatherer represented he or she was with the Green Party, and she testified that she did not ask the signature gatherer what that person's motivations in gathering the

signatures was. (*Id.* at 201:2–4.) She did not testify to any misrepresentation or inducement by the circulator. Nonetheless, she accused MTGOP of being "deceitful" and that it had "misrepresented themselves by choosing Green Party to be their platform" and therefore submitted a withdrawal. (*Id.* at 190:8–12; 193:1-17.)

A DocuSign withdrawal bearing Neuemeyer's name was submitted on April 28, 2020. (*Id.* at 197:9–10.) Neumeyer testified that she had in fact visited her election authority that very day but that the authority would not accept her withdrawal, as it was too late. (*Id.* at 192:8–16.) After she reported this to the MDP, she claimed the MDP suggested that she simply submit a DocuSign withdrawal. (*Id.* at 192:18–193:8). The withdrawal form MDP had her sign stated that Covid was the reason she did not want to use a notary or visit the elections office. But this statement was false by Neumeyer's own testimony—she had been to the county election office earlier in the day. The DocuSign signature was simply an easy way of electronically submitting a late withdrawal. Interestingly, Neumeyer testified that her DocuSign signature was likely not legible because she could not fit all the letters of her name on her "little cell phone." (*Id.* at 196:3–6.)

Plaintiff Weed testified she was approached by a signature gatherer at a grocery store and that she was in "kind of a hurry." (*Id.* at 203:7–9.) Her interaction with the signature gatherer was short, approximately one minute. (*Id.* at

213:5–13.) Weed stated that she signed the petition because she "generally feel[s] like participation in elections is a healthy thing," and that "it can't hurt to have an open ballot." (*Id.* at 203:19–23.) Weed assumed the Green Party was behind the signature gathering effort but did not testify that any affirmative representations were made by the gatherer to lead her to that conclusion. (*Id.* at 203:19–204:8.) Weed testified that she believed that MTGOP's behavior in paying for the signature gathering effort was deceitful; however, Weed did not ask the signature gatherer what her motives in gathering the signature were. (*Id.* at 207:6–10; 213:14–16.) Weed filed a signature withdrawal in early March and the Secretary removed her signature from the petition. (*Id.* at 26:21–261:11).

Plaintiff Blossom, who testified after the other Plaintiffs, stated he was approached by a petition signature gatherer and decided to sign the petition because he "thought that the individual was affiliated with the Green Party." (*Id.* at 217:9–16.) Blossom claimed he asked the petition signature gatherer if he or she was affiliated with the Green Party, but that he did not remember what the signature gatherer had said. (*Id.* at 217:12–16.) Notably, Blossom currently works for MDP. (*Id.* at 222:6–9.) Blossom submitted a signature withdrawal and the Secretary removed his signature from the petition. (*Id.* at 259:5–13.)

Plaintiff Filz did not testify at the hearing; however, consistent with the in-person testimony of the other Plaintiffs, his declaration provides that no affirmative

representation was made on the part of the signature gatherer that he or she was associated with any specific party, nor what the signature gatherer's motives in gathering signatures for the petition was. (R. 8 at Filz Dec.) Plaintiff Filz, like the other plaintiffs, just assumed the signature gatherer was with the Green Party. (*Id.*) According to his declaration. Mr. Filz completed a DocuSign withdrawal form. (*Id.*)

The District Court issued an Order on August 7, 2020, enjoining the Secretary from giving effect to the Green Party Petition, effectively removing the Green Party from the ballot once more. (R. 85.) In its findings, the District Court concluded that MTGOP committed constructive fraud, negligent misrepresentation, and that it willfully deceived petition signers—all without any direct evidence from MTGOP witnesses and without providing MTGOP any opportunity to defend itself, cross-examine, or present rebuttal evidence at the hearing. (R. 85 at ¶¶ 33–43.) Further, the District Court refused to consider any of the evidence provided by MTGOP in its *amicus* brief, stating that it could have been introduced at the hearing—the same hearing in which the district court denied MTGOP the opportunity to participate. (Hrg. Tr. vol. 1, 8:9–11:16; R. 86 at ¶ 4.)

The District Court also sanctioned an entirely new withdrawal procedure, permitting withdrawals to be filed months after the final action has occurred on the petition. (R. 85 at COL, ¶ 20.) And the Court required the Secretary to, for the first

time ever, accept DocuSign withdrawal forms. (R. 85 at COL, ¶¶ 52–55.) The court reasoned that such actions were necessary in order to preserve the Plaintiffs' "right to not associate." (R. 85 at COL, ¶ 44.) The court gave no consideration to the competing First Amendment rights of Green Party ballot access proponents and petition signers like Campbell and Loven. Appellants timely filed their Notice of Appeal on August 7, 2020.

STANDARD OF REVIEW

This Court conducts a *de novo* review of a district court's denial of a motion to intervene as a matter of right under Mont. R. Civ. P. 24(a). *Loftis v. Loftis*, 2019 MT 49, ¶ 6, 355 Mont. 316, 227 P.3d 1030. Specifically, "whether the party seeking intervention has made a *prima facie* showing of an interest in the proceedings is a conclusion of law which we review for correctness." *Id.* at ¶ 6.

SUMMARY OF ARGUMENT

A party is entitled to intervene in a case where they timely assert an interest that will be impaired by the case and where that interest is not otherwise adequately represented. Mont. R. Civ. 24(a). Appellants meet these criteria but the District Court denied them intervention. The District Court adopted MDP's legal theory and determined that MTGOP tortiously engaged in deceit, misrepresentations with failures to disclose that violated Montana campaign finance law without permitting MTGOP to participate. It held that the Secretary

could represent MTGOP's interest but would not admit evidence offered by the Secretary on MTGOP's behalf. It allowed MTGOP to participate as an amicus but struck all its publicly available evidence from the record. And it adjudicated MTGOP's political spending to be in violation of Montana campaign finance law without affording MTGOP its due process right to be heard. The District Court's denial of MTGOP's Motion to Intervene was clear error.

Likewise, the District Court adopted a broad new standard for petition withdrawals, permitting withdrawals to be filed via DocuSign months after the signature submission period has ended and in a format that mirrors none of the formalities required for submitting withdrawals. The court reasoned that this new standard was necessary in order to preserve the Plaintiffs' "right to not associate." But because the petition signers' Motion to Intervene was denied, the Court did not hear about the petition signers' competing First Amendment right to effectively associate via the petition. The Court, in effect, contravened petition signers' federal constitutional rights without granting them an opportunity to be heard. The District Court's denial of the petition signers' Motion to Intervene was clear error.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTIONS TO INTERVENE.

Montana law allows anyone to timely intervene as a right who "is given an unconditional right to intervene by statute," Mont. R. Civ. P. 24(a)(1), or "claims

an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest," Mont. R. Civ. P. 24(a)(2). A mere claim of interest does not create a right to intervene. *DeVoe v. State* 281 Mont. 356, 363 (1997) (citation omitted). Instead, a party seeking to intervene must show a "direct, substantial, legally-protectable interest in the proceedings." *In re C.C.L.B.*, 2001 MT 66, ¶ 16, 305 Mont. 22, 22 P.3d 646.

This Court, in turn, considers whether an applicant to intervene satisfies four criteria: 1) be timely; 2) show an interest in the subject matter of the action; 3) show the protection of the interest may be impaired by the disposition of the action; and 4) show the interest is not adequately represented by an existing party. *Sportsmen for 1-143 v. Mont. Fifteenth Judicial Dist. Court*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400; *Estate of Schwenke v. Becktold*, 252 Mont. 127, 131, 827 P2d 808, 811 (1992). All intervenors met these criteria.

Nevertheless, the District Court denied all parties the right to intervene. (Hrg. Tr. vol. 1, 5:22–6:22; R. 86.) The court then proceeded to adopt a broad new standard for petition withdrawals. And the Court adopted key facts about MTGOP's involvement in the effort to qualify the Green Party for the ballot and make legal conclusions about MTGOP in the absence of MTGOP's participation.

(R. 85 at FOF, ¶¶ 29, 34, 60–68, 73; COL, ¶¶ 41–43.) As a result, the District Court granted declaratory relief and enjoined the Secretary from giving the Green Party ballot access. (R. 85.) This abuse of discretion was incorrect and should be reversed.

A. THE DISTRICT COURT ERRED IN DISPOSING OF THIS ACTION WITHOUT MTGOP.

1. MTGOP's Interest Was Impaired Because Its Evidence Shows Its Spending Was Lawfully and Publicly Disclosed Weeks Prior to Petition Certification.

The Plaintiffs in this case repeatedly represented to the court that MTGOP "surreptitiously and illegal funded a petition drive to get the Green Party on the ballot in a cynical effort to siphon votes from Democratic candidates." (R. 59.) The District Court adopted facts and conclusions consistent with Plaintiffs' representations. (R. 85 at FOF, ¶¶ 29, 34, 60–68, 73, COL, ¶¶ 41–43.) Had MTGOP been allowed to present evidence in this case, its evidence would have shown that it did nothing surreptitious or illegal. Indeed, MTGOP timely and publicly disclosed in-kind contributions made to Montanans for Conservation, a minor party qualification political committee lawfully organized on January 24, 2020, (R. 57, Ex. B (Wenetta Aff.) at ¶ 3 and Ex. A), to fund signature gathering efforts to place the Green Party on the ballot. (R. 57, Ex. A (Merwin Aff.) at ¶¶ 9, 11.) Montana has no contribution limit or ban on contributions to political committees. § 13-37-216.

MTGOP's filings show MTGOP complied with federal and state law through public disclosure of all its petition-related spending beginning in February 2020, before the March signature withdrawal deadline. (R. 57, Ex. A (Merwin Aff.) at ¶ 10 and Ex. A.) Thus, MDP's argument that MTGOP "hid" its involvement until after the deadline is unsupportable. That MDP (which itself files FEC reports of its own, (*id.* at ¶ 4)), apparently did not review MTGOP's FEC reports and, according to Kendra Miller's testimony, chose to rely on solely on local reporters, COPP, and petition signers to investigate the source of petition funding and so did not learn of MTGOP's involvement until March 24, 2020, does not obviate the fact that MDP and the public had available to it information in February disclosing that information. MDP willfully failed to avail itself of campaign finance data it no doubt knew was publicly available as early as February 20, 2020.

Nor can the MDP credibly claim to have relied on local journalists for the state of "local knowledge." As an initial matter, this argument is backwards: the articles make clear that it was local journalists who relied on MDP for sourcing. The articles that MDP witnesses supposedly read to "learn" of MTGOP's involvement contain quotes from MDP attacking MTGOP; those articles report on the MDP's preexisting campaign attacking Republican candidates and Republican-supporting PACs for supporting the Green Party effort. (*See* Hrg. Tr. vol. 1, Pls.

Ex. 8.) More fundamentally, there is no competent evidence about what the articles' reporters themselves "knew"; they contain only untested hearsay remarks from reporters who, despite being present in the courtroom, were not called and who apparently followed the lead of their MDP sources in failing to check (or at least candidly report on) MTGOP's federal filings. MTGOP did not deceive the public regarding its spending. Rather, it was MDP that failed to conduct a thorough review of public records before publicly making statements that are demonstrably false.

Likewise, Montanans for Conservation registered in January 2020 and reported its receipt of MTGOP's in-kind contributions as required thereafter. (R. 57, Ex. B (Wenetta Aff.) at ¶ 16.) That it was categorized as an "independent" and not "minor party qualification" committee is not evidence of deception—it is evidence of a COPP website that had not yet been updated to reflect this new type of committee created in 2019. Montanans for Conservations' C–2 states on the face of it, in no uncertain terms, that it is organized in part to place the Green Party on the primary ballot. (R. 57, Ex. A (Wenetta Aff.) at ¶ 6 and Ex. A.) The existence and purpose of Montanans for Conservation was publicly available to all.

Last, COPP's June 25, 2020, findings on which the District Court relied, (*see* R. 85 at FOF, ¶¶ 61–63, 65-66, 68), do not suggest deceit on MTGOP's part. COPP found that MTGOP timely filed its report on March 31, 2020, but concluded

its federal spending, which COPP did not even know had been reported to the FEC, should have been reported to COPP. (R. 57, Ex. A (Merwin Aff.) at ¶ 14; Hrg. Tr. vol. 1, Pls. Ex. 8 at 9.) Though incorrect, (*see* R. 57, Ex. A (Merwin Aff.) at ¶ 18 and Ex. C), such a finding cannot be evidence of deception, as such information, even if required to be disclosed, would not have been reported until March 31, 2020, after the withdrawal deadline. MTGOP's in-kind contributions were timely and publicly disclosed. The District Court's resulting conclusions of MTGOP deceit, (*see* R. 85 at COL, ¶¶ 40–43), not only were incorrect, but impaired MTGOP's interests by adjudicating campaign finance violations to be tortious without MTGOP's participation.

The District Court held that the relevant issue was not what MTGOP did or did not do as a matter of campaign finance law, but rather what Montanans knew or did not know regarding the signature gathering effort. Its findings do not support this, (*see, e.g.,* R. 85, COL, ¶ 41 ("The MTGOP and its agents failed to properly and timely disclose its involvement in the petition in violation of Montana campaign finance rules …"); *id* at ¶ 43 ("The actions of MTGOP and its agents demonstrate its misrepresentations and failures to disclose in violation of Montana campaign finance law …"). Moreover, fundamental to campaign finance disclosure laws is precisely that concern—what the voters know. Indeed, because they burden First Amendment rights, disclosure laws are only constitutionally

justifiable if they serve such an informational interest. *Buckley v. Valeo*, 424 U.S. 1, 80–81 (1976); *McCutcheon v. FEC*, 572 U.S. 185, 223–224 (2014). If disclosure laws did not put the public on notice, they would not serve a constitutionally cognizable interest and so would be unconstitutional.

Assuming that both federal and Montana's campaign finance laws are constitutional, compliance with them must necessarily mean the public is informed. It is for this reason that MTGOP sought to bring its February 20, 2020, FEC report to the district court's attention. (*See* R. 57, Ex. A (Merwin Aff.) at Ex A.) In compliance with the public's informational interest, MTGOP disclosed to the proper legal authority its federal spending to give the Green Party access to the ballot more than two weeks before the Secretary certified the Party for the ballot. MTGOP did not conceal its spending: the public timely knew of its involvement. But the District Court excluded both MTGOP and the FEC report from the proceedings below. And in so doing, the District Court proceeded to wrongly conclude that MTGOP "misrepresented" and failed to disclose. (R. 85 COL ¶¶ 40-43.)

Moreover, the District Court ignored and rejected key facts that MDP misrepresented the circumstances of the Green Party Petition to petition signers and the public to persuade petition signers to withdraw their signatures. The alleged "flood" of petitioner signer withdrawals was not an organic effect—it was

a calculated, funded, organized drive by MDP, based on lies the MDP told to petition signers to induce them to withdraw their signatures. Kendra Miller testified that she organized the withdrawal effort on behalf of the MDP. (Hrg. Tr. vol 1, 48:20–24.) The effort was manned by about a dozen MDP staffers, with everyone at MDP chipping in, and began February 2020. (*Id.* at 147:16–148:3; 151:22–152:2.) MDP ultimately obtained numbers for about half of the total accepted signers and made "thousands" of phone calls. (*Id.* at 62:17–19; 127:16–22; 129:7–9.) Even though withdrawals were coming in quickly before March 24, 2020, they came in even more quickly after that date once MDP "learned" from a news article that MTGOP was paying for the Green Party effort and began to share that article and similar articles with petition signers. (*Id.* at 70:5–11.) However, what MDP told petitioner signers both before and after that date was untrue.

On February 6, 2020, Club for Growth Action ("Club Action") filed a C–2 Statement of Organization with the COPP as a minor party qualification committee. Club Action never reported any receipts or expenditures and, on February 20, 2020, informed the COPP that "Club Action is no longer gathering signatures to help the Green Party qualify for the ballot in Montana. Our vendor acknowledged our request to cease gathering signatures on our behalf on February 5 and stopped work for us on that same date." Importantly, Club Action did not submit any signatures it had collected. (Hrg. Tr. vol. 1, Pls. Ex. 8.) Despite the

fact that Club Action did not submit a single signature to qualify the Green Party for ballot access, the MDP repeatedly misrepresented to petition signers, voters, and the public that "dark money" groups were "mislead[ing] Montana voters" and "tamper[ing] with our elections," and that the Green Party "name is being misused." (R. 57 at 4–5.)

None of these statements were true—and were in fact provably false with the filing of MTGOP's FEC report and Club Action's statements to the Montana COPP. Through at least March 2, 2020, the MDP and its affiliates continued to falsely and publicly represent the above information to petition signers, voters, and the public. (Hrg. Tr. vol. 1, 15:17–23, 83:17–86:12..) To date, MDP has never disclosed who funded its coordinated effort to persuade petition signers to withdraw their signatures based on patently false claims.

2. The Secretary Is Not the Proper Party to Protect MTGOP's Interest.

MTGOP moved to intervene when it became apparent that Plaintiffs' allegations of misrepresentation and fraud formed a basis for the relief they sought and that the Court expected the Secretary to defend MTGOP's actions, (*see* Hrg Tr. vol. 1, Pls. Ex. A, at 9). The District Court held that the Secretary could have introduced MTGOP's evidence. (R. 86 at 3.) But when the Secretary attempted to introduce MTGOP's February FEC report disclosing its January petition spending, the Court declined to simply take judicial notice of the publicly filed administrative

document. (Hrg. Tr. vol. 1, 158:12–17 (MR. MEADE: Your Honor, to be honest, I would need the Montana Republican Party to defend that. I don't know. And perhaps it would be better addressed in their amicus brief. THE COURT: All right. I'm not sure I can take judicial notice of an administrative filing. …"); *id.* at 159:17–20 ("MR. MEADE: … This was a document the Republican Party intended to move to admit to the Court. THE COURT: So how are we bringing it in, then? …").) The district court ultimately rejected the report, both as offered by the Secretary and submitted in MTGOP's *amicus* brief. (R. 86 at 3–5.) The Secretary has no obligation to represent MTGOP's interests. *See State ex rel. Palmer v. Dist. Court*, 190 Mont. 185, 189, 619 P.2d 1201, 1203–1204 (1980) ("in determining adequacy of representation under Rule 24(a), the court will look to see if there is a party charged by law with representing [the absent party's] interest.") (internal citations omitted). And it was denied when it tried.

3. MTGOP's Participation As An Amicus Was Inadequate.

In denying MTGOP's Motion to Intervene, the District Court expressed skepticism that motivations behind petition signature gathering—a "purity test"—had any place in assessing the sufficiency of a minor party petition and articulated its view that this case is purely mechanical, involving the operation of state statutes and the Secretary's compliance. (Hrg. Tr. vol. 1, 9:8–10, 12–13) ("So the motive of the person that gives them that petition to sign it is irrelevant … I don't care who

circulates the petition I guess is what it comes down to. That seems to be irrelevant …"); (*id.* at 10:15–20) ("I don't think I need to hear a lot of testimony about the Republican Party did this, it was underhanded. Those are all proceedings—As I ruled in my decision to not allow the Republican Party to participate, those are decisions before a different body.") Nevertheless, the Court permitted Plaintiffs to introduce evidence purporting to show alleged bad faith and fraud on the part of MTGOP and signature gatherers, evidence that Plaintiffs repeatedly and disingenuously touted as "undisputed" throughout the hearing. The Court also, at Plaintiffs' suggestion, permitted MTGOP to participate as *amicus curiae*—"friends of the Court"—by submitting a brief for the Court's consideration.

Recognizing the Court's continued skepticism as to the relevance of Plaintiffs' claims against MTGOP, but also keenly aware of Plaintiffs' repeated and persistent presentation of its "undisputed" evidence to the court, MTGOP crafted its brief with an eye towards ensuring that the court was aware that evidence contradicting Plaintiffs' fraud claims existed. MTGOP wanted to be sure that the Court had available to it responsive evidence, through publicly available administrative documents and testimony, if the Court chose to set aside its skepticism and consider Plaintiffs' fraud claims. MTGOP's brief was intended to

demonstrate that Plaintiffs' evidence was *at least* disputable, if not readily contradicted.

For example, Plaintiffs claimed, and the District Court held, that MTGOP misrepresented and failed to disclose its spending until after the petition was certified. (R. 85 COL, ¶¶ 41–42.) But MTGOP's February FEC report—which the Merwin and Wenetta affidavits show are publicly available on the FEC administrative website—shows timely disclosure in February. (R. 57 at 4 (citing Merwin Aff., Ex. A; Wenetta Aff.).) Likewise, Plaintiffs touted, and the District Court relied on, a COPP finding of a campaign finance violation against MTGOP, (R. 85 FOF ¶¶ 61–63, 65–66, 68), but as the FEC report, MTGOP's March COPP report, and the COPP findings itself—again, all publicly available, administrative documents—show, MTGOP properly, timely, and publicly reported its spending to the appropriate regulatory agencies. (R. 57 at 4 (citing Merwin Aff., Ex. A & B; Pls. Ex. 8).)[2]

Additionally, Plaintiffs testified and the District Court held that petition signers were "induced" to sign, (*see* R. 85 COL ¶ 40), but the standards employed

[2] Indeed, a complaint has been filed against the Democratic Party for failing to properly report its efforts to prevent the certification of the Green Party from the ballot, efforts testified to by Ms. Miller. *See* Ankney Complaint for Declaratory Ruling, *available at* https://politicalpractices.mt.gov/Portals/144/2020%20Complaints%20and%20ONC/Ankney%20v%20Montana%20Democratic%20Party.pdf?ver=2020-07-20-125740-653.

by AMT and its gatherers were honest and transparent by industry standards, as the Pope and Goldberg affidavits show. (R. 57 11–12 (citing Pope Aff.; Goldberg Aff.).)[3] Yet all of this information was excluded by the District Court, which then proceeding to issue a ruling based in part on MDP's allegations that the petitions were fraught with fraud and should be judicially nullified. Despite MTGOP's brief and supporting documents showing that, at minimum, Plaintiffs were not exhibiting complete candor with the court and that their evidence and argument were not undisputed, the District Court permitted and relied solely on Plaintiffs' evidence to form the basis for its ruling in this case. This was a miscarriage of justice that negated any meaningful participation MTGOP might have provided.

4. The District Court Violated MTGOP's Due Process Rights.

In issuing its decisions, the District Court adjudicated campaign finance violations against MTGOP. (*See, e.g.,* R. 85, COL ¶ 41 ("The MTGOP and its agents failed to properly and timely disclose its involvement in the petition in violation of Montana campaign finance rules …"); *id* at ¶ 43 ("The actions of MTGOP and its agents demonstrate its misrepresentations and failures to disclose in violation of Montana campaign finance law …")." This was unconstitutional.

[3] Plaintiffs even claimed that MTGOP ran "sham" Green Party candidates, but that simply isn't the case, as the Marbut and Davis affidavits and even a news article, which MTGOP offered as examples, show. (R. 57 at 5 (citing *e.g.*, Marbut Aff.; Davis Aff.; Fredrickson Article).)

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "Some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333. "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause." *First Natl. Bank v. Bellotti*, 435 U.S. 765, 780 (1978).

Here, the District Court has adjudicated MTGOP's freedom of speech rights—spending to support the Green Party petition drive, *see McCutcheon*, 572 U.S. at 191 (recognizing political spending as protected speech)—to be in violation of Montana campaign finance law without an opportunity to be heard. Moreover, the District Court based its conclusion of a campaign finance violation on findings of COPP. These findings resulted from a MDP complaint filed against AMT, not MTGOP, for which an investigation was conducted about which MTGOP was completely unaware and in which MTGOP had no opportunity to participate. (R. 57, Ex. A (Merwin Aff.).) These findings, like all findings of COPP, are simply grounds to move forward with litigation in District Court to prove up alleged violations, a process that affords the alleged violator due process. § 13-37-128.

The District Court's findings short-circuited MTGOP's due process. Indeed, at no point has MTGOP ever had an opportunity to respond to the campaign finance claims lodged against its spending before findings have been made against it. The result is a violation of MTGOP's due process rights and a substantial impairment of its interests. For the District Court to determine MTGOP violated Montana campaign finance law, MTGOP had a constitutional right to be heard. Denial of intervention was unconstitutional error.

B. THE DISTRICT COURT ERRED IN DISPOSING OF THIS ACTION WITHOUT THE PETITION SIGNERS.

This case was supposed to resolve competing constitutional rights held by two competing groups of voters. On one side are thousands of Montana voters who associated—that is, advocated for political change by signing a petition—to qualify the Green Party for federal and state ballot access. These Green Party ballot access proponents have a First Amendment right to effectively associate to achieve that political goal. On the other side is a group of dissidents—individuals who signed the petition, but who, weeks or months after the petition was submitted and declared sufficient by the Secretary, were purportedly convinced to submit DocuSigned forms stating that they wanted out. The latter group was present at trial through three named Plaintiffs (two of whom were actually permitted to withdraw, which the district court apparently believed had no effect on their standing). These three Plaintiffs claim a Montana state constitutional right "not to

associate" that, applied here, would allow voters to defeat a minor party's federal ballot access by withdrawing from the petition even after the primary election was held in reliance on the petition, and using DocuSign or even phone calls—far less formality than is required for voters to associate together on the petition in the first place.

Where these groups' rights come into conflict, the district court held, Montana courts will be open only to the second group. Their state constitutional "right not to associate" will be fully enforced to allow months-late, DocuSigned petition withdrawals. If enforcing the second group's state constitutional rights renders a petition numerically insufficient, then the first, steadfast group's First Amendment right to associate to achieve federal ballot access will not be recognized; indeed, the steadfast signers will not even have standing in state court. As a matter of logic, law, and ultimately, under the Supremacy Clause, that cannot be right. This Court should reverse the denial of intervention and immediately vindicate the First Amendment rights of petition signers Loven and Campbell to an effective party qualification petition process.

1. The Petition Signers' First Amendment Interest Was Substantial And Dispositive.

Associating to promote political goals, including signing a petition, is protected under the First Amendment. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Norman v. Reed*, 502 U.S. 279, 288 (1992); *Anderson v. Celebrezze*, 260

U.S. 780, 793 (1980). More specifically, the First Amendment protects the right to make that association effective: "to associate in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 793. This particular facet of the First Amendment—a guarantee that a state petition process will not impose undue burdens on gathering sufficient signatures—protects petition proponents like the petition signers. *See Meyer v. Grant*, 486 U.S. 414, 421–422 (1988) (striking down restrictions that made it more difficult to amass petition signatures, and holding that "…[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (finding residency and filing deadline provisions of Arizona law unconstitutional because they unduly burdened process by which independent candidate gathered signatures to gain ballot access); *accord Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999) (invalidating Colorado requirements, including that petition circulators disclose funders to potential signers, and holding that First Amendment protection for the petition process is "at its zenith"). Thus, petition proponents are protected from state law that renders petition procedures ineffective for achieving political change.

These interests in effective association are at their apex in this case, because the underlying political goal the petition signers seek to advance through their

association-by-petition—federal ballot access for minor parties—is also federally protected: "The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *Am. Party of Texas v. White*, 415 U.S. 767, 783 (1974) (citing *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)).

Had they been allowed to intervene, Ms. Campbell and Ms. Loven would have shown the District Court that if the Plaintiffs' arguments were adopted as Montana law, it would eviscerate the First Amendment association rights of minor party ballot access proponents. It would render ballot access "merely theoretical," because petition proponents will never know how many signatures to safely collect due to the months-long "withdraw-only" phase of the petition process created by the district court at which time any number of signatures may be withdrawn.

In Ms. Campbell and Ms. Loven's absence, the District Court ignored these First Amendment rights and adopted Plaintiffs' radical reinterpretation of Montana law. Now, petition signatures will be due on one date but withdrawals will be permissible until months later after the primary election has occurred and the votes have been certified. Moreover, while voters must strictly follow petition requirements, their opponents can now easily nullify those efforts using means as simple as a phone campaign targeted to the nearest-margin districts.[4]

[4]The District Court makes clear that moving forward, an individual wishing to withdraw his or her signature from a petition merely needs to "express their intent to withdraw by identifying the petition at issue." (R. 85 at COL ¶ 52). In the

That task is rendered even easier using DocuSign. Direct human contact is no longer necessary, and it is easy to pressure a stranger over email, text, or voicemail. Here, MDP's campaign from late February to late June was waged by serial texts and messages to thousands of targeted signers, claiming the petition was the result of a "fraud" and imploring them to "clear their names," as if the signers themselves stood accused of participating in the fraud. The district court's rewrite of Montana's nominating petition standards renders the process an easily-gamed sham. It therefore violates the First Amendment rights of voters like Ms. Campbell and Ms. Loven who had a right to expect an effective petition process.

The petition signers present additional controlling authority in their amicus brief submitted in the sister appeal of this case, but for purposes of reviewing the denial of their intervention, this Court need only recognize that the petition signers have raised a legitimate question as to the constitutionality of Plaintiffs' proposed petition process that has now been approved by the district court. Intervention is necessary to ensure the rights of petition signers and proponents are preserved and any judgment adheres to constitutional contours.

MDP's Cross-Motion for Summary Judgment filed below, Plaintiff admitted, as they had to, that this standard is so lax that a mere email or phone call to a local election administrator is sufficient to remove a petition name. (R. 49 at 7, n. 3.) Even though in *Larson* this Court strictly enforced procedures for signing minor party qualification petitions, there is now no requirement and no process for ensuring that withdrawals are knowing and authentic.

2. The Montana Secretary Was Not The Proper Party To Raise These Constitutional Issues.

No other party to this litigation was in a position to assert the First Amendment rights of petition proponents like Lorrie Campbell and Jill Loven. The Secretary was merely interested in defending his actions as to certifying the petition and rejecting withdrawals that were improper and untimely under then-existing Montana law. But the Secretary's interest necessarily stops at the limits of Montana law. He becomes a neutral party when it comes to the political goal (federal and state ballot access for a minor party) of the petition signers, or their First Amendment rights to associate to achieve that goal. For that reason, the Secretary made none of the First Amendment arguments the petition signers make here. As a result, the District Court heard testimony from the Plaintiffs (the dissenting group), but not from Ms. Campbell, Ms. Loven, or any of the thousands of voters who do not claim to have been defrauded and whose federal rights are at stake. Perhaps not surprisingly, the district court's order does not even mention, let alone consider, the First Amendment rights of the steadfast signers. Because our system of zealous advocacy by competing interests was thwarted by the court's denial of the motion to intervene, First Amendment defenses went completely unresolved, and state constitutional issues alone were allowed to control the outcome.

3. The District Court's Justifications In Denying Intervention Were Unsound.

The court proffered two reasons for denying intervention. First, before the hearing, it argued that Campbell and Loven were just two of the many non-withdrawing signers; the implication was that their interests were insufficient to sustain the First Amendment defenses of the steadfast-signer group. This reasoning was unsound because, as shown above, Campbell and Loven's First Amendment interests are real and not merely theoretical. But it is also inexplicable given that the Court allowed two Plaintiffs whose withdrawals *were effectuated before the deadline* (Blossom and Weed) to seek a state constitutional remedy in the form of late "withdrawals" of hundreds of other voters who were not before the Court. The one other Plaintiff who did appear, Neumeyer, did submit a late DocuSign withdrawal. But Neumeyer could not testify that the petition circulator made any misrepresentation to her, and she also admitted that on the very day she submitted a DocuSign claiming she was unwilling to appear before a notary or election administrator due to Covid that she had gone to the clerk's office. This paltry showing from Neumeyer cannot somehow support standing to grant withdrawal of hundreds of other absent signers, of whose circumstances the Court knew nothing.

The District Court's other ground for denying intervention is also unsound. (R. 86 at 2–3.) The District Court first fully accepted Plaintiffs' state constitutional "right not to associate" arguments and found that as a result, the Green Party

petition was just barely numerically insufficient. It then held that petition signers' competing federal "right to associate" could only arise if a petition is numerically sufficient. Therefore, because this petition was insufficient, the petition signers had no First Amendment associational rights. Such circular reasoning will always defeat the First Amendment rights of minor party ballot access supporters. It gives full effect to the state constitutional interests of petition opponents, and only then asks whether anything remains for the thousands of other petition signers to protect under the First Amendment. But under the Supremacy Clause, the First Amendment is not subject to state-specific carveouts. It does not yield to state constitutions. The District Court's finding to the contrary was unsupported by citation and had no basis in the law.

4. The Petition Signers' Motion To Intervene Was Timely.

The petition signers moved to intervene as soon as they were made aware of MDP's attempt to remove the Green Party from the ballot. Even though MDP's withdrawal campaign had it contacting various petition signers for months, it failed to alert any petition signers to the fact that it had filed an action to strike the Green Party from the ballot. When these petition signers moved to intervene, no scheduling order had been entered, pleadings were still being filed, and threshold dispositive motions remained unresolved. Thus, no party indicated an injury or even inconvenience would occur due to the timing of signers' intervention motion.

5. Permitting The Petition Signers to Proceed As Amicus Was Insufficient.

While the district court did permit the petition signers to proceed as *amicus* in the underlying litigation in lieu of granting intervention, *amicus* status was insufficient. "*Amicus curiae* is a Latin phrase for 'friend of the court' as distinguished from an advocate before the court." *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974). As such, *amici* merely provide suggestions to the court for consideration. And here, the district court decided to disregard the suggestions from *amici* even though Plaintiffs and the petition signers are diametrically opposing parties who presented competing interests to be weighed by the court.

The petition signers were entitled to the opportunity to flesh out their arguments through the witnesses presented and then provide the court with constitutional claims to be resolved. The court committed reversable error by denying the petition signers this opportunity. Permitting the petition signers to participate in the litigation as *amicus* is not sufficient when intervention is proper. *See United States v. Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002) (holding that the district court's order granting the Police League amicus curiae status was insufficient when the Police League should have been permitted to intervene as a party to the action).

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's denial of Appellants' Motions to Intervene and its decision to strike MTGOP's evidence and consider their arguments and evidence in appeal No. DA 20-0396.

Dated this 12th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e), I certify that this Opening Brief is printed with proportionately-spaced, size 14 Times New Roman font, is double-spaced, and does not exceed 10,000 words, excluding the cover page, certificate of service, certificate of compliance, table of contents, table of authorities, and appendix as calculated by Microsoft Word.

Dated this 12th day of August, 2020.

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