IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 20-0396

COREY STAPLETON, in his official capacity
as Montana Secretary of State,

Defendant and Appellant,

v.

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

Plaintiffs and Appellees.

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ISSUES PRESENTED FOR REVIEW

1. Whether the District Court clearly erred when it determined, based on the largely undisputed factual record, that the Secretary unlawfully failed to honor over 500 requests from petition signers to withdraw their signatures from a petition to qualify the Montana Green Party (the "Green Party") for ballot access (the "Petition"), and that as a result, the Petition did not meet the minimum number of signatures required by Section 13-10-601, MCA.

STATEMENT OF THE CASE

Plaintiffs, the Montana Democratic Party and Montana voters, brought this action against the Secretary of State (the "Secretary"), seeking declaratory and injunctive relief concerning his decision to permit Montana Green Party candidates to appear on the 2020 general election ballot. The Secretary had announced that there were sufficient petition signatures to qualify the Montana Green Party to nominate candidates for general election ballot access through a primary election. But more than five hundred signers of the petition withdrew their signatures from the petition after learning that the Montana Green Party had nothing to do with the petition effort, and after it was belatedly revealed that the Montana Republican Party was the petition's sole backer. The Secretary conceded that so many withdrawal forms were submitted that the Petition would no longer qualify, yet he refused to honor the signers' requests to withdraw. The matter was heard by the First Judicial District

Court, and Judge James Reynolds issued a ruling, determining that the withdrawal requests were valid, and that as a result, there were not sufficient signatures to qualify the Green Party for the 2020 general election ballot. He enjoined the Secretary from giving any effect to the petition. From this ruling, the Secretary appeals. The Montana Green Party was not a party to the case and never sought to intervene.

STATEMENT OF FACTS

I. Paid petition gatherers attempted to qualify the Montana Green Party for ballot access — and were denounced by the Montana Green Party.

Beginning in late January 2020, over twenty petition circulators began to collect signatures for a petition to obtain ballot access in the November 2020 election for the Montana Green Party (the "Petition"). Findings of Fact (hereinafter "FOF"), ¶ 61. By mid-February, they had already collected almost all of the petition signatures that they would eventually turn in. FOF ¶ 17. All the while, it remained unclear who the petition circulators were and who was paying their bills. FOF ¶¶ 19–21, 29.

In mid-February, activists affiliated with the Montana Green Party tried to sound the alarm because the Green Party was not involved in the effort at all. FOF ¶ 18; Concl. of Law (hereinafter "COL"), ¶ 20 n.8. Local reporters began investigating. In response to the similar effort in 2018 to petition to qualify the Green Party for ballot access—whose funders were never publicly revealed—the Montana

Legislature, on a bipartisan basis, had passed legislation to require prompt disclosure of contributions and expenditures made in an effort to petition to qualify a minor political party for primary elections. FOF ¶ 22. Using those campaign finance filings, local reporters uncovered that a conservative Washington D.C. SuperPAC was behind the effort. FOF ¶ 19. But that group's spokesman issued an immediate, on-the-record denial. FOF ¶ 20.

As a result, by the time that the circulators had finished collecting the petition signatures that they would eventually turn in, Montanans still did not know who was financing the petition effort. FOF ¶ 21. As one local reporter put it on February 21: "[H]opefully we'll see some sort of paperwork filed soon to give us an idea of who's behind it." *Id.* .

II. Montana voters demanded that their names be removed from the Petition.

As the news began to spread of the mysterious petition gathering efforts and as the circulators began turning in the petitions in late February, just days before their March 2nd submission deadline, signers began to demand that their names be removed from the Petition. FOF ¶ 34. This included Plaintiffs Blossom and Weed, who attempted to withdraw their signatures after they found out that an unknown entity other than the Montana Green Party was behind the effort. *Id.*

County election offices completed their review of the petitions, and on Friday, March 6, the Secretary announced that the petition contained enough purportedly valid signatures. FOF ¶ 31. At the time of the Secretary's announcement, it was still unclear what entity was behind the Petition effort. FOF ¶ 33

Only six candidates filed to run in Green Party primary elections. Cheryl Wolfe, the Green Party treasurer, would later post on the Green Party's Facebook page that "none of those running under the Montana Green Party ticket this season are actual Greens as far as we can tell. They have not been involved in Montana Green Party activities." Plfs. Ex. 14, Plfs. Ex. 15.

III. After local reporters uncovered the Montana Republican Party's involvement, even more signers demanded their names be withdrawn from the Petition.

On March 24, weeks after the Secretary's announcement, the public finally learned the truth: the mystery group behind the Petition was the Montana Republican Party ("MTGOP"). FOF ¶ 60.

In a convoluted arrangement, the MTGOP Central Committee contracted directly with the Texas-based petition gathering firm Advanced Micro Targeting—the very same firm behind the 2018 Green Party petitions invalidated by this Court, whose funders had never been revealed. FOF ¶¶ 61. The MTGOP Central Committee then set up a shell organization titled "Montanans for Conservation," to which it credited a $100,000 in-kind contribution to cover the expenditure. FOF ¶ 63,

66. Rather than file a statement of organization as a minor party qualification committee within five days of beginning their operations, as required by the recently enacted disclosure law, the MTGOP never filed any statement of organization at all. FOF ¶ 60. And Montanans for Conservation incorrectly filed a statement of organization as an *independent* committee. FOF ¶ 63; Trial Tr. 174:8–11. As a result, their filing only appeared in the public database among hundreds of documents for independent committees—rather than among the handful of documents for minor party qualification committees. *See* FOF ¶ 64; Trial Tr. 175:5–15. This tactic successfully concealed the group's filings from even the dogged local investigative reporters. *See* FOF ¶¶ 19–21, 33, 64. Montanans for Conservation disclosed its status as a minor party qualification committee only a day before local newspapers ran articles finally exposing the MTGOP's involvement. FOF ¶ 65. The Commissioner of Political Practices ("COPP") later determined that these failures to timely and accurately disclose violated Montana campaign finance law and "added to the confusion surrounding the Green Party qualification effort in February and March of 2020." FOF ¶ 68.

After the revelation of the MTGOP's involvement, the flow of withdrawals became a flood. FOF ¶ 73. The MDP mobilized to inform signers that the MTGOP was behind the Petition and help signers who wanted to withdraw. *See* FOF ¶ 69; Trial Tr. 69:19–23. Even though signers of petitions have an absolute right to

withdraw, the Secretary never published any guidance about how to go about doing so, much less what he believed was required for a withdrawal request or the applicable deadline. FOF ¶¶ 45–50. The Secretary had prepared a withdrawal form that on its face applies only to *other* kinds of petitions, and although the MDP did not believe using it was required, the MDP advised signers that county elections officials would likely accept it, and assisted signers in completing and submitting them. FOF ¶ 75. But the pandemic and ensuing statewide stay-at-home order and social distancing guidelines made signers' attempts to complete the form—which purported to require a signature in front of a notary or elections official—unexpectedly and substantially more difficult. *See* FOF ¶¶ 76–79. In response to these well-founded concerns, the MDP set up a process to enable some singers, including Plaintiffs Filz and Neumeyer, to complete and sign the form electronically on their computers or smartphones using the electronic document signature platform DocuSign. *See* FOF ¶¶ 80-84. MDP then transmitted withdrawal forms completed through DocuSign to county elections offices. *Id.*; Trial Tr. 78:18–24. Despite these challenges, hundreds more voters submitted withdrawal forms to county elections offices. Trial Tr. 70:5–11.

To be successful, a political party qualification petition must contain a threshold number of signatures in 34 or more districts. *See* Section 13-10-601(2)(b), MCA. Prior to the June 2, 2020 Primary Election, well over 500 signers, including

Plaintiffs, requested to be removed from the Petition. FOF ¶¶ 92–93. As counsel for the Secretary admitted at trial, after accounting for these withdrawals, the Petition meets the threshold number of signatures in only 33 house districts, leaving the Petition with insufficient valid signatures to qualify. FOF ¶¶ 94–96. But the Secretary still refuses to honor those withdrawal requests and has not rescinded his announcement that the Petition contains enough purportedly valid signatures.

STANDARD OF REVIEW

"The grant or denial of injunctive relief is a matter within the broad discretion of the district court based on applicable findings of fact and conclusions of law." *Davis v. Westphal*, 2017 MT 276, ¶ 10, 389 Mont. 251, 256, 405 P.3d 73, 80; *Larson v. State By & Through Stapleton*, 2019 MT 28, ¶ 16, 394 Mont. 167, 182, 434 P.3d 241, 251 ("We review the grant or denial of injunctive relief for a manifest abuse of discretion.") (internal quotations omitted).

To the extent the ruling is based on legal conclusions, this Court reviews those findings de novo. *Id.* Factual findings are reviewed for clear error. *Id.*

SUMMARY OF THE ARGUMENT

Without the involvement, knowledge, or consent of the Green Party, the MTGOP surreptitiously funded a petition drive to put the Green Party on the ballot in a cynical attempt to siphon votes from Democratic candidates, violating bipartisan campaign finance disclosure requirements enacted just a few months before. When

the truth was revealed, hundreds of Montana citizens who signed the petition believing it was a legitimate effort by the Montana Green Party to advance their values and beliefs, with no inkling that it was wholly backed by the Republicans, sought to remove their names and dissociate themselves from the Republicans' deceptive tactics. But the Secretary unlawfully refused to honor those requests. Without any notice to the public and lacking statutory authority, the Secretary decided that withdrawal requests submitted after he tabulated the number of signatures in the Green Party petition—a determination he made based on a still-secret document and without any advance notice to the public—were invalid. During litigation, the Secretary announced for the first time that he would refuse to honor any electronically signed withdrawal forms, despite the COVID pandemic and the Governor's stay-at-home orders, despite the lack of statutory authority for him to prescribe requirements for withdrawal requests, and despite the lack of any public pronouncement of any such requirements.

The District Court, after a two-day evidentiary hearing, and after considering an extensive evidentiary record, briefing, and oral argument, issued a thorough 50-page opinion that held, on multiple independently sufficient grounds, that the withdrawal requests are valid under Montana law. After accounting for the withdrawal requests, the Petition no longer contained a sufficient number of

signatures under Section 13-10-601(2), MCA, and the District Court enjoined the Secretary from giving it any effect.

The District Court's careful opinion should be affirmed on all grounds, any one of which is independently sufficient to justify the injunctive relief issued by the court. The Secretary takes no issue with the District Court's findings of fact, and as set forth below, the District Court's rulings of law were well reasoned and fully supported.

The District Court correctly affirmed Montanans' absolute right to withdraw their signature from a petition on three independently sufficient grounds—that the Secretary was not empowered to issue "final action" on a political party qualification petition, that even if he was, his March 6, 2020 announcement of sufficiency, made with no prior warning and based on a secret decisional document and undisclosed procedural requirements, did not constitute final action under the circumstances, and that even if that decision were final action, petition signers still had the right to withdraw because they had been duped.

The District Court also correctly held that Secretary's failure to honor withdrawal requests under these circumstances severely and unjustifiably burdened signers' constitutional rights not to associate with a political party and a cause that they oppose. The District Court also correctly held that the subset of withdrawal

requests bearing an electronic (rather than wet-ink) signature, completed by signers after COVID-19 social distancing precautions took effect, were valid.

The circumstances of this case are unprecedented: a political party qualification petition surreptitiously funded by a rival political party in violation of campaign finance disclosure rules, from which hundreds of signers sought to withdraw in the middle of a global pandemic, where the Secretary failed to provide public guidance and secretly adopted policy on an *ad hoc* basis. Contrary to the Secretary's and *amici*'s parade of horribles, the District Court's resolution of the contested legal issues in this case will have little application beyond the extraordinary factual circumstances presented here. For example, resolving questions related to "final action" for political party qualification petitions, and procedures and requirements for withdrawing signatures from those petitions, will in no way implicate well-settled and statutorily defined procedures for far more common types of petitions—like petitions for initiatives, referenda, and constitutional amendments. Unlike petitions to qualify a minor political party, those petitions have clear statutorily-prescribed withdrawal deadlines and procedures, over which the Secretary has legislatively-conferred authority.

Moreover, at least two of the grounds relied upon by the District Court are exceedingly narrow and fact-bound. For example, the District Court found that the Secretary's actions could not constitute valid "final action" based on his failure to

conduct a transparent process consistent with constitutional mandates on open government. This holding turned on the specific facts of this case, and would not prevent the Secretary from transparently exercising his powers in a way that affords the public fair notice and an opportunity to participate. Similarly, the District Court found that the withdrawals at issue were justified based on the actions taken by the MTGOP to conceal its involvement despite the Party's obligation to abide by campaign finance disclosure laws. Future minor party qualification committees can be expected to adhere to their campaign finance disclosure requirements, particularly if this Court reaffirms the right of signers to withdraw, a decision that would create strong incentives for petition proponents to conduct their operations transparently, openly, and lawfully.

Moreover, as counsel for the Secretary represented in closing arguments below, the Secretary is already imploring the Legislature to make changes to the process, apparently to grant the Secretary the authority over withdrawals from political party qualification petitions that he—by his own admission—presently lacks. But however the Legislature may change Montana law going forward, it cannot retroactively cleanse the actions the Secretary took here—arbitrarily and without authority or public notice attempting to deprive hundreds of Montana citizens of their rights to withdraw from a petition and to force them to associate with a party or cause they oppose. Nor can it excuse the MTGOP's attempts to obtain

a political advantage by concealing the fact of its involvement, information which the legislature has already deemed the public's right to know. Only the courts of this State can set these wrongs right.

ARGUMENT

I. The District Court correctly held that the Secretary's failure to give effect to Plaintiffs' and other signers' withdrawal requests violates Montana law.

The District Court did not err in holding that the Secretary must give effect to the withdrawal requests under Montana law.

Montanans have the absolute right to withdraw their signatures from a petition. *State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 P. 297, 300 (1913) (finding "signers of a petition have an absolute right to withdraw therefrom at any time before final action thereon"). This Court has described this longstanding right as "a necessary inference from the very nature of the right of petition." *Id*. Pursuant to this right, individuals can withdraw their signature so long as: (1) no statute forbids it; and (2) individuals withdraw before "final action" is taken on a petition. *See id.* And even after "final action," signers may still withdraw if they later learn that representations made to induce them to sign the petition, and on which they relied, were false. *See State v. Anderson*, 92 Mont. 298, 13 P.2d 231, 234 (1932).

Because there is no express legal prohibition on withdrawing signatures from a political party qualification petition, nor any specified process or deadline for

withdrawing, Montanans have the unequivocal right to withdraw their names from such petitions. The signers submitted their withdrawals before valid final action on the petition. And signers submitted withdrawals after learning that—contrary to their reasonable belief when signing the petition—the Green Party did not organize or sponsor the petition, and the MTGOP was behind it.

Nevertheless, the Secretary contends that he has the power to unilaterally, and secretively—without any advance notice or public announcement—terminate Montanans' right to withdraw. As the District Court correctly concluded, the Secretary is wrong.

A. The signers withdrew their signatures before any certificates of nomination issued and thus before final action on the political party qualification petition.

The District Court correctly held that the withdrawal requests at issue here—all completed prior to the June 2, 2020 Primary Election—are valid because they were submitted before "final action." The meaning of "final action" is not defined in statute, and courts in Montana and other states have interpreted the phrase based on the nature of the particular petition and its function within the statutory framework that authorizes its use.

The unique characteristics of petitions for political party qualification in Montana compel the conclusion that action on such a petition is not final until votes have been cast and canvassed in the primary election and after certificates of

nomination have issued. This is because filing a political primary qualification petition is one of several initial steps in a process through which voters ultimately decide whether to nominate candidates for the general election. Primary election voters—not petition signers, and not the Secretary—ultimately decide whether to nominate candidates for office, and the state canvassing board, which counts those votes and issues certificates of nomination, is "the person or body created by law to determine the matter submitted by petition[.]" *See State ex rel. O'Connell v. Mitchell*, 111 Mont. 94, 106 P.2d 180, 181 (1940) (citing *Ford*, 61 P.2d at 815). Put another way, while filing a political party qualification petition initiates a multi-step procedure that a party's voters may use to determine who to nominate, no one is nominated—and no right to general election ballot access attaches—until primary votes have been cast and counted for candidates running for a party's nomination. Accordingly, no final action is taken on the petition until that time.

Courts in other jurisdictions have reached similar conclusions. For example, the Wisconsin Supreme Court allowed signatories to a petition for annexation to withdraw their signatures until the city council adopted the annexation ordinance. *See Town of Blooming Grove v. City of Madison*, 253 Wis. 215, 221, 33 N.W.2d 312, 315 (1948). There, the voters' signatures on the petition were not enough: the proposed ordinance also had to be introduced, published, and adopted by the city council by a three-quarter majority. *Id.* That court reasoned that the introduction and

publication of the ordinance—which was initiated by the filing of a petition deemed to have a sufficient number of signatures—were intermediate procedural steps, but that no rights were perfected until the council officially voted to adopt the ordinance. Accordingly, the court permitted withdrawals up until council's vote. *See id.*

Here, the Secretary, relying on analogies to initiative petitions, insists that his word is "final action" for political party qualification petitions. *See* Br. at 10–13. But his argument falls short for multiple reasons.

First, the Secretary's analogy to initiative petitions is inapt. For example, in *Ford v. Mitchell*, this Court held that the right to withdraw one's signature from an initiative petition existed until the Secretary of State had finally determined, in the manner provided by statute, that the petition was sufficient. *See Ford v. Mitchell,* 103 Mont. 99, 61 P.2d 815, 823 (1936). That makes sense in the context of an initiative petition because of the nature of the initiative process itself: initiatives are placed directly on the general election ballot so long as proponents submit enough signatures by the deadline; there is no requirement to first initiate a primary election or to satisfy any other steps or contingencies. *See* Mont. Const. art. III, § 4. Once the Secretary certifies that an *initiative* petition qualifies for the ballot, Section 13-27-308, MCA, the matter submitted by the petition is placed on the ballot. In this sense, the Secretary's certification—a power expressly conferred upon the Secretary by statute—is final.

But political party qualification petitions serve a much different function. The act of submitting a political party qualification petition simply authorizes a political party to initiate a state-administered procedure (a primary election) to determine whether to nominate candidates and which candidates to nominate. The Secretary's tabulation of signatures on the petition confers no right to placement on the general election ballot—and no statute so holds. Rather, a number of other procedural requirements and contingencies must first be met: candidates for the nomination of the political party must: (1) timely file a declaration of nomination, Section 13-10-201, MCA; (2) not die or withdraw their candidacies, Section 13-10-326, MCA; (3) maintain their constitutional and statutory eligibility for the offices in question, Section 13-12-201(3), MCA; and (4) file certain campaign finance and business disclosure statements and reports, Section 13-37-126, MCA. Most importantly, candidates for a nomination must stand for primary election and receive votes; the act of seeking a party's nomination has no legal significance until votes are canvassed and counted and certificates of nomination are issued. Section 13-15-507, MCA (state canvassing board declares nominated the individual having the highest number of votes); *see also* Section 13-10-303, MCA (providing that candidates

nominated by more than one party must choose one party or appear on the general election ballot without a party designation).[1]

Second, the Secretary wrongly infers that by tabulating a political party qualification petition, he "certifies" the petition, making his action "final action." Br. 10–12. But as the District Court correctly determined, no statute delegates to the Secretary "certification" authority. Indeed, the statute that empowers the Secretary, after tabulating signatures, to "immediately certify to the governor that the completed petition qualifies for the ballot," does *not* apply to political party qualification petitions. Rather, it applies to a "petition for referendum, initiative, constitutional convention, or constitutional amendment[.]" Section 13-28-308, MCA. And although the Political Party Qualification Statute incorporates by reference certain statutes applicable to ballot issues, Section 13-28-308, MCA is *not* among them, *see* Section 13-10-601, MCA. and it makes no mention of certification by the Secretary, to the Governor or to anybody else.No other statute delegates to

[1] The Secretary contends that, in certain exceptional circumstances not present in this case—in which a small number of candidates are running unopposed in a party's primary—primary ballots need not be printed and candidates may be certified to the general election ballot. 13-10-209(2)–(4), MCA. But this only reinforces that the Secretary's tabulation itself confers no right to placement on the general election ballot. Moreover, the Secretary's certification under this provision occurs under the same timeline as any other nomination—*i.e.*, *after* the results of the primary election have been canvassed. *See* 13-12-201, MCA.

the Secretary the authority to "certify" the inclusion of anything on any ballot for political party qualification petitions.[2]

Third, the Secretary unpersuasively attempts to recharacterize a political party qualification petition as simply a request to issue ballots that have a party's name on them—rather than a request to *nominate candidates* using a primary election. Br. at 10, 12–13, 16 (arguing that eligibility to participate in a primary is the "matter submitted by the petition"). The Secretary is wrong. Under Montana law, the very purpose of holding primary elections is to determine the candidates who are entitled to general election ballot access as their party's nominee. Section § 13-10-601(2)(a), MCA (minor parties "may qualify to *nominate its candidates* by primary election by presenting a petition") (emphasis added); *Larson*, ¶ 3 ("To be eligible *to nominate candidates for election to public offices* on the ballot in Montana, political parties

[2] The Secretary and *amici* make much of two sentences in this Court's opinion in *Larson* that summarized officials' administrative duties regarding political party qualification petitions, which used the term "certify" to describe the Secretary's role. *See Larson*, ¶¶ 3, 25. But these sentences were not referring to any statutorily conferred authority to "certify" the inclusion of candidates on any ballot. *See id.* (citing 13-27-303 to -307, MCA, but not citing 13-27-308, MCA, providing for certification to the Governor). Rather, the Court was simply articulating that when the Secretary tabulates a sufficient number of signatures (and announces that tabulation), a party becomes eligible to initiate the procedural mechanism of a primary election to nominate its candidates.

must qualify as specified by § 13-10-601, MCA.") (emphasis added).[3] Indeed, holding a primary election has no public purpose independent of nominating candidates who are then entitled to appear on the general election ballot. As a result, that the Secretary's tabulation of signatures for a political party qualification petition permits that party to begin to take procedural steps towards nominating candidates in a primary election does not mean that the Secretary's tabulation constitutes final action on "the matter submitted" by the petition—*i.e.* the party's nomination of candidates through a primary election. Only the voters can do that.

B. The Secretary of State's failure to conduct a transparent process consistent with constitutional mandates on open government means that his March 6, 2020 announcement cannot constitute "final action" under the circumstances presented here.

The District Court also correctly held that, even accepting the Secretary's claim that, under some circumstances, he could take "final action" on a political party qualification petition, the Secretary's failure to conduct a transparent process consistent with Montana's constitutional mandate on open government meant that his March 6 announcement in this case could not have constituted final action. *See*

[3] For example, when petition signers sign the Secretary's own Political Party Qualification Petition, they affirm the following statement: "We, the undersigned registered voters of the state of Montana hereby request that in accordance with 13-10-601, MCA, the names of the candidates running for public office from the [name of party] Party *be nominated as provided by law*." (emphasis added). Mont. Sec. of State, Political Party Qualification Petition, https://sosmt.gov/Portals/142/Elections/Documents/Officials/Political-Party-Qualification-Petition.pdf.

COL ¶¶ 21–31. The Secretary's opening brief does not contest the factual basis for the District Court's holding and it offers no argument as to why the District Court erred as a matter of law. The District Court's opinion can and should be affirmed on this basis alone. *See Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 9, 315 Mont. 231, 234, 69 P.3d 652, 654 ("[I]f a party fails to raise an issue or argue it in his or her brief, we will deem the issue waived and will not address it.") (citations omitted).

In any event, the District Court correctly held that the Secretary's actions in connection with the Petition in this case cannot constitute a final action. Article II, Sections 8 and 9 of the Montana Constitution require agencies to conduct a transparent process open to public input "prior to the final decision." *See* Mont. Const. art. II, § 8; *Bryan v. Yellowstone Cty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 39, 312 Mont. 257, 269, 60 P.3d 381, 390. The Secretary's conduct was anything but transparent. Among other things, the Secretary never issued any public guidance—let alone rules or other formal policy statement—regarding: (1) when he would make a sufficiency determination, (2) what he believed to be the deadline for withdrawing from the petition, (3) that he would refuse to honor withdrawal forms submitted after the (spontaneously decided) date of his sufficiency determination; (4) what he believed to be the formal requirements for a withdrawal; or (5) that he would refuse to honor electronically signed withdrawal forms. *See* FOF ¶¶ 44–50.

While the Secretary eventually took positions on these questions—in some cases, midway through litigation—those decisions were *ad hoc*, internally contradictory, unsupported by statute, and hidden from the public. FOF ¶¶ 51–59. Most remarkably, the Secretary tabulated the signers of the petition in a secret decisional document, whose existence was revealed for the first time at trial. This crucial document has never been disclosed to the public, to Plaintiffs-Appellees, or even to the court below. *See id.* ¶¶ 98–103.

The District Court's reasoning was sound. First, the District Court reasoned that while this Court has not definitively resolved what "final action" generally means in the context of a political party qualification petition, "final action" by "a person or body created by law to determine the matter" presupposes an orderly process with clear notice, procedures, rules, and timelines: "[i]t cannot be what the Secretary contends it is under these circumstances: an announcement of sufficiency based upon a decisional document hidden from the public, made without any prior notice that the Secretary would refuse to honor any additional withdrawal requests past a certain date, let alone what that date would be, and made without any prior notice of purported procedural requirements that withdrawal requests would have to satisfy." COL ¶ 24.

Second, the District Court reasoned that "final action" necessarily presupposes a "final decision" within the meaning of Article II, Section 8 of the

Montana Constitution. COL ¶ 25. As a result, "the Secretary's choice to shield the process, applicable procedural requirements, and decisional documents from the public means that his decision cannot be a 'final action.'" *Id.*; *see Bryan*, ¶¶ 39, 44 (holding that school district violated a parent's rights by keeping secret the spreadsheet underlying its decision to close a school); *id.* ¶ 55 (holding that violations rendered school district's decision void). The District Court grounded this reasoning in similar legal principles codified in in the Montana Administrative Procedure Act, which requires that state agencies "make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions." *See* COL ¶ 26 (citing Section 2-4-103(1)(a), MCA). When an agency fails to do so, it exceeds its authority, and its interpretations have no legal effect. *See* Section 2-4-103(3), MCA ("No agency rule is valid or effective against any person or party whose rights have been substantially prejudiced by an agency's failure to comply with the public inspection requirement herein.").

The District Court did not err. The open government provisions of the Montana Constitution prohibit secret decision-making and undisclosed rules and procedures that restrict Montanans' rights. Like all constitutional officers, the Secretary's authority must be bound by constitutional constraints. The power that the Secretary now claims—to certify a petition on a previously unannounced date,

based on secret documents, undivulged criteria, and undisclosed procedural requirements, and to simultaneously curtail signers' ability to exercise their absolute right to withdraw their signatures—would directly conflict with those constitutional protections. The need for basic transparency is even more important where, as here, the Secretary has zero statutorily or constitutionally conferred authority to impose these kinds of rules and procedural requirements for withdrawals from political party qualification petitions. *See* COL ¶¶ 11, 19, 27-30, 57. *Larson*, ¶ 41 ("[N]either the Montana Constitution, § 13-10-601(2), MCA, nor other statutory provisions incorporated therein vest the secretary of state with unilateral discretion to determine the substantive or procedural requirements for political party ballot qualification petitions.").

As noted above, the Secretary failed to preserve this issue on appeal, and the brief treatment of the issue by *amici* cannot resurrect it. *See Carter v. Miss. Farm Bureau Cas. Ins. Co.*, 2005 MT 74, ¶ 16, 326 Mont. 350, 355, 109 P.3d 735, 739 (amici cannot assume the functions of parties, nor create, extend, or enlarge issues). But even if they were properly before the Court, *amici's* arguments are unavailing. *Amici* incorrectly suggest that the Secretary's actions did not implicate Montana's constitutional guarantees of open government because they did not involve the Secretary's rulemaking authority. Campbell Br. at 37. But Article II, Sections 8 and 9 are not so limited. *See, e.g.*, Mont. Const. art. II, § 8 (right to "reasonable

opportunity for citizen participation in the operation of the agencies"); *Bryan*, ¶ 24 (applying protections to school district's vote to close schools). Indeed, the importance of these protections is heightened precisely because the Secretary was *not* acting pursuant to statutorily or constitutionally conferred authority to make rules.

Amici also incorrectly suggest that the District Court erred because Section 2-3-114, MCA, imposes a statutory deadline for claims under that statute. Campbell Br. at 38. But the Court did not rule on a petition brought under that statute (indeed, Plaintiffs only learned of the Secretary's undisclosed procedural requirements and secret decisional document during trial). Rather, the Court drew upon these constitutional provisions and doctrine in deciding whether the Secretary could have taken "final action" on the petition sufficient to cut off signers' rights to withdraw in this case.

Finally, *amici*'s remarkable contention that the public should have intuited the Secretary's undisclosed deadlines and procedural requirements—such as the proper formalities for a withdrawal request—by looking at the election calendar and "knowing the law," Campbell Br. at 39–40, runs counter to fundamental open government principles: the public has a right to meaningfully participate and to know—not guess at—the contents of the Secretary's rules and the bases of the Secretary's decisions. It also defies the record: the election calendar identifies no

deadline either for the Secretary to determine the sufficiency of a political party qualification petition or for the submission of withdrawal forms for such petitions. Defs. Ex. 1.

C. Signers validly withdrew their signatures after learning that the Montana Green Party did not organize or sponsor the Petition.

The District Court correctly held that the withdrawal requests must be given effect for yet a third independently sufficient reason: even if the Secretary had taken final action, Plaintiffs and other petition signers had the right to withdraw after learning that representations made to induce them to sign the petition were false. COL ¶ 32. The true identity of the group behind the Petition—the MTGOP —was not revealed until well after signers signed the Petition and the Secretary tabulated the signatures. *Id.* ¶ 33. Montana law is clear that signers can withdraw even after final action if they learn that representations made to them as an inducement to sign the petition, and on which they relied, were false. *Id.* ¶ 34 (citing *Anderson*, 92 Mont. at 298, 13 P.2d at 234). This furthers the purpose of the Political Party Qualification Statute: as this Court has explained, the statute was "enacted for the manifest purpose of ensuring that previously unqualified political parties qualify for ballot access *only upon the knowing request*" of signers. *See Larson*, ¶ 30 (emphasis added).

To evaluate whether the misrepresentations justified a signatory's withdrawal, the District Court looked to general common law and statutory principles of contract and tort law for guidance and identified common elements across these doctrines.

COL ¶¶ 35–39. The court then determined that actions taken by the MTGOP and its agents to induce Montanans to sign the Petition tracked those elements. *Id.* ¶¶ 40–43. The Court's factual findings supporting its determinations are all amply supported by the evidence at trial, and the Secretary makes no colorable argument to the contrary.

First, the Court found that the MTGOP and its agents concealed their involvement in the Petition in violation of Montana's campaign finance rules—as determined by the COPP—and only made accurate disclosures weeks or months after signers had signed the Petition and it was submitted to officials. *See* COL ¶ 41; FOF ¶¶ 27–29, 68; COL ¶¶ 41–43. The court also found that this concealment was intentionally designed to create an advantage for the MTGOP "at the expense of unwitting signers." COL ¶ 43; FOF ¶¶ 17–21, 33, 60–68. *See* 27-1-712(2)(c), MCA (deceit entails "giving facts that are likely to mislead for want of communication"); *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 45, 375 Mont. 38, 51, 324 P.3d 1167, 1180 (negligent misrepresentation) (untrue representation made to induce reliance without any reasonable ground for believing it to be true); Section 28-2-406, MCA (defining constructive fraud as "any breach of duty that, without an actually fraudulent intent, gains an advantage to the person in fault . . . by misleading another person to that person's prejudice").

Second, the Court found that these misrepresentations and failures to disclose mattered to signers, who would never have signed the Petition had they known the truth about who was sponsoring and organizing it, and who took action to attempt to withdraw their signature once they learned what had happened. COL ¶ 42; FOF ¶¶ 14–16, 72–73, 92, 107. *See* 27-1-712(2)(c), MCA (deceit) (prohibiting deceit that induces a person "to alter the person's position"); *Morrow*, ¶ 45 (negligent misrepresentation) (requiring that party acted in reliance upon the truth of the representation without knowledge of its falsity); *Dewey v. Stringer*, 2014 MT 136, ¶ 9, 375 Mont. 176, 180, 325 P.3d 1236, 1240 (constructive fraud) (requiring that hearer relied upon the truth of a material representation without knowledge of its falsity); *Keller v. Liberty Nw., Inc.*, 2010 MT 279, ¶ 23, 358 Mont. 448, 454, 246 P.3d 434, 439 (mistake) (defining mistake regarding a material fact as "so substantial and fundamental" "as to defeat the object of the parties in making the contract). Indeed, the materiality is established as a matter of law: the Legislature has deemed information about funding of political party qualification petitions so important to the process that it has mandated its disclosure within days after any petition-gathering activity commences.

Under the specific circumstances presented by this case, the District Court correctly held that the MTGOP's concealment of its involvement until well after all

signatures had been collected justified the withdrawal requests at issue, regardless of whether the Secretary's tabulation constituted "final action."

The Secretary offers no persuasive rebuttal. Instead, the Secretary incorrectly argues that *Anderson* narrowly limits the kinds of misrepresentations that may justify withdrawals after final action—namely, forged signatures or false statements about the contents of the petition. Br. at 21–22. The Secretary mistakenly contends that *Anderson* held that the withdrawals were too late even if allegations of fraud were proven true. Br. at 19. Not so: the *Anderson* Court acknowledged that fraud or the "misrepresentation of material facts" *could have* invalidated the petition, even after final action, but it never reached the issue of what kinds of misrepresentations would suffice, because it found the argument waived on appeal. *Anderson*, 92 Mont. at 298, 13 P.2d at 234. (Nor did the *Anderson* Court opine on what constituted laches, as the Secretary suggests, as there was no evidence in the record to assess that defense). The Secretary compounds this error by suggesting that the individual plaintiffs in this case testified that all material facts about the petition were true. Br. at 20. But in fact, each Plaintiff testified that the identity of the backer of the petition was material to their decision to sign the petition, that they reasonably believed that the Green Party had backed the petition, and that they did not know that MTGOP was behind the effort. *See* FOF ¶¶ 14–16.

The Secretary also wrongly suggests that the District Court improperly relied on newspaper articles. Br. at 20. But the District Court sought to determine what information was publicly available to Montanans who signed the petition at the time they signed. This Court has long recognized that newspaper articles are admissible to demonstrate that certain information has been publicized. *See, e.g.*, *Harvey v. Town of Townsend*, 57 Mont. 407, 188 P. 897, 900 (1920). Other courts agree. *See, e.g.*, *Hudson v. City of Shawnee*, 246 Kan. 395, 407, 790 P.2d 933, 943 (1990) ("Newspaper articles are generally admissible to show public knowledge."). Because public knowledge was the "ultimate fact with which the court was concerned," the District Court did not abuse its discretion in admitting the newspaper articles for that purpose. *Harvey,* 57 Mont. 407, 188 P. at 900. *See State v. Kolb*, 2009 MT 9, ¶ 10, 349 Mont. 10, 12, 200 P.3d 504, 505 ("We review evidentiary rulings for abuse of discretion.").

The additional arguments raised by *amici* all proceed under a common mistaken premise, that the MTGOP's involvement was publicly known during the signature campaign because of a federal campaign finance filing with an oblique reference to petition gathering, and because its improperly filed disclosures were still technically accessible in a public database. *See* MTGOP Amicus Br., at 10-12. But *amici*'s premise defies the undisputed evidence: as the District Court found, neither the petition signers, the general public, political reporters, or the COPP were actually

aware of the MTGOP's involvement until late March precisely because of the MTGOP's steps to conceal its activities. FOF ¶¶ 62-68.

Amici also assume that there could be no misrepresentation that justified withdrawal so long as circulators identified the petition as a petition to qualify the Green Party. *See* MTGOP Amicus Br., at 10-18. But the contents of the petition is not the only information that Montana law requires to be fully and accurately disclosed. Rather, Montana requires the timely and accurate disclosure of financial backers of such petitions—and requires such disclosure within days of the commencement of petition gathering activities, so the public can rely upon such information to evaluate the merits of the petition and inform their decision to sign. Section 13-37-601 *et seq*., MCA. Concealing this mandated disclosure for strategic advantage is exactly the kind of misrepresentation that justifies withdrawal in these circumstances.

II. The District Court correctly held that the Secretary's failure to honor the withdrawal requests severely burdens Plaintiffs' rights to free speech and association by forcing them to associate with a rival political party that they do not want to be associated with.

The District Court also correctly held that the Secretary's failure to give effect to Plaintiffs' and other signers' withdrawal requests violates Article II, Sections 6 and 7 of the Montana Constitution as applied to the unique (and hopefully anomalous) circumstances of this case because it severely burdens Plaintiffs' and

other signers' constitutional right to not associate with a Petition sponsored by a political party that they do not want to be associated with. COL ¶¶ 44–47.

The right to associate is burdened when a voter's "right not to associate" is harmed. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (emphasis added); *see also Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (finding First Amendment rights burdened when a statute "'lock[ed]' the voter into his pre-existing party affiliation for a substantial period of time"). For example, in *Jones*, the U.S. Supreme Court found a violation of the right not to associate when a law forced a political party to associate with "those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Jones*, 530 U.S. at 577.

The Secretary's refusal to recognize Plaintiffs' and others' valid withdrawal requests severely burdens their rights protected under Sections 6 and 7 of Article II of the Montana Constitution as applied to the unique circumstances of this case, while furthering no state interest. By evading Montana's disclosure requirements, preventing Plaintiffs from having any inkling that they were signing a Republican-sponsored petition, the MTGOP effectively commandeered Plaintiffs' associational and expressive activity to serve its own political ends. COL ¶¶ 49–50.

The Secretary offers no cogent reason to reverse that holding. In particular, the Secretary does not explain why his refusal to give effect to Plaintiffs' withdrawal requests in this case is justified by any weighty state interest — much less an interest

narrowly tailored to advance a compelling state interest. The Secretary's asserted interests in having enough time for candidates to file and ballots to be printed, Br. at 18, are not implicated by the *processing* of withdrawal requests, which can proceed while primary election preparations are underway. Rather, he believes that honoring petition signers' withdrawals undermines some abstract interest in the finality of a primary election, because enough people could withdraw to invalidate the petition altogether and render the party primary superfluous.

But the Political Party Qualification Statute itself undermines the importance of this purported interest. Its requirements ensure that only candidates with a modicum of voter support obtain ballot access, preventing frivolous candidacies, voter confusion and ballot overcrowding. *See, e.g*., *Montana Green Party v. Stapleton*, No. CV 18-87-H-BMM-JTJ, 2020 WL 1316816, at *10 (D. Mont. Mar. 20, 2020). Allowing voters to withdraw when previously unknown information about the financial backers of the petition come to light—information that fundamentally alters' voters understanding of the overall aims of the petition—furthers the purposes of the statute. *Cf. Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009) ("[B]y knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation."); *id.* ("[M]andating disclosure of the financiers of a ballot initiative may prevent 'the wolf from masquerading in sheep's clothing.'").

The fact that the Petition lost its modicum of support after preparations for the primary election were underway does not make these interests any less important. Indeed, Montana law does not otherwise elevate an abstract interest in primary election finality above all other interests. *See* Section 13-12-201(2), MCA; Section 13-27-126, MCA (candidates nominated through primary election must be denied general election ballot access for failing to comply with campaign finance disclosure requirements); Section 13-10-327, MCA; Section 13-10-303, MCA (permitting candidates nominated through primary to unilaterally withdraw from general election or accept the nomination of another party).

The Secretary's other asserted interest—preventing "gamesmanship"— rings hollow, given his party's secretive effort to get the Green Party on the ballot to harm the Democratic Party, and rests on unsupported hypothetical scenarios. Br. at 18–19. The Secretary identifies no evidence, anywhere, that "bad-faith pretended supporters" have ever tricked petition gatherers by signing petitions and then later withdrawing their names. And as the record here demonstrates, petition signers do not go through the considerable trouble of withdrawing their signatures without a good reason. A petition campaign conducted honestly and transparently—what the District Court's decision encourages—should face virtually no risk of signers subsequently withdrawing their signatures *en masse* to invalidate the petition;

indeed, minor parties have routinely submitted enough signatures to gain ballot access. *See* Dkt. 8, Corson Decl. ¶ 54.

This Court similarly need not heed *amici's* overwrought speculation that affirming the decision would doom third-party candidacies, unleash "fraud" and "chicanery", and empower bad actors to "cajole" and "threaten" petition supporters"—claims long on hyperbole but short on evidence from this case or anywhere else. *See* Campbell Br. at 17, 24. The District Court's ruling was based on the unique facts of this case—including, ironically, the "chicanery" of the MTGOP—and does not grant an unlimited right to withdraw from petitions at any point after-the-fact. Moreover, although Montanans have had the right to withdraw for at least a century, the Secretary's Elections Director could not recall seeing ever a single petition withdrawal request. Trial Tr. 301:3–25. The District Court properly rejected the Secretary's and *amici*'s similar arguments.

III. The District Court correctly held that the electronically-signed withdrawal forms at issue in this case are valid.

The District Court correctly held that withdrawal requests bearing electronically-affixed signatures were valid. Perhaps because he lacks authority, the Secretary has never issued any public guidance regarding what signers of a political party qualification petition must do to withdraw, what information they must provide, or when they must provide it. *See* FOF ¶¶ 45–47. Lacking such guidance,

signers did their best to communicate their intention to withdraw from the Petition, completing and submitting the Secretary's form for withdrawing from *other* kinds of petitions. *Id.* ¶ 75. Among other things, the Secretary's form purports to require a voter to sign in front of a notary or a public official. *Id.* ¶ 40. But, as the Secretary's own counsel admitted in an internal memorandum revealed at trial, it was not necessary for signers of *political party qualification* petitions to complete this withdrawal form in order to withdraw, and the Secretary does not argue otherwise on appeal. *Id.* ¶¶ 37-42, 56, 75.

While many signers nonetheless completed the withdrawal form before a notary or elections official, the COVID pandemic and public health orders made this unworkable for many others. *Id.* ¶¶ 76-79. In response, MDP set up a process that allowed signers to complete the withdrawal form electronically from their computers or smartphones, and sign the document using the electronic document signature platform DocuSign. *Id.* ¶ 80. MDP compiled the forms and sent them to the appropriate county elections office. *Id.* ¶ 82.

These electronic withdrawal forms collected a significant amount of information—far more than is collected on petitions themselves—including the signer's name, full residential and mailing addresses, phone number, and an electronic signature. Plf. Ex. 27. The forms also contained an unambiguous request to withdraw from the Petition and a cover letter explaining why they were

completing the form electronically, which also contained an additional signed affirmation: that the signer is "the person whose name is listed on the attached Request for Withdrawal of Signature, and the signature on the attached Request for Withdrawal of Signature is my own signature." *Id.* Further, the DocuSign platform collects the signer's email address, the date and time the document was transmitted, opened, and signed, the signer's IP address, the name, email address, and IP address of the MDP organizer who sent the copy of the withdrawal form to the signer, and a unique identifying code affixed to the document for subsequent audits. FOF ¶ 81. As a result, while no-one ever suggested—let alone offered evidence of—any irregularity regarding any of the DocuSigned withdrawal forms at issue in this case, the MDP's use of the DocuSign platform would significantly enhance the ability of an investigator to resolve any potential question of authenticity.

The District Court correctly held that the electronic signature on these withdrawal requests did not render them invalid. No statute, regulation, or policy statement even requires that such requests contain the requestor's signature—let alone a "wet-ink signature"—nor does any statute afford the Secretary the authority to prescribe what forms of signatures are sufficient. *See* COL ¶ 52. The Legislature chose which procedural provisions would apply to political party qualification petitions, and specifically left out the provision conferring authority to the Secretary to promulgate a withdrawal form. *See* Section 13-10-601(2)(c), MCA (not

incorporating by reference Section 13-27-301, MCA). Had the Legislature wanted to give the Secretary authority over withdrawals for political party qualification petitions, it would have done so.

Rather, all that is required is that the requestor clearly expressed their intent to withdraw by identifying the petition at issue. COL ¶ 53 (citing *Ford*, 61 P.2d at 822-23). The withdrawal forms at issue easily satisfy this requirement. *See* COL ¶ 53.

The Secretary has no persuasive rebuttal. While the Secretary attempts to attribute a "wet ink" signature requirement to this Court's precedent, the authorities he cites does not support his conclusion. Br. at 23-24. In *Ford v. Mitchell*, a 1936 case involving an initiative petition, the Secretary asserted that certain withdrawal petitions were not properly "certified" by county clerks and were therefore invalid. *See Ford* 61 P.2d at 822. The Court rejected this challenge to the sufficiency of the withdrawal petitions, reasoning that they took the same form as the initiative petitions themselves and accordingly should be afforded the same probative effect. *See id.*

From this straightforward reasoning, the Secretary concocts a completely different and unsupported rule: that any request for withdrawal that does not take the identical form as a petition—including a wet ink signature—is invalid. Br. at 23-24. But nothing about the *Ford* opinion suggests that by affirming what *could* constitute

a valid withdrawal request, the Court intended to announce general substantive rules that forbade all other forms of withdrawal request. Rather, it answered the only question before it: whether the particular withdrawal requests at issue *in that case* were valid. Nevertheless, the Secretary and *amici* argue, without support, that this Court adopted as "Montana law" a passage from a 1920 Missouri Supreme Court opinion, which purported to require a withdrawal request to be "at least as formal" as the petition itself. Br. at 23-24 (citing *State ex rel. Westhues v. Sullivan*, 283 Mo. 546, 224 S.W. 327, 339 (1920)). The sole basis of the Secretary's contention is that the *Ford* opinion, using a "compare" signal, cited the page of the *Westhues* opinion on which the passage was contained, with no further elaboration. *See* 61 P.2d at 822. But while *Ford's* citation to *Westhues* is delphic at best, the *Ford* Court's narrow holding is clear. The Secretary's and *amici*'s claim that *Ford* announced a longstanding "identical formality" requirement for withdrawal requests does not hold up to scrutiny.[4]

But even if withdrawal requests from political party qualification petitions were required to satisfy the same level of formality as the petitions themselves, the District Court's factual findings show that any such requirement was easily met in

[4] To the best of counsel's knowledge, this Court has never cited to *Westhues* in any prior or subsequent decision, nor has this Court ever cited to the portion of the *Ford* opinion discussing the format of withdrawal petitions in any subsequent decision.

this case. As discussed above, each of the DocuSigned withdrawal forms contained all of the information collected in a political party petition and more; each was signed with an affirmation of the signer's identity; and the platform records additional auditing information regarding the date and time of the transaction and the identities of the sender and signer of the form. The Secretary does not dispute any of this, nor does he dispute that an electronic signature validly binds the signer and expresses the signer's endorsement of the document.

Rather, his sole objection is that the absence of wet ink signatures could possibly prevent him from performing a signature comparison to evaluate a signature's authenticity. Br. at 24–25. But as the District Court found, the Secretary lacks the authority or responsibility to perform signature comparison on withdrawal requests, and the Secretary did not instruct county elections officials to perform such signature comparisons on withdrawal requests. *See* FOF ¶ 54; COL ¶ 53 n.9. The District Court correctly concluded that "[t]he DocuSign platform used in this case collected the same identifying information that would be collected by paper forms . . . and its security, tracking, and its additional auditing features more than adequately serve any interest in preventing and investigating fraudulent activity." COL ¶ 56.

The Secretary's additional argument—that the Uniform Electronic Transactions Act ("UETA") permits him to impose a wet-ink signature requirement

for withdrawals from political party qualification petitions—is similarly unsupported. UETA's provisions regarding electronic signatures are not implicated by this case, because "wet" signatures were never required in the first place. As discussed above, the Legislature did not confer authority to the Secretary to promulgate a withdrawal form for a political party qualification petition or otherwise require the use of a wet-ink signature on such a withdrawal form. And the Secretary has never created such a form or issued any public guidance regarding the required elements of a withdrawal request. Yet the Secretary claims that UETA itself confers upon him the exclusive power to decide whether withdrawal requests must contain a wet ink signature. But the Secretary cites no authority supporting this notion, and UETA itself is to the contrary. For example, UETA makes clear that its requirements are also subject to other applicable substantive law, and that whether an electronic signature has legal consequences is determined by both UETA and other applicable law. Sections 30-18-103(4), 30-18-104(5), MCA. Moreover, the legislature instructed that UETA be construed to *facilitate* electronic transactions consistent with other applicable law, Section 30-18-105, MCA, and sets forth strong rules in favor of the validity of electronic signatures, *see, e.g.*, Section 30-18-106, MCA (signature "may not be denied legal effect or enforceability solely because it is in electronic form,"). The Secretary cannot use UETA to bootstrap his way into

claiming exclusive authority to disallow electronic signatures that the legislature never conferred upon him.

But even if UETA somehow applied, the Secretary's argument should be rejected for several different reasons.

First, the submission of withdrawal requests to the Secretary are not "transactions" between the voter and the Secretary under UETA that require the Secretary's consent to the use of electronic signatures. UETA applies to "transactions," a defined term under the statute. Section 30-18-104(2), MCA; Section 30-18-102(18), MCA. But a voter's withdrawal of his signature from a petition is a unilateral act, not a "transaction" requiring interaction between the Secretary and the signer. *See Furnish*, 134 P. at 300 ("[S]igners of a petition have an absolute right to withdraw therefrom at any time before final action thereon. . ."). The National Conference of Commissioners on Uniform State Laws, which promulgated the UETA, comment that: "A transaction must include interaction between two or more persons. Consequently, to the extent that the execution of a will, trust, or a health care power of attorney or similar health care designation does not involve another person and is a unilateral act, it would not be covered by this Act because not occurring as a part of a transaction as defined in this Act." Definitions, Unif. Electronic Transactions Act (1999) § 2, p. 13. The act of withdrawing from a

political party qualification petition is not a bargain, agreement, or interaction with the Secretary or anyone else; it is a unilateral act of independent legal effect.

Second, even if withdrawal forms could be considered a transaction under UETA, the Secretary provides no authority demonstrating that he would be a party to the "transaction." Again, no statute affords him such authority, and the withdrawal requests at issue were addressed to and transmitted to county elections officials, not to the Secretary. FOF ¶¶ 82-87.

Third, the Secretary failed to address the District Court's factual finding that, even if the Secretary's consent were somehow required, his actions here demonstrated consent. *See* FOF ¶¶ 55, 85–87. Whether parties have agreed to conduct transactions by electronic means is a question of fact determined from the context, surrounding circumstances, and the parties' conduct. Section 30-18-104, MCA. The District Court found that "the context, surrounding circumstances, and the parties' conduct, specifically the failure to the Secretary to promulgate or announce the deadline for withdrawals and that certain requests for withdrawal would not be accepted, all demonstrate that the Secretary consented to receiving withdrawals from the Green Party political party qualification petition through electronic means." *Id.* ¶ 55. In support of that conclusion, the court noted that neither county elections officials nor the Secretary ever informed Plaintiffs that their withdrawal forms would be rejected simply because they were electronically signed.

COL ¶¶ 85–86. Indeed, it was not until July 9th, 2020 — more than a month after the filing of the complaint, after filing numerous other briefs that did not mention this issue, and after two hearings were continued — that the Secretary "announced for the first time during this case, in a motion for summary judgment, that he has a policy forbidding electronic signatures on petition withdrawal forms." COL ¶ 23.

Under these circumstances, the District Court did not clearly err when it found that that Secretary consented to receiving the withdrawals at issue in this case through electronic means. Regardless of what restrictions the Secretary will purport to impose upon future petition withdrawals, the Secretary cannot retrospectively adopt a contrary position at the last minute solely for litigation purposes.

Finally, the District Court correctly held that the Secretary's undisclosed wet-ink signature policy would impose an unconstitutional burden as applied to the signers who, in the absence of contrary guidance from the Secretary—or indeed, any guidance from the Secretary at all—sought to withdraw their signature in the middle of a global pandemic. *See* COL ¶ 56. Given the absence of guidance on how to withdraw, voters reasonably and understandably relied upon an electronic document signature platform that enabled them to clearly express their desire to withdraw from the petition without requiring non-essential travel or violation of social distancing protocols.

Refusing to honor the withdrawal forms here serves no state interest. As the District Court correctly concluded, the information collected in the DocuSigned forms and DocuSign platform's security, tracking, and additional auditing features more than adequately serve any interest in preventing and investigating fraudulent activity. *See* COL ¶ 56.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's order.

Respectfully submitted this 17th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,998 words, excluding certificate of service and certificate of compliance.

DATED this 17th day of August, 2020.

/s/ Matthew Gordon
Matthew Gordon

CERTIFICATE OF SERVICE

I, Matthew Prairie Gordon, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-17-2020:

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