IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 21-0378

JOHN MEYER,

Plaintiff and Appellant,

vs.

CHRISTI JACOBSEN, in her official capacity as Secretary of State of the State of Montana and ERIC SEMERAD, in his official capacity as Gallatin County Election Administrator,

Defendants and Appellees.

APPELLEE SECRETARY OF STATE JACOBSEN'S RESPONSE BRIEF

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County, Cause No. DV-16-362, the Honorable John C. Brown presiding.

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ISSUE

The Secretary restates the issues as follows:

1. Is this appeal moot because there is no effective relief this Court can grant to Meyer and the November 2020 general election has already occurred?

2. Does the Uniform Electronic Transaction Act, or Montana election law, require either county election officials or the Secretary of State to accept electronic signatures in support of a Petition submitted under § 13–10–501, MCA.

STATEMENT OF THE CASE

On March 27, 2020, Meyer filed a "Complaint for Mandamus and Declaratory Relief" in the Eighteenth Judicial District Court. Dkt. 1. Meyer asked the District Court to declare the Gallatin County Election Administrator Eric Semerad ("Election Administrator") and the Montana Secretary of State had violated Montana's Uniform Electronic Transaction Act and Montana's election laws by refusing to accept electronic signatures on forms submitted by him in support of his Petition to appear as an Independent candidate for Attorney General on the general election ballot in November 2020. Shortly thereafter, he filed an "Application for Writ of Mandamus and Order to Show Cause." Dkt. 2–4. Meyer asked the District Court to compel the Election Administrator to "compare

and accept electronic signatures on [Meyer's] petitions for nomination that match signatures on Montana voter registration records." Compl. ¶ 25 (Dkt. 1).

On April 20, 2020, the Election Administrator moved to dismiss the Complaint and Application for Writ of Mandamus under Rule 12(b)(6), Mont. R. Civ. P. (Dkt. 6–9). The District Court granted the Election Administrator's motion on September 8, 2020. Ex. 1 (Dkt. 13) ("Dismissal Order"). As to Meyer's election law related argument, the District Court noted "there is no obligation on the Election Administrator within Title 13 to accept electronic signatures on petitions for nominations." Dismissal Order at 7. After review of the provisions of Title 13 the District Court concluded "there is no basis upon which this Court can conclude that the Election Administrator has violated Montana's election laws by failing to accept electronic signatures on Meyer's petition for nomination forms." Dismissal Order at 6.

As to Meyer's UETA argument, the District Court held, "[c]onstruing and giving effect to all provisions of the UETA, the Complaint and Application must be dismissed under Rule 12(b)(6), Mont. R. Civ. P. There is no basis upon which this Court can conclude that the Election Administrator violated the UETA." Dismissal Order at 13.

On July 8, 2021, Meyer moved for entry of default against the Secretary. (Dkt. 16–17). On July 30, 2021, while that motion was pending, Meyer moved for entry of default judgment against the Secretary, based on his contention that the Secretary had failed to respond. (Dkt. 18). The District Court granted Meyer's motion for default judgment on August 3, 2021, (Dkt. 19), and Meyer appealed the District Court's order on the Election Administrator's motion to dismiss that same day, (Dkt. 20).

On August 23, 2021, the Secretary moved to vacate the District Court's order granting Meyer's motion for default judgment arguing, in part, the Secretary had not been properly served. (Dkt. 23–24). Meyer responded and confirmed he had failed to properly serve the Secretary. (Dkt. 28). The District Court, however, did not rule on the Secretary's motion and it was deemed denied.

On November 9, 2021, Meyer, the Election Administrator, and the Secretary jointly filed a Motion to Vacate the District Court's order granting Meyer's motion for default judgment. (Dkt. 35). The Court granted the joint motion on November 26, 2021, vacated its previous order regarding Meyer's motion for default judgement, and found its previous Order granting the Election

Administrator's motion to dismiss fully and finally determined Meyer's claims against the Secretary. Ex. 2 (Dkt. 39).

STATEMENT OF FACTS

Overview of Signature Requirements for Nomination Petitions

An individual may nominate himself to appear on the general election ballot as an independent candidate for public office by submitting a petition for nomination. § 13–10–501(1), MCA. The form of the petition is prescribed by the Secretary. § 13–10–501(4), MCA. A petition must include signatures from electors residing within the State and district in which the individual is seeking election. § 13–10–502(1), MCA. By statute, each signature line must contain spaces for the signature, post-office address, and printed last name of the signer. *Id.*

The local county election administrator is required by statute to verify and certify the signatures submitted in support of a petition. § 13–10–503(1), MCA. The signatures gathered must be verified and certified by the election administrator in the county of the signor's residence. § 13–10–501(5), MCA. In other words, signatures from residents of Gallatin County must be reviewed by the Gallatin County Election Administrator. *Id.*

The verification and certification process is two-fold. First, a county official is required to "check the names of all signers to verify they are registered electors

of the county." § 13–27–303(1), MCA. Second, a county official is required to "randomly select signatures on each sheet or section and compare them with the signatures of the electors as they appear in the registration records of the office." *Id.* "If any of the randomly selected signatures do not appear to be genuine, all signatures on that sheet or section must be compared with the signatures in the registration records of the office." *Id.*

After review, the county official charged with verifying and certifying the signatures is required to forward the petition to the Secretary and inform the Secretary of the number of valid signatures submitted by the petitioner. § 13–27–304, MCA. Additionally, if the election administrator is able to verify and certify a sufficient number of signatures, the election administrator "shall file the petition for nomination with the same officer with whom other nominations for the office sought are filed." § 13–10–503(1), MCA.

Rejection of Meyer's Submission of Electronic Signatures

Meyer sought to appear as an Independent candidate for Montana Attorney General on the 2020 general election ballot. Complt. ¶ 1 (Dkt. 1). Accordingly, Meyer began gathering signatures in support of his petition for nomination. *Id.* at ¶¶ 1–6. Meyer was required to obtain 16,639 signatures in support of his petition. *Id.* at ¶ 2. Effective March 28, 2020, former Governor

Steve Bullock issued a directive ordering all Montana residents to stay at home and temporarily closing all nonessential businesses and operations to stop the spread of COVID-19. *Id.* at ¶ 4.

Meyer states the Governor's directive prevented him from collecting "wet ink signatures" in support of his petition for nomination. *Id.* at ¶ 5. Meyer alleges—which must be taken as true in the context of a Rule 12(b)(6) motion—that "[i]n an effort to prevent the spread of COVID-19 and participate in the Democratic process," he created a website that allowed individuals to electronically sign his petition for nomination. *Id.* at ¶¶ 6–7. Through his website, Meyer collected electronic signatures from electors who lived in Gallatin County. Dismissal Order at 2.

In March 2020, Meyer submitted five petition for nomination forms to the Gallatin County Election Office. *Id.* at 2. Each of the five forms Meyer submitted contained only electronic signatures. *Id.* Meyer states "[t]he Gallatin County Election Office and Montana Secretary of State's office informed [him] they would not accept the petitions for the sole reason that they were signed electronically." Complt. ¶ 9 (Dkt. 1). Meyer filed the instant lawsuit on March 27, 2020.

As the District Court recognized, the only evidence Meyer offered in support of his argument that the electronic signature gathering system he devised

was secure was the statement that an individual "must first enter a password that is sent to their email address" before they sign the petition. Dismissal Order at 14. As the Election Administrator informed the District Court, requiring validation of an email address "does not in any way assure that the individual is a registered voter or the individual they represent themselves to be." *Id.*

On April 22, 2020, less than one month after Meyer filed this lawsuit, Governor Bullock lifted the stay at home directive. Gallatin County's Reply Br. Supp. Mtn. Dismiss, Dkt. 9 at 10. As of that date, nothing prevented Meyer from collecting wet ink signatures on his petition for nomination. *Id.* On November 3, 2020, Montana held its general election, Meyer was not on the ballot, and the voters elected an Attorney General. These results have been final for over a year.

STANDARD OF REVIEW

This Court applies *de novo* review to a district court's grant or denial of a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Matter of the Est. of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165 (citations omitted).

A Rule 12(b)(6) motion to dismiss focuses on whether the complaint states a cognizable legal claim entitling the claimant to relief on the facts pled. *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 454 P.3d 655. If the complaint fails to state a cognizable legal theory or fails to allege sufficient

facts that would entitle the claimant to relief under the claim presented, the complaint must be dismissed. *Anderson v. ReconTrust Co.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692.

When considering a motion to dismiss, the district court must take all well-pleaded allegations as true and construe them in favor of the claimant. *Stowe*, ¶ 12.

SUMMARY OF THE ARGUMENT

As the 2020 general election occurred over one year ago, the question of whether the Election Administrator should have accepted electronic signatures submitted by Appellant John Meyer in connection with his effort to appear as an Independent candidate for Attorney General is now purely academic. This issue is not capable of repetition, is not evading review, and there is no effective relief that this Court can grant Meyer, who waited until August 2021 to file an appeal challenging a decision issued in September 2020. This appeal is moot and should be dismissed.

But even if this appeal were not moot, Meyer is not entitled to either declaratory or mandamus relief.[1] Meyer submitted a petition for nomination to

[1] Meyer does not present, and therefore has waived, any objection relating to the District Court's disposition of his mandamus claim. *See Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 9, 315 Mont. 231, 69 P.3d 652. But even if

the Gallatin County Election Administrator for verification of the supporting signatures and certification to the Secretary of State. The Election Administrator refused to verify the signatures because they were electronic. Meyer contends this refusal violated Montana's Uniform Electronic Transactions Act ("UETA"). But, the UETA "does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures." § 30–18–117(3), MCA. As the District Court recognized, this is an insurmountable barrier to Meyer's UETA claim.

Meyer also vaguely contends the Election Administrator's refusal to accept electronic signatures violated Montana's election laws, but Meyer does not present a cognizable legal theory that would entitle him to relief under any set of facts. This Court should not formulate arguments on his behalf. Even if Meyer had presented sufficient argument on appeal, he would be unable to overcome the District Court's thorough rejection of his claim that the applicable statutes require acceptance of electronic signatures.

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he had, this Court has already determined the review of signatures submitted in support of a petition is discretionary. *See State ex rel. Miller v. Murray*, 183 Mont. 499, 504, 600 P.2d 1174, 1176 (Mont. 1979).

ARGUMENT

I. This appeal presents a non-justiciable question and should be dismissed.

This case is moot because the attorney general election is long past, Meyer did not allege that he intends to run again, and the premise of his claims—that the Governor's stay-at-home order prevented him from circulating petitions—is unlikely to be repeated.

"The judicial power of Montana's courts is limited to justiciable controversies." *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 16, 364 Mont. 390, 276 P.3d 867. "[T]his Court can raise questions of justiciability sua sponte." *Dennis v. Brown*, 2005 MT 85, ¶ 8, 326 Mont. 422, 110 P.3d 17 (citing *Jumping Rainbow Ranch v. Conklin*, 162 Mont. 128, 129, 509 P.2d 292, 293 (Mont. 1973)). Justiciability presents a threshold question this Court must consider even if it is not raised by the litigants. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 13, 355 Mont. 142, 226 P.3d 567.

One of the central concepts of justiciability is mootness. *Progressive Direct Ins. Co.*, ¶ 16 (citing *Plan Helena, Inc.*, ¶ 8). "Mootness is the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* at ¶ 17 (citing *Greater Missoula Area Fedn. of Early*

Childhood Educators v. Child Start, Inc., 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881). "If the issue presented at the outset of the action has ceased to exist or is no longer 'live,' or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot." *Id.* (citations omitted).

Meyer asks this Court to declare the Election Administrator should have accepted electronic signatures he submitted in his effort to appear on the 2020 general election ballot. But this question is now moot. The 2020 general election took place as scheduled and an Attorney General was elected. "[A] question which is moot is not a proper subject for a declaratory judgment." *State ex rel. Miller*, 183 Mont. at 503, 600 P.2d at 1176. Because a declaratory judgment cannot be used to answer a moot question, this Court cannot grant effective relief in this case. Nor is Meyer without blame—the Order he challenges on appeal was issued by the District Court on September 8, 2020.

While it is true that election cases may fall within the "capable of repetition, yet evading review exception to the mootness doctrine" because of the brief duration of an election cycle, *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003), this concern is not present here. First, this issue is not capable of repetition as the record contains no evidence indicating Meyer intends to run for any

elected office in the future. *See Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463, 127 S. Ct. 2652, 2663 (2007) (to be capable of repetition there must be a reasonable expectation that "the same controversy will recur involving the same complaining party" (internal quotations and citations omitted)). And even if the record did reflect Meyer's intent to run for elected office and gather signatures in the same way, this issue would still be incapable of repetition because the Stay-At-Home Order effective as of March 28, 2020, Meyer's cited reason for gathering electronic signatures, has been rescinded and there is no reasonable expectation that it will resume.

Second, even if this issue was capable of repetition, this appeal is still moot because the question presented is not capable of evading review. Meyer raises specific demands relating to a specific request for relief focusing specifically on whether the signatures he submitted to the Election Administrator in March of 2020 should have been accepted. Meyer does not raise the type of constitutional challenge that would be capable of transcending a single election cycle and therefore be capable of evading review. *See Arizona Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016) (specific demands for relief related to an election are moot once the election occurs).

For these reasons, this appeal is moot and the Court should dismiss it on this basis alone.

II. The plain language of Montana's Uniform Electronic Transaction Act does not require the Secretary, or any other governmental entity including the Gallatin County Election Administrator, to accept electronic signatures.

Meyer argues the UETA prohibits the Secretary and the Election Administrator from "denying the legal effect of the signatures solely because they were signed electronically." Opening Brief, p. 8. Essentially, Meyer believes the UETA requires both the Election Administrator and the Secretary to accept electronic signatures and the refusal to accept such signatures violated the UETA. Opening Brief at 8–11.

As a preliminary matter, the UETA does not apply in this case. By its terms, the UETA "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means." § 30–18–104(2), MCA; *see Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 23, 368 Mont. 101, 293 P.3d 817 ("The UETA applies to transactions between parties who have agreed to transact by electronic means"). Neither the Election Administrator nor the Secretary has agreed to accept electronic signatures in connection with a petition for nomination. Thus, the UETA does not apply and the District Court should be affirmed.

But even if the UETA did apply, it still does not require a governmental agency to accept electronic signatures simply because an individual makes such a demand. For this reason, Meyer's argument is incorrect as a matter of law. The District Court noted the UETA "grants government agencies exclusive discretion in determining whether to accept electronic signatures." Dismissal Order at 10 (citing § 30–18–117(1), MCA). Further, the District Court acknowledged the UETA "'does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures'" subject to a limited exception that is not relevant here. Dismissal Order at 10 (quoting § 30–18–117(3), MCA).

"In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1–2–101, MCA; *see also City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. Further, "[w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." § 1–2–101, MCA. "The duty of this Court is to 'read and construe each statute as a whole' so that we may 'give effect to the purpose of the statute.'" *City of Missoula*, ¶ 18 (quoting *State v. Triplett*, 2008 MT 360, ¶ 25, 346 Mont. 383, 195 P.3d 819).

Meyer's proposed interpretation of the UETA cannot withstand application of these principles. The Election Administrator and the Secretary are governmental agencies within the meaning of the UETA. *See* § 30–18–102(10), MCA.[2] As governmental entities, the Election Administrator and Secretary are expressly granted the authority to refuse to permit the use of electronic signatures. § 30–18–117(3), MCA. This necessarily includes the authority to refuse to permit the use of electronic signatures in connection with a petition for nomination.

Further, even if the UETA did not grant governmental agencies the express authority to refuse to accept electronic signatures, Meyer would still not prevail because the UETA grants governmental agencies the independent authority to determine whether, and to what extent, they "will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use and rely upon electronic records and electronic signatures." § 30–18–117(1), MCA. This includes the

[2] The UETA defines a "governmental agency" broadly as "an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state." § 30–18–102(10), MCA. Both the Election Administrator and the Secretary are, at minimum, an "instrumentality" of county and state government, respectively.

authority to determine whether either the Election Administrator or the Secretary would accept electronic signatures in connection with a petition for nomination.

Meyer does not confront these provisions of the UETA. Instead, he asks this Court to specifically enforce other provisions, such as § 30–18–106(4), MCA, stating that "[i]f a law requires a signature, an electronic signature satisfies the law," without regard for the effect of such a holding on the statutory scheme as a whole. Essentially, Meyer asks this Court to hold that, under the UETA, an individual can force a governmental agency to accept electronic signatures simply by demanding it. Meyer's proposed interpretation would render meaningless the UETA provisions granting election officials authority to reject electronic signatures, and would contradict this Court's well-stablished principles of statutory interpretation. *See City of Missoula*, ¶ 18 (This Court "construes a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature").

Meyer attempts to find support for his argument by citating decisions from the supreme courts of Utah and West Virginia. *See* Opening Brief at 9 (citing *Anderson v. Bell*, 2010 UT 47, 234 P.3d 1147 (Utah 2010); *Benjamin v. Walker*, 237 W. Va. 181, 786 S.E.2d 200 (W. Va. 2016)). But these are readily distinguishable.

Meyer cites *Anderson* and argues the Utah Supreme Court relied on the UETA to approve the use of electronic signatures in the context of elections. Opening Brief at 9. But Utah's current version of the UETA is materially different from Montana's current version regarding the amount of authority granted to governmental agencies regarding the acceptance of electronic signatures. *Compare* Utah Code Ann. § 46–4–501 *with* § 30–18–116 *and* –117, MCA. *Anderson* found that, under Utah's UETA, governmental agencies were not authorized to "make informal decisions on what type of transactions cannot be supported by electronic signatures" without engaging in the rulemaking process, *see Anderson*, ¶ 23, because the Utah UETA contains a provision stating that "a governmental agency may, by following the proceedings and requirements of [Utah's Administrative Rulemaking Act] make rules that . . . identify specific transactions that the agency is willing to conduct by electronic means[,]" Utah Code Ann. § 46–4–501(1)(a). Montana's UETA contains no such rulemaking requirement and, for that reason, Anderson is not persuasive.[3]

[3] The District Court distinguished *Anderson* on two additional grounds: first, based on the distinctions between the election laws of Utah and Montana; and second, on the grounds the Utah Legislature subsequently overruled the Anderson case by prohibiting the use of electronic signatures in this context. Dismissal Order, at 11–12.

The West Virginia Supreme Court's decision in *Benjamin v. Walker* is also distinguishable because it analyzed a very different statutory scheme. *Benjamin* addressed the use of electronic transaction receipts in connection with West Virginia's public campaign financing program. *Benjamin*, 237 W. Va. at 183, 786 S.E.2d at 202. Under the program, a candidate is required to gather "at least 500 qualifying contributions from West Virginia voters" and retain receipts that include the "contributor's signature." *Id.* at 184–185, 786 S.E.2d at 203–204 (citations omitted). In *Benjamin*, the Court was asked to determine whether computerized receipts generated by the candidate following receipt of contributions that included unique identifying account numbers could be deemed to be "signatures" under the relevant provision of West Virginia law. *Id.* at 189, 786 S.E.2d at 208. The Court noted that the West Virginia public campaign financing statutes contained no requirement that the signature be certified, that the residence of the signor be verified, and that there were no provisions of West Virginia law specific to how such signatures should be reviewed.

That is very different from Montana's requirements for nomination petitions. First, in Montana, a signature in support of a petition for nomination must be submitted for verification to the local county election administrator. § 13–10–503(1), MCA. Second, the election administrator must verify the residence

of each signor. § 13–27–303(1), MCA. Third, Montana law contains specific provisions governing the review of such signatures and delegates authority for that review to a specific entity—the county election administrator. *See* §§ 13–27–303 through 13–27–306, MCA.

Finally, Meyer ignores the Secretary has promulgated rules regarding the acceptance of electronic signatures. *See* Mont. Admin. R. 44.2.301 (allowing the business services division of the Secretary's office to accept electronic signatures if such signatures meet specific criteria); Mont. Admin. R. 44.3.116 (permitting election officials to electronically transmit certain voting materials to disabled electors). "That the Secretary has not adopted a rule or policy that he will accept electronic records and electronic signatures for other types of election records means, under UETA, that he will not." *Montana Democratic Party v. State*, 2020 MT 244, ¶ 26, 401 Mont. 390, 472 P.3d 1195 (Baker and Rice, JJ., dissenting).

In sum, the plain language of the Montana's UETA precludes Meyer's requested declaratory and mandamus relief. Meyer's proposal—requiring this Court to read provisions of a statute in isolation and without regard for the statutory scheme as a whole—cannot be squared with well-established principals of statutory interpretation. The District Court did not error when it determined

"[t]here is no basis upon which [to] conclude that the Election Administrator has violated the UETA." Dismissal Order at 13.

III. Montana election law does not require the Election Administrator or the Secretary to accept electronic signatures in connection with a petition for nomination.

Meyer argues the refusal to accept electronic signatures in connection with a petition for nomination violates Montana's election laws. He alleges "state action that burdens fundamental rights . . . must be justified by a compelling state interest narrowly drawn." Opening Brief at 7. This may be true. But the right to run for office is not a "fundamental right" in Montana, and Meyer is incorrect that strict scrutiny applies in this case. This Court has consistently held fundamental rights are those found in Article II of the Montana Constitution. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386. The term "fundamental right" has a particular legal meaning in the context of a court's decision as to what level of scrutiny to apply when a constitutional injury is alleged. *See id.*

Article II, Section 13, of Montana's Constitution states "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The inclusion of this provision in the Declaration of Rights ensures whatever rights it confers are categorized as

"fundamental rights." But the rights conferred are limited by the language of the provision itself: elections must be free and open, and the "**free exercise**" of the right to vote must not be interfered with by civil or military power. Mont. Const. art. II, § 13 (emphasis added).

The text suggests the fundamental right contained in Section 13 is not the ability to vote, but rather the exercise of that ability. When viewed in concert with other provisions of the Constitution, this limitation makes sense. For example, other provisions detail who may or may not vote, Mont. Const. art. IV, § 2, how votes must be cast, Mont. Const. art. IV, § 1, and who is eligible to be elected, Mont. Const. art. IV, § 4. This Court should decline Meyer's invitation to expand the scope of the fundamental right contained in Section 13 of Article II outside of the limitations imposed by the plain language of that provision and conclude regulations relating to running for office, and other related activity, do not implicate a fundamental right found in Article II of Montana's Constitution.

But even if this case did implicate a "fundamental right," Meyer is incorrect that strict scrutiny should be applied. This Court has determined that mere regulation of a fundamental right does not render a statute subject to strict scrutiny. *See Montana Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 19–21, 24, 32, 366 Mont. 224, 286 P.3d 1161. Montanan's enjoy fundamental rights relating

to employment and privacy, among other things, but this Court has applied rational basis scrutiny to regulations implicating those rights and recognized that such fundamental rights are still subject to reasonable state regulation. *Id.*, ¶¶ 20, 27–28. ("Although individuals have a fundamental right to pursue employment, they do not have a fundamental right to pursue a particular employment or employment free of state regulation.").

Voters have a fundamental right to exercise their right to vote, but they may not vote in any manner they wish. Further, not everyone is allowed to vote, *see* Mont. Const. art. IV, § 1, and not everyone is allowed to run for office, *see* Mont. Const. art. IV, § 4. To hold that Article II, Section 13, creates a fundamental right encompassing these issues would throw election administration into chaos and impermissibly degrade the Montana Constitution's delegation of authority to the Legislature to "provide by law the requirements for residence, registration, absentee voting, and administration of elections" and to "insure the purity of elections and guard against abuses of the electoral process," Mont. Const., art. IV, § 3.

Meyer's remaining argument that the Secretary and the Election Administrator violated Montana's election law is based primarily on two decisions from the First Judicial District Court: *Montana Democratic Party v. State*, Cause

No. DDV-2020-856 (1st Jud. D. Ct., August 7, 2020) (Ex. 3); and, *New Approach Montana, et al v. State*, Cause No. XBDV-2020-444 (1st Jud. D. Ct., April 30, 2020) (Ex. 4).[4] Meyer does not point to any particular provision of Title 13 of the Montana Code Annotated in support of this argument. Nor does he present any specific argument as to how refusal to accept electronic signatures violates any provision of Montana's election laws.

Meyer contends the District Court's decision in *Montana Democratic Party* stands for the premise that electronic signatures are valid for purposes of Montana election law. Opening Brief at 11. But *Montana Democratic Party* dealt with a unique issue—whether an individual may withdraw their signature from a petition—which required the District Court to harmonize the common law right to withdraw a signature with the provisions of various statutes. *Montana Democratic Party* at *16–23. Further, the entirety of the District Court's UETA analysis occurred within three paragraphs in which the District Court was engaging in a hypothetical as to whether electronic signatures would satisfy the withdrawal criteria "[a]ssuming that it was necessary for a voter to provide a

[4] To the extent Meyer is making a constitutional challenge to the statutes (which is unclear), he failed to file a Notice of Constitutional Challenge on the Montana Attorney General as required by Rule 5.1(a), Mont. R. Civ. P.

signature[.]" *Id.* at *22. Not only did the District Court analyze a different question in a very different context, it was also dicta.

New Approach Montana, the second case cited by Meyer, is on point and directly contrary to Meyer's position. There, the district court issued an order denying the plaintiffs' request to use electronic signatures in connection with petition efforts. Meyer contends *New Approach Montana* turns on the defendant's concerns regarding the specific electronic signature program in that case. But this is not so. The district court specifically noted the UETA does not require state agencies to accept electronic signatures. *New Approach Montana* at 8–9. Further, the district court found plaintiffs had made "no showing that DocuSign in the election initiative context meets the requirements of the UETA, assuring validity, authenticity, reliability, and security of the electronic transactions. *Id*.

As the District Court noted in this case, "the same concerns apply here." Dismissal Order at 14. The District Court found "Meyer did not disclose to the Election Administrator, nor identify in any pleadings or briefing, the technology he is using to obtain electronic signatures. The Election Administrator had no way of knowing if the technology is reliable and secure. The only assurance of authenticity advanced in the Complaint is that an individual 'must first enter a

password that is sent to their email address' before they can sign the petition electronically." Dismissal Order, at 14 (quoting Complaint at ¶ 7). The *New Approach Montana* case shows why Meyer is not entitled to relief in this case.

Meyer fails to advance any persuasive argument in support of this contention that Montana's election laws require the Election Administrator and the Secretary to accept electronic signatures. There is no requirement within Section 13–10–501, et. seq., that requires an election administrator to "verify electronic signatures on a petition for nomination." Dismissal Order at 4–5. An election administrator is empowered to verify and certify signatures on a petition. § 13–10–503(1), MCA. An election administrator must "check the names of all signers to verify they are registered electors of the county." § 13–27–303(1), MCA. Further, the election administrator must also "randomly select signatures on each sheet or section and compare them with the signatures of the electors as they appear in the registration records of the office." *Id.* Because of these requirements, Meyer's argument the Election Administrator erred in refusing to accept the electronic signatures contradicts the Election Administrator's statutory obligation to review signatures submitted in support of a petition.

Moreover, the District Court noted that even where the Legislature has permitted electronic signatures in certain circumstances as part of the Montana

Absent Uniformed Services and Overseas Voter Act, the Act does not allow digital signatures to be submitted in connection with a petition for nomination. *See* § 13–21–107(1), MCA; Dismissal Order at 6. That the Legislature chose to allow electronic signatures in specific circumstances lends additional weight to the conclusion that, because it did not do so within the context of § 13–10–501, et seq, no such obligation was meant to be imposed.

But even if Montana's election laws required acceptance of electronic signatures, application of those same laws likely barred Meyer from running for office as an independent candidate. As demonstrated by his campaign website as of September 23, 2019,[5] Meyer initially ran as a Democratic candidate for Governor in the 2020 election cycle. "A person seeking office as an independent candidate may not be associated with a political party for 1 year prior to the submission of the person's nomination petition." § 13–10–507(1), MCA. A person who has run for office in Montana as a partisan candidate is defined as being "associated with a political party." *Id.* at § 13–10–507(2). Because Meyer initially ran for Governor in the 2020 election cycle, as evidenced by the state of his

[5] Meyer's campaign website existing as of Septmember 23, 2019, is archived by the Wayback Machine and available at the following link: https://web.archive.org/web/20190923133352/https://www.meyerformontana.com/ (last accessed December 20, 2021).

website as of September 23, 2019, he was associated with a political office within one year of his March 2020 attempt to submit his nomination petition. Accordingly, even if Montana's election laws did require the Election Administrator to accept electronic signatures, Meyer still would not be entitled to relief because he was not eligible to run as an independent candidate.

CONCLUSION

When the 2020 general election occurred Meyer's interest in the question posed to this Court ceased to exist, and this Court should dismiss the appeal as moot. But even if this appeal were justiciable, the District Court conducted an exhaustive analysis of both the UETA and Montana's election laws in concluding that Meyer was not entitled to relief under any set of facts. On appeal, Meyer has not presented sufficient argument to challenge this conclusion. This Court should dismiss this appeal as moot or, in the alternative, affirm the District Court.

DATED this 23rd day of December, 2021.

CROWLEY FLECK PLLP

By */s/ Lars Phillips*
E. Lars Phillips

Attorneys for Defendant Christi Jacobsen, in her official capacity as Montana Secretary of State

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Equity A typeface size 14-point font; is double spaced; and the word count calculated by Microsoft Word is 5,990 words, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

DATED this 23rd day of December, 2021.

By */s/ Lars Phillips*
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APPENDIX

CERTIFICATE OF SERVICE

I, E. Lars Phillips, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-23-2021:

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