No. 10-35174

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE KELLY and CLARICE DREYER,
Plaintiffs–Appellants

v.

LINDA McCULLOCH, in her official capacity as
Secretary of State of the State of Montana,
Defendant–Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

APPELLANTS' BRIEF

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SUMMARY OF THE CASE

This is a constitutional challenge to Montana's ballot-access scheme for independent candidates for the U.S. Senate. The scheme's early deadline, high signature requirement, and high filing fee make it all but impossible for such candidates to get on the general-election ballot. The scheme is by far the most burdensome in the nation, and no such candidates have appeared on Montana's ballots since 1936.

Would-be candidate Steve Kelly and voter Clarice Dreyer claim in this lawsuit that the scheme violates their rights under the First and Fourteenth Amendments to the U.S. Constitution. They argue, among other things, that the outcome of this case is controlled by *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1580 (2009) (mem.).

In the district court, the parties filed cross motions for summary judgment. Judge Sam Haddon granted the defendant's motion on a ground not advanced by the defendant. Judge Haddon found, contrary to Kelly's sworn testimony, that Kelly had not

decided to run for office until after he and Dreyer filed their complaint, and Haddon concluded that the plaintiffs therefore lacked standing to bring this case.

The plaintiffs appeal Judge Haddon's ruling and judgment in the defendant's favor. They ask this Court to reverse the judgment and to remand the case to the district court with instructions to enter summary judgment in their favor.

CORPORATE DISCLOSURE STATEMENT

Neither Steve Kelly nor Clarice Dreyer, the two plaintiffs and appellants in this case, is a nongovernmental corporation to which the corporate disclosure requirements apply. *See* Fed. R. App. P. 26.1(a).

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JURISDICTIONAL STATEMENT

Because this constitutional challenge to Montana's ballot-access scheme arose under the U.S. Constitution and federal civil-rights laws, the bases of the district court's original jurisdiction were 28 U.S.C. § 1331, which confers jurisdiction over federal questions, and 28 U.S.C. § 1343(a)(3) and (4), which confer jurisdiction over matters involving civil rights secured by the constitution or laws of the United States.

The district court granted the defendant's motion for summary judgment and entered a final judgment disposing of all claims on February 3, 2010. (Record Excerpts, hereinafter "R.E.," 3-10.) As a result, the basis of this Court's jurisdiction is 28 U.S.C. § 1291, which confers jurisdiction over final decisions of the district courts.

The plaintiffs filed their notice of appeal with the district clerk on February 22, 2010, nineteen days after entry of judgment and well within the 30-day period allowed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. (R.E. 1-2.)

STATEMENT OF THE ISSUES

This appeal by plaintiffs Steve Kelly and Clarice Dreyer raises two main issues:

1. Standing. Kelly wanted to run for the U.S. Senate in 2008, and Dreyer wanted to vote for him. Both of them said so in their verified complaint, filed April 8, 2008. Kelly later testified, among other things, that he usually decides whether to run for public office after Tax Day on April 15. Does the record establish as a matter of law that Kelly had not decided to run until after the plaintiffs filed their complaint and that, as a result, neither Kelly nor Dreyer had standing to challenge Montana's ballot-access scheme for independent candidates?

2. Political Speech and Association. The State of Montana uses an early filing deadline, a high signature requirement, and a high filing fee to restrict independent candidates' access to the general-election ballot. Does the cumulative effect of these restrictions violate the plaintiffs' rights to freedom of speech and to associate for the advancement of political beliefs?

STATEMENT OF THE CASE

This is an appeal from a judgment of the U.S. District Court for the District of Montana in a case challenging Montana's ballot-access scheme for independent candidates for the U.S. Senate. The plaintiffs in the district court were Steve Kelly, a would-be candidate in the 2008 election, and Clarice Dreyer, a voter who wanted to vote for Kelly. The defendant was initially Brad Johnson, the Secretary of State of the State of Montana, who was then succeeded in office by Linda McCulloch while the case was pending.

The plaintiffs filed this action on April 8, 2008, claiming that the ballot-access scheme violated rights guaranteed to them by the First and Fourteenth Amendments to the U.S. Constitution. (R.E. 742-48.) They sought a preliminary injunction ordering Kelly onto the ballot, and the district court denied that motion on October 9, 2008. (R.E. 756.)

Following a brief period of discovery, the parties then filed cross-motions for summary judgment. Those motions were fully briefed and submitted on July 1, 2009. On February 3, 2010, the district court issued an opinion and order granting the defendant's motion for summary judgment and denying the plaintiffs' motion for

summary judgment. (R.E. 4-10.) The court then entered judgment in favor of the defendant. (R.E. 3.)

This appeal followed. (R.E. 1-2.)

STATEMENT OF FACTS

Steve Kelly is a Montana resident and a registered voter. (R.E. 743.) He ran for Congress as an independent candidate in 1994 and wanted to run as an independent candidate for the U.S. Senate in 2008. (R.E. 743.) Clarice Dreyer is one of Kelly's supporters and is also registered to vote in Montana. (R.E. 744.) They challenge the ballot-access scheme that applied to Kelly's would-be candidacy.

1. Montana's ballot-access scheme for independent non-presidential statewide candidates.

Montana enacted its first ballot-access law for independent candidates in 1889. *See* 1889 Mont. Laws 135. Under that statute, an independent candidate for non-presidential statewide offices could get on the ballot by submitting a petition containing the signatures of at least 100 eligible voters 30 days before the general election. There was no filing fee. (R.E. 455, 518-519.)

An 1895 statute raised the signature requirement from 100 signatures to 5% of the total votes cast for the successful candidate for the same office in the last general election. *See* Montana Constitution, Codes & Statutes 1895, part 3, title 2, ch. 8, sec. 1313, p. 106. The deadline was 30 days before the general election,

and there was no filing fee. (R.E. 455-456, 518-519.) That signature requirement remains in effect today. *See* Mont. Code Ann. § 13-10-502(2).

In 1949, the Legislature moved the petition-filing deadline for independent candidates to 90 days before the general election, which falls in early August. *See* 1949 Mont. Laws Ch. 160. (R.E. 456, 518-519.) In 1973, the Legislature moved the deadline to March, one week before the filing deadline candidates hoping to appear on the June primary-election ballot. *See* 1973 Mont. Laws Ch. 237. There was still no filing fee. (R.E. 456, 518-519.)

In 1979, the Legislature imposed a filing fee equal to 1% of the annual salary of the office sought. *See* 1979 Mont. Laws Ch. 571. (R.E. 456, 518-519.) That filing fee remains in effect today. *See* Mont. Code Ann. § 13-10-202(3).

In 1991, the Legislature moved the petition-filing deadline for independent candidates to June, one week before the day of the June partisan primary. *See* 1991 Mont. Laws Ch. 591. (R.E. 457, 518-519.) In 2007, the Legislature once again moved the petition-filing deadline to March, one week before the filing deadline for candidates hoping to appear on the June primary-election ballot.

See 2007 Mont. Laws Ch. 458 § 2. The 5% signature requirement and filing fee remained.

For the office of U.S. Senator in 2008, Montana's ballot-access scheme for independent candidates required plaintiff Kelly to submit petitions containing at least 10,243 valid signatures on March 13, 2008—236 days before the November 4 general election at which Kelly sought to appear on the ballot. The filing fee, due on March 20, was $1,693. (R.E. 458.)

Montana's ballot-access scheme for party candidates, by contrast, does not require a would-be candidate to submit any signatures. Political parties nominate their candidates by primary election, and their nominees appear automatically on the general-election ballot. *See* Mont. Code Ann. § 13-10-201. In order to appear on the primary-election ballot, candidates need only to submit a declaration for nomination and pay the filing fee. The declaration-for-nomination form does not require the primary candidate to collect or submit any petition signatures. *See* Mont. Code Ann. § 13-10-201. The form was due 75 days before the primary election at which the candidate seeks to appear on the

ballot. *See* Mont. Code Ann. § 13-10-201 (2008). In 2008, that deadline was March 20, 2008. (R.E. 461-62.)

In 2009, while this case was pending, the Montana Legislature amended the filing deadline for the primary election. *See* 2009 Mont. Laws Ch. 292 § 1. Now, the deadline is 85 days before the primary election. *See* Mont. Code Ann. § 13-10-201(6). Because the deadline for independent candidates is linked to the primary filing deadline, *see* Mont. Code Ann. § 13-10-503(2), this change had the effect of moving the filing deadline for independent candidates. Now, the deadline is 92 days before the primary election and almost 250 days before the general election.

2. Kelly and Dreyer bring suit.

Kelly and Dreyer brought this action on April 8, 2008. They filed a verified complaint in which they alleged, among other things, that Kelly "desires to run as an independent or minor-party candidate for United States Senate this year"[1] and that Dreyer

1. Montana's ballot-access laws do not distinguish between so-called major and minor parties; parties are either qualified or unqualified for the ballot. An unqualified, *i.e.*, "minor", party can have its candidates appear on the ballot only if the candidates satisfy the requirements for independent candidates. *See, e.g.,*

"would like to have the opportunity to vote for Kelly in the November general election." (R.E. 743-44.) They further alleged that Montana's ballot-access scheme imposed severe and unjustified burdens that violated rights guaranteed to them by the First and Fourteenth Amendments. (R.E. 746-47.) They sought a declaration that Montana's scheme is unconstitutional and an injunction barring the enforcement of it in the 2008 election. (R.E. 747.) The defendant was served with the verified complaint on April 17, and he filed an answer on May 7, 2008. (R.E. 752.)

The case was assigned to U.S. District Judge Sam Haddon. Judge Haddon did not issue a scheduling order or call for a scheduling conference within the time prescribed by Rule 16(b)(2) of the Federal Rules of Civil Procedure.

The plaintiffs filed a motion for a preliminary injunction and a request for expedited consideration on August 26, 2008. (R.E. 752-53.) On Thursday, August 28, Judge Haddon ordered the parties to appear in Helena, Montana, for a status conference on Tuesday morning, September 2—the day after Labor Day. (R.E. 753.) He

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Mont. Code Ann. § 13-10-504 ("Independent or minor party candidates for president or vice president").

denied the plaintiffs' unopposed motion to allow their lead counsel, Bryan Sells, to appear by telephone from his office in Atlanta. (R.E. 753.) Sells appeared in person, and the conference lasted approximately 45 minutes. (R.E. 753.) Judge Haddon then held an evidentiary hearing on the plaintiffs' motion on September 19, and he issued an order denying the injunction on October 9. (R.E. 755-56.)

3. The parties move for summary judgment.

The parties filed cross motions for summary judgment in the summer of 2009.

The plaintiffs argued, among other things, that the outcome of the case is controlled by *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1580 (2009) (mem.). (R.E. 402.) Both of those cases, according to the plaintiffs, struck down ballot-access schemes that had later filing deadlines, lower signature requirements (on a relative basis), and lower filing fees than those at issue in this case.

In support of their motion, the plaintiffs relied on the verified complaint as evidence that Kelly wanted to run and that Dreyer

wanted to vote for him. (R.E. 390-91.) As to the burden, the plaintiffs relied on undisputed evidence of the State's electoral history provided by the defendant during discovery. Montana had had only one independent candidate for the U.S. Senate in the State's entire history—Joseph P. Monaghan in 1936, when the petition-filing deadline was in October. (R.E. 397.) Since 1973, when the Legislature moved the deadline from August to March, there had been only one independent candidate for *any* non-presidential statewide office on the general-election ballot. (R.E. 397-98.) In the entire history of the State of Montana, there had been only five independent candidates for non-presidential statewide office on the general-election ballot. (R.E. 371-76.) And no independent candidate for non-presidential statewide office had ever been able to get on Montana's ballot when the deadline was in March. (R.E. 371-76.)

The plaintiffs also relied on the testimony of three expert witnesses. Richard Winger, a ballot-access expert, pointed out that Montana ranks among the top three states on measures of deadline, signatures, and filing fee, and that no other state ranks even in the top 15 on all three. (R.E. 478-83.)

In absolute terms, according to Winger, Montana's deadline for Senate candidates in 2008 was the third earliest in the nation. Only Mississippi (January 11) and Ohio (March 3) had earlier deadlines, but, because both of those states held their party primaries in March, neither of those deadlines gave qualified parties as much of a head start as did Montana's. On the other end of the spectrum, twenty-seven states had petition filing deadlines later than June 30. Eleven states had deadlines in July. Thirteen states had deadlines in August. Three states had deadlines in September. Only seven states—Idaho, Ohio, Mississippi, Montana, Nevada, Tennessee, and Utah—had deadlines before May 1. (R.E. 748-49.)

Winger's analysis also showed that Montana's signature requirement was the highest in the country when measured as a ratio of the number of votes cast in the last presidential election in the state, a figure that allows apples-to-apples comparison from state to state.[2] Montana's signature requirement for the U.S. Senate

2. The number of votes cast serves as a rough estimate of the number of people who are eligible to sign petitions. Other estimates are possible, and one researcher has used a published estimate of a state's voting-eligible population as the transforming variable. *See* Barry C. Burden, *Multiple Parties and Ballot Regulations, in Democracy in the States* (Bruce Cain et al. eds. 2008). Choosing a

in 2008 was 2.27% on Winger's normalized scale. Thirty-seven states had a signature requirement under 1%. Four states had no signature requirement at all. The median was .43%. The mean was .63%, and the standard deviation was also .63%. (R.E. 482-83.) Montana's signature requirement was thus more than 2.6 standard deviations above the mean.

Winger also found that Montana's filing fee falls on the high end of the scale when compared to other states. In absolute terms (not taking into account wealth and income variations from state to state), Montana's filing fee for Senate candidates in 2008 was tied with five other states for the third-highest filing fee in the nation. Thirty-three states had no filing fee at all for independent Senate candidates. Of the seventeen states that did have filing fees, eight states had fees of $500 or less. Montana's filing fee was more than three times the national average of $505. (R.E. 480-81.)

C.B. Pearson, the plaintiffs' second expert and a longtime political consultant with extensive petitioning experience in

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different transforming variable changes the precise ratio, but it generally does not affect the rank ordering of states in any significant way. (R.E. 120-24.)

Montana, explained in great detail the practical burdens that the scheme imposes on petitioners. (R.E. 491-501.) He testified, for example, that satisfying the petition requirements would require approximately 1,000 person-hours of work, or tens of thousands of dollars, or both. (R.E. 494-96.) And, because of the difficulty of gathering signatures during Montana's harsh winters, petitioners hoping to get on the ballot would likely have to start gathering signatures in September, more than a year before the general election. (R.E. 498.)

The plaintiffs' expert statistician, Dr. Steven P. Cole, analyzed the effect of ballot-access rules on the number of independent Senate candidates in the 2004, 2006, and 2008 elections using data from all 50 states. (R.E. 137-40.) Cole found a statistically significant relationship between the number of signatures required and the number of independent Senate candidates appearing on the ballot, with the number of candidates decreasing as signature requirements increased. (R.E. 147.) Cole also found a statistically significant relationship between candidates and the interaction between signatures and deadline, with the number of candidates decreasing as the combination of signatures and deadline

increased. (R.E. 148.) And, Cole found that Montana's ballot access scheme is so burdensome that one would expect no independent Senate candidates to make it onto the ballot. (R.E. 150.) He concluded that "Montana's ballot access requirements are much greater than necessary to eliminate virtually all independent candidates from the ballot." (R.E. 153.)

Finally, the plaintiffs also relied on the deposition testimony of the defendant's own statistical expert, Dr. Todd Donovan, who admitted that his own analyses, like Dr. Cole's, revealed a statistically significant relationship between the number of signatures required and the number of independent candidates on the ballot. (R.E. 111, 125.) As the number of signatures required went up, the number of independent Senate candidates went down. Donovan went so far as to admit that his analysis shows the same thing as Dr. Cole's: Montana's ballot-access scheme for independent Senate candidates is burdensome enough that one can expect that there will be no such candidates on the ballot. (R.E. 111-18.)

The defendant, Secretary of State Linda McCulloch, argued first that Kelly lacked standing because he did not turn in nominating papers or a petition (both of which presumably would

have been rejected). (R.E. 284.) She also argued that Montana's scheme did not impose a severe burden on the plaintiffs' rights. (R.E. 287-301.) McCulloch argued further that, even if the scheme did impose severe burdens, the restrictions were narrowly drawn to advance compelling state interests. (R.E. 301-09.) Specifically, McCulloch argued that the scheme advanced the State's interests in preventing voter confusion, in promoting voter education, in preserving political stability, and in protecting the integrity of the election process. (R.E. 301-09.) As evidence, McCulloch offered affidavits from five witnesses.

In support of her argument that the ballot-access scheme for independent candidates presented no burden, McCulloch pointed out that Montana does not place any time limits on the collection of signatures or require petition-signers to exclude themselves from voting in another party's primary, making Montana's scheme for independent candidates less burdensome than it might otherwise be. (R.E. 296.)

McCulloch also relied on the affidavit of Alan Miller, an election specialist in her office, who testified about the history of ballot-access for qualified parties other than the Democratic and

Republican parties, which Miller referred to as both "third parties" and "minor parties." (R.E. 358-67.) More than 200 such candidates had appeared on Montana's ballots since 1970, including 46 at the statewide level. (R.E. 364.) McCulloch argued that, instead of seeking ballot access as an independent candidate, Kelly could have sought to qualify his own political party with fewer signatures than are required of independent candidates, or he could have run for the nomination of an already-qualified party without having to file any signatures at all. (R.E. 297-98.)

McCulloch further relied on the affidavits of political consultant Doug Mitchell and activist Matt Singer. (R.E. 345-57.) Mitchell relayed his experience managing a ballot-issue campaign related to children's health, claiming that the campaign gathered more than 30,000 signatures between March and June 2008. (R.E. 352-53.) Mitchell was also involved in a referendum petition drive (though he does not describe the subject of the referendum) that gathered almost 8,000 signatures between October and December 2000. (R.E. 353.) Singer testified that he and an unspecified number of volunteers once gathered 1,600 signatures on college campuses over three months for a non-binding petition opposing a

nominee for the university board of regents. (R.E. 346-47.) McCulloch pointed to this testimony as evidence that "good faith" independent candidates for the Senate could meet the petition requirements. (R.E. 291-93.)

In her attempt to justify the scheme, McCulloch offered no evidence whatsoever of any actual voter confusion because of the presence of too many candidates on Montana's ballots. Indeed, the only evidence on which she relied at all was a compendium of sample ballots from the 2008 elections which are not self-evidently confusing or overlong because of the presence of independent candidates. (R.E. 302.) McCulloch offered no explanation for why the scheme was necessary to prevent voter confusion and appeared to agree with the plaintiffs' expert that a much lower number of signatures would be sufficient to prevent crowded ballots. (R.E. 302-05.)

McCulloch also offered no evidence that Montana's voters were uninformed or uneducated about the candidates, nor did she explain why the deadline, signature requirement, and filing fee were necessary to prevent voter ignorance.

In support of her argument that the scheme serves the State's interest in political stability, McCulloch pointed to Mitchell's opinion that the early deadline would prevent the political mischief of having potential primary opponents "lying in wait" and proceeding directly to the general election. (R.E. 305.) McCulloch also relied on the legislative history of the 2007 bill changing the deadline from June to early March. (R.E. 305.) According to testimony presented in both houses of the Legislature, the bill was a response to the 2006 election for Sheriff in Rosebud County, where the major-party nominee thought he was "safe" after winning the primary only to find out that five or six independent candidates entered the race just before the deadline (which was then one week before the primary election). (R.E. 334, 338.) Citing to election results showing 17 elections involving at least one third-party candidate that were decided by a plurality of the vote, McCulloch also suggested that the scheme advances political stability by making it more likely for elections to be decided by a majority vote. (R.E. 306.)

Finally, in support of her argument that the ballot-access scheme serves the State's interest in protecting the integrity of the

electoral process, McCulloch relied on an affidavit from Lisa Kimmet, the elections deputy in McCulloch's office, describing the election-administration process. (R.E. 309.) Kimmet explained that election administrators have to complete a long list of tasks before each primary and general election and that these tasks already tax the limited resources and small staffs of Montana's county elections officials. (R.E. 313-23.) Kimmet noted that the old filing deadline in early June meant that election administrators would likely have to verify any signatures in the weeks just before the primary elections for qualified parties when they need to focus on voter registration and ballot preparation. (R.E. 315.) Moving the deadline to early March, she opined, allowed election administrators to count independent-petition signatures during a less busy time. (R.E. 315.)

The district court heard no oral argument or live testimony on the motions. The cross-motions for summary judgment were fully briefed and submitted for decision on June 1, 2009. (R.E. 757-59.)

4. Judge Haddon enters summary judgment for the defendant.

On February 3, 2010, in a seven-page memorandum opinion and order, Judge Haddon granted the defendant's motion for

summary judgment and denied the plaintiffs' motion for summary judgment. (R.E. 4-10.) In so doing, Judge Haddon addressed none of the arguments or evidence offered by either side. Instead, he focused exclusively on the factual issue of whether Kelly had decided to run for the Senate before the plaintiffs filed their complaint in this case—an issue that McCulloch had not raised as the basis for her own standing argument.

Citing to the transcript of the hearing on the plaintiffs' motion for a preliminary injunction, Judge Haddon found that "the undisputed record establishes" that Kelly did not decide to run for the Senate until after April 15, 2008, one week *after* the plaintiffs filed their complaint. (R.E. 8.) The portion of the transcript on which Judge Haddon relied is reproduced here in full:

> Q And as best as you can recall, at what point did you say to yourself: "The opportunities look good enough that I'd like to throw my hat in the ring"?
>
> A Sometime this spring. Usually, it's after taxes. After April 15th. You know. Right in that period, probably.

(R.E. 686-87.) Judge Haddon then concluded that Kelly had suffered no harm, and therefore lacked standing to bring this case, because he had not decided to run before the plaintiffs filed their

complaint. (R.E. 8.) As further evidence in support of his finding that Kelly had not decided to run before April 8, Judge Haddon noted that Kelly did not submit any nominating papers before the statutory deadline. (R.E. 8-9.)

In a footnote, Judge Haddon acknowledged that Kelly had alleged in the plaintiffs' complaint that he wanted to run for Senate in 2008, but Haddon concluded that allegations in a complaint are insufficient to establish standing at the summary-judgment stage. (R.E. 9.) He made no mention of the fact that the complaint was verified and sworn.

Judge Haddon then turned to Dreyer and concluded that she could not have standing, either, because her chosen candidate (Kelly) had not decided to run for office before the plaintiffs filed their complaint. (R.E. 9-10.)

Because neither plaintiff had standing, Judge Haddon granted McCulloch's motion for summary judgment and directed the clerk to enter judgment in her favor. (R.E. 10.)

SUMMARY OF THE ARGUMENT

This case should sound familiar. It's a constitutional challenge to Montana's ballot-access scheme for independent candidates, and it's similar in many respects to *Anderson v. Celebrezze*, 460 U.S. 780 (1983), in which the Supreme Court struck down an Ohio scheme, and *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1580 (2009) (mem.), in which this Court recently struck down an Arizona scheme. The nature of the constitutional burdens here are very similar, and the state interests offered to justify them are similar as well. The main differences are that Montana's scheme is far more burdensome than Ohio's and Arizona's and that the evidence offered to justify the burdens here is weaker.

Rather than address the constitutional issue, though, the district court ruled that the plaintiffs lacked standing. In so doing, the court overlooked Kelly's sworn testimony and quoted selectively from a transcript. The court also overlooked the well-established law of this Circuit on standing in ballot-access cases, failing even to cite the leading case. The court's ruling on standing is ill-founded, ill-reasoned, and plainly wrong.

On the merits, this case should be controlled by *Anderson* and *Nader*. Those cases dictate that strict scrutiny should apply in this case, and they undermine the justifications offered here by the State. The record before the Court thus permits only one conclusion: Montana's burdensome ballot-access scheme is unconstitutional.

LEGAL STANDARD

The Court applies *de novo* review to a district court's decision to grant summary judgment. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1039 (9th Cir. 1999). A district court's decision on cross motions for summary judgment is also reviewed *de novo*. *See Travelers Prop. Cas. Co. of Am. V. ConocoPhillips Co.*, 546 F.3d 1142, 1145 (9th Cir. 2008). This standard of review means that the Court applies the same legal standards employed by the district court to determine whether summary judgment is appropriate in a specific case. *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1221 (9th Cir. 1999)

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party is entitled to summary judgment where the evidence and the applicable law permit only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party, which may not rely merely on the allegations or denials in its own pleadings, but must, by affidavits or otherwise as provided in Rule 56, "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *accord Anderson*, 477 U.S. at 248. Only genuine disputes over material facts—facts that, under the governing law, could affect the lawsuit's outcome—will properly preclude entry of summary judgment. *Anderson*, 477 U.S. at 248.

In determining whether it is appropriate to grant or deny summary judgment, the court's role is not to weigh the evidence or to determine the truth of the matter, but rather to determine only whether a genuine issue exists for trial. *See Anderson*, 477 U.S. at 249. In doing so, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Standing is also question of law that the Court reviews *de novo*. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002).

The Court may affirm the grant of summary judgment upon any ground supported by the record. *Simo v. Union of Needletrades*, 322 F.3d 602, 610 (9th Cir. 2003).

ARGUMENT

I. The record does not establish as a matter of law that both Kelly and Dreyer lacked standing to bring this case.

The district court's decision on standing is wrong on the facts and wrong on the law.

As a factual matter, the question of whether Kelly had decided to run for office on or before April 8 is hardly "undisputed" in the way that the district court described it. (R.E. 8.) The plaintiffs' verified complaint, signed by Kelly, declared that Kelly wanted to run, and it is well-established that a verified complaint qualifies as an affidavit for purposes of summary judgment "if it is based on personal knowledge and if it sets forth the requisite facts with specificity." *Moran v. Selig*, 447 F.3d 748, 760 n. 16 (9th Cir. 2006) (citation omitted). There is no question that Kelly had personal knowledge of his own desire to run and that he said so with specificity. At the very least, this created a dispute that should have precluded summary judgment.

In addition, the testimony on which the district court relied is not inconsistent with the allegation in the verified complaint. Kelly testified at the September hearing that he decided to run

"[s]ometime this spring." (R.E. 687.) He also testified that he *usually* decides to run after Tax Day. This testimony does not, as the district court concluded, establish as a matter of law that Kelly decided to run after April 15. Indeed, that conclusion is patently absurd given that Kelly and Dreyer filed this lawsuit before April 15. If ever there were a solid indication that a person wanted to run for office, it is a lawsuit asking a federal court to put that person on the ballot.

Other testimony at the same September hearing further belies the district court's finding. On direct examination, Kelly testified that he started thinking seriously about a run in the fall of 2007. (R.E. 656-57.) Under questioning from the defendant's attorney, Kelly reiterated that testimony and said that he had decided to run "early in 2008." (R.E. 673-74.) He could not remember the exact moment he decided, though, and wasn't sure whether it was "in February or March or January." (R.E. 673-74.) "But," he said, "it was early in the year." (R.E. 673-74.)

Taken as a whole, the record before the district court does not establish that Kelly decided to run after April 8. To the contrary, it establishes just the opposite.

As a legal matter, moreover, the question of whether Kelly had decided to run for office on or before April 8 is completely immaterial. When challenging ballot-access restrictions, candidates have standing not only in their capacity as candidates, but also in their capacity as registered voters. *Erum v. Cayetano,* 881 F.2d 689, 691 n.5 (9th Cir. 1989). "Candidate eligibility requirements implicate basic constitutional rights of voters as well as those of candidates." *Id.* at 691 (citing *Anderson v. Celebrezze,* 460 U.S. 780, 786-87 (1983); *Lubin v. Parish,* 415 U.S. 709, 716 (1974)); *see also Bullock v. Carter,* 405 U.S. 134, 143 (1972) (interests of candidates and voters are intertwined so that injury to the candidate causes correlative harm to voters); *Gottlieb v. Federal Election Comm'n,* 143 F.3d 618, 622 (D.C. Cir. 1998) ("Ballot eligibility requirements . . . prevent candidates from appearing on the ballot, directly impinging on the voters' ability to support that candidate.").

There is no dispute in this case that Kelly and Dreyer are registered voters. (R.E. 390-91.) As a result, both of them have standing *as voters* to challenge the constitutionality of Montana's ballot-access scheme. *See, e.g., Anderson,* 460 U.S. at 786 (allowing

voters to challenge ballot-access requirements); *Bullock,* 405 U.S. at 143 (same); *Erum,* 881 F.2d at 691 (same).

In reaching the opposite conclusion, the district court cited *Miyazawa v. City of Cincinnati,* 45 F.3d 126 (6th Cir. 1995), but its reliance on that case is misplaced. The Sixth Circuit found that a plaintiff challenging Ohio's ballot-access laws suffered no injury and lacked standing because she "merely asserted a general complaint that an unidentified candidate that she may want to vote for may not be eligible to run for that office. She has demonstrated no close relationship to, or any personal stake in, the claim made." *Id.* at 127-28. In this case, by contrast, Dreyer has a personal stake in the claim. The verified complaint declares that Dreyer wanted to vote for Kelly in the 2008 election, and there is not a shred of evidence to the contrary. (R.E. 744.) Even if *Miyazawa* were the law of this Circuit, then, Dreyer would still have standing because: (1) she is a supporter of a specific candidate; and (2) she will be unable to vote for that candidate due to the ballot-access scheme. *Miyazawa,* 45 F.3d at 128.

The district court was thus plainly wrong when it concluded that neither Kelly nor Dreyer had standing as a matter of law.

Reviewing the case *de novo*, this Court should conclude that Kelly's desire to run for office, as amply demonstrated by the record, and both plaintiffs' status as registered voters were more than enough to give them standing to bring this case.

II. Montana's ballot-access scheme is unconstitutional.

The legal test governing the merits of this case is clear and undisputed. The Court must apply the balancing test set forth in *Anderson v. Celebrezze*:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson, 460 U.S. at 789. Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of that scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the

restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law places severe or discriminatory burdens on the rights of political parties, candidates or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The plaintiff bears the burden of proof on the first step in the *Anderson* test, and the defendant bears the burden on the second. *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

A. The Character and Magnitude of the Burdens

Montana's ballot-access scheme burdens "two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). As the Supreme Court has recognized, "[t]he right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'" *Anderson* , 460 U.S. at 787

(quoting *Lubin*, 415 U.S. at 716). Ballot-access restrictions also burden voters' freedom of association, because an election campaign is a platform for the expression of views on the issues of the day, and a candidate "serves as a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 787-88.

Kelly and Dreyer contend that Montana's ballot-access scheme burdens their rights through the cumulative effect of the scheme's early deadline, high signature requirement, and high filing fee.

1. *Filing Deadline*

Montana's filing deadline means that the opportunity to run for the U.S. Senate as an independent candidate is formally cut off in early March, almost eight months before the general election. This also means, of course, that the opportunity for voters to coalesce around such a candidacy is cut off at the same time. "History . . . ends" for both independent candidates and their supporters when the early March deadline passes. *Anderson,* 460 U.S. at 800. As a practical matter, moreover, candidates must actually make their decision well before the deadline in order to gather the more than 10,000 signatures required on nominating petitions and to raise money for the filing fee, the petition drive, and

the campaign. *See id.* at 791 n.11. (R.E. 498.) This makes the effective cut-off date for a candidate to enter the race at least several months before the legal deadline.

One of the most widely-recognized ways in which an early effective deadline burdens candidates and voters is by depriving them of the opportunity to respond to developments that occur after the campaign heats up. *See, e.g., Anderson,* 460 U.S. at 790-91; *Nader v. Brewer,* 531 F.3d 1028 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1580 (2009) (mem.); *Cromer v. South Carolina,* 917 F.2d 819, 823-24 (4th Cir. 1990). Candidates rise and fall in popularity. Issues emerge. Positions shift. Scandals happen. The early months of a campaign are rarely static. These changes create opportunities for new candidacies and political coalitions. *See Anderson,* 460 U.S. at 790-91. Oftentimes, moreover, independent candidacies and voter support for such candidacies occur only as a reaction to the particular nominees, or likely nominees, of the existing parties. *Id.* This is certainly true in Montana, where, for example, a prospective independent candidate for the U.S. Senate could not likely have predicted in November or December of 2007 that the Republican Party would nominate Bob Kelleher, a former member of the Green

Party and widely considered a relatively weak candidate, to oppose the incumbent Senator Max Baucus.[3]

The Supreme Court and this Court have also recognized that early filing deadlines burden candidates by making the business of campaigning more difficult. *See, e.g., Anderson,* 460 U.S. at 792; *Nader,* 531 F.3d at 1038. "Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Anderson,* 460 U.S. at 792. In Montana, the early effective deadline also means, as a practical matter, that candidates have to do their signature gathering and early campaigning in the late fall and winter, when the weather in Montana is often inclement and a substantial number of voters relocate to warmer climates. (R.E. 493-98.) Not only are potential supporters less accessible but signature gathering and campaigning is more difficult when it's raining or snowing and the roads are treacherous. (R.E. 493-98.) The early deadline also precludes the possibility of gathering

3. *See* Kirk Johnson, *Candidate Shocks Party and Himself*, N.Y. Times, Aug. 11, 2008, *available at* http://www.nytimes.com/2008/08/12/us/politics/12montana.html.

signatures at the polls during school elections, which are held in late March, or on primary day in June. Both are fertile sources of signatures upon which independent candidates are unable to draw. (R.E. 460, 498.)

Early effective deadlines also burden independents by putting them at a competitive disadvantage in the electoral process. *See Anderson,* 460 U.S. at 790-91. The ability to select candidates later in the process gives qualified parties and their supporters "the political advantage of continued flexibility." *Id.* at 791. For independents, the inflexibility imposed by an early effective deadline "is a correlative disadvantage because of the competitive nature of the electoral process." *Id.* The ability to campaign when voters are more interested is a further advantage for qualified-party candidates and a disadvantage for independents. These burdens, which fall unequally on independent candidates, "discriminate[] against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id.* at 794. They also strike at core First Amendment values by reducing electoral diversity and competition in the marketplace of ideas. *Id.* In Montana, the qualified parties

have until June or later to select their nominees. This gives them more than six months of flexibility that is unavailable to Montana's independent candidates and their supporters. It also allows them to do virtually all of their campaigning in the spring and summer, when voters are more accessible and engaged.

The magnitude of these burdens is not difficult to gauge. In *Anderson,* the Supreme Court found that a March 20 deadline for independent candidates imposed burdens sufficiently weighty to warrant strict scrutiny. 460 U.S. at 790-95. In *Nader,* this Court concluded that a June 9 deadline for independent candidates imposed a "severe" burden. 531 F.3d at 1039. In *Cromer,* 917 F.2d at 823-24, the Fourth Circuit applied strict scrutiny to a March 30 deadline. Montana's deadline, which is earlier than any of these, likewise falls on the "severe" end of the sliding scale.

Another way to measure the magnitude of the burden is by looking to past experience. If Senate candidates have been unable to meet the deadline, then the burden is probably heavy. *See, e.g., Mandel v. Bradley,* 432 U.S. 177, 178 (1977) (criticizing the district court for failing to analyze what the "past experience" under the ballot restriction might indicate about the burdens it imposed);

Storer v. Brown, 415 U.S. 724, 742 (1974) ("Past experience will be a helpful, if not always unerring, guide" when assessing the burdens imposed by ballot access requirements). Montana's past experience, particularly the undisputed fact that no independent candidates for non-presidential statewide offices have ever been able to get on Montana's ballot when the deadline was in March, is about as heavy as a burden can get. (*See supra* pp. 10-11.)

Yet another way to measure the burden is by comparing Montana's deadline to those in other states. It is undisputed that Montana's deadline in 2008 was the third earliest in the nation and, among the top three, was the farthest in advance of date of the partisan primary. (*See supra* p. 12.) When compared to other states, then, Montana is clearly on the extreme end of the distribution.

A fourth way to gauge the magnitude of the burden is through the application of common sense. Montana's filing deadline is in early March, now almost 250 days before the general election at which an independent Senate candidate would hope to appear on the ballot and 92 days before the qualified parties have to choose their candidates. Because Montana also requires an independent candidate to file a nominating petition and pay a filing fee, the

effective deadline is even earlier—perhaps as early as a year or more before the election. By any reasonable standard, that's a long time and one that imposes a severe burden.

Strict scrutiny is also warranted by the discriminatory nature of Montana's early filing deadline. As the Supreme Court explained in *Anderson*, the burdens of an early deadline discriminate against independent candidates and their supporters. 460 U.S. at 794. In Montana, independent Senate candidates have to turn in petitions containing more than 10,000 signatures exactly one week before candidates seeking the nomination of qualified parties have to turn in a statement of candidacy containing no signatures. Qualified parties then have an additional 85 days to select their candidates. Under the *Anderson* test, these inequalities warrant strict scrutiny no matter how severe the burdens are.

Ultimately, Montana's early filing deadline is so burdensome and so discriminatory that it is probably unconstitutional standing alone. No court of which the appellants are aware has ever upheld a filing deadline for independent candidates that fell so far before the general election, the primary election, and the filing deadline for qualified-party candidates. But Montana's filing deadline does not

stand alone, and the Court must also consider the additional effects of Montana's signature requirement and filing fee.

2. *Signature Requirement*

Montana's high signature requirement is more than just a number. Because signatures don't collect themselves, a signature requirement acts as a tax on a candidate's human and financial resources. In Montana, the law requires an independent candidate to collect valid signatures at least equal in number to 5% of the votes cast for the last successful candidate for the office sought. Mont. Code Ann. § 13-10-502. For would-be Senate candidates in 2008, the minimum number was 10,243 signatures. However, because some signatures collected will inevitably turn out to be invalid, a candidate must, as a practical matter, aim to exceed the minimum number by approximately 25%, which would require a Senate candidate to collect approximately 12,800 signatures in order to be reasonably certain of obtaining ballot access. (R.E. 492.)

C.B. Pearson, a longtime political consultant with extensive petitioning experience in Montana, estimates that a petition drive to collect that many signatures before the early March deadline would take somewhere between 854 and 1,067 person-hours of work,

which is the equivalent of one person working full time for approximately six months. (R.E. 493.) If the petition drive were to use paid or volunteer staff, moreover, Pearson adds in an extra 10% to his estimate for administrative tasks. (R.E. 494.) If the entire drive were to be conducted by paid signature-gatherers, as many are, Pearson estimates the cost to be $25,000 to $50,000, depending on the time of year. (R.E. 496.)

That's a heavy burden. It's a particularly heavy burden for the vast majority of Montanans, like Kelly, who can afford neither to take six months off from work to collect their own signatures nor to pay an outside consultant like C.B. Pearson to collect signatures for them. (R.E. 656, 658-59.) It's also a burden that falls unequally on independent candidates and their supporters, because qualified parties and their candidates don't have to collect any signatures in order to appear on the ballot.

Past experience further measures the burden. As already discussed above, there has been only one independent candidate for U.S. Senate in the State's 119 years and none since 1936, when the petition filing deadline was in October and the number of signatures required was much smaller. (*See supra* pp. 11.) That 72-

year-old unblemished streak suggests that the burden is heavy indeed. No independent candidate for governor has ever met the signature requirement in the State's entire history, only one independent candidate for any other non-presidential statewide office has ever successfully met the signature requirement to be on the general-election ballot. (R.E. 446.) This further suggests that Montana's signature requirement falls on the "severe" end of the scale.

When compared to other states, moreover, it is undisputed that Montana's signature requirement is not only the most burdensome in the country when measured on an apples-to-apples basis but also far more burdensome than the average state. (*See supra* pp. 12-13.)

By these measures, Montana's signature requirement standing alone is burdensome enough to warrant strict scrutiny under the *Anderson* test. Strict scrutiny is also warranted by virtue of the discriminatory nature of the burdens. It's not clear whether the signature requirement, standing alone, could pass constitutional muster following the application of strict scrutiny. But Montana's signature requirement does not stand alone, and the Court must

also consider the additional effects of Montana's filing deadline and filing fee.

3. *Filing Fee*

Like the signature requirement, Montana's filing-fee requirement acts as a tax on a candidate's resources. The State requires candidates to submit a filing fee equal to 1% of the annual salary of the office sought. *See* Mont. Code Ann. § 13-10-202(3). In 2008, the filing fee for the U.S. Senate was $1,693. (R.E. 458.)

By common-sense measures, this figure is high, particularly in a state like Montana which ranks near the bottom on state-by-state measures of personal income. According to the Census Bureau's 2007 American Community Survey, for example, Montana's median household income of $43,531 ranks 40th out of the 50 states plus the District of Columbia. (R.E. 465, U.S. Census Bureau, American Community Survey, *available at* www.census.gov/acs.) Montana's median family income ranks 41st. (R.E. 465, U.S. Census Bureau, American Community Survey, *available at* www.census.gov/acs.) The fee is not so high as to exclude everyone, and many candidates in Montana have indeed been able to pay similar amounts. But the fee is certainly high enough to exclude many potential candidates in

Montana, like Kelly, who lack both personal wealth and affluent backers and who could not, without substantial hardship, pay the fee from their own resources or modest contributions. (R.E. 658-59.) Montana's filing fee also falls on the high end of the scale when compared to other states. (*See supra* p. 13.)

Like all other states that have a filing fee, Montana offers a procedure by which a candidate who is unable to pay the fee can nonetheless qualify for the ballot. A candidate who wants to avoid the fee may, in lieu of the fee, file a verified statement that he or she is unable to pay the fee along with a petition containing signatures from eligible voters numbering 5% of the total votes cast for the successful candidate for the same office in the last general election. Mont. Code Ann. § 13-10-203. Had Kelly chosen to submit a petition in lieu of the filing fee, Montana's ballot-access scheme would have required him to submit petitions containing at least 10,243 signatures *in addition to* the 10,243 signatures that Kelly was already required to file with his petition for nomination. *See* Mont. Code Ann. § 13-10-503(2) (nominating petition containing sufficient signatures must be "accompanied by" a filing fee). This alternative to the filing fee is probably more burdensome than the

fee itself. In fact, no candidate for non-presidential statewide office has ever successfully avoided the filing fee by petition. (R.E. 438.)

Because the petition in lieu of the filing fee appears to be virtually impossible, Montana's filing fee, standing alone, is of questionable constitutional validity. *See Lubin,* 415 U.S. at 709 (striking down a filing fee of $701.60 in the absence of a reasonable alternative means of gaining access to the ballot). Montana's filing fee is also higher, at least in absolute terms, than a $1,000 filing fee that the Supreme Court struck down as "patently exclusionary." *Bullock v Carter,* 405 U.S. 134, 143 (1972). But, again, Montana's filing fee does not stand alone, and the Court must also consider the additional effects of Montana's filing deadline and signature requirement.

4. *The Cumulative Effect*

The cumulative effect of Montana's filing deadline, signature requirement, and filing fee make Montana's ballot-access scheme for independent Senate candidates by far the most burdensome in the nation. Montana ranks in the top three states on all three measures and lies at the far highest extreme on one of them. (R.E.

478-83.) **No other state ranks even in the top 15 on all three measures.** (R.E. 478-83.)

The record also shows that the cumulative effect of these burdens makes it virtually impossible for independent Senate candidates to get on the ballot. No such candidates have ever qualified under the current scheme, and the last such candidate to qualify for the ballot did so in 1936, when the filing deadline was in October and there was no filing fee. (R.E. 445-47.) If that doesn't indicate a heavy burden, then nothing does.

The cumulative burdens of Montana's ballot-access scheme, moreover, far exceed burdens that the Supreme Court struck down in *Anderson v. Celebrezze*. In that case, presidential candidate John Anderson challenged Ohio's ballot-access scheme for independent candidates. Under Ohio's scheme, the filing deadline was March 20 of the election year—seven days *after* the deadline under Montana's scheme. 460 U.S. at 783 n.1. Ohio required only 5,000 valid signatures, which is much lower on an absolute and relative basis than Montana's scheme requires. *Id.* And Ohio's filing fee was a mere $100. *See Anderson v. Celebrezze,* 449 F. Supp. 121, 141 (D.

Ohio 1980), *aff'd* 460 U.S. 780 (1983). *Anderson* thus requires the application of strict scrutiny here.

The Ninth Circuit also applied strict scrutiny and struck down a ballot-access scheme for independent candidates that was far less burdensome than Montana's scheme at issue here. In *Nader v. Brewer,* 508 F.3d 1028 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1580 (2009) (mem.), Arizona's petition deadline was in early June—146 days before the general election. The number of signatures required was 14,695—a high absolute number but a much smaller number, relative to the state's population, than Montana requires. (Arizona's population is more than six times the population of Montana.) And there was no filing fee. *Nader* likewise requires the application of strict scrutiny in this case.

Furthermore, the Third, Fourth and Eleventh Circuits have also struck down arguably less burdensome ballot-access schemes for non-presidential independent candidates. *See Council of Alternative Political Parties v. Hooks,* 121 F.3d 876 (3d Cir. 1997) (April 10 deadline; 2% signature requirement capped at 800 signatures; $0 filing fee); *New Alliance Party v. Hand,* 933 F.2d 1568 (11th Cir. 1991) (April 6 deadline; 12,033 signature requirement; $0

filing fee); *Cromer,* 917 F.2d at 819 (deadline for filing statement of candidacy 200 days; deadline for filing petitions August 1; the lower of 5% of registered voters or 10,000 signature requirement; $0 filing fee). No court of which the appellants are aware has ever upheld a ballot-access scheme as burdensome as Montana's.

Under these circumstances, strict scrutiny should apply.

B. State Interests and Narrow Tailoring

Because Montana's ballot-access scheme imposes severe and discriminatory constitutional burdens, it must be narrowly drawn to advance a compelling state interest. *Burdick v. Takushi,* 504 U.S. 428, 434 (1992). This step in the *Anderson* test requires the Court to: (1) "determine the legitimacy and strength of each of [the state interests asserted to justify the challenged scheme];" and (2) "consider the extent to which those interests make it necessary to burden the [plaintiffs'] rights." *Anderson,* 460 U.S. at 789. The defendant bears the burden of proof on both of these elements. *Burson v. Freeman,* 504 U.S. 191, 199 (1992); *Lopez Torres v. New York State Bd. of Elections,* 462 F.3d 161, 203 (2d Cir. 2006), *rev'd on other grounds* 128 S. Ct. 791 (2008); *Patriot Party v. Allegheny*

County Dept. of Elections, 95 F.3d 253, 267-68 (3d Cir. 1996); *see, e.g.*. *Nader,* 531 F.3d at 1039-40.

McCulloch argued in the district court that the scheme is justified by the State's interests in preventing voter confusion, in promoting voter education, in preserving political stability, and in protecting the integrity of the election process. One quick way to assess these justifications is by reference to other states. *See Williams*, 393 U.S. at 33 (1968). The fact that no other state has found it necessary to impose anything close to the cumulative burdens associated with Montana's early filing deadline, high signature requirement, and high filing fee is a strong indication that Montana's scheme should fail strict scrutiny.

A closer examination of the asserted interests leads to the same conclusion. McCulloch has had every opportunity to demonstrate the scheme's necessity, but the record before the Court proves just the opposite.

1. ***Preventing Voter Confusion***

Montana's ballot-access scheme for independent Senate candidates goes far beyond what is necessary or reasonable to protect against voter confusion. The Supreme Court has recognized

that "laundry list" ballots, which it described as ballots with more than 12 candidates for a single office, have the potential for voter confusion. *See Lubin* , 415 U.S. at 715-18. But Montana has never had 12 candidates on the ballot for *any* statewide office. (R.E. 371-76.) It has never had more than a handful of candidates on the ballot for the U.S. Senate. (R.E. 371-76.) These undisputed facts seriously undermine the proffered justification.

Further undermining this justification is the testimony of both parties' experts. As described above, the statistical analyses conducted by both experts demonstrate that Montana's ballot access requirements are substantially stricter than necessary to ensure that the number of independent Senate candidates remains at zero. (*See supra* pp. 14-15.)

Yet another factor undermining this justification is Montana's party qualification and nomination regime. Unqualified parties need only to submit 5,000 signatures to qualify for the ballot. *See* Mont. Code Ann. § 13-10-601. Qualification then allows them to run a candidate for any partisan office without the need to submit any additional signatures. *See* Mont. Code Ann. § 13-10-201. If Montana's much stricter ballot-access scheme for independent

candidates were necessary to prevent voter confusion, one would expect to see Montana's ballots teeming with qualified-party parties, but no such "problem" exists. A 5,000-signature requirement for party qualification has proven more than adequate to keep Montana's ballots to a reasonable length, and the much higher signature requirement for a single independent Senate candidate seems without justification. *Cf. Citizens to Establish a Reform Party v. Priest*, 970 F. Supp. 690, 699 (E.D. Ark. 1996) (holding that a state could not require more signatures of a new party than an independent candidate).

Finally, it is apparent from C.B. Pearson's report that the ballot-access scheme does not actually advance the State's interest in limiting the ballot to serious candidates. The scheme excludes "impecunious but serious candidates" like Kelly while including unserious but wealthy candidates. *Lubin,* 415 U.S. at 717. The scheme also allows unserious candidates onto the ballot without any showing of popular support if they are able to get the nomination of a qualified party. The cumulative effect of the signature requirement, deadline, and filing fee is so burdensome that a candidate can realistically satisfy them only if he or she can

afford to devote six full months to petitioning or to write a $50,000 check to a professional signature-gatherer like Pearson. While such a test may shorten ballots, it does not gauge the seriousness of a candidate with sufficient accuracy to justify the burdens it imposes on the First Amendment rights.

2. *Voter Education*

The "voter education" argument offered by McCulloch in the district court is the same argument advanced by Ohio to justify its early deadline for independent candidates that was soundly rejected by the Supreme Court in *Anderson*. *See Anderson*, 460 U.S. at 796-98. "In the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label." *Id.* at 797. The same is true here.

In fact, the Supreme Court's reasoning in *Anderson* applies with even more force in this case. Citing the modern communications available to voters in 1983, the Court noted that information about candidates could be "instantaneously communicated" in verbal and visual form. *Id.* at 797. Today, of course, we have vastly improved telecommunications networks, new

technologies, and the Internet, all of which routinely provide even greater access to candidate information. The Court also noted that most voters in 1983 were not only literate but also "informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates." *Id.* at 797. Today, we have almost universal literacy in the United States. The Supreme Court has shown "faith in the ability of individual voters to inform themselves about campaign issues," *id.* at 797, and so should this Court.

It is also not self-evident that Montana's stringent ballot-access requirements actually serve the State's interest in voter education. According to the Supreme Court:

> A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we observed in another First Amendment context, it is often true "that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 770, 96 S. Ct. 1817, 1829, 48 L.Ed.2d 346 (1976).

Anderson, 760 U.S. at 789. By reducing the number of candidates who are able to get on the ballot, Montana is limiting both electoral competition and competition in the marketplace of ideas.

Candidates without serious opposition on the ballot will not need to do much campaigning. Nor will they face a vigorous debate on the issues that could inform the voters and lead to a more engaged electorate. If the State were serious about having an informed electorate, it would foster competition, not stifle it.

Finally, if Montana were truly serious about voter education, it has better means to achieve it. McCulloch could, for example, sponsor or facilitate candidate forums around the State. She could sponsor or facilitate the nonpartisan distribution of candidate platform information. She could participate in public service announcements and other media campaigns. These are but a few steps that the State could take to improve voter education without imposing such a heavy burden on First Amendment rights.

3. *Political Stability*

McCulloch's "political stability" justification must fail for similar reasons. The Supreme Court held in *Storer* that a state has a "compelling" interest in "the stability of its political system." 415 U.S. at 736. But the Court held more recently that this interest does not extend so far as to permit a state to protect existing parties from competition with independent or third-party candidates.

Anderson, 460 U.S. at 801-02. Indeed, "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Id.* at 802 (quoting *Williams*, 393 U.S. at 32). There is thus a critical difference between a legitimate stability interest in avoiding "splintered parties and unrestrained factionalism," *Storer*, 415 U.S. at 736, and an illegitimate "desire to protect existing political parties from competition," *Anderson*, 460 U.S. at 801. Montana's ballot-access scheme serves the latter and not the former, and the Supreme Court has already rejected that kind of political stability as justification for anticompetitive restrictions. *See id.* at 801-06.

McCulloch's brief in the district court suggested that the scheme encourages political stability because it "discourages party-splintering and factionalism" by preventing potential primary opponents from going straight to the general election. (R.E. 305.) This is nothing more than a clear-cut statement that Montana's scheme preserves political stability by eliminating electoral competition. Preventing competition is not the same thing as preventing factionalism. "Political competition that draws resources away from the major parties cannot . . . be condemned as

"unrestrained factionalism." *Anderson,* 460 U.S. at 802. It is hardly surprising that a partisan legislature would want to protect its own political stability, but that does not make it a legitimate state interest. *See Anderson,* 460 U.S. at 803 n.30 (observing that even though election laws are written by partisan officials, "it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests"); *see also Clingman v. Beaver,* 544 U.S. 581, 603 (2005) (O'Connor, J., concurring) (noting that "those in power may be using electoral rules to erect barriers to electoral competition"). Montana already has a disaffiliation statute for independent candidates that is more than adequate to prevent factionalism. *See* Mont. Code Ann. § 13-10-507.

As the Court observed in *Anderson,* moreover, an early deadline like Montana's is both too broad and too narrow to serve a state's legitimate interest in political stability. 460 U.S. at 805. It applies to would-be candidates, like Kelly, who had no interest in running in a party's primary. (R.E. 657.) On the other hand, Montana's deadline does nothing to prohibit actual partisans from skipping a primary as long as they decide early enough and have

sufficient resources to meet the other requirements for independent candidates.

It is also not clear that Montana's scheme actually does discourage party-splintering. The early deadline and high signature and fee requirements force otherwise-partisan candidates to break from the existing parties very early in the electoral process. With more time, those candidates might be able to reconcile or find a new home within the existing parties. *See Anderson,* 460 U.S. at 805.

McCulloch also suggested that Montana's scheme preserves political stability by making it more likely that the election winner will be the choice of a majority of the voters. (R.E. 306.) This claim is difficult to square with Montana's party-qualification regime. Montana already has a handful of qualified parties which have the ability to nominate candidates for any partisan office. The door is already wide open to plurality elections, and Montana's ballot-access scheme for independent candidates does nothing to close it.

4. *Electoral Integrity*

McCulloch's "electoral integrity" justification amounts to an argument about administrative convenience: state officials need time to prepare the ballots. (R.E. 307-09.) While there must always

be some sort of cut-off date, the claim that election officials need approximately eight months defies credulity, the law, and the evidence.

Both the Supreme Court and the Ninth Circuit have rejected this argument. In *Anderson,* the Supreme Court found that the administrative justification did not apply to independent candidates. 460 U.S. at 800. Ohio did not claim that a March deadline was "necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed." *Id.* Neither does Montana. McCulloch claims only that the early deadline makes it "easier" for election officials to juggle competing demands. (R.E. 309.)

In *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 217-18 (1986), the Supreme Court reaffirmed this holding of *Anderson*, concluding that "administrative convenience" was not a sufficient basis on which to restrain the Republican Party's freedom of association. No court of which the appellants are aware has ever held that mere administrative convenience, rather than administrative necessity, is sufficient to justify such a heavy burden on First Amendment rights. Administrative convenience here is

merely another way of saying that the rights of Montana's independent candidates and their supporters should take a back seat to the convenience of political parties.

In *Nader*, the Arizona Secretary of State claimed—as does McCulloch—that its early deadline was justified by "deadlines related to early voting and sample ballots and the state's schedule for printing the ballots." 531 F.3d at 1032. This Court rejected that argument, finding "no satisfactory explanation in the record" as to why the state needed the time from its June filing deadline to its deadline for preparing sample ballots in mid-September in order to prepare its general election ballot. *Id.* at 1040.

There is likewise nothing in the record here to support a claim that the State of Montana needs even longer to prepare its ballots. The plaintiffs' counsel questioned the Secretary of State's designated representative, Lisa Kimmet, extensively about this alleged justification. (R.E. 531-33.) Her answers demonstrate that a filing deadline in June or July would leave the Secretary of State's office with ample time to verify petition signatures and prepare the ballot. She testified, for example, that it takes relatively little time to verify signatures (which could be even further reduced with

sampling techniques), and that almost all of the tasks associated with preparing the ballot are not significantly affected by the presence of independent candidates. (R.E. 589-91.) Indeed, her answers indicate that very few of the administrative burdens upon which the defendant now relies are significantly affected by the presence of independent candidates. (R.E. 589-91.)

Three other factors further undermine McCulloch's claim. First, the fact that the Secretary of State's office is apparently able to handle the preparation of multiple primary election ballots within the 75 days between the filing deadline for party candidates and the primary election strongly suggests that it does not need 236 days in order to put a handful of independent candidates on the ballot. Second, the fact that the Secretary of State's office was apparently able to print the 2008 general election ballot without undue difficulty even though the Republican presidential and vice-presidential candidates were not known until early September also casts doubt on McCulloch's assertion. (R.E. 692.) And, finally, the fact that 47 other states are apparently able to prepare the ballots on a shorter timeline is a strong indication that Montana's deadline is not as necessary as McCulloch claimed.

Of course, if Montana wants to ease the pressure on election officials by giving them more time, it is free to do so by other means. The State could arguably even have an early deadline if it did not also require a large number of signatures and high filing fee. *See Libertarian Party of Washington v. Munro*, 31 F.3d 759, 762 (9th Cir.1994) (upholding a July 4 deadline because the state only required 200 signatures for statewide candidates). What the State may not do, consistent with the First Amendment, is couple an early filing deadline with other ballot-access requirements that result in a barrier to ballot-access that is unduly difficult to overcome.

C. Summary

There is no dispute in this case that the filing deadline at issue here is earlier than the Ohio deadline struck down in *Anderson*. Nor is there any dispute that Ohio required a much smaller number of signatures, on an absolute and relative basis, and had a much lower filing fee.

There is likewise no dispute that the filing deadline in this case is much earlier than Arizona's deadline struck down in *Nader*.

Arizona also had no filing fee and required a smaller number of signatures, on a relative basis, than does Montana.

There is also no dispute about other materials facts. There is no dispute, for example, that no independent candidates for the U.S. Senate have ever qualified for the ballot under the current scheme. There is no dispute that the last such candidate to qualify did so in 1936, when the filing deadline was in October and there was no filing fee. There is no dispute that Montana ranks in the top three states on measures of deadline, signatures, and filing fee. And there is no dispute that no other state ranks even in the top 15 on all three measures.

These and the other undisputed facts described above establish not only that the constitutional burdens here are heavy but also that the State's justifications for them are weak. Particularly in light of *Anderson* and *Nader*, the full record before the Court permits only one conclusion. Kelly and Dreyer are entitled to summary judgment.

CONCLUSION

This is not a particularly difficult case. The district court's decision on standing is plainly wrong. On the merits, the facts are overwhelming. No case has ever upheld an effective filing deadline for non-presidential independent candidates that both precedes the deadline for party candidates to file for the primary election and requires a candidate to submit more than a *de minimus* number of signatures or filing fee. The cases that do exist support Kelly and Dreyer.

For these reasons, the Court should reverse the judgment in McCulloch's favor and remand the case to the district court with instructions to enter summary judgment in the plaintiffs' favor.[4]

4. The appellants respectfully ask the Court to exercise its authority under 28 U.S.C. § 2106 and to include instructions to have the case assigned to a different judge on remand. Judge Haddon's ruling and conduct of this case suggests that he might have difficulty disregarding his previously expressed views in this matter and that reassignment is advisable to preserve the appearance of justice. *See Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007); *see also, e.g., United States v. Labuf*, 2010 WL 1258205 (April 1, 2010); *United States v. Paul*, 561 F.3d 970, 975 (9th Cir. 2009).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,040 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 Bookman Old Style 14-point font.

/s/Bryan Sells

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Bryan Sells

STATEMENT OF RELATED CASES

The Appellants are aware of no related cases currently pending in this Court.

ADDENDUM

Mont. Code Ann. § 13-10-201. Declaration for nomination. (1) Each candidate in the primary election, except nonpartisan candidates filing under the provisions of Title 13, chapter 14, shall file a declaration for nomination with the secretary of state or election administrator. A candidate may not file for more than one public office. Each candidate for governor shall file a joint declaration for nomination with a candidate for lieutenant governor.

(2) A declaration for nomination must be filed in the office of:

(a) the secretary of state for placement of a name on the ballot for the presidential preference primary, a congressional office, a state or district office to be voted for in more than one county, a member of the legislature, or a judge of the district court;

(b) the election administrator for a county, municipal, precinct, or district office (other than a member of the legislature or judge of the district court) to be voted for in only one county.

(3) Each candidate shall sign the declaration and send with it the required filing fee or, in the case of an indigent candidate, send with it the documents required by 13-10-203. Unless filed electronically with the secretary of state, the declaration for nomination must be acknowledged by an officer empowered to acknowledge signatures or by the officer of the office at which the filing is made.

(4) The declaration, when filed, is conclusive evidence that the elector is a candidate for nomination by the elector's party. For a partisan election, an elector may not file a declaration for more than one party's nomination.

(5) (a) The declaration for nomination must be in the form and

contain the information prescribed by the secretary of state.

(b) A person seeking nomination to the legislature shall provide the secretary of state with a street address, legal description, or road designation to indicate the person's place of residence. If a candidate for the legislature changes residence, the candidate shall, within 15 days after the change, notify the secretary of state on a form prescribed by the secretary of state.

(c) The secretary of state and election administrator shall furnish declaration for nomination forms to individuals requesting them.

(6) (a) Except as provided in 13-10-211 and subsection (6)(b) of this section, a candidate's declaration for nomination must be filed no sooner than 135 days before the election in which the office first appears on the ballot and no later than 5 p.m., 75 days before the date of the primary election.

(b) For an election held pursuant to 13-1-104(1)(a) or 13-1-107(1), a candidate's declaration for nomination must be filed no sooner than 145 days before the election in which the office first appears on the ballot and no later than 5 p.m., 85 days before the date of the primary election.

(7) A declaration for nomination form may be sent by facsimile transmission if a facsimile facility is available for use by the election administrator or by the secretary of state, delivered in person, or mailed to the election administrator or to the secretary of state.

Mont. Code Ann. § 13-10-202. Filing fees. Filing fees are as follows:

(1) for offices having an annual salary of $2,500 or less and candidates for the legislature, $15;

(2) for county offices having an annual salary of more than $2,500, 0.5% of the total annual salary;

(3) for other offices having an annual salary of more than $2,500, 1% of the total annual salary;

(4) for offices in which compensation is paid in fees, $10;

(5) for officers of political parties, presidential electors, and officers who receive no salary or fees, no filing fee is required.

Mont. Code Ann. § 13-10-203. Indigent candidates. If an individual is unable to pay a filing fee, the filing officer shall accept the following documents in lieu of a filing fee:

(1) from a successful write-in candidate, a verified statement that the candidate is unable to pay the filing fee;

(2) from a candidate for nomination, a verified statement that the candidate is unable to pay the filing fee and a written petition for nomination as a candidate that meets the following requirements:

(a) the petition contains the name of the office to be filled and the candidate's name and residence address;

(b) the petition contains signatures numbering 5% or more of the total vote cast for the successful candidate for the same office at the last general election;

(c) the signatures are those of electors residing within the political subdivision of the state in which the candidate petitions for nomination; and

(d) the signatures have been certified by the appropriate election administrator by the procedure provided in 13-27-303 and 13-27-304.

Mont. Code Ann. § 13-10-501. Petition for nomination by independent candidates or political parties not eligible to participate in primary election. (1) Except as provided in 13-10-504, nominations for public office by an independent candidate or a political party that does not meet the requirements of 13-10-601 may be made by a petition for nomination.

(2) The petition must contain the same information and the oath of the candidate required for a declaration for nomination.

(3) If a petition is filed by a political party, it must contain the party name and, in five words or less, the principle that the body represents.

(4) The form of the petition must be prescribed by the secretary of state, and the secretary of state shall furnish sample copies to the election administrators and on request to any individual.

(5) Each sheet of a petition must contain signatures of electors residing in only one county.

Mont. Code Ann. § 13-10-502. Signature requirements for petition. (1) The petition for nomination must be signed by electors residing within the state and district or political subdivision in which the officer or officers are to be elected. Each signature line

must contain spaces for the signature, post-office address, and printed last name of the signer.

(2) The number of signatures must be 5% or more of the total vote cast for the successful candidate for the same office at the last general election.

(3) If the office sought is a new office or the boundaries of the district or political subdivision in which the election is to be held have changed since the last election for the office, the officer with whom nominations for the office sought are filed shall determine the number of signatures required for a petition of nomination for that office.

Mont. Code Ann. § 13-10-503. Filing deadlines. (1) A petition for nomination and the affidavits of circulation required by 13-27-302, accompanied by the required filing fee, must be filed with the same officer with whom other nominations for the office sought are filed. Petitions must be submitted, at least 1 week before the deadline for filing, to the election administrator in the county where the signer resides for verification and certification by the procedures provided in 13-27-303 through 13-27-306. If there are insufficient signatures on the petition, additional signatures may be submitted before the deadline for filing. If sufficient signatures are verified and certified pursuant to 13-10-502, the county election administrator shall file the petition for nomination with the same officer with whom other nominations for the office sought are filed.

(2) Except as provided in 13-10-504, each petition for nomination, accompanied by the required filing fee, must be filed by the applicable deadline established in 13-10-201(6)(a) or (6)(b).

Mont. Code Ann. § 13-10-507. Independent candidates -- association with political parties not allowed. (1) 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.

(2) For the purposes of subsection (1), "associated with a political party" means having run for office as a partisan candidate or having held an office with a political party designation.

Mont. Code Ann. § 13-10-601. Parties eligible for primary election -- petitions by minor parties. (1) Each political party that had a candidate for a statewide office in either of the last two general elections who received a total vote that was 5% or more of the total votes cast for the most recent successful candidate for governor shall nominate its candidates for public office, except for presidential electors, by a primary election as provided in this chapter.

(2) (a) A political party that does not qualify to hold a primary election under subsection (1) may qualify to nominate its candidates by primary election by presenting a petition, in a form prescribed by the secretary of state, requesting the primary election.

(b) The petition must be signed by a number of registered voters equal to 5% or more of the total votes cast for the successful candidate for governor at the last general election or 5,000 electors, whichever is less. The number must include the registered voters in more than one-third of the legislative districts equal to 5% or more of the total votes cast for the successful candidate for governor at the last general election in those districts or 150 electors in those districts, whichever is less.

(c) At least 1 week before the deadline provided in subsection (2)(d), the petition and the affidavits of circulation required by 13-27-302 must be presented to the election administrator of the county in which the signatures were gathered to be verified under the procedures provided in 13-27-303 through 13-27-306.

(d) The election administrator shall forward the verified petition to the secretary of state at least 85 days before the date of the primary.

Mont. Code Ann. § 13-27-303. Verification of signatures by county official -- allocating voters following reapportionment -- duplicate signatures. (1) Except as required by 13-27-104, within 4 weeks after receiving the sheets or sections of a petition, the county official shall check the names of all signers to verify they are registered electors of the county. In addition, the official shall 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. If all the randomly selected signatures appear to be genuine, the number of signatures of

registered electors on the sheet or section may be certified to the secretary of state without further comparison of signatures. 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.

(2) For the purpose of allocating the signatures of voters among the several legislative representative districts of the state as required to certify a petition for a referendum or a call of a constitutional convention under the provisions of this chapter following the filing of a districting and apportionment plan under 5-1-111 and before the first gubernatorial election following the filing of the plan, the new districts must be used with the number of signatures needed for each legislative representative district being the total votes cast for governor in the last gubernatorial election divided by the number of legislative representative districts.

(3) Upon discovery of fraudulent signatures or duplicate signatures of an elector on any one issue, the election administrator may submit the name of the elector or the petition circulator, or both, to the county attorney to be investigated under the provisions of 13-27-106 and 13-35-207.

LEGAL DEPARTMENT
SOUTHERN
REGIONAL OFFICE
VOTING RIGHTS
PROJECT

May 17, 2010

Mr. Anthony Johnstone
Solicitor
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Helena, MT 59620-1401

Re: *Kelly v. Johnson,* No. 10-35174

Dear Anthony:

This is to notify you that I have requested, and the court has granted, an extension until June 11 to file the Appellants' initial brief. The Appellee's brief will now be due July 11.

Sincerely,

Bryan Sells
Senior Staff Counsel
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