UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE KELLY and CLARICE DREYER,	)	C.A. No. 10-35174
	)	
Appellants,	)	D.C. No. CV-08-25-BU-SEH
v.	)	
	)	District of Montana
LINDA McCULLOCH, in her official capacity as Secretary of State of the State of Montana,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE

On Appeal from the United States District Court
for the District of Montana, Butte Division,
The Honorable Sam E. Haddon, Presiding

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STATEMENT OF THE ISSUES

1. Appellant Steve Kelly qualified in previous elections as both an independent and Democratic Party candidate for a statewide congressional seat in Montana, and led the Green Party in Montana before publicly declaring his intention not to run for office in 2008. He took no steps toward any future candidacy, other than filing this lawsuit. Has he suffered an injury that this Court could redress by the facial invalidation of Montana's ballot access laws?

2. Montana's ballot access laws have allowed hundreds of independent and minor party candidates, including Kelly himself, to appear on the ballot by showing a basic level of public support for their candidacies. The laws fit within an election calendar designed to facilitate open ballot access and ease of voting, and to protect the integrity of both candidate and initiative petition processes. Do these laws impose a severe and unjustified burden on reasonably diligent candidates who seek to run for office outside of the major party system?

STATEMENT OF FACTS

The parties agree that there is no genuine dispute as to material facts. (Kelly Br. at 63.) The parties disagree, however, about which facts are material to the Court's analysis of Kelly's claims and the State's ballot access laws.

Although Kelly has yet to detail the relief he seeks in terms of specific legislative acts, he calls into question at least half a dozen statutes, some dating back to statehood, that govern ballot access for all state and local candidates regardless of party affiliation. (Kelly Br., Addendum.) Beyond these particular statutes, Kelly also implicates the entire state election calendar, including deadlines for administration of voter registration, absentee voting, the initiative process, and election litigation. Finally, Kelly's own history and conduct in 2008 and prior elections frame his claims. The State will explain each of these factual backgrounds in turn.

I. HISTORY OF BALLOT ACCESS IN MONTANA

Since Montana statehood in 1889, more than 200 statewide independent and minor party candidates have qualified for the general election ballot, and many more have qualified for state legislative races. (E.R. 371-76, 380.) Historically, Montana law has provided two well-worn paths for these candidates. A candidate could run as an independent or qualify a new minor party for the ballot. Candidates also could campaign for write-in votes. The history and function of Montana's ballot access rules over time are summarized in a comprehensive study conducted by Prof. Todd Donovan of Western Washington University. (E.R. 204-66.)

A. The Early Era of Ballot Access: 1889-1968

Montana's first codification provided that minor party candidates could be nominated in a primary meeting by filing a certificate of nomination at least 30 days before the election. 1895 Mont. Pol. Code §§ 1310, 1316 (these session laws are reproduced in the appendix of legal authorities). Candidates could petition with 5% of the number of votes cast for the successful candidate for the same office at the prior election, filed on the deadline for other certificates of nomination. 1895 Mont. Pol. Code § 1313. The precodification law, required an absolute number of signatures (100 for statewide races). 1889 Mont. Election Laws § 5.

The direct primary initiative of 1912 required all parties to nominate by election rather than by convention, with separate petitions required for each candidate due 20 days before the primary election. 1912 Initiative § 8, 11, 13. In 1923, the deadline was pushed up to 40 days before the primary election, and a nomination filing fee of one percent of the office's salary was established. 1923 Mont. Laws, ch. 133, §§ 1, 2. Later, minor parties that had not received at least 3% of the statewide vote were exempted from the direct primary requirement. 1927 Mont. Laws, ch. 7, § 1. Soon after, the Legislature expanded a 1% of office salary filing fee to all candidates appearing on the general election ballot. 1933 Mont. Laws, ch. 28, § 1. During World War II, the legislature set earlier

filing deadlines for candidates, eventually settling at 90 days before the election. 1943 Mont. Laws, ch. 105, § 1; 1947 Mont. Laws, ch. 259, § 1; 1949 Mont. Laws, ch. 160, § 1; see also 1965 Mont. Laws, ch. 156, § 5 (resetting deadline to 60 days before election).

Candidates outside of the two major parties thrived during the first 50 years of statehood, regardless of multiple changes to the ballot access laws. (E.R. 228-36; 229; 371-76.) Several statewide independent candidates qualified for the ballott (J.W. Lewis in 1900, C.W. Tenney in 1916, Joseph Monaghan in 1936, Ed Shields in 1940). Id. Most candidates, however, established a pattern that would repeat itself to this day: they chose to run as minor party candidates under 15 different banners by 1936. Id. After World War II, these independent and minor party candidates disappeared as a result of national trends without any significant changes in ballot access laws. (E.R. 233.) Between 1952 and 1968 only 3 candidates in 49 statewide races came from outside of the 2 major parties. (E.R. 371-76.)

B. The Modern Era of Ballot Access: 1969-2010

The Legislature generally revised the election laws in 1969, and required minor parties to show support under the same 5% petition rule that had applied to independent candidates since 1895, unless a party's candidate received votes equal to 3% of the vote for governor at the last election. 1969 Mont. Laws,

ch. 368, § 78, 80. In the 1970s, the Legislature unified the filing deadlines for independent and previously unqualified minor party candidates with the deadline for qualified party candidates in the primary. 1973 Mont. Laws, ch. 237, § 1. A 1979 recodification reinstated the filing fee, which was temporarily omitted in the 1973 revision, and required signatures to be submitted one week before the filing deadline. 1979 Mont. Laws, ch. 571, § 85. The recodification also raised the minor party qualification threshold to 5% of votes for governor in the last election. 1979 Mont. Laws, ch. 571, § 88.

Under these rules--substantially the same unified deadline, filing fee, and signature requirements in place today--state ballots experienced a resurgence in minor party and independent candidates. Before then, in the 1970s, not a single candidate came from outside of the two major parties in 27 statewide races. (E.R. 371-80.) After them, in the 1980s, there were 11 minor party candidates or gubernatorial tickets for statewide office, and 42 state legislative minor-party or independent candidates. Id. (E.R. 230, 237.)

The Legislature further liberalized ballot access in the 1990s, temporarily pushing back the filing deadline for independent candidates to the day before the primary election in June. 1991 Mont. Laws, ch. 591, § 8. The deadline for qualifying minor party candidates stayed the same as the primary filing deadline, but the Legislature expanded the window for qualifying a minor party by votes

from the last general election to the last two general elections. 1991 Mont. Laws, ch. 196, § 1. The Legislature later provided a maximum of 5,000 signatures needed for a previously unqualified minor party. 1999 Mont. Laws, ch. 192, § 2. In 2007, the Legislature restored the previous deadline for independent candidates, again harmonizing the deadlines for all candidates attempting to qualify for the general election ballot, whether by signature or by primary vote. 2007 Mont. Laws, ch. 458, § 2. Last year, the deadline was pushed up ten days, still in March. 2009 Mont. Laws, ch. 292, § 1.

Over 200 minor party and independent candidates for state offices have qualified for the ballot in Montana since 1970, including 36 independents. (E.R. 371-80.) Forty-six of those candidates appeared on the ballot for a statewide non-presidential office. (E.R. 371-76.) Four different minor parties qualified ten candidates with six different petitions under the same March deadlines at issue here: the Libertarian Party qualified four candidates in 1982 with 10,547 signatures submitted by March 18; the Natural Law Party qualified four candidates in 1996 with 11,370 signatures submitted by March 18; Becky Shaw qualified as a single statewide candidate for the Reform Party in 1996 with 11,197 signatures submitted by March 13; and under the liberalized rules for statewide minor parties, Ron Marquardt qualified as a single statewide candidate for the Constitution Party in 2006 with 6,299 signatures by March 22;

the party requalified in 2000 (with 7,511 signatures by March 17) and 2004 (5,707 signatures by March 24). (E.R. 361.)

Since 1972, 39 out of 44 independent candidates for state office who petitioned for ballot access qualified (another candidate withdrew). (E.R. 380.) Out of 103 statewide non-presidential races, only three independent candidates have attempted to qualify. (E.R. 371-76, 380). All three filed in 1994, when Kelly qualified as a candidate for Congress with 11,666 signatures, Harold Combs failed to qualify for the same office with 89 signatures, and Curly Thornton failed to qualify for United States Senate with 3,611 signatures. (E.R. 361.) Kelly later ran as a Democrat for United States House in 2002. (E.R. 359.) Both independent candidates for state office in 2008 qualified; no independent candidate has failed to qualify since Kelly qualified in 1994. (E.R. 379.)

II. ELECTION ADMINISTRATION IN MONTANA

The clerks of Montana's 56 counties administer elections . Mont. Code Ann. § 13-1-301. Each county clerk also serves as clerk of the county commission, keeps the county's financial accounts, administers campaign finance disclosure laws for local candidates, and records the real property transactions in the county. Mont. Code Ann. §§ 7-4-2611, -2613. County clerks in the most

populous counties have six deputies, while the majority of counties may have between one and three deputies. Mont. Code Ann. § 7-4-2601. In practice, this amounts to between one half-time election staffer in the least populous counties (several thousand voters per staffer), and four full time equivalent staffers in the most populous counties (more than 20,000 voters per staffer), with several counties hiring additional temporary staff the weeks before the primary and general elections. (E.R. 341.)

In addition to their daily duties as clerks and recorders, Mont. Code Ann. §§ 7-4-2611, -2613, county election administrators spend more than a year preparing for general elections under a carefully orchestrated and tight calendar. (E.R. 324-33.) Beginning in January, and again in July, election administrators process address confirmation forms for absentee voters. Mont. Code Ann. § 13-13-212. Candidate filings begin on January 22. Mont. Code Ann. § 13-10-201. Candidate and minor party petitions can be counted by election administrators during this relatively quiet period before the petition filing date in March. Mont. Code Ann. §§ 13-10-201(6), -503. (E.R. 315, 319.) Then, absentee ballot applications for non-military, non-overseas voters begin. Mont. Code Ann. § 13-10-211. Election administrators must comply with the deadlines set forth in the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which requires states to mail absentee ballots to overseas and

Military voters at least 45 days prior to primary, general and special elections for Federal office. See 42 U.S.C. § 1973ff-1(8)(A).

After the candidate filing deadline closes, election administrators must complete at least 27 tasks in preparation for the primary election that takes place less than eleven weeks later. Mont. Code Ann. § 13-1-107. (E.R. 317-20.) The legislature provided for "no-excuse" absentee voting in 1999, and 206,798 absentee votes were cast in 2008. 1999 Mont. Laws ch. 151, § 1; Mont. Code Ann. § 13-13-222. (E.R. 320.) The legislature provided for late registration in 2005, and approximately 93,500 voters newly registered or registered in a different county. 2005 Mont. Laws, ch. 286, § 1; Mont. Code Ann. § 13-2-304. (E.R. 320.) Without a unified filing deadline, election administrators also would have to verify and certify candidate petition signatures during this critical week before the final day of the primary election, June 3. Mont. Code Ann. § 13-10-503 (2005). Absentee voting and late registration are the most time consuming processes for election administrators, occupying most of the 30 days prior to an election. (E.R. 309.) The primary process ends with a count of provisional ballots, military and overseas absentee votes, and the county canvass completed in the week following the end of the election. Mont. Code Ann. §§ 13-15-107, -401; 13-21-206.

As soon as the county canvass is over, assuming there is no litigation, election administrators must shift their focus to initiatives. The deadline for submission of initiative petitions is in June. Mont. Code Ann. § 13-27-301. In June and July election administrators have to verify and certify more than 120,000 signatures before the third Friday in July. Mont. Code Ann. § 13-17-104. (E.R. 364.) Verification also requires random checks of signatures, and if any signature is not comparable or an elector challenges the signatures, the election administrator must compare every signature with the election records. Mont. Code Ann. §§ 13-27-303, -306. The same process applies to candidate petitions. Mont Code Ann. §§ 13-10-503(1), -601(2)(c).

In August, election administrators return to ballot preparation for the general election. (E.R. 322.) The last day for a candidate to withdraw is in August, 85 days before the election, after which the Secretary of State must certify the final ballot of candidates and ballot issues to the counties for printing ten days later. Mont. Code Ann. §§ 13-10-325, 13-12-201. At the same time, election administrators may be juggling recounts and late election litigation. One petition challenge filed August 16, 2006 was not decided until one week before Election Day, scrambling election administrators to correct ballots and instruct voters about three initiatives the court invalidated. Montanans for Justice v. State, 2006 MT 277, 334 Mont. 237, 146 P.3d 769, 764-65. In 2008, election

administrators in several counties were required to respond to 6,000 voter registration challenges just before the close of regular registration, in the midst of final preparations for the general election. See Montana Democratic Party v. Eaton, CV 08-141-M-DWM, 2008 U.S. Dist. LEXIS 105849 (D. Mont. Oct. 8, 2008). Given national trends, there are no indications that this pressure on election administrators will lessen anytime soon. See Hasen, "The Democracy Canon," 62 Stan. L. Rev. 69, 90 (2009) (election litigation has more than doubled from the pre-2000 period to the 2000-2008 period).

III. THE 2008 ELECTION

Kelly served as the coordinator of the Montana Green Party for the year leading up to the candidate filing deadline for 2008. (E.R. 368-70, 660-63.) His Green Party qualified for automatic ballot access for the 2002 and 2004 general elections due to the presidential candidacy of Ralph Nader in 2000, who received more than the required 5% of votes cast for the successful candidate for governor. (E.R. 68-70.) Kelly failed to take advantage of automatic ballot access, and the Green Party failed to requalify for minor party status in 2006, submitting just 264 signatures statewide. Id.

In April of 2007, Kelly led the Party's annual meeting where the party distributed petition forms and instructions on how to qualify for minor party

status by signatures. (E.R. 664-65.) Ten months later, however, Kelly did not file for Green Party qualification, and there was no record of the party submitting any signatures for qualification. (E.R. 368-70.) The only public statement Kelly made concerning his interest in becoming a candidate in 2008 was on the website "Left in the West" in February 2008:

> **not running.** No JC, but thanks for the thought. Right year, wrong person. Think I'll just sit on the sidelines and hurl insults--it's cheap, easy, and popular.

(E.R. 49-50.) He did not decide to run for office until late April, more than three weeks after the deadline and more than two weeks after he verified the Complaint in this case. (E.R. 686-87.)

Kelly did not attempt to qualify for ballot access in 2008. (E.R. 19.) Other than the above denial, he did not commit a single word to his candidacy. (E.R. 19-20.) He has identified no supporters of, or expressions of support for, his candidacy. (E.R. 3, 4.) He gathered no signatures. (E.R. 19.) He did not request or file forms to petition, declare his candidacy, or waive filing fees. (E.R. 17, 359.) He did not file a write-in declaration. (E.R. 2.) He has expressed no interest in, and has taken no actions toward, any candidacy in the future. (E.R. 5.)

Meanwhile, reasonably diligent candidates responded to early interest by voters, exemplified by the Republican Party's decision to hold a presidential

preference caucus on February 5. (E.R. 324-33.) Thousands of Montana voters registered in late 2007 and 2008. (E.R. 347.) All of the eligible incumbents for statewide partisan office filed to campaign for reelection by January 2007. (E.R. 381-83.) For the three open statewide offices, all but one of the major party candidates who would appear on the general election ballot filed by August 2007, more than half a year before the filing deadline. Id. Kelly's potential opponent, Senator Max Baucus, filed in May 2003, almost five years before Kelly had to decide to enter the race. Id. Nonincumbent candidates campaigning for statewide partisan office raised more than $1.4 million by March 2008. Id.

Kelly could have run on the 2008 general election ballot in any of several different ways. First, he could have petitioned as the Green Party candidate with 5,000 signatures due on the unified candidate filing date of March 20. Mont. Code Ann. § 13-10-601 (2007) (E.R. 314, 324-33). Second, he could have petitioned under the "Independent" statewide party label or a personal "Steve Kelly" statewide party label in the same way. Id. Third, he could have petitioned as a standalone independent or minor-party candidate with 10,243 signatures (equivalent to 1.5% of registered voters and 2% of votes cast at the general election) due on the uniform candidate filing date. Mont. Code Ann. § 13-10-501, -502, -503; E.R. 364.) He had an unlimited amount of time to collect these signatures. (E.R. 359.) Fourth, he could have filed a declaration of

intent to be a write-in candidate by September 26. Mont. Code Ann. § 13-10-211 (E.R. 324-33). Kelly was not required to pay a filing fee and, contrary to his assertion (Kelly Br. at 45), if he filed a statement of indigency he did not need to file any additional signatures beyond those necessary to qualify him for the ballot. Mont. Code Ann. § 13-10-203. (E.R. 359, 360-61.) Also contrary to his assertion (Kelly Br. at 40), Kelly did not need to file all of his signatures one week before the filing deadline. See Mont. Code Ann. § 13-10-503(1) ("additional signatures may be submitted before the deadline for filing") (E.R. 314).

IV. THE LAWSUIT

On April 8, 2008, Kelly and Ms. Dreyer filed a verified complaint seeking an injunction against "the defendants from enforcing Montana's ballot-access scheme for independent and minor-party candidates seeking to run for nonpresidential offices in the November general election." (E.R. 747.) Kelly neither specified the ballot-access laws he seeks to declare invalid, nor conceded the constitutionality of any ballot access law ever in effect in Montana. Nor did he identify any other candidates who would qualify as "seeking to run" in the absence of ballot access laws.

Kelly moved for a preliminary injunction seeking his placement on the general election ballot on August 26, five days after the deadline for certifying the ballot to local election administrators for printing in time for delivery of ballots to absentee, uniformed, and overseas citizens. (E.R. 752, 330.) Mont. Code Ann. § 13-12-201. After a hearing, the district court denied the preliminary injunction. (E.R. 756.) Several months of discovery ensued, followed by cross-motions for summary judgment. (E.R. 756-57.) Neither Kelly nor Ms. Dreyer, nor any other Montana voter claiming they had been denied a vote on a candidate of his or her choice, offered affidavits in support of his motion. (E.R. 757-58.) The court granted summary judgment to the State, and denied it to Kelly. (E.R. 3.)

SUMMARY OF THE ARGUMENT

This case must begin, and should end, with the question of whether Kelly suffered any injury that this Court can redress by the facial invalidation of one or more of Montana's long established ballot access laws. He has not, because he took no steps toward a candidacy in 2008 and has no plans to do so in the future. This fundamental omission deprives the Court of any basis on which to assess the specific voter interests and candidate burdens usually

at issue in a ballot access case. It also leaves Kelly far short of the high standard for a facial challenge to state election regulations.

For reasonably diligent candidates, Montana's ballot access laws impose no significant burden. Montana's filing deadline allows unlimited time for gathering signatures and has no impact on the rate of candidate qualification. The signature requirement is equal to or lower than laws repeatedly upheld by the Supreme Court and lower courts. The filing fee, while well within constitutional bounds, would have no application to Kelly had he actually filed as a candidate. In their entirety, Montana's ballot access laws have allowed hundreds of independent and minor party candidates to qualify for the ballot on the same or similar petitioning paths now available to Kelly.

An extensive record details the state interests supporting Montana's ballot access laws. The ballot access laws have succeeded for a century in preventing ballot crowding by candidates lacking in support or reasonable diligence. They respond to a demonstrated increase of early voter interest in elections and facilitate a vigorous ballot issue process. They encourage relative stability and majority winners given the diversity of parties and candidates appearing on the ballot outside of the major party system, and discourage spoilers. Most importantly, they enable the State and local

election administrators to protect the integrity of these and other important voting processes against illegality and fraud.

ARGUMENT

I. KELLY'S CLAIMS ARE NONJUSTICIABLE.

The posture of this case as Kelly has brought it poses an insurmountable bar to his claims. His failure to take any steps toward a candidacy leaves him without standing to complain about ballot access laws that he has not invoked. Indeed, he qualified under these laws the last time he attempted to comply with them. This absence of injury poses a particular problem in terms of redressability, where he gives neither the State nor the Court any idea of the relief he seeks beyond "summary judgment in the plaintiffs' favor." (Kelly Br. at 64.)

Because Kelly has not engaged in or proposed any specific conduct to which the ballot access laws could apply, he is left with a facial challenge. Yet the undisputed record is that every reasonably diligent candidate who has attempted to qualify for the ballot in Montana, including Kelly himself, has succeeded. While Kelly still has not specified the particular enactments he challenges, he cannot meet the high standard to invalidate those enactments on their face.

A. Kelly Lacks Standing to Challenge Laws That Did Not Cause Him a Redressable Injury.

It is undisputed that Kelly never took any steps toward a candidacy. (E.R. 200.) While the district court noted that Kelly's courtroom testimony contradicted his verified complaint about his subjective intentions to run, its holding turned on the latter and more objective point: he could not show a redressable injury due to his "complete lack of effort . . . to comply with the statutory program," including any number of other laws not at issue. (E.R. 9.) See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71 (1992).

Given Kelly's failure to file candidacy papers or a single signature at any time, his absence from the ballot has not been caused solely by the statutes he challenges. "[I]f a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates." Storer v. Brown, 415 U.S. 724, 737 (1974); see also Renne v. Geary, 501 U.S. 312, 319 (1991) (redressability in doubt where allegedly protected conduct was barred by separate laws not at issue). It is no excuse "that [he] had not even attempted to undertake a petition drive because in [his] view the [5]% requirement simply was impossible to meet." Libertarian Party of Florida v. Florida, 710 F.2d 790, 795 (11th Cir. Fla. 1983). Ms. Dreyer may want to vote for Kelly (Kelly Br. at 31), but without any diligence on his part to qualify he is not even a "potential candidate" denied ballot access by the laws at

issue. See Miyazawa v. City of Cincinnati, 45 F.3d 126, 128 (6th Cir. 1995); see also Gottlieb v. Federal Election Comm'n, 143 F.3d 618, 619 (D.C. Cir. 1998) (plaintiffs supported candidates already on the ballot).

This distinguishes Kelly's case from those he relies on most. The key plaintiffs in Bullock v. Carter, 405 U.S. 134 (1972), for example, "were in all respects eligible to be candidates" based on their applications, except for their failure to pay the filing fees at issue. Id. at 136 n.2. In Williams v. Rhodes, 393 U.S. 23 (1968), the Supreme Court ordered ballot access for a party that had "demonstrated its numerical strength" with 450,000 signatures. Id. at 26, 35. It did so "subject, of course, to compliance with valid regulatory laws of Ohio," and denied relief to another party that merely "conceded it could not [qualify]." Id. at 28, 35. In Erum v. Cayetano, 881 F.2d 689 (9th Cir. 1989), the plaintiff was "an erstwhile and potentially future candidate," id. at 691, who had already collected and submitted signatures for the primary ballot and run in the primary before contesting his failure to receive sufficient votes to qualify for the general election ballot. Id. at 690 & n.1.

Kelly has not cited one case that has granted relief in favor of a candidate or supporter of a candidate that has not declared a candidacy, gathered a signature, identified supporters, or prepared or filed paperwork for a candidacy or party status, or even expressed an interest in a future candidacy. See Anderson v.

Celebrezze, 460 U.S. 780, 782 (1983) (candidate's supporters tendered petition with 14,500 signatures); Lubin v. Panish, 415 U.S. 709, 711 (1974) (petitioner appeared at registrar's office and attempted to file "all necessary nomination papers requisite to his proposed candidacy"); Nader v. Brewer, 531 F.3d 1028, 1030, 1032 (9th Cir. 2008) (Nader filed most of the required petition signatures); Council of Alternative Political Parties v. Hooks, 121 F.3d 876, 878 (3d Cir. 1997) (plaintiffs either qualified or tried to qualify); New Alliance Party v. Hand, 933 F.2d 1568, 1571 (11th Cir. 1991) ("Plaintiffs submitted an adequate number of signatures"); Cromer v. South Carolina, 917 F.2d 819, 821 (4th Cir. 1990) (plaintiff submitted four times the required number of signatures). There is no more injury to Kelly than there is to any other voter with idle thoughts of becoming a U.S. Senator.

Beyond this, without a tender of signatures for a candidacy filing at any time (as was done in Anderson and Nader), the Court cannot determine whether to scrutinize the law that enacted the current filing deadline (85 days before the primary), the prior filing deadline (75 days before the primary), the 1990s filing deadline (the day before the primary), the 1950s filing deadline (90 days before the general), or the 1890s filing deadline (30 days before the general). Without any showing of signatures at all under either the independent or minor party statute, the Court cannot determine whether to scrutinize the former signature

threshold (5% of votes for the previous successful candidate) or the latter signature threshold (5000) or even the threshold that stood for just a few years of Montana's statehood (100). Without an application for candidacy (as was done in Bullock and Lubin), Kelly can only speculate--incorrectly, as the record shows--about the indigency waiver for the filing fee. See Part II(A)(3), below.

Thus, there are simply no grounds on which the Court could redress Kelly's claims. He would not qualify for the ballot under any law that ever existed in Montana, and any rule that allowed Kelly ballot access would allow all comers regardless of how frivolous their candidacies or late their declarations. Even in Montana, such an election would raise issues present in the California gubernatorial recall election of 2003, where 135 candidates confused voters and diluted a majority vote despite a filing deadline and a requirement that candidates file either a $3500 filing fee or 1000 signatures. (E.R. 215.) As the Supreme Court recognized in rejecting similarly absolute claims for relief, "[t]o conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot." Storer, 415 U.S. at 736.

B. Kelly Cannot Satisfy the Standards for a Facial Challenge.

This is not only a matter of standing. Kelly's challenge in 2008, to laws that have not been applied to him since he qualified for the ballot in 1994, confirms that he brings a facial challenge against the entire Montana ballot access system. See Doe v. Reed, 561 U.S. ___, No. 09-559, Slip Op. at 5 (June 24, 2010) (claim for relief beyond the plaintiff's circumstances must meet standards for a facial challenge). The Supreme Court has made clear that "[f]acial challenges are disfavored" in election law cases and a plaintiff bringing such a challenge must prove that "the law is unconstitutional in all of its applications." Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008). Facial challenges "rest on speculation," ask for "a rule of constitutional law broader than is required by the precise facts," and "prevent[ ] laws embodying the will of the people from being implemented in a manner consistent with the Constitution." Id. (citations omitted). This is precisely what Kelly asks the Court to do.

A ballot access law that has allowed hundreds of minor party and independent candidates to qualify cannot be "unconstitutional in all of its applications." Id. at 1190. Given how few candidates have failed to qualify under the ballot access laws at issue, "it is not possible to quantify either the magnitude of the burden on this narrow class of [candidates] or the portion of the

burden imposed on them that is fully justified." Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1622 (2008). This alone warrants affirmance. See id., 128 S. Ct. at 1622-23 (affirming summary judgment where plaintiffs "have not demonstrated that the proper remedy--even assuming an unjustified burden on some voters--would be to invalidate the entire statute").

Even if Montana law burdened Kelly in particular, "these challenges would be properly brought on an as-applied, not facial, challenge." Alaska Independence Party v. Alaska, 545 F.3d 1173, 1181 (9th Cir. 2008). Yet Kelly's lack of a cognizable injury deprives this Court of any basis to assess the ballot access laws as applied to him: an as-applied ballot access challenge cannot succeed as applied to a non-candidate who has not sought ballot access. See Part I(A), above

II. MONTANA'S BALLOT ACCESS LAWS ARE CONSTITUTIONAL.

The Supreme Court recently reaffirmed that the Constitution "allow[s] States significant flexibility in implementing their own voting systems." Doe v. Reed, 561 U.S. ___, No. 09-559, Slip Op. at 6 (June 24, 2010). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." Burdick v. Takushi, 504 U.S. 428, 433 (1992).

Therefore, a flexible standard applies to ballot access laws depending on the burden they impose. (Kelly Br. at 32-33.) Laws that impose a severe burden on such candidates are subject to strict scrutiny, while other laws "will survive review as long as they have a rational basis." Libertarian Party of Washington v. Munro, 31 F.3d 759, 761 (9th Cir. 1994). The Court "must examine the entire scheme regulating ballot access" to determine "the nature and magnitude of the burden" on candidates. Id. at 761-62. Any burden must be measured by whether "reasonably diligent" candidates "can normally gain a place on the ballot," in which case the burden is slight, "or if instead they only rarely will succeed," in which case the burden is severe. Id. at 762; Nader v. Brewer, 531 F.3d 1028, 1035 (9th Cir. 2008). "[P]ast candidates' ability to secure a place on the ballot can inform the court's analysis." Id.

Kelly maintains that "[t]his is not a particularly difficult case," because no court has ever upheld ballot access laws identical to those in place in Montana. (Kelly Br. at 64.) It also could be said, however, that no plaintiff in a cited case has challenged ballot access laws that have allowed so many candidates to qualify, or done so little to qualify himself. Nor has any court in a cited case invalidated several ballot access laws when the purported candidate had made no effort, let alone a reasonably diligent effort, to qualify under those laws. Yet "[c]onstitutional challenges to specific provisions of a State's election

laws . . . cannot be resolved by any 'litmus paper test' that will separate valid from invalid restrictions." Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), quoting Storer, 415 U.S. at 730. To the contrary, in the face of a rapidly changing historical background for ballot access, this Court recognizes that "[e]lection cases are difficult." Nader, 531 F.3d at 1040.

Anderson and Nader are not, as Kelly would have it, talismans that guard against specific ballot access rules, regardless of any candidate burden imposed or state interest vindicated. They are precedents establishing a reasoned analysis in which "a court must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments.'" Nader, 531 F.3d at 1034, quoting Anderson, 460 U.S. at 789. Rather than engaging the holdings in these cases, Kelly mechanically applies the Presidential election deadlines at issue in those states to non-presidential election deadlines at issue here. That approach contradicts the basic premise underlying both cases: "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." Id. at 794-95 (footnotes omitted); Nader, 531 F.3d at 1038 ("candidates for president are national candidates and thus situated differently from candidates for state offices, or even other federal offices."). Montana law recognizes this national interest by permitting a limited exception to

its ballot access rules for Presidential electors. See Mont. Code Ann. § 13-10-504.

As Anderson and Nader recognize, and the Complaint concedes in its limitation to "non-presidential candidates" (E.R. 743), "presidential elections call for a different balancing of interests than statewide or local races." Swanson v. Worley, 490 F.3d 894, 905 n.12 (11th Cir. 2007). Here, that balance tips in the State's favor due to the weight of Montana's ballot access record for candidates in the absence of any legally or statistically significant burden, and of the State's long-established and compelling state interests in the administration and integrity of its election system.

A. Reasonably Diligent Candidates Can Gain a Place on Montana's Ballot.

Kelly has offered no evidence of an injury to himself or any candidate. Instead, he offers the kind of speculative "litmus-paper test" the Supreme Court rejected in Anderson. Summary judgment for the State should be affirmed where, as here, "[t]he candidates themselves did not attempt to obtain the signatures and therefore proffered no testimony as to the burdens the requirement placed on them," and "[a]ffidavits from other similarly situated minor party candidates . . . were not obtained to prove the burden imposed by the candidate petition was severe." Libertarian Party v. Herrera, 506 F.3d 1303, 1309-10 (10th Cir. 2007). As one court observed in rejecting a similar challenge, neither

the filing deadline nor the signature requirements were to blame for Kelly's failure to get on the ballot; "instead, it was [his] lack of reasonable diligence that ultimately thwarted [his] effort to gain ballot access here for the 2008 general election. Barr v. Ireland, 575 F. Supp. 2d 747, 761 (D. W. Va. 2008).

Instead of showing an actual burden on reasonably diligent candidates, Kelly engaged experts to hypothesize burdens with no experience petitioning for ballot access under the laws at issue or under similar circumstances. (See E.R. 484, 488-89.) Meanwhile, he disregards the fact that hundreds of minor parties and independent candidates have achieved ballot access under the rules at issue. (E.R. 237, 371-76.) Other petitioners have repeatedly gathered signatures at rates that would qualify any reasonably diligent candidate under the laws at issue. (E.R. 347, 352-53, 361-63, 364, 365.) The only comprehensive empirical analysis of ballot access rates before the Court showed no significant or substantial burden imposed by Montana law. (E.R. 257-58.)

1. The March Filing Deadline Has No Impact on Reasonably Diligent Candidates.

Since 1973, the independent candidate filing deadline has coincided with the primary filing deadline for more than half the election years, and the minor party filing deadline has done so every election year. See Mont. Code Ann. § 13-10-503. These deadlines have produced a steady stream of over 200 minor party and independent candidates, including 46 statewide candidates since 1970.

The fact that most of these candidates did not choose to run as independents for U.S. Senate says nothing about "the entire scheme regulating ballot access." Libertarian Party of Washington, 31 F.3d at 762. Independent candidacies are rare everywhere; in 2008, only six states featured an independent candidate for U.S. Senate. (E.R. 243.)

The proof of any actual burden imposed by a filing deadline, or lack thereof, is in the petitioning. See Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd., 844 F.2d 740, 746 (10th Cir. 1988) (upholding ballot access law when minor party qualified "despite the early deadline"). Under the deadline at issue, four different minor party petitions have qualified for the ballot with more than ten thousand signatures gathered by a March deadline. (E.R. 359.) Ballot issue petitioners have gathered thousands of signatures in the space of a few weeks during similar time frames. (E.R. 346-48, 352-54, 365.) Kelly himself testified he collected most of the 13,000 signatures he gathered in April and May alone when he qualified as an independent in 1994. (E.R. 650-52.)

Kelly claims he knows of no court that has ever upheld a filing deadline like Montana's. (Kelly Br. at 40.) As the plaintiff, however, litmus tests do not suffice; it is Kelly's duty to show a burden in this case. (Kelly Br. at 33.) The proper inquiry is therefore whether he has cited a case in which a court ***has*** invalidated a filing deadline that has produced so many independent and minor

party candidates. He has not. On the facts, Montana's deadline is well within constitutional bounds, particularly given the unlimited time allowed for signature gathering under Montana law. See, e.g., Andress v. Reed, 880 F.2d 239, 242 (9th Cir. 1989) ("certainly the requirement that Andress collect 10,000 signatures within approximately forty-five days is reasonable and constitutionally adequate"). The repeated qualification of minor party candidates is undisputed proof that, "[g]iven the unlimited petitioning window, a diligent independent or minor party candidate could meet the filing deadline by collecting signatures many months before" the deadline. Swanson v. Worley, 490 F.3d 894, 909 (11th Cir. 2007).

The claim that a March deadline "make[s] the business of campaigning more difficult," (Kelly Br. at 36) therefore, confuses a severe constitutional burden with the "[h]ard work and sacrifice by dedicated volunteers" that "are the lifeblood of any political organization." American Party of Tex. v. White, 415 U.S. 767, 787 (1974). It also relies on speculation about Montana's unpredictable weather by an expert with no experience in petitioning for candidates or petitioning during the times of year candidates usually petition. (E.R. 488-89.) Even this expert repeatedly gathered between 22,000 and 45,000 signatures in just a few months to qualify statutory and constitutional ballot issues, many times more than what Kelly required for ballot access.

(E.R. 363, 488-89.) In any event, an unsubstantiated opinion that a rainy May is better for signature gathering than a cold February cannot defeat summary judgment when multiple affiants have attested in detail to the contrary. (E.R. 352-54, 347-48.) Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1435-36 (9th Cir. 1995) (rejecting expert speculation contradicted by undisputed facts on summary judgment).

In fact, there is no meaningful statistical relationship between Montana's filing date and the number of minor party and independent candidates, and no meaningful statistical relationship between state filing deadlines and the number of independent candidates on state ballots. (E.R. 239, 263, 265.)

It is true, but irrelevant, that the filing deadline falls too soon for a prospective candidate to have predicted, for example, that the Republican Party would nominate someone Kelly considered "a relatively weak candidate." (Kelly Br. at 35-36.) It would have been just as difficult to predict in June or even August of 2008 the depths of the financial crisis realized in October 2008 and voters' reaction to it, but Kelly has no right to "make[] a late rather than an early decision to seek independent ballot status." Burdick v. Takushi, 504 U.S. 428, 437 (1992). Moreover, all of Kelly's potential opponents would have had to file for their candidacies on the same deadline he faced, and most of them filed well before then. (E.R. 381, 382-83.) Kelly's main opponent would have been

Senator Baucus, whose candidacy was clear nearly five years before the filing deadline. (E.R. 226, 381, 382-83.) In practice, then, it is not true that other qualified candidates have "more than six months of flexibility that is unavailable to Montana's independent candidates and their supporters." (Kelly Br. at 38.)

2. The Five Percent Signature Requirement Is Constitutional on Its Face.

The lack of any case citations in Kelly's argument concerning the signature requirement is telling. (Kelly Br. at 41-44.) Montana has required independent candidates to show the support of at least 5% of the vote for the successful candidate for that office in last election for more than a century, and has had the same rule for minor party candidates for four decades. Mont. Code Ann. §§ 13-10-502, -601. For almost as long, the Supreme Court has held that states may require "some preliminary showing of a significant modicum of support," measured by the significantly higher petition requirement of 5% of all voters. Jenness v. Fortson, 403 U.S. 431, 442 (1971). As one of the most recent federal courts to consider the same percentage requirement for signatures held, "when the judgment of the legislature remains within the constitutional playing field, as it does with the fixed 5% figure, it is not this Court's role to re-write the legislature's handiwork based on a comparison to what other states have enacted." Block v. Mollis, 618 F. Supp. 2d 142, 150 (D. R.I. 2009).

In 2008, the 10,243 signatures required for independent United States Senate candidates amounted to just 1.5% of the 668,085 registered voters, and 2% of 497,599 votes cast at the general election. (E.R. 250, 251, 364.) Montana's 5% rule comes in well under what the Supreme Court and others have determined to be a "significant modicum of support." See Swanson v. Worley, 490 F.3d 894, 904 (11th Cir. 2007) (3% of votes cast for governor); Lawrence v. Blackwell, 430 F.3d 368, 375 (6th Cir. 2005) (1% of electors); Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd., 844 F.2d 740, 747 (10th Cir. 1988) (5% of votes cast for governor or president); Coffield v. Handel, 599 F.3d 1276, 1277 (11th Cir. 2010) (5% of "the total number of registered voters eligible to vote in the last election for the position the [independent] candidates seeks"); Stevo v. Keith, 546 F.3d 405, 407 (7th Cir. 2008) (5% of voters who voted in the last congressional election, warning "against federal judicial micromanagement of state regulation of elections").

Kelly protests that making this constitutionally permitted showing of support is hard work. (Kelly Br. at 41-42.) He ignores the fact that Kelly had an unlimited amount of time to gather these signatures. Cf. American Party of Tex. v. White, 415 U.S. 767, 786 (1974) (55 days not "an unduly short time" for gathering 22,000 signatures "only at the rate of 400 per day"); Andress v. Reed, 880 F.2d 239, 242 (9th Cir. 1989) ("certainly the requirement that Andress

collect 10,000 signatures within approximately forty-five days is reasonable and constitutionally adequate"). He also ignores Montana's other "alleviating factors that ease[] the burden of gathering signatures. Swanson, 490 F.3d at 904. Montana law offers all seven of the alleviating factors discussed in Swanson. Id. at n.11, citing Libertarian Party of Florida v. Florida, 710 F.2d 790, 794 (1983) & Jenness, 403 U.S. at 438-39; cf. E.R. 2326.

Most significantly, Kelly ignores the fact that he already has borne this burden, and then some, when he gathered 11,666 valid signatures in 1994. Courts are unimpressed with arguments that burdens like those imposed by [the State] are too onerous," when the "plaintiffs themselves satisfied these requirements." Rainbow Coalition, 844 F.2d at 746, quoting American Party, 415 U.S. at 787 (citations omitted). The successes of Kelly and others "demonstrate that the . . . signature requirement does not hinder diligent independent and minor party candidates." Swanson, 490 F.3d at 905. The claim that Montana has had one independent Senate candidate and no independent gubernatorial candidate (Kelly Br. at 42-43), only shows that few such prospective candidates have ever tried, given the even easier access available through minor party and other means. Still, almost every independent candidate who has attempted to qualify for the ballot since 1972 succeeded, including Kelly. (E.R. 380.)

Again, Kelly relies on interstate comparisons despite the fact that Montana's signature thresholds are lower than those upheld by multiple courts. (Kelly Br. at 43.) He relies on a measure of signatures not provided in Montana law, and used only in Oregon. (E.R. 482.) The fractions of a percentage point that separate Montana's signature requirements from similar states only shows that all lines drawn for ballot access are "necessarily arbitrary." Libertarian Party of Florida, 710 F.2d at 793 (citation omitted). Kelly's statistical conclusion "that one would expect no independent Senate candidates to make it onto the ballot" under Montana's signature requirements (Kelly Br. at 15), simply reflects the fact that three quarters of Senate elections between 2004 and 2008 had no independent Senate candidates at all. (E.R. 150, 155-57.) Given this, nearly all of the interstate variation in independent Senate candidates is attributable to something other than signature requirements. (E.R. 253-56.)

If that kind of math determined the constitutionality of ballot access laws, then the two-thirds of the states in the union lacking independent Senate candidates would be suspect. (E.R. 155-57.) According to such a method, "[a]ny numerical requirement could be challenged and judicially reduced, and then again, and again until it did not exist at all." Libertarian Party of Florida, 710 F.2d at 793. This is not what the law requires. Id. Montana's signature requirements should be upheld because they do not "'freeze' the status quo by

effectively barring all candidates other than those of the major parties, [Jenness, 403 U.S. at 439],” and they “provide a realistic means of ballot access. [American Party, 415 U.S. at 783].” Libertarian Party of Florida, 710 F.2d at 793.

3. The Filing Fee Would Not Apply to Kelly if He Filed.

For 70 out of the past 76 years, Montana has required from all state candidates a filing fee equal to 1% of the annual salary for the office sought. See 1933 Mont. Laws, ch. 28, § 1; 1979 Mont. Laws, ch. 571, § 85; Mont. Code Ann. § 13-10-202(3). Montana law also allows an indigent candidate to waive the filing fee with “a verified statement that he is unable to pay the filing fee” and the requisite number of signatures for an independent candidate to qualify for the ballot. Mont. Code Ann. § 13-10-203(2).

Contrary to Kelly’s assertion, the waiver does not require the submission of additional signatures. He acknowledges he could have chosen to waive the fee, but maintains that he must submit double the qualifying signatures. (Kelly Br. at 45.) This is an absurd reading of the relevant statutes. Simply put, “the required filing fee,” Mont. Code Ann. § 13-10-503(2), must be filed by the primary filing deadline, Mont. Code Ann. § 13-10-201(6), or on the same deadline the filing officer “shall accept” the indigency statement and petition “in lieu of a filing fee,” Mont. Code Ann. § 13-10-203. Montana law only requires

one petition with one set of signatures, not two petitions as Kelly claims. (E.R. 359, 360-61.)

In any event, like Montana's signature requirement, these filing fees are well within constitutional bounds. See Green v. Mortham, 155 F.3d 1332, 1334, 1337, 1339 (11th Cir. 1998) (upholding 6 and 7.5% of annual salary filing fees, equal to $8,016 and $10,020, respectively). The mere fact that Montana is not as wealthy as other states cannot support Kelly's bare speculation that "the fee is certainly high enough to exclude many potential candidates in Montana." (Kelly Br. at 44-45.) In fact, there is no relationship between filing fees and ballot access across states; in Montana, the number of candidates actually increased after the return of filing fees. (E.R. 230, 237, 245, 253.)

Kelly himself paid the filing fee when he ran in 1994, see Mont. Code Ann. § 13-10-503(1) (1993), and seven Senate candidates from all walks of life paid the filing fee in 2008, along with 30 other statewide candidates. (E.R. 360-61, 381, 382.) The only cases he cites in support of his filing fee challenge were decided in the early 1970s without accounting for inflation. (Kelly Br. at 46.) Compare Bullock v. Carter, 405 U.S. 134, 143 (1972) with http://data.bls.gov/cgi-bin/cpicalc.pl ($1,000 in 1972 has the same buying power as $5,150.79 in 2008).

4. The Cumulative Effect of the Ballot Access Laws Is Not a Severe Burden.

Although Kelly purports to consider the "cumulative effect" of Montana's ballot access laws (Kelly Br. at 46), he applies a litmus test to a subset of rules that apply only to one of several paths to the ballot. As a result, his claim that Montana's ballot access laws are "by far the most burdensome in the nation" is suspect. Id. "There is a range of fees and signature requirements that are constitutional, and the [Montana] legislature is free to choose its ballot access requirements from that constitutional spectrum." Green v. Mortham, 155 F.3d 1332, 1339 (11th Cir. Fla. 1998). Montana's ballot access scheme in its entirety poses no unconstitutional burden on Kelly's ballot access. (E.R. 221-27.)

There is no such thing as a "ballot-access scheme for independent Senate candidates" in Montana's laws or in other states. (Kelly Br. at 46.) The declaration filing deadline for independent Senate candidates is the same day as that for every other balloted state candidate regardless of office or party affiliation. See Mont. Code Ann. § 13-10-201(6), -503(2). The filing fee for independent Senate candidates is the same percentage as that for every other salaried state candidate. See Mont. Code Ann. § 13-10-202. The filing fee waiver for independent Senate candidates is the same process as that for every other balloted state candidate, except that independent candidates need not submit any additional signatures. See Mont. Code Ann. § 13-10-203. The

signature requirement for independent Senate candidates is the same percentage as that for every other independent or non-qualified minor party candidate at the state or local level. See Mont. Code Ann. § 13-10-502.

In other words, Kelly has gerrymandered the scope of his "independent Senate candidate" claims to support his desired result. In doing so he carved out the several paths candidates have to ballot access, the several other rules that make those paths easier than in other states, and the many other candidates who have qualified as a result.

a. Candidates have multiple paths to ballot access.

Like hundreds of other candidates, Kelly could have run as a Democratic candidate (as he did in 2002), a Green candidate (he was their coordinator in 2008), another minor party candidate (including as an "Independent"), or an independent candidate (as he did in 1994). "[F]rom the point of view of one who aspires to elective public office in [Montana], alternative routes are available to getting his name printed on the ballot." Jenness, 403 U.S. at 441; see also Green v. Mortham, 989 F. Supp. 1451, 1458 (M.D. Fla. 1998), aff'd, 155 F.3d 1332 ("ballot access alternatives should be viewed in tandem when determining their constitutionality"). In viewing the entire scheme regulating ballot access, "how frequently one ballot access alternative is used relative to the other simply does not matter." Id., 989 F. Supp. at 1458.

Montana's ballot access laws are more open than most: 24 states require more signatures than Montana for minor party candidates, 12 states have no petition procedure for minor parties at all, and 6 more states have earlier filing deadlines. R. Winger, *Ballot Access News*, Dec. 1, 2008, available at http://www.ballot-access.org/2008/120108.html#11; cf. Coalition for Free & Open Elections v. McElderry, 48 F.3d 493, 500 (10th Cir. 1995) (5% signature requirement less burdensome due to relative ease of minor party access); (E.R. 241) (Montana had as many or more minor party gubernatorial candidates than 24 states). Montana's rules for minor party qualification and requalification for the ballot are among the least restrictive, because of the number and frequency of statewide races available to qualify a party, and the ability for candidates to requalify biennially in an historically noncompetitive at large congressional seat. (E.R. 219-25.) Moreover, unlike states that require two rounds of minor party and candidate petitions, Montana does not. Libertarian Party v. Herrera, 506 F.3d 1303, 1307 (10th Cir. 2007) (upholding dual-petition requirement).

Faced with this indisputably clear path to the ballot, Kelly quietly abandoned his original challenge to "Montana's ballot-access scheme for independent and ***minor-party*** candidates seeking to run for nonpresidential offices in the November general election." Compl. (Doc 1) at ¶ 1 (emphasis

added); see also ¶¶ 8, 12, 14, 20, 22, 24, 25, 28, 29, 30, 31, 32, 35(2), 35(3). He could have run under the banner of his own Green Party by finishing the petition process he began in 2007. (E.R. 368-70.) While he claims, without any support and despite his leadership of that party, that "his emphasis on progressive environmental policies and fiscal conservatism" was somehow alien to the Green Party (E.R. 30-31), that is no excuse. "Time after time established political parties . . . have, while retaining their old labels, changed their ideological direction because of the influence and leadership of those with unorthodox or 'radical' views." Jenness, 403 U.S. at 441 n.25. After all, Kelly ran to represent the Democratic Party in Congress after he was an independent and before he was a Green. (E.R. 359.)

Kelly also could run as a minor party candidate in two other ways. He could be designated an "independent" minor party without any difference in the ballot designation. (E.R. 259, 315.) See also Socialist Workers Party v. March Fong Eu, 591 F.2d 1252, 1261 (9th Cir. 1978) ("Independent" designation on ballot does not "impermissibly burden[]" candidates). Or Kelly could form a party named for himself; "there is little difference between [running as the Steve Kelly Party] and running as "[Steve Kelly], independent." Stevenson v. State Bd. of Elections, 794 F.2d 1176, 1179 (7th Cir. 1986) (Easterbrook, J., concurring).

Given these options, "nothing in Anderson requires a state to accommodate each candidate's druthers about how he should appear on the ballot." Id.

b. The entirety of Montana's ballot access laws is less burdensome than in other states.

The Court "must examine the entire scheme regulating ballot access" to determine "the nature and magnitude of the burden" on candidates. Libertarian Party v. Washington, 31 F.3d at 761-62; see also Wood v. Meadows, 207 F.3d 708, 711 (4th Cir. 2000) ("The variations and complexities of the election laws of the several states complicates" any comparative analysis, and "a court must examine that state's ballot access scheme in its entirety"). Not only does Kelly take a cramped view of ballot access only for "independent Senate candidates" alone (Kelly Br. at 46), but he does not even consider independent candidate ballot access in its entirety.

His assertion that "no other state ranks even in the top 15 on all three measures," (Kelly Br. at 47), cherry-picks three rules that have no substantial effect on ballot access in Montana (E.R. 257-58). Courts have rejected repeatedly his expert's method of tailoring his analysis so that any given defendant has the worst ballot access laws in the country. See, e.g., Swanson, 490 F.3d at 910 (he testified Alabama "had the second toughest ballot access restrictions," court held "the legislative choices of other states are irrelevant"); Fishbeck v. Hechler, 85 F.3d 162, 169 (4th Cir. 1996) (he called West Virginia

"the most inaccessible state in the country for third party and independent candidates," court rejected challenge). Properly so, because "a court is no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature." Libertarian Party of Florida v. Florida, 710 F.2d 790, 794 (11th Cir. 1983). The Constitution does not require a state "to adopt a system that is the most efficient possible," but only one that is reasonable in light of the burdens imposed. Libertarian Party of Washington, 31 F.3d at 764.

Meanwhile his analysis ignores other rules that make ballot access easier in Montana than in other states. (E.R. 219-27.)

The most significant omission is Kelly's ability to run as the nominee of his own independent party or another party, discussed above. He also does not consider how much time states allow candidates to petition; Montana has no time limit for gathering signatures, but many other states do. (E.R. 226.) An unlimited petitioning period is "a far more permissive scheme than filing deadlines that have been upheld in the past," that "significantly lessen[s]" any burden imposed by a filing deadline. Swanson, 490 F.3d at 909. Nor does he consider whether petition signers must exclude themselves from voting in party primaries; unlike other states, Montana allows petition signers to vote in the primary and petition for candidates. (E.R. 226.) Again, even relatively high

petitioning burdens can be "balanced by the fact that [Montana] has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." Jenness, 403 U.S. at 442.

Kelly's remaining cases are distinguishable by the fact that their plaintiffs, unlike Kelly, were reasonably diligent candidates. See Part I(A), above. These cases also address more burdensome ballot access requirements. In Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3d Cir. 1997), New Jersey holds odd-year elections that "exacerbate [] the difficulties" of generating voter interest (Montana does not); minor parties needed 10% of votes cast for recognition (Montana allows either petitions or a 5% threshold); and the state had no minor parties since at least 1913 (Montana has had 22). Id. at 880-81. In New Alliance Party v. Hand, 933 F.2d 1568, 1575 (11th Cir. 1991) (per curiam), Alabama imposed no extra burden with a simultaneous filing deadline (similar to Montana's deadline), and only imposed a moderate burden with the qualification of 22 candidates in 3 elections (Montana had nearly 60 candidates in 2004, 2006, and 2008). Id. at 1575. In Cromer v. South Carolina, 917 F.2d 819 (4th Cir. 1990), the state required signatures equal to 5% of all voters (as much as twice Montana's requirement), and offered no administrative justification for its filing deadline. Id. at 821, 824; see also Wood v. Meadows, 117 F.3d 770, 774 (4th Cir. 1997) (distinguishing Cromer because "the state had not even asserted

administrative necessities"). In Storer, qualification required either petition signatures equal to 10% of the last gubernatorial vote (as much as four times the number required in Montana) or 1% of the electorate to change their registration to the new party (Montana does not require registration), followed by a primary and party conventions (Montana requires neither for a candidate). Id., 415 U.S. at 745.

Such attempts to transfer the real burdens experienced by real candidates in other states to the hypothetical burdens experienced by a noncandidate in Montana are irrelevant. Particularly where the law demands a case-specific inquiry, views expressed by courts as to facts presented in other cases "cannot provide sufficient support" to create a genuine issue of fact in the particular context of Montana law and politics presented in this case. Beard v. Banks, 548 U.S. 521, 534 (2006). This makes it "difficult to rely heavily on precedent in evaluating such restrictions," as Kelly asks this Court to do. Nader v. Keith, 385 F.3d 729, 735 (7th Cir. 2004). What matters in this case are the specific record of ballot access and petitioning by Montanans and the specific failure of one Montanan in particular (Kelly) to show any actual burden on his hypothetical candidacy.

c. Montana has a strong history of ballot access.

The parties are agreed that like the law, the record of ballot access should be viewed cumulatively. (Kelly Br. at 47.) Just as Kelly gerrymandered the scope of his claims, he also strategically limits the scope of the "record" to include only independent candidates for United States Senate, rather than the hundreds of candidates that achieved ballot access under the laws at issue. The fact that few statewide independent candidates have qualified for the ballot means little when only a handful have ever tried. It means even less when many minor party candidates have qualified under the same 5% signature requirement, the same March deadline, and the same 1% filing fee. Where there "is no evidence in the record in this case that any independent or minor party candidate sought and failed to gain ballot access" since Kelly last sought statewide independent status in 1994, the record "does not establish any severe burden on rights." Swanson, 490 F.3d at 910.

On the question of burden the record is clear: none of the requirements at issue measurably reduced the number of candidates. (E.R. 243-44, 257.) This is true both as a matter of historical analysis within Montana across time, and comparative analysis across states. Historically, the number of independent and minor party candidates on the ballot in Montana follows national trends, and changes in ballot access laws have had no effect on those trends. (E.R. 228-39,

243-46.) Comparatively, although independent candidates are relatively rare in all states, Montana has not had significantly fewer independent or minor party candidates than either its neighboring states or all states. (E.R. 239-43.) "[W]hat this particular statistical evidence most poignantly suggests is that overall it was no harder to obtain [ballot] access" once the laws took effect. Green v. Mortham, 989 F. Supp. 1451, 1458 (M.D. Fla. 1998); Fishbeck v. Hechler, 85 F.3d 162, 165 (4th Cir. 1996) (rejecting "severe burden" claim when no more candidates qualified under more liberal law). That record also includes Kelly himself, who qualified under most of the laws at issue.

B. Montana's Ballot Access Laws Serve Compelling Interests.

Election laws "are generally subject to a balancing standard rather than strict scrutiny, "because 'common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.'" Caruso v. Yamhill County, 422 F.3d 848, 855 (9th Cir. 2005), quoting Burdick, 504 U.S at 433. "Where, as here, a state election law imposes restrictions on speech that are not severe, 'the State's important regulatory interests are generally sufficient' to justify it." Id. at 861, quoting Burdick, 504 U.S. at 434.

To do otherwise and "require that the regulation be narrowly tailored to advance a compelling state interest, . . . would tie the hands of States seeking to

assure that elections are operated equitably and efficiently." Burdick, 504 U.S. at 433. However, even if Kelly could show a severe burden, Montana's interests are narrowly drawn to compelling state interests. Caruso, 422 F.3d at 859. The "preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion, are compelling." American Party, 415 U.S. at 782 n.14.

As this Court acknowledged in Nader, it reached its holding as to Arizona's presidential ballot access laws without "the benefit of much documentation of the state's needs for the requirements." 531 F.3d at 1030-21. Here, although the analysis is different for non-presidential candidates, the State has provided more than one hundred pages of genuinely undisputed facts and expert analysis. (E.R. 204-66 (elections and political parties expert Prof. Todd Donovan); 313-41 (State Elections Deputy and former County Elections Administrator Lisa Kimmet), 358-87 (Election Specialist Alan Miller), 345-49 (voter registration and ballot issue campaigner Matt Singer); and 350-57 (veteran campaign manager Doug Mitchell); cf. Kelly Br. at 62-63 (there is no dispute about material facts).) Kelly, on the other hand, relies almost exclusively on the Supreme Court's analysis of John Anderson's 1980 presidential campaign in Ohio. For reasons discussed above and in Anderson itself, the Court should

reject Kelly's litmus tests and consider the undisputed reality of Montana's election administration in 2010.

1. Montana's Ballot Access Laws Prevent Voter Confusion.

The State has a compelling interest in "regulating the number of candidates on the ballot to avoid undue voter confusion." American Party, 415 U.S. at 782 n.14. A signature requirement of 5% of all voters (as much as twice as high as Montana's requirement) can serve the state's interest "in avoiding confusion, deception, and even frustration of the democratic process at the general election." Jenness, 403 U.S. at 442. (E.R. 215-19). These cases "establish with unmistakable clarity that States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot. . . .'" Munro v. Socialist Workers Party, 479 U.S. 189, 194 (1986), quoting Anderson, 460 U.S. at 788-789 n.9.

Signature requirements undeniably accomplish this interest by directly measuring a candidate's level of popular support, "ensuring that only bona fide independent candidates with a measure of support gain ballot access, preventing frivolous candidates from clogging the ballot and confusing voters." See Swanson, 490 F.3d at 911. Montana's requirement of 5% of votes for the last successful candidate is particularly well suited to this purpose "because that is the

most recent gauge of those voters who are politically interested and therefore most likely to sign a [candidate] petition." Rainbow Coalition, 844 F.2d at 744.

The filing deadline serves a similar purpose, in that it "limits the number of candidates that will appear on the general election ballot" and "ensures that each candidate already has the support of some of the eligible voters." Wood, 207 F.3d at 715. The filing deadline also promotes an informed electorate, by providing "a period of time prior to the general election when the full field of candidates will be known to the voters." Id. The deadline further responds to increased early interest by voters, and was part of a broader effort to set an earlier presidential primary. (E.R. 317.)

Kelly attacks these self-evident interests by arguing that the 5,000-signature minor party requirement should apply to independent candidates. (Kelly Br. at 51.) In fact, the 5% rule applies to minor parties as well as independents. See Mont. Code Ann. § 13-10-601(2)(b). However, following increased minor party interest in state legislative races, in 1999 the Legislature provided a 5,000-signature ceiling to the minor party requirement to ease access for minor parties, like the Constitution Party, that qualified legislative rather than statewide candidates. (E.R. 243, 244. 251; 377-79.) Unlike the flat statewide minor party requirement, the variable independent candidate requirement already accounts for the voter interest in the "same office" the candidate is seeking.

Mont. Code Ann. § 13-10-502. This sort of adaptation serves constitutional interests. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979) (invalidating signature requirement that was higher for local office than for state office). The minor party requirement also encourages candidates to run under a platform, thus informing voters. (E.R. 221.)

In any event, Kelly had the choice to follow the minor party path to the ballot, and declined. Even he concedes that Montana's 5,000-signature minor party threshold is the minimum to prevent ballots crowded with candidates in the double digits. (Kelly Br. at 52; E.R. 477.) No statewide independent candidate who has collected that amount of signatures has been excluded from the ballot; when Kelly last qualified with 11,666 signatures in 1994, the two statewide independent candidates who failed to qualify both submitted well under 5,000 signatures. (E.R. 380.)

In arguing that Montana's generally uncluttered ballots "seriously undermine the proferred justification," Kelly forgets the historical breadth of his challenge. (Kelly Br. at 51.) Montana "has never had 12 candidates on the ballot for ***any*** statewide office" precisely because Montana has required that petitioning candidates show a constitutionally permissible "significant modicum of support" in the amount of 5% of the votes received by the last successful candidate since 1895. See 1895 Mont. Pol. Code § 1313; Jenness, 403 U.S. at 442. It is that law

that Kelly would invalidate, a law that indisputably has been successful in meeting the State's compelling interest in "regulating the number of candidates on the ballot to avoid undue voter confusion." American Party, 415 U.S. at 782 n.14. If the premise of Kelly's case is true, and a heretofore unidentified queue of independent candidates "clamoring for a place on the ballot" when the rules disappear (Kelly Br. at 33), then the State's compelling interest will prove itself. Given Montanans' choice to elect a long slate of state officials, even a couple more independent candidates in each partisan nonlegislative state race would add more than twenty new candidates for voters to evaluate each cycle. (E.R. 216.)

2. Montana's Ballot Access Laws Promote Voter Education.

Kelly's attack on Montana's efforts to maintain an informed electorate misses the point. He dresses a straw man with "vastly improved telecommunications networks" and other facts that appear nowhere in the record because they are neither disputed nor at issue. (Kelly Br. at 53-55.) What is in the record, and undisputed, is that Montanans have become engaged in election year politics earlier and earlier. The presidential race began in early February with Republican caucuses. (E.R. 317.) Thousands of voters registered to vote in late 2007 and early 2008. (E.R. 347.) Nearly all of the relevant candidates filed more than half a year before even the early filing deadline, and Kelly's prospective opponent filed in May 2003. (E.R. 381, 382-83.) Challengers for

statewide races had raised more than $1.4 million by March 2008. (E.R. 381, 382-83.) A uniform deadline ensures that candidates, voters, and election administrators know the field of potential candidates closes at a date certain. (E.R. 315-17.) The State is entitled to react to these trends and provide "a period of time prior to the general election when the full field of candidates will be known to the voters." Wood v. Meadows, 207 F.3d 708, 715 (4th Cir. 2000).

The assertion that "Montana is limiting both electoral competition and competition in the marketplace of ideas" is baseless (Kelly Br. at 54). Montana has had hundreds of candidates competing on the ballot against the two major parties, ranging from Greens to Libertarians to Constitution Party members, including independents like Kelly, recently in numbers equal to or greater than those in 24 other states and several neighboring states. (E.R. 239-43, 371-76, 380.) Montana's election process therefore does not stifle "vigorous debate on the issues," (Kelly Br. at 55), it enables it.

Meanwhile, the election calendar enables hundreds of thousands of voters to propose and debate many different ballot issues, each of which can qualify under signature requirements several times more stringent than those for candidates. (E.R. 364.) For example, this year there are 26 ballot issues, 11 at the petition stage, five of which have received more signatures than an independent or minor party candidate requires for ballot access. See Mont. Sec'y

of State, *Proposed 2010 Ballot Issues*, http://sos.mt.gov/Elections/archives/2010s/2010/Ballot_Issues.asp. This lively exchange plays out not just on petitions and the ballot but also through the nonpartisan distribution of platform and ballot issue information, see Mont. Code Ann. § 13-27-401, a point Kelly misses in his insinuation that Montana is not "truly serious about voter education." (Kelly Br. at 55.) See also Mont. Sec'y of State, *2008 Voter Information Pamphlet*, http://sos.mt.gov/Elections/archives/ 2000s/2008/voters/2008_Voter_Information_Pamphlet.pdf.

Kelly would compromise this debate by invalidating "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." Burdick v. Takushi, 504 U.S. 428, 438 (1992). Every candidate or ballot issue that shows a basic level of public support can express that support by qualifying for the ballot. Beyond this, no one is entitled to be on the ballot just to give voice to his own personal agenda. "The function of the election process is 'to winnow out and finally reject all but the chosen candidates,' not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].'" Id., 504 U.S. at 438, quoting Storer v. Brown, 415 U.S. 724, 735.

3. Montana's Ballot Access Laws Preserve Political Stability.

The State has at least two different interests in preserving political stability. "By placing reasonable restrictions on ballot access for independent and minor party candidates, [Montana's] election scheme discourages party-splintering and factionalism that could destabilize the political system." Swanson, 490 F.3d at 911-12. If, as Kelly suggests without a shred of record evidence, Montana's ballot access laws are driven instead to "eliminat[e] electoral competition" by "a partisan legislature [that] would want to protect its own political stability," the record of hundreds of independent and minor party candidates reaching the ballot suggests that the effort has failed for more than a century. (Kelly Br. at 56-57.)

One function of a single candidate deadline is to prevent potential primary opponents from lying in wait under the former deadline, allowing party candidates to fight primary battles while the potential opponent skips those battles and leaps directly to the general election. (E.R. 344-40, 354-55.) The Supreme Court has recognized the concerns of unsuccessful primary candidates who campaign and win tens of thousands of votes, only to watch another candidate march to the general election ballot "simply by filing a nominating petition signed by 5% of the total electorate." Jenness, 403 U.S. at 440. In response, the deadline "protects the direct primary process," "works against independent candidacies prompted by short-range political goals, pique, or

personal quarrel," and prevents "a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party." Storer v. Brown, 415 U.S. 724, 735 (1974).

These interests are "compelling" and "outweigh[] the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status." Id. at 736; Hooks, 179 F.3d at 80 (recognizing "legitimate and important State interest" in deadline notwithstanding "sore loser" law).

A second function is to serve the State's "interest in attempting to see that the election winner be the choice of a majority of its voters." Williams v. Rhodes, 393 U.S. 23, 32 (1968). The Supreme Court has "expressly approved a state's interest in limiting the number of candidates on its ballot" to accomplish this, and has deemed the interest "of the highest order." Wood, 207 F.3d at 715, quoting Lubin v. Panish, 415 U.S. 709, 715 (1974). Thus, a state may enact laws that help "assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." Bullock v. Carter, 405 U.S. 134, 145 (1972).

When candidates qualify for the ballot with less than a significant modicum of support, even a few thousand votes can erode the successful candidate's majority, or spoil the election of a candidate who would otherwise

win a contest of fewer candidates. (E.R. 210-19.) To some extent, this is the price Montanans pay for the number of dynamic minor party and independent candidacies their ballot access laws permit. Montana has had non-majority winners from the top of the ticket to the bottom, including at least 20 in the past two election cycles. (E.R. 364-65, 215-18.)

The fact that Montanans tolerate this in exchange for robust electoral competition does not mean, however, that it must throw its doors open to a dozen or more additional candidates on each statewide ballot, and accept the concomitant risk of plurality winners or spoilers. See Bullock, 405 U.S. at 145 ("no way of gauging the number of candidates" in the absence of filing fees); see also Big Spring v. Jore, 2005 MT 64, ¶ 9 (addressing tied legislative election involving minor party candidate) (citation omitted). For example, candidates can play spoiler by waiting out a hard-fought primary and running as an independent in the general election; the filing deadline was moved in part as a response to this problem. (E.R. 344-40, 354-55.) Kelly does not explain how Montana's "sore loser" disaffiliation statute "is more than adequate to prevent" this problem. (Kelly Br. at 57.) It is not: Montana does not require party registration, so that law is limited to a small group of prior candidates and party officers. Mont. Code Ann. § 13-10-507; Hooks, 179 F.3d at 80 (recognizing "legitimate and important State interest" in deadline notwithstanding sore loser law).

4. Montana's Ballot Access Laws Protect the Integrity of the Election Process.

The Supreme Court also has recognized that a state's interest in "preservation of the integrity of the electoral process . . . [is] compelling." American Party of Tex., 415 U.S. at 782 n.14. Consequently, "some cutoff period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges." Id. at 787 n.18. This process "requires pushing back the deadline for submitting petitions by increasing the amount of time required to determine whether the candidate has obtained the requisite number of valid petitions." Nader v. Keith, 385 F.3d at 735. Modern election calendars therefore must accommodate the time "necessary to administer recounts, to enable judicial resolution of election challenges on the basis of fraud, to print ballots, and to mail out and receive absentee ballots." Rainbow Coalition, 844 F.2d at 745.

On the other end of the election process, early voting shortens "[t]he effective period between the filing deadline and the election." Browne v. Bayless, 46 P.3d 416, 419 (Ariz. 2002). The federal Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA") encourages states to make absentee ballots available as early as 60 or 90 days prior to a federal general election in order to ensure sufficient transit time in military and foreign mail systems. See 42 U.S.C. § 1973ff-2(e), (f); Keith, 385 F.3d at 737. "Before the

ballots are printed, the state must have sufficient time, after signatures are verified, to determine the order in which candidates will appear on ballots, to transmit this information to the printer, and to receive the finished ballots in time to check them for accuracy and have them reprinted if necessary." Libertarian Party v. Munro, 31 F.3d 759, 764 (9th Cir. 1994).

The federal government also has encouraged the replacement of punch card and lever voting machines, see 42 U.S.C. § 15302, and regulated electronic voting systems with detailed technology standards, see 42 U.S.C. § 15481; see, e.g., Mont. Code Ann. § 13-17-212 (testing and certification required). New federal requirements like these "have made it necessary for States to reexamine their election procedures." Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1617 (2008). Meanwhile, election administrators must address petition and registration challenges. See Montanans for Justice v. State, 2006 MT 277, ¶ 13, 334 Mont. 237, 146 P.3d at 764-65 (petition challenge filed August 16 decided week before the election); Montana Democratic Party v. Eaton, CV 08-141-M-DWM, 2008 U.S. Dist. LEXIS 105849 (D. Mont. Oct. 8, 2008) (thousands of voter registration challenges filed and invalidated weeks before the election). The same challenges can occur during the primary process.

(E.R. 320.)

These competing demands tax the small staffs of Montana's 56 county clerk offices. (E.R. 313-23, 341.) The unified filing deadline is easier to administer because all non-presidential candidates on the ballot have a single deadline, so the pool of candidates closes. (E.R. 315-16.) On top of these existing duties, the Legislature recently decided to bring more Montanans into the electoral process through early no-excuse absentee voting and late registration. Both of these programs substantially increase election administrator workloads in the thirty days prior to the primary and general elections. (E.R. 319-20.) Under the prior independent candidate ballot access deadline, election administrators also would have to verify and certify petition signatures during the critical weeks before the final day of the primary election, June 3. Mont. Code Ann. § 13-10-503 (2005). The unified deadline allows the State to administer both the independent candidate petition process, and the early voting and late registration processes, without compromising either. (E.R. 319.)

The question posed by Kelly's claims is not whether officials could meet his schedule in a vacuum; it is whether they must do so at the expense of other policies, which have little to do with "the convenience of political parties" and much to do with expanding the ranks of voters whose interests Kelly purports to represent. (Kelly Br. at 60.) For example, Montana election officials might process a limited number of independent and minor party petitions in June and

July (Kelly Br. at 60), if they were not already processing hundreds of thousands of voters' initiative petition signatures at that time. (E.R. 319, 321, 364.) They are able to prepare primary election ballots between the filing deadline and the primary election (Kelly Br. at 61), because they do not need to handle candidate petitions during that critical pre-primary period. (E.R. 317-19.) They are able to vindicate the special national interest at stake in Anderson and Nader by accepting presidential nominations late in the process (Kelly Br. at 61), because they have already taken the time to set all statewide races on the ballot, including initiatives. (E.R. 328-30.) The State has given candidate ballot access equal status with each of these other important interests, under a law that imposes no "undue burden . . . [i]n the context of a nondiscriminatory deadline that applies to all parties and candidates". Texas Indep. Party v. Kirk, 84 F.3d 178, 184 (5th Cir. 1996). Nothing in the Constitution requires Montana to sacrifice all of its other electoral interests to Kelly's idle thoughts of a U.S. Senate candidacy.

CONCLUSION

Kelly qualified as an independent statewide candidate under Montana's ballot access laws in 1994, but he has made no effort to comply with those laws since. He has suffered no redressable injury and makes no attempt to meet the standards for a facial challenge. Meanwhile, the laws at issue allow hundreds of

candidates to qualify for the ballot and enable widespread participation in vigorously contested and procedurally sound elections. Therefore, the State respectfully requests the Court to affirm the judgment below.

Respectfully submitted this 12th day of July, 2010.

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STATEMENT OF RELATED CASES

The State is unaware of any related cases pending before this Court.

CERTIFICATE OF MAILING
Fed. R. App. P. 25

I hereby certify that on July 12, 2010, I electronically fled the foregoing Answer Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: July 12, 2010 */s/ Anthony Johnstone*
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CERTIFICATE OF COMPLILANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) and CIRCUIT RULE 32-1 FOR CASE NUMBER 10-35174

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

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DATED: July 12, 2010 */s/ Anthony Johnstone*
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