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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STEVE KELLY and CLARICE)
DREYER,)
Plaintiffs,)

v.)

LINDA McCULLOCH, in her)
official capacity as Secretary of)
State of the State of Montana,)
Defendant.)

Civil No. CV-08-25-BU-SEH

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT**

Montana's ballot-access scheme for independent candidates for the United States Senate is by far the most burdensome in the nation. The scheme's early deadline, high signature requirement, and high filing fee make it all but impossible for such candidates to get on the ballot. In fact, no such candidates have appeared on Montana's ballots since 1936.

Plaintiffs Steve Kelly and Clarice Dreyer claim in this lawsuit that Montana's scheme violates their rights under the First and Fourteenth Amendments to the United States 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*, 2009 WL 578703 (Mar. 9, 2009) (mem.). They have moved this Court for summary judgment, and they now respectfully submit this brief in support of that motion.

I. BACKGROUND

A. The Statutory Scheme

Montana law creates a two-tiered ballot-access scheme for candidates seeking to run for non-presidential offices: one for qualified parties and one for independent candidates. A qualified party is any party that had a candidate for statewide office who met a certain vote threshold in either of the last two general elections or that submitted a party-qualifying petition meeting the requirements of Mont. Code Ann. § 13-10-601.

Qualified parties nominate their candidates by primary election, and their nominees appear automatically on the general-election ballot. Mont. Code Ann. § 13-10-201. In order to appear on the primary- election ballot, candidates seeking the nomination of a qualified party need only to submit a declaration for nomination and pay the filing fee prescribed by Mont. Code Ann. § 13-10-202. The declaration-for-nomination form does not require the candidate to collect or submit any petition signatures. Mont. Code Ann. § 13-10-201. The form is due 75 days before the

primary election at which the candidate seeks to appear on the ballot. Mont. Code Ann. § 13-10-201.

Independent candidates, on the other hand, appear on the general-election ballot only if the candidate or party submits a nominating petition meeting the requirements of Mont. Code Ann. §§ 13-10-501 through -503 and pays the filing fee prescribed by Mont. Code Ann. § 13-10-202. Nominating petitions must contain the signatures of at least 5% of the total votes cast for the successful candidate for the same office in the last general election. Mont. Code Ann. § 13-10-502. Nominating petitions for independent and minor-party candidates seeking to appear on the general-election ballot are due 75 days before the date of the primary election for qualified parties. Mont. Code Ann. § 13-10-503.

The filing fee and deadline are new. The Montana Legislature amended the ballot-access scheme for independent and minor-party candidates at the Legislature's regular session in 2007. S. 270, 2007 Leg., Reg. Sess. (Mont. 2007). Prior to the 2007

amendment, the nominating petition deadline was the first Monday in June and no filing fee was required. S. 270, 2007 Leg., Reg. Sess. (Mont. 2007).

In 2008 year, the deadline for nominating petitions was March 13, 2008 - exactly 236 days before the general election. For United States Senate, the number of signatures required was 10,243, and the filing fee was \$1,693.00. Together, these requirements make Montana's scheme for independent and minor-party candidates the most burdensome in the nation.

B. The Plaintiffs

Plaintiff Steve Kelly is a United States citizen and a resident of the State of Montana. He is a resident and registered voter in Gallatin County, Montana. He ran for Congress as an independent candidate in 1994 and desired to run as an independent or minor-party candidate for United States Senate in 2008.

Plaintiff Clarice Dreyer is a United States citizen and a resident of the State of Montana. She is a resident and registered

voter in Gallatin County, Montana. She wanted like to have the opportunity to vote for Steve Kelly in the 2008 election.

II. LEGAL STANDARD

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).

III. ARGUMENT

The legal test governing the plaintiffs’ claim is clear and undisputed. This 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. at 289).

1. *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.' *Ibid.*; *Williams v. Rhodes*, *supra*, 393 U.S. at 31, 89 S. Ct., at 10." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). 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." *Id.* at 787-88.

The plaintiffs here 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.

a. Filing Deadline

Montana's filing deadline means that the opportunity to run for the United States 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. (See Ex. 6 at 11). 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*, 2009 WL 578703 (Mar. 9, 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 United States 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.

The Supreme Court and the Ninth Circuit 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. (See Ex. 6.) 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. (See Ex. 6.) The early deadline also precludes the possibility of gathering 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.

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 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.

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*, the Ninth Circuit concluded that a June 9 deadline for independent candidates imposed a “severe” burden. 531 F.3d at 1039. In *Cromer v. South Carolina*, 917 F.2d 819, 823-24 (4th Cir. 1990), 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). Here, there has been only one independent candidate for U.S. Senate in the State’s 119 years – Joseph P. Monaghan in 1936, when the petition filing deadline was in October. (Ex. 1 at 9.) Since 1973, when the Legislature moved the filing deadline from August to March, there has been only one independent candidate for *any* non-presidential statewide office on the general election ballot. (Ex. 1 at 11-13.) Plaintiff Steve Kelly petitioned successfully for ballot access as an independent candidate for the United States House of Representatives in 1994, when the petition filing deadline was in

June. (Ex. 12) No independent candidates for non-presidential statewide offices have ever been able to get on Montana's ballot when the deadline was in March. (Ex. 1 at 11-13.) This record of total exclusion is about as heavy as a burden can get.

Yet another way to measure the burden is by comparing Montana's deadline to those in other states. In absolute terms, Montana's deadline for Senate candidates in 2008 was the third earliest in the nation. (Ex. 5 at 6-7.) 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. (Ex. 5 at 6-7.) On the other end of the spectrum, twenty-seven states had petition filing deadlines later than June 30. (Ex. 5 at 6-7.) 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. 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, more than 230 days before the general election at which an independent Senate candidate would hope to appear on the ballot and more than 75 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 75 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 plaintiffs 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.

b. 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. (Ex. 6.)

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. (Ex. 6) If the petition drive were to use paid or volunteer staff, moreover, Pearson adds in an extra 10% to his estimate for administrative tasks. 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.

That's a heavy burden. It's a particularly heavy burden for the vast majority of Montanans, like Steve 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. 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 – Joseph P. Monaghan in 1936, when the petition filing deadline was in October and the number of signatures required was obviously much smaller. That 72-year-old unblemished streak suggests that the burden is heavy indeed. In addition, no independent candidate for governor has ever met the signature requirement in the state's entire history.

And, in fact, 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. (Ex. 1 at 12.) Plaintiff Steve Kelly petitioned successfully for ballot access as an independent candidate for the United States House of Representatives in 1994, when the petition filing deadline was in June and the number of signatures required was somewhat less. This further suggests that Montana's signature requirement falls on the "severe" end of the scale.

When compared to other states, moreover, Montana's signature requirement is the most burdensome in the country. 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,¹ Montana's signature requirement for the U.S. Senate

¹ 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 different transforming variable changes the ratio, but it generally does not affect the rank ordering of states in

in 2008 was 2.27%. (Ex. 5 at 11.) Thirty-seven states had a signature requirement under 1%. Four states had no signature requirement at all. (Ex. 5 at 10.) The median was .43%. The mean was .63%, and the standard deviation was also .63%. Montana's signature requirement was thus more than 2.6 standard deviations above the mean. Montana's signature requirement is therefore not only the most burdensome in the country but also far more burdensome than the average state.

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.

any significant way.

c. 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. In 2008, the filing fee for the United States Senate was \$1,693.

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. Montana's median family income ranks 41st. 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 plaintiff Steve 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.

Montana's filing fee also 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. (Ex. 5 at 8-9.) 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. Montana's filing fee is therefore not only burdensome but also far above average on the sliding scale.

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 can 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. The deadline for filing the petition in lieu of the filing fee is four weeks prior to the filing deadline for non-indigent independent candidates – a full five weeks before the filing deadline for the June party primary election. Mont. Code Ann. § 13-27-303. Had plaintiff Steve Kelly chosen to file additional signatures in lieu of the filing fee, Montana's ballot-access scheme would have required him to submit petitions containing at least 10,243 signatures on February 14, 2008 – 264 days before the November 4 general election at which Kelly sought to appear on the ballot. These signatures would have been required *in addition to* the 10,243 signatures that Kelly was already required to file by March 13, 2008. 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.

Because the petition in lieu of the filing fee appears to be impossible, Montana's filing fee, standing alone, is of questionable constitutional validity. *See Lubin v. Panish*, 415 U.S. 709 (1975) (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.

d. 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. **No other state ranks even in the top 15 on all three measures.**

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. 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 – the same date as 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), 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; \$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 v. South Carolina*, 917 F.2d 819 (4th Cir. 1990) (deadline for filing statement of candidacy 200 days; deadline for filing petitions August 1; 5% of registered voters signature requirement; \$0 filing fee). No court of which the plaintiffs are aware has ever upheld a ballot-access scheme as burdensome as Montana's.

Under these circumstances, strict scrutiny should apply.

2. *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 v. Brewer*, 531 F.3d 1028, 1039-40 (9th Cir. 2008).

Although it remains to be seen what interests, if any, the defendant will actually identify in support of the scheme, the State offered a laundry list of justifications in its discovery responses and in its briefing on the plaintiffs' motion for a preliminary injunction. (Ex. 1.) One thing, however, is certain: no court has ever found any of the interests asserted on the State's laundry list to be legitimate or compelling. Indeed, were this Court to do so, it would be breaking new ground.

One way to assess the necessity of Montana's ballot-access restrictions is by reference to other states. *See Williams v. Rhodes*, 393 U.S. 23, 33 (1968). The fact that no other state has found it necessary to impose anything close to the cumulative burdens associated with Montana's filing deadline, signature requirement,

and filing fee is a strong indication that Montana's scheme fails strict scrutiny.

Yet another way to measure the state's potential justifications is by reference to other aspects of Montana law. The state allows any group of citizens to qualify a new political party for the ballot with only 5,000 signatures. Mont. Code. Ann. § 13-10-601.

Qualification allows the party to run candidates for as many offices as it wants, without having to collect any additional signatures for each candidate. Because the State has apparently deemed 5,000 signatures to be sufficient to serve as a gatekeeper to the ballot for political parties and an unlimited number of candidates, 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).

Under these circumstances, Montana's ballot-access scheme for independent Senate candidates should fail strict scrutiny.

IV. SUMMARY AND CONCLUSION

Summary judgment is appropriate here because *Anderson* and *Nader* permit only one conclusion. The cumulative burdens of Montana's filing deadline, signature requirement, and filing fee far exceed the burdens at issue in either of those cases. Given the severity and discriminatory nature of the burdens here, Montana will be unable to assert a legitimate and sufficiently compelling state interest to justify the scheme. Certainly, the interests that the defendant has asserted thus far fall well short of that goal. *Anderson* and *Nader* thus leave no genuine issues of material fact to be resolved at trial.

Accordingly, the Court should grant the plaintiffs' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the undersigned counsel certifies that this brief complies with the word limit of Local Rule 7.1(d)(2)(A). Exclusive of the caption and certificates of service and compliance, the brief contains 5,387 words.

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FEB 09 2008

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STEVE KELLY and
CLARICE DREYER,

Plaintiffs,

v.

LINDA MCCULLOCH, in her
official capacity as Secretary of State
of the State of Montana,

Defendant.

) Cause No. CV-08-25-BU-SEH
)
) **DEFENDANT'S RESPONSE**
) **TO PLAINTIFFS' FIRST SET**
) **OF INTERROGATORIES**
)
)
)
)
)
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Exhibit 1

No. 48. See No. 47.

No. 49. The Secretary's office has received but not recorded complaints by voters confused by ballots for various reasons. Unrebutted testimony before the Legislative hearing on the bill at issue describes voter confusion and the bill's effect of resolving that confusion.

No. 50. The Secretary's office has received but not recorded complaints by candidates confused by the election calendar for various reasons. Unrebutted testimony before the Legislative hearing on the bill at issue describes candidate confusion and the bill's effect of resolving that confusion.

6. Please identify all state interests that the defendant may assert to justify Montana's ballot-access scheme for independent candidates for non-presidential offices and explain how the scheme advances each interest so identified.

RESPONSE: The Secretary asserts the following interests in setting a uniform filing date for all party and independent candidates include the following: simplifying the timelines for candidates who wish to appear on the ballot; equalizing the timelines to level the playing field for all Montana candidates and eliminating a double-standard that was unfair to major party candidates; reducing the administrative burden on busy election officials in the weeks before the primary to improve the quality of election administration for voters; providing sufficient time and staff to scrutinize petition signatures and avoid error or fraud; allowing for the investigation

and judicial resolution of petition or other election challenges; requiring a modicum of community support early in the election process; preventing voter confusion by limiting ballot access to serious candidates who can demonstrate some level of political viability; lessening the likelihood of multiple independent candidates appearing on the ballot and diluting the will of the majority; preventing multiple potential major- or third-party candidates from waiting out the primary and appearing as last minute "independent" candidates; encouraging candidates aligned with major- or third-parties to appear on the ballot with those party designations to inform voters; encouraging independent and minor party candidates to reach out early to voters who do not have the benefit of the extended media coverage accorded to some major party candidates; and responding to increased early interest in politics.

7. Please identify every person who has attempted to become an independent candidate or the candidate of a previously unqualified party for non-presidential statewide office in Montana. For each such person, please include the following information: (1) the person's name and, if known, contact information; (2) the year and office sought; (3) whether and when the candidate submitted any petitions and, if so, how many valid and invalid signatures those petitions contained; and (4) whether the candidate obtained ballot access.

RESPONSE: The Secretary objects to Interrogatory No. 7 as unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Subject to these objections, the persons who appeared on the ballot as an independent or third-party candidate since 1889 are described in Exhibit A. Beginning in 1972, the following persons filed for candidacy as an independent candidate or the candidate of a previously unqualified party (as of that election cycle) for non-presidential statewide office in Montana:

1. Larry Dodge (Libertarian); address unknown; U.S. Senator (1982); party submitted 10,547 signatures by March 18, 1982; on ballot.
2. Don Doig (Libertarian); address unknown; U.S. Representative (1982); party submitted 10,547 signatures by March 18, 1982; on ballot.
3. Westley Deitchler (Libertarian); address unknown; U.S. Representative (1982); party submitted 10,547 signatures by March 18, 1982; on ballot.
4. Linda Hoffman (Libertarian); address unknown; Clerk of the Supreme Court (1982); party submitted 10,547 signatures by March 18, 1982; on ballot.
5. Steve Kelly (Independent); 40 East Main, #3 Bozeman, MT 59715; U.S. Representative (1994); submitted 11,666 signatures; on ballot.
6. Harold V. Combs (Independent); P.O. Box 296, Park City, MT 59063; U.S. Representative (1994); submitted 89 signatures; not on ballot.

8. Identify the total number of candidates on the general-election ballot for each statewide office in each general election in Montana since statehood.

RESPONSE: The Secretary refers to Exhibit A, attached.

Respectfully submitted this 6th day of February, 2009.

As to Answers:

Alan Miller
ALAN MILLER
Elections Specialist
Office of Montana Secretary of State

SUBSCRIBED AND SWORN to before me this 6th day of February, 2009.

(Notarial Seal)

Shannon H. Stevens
Shannon H. Stevens (printed name)
Notary Public for the State of Montana
Residing at Helena MT
My Commission expires: 1-10-2010

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By:

Anthony Johnstone
ANTHONY JOHNSTONE
Solicitor

AT = Anti Trust Republica	C = Constitution	CM = Communist	D = Democrat	FL = Farmer Labor	G = Green	I = Independent	ID = Independent Democrat
LA = Labor	L = Libertarian	LI = Liberty	N = National	NL = Natural Law	NR = New Reform	NS = National State Rights	P = Prohibition
PR = Progressive	PL = Populist	R = Republican	RF = Reform	S = Socialist	SD = Social Democrat	SR = Silver Republican	U = Union

	United States Senate	United States House #1	United States House #2	Governor/Lt. Governor	Secretary of State	Attorney General	Treasurer	State Auditor	Supt Public Instruction	Clerk Supreme Court
1889*	Elected by Caucus Martin Maginnis (D) Thomas Carter (R)		Only one House seat until 1912	Joseph Toole & John Conrad (D) Thomas Power & John Rickards (R)	Joseph Browne (D) Louis Rotwitt (R)	William Penberton (D) Henri Haskell (R)	Jerry Collins (D) Richard Hickman (R)	Thomas Fitzgerald (D) Edwin Kinney (R)	James Russel (D) John Gannon (R)	George Cope (D) William Kennedy (R)
1890	Elected by Caucus William Dixon (D) Thomas Carter (R) Andrew Corby (P) WT Field (L)		Only one House seat until 1912	No Election	No Election	No Election	No Election	No Election	No Election	No Election
1892*	Elected by Caucus William Dixon (D) Caldwell Edwards (PL) Benjamin Atkinson (P) Charles Hartman (R) Hal Corbett (D)		Only one House seat until 1912	Timothy Collins (D) * William Kennedy (PL) * JM Waters (P) * John Rickards (R) *	Benjamin Folk (D) Joseph Allen (PL) Edward Gardner (P) Louis Rotwitt (R)	Edward Day (D) Ella Knowles (PL) Henri Haskell (R) Frederick Wright (R)	Jesse Haslon (D) William Lear (PL) Andrew Corby (P) Andrew Cook (R)	William Whaley (D) James McKay (PL) Charles Smith (P) Andrew Cook (R)	John Mahoney (D) Eva Hunter (P) Eugene Steere (R)	John Sloane (D) Compton Coates (PL) John Peets (P) Benjamin Webster (R)
1894	Elected by Caucus Robert Smith (PL) Benjamin Maiden (P) Charles Hartman (R)		Only one House seat until 1912	No Election	No Election	No Election	No Election	No Election	No Election	No Election
1896*	Elected by Caucus Charles Hartman (SR) OF Goddard (R)		Only one House seat until 1912	Robert Smith & AE Spriggs (D PL) Alexander Botkin & Peter Dolman (R SR)	TS Hogan (D PL) Louis Rotwitt (R SR)	CB Nolan (D PL) Samuel Murray (R SR)	Timothy Collins (D PL) Charles Webster (R SR)	TW Pindexter Jr (D PL) Albert Love (R SR)	EA Carleton (D PL) John Hendricks (R SR)	No Election
1898	Elected by Caucus Albert Campbell (D) Thomas Hogan (PL/SR) Thomas Marshall (R)		Only one House seat until 1912	No Election	No Election	No Election	No Election	No Election	No Election	Henry Rickets (D) Benjamin Webster (R) Oliver (SR/PL)
1900	Elected by Caucus Caldwell Edwards (D) Cornelius Kelley (ID) Samuel Murray (R) Martin Elliott (SD)		Only one House seat until 1912	Joseph Toole (D) & Frank Higgins (D) Thomas Hogan & Joseph Marion (ID) David Folsom & Alden Bennett (R)	George Hays (D) Abraham Yoder (R) John Horne (SD)	James Donovan (D) WR Stewart (ID) Thomas Porter (R) Jesse Beckwith (SD)	AN Barrett (D) Alex Livingston (ID) Frank Edwards (R) Henry Topel (SD)	JN Calderhead (D) EJ McLean (ID) Charles Proctor (R) Douglas Lawson (S)	WW Welch (D) JW Lewis (I) PA Leamy (ID) Wilfred Harmon (R) Oscar Partelow (SD)	No Election

EXHIBIT

A

539992

	United States Senate	United States House #1	United States House #2	Governor/Lt. Governor	Secretary of State	Attorney General	Treasurer	State Auditor	Supt Public Instruction	Clerk Supreme Court
1916*	Henry Myers (D)	John Evans (D)	Sam Stewart & WW McDowell (D)	Thomas Swindlehurst (I)	Joseph Poindexter (D)	JW Farrell (D)	William Keating (D)	Teresa O'Donnell (D)	JT Carroll (D)	WO Craig (R)
	Charles Pray (R)	Harry Mitchell (D)	Frank Edwards & JB Annun (R)	Charles Stewart (R)	Sam Ford (R)	HL Hart (R)	WD Fenner (R)	CW Tenney (I)	GC Lasater (S)	
	Henry La Beau (S)	Jeannette Rankin (R)	Elected At-Large until the 1918 Election	CR Dauterman (S)	Thomas Robinson (S)	John Powers (S)	EJ Bjorneby (S)	May Trumper (R)		
		George Farr (R)	Lewis Duncan & FJ Buzzell (S)					Amy Edmunds (S)		
1918	Thomas Walsh (D)	John Evans (D)	Harry Mitchell (D)	No Election	No Election	No Election	No Election	Rufus Poland (D)	No Election	No Election
	Jeanette Rankin (N)	Tom Kane (N)	Joseph Pope (N)					Joseph Kirschwing (N)		
1920	Oscar Lanstrum (R)	Frank Linderman (R)	Carl Riddick (R)					Geo. Porter (R)		
		Burton Watson (D)	M McCusker (D)	Burton Wheeler & Roland Arnold (D)	RA Haste (D)	Louis Irvin (D)	Ella Lord (D)	Ole Sanvik (D)	Margaret Hannah (D)	No Election
	No Election	WJ McCormick (R)	Carl Riddick (R)	Joseph Dixon & Nelson Story Jr (R)	Charles Stewart (R)	Wellington Rankin (R)	JW Walker (R)	George Porter (R)	May Trumper (R)	
1922	Burton Wheeler (D)	John Evans (D)	Preston Moss (D)	No Election	No Election	No Election	No Election	No Election	No Election	JT Carroll (D)
	Carl Riddick (R)	Washington McCormick (R)	Scott Leavitt (R)							Dana Easton (R)
	George Ambrose (S)	Lulu Dawley (S)								Emma Dargis (S)
1924	Thomas Walsh (D)	John Evans (D)	Joseph Kirschwing (D)	John Erickson & Frank Cooney (D)	Sam Mitchell (D)	CE Carlson (D)	HA McIntyre (D)	Thomas Carey (D)	John Kay (D)	Leon Choquette (D)
	JW Anderson (FL)	John Davies (R)	Charles Taylor (FL)	Frank Cooney (D)	JA McGlynn (FL)	LO Johnson (FL)	H Strassburger (FL)	Lillian Meinecke (FL)	Bess Crews Potts (FL)	PJ Wallace (FL)
	Sam Teagarden (I)	John McKay (S)	Scott Leavitt (R)	Frank Edwards (FL) Gov	Charles Stewart (R)	LA Foot (R)	WE Harmon (R)	George Porter (R)	May Trumper (R)	John Crosby (R)
	Frank Linderman (R)			Joseph Dixon & WS McCormack (R)		JL Wallace (S)	Steven Jones (S)			
				JS Matheson & J Skinner (S)						
1926		John Evans (D)	Harry Mitchell (D)	No Election	No Election	No Election	No Election	No Election	No Election	No Election
	No Election	Ronald Higgins (R)	Clair Stoner (FL)							
		Geo Ambrose (S)	Scott Leavitt (R)							
1928	Burton Wheeler (D)	John Evans (D)	DA Taylor (D)	John Erickson & FH Cooney (D)	John Mountjoy (D)	George Bourquin (D)	Thomas Carey (D)	Peter Kelly (D)	Walker Carroll (D)	Mary O'Neill (D)
	Joe Dixon (R)	Mark Fitzgerald (R)	Scott Leavitt (R)	Frank Cooney (D)	Harry Hazelton (S)	LA Foor (R)	FE Williams (R)	George Porter (R)	Elizabeth Ireland (R)	John Crosby (R)
		PJ Cavanaugh (S)	Jacob Kruse (S)	Wellington Rankin & Frank Hazelbaker (R)	WE Harmon (R)	Tolly Hartwick (S)	John Mathewson (D)	PC Siria (S)	William Held (S)	William Held (S)
				WR Duncan & Julius Redman (S)						
1930	Thomas Walsh (D)	John Evans (D)	Tom Stout (D)	No Election	No Election	No Election	No Election	No Election	No Election	No Election
	Willis Wright (CM)	Charles Squires (FL)	Wayne LaGrange (CM)							
	Charles Taylor (FL)	Mark Fitzgerald (R)	James Osby (FL)	No Election	No Election	No Election	No Election	No Election	No Election	No Election
	John McKay (S)	JP Cavanaugh (S)	Scott Leavitt (R)							
	Albert Galen (R)		Jacob Kruse (S)							

	United States Senale	United States House #1	United States House #2	Governor/Lt. Governor	Secretary of State	Attorney General	Treasurer	State Auditor	Supt Public Instruction	Clerk Supreme Court
1932		Roger Murray (CM)	Harry Juul (CM)	Rodney Salisbury &	Charles Mosley (CM)	Raymond Nagle (D)	Julius Meisenbach (C)	Charles Wilson (C)	Elena Swanson (C)	No Election
		Joseph Monaghan (D)	Roy Ayers (D)	Arvid Wilson (CM)	Sam Mitchell (D)	LA Foot (R)	James Brett (D)	John Holmes (D)	William Wyatt (D)	
		Mark Fitzgarrald (R)	HF Fuerstrow (LI)	John Erickson &	Arthur Harvey (LI)	John Dufly (S)	Glenn Davis (R)	John Zuck (LI)	Elizabeth Ireland (R)	
	No Election	AN Brooks (S)	Scott Leavitt (R)	Frank Cooney (D)	FE Williams (R)		George Lambert (S)	George Porter (R)	Daniel McCorkle (S)	
			JH Matheson (S)	William Duncan &	Charles Pyatt (S)					
				Robert Doran (LI)						
				Frank Hazelbaker &						
				Steve Arnold (R)						
				Christian Yegen &						
				Harry Hazelton (S)						
1934	Raymond Gray (CM)	George Salisbury (CM)	Roy Ayers (D)							Herbert Wurst (CM)
	Burton Wheeler (D)	Joseph Monaghan (D)	Stanley Felt (R)	No Election	No Election	No Election	No Election	No Election	No Election	AT Porter (D)
	George Bourquin (R)	DD Evans (R)	Yale Adams (S)							J Ward Crosby (R)
	William Held (S)	Charles Schneider (S)								
1936	James Murray (D)	Jerry O'Connell (D)	James O'Connor (D)	Arvo Fredrickson (CM) Gov	Sam Mitchell (D)	Harrison Freebourn (D)	Ray Shannon (D)	John Holmes (D)	Ruth Reardon (D)	No Election
	Joseph Monaghan (I)	HL Hart (R)	TS Stockdal (R)	Roy Ayers &	Leonard Young (R)	SR Foot (R)	FL Sorenson (R)	George Porter (R)	Elizabeth Ireland (R)	
	Tom Larson (R)	HC Schneider (S)	Bert Chesner (S)	Hugh Adair (D)						
				Frank Hazelbaker &						
				Howard Johnson (R)						
				JP Cavanaugh (S) &						
				Charles Pyatt (S)						
				David Ryan (U) Gov						
1938	No Election	Jerry O'Donnell (D)	James O'Connor (D)	No Election	No Election	No Election	No Election	No Election	No Election	No Election
		Dr J Thorkelson (R)	WC Husband (R)							
1940	Burton Wheeler (D)	Jerry O'Connell (D)	James O'Connor (D)	Arno Fredrickson &	Sam Mitchell (D)	John Bonner (D)	Thomas Carey (D)	John Holmes (D)	Catherine Nutterville (D)	AT Porter (D)
	EK Cheadle (R)	Jeannette Rankin (R)	Melvin Hoiness (R)	Waino Mustonen (CM)	Fred Padbury (R)	SR Foot (R)	Kirby Hoon (R)	George Porter (R)	Elizabeth Ireland (R)	J Ward Crosby (R)
			Laverne Hamilton (S)	Roy Ayers &						
				RS Murray (D)						
				Ed Shields (I)						
				Sam Ford &						
				Ernest Eaton (R)						
1942	James Murray (D)	Mike Mansfield (D)	James O'Connor (D)							Frank Murray (D)
	Charles Miller (P)	Leverne Hamilton (S)	FF Haynes (R)	No Election	No Election	No Election	No Election	No Election	No Election	Lewis Knox (R)
	Wellington Rankin (R)	Howard Hazelbaker (R)	Earl McConnell (S)							
	EH Heletrbran (S)									
1944		Mike Mansfield (D)	James O'Connor (D)	Leif Erickson &	Sam Mitchell (D)	RV Bottomly (D)	William Pilgeram (D)	John Holmes (D)	Violet Eastman (D)	No Election
	No Election	Charles Miller (P)	FF Haynes (R)	Paul Cannon (D)	Howard Hazelbaker (R)	Stanley Foot (R)	George Porter (R)	EJ (Elmer) Mo (R)	Elizabeth Ireland (R)	
		MS Galasso (R)	E Spriggs (S)	Charles Miller (P) Gov						
				Sam Ford &						
				Ernest Eaton (R)						
				Floyd Jones (S) Lt Gov						

	United States Senate	United States House #1	United States House #2	Governor/Lt. Governor	Secretary of State	Attorney General	Treasurer	State Auditor	Supt Public Instruction	Clerk Supreme Court
1946	Leif Erickson (D)	Mike Mansfield (D)	John Holmes (D)							Frank Murray (D)
	Zales Ecton (R)	Walter Rankin (R)	Wesley D'Ewart (R)	No Election	No Election	No Election	No Election	No Election	No Election	Lawrence Heller (R)
	Floyd Jones (S)		Edgar Spriggs (S)							
1948	James Murray (D)	Mike Mansfield (D)	Willard Fraser (D)	John Bonner &	Sam Mitchell (D)	Arnold Olsen (D)	Neil Fisher (D)	John Holmes (D)	Mary Condon (D)	
	CS Hanna (P)	Albert Angstman (R)	Wesley D'Ewart (R)	Paul Cannon (D)	Ernest Eaton (R)	Stanley Felt (R)	Harry Todd (R)	EJ Mo (R)	Elizabeth Ireland (R)	
	Tom Davis (R)	Floyd Jones (S)		Sam Ford & Tom Burke Leverne Hamilton & Edward Spriggs (S)						No Election
1950		Mike Mansfield (D)	John Holmes (D)				John Kennedy (D)			
	No Election	Ralph McGinnis (R)	Chester Kinsey (PR)	No Election	No Election	No Election	John Henry (R)	No Election	No Election	No Election
		Leverne Hamilton (S)	Wesley D'Ewart (R)				Two-Year Term			
1952	Mike Mansfield (D)	Lee Metcalf (D)	Willard Fraser (D)	John Bonner &	Sam Mitchell (D)	Arnold Olsen (D)	John Kennedy (D)	John Holmes (D)	Mary Condon (D)	Frank Murray (D)
	Lawrence Price (PR)	Wellington Rankin (R)	Wesley D'Ewart (R)	Jack Toole (D)	Edgar Price (D)	Wesley Castles (R)	Charles Sheridan (R)	Bruce Mcford (R)	Elizabeth Ireland (R)	Edna Hinman (R)
	Zales Ecton (R)	Leverne Hamilton (S)		J Hugo Aronson & George Gosman (R)						
1954	James Murray (D)	Lee Metcalf (D)	LeRoy Anderson (D)				Horace Casey (D)			
	Wesley D'Ewart (R)	Winfield Page (R)	Orvin Fiare (R)	No Election	No Election	No Election	Edna Hinman (R)	No Election	No Election	No Election
							Two-Year Term			
1956		Lee Metcalf (D)	LeRoy Anderson (D)							
	No Election	WD McDonald (R)	Orvin Fiare (R)	Arnold Olsen & Paul Cannon (D) J Hugo Aronson & George Gosman (R)	Frank Murray (D)	Forrest Anderson (D)	Horace Casey (D)	John Holmes (D)	Harriet Miller (D)	No Election
					Edna Hinman (R)	Michael O'Connell (R)	George Davis (R)	Alex Cunningham (R)	Mary Condon (D)	
1958	Mike Mansfield (D)	Lee Metcalf (D)	LeRoy Anderson (D)	No Election	No Election	No Election	No Election	No Election	No Election	Thomas Kearney (D)
	Lou Welch (R)	Jean Walterskirchen (R)	Ashton Jones (R)							Edna Hinman (R)
1960	Lee Metcalf (D)	Arnold Olsen (D)	Leo Graybill Jr (D)	Paul Cannon & Henry Anderson (D) Donald Nutter & Tim Babcock (R)	Frank Murray (D)	Forrest Anderson (D)	HL Tip O'Neal (D)	John Holmes (D)	John Cushman (D)	
	Orvin Fiare (R)	George Sarsfield (R)	James Battin (R)		Albert Leuthold (R)	Bruce Shelden (R)	Edna Hinman (R)		Harriet Miller (R)	No Election
1962										
	No Election	Arnold Olsen (D)	Leo Graybill Jr (D)	No Election	No Election	No Election	No Election	Robert Durkee (D)	No Election	No Election
		Wayne Montgomery (R)	James Battin (R)					EY Sonny Omholt (R)		
1964	Mike Mansfield (D)	Arnold Olsen (D)	Jack Toole (D)	Rowland Renne & RV Bottomly (D) Tim Babcock & Ted James (R)	Frank Murray (D)	Forrest Anderson (D)	Henry Anderson (D)	Jack Holmes (D)	Harriet Miller (D)	Tom Kearney (D)
	Alex Blewett (R)	Jack Gunderson (NS)	James Battin (R)		Walter Anderson (R)	Marshall Murray (R)	Jack Quilico (R)	EY Sonny Omholt (R)	CR Anderson (R)	HL Scott (R)
1966	Lee Metcalf (D)	Arnold Olsen (D)	John Melcher (D)	No Election	No Election	No Election	No Election	No Election	No Election	No Election
	Tim Babcock (R)	Dick Smiley (R)	James Battin (R)							
1968		Arnold Olsen (D)	Robert Kelleher (D)	Forrest Anderson & Thomas Judge (D) Wayne Montgomery (NR) Tim Babcock & Tom Selstad (R)	Frank Murray (D)	Gene Daly (D)	Paul Cannon (D)	EY Sonny Omholt (R)	Dolores Colburg (D)	No Election
	No Election	Dick Smiley (R)	James Battin (R)		Elizabeth Gufey (R)	Bob Woodahl (R)	Alex Stephenson (R)		Henry Cox (R)	

	United States Senate	United States House #1	United States House #2	Governor/Lt. Governor	Secretary of State	Attorney General	Treasurer	State Auditor	Supt Public Instruction	Clerk Supreme Court
1970	Mike Mansfield (D)	Arnold Olsen (D)	John Melcher (D)	No Election	No Election	No Election	No Election	No Election	No Election	Tom Kearney (D)
	Harold Wallace (R)	Richard Shoup (R)	Jack Rehberg (R)							
1972	Lee Metcalf (D)	Arnold Olsen (D)	John Melcher (D)	Thomas Judge & Bill Christiansen (D)	Frank Murray (D)	John Sheehy (D)	John McLaughlin (D)	EV Sonny Ornholzt (R)	Dolores Colburg (D)	No Election
	Henry Hibbard (R)	Dick Shoup (R)	Dick Forester (R)	Ed Smith & Harold Hanson (R)	David Lewis (R)	Bob Woodahl (R)	Hollis Connors (R)	Jerry Agen (R)		
1974	No Election	Max Baucus (D)	John Melcher (D)	No Election	No Election	No Election	No Election	No Election	No Election	No Election
		Dick Shoup (R)	John McDonald (R)							
1976	John Melcher (D)	Max Baucus (D)	Thomas Towe (D)	Thomas Judge & Ted Schwinden (D)	Frank Murray (D)	Mike Greeley (D)	Jerry Mitchell (D)	Georgia Ruth Rice (D)	Tom Kearney (D)	
	Stanley Burger (R)	WD Diehl (R)	Ron Marlenee (R)	Ted Schwinden (D)		James Harrison Jr (R)	EV Sonny Ornholzt (R)	John Deeeny (R)		
				Bob Woodahl & Antoinette Fraser Rosell			No Longer Elected			
1978	Max Baucus (D)	Pat Williams (D)	Thomas Monahan (D)	No Election	No Election	No Election	No Longer Elected	No Election	No Election	No Election
	Larry Williams (R)	Jim Waltermire (R)	Ron Marlenee (R)							
1980	No Election	Pat Williams (D)	Tom Monahan (D)	Ted Schwinden & George Turman (D)	ID Lynch (D)	Mike Greeley (D)	EV Sonny Ornholzt (R)	Georgia Ruth Rice (D)	No Election	
		John (Jack) McDonald (R)	Ron Marlenee (R)	Jack Ramirez & Walt Johnson (R)	Jim Waltermire (R)		No Longer Elected	Ed Argenbright (R)		
1982	John Melcher (D)	Pat Williams (D)	Howard Lyman (D)	No Election	No Election	No Election	No Longer Elected	No Election	No Election	Richard Conboy (D)
	Larry Dodge (L)	Don Doig (L)	Westley Deitchler (L)							Linda Hoffman (L)
	Larry Williams (R)	Bob Davies (R)	Ron Marlenee (R)							Ethel Harrison (R)
1984	Max Baucus (D)	Pat Williams (D)	Chet Blaylock (D)	Ted Schwinden & George Turman (D)	Joe Tropila (D)	Mike Greeley (D)	Newell Anderson (D)	Don Driscoll (D)		
	Neil Halprin (L)	Royer Warren (L)	Ron Marlenee (R)	Larry Dodge & Clifford Thies (L)	Jim Waltermire (R)	William Morris (L)	Patricia Summes (L)	Ed Argenbright (R)		
	Chuck Cozzens (R)	Gary Carlson (R)		Pat Goodover & Don Allen (R)		Douglas Kelley (R)	Andrea Henslad (R)			No Election
1986	No Election	Pat Williams (D)	Buck O'Brien (D)	No Election	No Election	No Election	No Longer Elected	No Election	No Election	No Election
		Don Allen (R)	Ron Marlenee (R)							
1988	John Melcher (D)	Pat Williams (D)	Buck O'Brien (D)	Thomas Judge & Barbara Skelton (D)	Mike Cooney (D)	Mike McGrath (D)	Andrea Bennett (R)	Nancy Keenan (D)	Ed Smith (D)	
	Conrad Burns (R)	Jim Fenlason (R)	Ron Marlenee (R)	William Morris & John Light (L)	Larry Dodge (L)	Marc Racicot (R)	No Longer Elected	Barbara Foster (R)	Phyllis Neld-English (R)	
				Stan Stephens & Allen Kolstad (R)	Pete Story (R)					
1990	Max Baucus (D)	Pat Williams (D)	Don Burris (D)	No Election	No Election	No Election	No Longer Elected	No Election	No Election	No Election
	Westley Deitchler (L)	Brad Johnson (R)	Ron Marlenee (R)							
	Allen Kolstad (R)									
1992	No Election	Pat Williams (D)	Lost House Seat following Census	Dorothy Bradley & Mike Halligan (D)	Mike Cooney (D)	Joe Mazurek (D)	Mark O'Keefe (D)	Nancy Keenan (D)	No Election	
		Jerome Wilverding (L)		Marc Racicot & Dennis Rehberg (R)	Robert Werner (R)	Jack Sands (R)	J Eric Larson (L)			No Election
		Ron Marlenee (R)								

	United States Senate	United States House #1	United States House #2	Governor/Lt. Governor	Secretary of State	Attorney General	Treasurer	State Auditor	Supt Public Instruction	Clerk Supreme Court
1994	Jack Mudd (D) Conrad Burns (R)	Pat Williams (D) Steve Kelly (I) Cy Jamison (R)	Lost House Seat following Census	No Election	No Election	No Election	No Longer Elected	No Election	No Election	Ed Smith (D) Jerry O'Neil (L)
1996	Max Baucus (D) Stephen Heaton (NL) Becky Shaw (RF) Dennis Rehberg (R)	Bill Yellowtail (D) Jim Brooks MD (NL) Rick Hill (R)	Lost House Seat following Census	Judy Jacobson (Chet Blaylock deceased) (D) Marc Racicot & Judy Martz (R)	Mike Cooney (D) Martha Oas (NL) Larry Baer (R)	Joe Mazurek (D) Larry Baer (R)	No Longer Elected	Mark O'Keefe (D) John Larson (L)	Nancy Keenan (D) Phillip Zenke (NL) Wayne Buchanan (R)	No Election
1998	No Election	Dusty Deschamps (D) Mike Fellows (L) Webb Sullivan (RF) Rick Hill (R)	Lost House Seat following Census	No Election	No Election	No Election	No Longer Elected	No Election	No Election	No Election
2000	Brian Schweitzer (D) Gary Lee (RF) Conrad Burns (R)	Nancy Keenan (D) James Tkalsky (L) Dennis Rehberg (R)	Lost House Seat following Census	Mark O'Keefe & Carol Williams (D) Stan Jones & Michael Kaszula (L) Judy Martz & Karl Ohs (R)	Hal Harper (D) Mike Fellows (L) JR Myers (RF) Bob Brown (R)	Mike McGrath (R) Jim Rice (R)	No Longer Elected	John Morrison (D) Rebecca Scott (NL) Joyce Schmidt (R)	Linda McCulloch (D) Larry Foust (RF) Elaine Herman (R)	Ed Smith (D) Allen Salvesson Jr (L)
2002	Max Baucus (D) Stan Jones (L) Bob Kelleher (G) Mike Taylor (R)	Steve Kelly (D) Mike Fellows (L) Dennis Rehberg (R)	Lost House Seat following Census	No Election	No Election	No Election	No Longer Elected	No Election	No Election	No Election
2004	No Election	Tracy Velazquez (D) Mike Fellows (L) Denny Rehberg (R)	Lost House Seat following Census	Brian Schweitzer & John Bohlinger (R) Bob Kelleher & Colleen Little Thunder (G) Stan Jones & Michael Kaszula (L) Bob Brown & Dave Lewis (R)	Bill Kennedy (D) Brad Johnson (R)	Mike McGrath (D)	No Longer Elected	John Morrison (D) Duane Grimes (D)	Linda McCulloch (D) Bob Anderson (R)	No Election
2006	Jon Tester (D) Stan Jones (L) Conrad Burns (R)	Monica Lindeen (D) Mike Fellows (L) Denny Rehberg (R)	Lost House Seat following Census	No Election	No Election	No Election	No Longer Elected	No Election	No Election	Ron Marquardt (C) Ed Smith (D) Howard Scott Butler (L)
2008	Max Baucus (D) Bob Kelleher (R)	John Driscoll (D) Mike Fellows (L) Denny Rehberg (R)	Lost House Seat following Census	Brian Schweitzer & John Bohlinger (D) Stan Jones & Michael Baker (L) Roy Brown & Steve Daines (R)	Sieglinde Sharbono (C Linda McCulloch (D) Tim Fox (R) Brad Johnson (R)	Monica Lindeen (D) Duane Grimes (R)	No Longer Elected	Denise Juneau (D) Donald Eisenmenger (L) Elaine Sollie Herman (R)	No Election	

~ Please see attached compiler notes for further information ~

Compilers Notes:

1889 thru 1972	Candidates for Governor & Lieutenant Governor ran separately & not jointly during these years. Candidates having listed the same political party affiliation will appear together in the text box simply to designate their party. Therefore, a candidate listed under one party could have been elected Governor and a candidate listed under another party could have been elected Lieutenant Governor through 1972.
1934	Two-year term for the United States Senate also appeared on the ballot & the candidates were as follows: James Murray (D) Scott Leavitt (R) John Duffy (S)
1912 1914 1916	Gained a second seat in the United States House of Representatives in 1912 following the 1910 Census. The two Representatives were elected "At -Large" until the seats were divided into District #1 & District #2 in 1918. Following the 1990 Census the second seat in the United States House was eliminated in 1992 & remains at one.
1972	Eliminated the election of a Treasurer in the 1972 Constitution
1992	Lost second seat in the United States House of Representatives following Census

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COUNSEL FOR DEFENDANT
SECRETARY OF STATE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STEVE KELLY and	)	Cause No. CV-08-25-BU-SEH
CLARICE DREYER,)	
	)	STATE'S RESPONSE TO
Plaintiffs,	)	PLAINTIFFS' SECOND SET
	)	OF INTERROGATORIES
v.)	
)	
LINDA MCCULLOCH, in his)	
official capacity as Secretary of State)	
of the State of Montana,)	
)	
Defendant.)	

INTERROGATORY NO. 10: Please indicate whether the defendant disputes the accuracy of any information contained in the three charts attached to the declaration of Richard Winger (a copy of which is attached as an exhibit to the

plaintiffs' offer of proof, filed September 22, 2008 (doc. no. 44)), and, if so, identify specifically what she contends is inaccurate.

RESPONSE: Defendant does not dispute the accuracy of the referenced charts.

Respectfully submitted this 1st day of April, 2009.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: 

ANTHONY JOHNSTONE
Solicitor


CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2009, an accurate copy of the foregoing State's Response to Plaintiffs' Second Set of Interrogatories was served on the following persons by U.S. Mail:

Mr. Bryan Sells
Senior Staff Counsel
Southern Regional ACLU
230 Peachtree Street, N.W.
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Atlanta, GA 30303-1513

Ms. Elizabeth L. Griffing
American Civil Liberties Union of Montana Foundation, Inc.
241 East Alter, Suite. B
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DATED: April 1, 2009



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COUNSEL FOR DEFENDANT
SECRETARY OF STATE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STEVE KELLY and
CLARICE DREYER,

Plaintiffs,

v.

LINDA MCCULLOCH, in her
official capacity as Secretary of State
of the State of Montana,

Defendant.

) Cause No. CV-08-25-BU-SEH
)
) **DEFENDANT'S RESPONSE**
) **TO PLAINTIFFS' FIRST**
) **REQUESTS FOR ADMISSION**

Exhibit 3

Secretary of State Linda McCulloch (Secretary) responds to Plaintiffs' First Requests for Admission as follows:

REQUEST FOR ADMISSION

1. This action arises under the Constitution and laws of the United States.

RESPONSE: Admit.

2. The plaintiffs brought this action to redress the alleged deprivation, under color of State law, of rights secured by the Constitution of the United States.

RESPONSE: Admit.

3. Plaintiff Steve Kelly is a United States citizen.

RESPONSE: Admit.

4. Plaintiff Steve Kelly is a resident of Gallatin County, Montana.

RESPONSE: Admit.

5. Plaintiff Steve Kelly is registered to vote in Gallatin County, Montana.

RESPONSE: Admit.

6. Plaintiff Steve Kelly wanted to run as an independent candidate for the United States Senate in the 2008 general election.

RESPONSE: Deny.

7. Plaintiff Steve Kelly meets the qualifications to hold the office of United States Senator.

RESPONSE: Admit.

8. Plaintiff Steve Kelly met the qualifications to appear on the 2008 general election ballot as an independent candidate for the United States Senate but for compliance with the ballot-access scheme at issue in this case.

RESPONSE: Deny.

9. Plaintiff Steve Kelly wishes to run for non-presidential statewide office as an independent candidate in the future.

RESPONSE: The Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny Mr. Kelly's wishes for the future.

10. Plaintiff Clarice Dreyer is a United States citizen.

RESPONSE: Admit.

11. Plaintiff Clarice Dreyer is a resident of Gallatin County, Montana.

RESPONSE: Admit.

12. Plaintiff Clarice Dreyer is registered to vote in Gallatin County, Montana.

RESPONSE: Admit.

13. Plaintiff Clarice Dreyer wanted to have the opportunity to vote for Steve Kelly as an independent candidate for the United States Senate in the 2008 general election.

RESPONSE: The Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny Ms. Dreyer's intentions.

14. Plaintiff Clarice Dreyer wishes to have the opportunity to vote for Steve Kelly as an independent candidate for non-presidential statewide office in the future.

RESPONSE: The Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny Ms. Dreyer's wishes for the future.

15. Defendant Linda McCulloch is the Secretary of State of the State of Montana.

RESPONSE: Admit.

16. Defendant Linda McCulloch or her predecessor in office was charged by statute with enforcing Montana's ballot access scheme for independent and minor-party candidates seeking to run for non-presidential offices in the 2008 general election.

RESPONSE: Admit that Secretary McCulloch's predecessor in office was charged by statute with enforcing Montana's ballot access scheme for independent and minor-party candidates seeking to run for non-presidential offices in the 2008 general election to the extent the statutes so provide. Deny to the extent the statutes provide other election officials the duty to enforce Montana's ballot access scheme, such as local election administrators charged with verification and certification of petitions under Mont. Code Ann. § 13-10-503.

17. Defendant Linda McCulloch is sued in her official capacity only.

RESPONSE: Admit.

18. Montana enacted its first ballot-access law for independent candidates in 1889. 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.

RESPONSE: Admit the contents of 1889 Mont. Laws 135, and deny to the extent the request misstates that law.

19. 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. This signature requirement remains in effect today.

RESPONSE: Admit the contents of Montana Constitution, Codes & Statutes 1895, part 3, title 2, ch. 8, sec. 1313, and deny to the extent the request misstates that law.

20. In 1949, the Legislature moved the petition filing deadline for independent candidates to 90 days before the general election, which falls in early August. 1949 Mont. Laws Ch. 160.

RESPONSE: Admit the contents of 1949 Mont. Laws Ch. 160, and deny to the extent the request misstates that law.

21. In 1973, the Legislature moved the petition filing deadline for independent candidates to March, one week before the filing deadline for June party primary election. 1973 Mont. Laws Ch. 237. There was no filing fee.

RESPONSE: Admit the contents of 1973 Mont. Laws Ch. 237, and deny to the extent the request misstates that law.

22. In 1979, the Legislature imposed a filing fee equal to 1% of the annual salary of the office sought. 1979 Mont. Laws Ch. 571.

RESPONSE: Admit the contents of 1979 Mont. Laws Ch. 571, and deny to the extent the request misstates that law.

23. In 1991, the Legislature moved the petition filing deadline for independent candidates to June, one week before the day of the June primary. 1991 Mont. Laws Ch. 591.

RESPONSE: Admit the contents of 1991 Mont. Laws Ch. 591, and deny to the extent the request misstates that law.

24. The Legislature last amended the ballot-access scheme in 2007. 2007 Mont. Laws Ch. 458. The Legislature once again moved the petition filing deadline to March, one week before the filing deadline for the June party primary election. Mont. Code Ann. § 13-10-503. The 5% signature requirement and filing fee remained. Mont. Code Ann. § 13-10-502.

RESPONSE: Admit the contents of 2007 Mont. Laws Ch. 458, and deny to the extent the request misstates that law.

25. All petitions must be submitted to the election official of the county where each petition-signer resides. Mont. Code Ann. § 13-10-503. As a practical matter, this means that petitions have to be county-specific. Residents of Lewis and Clark County have to sign a Lewis and Clark County petition, for example, and residents of Cascade County have to sign a Cascade County petition. A statewide candidate therefore has to have at least one set of petitions for each county in which the candidate gathers signatures.

RESPONSE: Admit that petitions must be submitted to the election official of the county where each petition-signer resides under Mont. Code Ann. § 13-10-503 and that each petition must contain signatures of electors residing in only one county under Mont. Code Ann. § 13-10-501(5). Deny that a statewide candidate therefore has to have at least one set of petitions for each county in which the candidate gathers signatures.

26. 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.

RESPONSE: Admit that 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, and pay a filing fee, due on March 20, of \$1,693. Deny that the submission date was 236 days before the general election.

27. The filing fee is mandatory unless the candidate files a verified statement that he or she is unable to pay the fee and files 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. The deadline for filing the petition in lieu of the filing fee is four weeks prior to the filing deadline for non-indigent independent candidates--a full five weeks before the filing deadline for the June party primary election.

Mont. Code Ann. § 13-27-303.

RESPONSE: Admit that a candidate claiming indigency need not pay the filing fee. Deny that the deadline for filing petitions with an indigency statement is four weeks prior to the filing deadline for non-indigent independent candidates.

28. Plaintiff Steve Kelly's annual income is less than \$30,000 per year, and paying a filing fee of \$1,693 would have been a hardship for him personally.

RESPONSE: The Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny Mr. Kelly's annual income or financial situation.

29. Paying a filing fee of \$1,693 would have significantly compromised plaintiff Steve Kelly's ability to campaign as an independent candidate for the United States Senate.

RESPONSE: Deny.

30. Had plaintiff Steve Kelly chosen to file additional signatures in lieu of the filing fee, Montana's ballot-access scheme would have required him to submit petitions containing at least 10,243 signatures on February 14, 2008--264 days

before the November 4 general election at which Kelly sought to appear on the ballot. These signatures would have been required *in addition to* the 10,243 signatures that Kelly was already required to file by March 13, 2008.

RESPONSE: Deny.

31. The 2007 amendment to the filing deadline makes it impossible for a prospective candidate to gather signatures outside of the polls on the day of Montana's school elections, which are held annually in early May.

RESPONSE: Admit that the filing deadline makes it impossible for a prospective candidate to gather signatures outside of the polls on the day of May school elections after the deadline. Deny to the extent that a prospective candidate can gather signatures outside of the polls on the day of

32. Montana's ballot-access scheme for candidates affiliated with qualified political parties, by contrast, does not require the candidate to submit any signatures.

RESPONSE: Admit that Montana's ballot-access scheme for candidates affiliated with qualified political parties does not require the candidate to submit any signatures after the party has qualified. Deny to the extent that Montana's ballot-access scheme requires the persons who originally qualify the political party to submit signatures.

33. A qualified party is any party that had a candidate for statewide office who met a certain vote threshold in either of the last two general elections or that submitted a party-qualifying petition containing at least 5,000 valid signatures from registered voters in at least one-third of Montana's legislative districts. Mont. Code. Ann. § 13-10-601.

RESPONSE: Deny.

34. Qualified parties nominate their candidates by primary election, and their nominees appear automatically on the general-election ballot. 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 candidate to collect or submit any petition signatures, and the form is due 75 days before the primary election at which the candidate seeks to appear on the ballot. Mont. Code Ann. § 13-10-201.

RESPONSE: Admit, to the extent there are multiple candidates requiring the party to hold a primary election. Deny to the extent a party need not hold a primary if only one candidate files for the nomination.

35. For the office of U.S. Senator in 2008, candidates seeking the nomination of a qualified political party were required to file a declaration-of-nomination form, along with a filing fee of \$1,693, on March 20, 2008--75 days

before the June primary election at which the candidates sought to appear on the ballot. The candidates were not required to submit any petition signatures.

RESPONSE: Admit the second sentence. Deny the first sentence.

36. Montana's petition deadline for independent and minor party candidates for the United States Senate in 2008 was among the earliest in the nation.

RESPONSE: The Secretary objects to Request for Admission No. 36 as not reasonably calculated to lead to the discovery of admissible evidence, and unduly burdensome to the extent Plaintiffs can obtain that information from some other source that is more convenient. Subject to that objection, the Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny the existence of laws the Secretary of State does not administer.

37. 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.

RESPONSE: The Secretary objects to Request for Admission No. 37 as not reasonably calculated to lead to the discovery of admissible evidence, and unduly burdensome to the extent Plaintiffs can obtain that information

from some other source that is more convenient. Subject to that objection, the Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny the existence of laws the Secretary of State does not administer.

38. Only two states, Mississippi and Ohio, had earlier deadlines than Montana. Mississippi's deadline was January 11 and Ohio's was March 3. Unlike Montana, which held its primary election in June, both states held their party primaries in March. Also unlike Montana, Mississippi required only 1,000 signatures. Ohio required only 5,000. Mississippi required no filing fee, and Ohio's was only \$100.

RESPONSE: The Secretary objects to Request for Admission No. 38 as not reasonably calculated to lead to the discovery of admissible evidence, and unduly burdensome to the extent Plaintiffs can obtain that information from some other source that is more convenient. Subject to that objection, the Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny the existence of laws the Secretary of State does not administer.

39. Montana's signature requirement--10,243 valid signatures for an independent U.S. Senate candidate in 2008--was the highest in the nation when compared to the number of votes cast in the last presidential election in the state.

By that measure, Montana's signature requirement was 2.27%. No other state had a signature requirement higher than 2.22%. Thirty-seven states had a signature requirement under 1%. Four states had no signature requirement at all. The median was .43%.

RESPONSE: The Secretary objects to Request for Admission No. 39 as not reasonably calculated to lead to the discovery of admissible evidence, and unduly burdensome to the extent Plaintiffs can obtain that information from some other source that is more convenient. Subject to that objection, the Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny the existence of laws the Secretary of State does not administer.

40. Montana's filing fee--\$1,693 for an independent U.S. Senate candidate in 2008--was also among the highest in the nation. Thirty-three states had no filing fee at all for independent candidates. Of the seventeen states that had filing fees for independent candidates, eight states had fees of \$500 or less. Only two states, Florida (\$6,772) and Georgia (\$5,079), had higher filing fees for independent candidates than Montana. Georgia's signature requirement is just more than half of Montana's requirement when compared to the total number of votes cast in the last presidential election, and the filing deadline is in July. Florida had a filing deadline in May and required no signatures at all.

RESPONSE: The Secretary objects to Request for Admission No. 40 as not reasonably calculated to lead to the discovery of admissible evidence, and unduly burdensome to the extent Plaintiffs can obtain that information from some other source that is more convenient. Subject to that objection, the Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny the existence of laws the Secretary of State does not administer.

41. Montana ranks near the bottom on state-by-state measures of personal income. According to the Census Bureau's 2007 American Community Survey, Montana's median household income of \$43,531 ranks 40th out of the 51 states plus the District of Columbia. Montana's median family income ranks 41st.

RESPONSE: The Secretary objects to Request for Admission No. 41 as not reasonably calculated to lead to the discovery of admissible evidence, and unduly burdensome to the extent Plaintiffs can obtain that information from some other source that is more convenient. Subject to that objection, the Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny the median household income of Montanans.

42. Since Montana became a state in 1889, there has been only one independent candidate for U.S. Senate in the State's 119 years--Joseph P. Monaghan

in 1936, when the petition filing deadline was in October. The State has never had an independent candidate for governor.

RESPONSE: Deny.

43. Only four states--Indiana, New Mexico, North Carolina, and South Carolina--have never had an independent candidate for Governor or U.S. Senator, and South Carolina's history of government-printed ballots only extends back to 1950.

RESPONSE: The Secretary objects to Request for Admission No. 43 as not reasonably calculated to lead to the discovery of admissible evidence, and unduly burdensome to the extent Plaintiffs can obtain that information from some other source that is more convenient. Subject to that objection, the Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny the ballot histories in other states.

44. Since 1973, when the Legislature moved the petition filing deadline from August to March, there has been only one independent candidate for *any* non-presidential statewide office on the general election ballot.

RESPONSE: Admit that Steve Kelly was the only candidate independent of qualified parties to designate himself as Independent in a non-presidential statewide office on the general election ballot. Deny to the

extent that several other statewide candidates independent of the major parties have designated themselves third-party candidates since 1973.

45. Plaintiff Steve Kelly petitioned successfully for ballot access as an independent candidate in 1994, when the petition filing deadline was in June.

RESPONSE: Admit, to the extent “petition filing deadline” refers to the date the county election administrators file the petition with the State. The candidate’s petition submission deadline was in May.

46. No independent candidates for non-presidential statewide offices have ever been able to get on Montana’s ballot when the deadline was in March.

RESPONSE: Admit that no candidates on the ballot for non-presidential statewide offices have designated themselves as Independent when the deadline was in March. Deny to the extent that several other statewide candidates independent of the major parties have designated themselves third-party candidates when the deadline was in March. Deny further that any candidates who designated themselves as Independent were unable to get on Montana’s ballot when the deadline was in March. The Secretary has made reasonable inquiry and the information her office knows or can readily obtain is insufficient to enable her to admit or deny that any candidates who designated themselves as Independent intended to get on Montana’s ballot when the deadline was in March.

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APR 06 2009

COUNSEL FOR DEFENDANT
SECRETARY OF STATE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STEVE KELLY and	)	Cause No. CV-08-25-BU-SEH
CLARICE DREYER,)	
	)	STATE'S RESPONSE TO
Plaintiffs,	)	PLAINTIFFS' SECOND SET
	)	OF REQUESTS FOR
v.	)	ADMISSIONS
)	
LINDA MCCULLOCH, in his)	
official capacity as Secretary of State)	
of the State of Montana,)	
)	
Defendant.)	

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, the plaintiffs hereby ask the defendant to respond within 30 days to these requests by admitting, for the purpose of this action only and subject to all pertinent objections

to admissibility which may be interposed at trial, the truth of each of the following statements:

REQUESTS FOR ADMISSIONS NO. 51: Ed Shields, to whom the defendant refers in her response to Interrogatory No. 5 (subparagraph 42), was an independent candidate for Lieutenant Governor in 1940--not an independent candidate for Governor in 1940.

RESPONSE: Admit.

REQUESTS FOR ADMISSIONS NO. 52: Sam Teagarden, to whom the defendant refers in her response to Interrogatory No. 5 (subparagraph 42), was a candidate of the Independent Party of Montana for U.S. Senate in 1924--not an independent candidate for U.S. Senate 1924.

RESPONSE: Admit.

REQUESTS FOR ADMISSIONS NO. 53: Thomas Hogan, to whom the defendant refers in her response to Interrogatory No. 5 (subparagraph 42), was a candidate of the Independent Democratic Party for Governor in 1900--not an independent candidate for Governor in 1900.

RESPONSE: Admit.

REQUESTS FOR ADMISSIONS NO. 54: Montana law distinguishes between independent candidates and candidates affiliated with qualified parties.

RESPONSE: Admit that current Montana law distinguishes between independent candidates and candidates affiliated with qualified parties, but deny to the extent prior Montana law did not require qualification of parties.

REQUESTS FOR ADMISSIONS NO. 55: The Independent Democratic Party was a qualified party in 1900.

RESPONSE: Admit that the Independent Democratic Party nominated candidates for office in 1900, but deny to the extent that Montana law at the time did not require qualification of parties. See Mont. Pol. Code § 1310 (1895).

REQUESTS FOR ADMISSIONS NO. 56: The Independent Party of Montana was a qualified party in 1924.

RESPONSE: Admit that the Independent Party of Montana nominated candidates for office in 1924, but deny to the extent that Montana law at the time did not require qualification in the same manner as required by current Montana law. See Mont. Pol. Code § 642 (1921).

REQUESTS FOR ADMISSIONS NO. 57: In the 1914 election for U.S. House, to which the defendant refers in her response to Interrogatory No. 5 (subparagraph 47), the eight candidates on the ballot were vying for two seats elected at large--not for a single seat.

RESPONSE: Admit.

REQUESTS FOR ADMISSIONS NO. 58: The offices of Governor and Lieutenant Governor are not a single office even though they are now elected as a slate.

RESPONSE: Admit.

REQUESTS FOR ADMISSIONS NO. 59: Through the 1972 election, Montana elected the offices of Governor and Lieutenant Governor separately.

RESPONSE: Admit.

REQUESTS FOR ADMISSIONS NO. 60: In the 1912, 1924, 1932, 1936 and 1940 elections, to which the defendant refers in her response to Interrogatory No. 5 (subparagraph 47), the offices of Governor and Lieutenant Governor were elected separately, and there were not more than seven candidates for the office of Governor or for the office of Lieutenant Governor in any of those elections.

RESPONSE: Admit.

Respectfully submitted this 1st day of April, 2009.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: 

ANTHONY JOHNSTONE
Solicitor


CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2009, an accurate copy of the foregoing State's Response to Plaintiffs' Second Set of Requests for Admissions was served on the following persons by U.S. Mail:

Mr. Bryan Sells
Senior Staff Counsel
Southern Regional ACLU
230 Peachtree Street, N.W.
Suite 1440
Atlanta, GA 30303-1513

Ms. Elizabeth L. Griffing
American Civil Liberties Union of Montana Foundation, Inc.
241 East Alter, Suite. B
P.O. Box 9138
Missoula, MT 59802-9138

DATED: April 1, 2009



ANTHONY JOHNSTONE
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

STEVE KELLY, et al.,

No. cv 08-25

Plaintiffs

vs.

BRAD JOHNSON, Montana Secretary of
State,

Defendant

DECLARATION OF RICHARD WINGER

BACKGROUND & INTRODUCTION

1. My name is Richard Winger, and I am an adult resident of California.
2. Since 1985, I have been the editor of *Ballot Access News*, a newsletter covering legal, legislative and political developments of interest to minor parties and independent candidates. In that capacity, I have researched the ballot access laws of all 50 states from 1888 through the present and have become well versed in how the ballot access laws of each state have worked historically and how they compare to each other. I am generally recognized as an expert in ballot access laws and have been qualified as such in numerous federal cases.
3. A true and correct copy of my current *curriculum vitae* is attached to this declaration as Appendix A. That document details my qualifications, including a list of all publications authored by me in the previous 10 years and a list of all other cases in which, during the previous 4 years, I testified as an expert at trial or by deposition.
4. I have been retained by the plaintiffs in this case, and I am being compensated at the rate of \$100 per hour for my time plus out-of-pocket expenses. Neither the amount of my compensation nor the fact that I am being compensated has altered or will alter my testimony in this case.

Exhibit 5

STATEMENT OF OPINIONS AND THE BASES FOR THEM

5. Montana has a long tradition of relatively lenient ballot access for minor parties, but very difficult ballot access for independent candidates.

6. The bases for this opinion are the history of ballot access laws in Montana for both types of candidate and the historical frequency with which each type of candidate has qualified for a government-printed ballot in Montana. I used the history of Montana's ballot access laws, and election returns from all states, to reach this conclusion.

History of Ballot Access Laws in Montana

7. During the period 1895 through 1969, and also during the period 1999 through the present, Montana election laws have been substantially easier for minor parties than for independent candidates.

8. The first government-printed ballot in Montana was created by the legislature in 1889.

9. When states first provided for government-printed ballots, they also had to write a law determining how candidates qualify for a place on that ballot. The original 1889 law¹ provided that any organized group which held a convention to nominate candidates could have those candidates placed on the general election ballot, simply by notifying elections officials. No petition was needed. The original 1889 law also said that an independent candidate could be put on the ballot with a petition of 100 signatures, due 30 days before the general election. That very easy procedure for minor parties remained basically unchanged (except for changes in the deadline) until 1969.

10. In 1895, the procedure for independent candidates was made considerably more difficult. An 1895 bill² raised the independent candidate petition from 100 signatures, to 5% of the winning candidate's vote for that office at the previous election. That 1895 formula still exists in current law for independent candidates other than presidential candidates.

¹ 1889 State Session Laws, p. 135 (no chapter or bill number shown).

² Montana Constitution, Codes & Statutes 1895, part 3, title 2, ch. 8, sec. 1313, p. 106.

11. The minor party procedures were made substantially more difficult in 1969³, when the legislature required the same petition for new and previously unqualified parties that it had been applying to independent candidates.

12. But, in 1999⁴, the legislature eased that petition, but only for minor parties and for independent presidential candidates. So, starting in 1999, the state reverted to its old habit that independent candidates (for office other than president) should be treated more harshly than minor parties. This is the same principle that had been embodied in the election law between 1895 and 1969.

Consequences of the Favoritism Toward Minor Parties and Against Independent Candidates

13. Not surprisingly, the tilt in Montana election laws in favor of minor parties, and against independent candidates, had consequences in terms of who qualifies for the ballot.

14. Between statehood in 1889 and the present day, there have been 50⁵ minor party candidates on the Montana ballot for Governor or U.S. Senator, but only one independent candidate for those offices. There has never been an independent candidate for Governor on the Montana ballot, and the only U.S. Senate independent was Joseph P. Monaghan in 1936. He was a Democratic member of the U.S. House of Representatives at the time, but he ran for the Senate as an independent and polled 17.9%.

15. It is very unusual for any state to have so few independent candidates for Governor and U.S. Senator. The only states that have never had any Independent candidates on a government-printed ballot for either U.S. Senator or Governor are Indiana, New Mexico, North Carolina, and South Carolina, and South Carolina's history of government-printed ballots only goes back to 1950.

³ 1969 State Session Laws, ch. 368, sec. 78 & 80, p. 1026.

⁴ House Bill 585.

⁵ Minor parties who placed nominees on the ballot for Governor were: Prohibition Party in 1892 and 1944; Socialist Party in 1900, 1904, 1908, 1912, 1916, 1924, 1928, 1932, 1936, and 1948; Communist Party in 1932, 1936, and 1940; Independent Democratic Party in 1900; Progressive Party in 1912; Farmer-Labor Party in 1924; Liberty Party in 1932; Union Party in 1936; New Reformist Party in 1968; Libertarian Party in 1984, 1988, 2000, and 2004; Green Party in 2004. Minor party candidates for U.S. Senate were: Socialist Party in 1916, 1922, 1924, 1930, 1934, 1942, and 1946; National Party in 1918; Farmer-Labor Party in 1924 and 1928; Independent Party of Montana 1924; Communist Party 1930 and 1934; Prohibition Party in 1942 and 1948; Progressive Party in 1952; Libertarian Party in 1982, 1990, 2002, and 2006; Reform Party in 1996 and 2000; Natural Law Party in 1996; and Green Party in 2002.

16. Montana procedures for independent candidates for statewide office other than president are among the most difficult such laws in the nation.

17. One basis for this opinion is that Montana requires more signatures for an independent candidate for U.S. Senate than any other state, when each state's signature requirement for independent candidates in 2008 is compared to the total number of votes cast for president in the state in the November 2004 election. In my opinion, this is the fairest and best way to compare signature requirements from state to state because the presidential election is the only context on the ballot in all 50 states. Using a state's population for comparison would skew the results, because some states have more alien residents or children (who are generally ineligible to sign petitions) than other states. The number of registered voters is a poor comparison because North Dakota has no such thing as voter registration, because Minnesota and Wisconsin never know how many registered voters they have, and because other states that have same-day registration (such as Wyoming) tend to have a small number of registered voters prior to election day because a substantial number of people do not register until election day. See the chart "2008 Petition Requirements for Independent Senate Candidates" attached to this declaration as Exhibit 1.

18. Also, Montana has the third earliest deadline in the nation for such petitions. See the attached "2008 Petition Deadlines, Independent Candidates for U.S. Senate" attached to this declaration as Exhibit 2. Note that the two states that have earlier deadlines (Ohio and Mississippi) require substantially fewer signatures than Montana does.

19. Finally, Montana filing fees are among the highest in the nation for independent candidates for U.S. Senate. See the chart "Filing Fees for Independent U.S. Senate Candidates" attached to this declaration as Exhibit 3.

20. Montana signature requirement is much higher than necessary to protect against voter confusion resulting from a crowded ballot. No more than 5,000 signatures for a statewide office are needed to protect any state against having a crowded ballot.

21. My definition of "crowded ballot" is one that has more than eight candidates for a single office. U.S. Supreme Court Justice John Harlan expressed the idea that eight candidates for a

single office does not result in a crowded ballot, in his concurrence in *Williams v Rhodes*, 393 U.S. 23 (1968) at page 47.

22. History shows that any state that required as few as 5,000 signatures (for that particular office) never had more than eight candidates on the ballot for any office, except that Ohio had nine for president in 1984 and New York had nine for president in 1996.⁶

23. Since most states are more populous than Montana, this observation is certainly true for Montana.

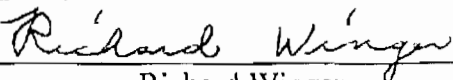
24. Montana has never had a regularly-scheduled general election for any statewide office with more than seven candidates on the ballot for that office. That most crowded ballot was in 2000, when Montana had seven candidates for president.

25. Of course, only 5,000 signatures were required in 2000 for independent candidates for president and for minor parties.

26. The information that formed the basis of this Opinion is my research into the number of candidates that have appeared on ballots of all the states, throughout the history of government-printed ballots in the United States; and my research on what the ballot access laws of each state have been, since they were first created.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Francisco, California, this 16th day of September, 2008.


Richard Winger

⁶ See article "How Many Parties Ought to be on the Ballot?" in the *Election Law Journal*, vol. 3, no. 2, p. 183, a peer-reviewed article by Richard Winger.

2008 PETITION DEADLINES, INDEPENDENT CANDIDATES (not president)

State	Deadline	Election Code Citation	Formula for Determining Date
Vt	Sept. 12	Title 17, sec. 2386	53 days before general election
ND	Sept. 5	16.1-12-04	60 days before general election
Neb	Sept. 1	32-617	date named in law
Alas	August 26	15.25.150	primary day
Or	August 26	249.722(1)	70 days before general election
Wy	August 25	22-5-307	71 days before general election
NY	August 19	Elec. Code sec. 6-158.9	11 weeks before general election
Az	August 16	<i>Nader v Brewer</i>	date Nader submitted 2004 petition
Iowa	August 15	Title 4, sec. 44.4	81 days before general election
Ky	August 12	Title 10, sec. 118.365	second Tuesday in August
Cal	August 8	Elec. Code sec. 8403	88 days before general election
Ct	August 6	9-405 & 9-453i	34 days before primary election
NH	August 6	Title 4, sec. 655:41	1 day after 5 weeks before primary
Ks	August 4	25-305	day before primary
Md	August 4	Art. 33, sec. 5-703(f)	first Monday in August
Pa	August 1	<i>Libt Pty v Davis</i> (1984)	date named in consent decree
Mass	July 29	Ch. 53, sec. 7 & 10	14 weeks before general election
Mo	July 28	115.329	last Monday in July
Hi	July 22	12-6, 12-41	60 days before primary election
Mich	July 17	168.685	110 days before general election
RI	July 17	17-14-12	54 days before primary election
Del	July 15	Title 15, sec. 3002	date named in law
Mn	July 15	204B.09	56 days before primary election
SC	July 15	7-13-351	date named in law
La	July 11	Title 18, sec. 467 & 468B	Friday after opening of qualifying day
Ga	July 8	21-2-132	second Tuesday in July
Wis	July 8	8.20(8)	second Tuesday in July
Ind	June 30	3-8-6-10	date named in law
Ill	June 23	10 ILCS 5/10-3	134 days before general election
Colo	June 17	1-4-802(1)(f)	140 days before general election
NC	June 12	163-122(1)	15 days before last Friday in June
Va	June 10	24.2-507	second Tuesday in June
Wa	June 6	29.24.050	Friday after first Monday in June
Ok	June 4	5-110	first Wednesday in June
NM	June 4	1-8-52.B	day after primary election
Ala	June 3	17-7-1(a)(2)	primary election day
SD	June 3	12-7-1, 12-7-1.1	primary election day
NJ	June 3	19:13-9	primary election day
Me	May 27	Title 21A, sec. 354.7.B	date named in law
WV	May 12	3-5-24	day before primary election
Tx	May 8	142.006	30 days after runoff primary
Fla	May 2	99.0955 & 99.061	116 days before primary election
Ark	May 1	7-7-103(b)	date named in law
Nev	April 11	293.200	25 wk days before 3 rd Mon. in May
Tn	April 3	2-5-101(1)	first Thursday in April
Id	March 21	34-708 & 34-704	10 th Friday before primary election

Chart prepared Sep. 6, 2008. Deadlines shown are for completion of petitions. In Georgia, Kentucky, Maryland, New Hampshire, Rhode Island, Texas and West Virginia, an independent candidate must file a declaration of candidacy before the petition is due. Median petition deadline is July 11.

2008 PETITION DEADLINES, INDEPENDENT CANDIDATES (not president)

State	Deadline	Election Code Citation	Formula for Determining Date
Ut	March 17	20A-9-503(1)(a)	date named in law
Mt	March 13	13-10-503	7 days before 75 days before primary
Oh	March 3	3513.257	day before primary day
Miss	January 11	23-15-785(2)	60 days before primary election

Chart prepared Sep. 6, 2008. Deadlines shown are for completion of petitions. In Georgia, Kentucky, Maryland, New Hampshire, Rhode Island, Texas and West Virginia, an independent candidate must file a declaration of candidacy before the petition is due. Median petition deadline is July 11.

2008 FILING FEES FOR INDEPENDENT U.S.SENATE CANDIDATES

STATE	PETITION REQUIREMENT OR FEE	ELECTION CODE REFERENCE	FEE AMOUNT
Ala	only primary candidates pay fee	17-16-15	0
Az	no filing fees	--	0
Ark	only primary candidates pay fee	7-7-301	0
Cal	see note at bottom	elec. code 8103,8062,8106	0
Colo	no filing fees	--	0
Ct	no filing fees	--	0
Del	only primary candidates pay fee	Title 15, §3103	0
Id	only primary candidates pay fee	34-708	0
Il	no filing fees	--	0
In	no filing fees	--	0
Io	no filing fees	--	0
Kan	only primary candidates pay fee	25-205	0
Me	no filing fees	--	0
Ma	no filing fees	--	0
Mi	no filing fees	--	0
Mn	only primary candidates pay fee	204B.03-11	0
Ms	only primary candidates pay fee	23-15-297	0
Mo	only primary candidates pay fee	115.357	0
N J	no filing fees	--	0
N M	only primary candidates pay fee	1-8-33	0
N Y	no filing fees	--	0
N D	no filing fees	--	0
Ore	only primary candidates pay fee	Title 23, §249.056	0
R I	no filing fees	--	0
S C	only primary candidates pay fee	7-13-40	0
S D	no filing fees	--	0
Tn	no filing fees	--	0
Tx	only primary candidates pay fee	Elec. code 172.024	0
Vt	no filing fees	--	0
Va	only primary candidates pay fee	24.2-521, 24.2-523	0
Wis	no filing fees	Title 2, §8.10, 8.15	0
WV	amount set forth in law	Title 2, §12-5, 12-6	\$75
Alas	amount set forth in law	15.25.050	\$100
N H	amount set forth in law	Title 4, §655:19(c)	\$100
Oh	amount set forth in law	3513.05, 3513.10	\$100
Pa	amount set forth in law	Title 25, §2872.1	\$200
Wy	amount set forth in law	22-5-208	\$200
Md	amount set forth in law	Art. 33, §5-401	\$290
Ky	amount set forth in law	Title 10, §118.255	\$500
Nev	amount set forth in law	293.193	\$500
La	amount set forth in law	Title 18, §464	\$600
Ok	amount set forth in law	Title 26, §5-112	\$1,000
Ut	fee of 1/8th of 1% of term salary	20A-9-201	\$1,270
Mt	filing fee of 1% of annual salary	13-10-202	\$1,693
Neb	filing fee of 1% of annual salary	32-608	\$1,693

Note: although California formally requires a filing fee for independent candidates, in reality it does not. That is because all independent candidates must circulate a ballot access petition in order to get on the November ballot. California also has a procedure for petitions in lieu of filing fees, which require 10,000 signatures for statewide office. But California lets the ballot access petition and the in-lieu-of-filing-fee petition be combined, so that any independent who collects enough signatures to be on the ballot has automatically (with a single petition form) also completed both types of petition.

2008 FILING FEES FOR INDEPENDENT U.S.SENATE CANDIDATES

STATE	PETITION REQUIREMENT OR FEE	ELECTION CODE REFERENCE	FEE AMOUNT
N C	filing fee of 1% of annual salary	163-107	\$1,693
Wa	filing fee of 1% of annual salary	29A.24.091	\$1,693
W V	filing fee of 1% of annual salary	3-5-8	\$1,693
Ga	filing fee of 3% of annual salary	21-2-131, 21-2-132	\$5,079
Fla	filing fee of 4% of annual salary	99.092, 99.095	\$6,772

Note: although California formally requires a filing fee for independent candidates, in reality it does not. That is because all independent candidates must circulate a ballot access petition in order to get on the November ballot. California also has a procedure for petitions in lieu of filing fees, which require 10,000 signatures for statewide office. But California lets the ballot access petition and the in lieu-of-filing-fee petition be combined, so that any independent who collects enough signatures to be on the ballot has automatically (with a single petition form) also completed both types of petition.

2008 PETITION REQUIREMENTS FOR INDEPENDENT SENATE CANDIDATES

STATE	LEGAL REQUIREMENT	ELECTION CODE REFERENCE	REQUIRED	%
Fla	no petition; just pay filing fee	99.0955	0	.00
La	no petition; just pay filing fee	Title 18, sec.464.B(1)	0	.00
Ok	no petition; just pay filing fee	Title 26, sec. 5-112 & 6-106	0	.00
Wa	no petition; just pay filing fee	not yet codified	0	.00
Tn	number stated in law	2-5-101(2)	25	.00+
Hi	number stated in law	Title 2, sec. 12-6	25	.01
NJ	number stated in law	19:13-5	800	.02
Colo	number stated in law	1-4-801	1,000	.05
Mn	number stated in law	204B.08	2,000	.07
Wi	number stated in law	Title 2, sec.8.20(4)	2,000	.07
Ohio	number stated in law	3513.257	5,000	.09
Miss	number stated in law	23-15-359	1,000	.09
Iowa	number stated in law	Title 4, sec. 45.1	1,500	.10
Utah	number stated in law	20A-9-501	1,000	.11
Vt	number stated in law	Title 17, sec. 2402(b)	500	.16
Ida	number stated in law	34-708	1,000	.17
NY	number stated in law	Chap. 17, sec. 6-142	15,000	.20
RI	number stated in law	17-14-7	1,000	.23
Ky	number stated in law	Title 10, sec. 118.315(2)	5,000	.28
Va	number stated in law	24.2-506	10,000	.31
ND	number stated in law	16.1-12-02	1,000	.32
Ma	number stated in law	Chap. 53, sec. 6	10,000	.34
Mo	number stated in law	Title 9, sec. 115.321	10,000	.37
Ks	number stated in law	25-303	5,000	.42
Pa	2% of judge winner's vote, 2007	Title 25, sec. 2911	24,666	.43
NH	number stated in law	Title 4, sec. 655:42	3,000	.44
Ill	number stated in law	10 ILCS 5/10-3	25,000	.47
Ct	number stated in law	9-453(d)	7,500	.48
Neb	number stated in law	32-618	4,000	.51
Me	number stated in law	Title 21, sec. 494.5	4,000	.54
Tx	1% of 2006 gub. vote	Elcc. Code 142.007	43,911	.59
SC	number stated in law	7-11-70	10,000	.62
Nv	1% of 2006 gub. vote	Title 24, sec. 293.200	5,746	.69
Alas	1% of 2006 vote cast	15.30.025	2,383	.76
Mi	1% of 2006 gub. vote	168.685(1)	38,024	.79
SD	1% of 2006 gub. vote	12-7-1	3,356	.86
Ark	number stated in law	7-7-103(2)	10,000	.95
Ore	1% of 2004 pres. vote	Title 23, sec. 249.735	18,368	1.00
Az	3% of registered independents	16-341E	21,759	1.08
WV	2% of 2006 US Senate vote	3-5-23	9,198	1.22
Ca	1% of registered voters, Oct. 2006	election code 8400	158,372	1.27
Ga	1% of registered voters, Oct. 2004	21-2-170	42,289	1.29
Md	1% of registered voters, Dec. 2007	Art. 33, sec. 5-703(e)	31,102	1.30
In	2% of 2006 Sec. of State vote	3-8-6-3	32,742	1.33
Del	1% of registered voters, Dec. 2007	Title 15, sec. 3001	5,674	1.51

"Requirement" shows the no. of signatures to get an independent candidate for US Senate on the Nov. 2008 ballot.

"%" means the requirement, divided by the number of votes cast for president in November 2004. Chart prepared Sep. 6, 2008. Although only two-thirds of the states have regularly-scheduled Senate elections in any particular election year, any state could have a special Senate election. The median percentage above is .43%.

2008 PETITION REQUIREMENTS FOR INDEPENDENT SENATE CANDIDATES

STATE	LEGAL REQUIREMENT	ELECTION CODE REFERENCE	REQUIRED	%
Wy	2% of 2006 US House vote	22-4-402(d)	3,868	1.59
Ala	3% of 2006 gub. vote	17-19-2(a)	37,513	1.99
NC	2% of 2004 gub. vote	163-122	69,734	1.99
NM	3% of 2006 gub. vote	1-8-51	16,776	2.22
Mt	5% of Senate winner's vote 2002	13-10-502(2)	10,243	2.27

"Requirement" shows the no. of signatures to get an independent candidate for US Senate on the Nov. 2008 ballot. " $\%$ " means the requirement, divided by the number of votes cast for president in November 2004. Chart prepared Sep. 6, 2008. Although only two-thirds of the states have regularly-scheduled Senate elections in any particular election year, any state could have a special Senate election. The median percentage above is .43%.

APPENDIX A: Richard Winger Curriculae Vitae
3201 Baker Street
San Francisco, California 94123

EDUCATION

BA, Political Science, University of California, Berkeley, 1966
Graduate study, Political Science, UCLA, 1966-67

EMPLOYMENT

Ballot Access News, Editor 1985-Present

Editor of newsletter covering legal, legislative and political developments of interest to minor parties and independent candidates. Researcher of ballot access laws of all 50 states from years 1888-present; well versed in how ballot access laws of each state work historically and how they compare to each other. Responsible for reading all statutes, regulations, legal opinions, and state attorney general opinions on rights of political parties and the publications of minor parties.

On the Editorial Board of *Election Law Journal*, published by Mary Ann Liebert, Inc., Larchmont, N.Y., since 2001.

PUBLICATIONS

Wrote a chapter or two in each of these books:

Others, Vol. 2, Third Parties During The Populist Period, by Darcy G. Richardson (2007: iUniverse, Inc., New York). Wrote the book's Appendix, "Early Ballot Access Laws for New and Minor Parties."

Democracy's Moment

edited by Ronald Hayduk and Kevin Mattson (2002: Rowman & Littlefield, Lanham, Md.)

The Encyclopedia of Third Parties in America

edited by Immanuel Ness and James Ciment (2000: M.E. Sharpe, Inc., Armonk, N.Y.)

Multiparty Politics in America

edited by Paul S. Herrnson (1997: Rowman & Littlefield, Lanham, Md.)

The New Populist Reader

edited by Karl Trautman (1997: Praeger, Westport, Ct.)

Additional articles published in these periodicals:

University of Arkansas Little Rock Law Review

Wall Street Journal

American Review of Politics

The Long Term View

University of Mass. Law Review

California Journal

Election Law Journal (two 1 articles)

Cleveland State Law Review
Chronicles Magazine
Price Costco Connection
Fordham Urban Law Journal

NATIONAL INTERVIEWS on Minor Parties, Independents, Ballots and Ballot Access

<i>NBC</i>	<i>National Public Radio</i>
<i>ABC</i>	<i>Pacifica Radio</i>
<i>CNN</i>	<i>MSNBC</i>

CASES: TESTIMONY or AFFIDAVITS (political party or candidate prevailing, or case pending)

Alaska: Libertarian Party v Coghill, state superior court, 3rd dist., 3AN-92-08181, 1992

Court issued injunction enjoining enforcement of petition deadline for minor parties

Arizona (2 cases): Campbell v Hull, 73 F Supp 2d 1081 (1999); Az. Libt. Party v Hull, superior court, Maricopa Co. 96-13996, 1996. Court ordered Secretary of State to place Libertarian Party presidential candidate on ballot.

Arkansas (3 cases): Citizens to Establish a Reform Party v Priest, 970 F Supp 690 (E.D. Ark. 1996); Green Party of Ark. v Priest, 159 F.Supp.2d (E.D. Ark. 2001); Green Party of Ark. v Daniels, U.S. District Court, 448 F.Supp 2d 1056 (E.D.Ark. 2006).

California: California Democratic Party v Jones, 530 US 567 (2000).

Colorado: Ptak v Meyer, 94-N-2250, U.S. Dist. Ct., 1994. Court ordered Secretary of State to place Libertarian legislative candidate on ballot.

Connecticut: Green Party of Connecticut v Garfield, U.S. Dist. Ct., 2008. No formal decision yet.

Florida (2 cases): Libt. Party of Fla. v Mortham, 4:96cv258-RH, U.S. Dist. Ct., N.D., 1996. Court ordered Secretary of State to place Libertarian vice-presidential candidate on ballot. Reform Party v Black, 885 So.2d 303 (Fla. 2004).

Georgia: Bergland v Harris, 767 F 2d 1551 (11th cir., 1985). U.S. Court of Appeals remanded case back to U.S. District Court. Before U.S. District Court acted, legislature substantially eased law, so case became moot.

Hawaii: Libt. Party of Hi. v Waihee, cv 86-439, U.S. Dist. Ct., 1986. Court ordered Lieutenant Governor to extend petition deadline for new parties.

Illinois: (2 cases): Nader v Ill. State Bd. of Elections, 00-cv-4401, U.S. Dist. Ct., N.D., 2000. Court ordered State Board of Elections to place candidate on ballot. Lee v Ill. State Bd. of Elections, 463 F.3d 763 (7th cir. 2006).

Iowa: Oviatt v Baxter, 4:92-10513, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put Grassroots Party candidate for Congress on ballot.

Kansas: Merritt v Graves, 87-4264-R, U.S. Dist. Ct., 1988. State did not defend three election laws and signed consent decree on independent petition deadline, requirement that independent petitions not be circulated outside of circulator's home precinct, and requirement that voters could only register in qualified parties. This case should not be confused with another by the same name decided in December, 1988.

Kentucky: Libt. Pty. of Ky. v Ehrler, 776 F Supp 1200 (E.D. 1991)

Maryland (2 cases): Dixon v Md. State Adm. Bd. of Elec. Laws, 878 F 2d 776 (1989, 4th cir.); Green Party v Bd. of Elections, 832 A 2d 214 (Md. 2003).

Nevada (2 cases): Libt Pty. of Nev. v Swackhamer, 638 F Supp 565 (1986); Fulani v Lau, cv-N-92-535, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put various minor parties on ballot.

New Jersey (2 cases): Council of 2Alternative Political Parties v Hooks, 999 F Supp

- 607 (1998); Council of Alternative Political Parties v State Div. of Elections, 781 A 2d 1041 (N.J.Super. A.D. 2001).
- New York** (3 cases): Molinari v Powers, 82 F Supp 57 (E.D.N.Y. 2000); Schulz w Williams, 44 F 3d 48 (2nd cir., 1994); Green Party of N.Y. v N.Y. State Bd. of Elections, 389 F.3d 411 (2nd cir., 2004).
- North Carolina**: Obie v N.C. Bd. of Elections, 762 F Supp 119 (E.D. 1991); DeLaney v Bartlett, 370 F.Supp.2d 373 (M.D. 2004).
- Ohio**: Libertarian Party of Ohio v Blackwell, 462 F.3d 579 (6th cir. 2006).
- Oklahoma**: Atherton v Ward, 22 F Supp 2d 1265 (W.D. Ok. 1998).
- Pennsylvania**: Patriot Party of Pa. v Mitchell, 826 F Supp 926 (E.D. 1993).
- South Dakota**: Nader v Hazeltine, 110 F Supp 2d 1201 (2000).
- Texas**: Pilcher v Rains, 853 F 2d 334 (5th cir., 1988).
- Virginia**: Libt. Pty of Va. v Quinn, 3:01-cv-468, U.S. Dist. Ct., E.D. (2001). Court ordered State Board of Elections to print "Libertarian" party label on ballot next to name of Libertarian candidates.
- West Virginia** (3 cases): State ex rel Browne v Hechler, 476 SE 2d 559 (Supreme Court 1996); Nader v Hechler, 112 F.Supp.2d 575 (S.D.W.V., 2000); McClure v Manchin, 301 F Supp 2d 564 (2003).

CASES: TESTIMONY or AFFIDAVITS (political party or candidate not prevailing)

- Alabama**: Swanson v Bennett, 490 F.3d 894 (11th cit. 2007).
- Arizona**: (2 cases) Indp. Amer. Party v Hull, civ 96-1240, U.S. Dist. Ct., 1996; Browne v Bayless, 46 P 3d 416 (2002).
- Arkansas** (2 cases): Langguth v McKuen, LR-C-92-466, U.S. Dist. Ct., E.D., 1992; Christian Populist Party v Sec. of State, 650 F Supp 1205 (E.D. 1987).
- California**: Socialist Workers Party v Eu, 591 F 2d 1252 (9th cir., 1978).
- Florida** (2 cases): Fulani v Smith, 92-4629, Leon Co. Circuit Court, 1992; Libertarian Party of Fla. v State of Fla., 710 F 2d 790 (11th cir., 1983).
- Georgia** (2 cases): Libertarian Party of Ga. v Cleland, 1:94-cv-1503-CC, U.S. Dist. Ct., N.D. (1994); Esco v Secretary of State, E-53493, Fulton Co. Superior Court, 1998.
- Idaho**: Nader v Cenarrusa, cv 00-503, U.S. Dist. Ct., 2000.
- Illinois**: Libt Party v Rednour, 108 F 3d 768 (7th cir., 1997).
- Kansas**: Hagelin for President Committee v Graves, 804 F Supp 1377 (1992).
- Maine** (2 cases): Maine Green Party v Diamond, 95-318, U.S. Dist. Ct., 1995; Maine Green Party v Secretary of State, 96-cv-261, U.S. Dist. Ct., 1996.
- Maryland** (2 cases): Ahmad v Raynor, R-88-869, U.S. Dist. Ct., 1988; Creager v State Adm. Bd. of Election Laws, AW-96-2612, U.S. Dist. Ct., 1996.
- Missouri**: Manifold v Blunt, 863 F 2d 1368 (8th cir. 1988).
- New Hampshire**: Werme v Gov. of N.H., 84 F 3d 479 (1st cir., 1996).
- North Carolina**: Nader v Bartlett, 00-2040, 4th cir., 2000.
- Ohio**: Schrader v Blackwell, 241 F 2d 783 (6th cir., 2001).
- Oklahoma** (3 cases): Rainbow Coalition v Okla. State Elec. Bd., 844 F 2d 740 (1988); Nader v Ward, 00-1340, U.S. Dist. Ct., 1996; Clingman v Beaver, __US__(May 2005).
- Oregon**: Libt Party v Roberts, 737 P 2d 137 (Ore. Ct. of Appeals, 1987).
- Texas** (2 cases): Texas Indp. Party v Kirk, 84 F 3d 178 (5th cir., 1996); Nat. Comm. of U.S. Taxpayers Party v Garza, 924 F Supp 71 (W.D. 1996).

Virginia: Wood v Meadows, 207 F 3d 708 (4th cir., 2000).

West Virginia: Fishbeck v Hechler, 85 F 3d 162 (4th cir., 1996).

Wyoming: Spiegel v State of Wyoming, 96-cv-1028, U.S. Dist. Ct., 1996.

QUALIFIED EXPERT WITNESS

Fishbeck v Hechler, 85 F 3d 162 (4th cir. 1996, West Virginia case)

Council of Alternative Political Parties v Hooks, 999 F Supp 607 (1998, N.J.)

Citizens to Establish Reform Party v Priest, 970 F Supp 690 (E.D. Ark, 1996)

Atherton v Ward, 22 F Supp 2d 1265 (W.D.Ok. 1998)

Calif. Democratic Party v Jones, 530 US 567 (2000)

Swanson v Bennett, not reported, U.S. Dist. Ct., m.d.Ala. (02-T-644-N)

Beaver v Clingman, 363 F 3d 1048 (10th cir., 2004, Okla. case)

Green Pty v N.Y. Bd. Elec., 267 F Supp 2d 342 (EDNY 2003), 389 F.3d 411 (2nd 2004)

Lawrence v Blackwell, 430 F.3d 368 (6th cir. 2005)

In all cases in which I was presented as an expert, the opposition accepted that designation, except in the Green Party of New York case. The U.S. District Court ruled that I qualify as an expert. See headnote #1 at page 342, and footnote nine on page 350. The 2nd circuit agreed, 389 F.3d 411 (2004), at 421.

SPEAKING ENGAGEMENTS: Colleges and Scholarly Meetings

Panel of New York City Bar Association, 1994. Ballot access.

Amer. Political Science Assn., nat. conventions of August 1995 and August 1996. Papers.

Capital University School, law school class, Columbus, Ohio, 1996. Guest lecturer.

Cal. State U., course in political science, Hayward, 1993 and 1996. Guest lecturer.

San Francisco City College, course in political science, 1996 and 1997. Guest lecturer.

Providence College, R.I., Oct. 1997, seminar on ballot access.

Harvard U., JFK School of Gov't, Oct. 18, 1995, guest lecturer, ballot access.

Voting Integrity Project national conference, Apr. 1, 2000, speaker on ballot access.

Center for Voting & Democracy nat. conference, Nov. 30, 2003, speaker on ballot access.

Robert Dole Institute of Politics, U. of Kansas, one of 5 panel members, Oct. 25, 2007.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STEVE KELLY and CLARICE
DREYER,

Plaintiffs,

v.

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

Defendant.

Case No. 2:08-cv-25-SEH

REPORT OF C.B. PEARSON

Expert Witness

Charles Bernard (C.B.) Pearson, II
2810 Woodland Avenue
Missoula, Montana 59802

Education

Randolph Macon College	1972-1974
University of Northern Colorado	B.A., 1978, Interdisciplinary Studies
University of Montana	M.S. 1996, Environmental Studies

RELEVANT QUALIFICATIONS

Initiative and Referendum Experience

2008 Campaign Manager – Initiative 159 – In-Home Care Petition Drive – Petition Drive Completed by Initiative Withdrawn By Sponsors

2004 Campaign Manager – Initiative 149 – Tobacco Tax Increase - Petition Drive and Fall Campaign

2002 Campaign Manager – Initiative 146 – Fund Tobacco Prevention Program, CHIP and Insurance - Petition Drive and Fall Campaign

Campaign Co-Manager – Constitutional Referendum 35 - Establish Trust with Tobacco Settlement Dollars - Petition Drive (initial petition) and Fall Campaign

1996 Campaign Manager – Initiative 125 – Prohibit Corporate Funding of Ballot Issues - Petition Drive and Fall Campaign

1994 Campaign Manager – Initiative 120 – Prohibit Corporate Funding of Ballot Issues
Petition Drive – failed to make it on ballot – short of signatures

1994 Campaign Manager – Initiative 118 – Limit Campaign Contribution Amounts -
Petition Drive and Fall Campaign

1990 Campaign Manager – Constitutional Referendum 20 – (Common Cause) –
Annual Legislative Session – Fall Campaign

1988 Campaign Manager - Initiative 113 (Common Cause) – Beverage Container
Deposit – Petition Drive and Fall Campaign

Expert Witness

Montana Chamber of Commerce vs. Argenbright and I-125 Proponents Committee
No. CV 97-6-H-CCL, US District Court, District of Montana, Helena division.
National Voting Rights Institute. Defend I-125 – Corporate Ban On Ballot Issue
Contributions.

Montana Right to Life et. al. vs. Eddelman et al. No. CV 96-165-BLG-JDS US District
Court, District of Montana, Billings Division.
State of Montana Attorney General's Office. Defend I-118 – Montana's Candidate and
PAC Contribution Limits Law.

Political Reform Research Reports

Big Money and Montana's Ballot Campaigns – A Study of Campaign Contributions to
Montana's Ballot Elections from 1982 to 1994. 1996. With Hilary Doyscher.

Gaining Influence – A Special Common Cause/Montana Study on PAC Contributions to
the 1990 Montana Legislative Candidates Including Candidate and PAC Use of the In-
kind Loophole. 1991. With Marguerite Burns and John McCarthy.

“For the People...” – A Common Cause/Montana Report on the Necessity of Reform in Montana Politics. 1990. A comprehensive look at reform of campaign contributions laws, lobbying reporting laws, and ethics laws in Montana.

Campaign Contributions to the 1988 Montana Legislative Races: The Effect of Montana’s PAC Limit Law. 1989. With Terri McBride.

A Common Cause/Montana Study On: Out-of-State Contributions to the 1980 Campaign Against Initiative 87 – The Bottle Bill. 1988.

Montana Legislative Experience

1989 – Lobbyist for Common Cause/Montana

1991 – Lobbyist for Common Cause/Montana

2001 – Grassroots Lobbying Campaign Manager for the American Lung Association

2003 – Grassroots Lobbying Campaign Manager for the American Cancer Society

2005 – Grassroots Lobbying Campaign Manager for Protect Montanan Kids – a coalition of the American Cancer Society, the American Lung Association and the American Heart Association

Work Experience

Senior Vice-President and Montana Office Director M+R Strategic Services
1999 – Current

Environmental Organizing Semester - Green Corps – University of Montana
1995 – 1998

Pearson & Associates, 1994 – 1998

Clark Fork Coalition, 1992 – 1994

Common Cause/Montana 1988 – 1992

Fund for Public Interest Research 1987 – 1988

California Public Interest Research Group – 1985 – 1986

Montana Public Interest Research Group – 1982 – 1985

Ralph Nader – 1980 – 1982

Colorado Public Interest Research Group – 1977 – 1980

RESEARCH QUESTIONS

Background

Montana law requires Montana individuals to meet a three part criteria to be placed on the ballot as an independent candidate.

First the individual must collect valid signatures equal to 5% of the number of voters who voted for the candidate who won in the position the independent candidate is seeking.

Second the individual must collect those signatures by a prescribed date, currently 80 days before the primary election which is held the first Tuesday in June.

If the individual filing is indigent they must collect signatures from 5% of the voters who voted for the candidate who won (in the position the independent candidate is seeking) in lieu of the filing fee if they wish to have this fee waived. They then must collect another 5% of the voters who voted for the candidate who won to file for the ballot. In effect they must conduct two petition campaigns, one in lieu of the filing fee and one to qualify for the ballot. If they are using the petition in lieu of a filing fee the petition must be filed four weeks *earlier* than the current time line used for filing for the ballot as an independent candidate.

Is the number of signatures required by Montana individuals to be placed on the ballot as an independent candidate a heavy burden?

Practical Applications of the Law: The Signature Gathering Process

Signature-gathering campaigns have been a hallmark of my professional career since 1977. From majority petition drives on college campuses to support the creation of a new campus organization, to public policy petition drives for specific issues and formal legally defined initiative petition processes, I have participated, coordinated and advised on dozens of campaigns. I have taught and trained people on effective signature gathering techniques since the late 1970's.

Since 1988 I have been either the campaign manager or co-campaign manager for eight different initiative signature gathering campaigns with the most recent being in 2008. In my current occupation my company and I are hired to run signature gathering campaigns for a variety of organizations and causes.

Collecting signatures on a petition is an underrated and difficult task. Some say anyone will sign a petition; others dismiss the amount of time, coordination and effort required to compete a signature gathering drive. With a legal petition the effort is further amplified since only valid signatures, compiled in a prescribed format on a prescribed timeline and submitted in a specific format are acceptable, or the proposed initiative fails and there is no recourse for reconsideration.

For my profession I develop the components of a signature campaign, determine the effort necessary for success and will either complete the task, help guide, or co-manage the effort. I have run a range of petition drives from efforts mostly completed by volunteers with management oversight to a predominantly paid signature gathering effort with minimal volunteer participation.

What would it take to qualify an independent candidate such Steve Kelly for the ballot?

As spelled out in Montana code the requirement is 5% of those who voted for the winning candidate in the last election for the office. In this case the office was won by Max Baucus 2002 with a vote total of 204,853 (See Appendix A). Steve Kelly would need to generate 10,243 valid signatures to be on the ballot.

$$204,853 \times .05 = 10,243$$

Assuming that 25% of the signatures will be disqualified the Steve Kelly campaign would need to generate at least 12,803 signatures gross to have some degree of confidence to qualify for the ballot. The figure of 25% is a safe number but is not the safest number the Kelly campaign could set as a goal to be successful.

In the initiative campaigns I have run approximately 17% of the signatures are not valid for some reason (i.e. can not read the name, signature not the same, not eligible to vote, etc.) assuming 25% of them are invalid creates a buffer. If there's time it's better to go for assuming 30% will be invalid. The price of not enough valid signatures cannot be overemphasized; one signature short and the campaign is over before it begins.

Total number of signatures needed to hope to qualify for the ballot:

$$10,243 \times 1.25\% = 12,803$$

The criteria for a valid signature is a signature from a verified eligible Montana voter whose name appears on a petition certified by the state of Montana, and whose signature has been attested to be accurate when submitted by the signature gatherer whose petition has been notarized with an affidavit prescribed by the state of Montana. Local county election offices make the final determination is a signature is valid.

Based on my experiences with collecting signatures in Montana for various campaigns over a twenty year period the average a person will collect over time is 15 signatures per hour, assuming they have access to eligible Montana voters in public venues and

locations to be able to ask them to sign the petition. Weather, access and the method of signature gathering can reduce the hourly rate to 12 signatures or less per hour. Collecting the 12,803 signatures required for the Kelly campaign would mean having to spend between 853 hours to 1,066 hours, at an estimated average rate of 15 to 12 signatures per hour, per person.

Access to public venues is an important part of this process; if the Kelly campaign can not get access to a farmer's market, public event or busy sidewalk with a constant flow of pedestrians who are eligible voters then the next most effective method to collect valid signatures may be going door-to-door to solicit individuals. My practical experience of completing door-to-door efforts yields an average of 12 signatures per hour.

This method can only work in urban areas where housing is close together and there is access to apartments. Again, weather is a critical issue; harsh plunging cold temperatures make door-to-door work extremely difficult and slow, hindering the petitioning process and resulting in fewer signatures per hour. In short, access to public locations matters for access to eligible votes. Less direct access and harsher conditions mean slower results making extra effort needed to achieve the goal within the time frame allowed.

Models for the amount of work required to qualify Kelly for the ballot.

Fifteen Signatures per Hour Model – High Range:

12,803 signatures divided by an average of 15 signatures per hour = 854 hours of work.

854 hours of work is equal to approximately 21.4 weeks for one person working 40 hours per week

Twelve Signatures per Hour Model – Low Range:

12,803 signatures divided by an average of 12 signatures per hour = 1,067 hours of work.

1,067 hours of work is equal to approximately 26.7 weeks for one person working 40 hours per week

Thirteen and One-half Signatures per Hour Model – Middle Range:

12,803 signatures divided by an average of 13.5 signatures (the mid point between the average of 15 signatures the high amount and the average of 12 the estimated low amount) per hour = 948 hours of work

948 hours of work is equal to 23.7 weeks of work for one person working forty hours per week.

A Model Engaging Staff

Assume Mr. Kelly is able to get 24 volunteers to help him collect the required number of signatures. In total 25 individuals will work on the effort.

12,803 signatures divided by 25 people = 512 signatures each or between 34.1 (15 signatures per hour average) to 42.7 hours (12 signatures per hours average) each with an average amount of work per person of 37.9 hours.

Of course these volunteers or even paid staff could be used to complete the signature gathering effort but the amount time necessary to complete the effort is significant and can not be taken lightly. No matter the method the time commitment is significant; critical time that could be used to develop and conduct the campaign would instead be spent on gathering signatures to meet requirements.

But the work requirements do not end there. These numbers simply reflect the on-the-ground signature gathering time required. There are an additional logistical and management tasks.

Additional effort would be necessary to:

- 1) Oversee the recruitment, training and management of any volunteers;
- 2) Oversee the appropriate filing of all petitions;
- 3) Identify and manage petitioning locations so volunteers are effective; and
- 4) Managing the affidavit and notary public requirements for the filing signatures.

These tasks add additional hours. Time and money are precious commodities in any campaign, while it is hard to predict the exact additional hours due to experience and the different amount of efficiency within each campaign; it is a safe estimate to say that an additional commitment of at least 10% of the original time estimate would be required to address these needs.

Models for the amount of work required to qualify Kelly for the ballot including management of the effort.

Model One – the High Range: 12,803 gross signature goal collected at 15 signatures per hour would result in 854 hours of work plus an additional 10% of time (85.4 hours) for logistical and management time for a total time commitment of **939.4** hours.

Model Two – the Low Range: 12,803 gross signature goal collected at 12 signatures per hour would result in 1,067 hours of work plus an additional 10% of time (106.6 hours) for logistical and management time for a total time commitment of **1,173.7** hours.

Model Three – the Middle Range: 12,803 gross signature goal collected at 13.5 signatures per hour would result in 948 hours of work plus an additional 10% of time (94.8 hours) for logistical and management time for a total time commitment of **1,042.8** hours.

Operating A Volunteer Run Petition Drive

Volunteer management and involvement requires the development of infrastructure of support to recruit, train and manage people. Volunteer run petition drives for initiatives often fail. An existing group with a seasoned core of active volunteers has a greater chance of success than a new group or campaign that has no experience with petitioning.

Most volunteers will limit their time to between four and eight hours per week. Two hours here, a half a day there, to a healthy involvement level of about eight hours per week; but not all volunteers are created equal, some may like to talk to voters in a public setting and collect signatures while others may only want to do office tasks or phone calls. All volunteers won't be up to the rigors of signature collecting.

Assuming Kelly is able to build a core group of volunteers to collect signatures of 24 people we assume the time each person would take between the different models is as follows:

15 signatures per hour per person on the average

Assuming a person could complete their goal of 512 signatures, and they would work for 34.1 hours, assuming an average of 6 hours of volunteer time per week per person, the effort would take at least 5.7 weeks – not including administrative or management time.

12 signatures per hour per person on the average

Assuming a person could complete their goal of 512 signatures, they would work for 42.7 hours, assuming 6 hours of volunteer time per week per person, the effort would take at least 7.1 weeks – not including administrative or management time.

13.5 signatures per hour per person on the average

Assuming a person could complete their goal of 512 signatures, they would work for 37.9 hours, assuming 6 hours of volunteer time per week per person, and the

effort would take at least 6.3 weeks – not including administrative or management time.

Volunteer management is a challenging task. A petition drive of this importance and with the legal requirements would need to be effectively managed. The effort would not be free of costs no matter the level of volunteer involvement and management.

Operating a Paid Signature Drive

The national range for the costs of collecting a signature varies from two to four dollars per signature – which includes all of the overhead, staffing and operations costs. It is not simply the cost paid to collect a signature on a petition by a single staff member. Costs for legal signatures also represent the absorbed costs of gathering signatures which may end up not being verifiable.

Within the past 12 months I managed two significant petition drives in Montana. In the most recent the petition effort was a statement of support that any age group from 14 up could sign and was not legally binding. My company fielded staff, recruited and managed volunteers and printed materials for the 50,000 signature campaign in concert with the nonprofit organization which was our client. In this case the cost per signature averaged \$1.85 per signature for the effort we conducted for them. We did not pay our staff who did collect signatures a per signature amount. This cost also did not include the support, media and materials that the organization provided – just the expertise, staffing and management skill my firm brought to the effort.

The second was for an initiative campaign where we were paid approximately \$4.50 per signature for staffing, management, support services, web site, etc to collect a total of 30,000 signatures. Again we did not pay per signature. This was the calculated cost of the overall campaign and did not include the support provided by the client. Initiative signatures must reach a different level of legal requirements – each with a strict timeframe. In this case the timeline was very short, pushing up the cost.

In the various petition campaigns I have been involved with we have not paid per signature collected. We pay a fee, an hourly wage and some sort of bonus for achieving community goals for signatures as well as for the recruitment of volunteers.

If my company were to prepare a proposal for Kelly to undertake this campaign to collect 12,803 signatures for just one petition I would estimate the proposal to be somewhere in the range of \$25,000 to \$50,000 to include all of the associated costs for such an effort.

The timeframe and the time of year to collect signatures would be key influences in determining this estimated price proposal.

Is the timing of the signature gathering by Montana individuals to be placed on the ballot as an independent candidate a heavy burden?

Practical Applications of the Law: The Signature Gathering Process and Time of Year

Petitions must be submitted, at least one week before the deadline for filing which is set out in statute as 75 days before the date of the primary election. The effective date for that would be 80 days before the primary. In the case of 2008 that date was March 13th 2008.

Gaining access to qualified voters in Montana is difficult and becomes more so every year. Venues for talking to eligible voters to ask for their signature are generally limited to public places. The lists of sites include:

- Public sidewalks usually in a downtown area (weather permitting);
- Occasionally in front of a grocery store or department store such as a K-mart but that is dependent upon the approval of management (weather permitting);
- There is limited access at Universities; most require approval or student group sponsorship
- In front of county courthouses (weather permitting)
- Senior centers (permission required)
- Farmer's market (seasonal)
- Outdoor concerts (seasonal)
- Concert lines (weather permitting and permission is often required)
- The sidewalks in shopping centers (permission is often required)
- Polling sites (primary day, school board elections – although more and more school districts are going to a mail-in ballot) inside mostly but sometimes forced outside
- Big events such as fairs, rodeos, pow-wows (if you can get permission or if there is a public right-of-way, also weather permitting)
- Door-to-door work – either houses or apartments

Permission to petition at any location is always a fight between the people who want to petition and the interests who believe they control the site. Refusal for access to petition is common across all potential locations – even on public property petitioners will have to argue for access. There is no small amount of irony in this – access to petitioning eligible voters is a huge challenge in Montana.

Examples of locations where signature collecting is not allowed or extremely limited – and where it would be an enormous help for involving voters in the civic processes – follow below:

- Post Office entrances
- Hospitals – including Veteran's Hospitals
- Inside Sporting Events

- Inside Shopping Malls
- Inside or in entrances to Grocery Stores
- Inside or in entrances to Department Stores
- Inside Driver's Licenses Bureaus
- Inside County Courthouses with Motor Vehicle Registration offices
- Inside High School Sporting Events
- Inside Concerts or other Events
- Lines for movies when the theatre is an isolated building

Completing a signature gathering drive which needed to be submitted in March severely limits adequate access to eligible voters given the current restrictions. Based upon my experience and calculations to complete a petition drive due in mid March (March 13th) the campaign to collect signatures would need to begin in September. That timeframe is because: 1) winter weather; 2) access to eligible voters; and, 3) the holiday months of November and December.

The venues – already limited– are also hindered further by the cold weather and poor access. This would be a much more difficult petition drive to complete than the legal petitions I have been involved in for the last twenty years. Legal initiative petitions are not due until the third week of June, offering several months of better weather when voters may be accessed in outside settings.

The current petition timeline for initiative petitions has several advantages for access to petitioning that would not be availed to the independent candidate attempting to run for office:

- 1) Access to voters on public sidewalks and other outdoor locations as the weather changes.
- 2) Access to voters during the school board elections (although this venue is diminishing with mail-in ballots.)
- 3) Access to voters during the primary election the first Tuesday in June.
- 4) Access to voters at outside events

A final, critical challenge also exists – as a professional who works with volunteers on a regular basis I would be deeply concerned about the significant time between the date the petition effort must be concluded and the onset of the fall campaign season. This schedule would create a two-campaign dynamic, requiring mustering volunteers for two separate campaigns which could significantly reduce volunteer involvement and commitment.

The heavy commitment required by the petition drive itself could result in reducing the volunteers who were willing and able to spend time devoted to the actual campaign in the fall by requiring them to start the fall a full year before the election. This 12 to 14 month commitments are far more than most volunteers could manage. A schedule of heavy involvement and then a pause prior to a fall campaign could mean a heavy drop off of volunteers.

Is the cost to be placed on the ballot as an independent candidate a heavy burden?

If an independent candidate is indigent and willing to collect an additional 5% of the number of voters who voted for the candidate who won in the position the independent candidate is seeking then the filing fee is waived.

A total of two actual petitions are then required by the indigent candidate – each with a 5% of signatures needing to be completed. To use this provision the first petition (5% of signatures in lieu of a filing fee) must be filed four weeks earlier than the timeline for the second petition (of 5% of signatures) needed to file for the ballot. It is unclear whether the signatures can be used twice – from the first petition (in lieu of a filing fee) for the purpose of qualifying for the second petition. It is also unclear if an indigent, independent candidate can ask an eligible voter for two signatures at one time – one for the petition in lieu of the filing fee and one for the actual requirement to file for the ballot.

In the Kelly scenario the due date would have been February 14th for the 5% petition to waive the fee.

Under the provision of Montana law where the potential candidate can waive the filing fee the candidate would face a daunting task – it would appear there is a need to complete two petitions for a total of 25,000 gross signatures during the Montana winter months.

Two Petitions Drives Completed at Two Separate Times

Assuming that there were two separate petition drives the amount of work required to complete both petitions would be prohibitively expensive and overwhelming.

If we use the median model of 13.5 signatures per person per hour, you would have to collect 12,803 signatures involving at least 1,042.8 hours for the petition simply to **waive the fee** during the harshest weather in Montana when there is very limited access to eligible voters.

Then you would have to conduct a second petition drive to collect 12,803 signatures involving 1,042.8 hours to earn a place on the November ballot, also during the harshest weather in Montana when there is very limited access to eligible voters

Model Three – Middle Range: 12,803 gross signature goal collected at 13.5 signatures per hour would result in 948 hours of work plus an additional 10% of time (94.8 hours) for logistical and management time for a total time commitment of **1,042.8** hours.

Total amount of signatures required would be 25,606 with a work commitment of approximately 2,085.6 hours.

Two Petitions Completed On the Same Time Schedule and Carried at the Same Time

Using the median Model Three – but assuming it would be possible to carry both petitions at the same time – the projected workload would be 1,355.64 hours of work.

There would be additional time and work required to complete both petitions by the same effort. Based upon prior experience I estimate an additional time commitment of 30% over the base time commitment of 1,042.8 hours.

OPINIONS

Is the number of signatures required by Montana individuals to be placed on the ballot as an independent candidate a heavy burden?

Yes, the amount of time it would take to make it on the ballot is excessive and burdensome. In my professional experience it would take between 938 to 1,142 hours of petitioning and management time to qualify for the ballot.

Is the timing of the signature gathering by Montana individuals to be placed on the ballot as an independent candidate a heavy burden?

Yes. The early deadline is a very practical burden. Winter is the most difficult time to collect signatures for a petition. From November to March in Montana it is nearly impossible to collect signatures on the scale required to be on the statewide ballot. There are limited venues to speak to eligible voters and obtain the required number of signatures.

Important times to access eligible voters such as School Board Elections and the June Primary are eliminated as options under this requirement. People going to the polls are one of best opportunities to talk to eligible voters with clear access in an efficient and professional manner.

Is the cost to be placed on the ballot as an independent candidate a heavy burden?

Yes, particularly for those candidates who are indigent. The petition requirements – over 25,606 signatures - and the poor timing are enormous barriers.

Is the combination of requirements to be placed on the ballot as an independent candidate a heavy burden?

Yes, the combination of these requirements is an enormous burden.

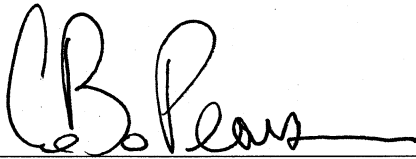
Is a burden this heavy necessary to kept frivolous candidates from appearing on the ballot?

No, more appropriate requirements could be established that screens for frivolous candidates but that does not overly burden Montanans who can and should be able to make a contribution to the political debate.

Compensation

I am receiving compensation of \$80 per hour for my time.

Pursuant to 28 U.S.C. §1746 I declare under penalty of perjury that the foregoing is true and correct. Date the day 6 February 2009 in the city of Missoula, Montana.

A handwritten signature in black ink, appearing to read "C.B. Pearson", written over a horizontal line.

Signature

Charles Bernard (C.B.) Pearson, II



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Professional Experience

M & R Strategic Services, Washington, D.C. (Missoula Office) 1999 to current
Senior Vice-President

Client History: American Cancer Society - Northwest Division, American Heart Association, American Lung Association of the Northern Rockies, National Prostrate Cancer Coalition, Campaign For Tobacco-Free Kids, National Environmental Trust, Montana Attorney General's Office, Susan G. Komen Foundation, Reno-Sparks Indian Colony, Nevada Tobacco Prevention Coalition, University of Montana Tobacco Use Prevention Resource Center and Montana Social Norms Project.

Pearson & Associates, Missoula, MT 1994-1998
Owner

Own and operate consulting service for nonprofit organizations specializing in issue development and campaign management. Also provide civic skills training, database programs for the Macintosh, fund-raising services and mediation. Expert witness on campaign finance reform in Montana for two lawsuits. Clients have included: Americans Discuss Social Security, American Lung Association of the Northern Rockies, Green Corps, M & R Strategic Services, Campaign for Tobacco Free Kids, Northern Rockies Action Group,

Fund for Public Interest Research, MontPIRG, MontPIRG and Common Cause/Montana. Campaign Manager for Initiative 118 in 1994 and Initiative 125 in 1996.

Environmental Organizing Semester, Missoula, MT 1995-98 *Director and Lead Instructor*

Designed, promoted and directed an innovative 12-credit course in the Environmental Studies Department at the University of Montana. The course was a one of a kind intensive immersion of students into the civic skills needed to do public interest environmental work. The course also brought international and national environmental leaders to Missoula to speak to the class and conduct workshops. The goal of the course was to train and encourage new environmental organizers.

Clark Fork-Pend Oreille Coalition, Missoula, MT 1992-1994 *Executive Director*

Responsible for the overall management of a regional citizens group dedicated to protecting and restoring water quality in the Clark Fork-Pend Oreille watershed. Major issue areas: Superfund, mining, nutrient pollution, dams, river and lake habitat. Supervised a staff of six located in Missoula and Butte, Montana and Sandpoint, Idaho.

Common Cause/Montana, Helena, MT 1988-1992 *Executive Director*

Responsible for the overall management of a statewide citizens group dedicated to good government. Author of numerous studies on campaign finance, lobbying disclosure, and the initiative process. Lead lobbyist for the 1989 and 1991 Legislative sessions.

Fund for Public Interest Research, Boston, MA 1987-1988 *Assistant Organizing Director*

Responsible for hiring, training, and supervising ten field organizers in ten different states from Rhode Island to Georgia.

California PIRG, Berkeley, CA 1985-1986 *Executive Director*

Responsible for the overall management of college student-run citizen group. Hired, trained and supervised a staff of 18 employees.

Montana PIRG, Missoula, MT
Executive Director

1982-1985

Responsible for the overall management of college student-run citizen group.
Responsible for the hiring, training and supervision of a staff of three and five student interns.

Ralph Nader, Washington, D.C.
Western Field Organizer

1980-1982

Responsible for working with college student organizing committees and established PIRGs in the Midwest, Rocky Mountain West and the West Coast.
Responsible for the training of student leaders, assisting with campaign planning and overall development of PIRG organizations in 15 states. Arranged a western speaking tour for Mr. Nader, and organized fund-raisers.

Colorado PIRG, Ft. Collins & Greeley, CO
Senior Organizer/Acting Executive Director

1977-1980

Responsible for all campus organizing and the overall management of a college student-run citizen group.

Education

Masters of Science in Environmental Studies - **University of Montana**, 1996.
Bachelors of Arts -Interdisciplinary Work in Environmental Studies - **University of Northern Colorado**, 1978.
Randolph-Macon College, 1972-74.

Awards

Who's Who Among America's Teachers, 1998.
Who's Who Among America's High School Students, 1972.

References

Jonathan Motl, Helena, MT
Ralph Nader, Washington, D.C.
William Wasserman, Washington, D.C.

APPENDIX A

2002 STATEWIDE GENERAL CANVASS - NOVEMBER 5, 2002
COMPILED BY SECRETARY OF STATE BOB BROWN

Voting Information					United States Senate					United States House					Justice #1		Justice #4		PSC District 1		PSC District 2	
County	Polling Places	Precincts	Registered Voters	Votes Cast	Turnout	Democrat	Libertarian	Green	Republican	Libertarian	Democrat	Republican	Democrat	Republican	Non-Partisan	Non-Partisan	Non-Partisan	Non-Partisan	Republican	Democrat	Republican	
Beverhead	16	17	5,855	3,260	56%	1,587	97	65	1,378	74	690	2,042	1,804	2,497	437	1,281	1,442	1,846	325	1,869		
Big Horn	19	18	7,323	4,082	56%	2,970	67	106	835	106	2,042	1,804	2,618	1,110	1,657	1,846	325	1,869				
Blaine	8	10	4,167	2,503	60%	1,704	51	37	578	57	978	1,347	1,872	380	936	1,089						
Broadwater	3	5	3,192	1,914	60%	1,028	60	47	693	56	387	1,381	1,466	210	733	863						
Carbon	11	16	7,229	4,424	61%	2,737	148	102	1,306	125	1,194	3,018	3,229	636	1,773	2,016						
Carter	11	11	907	659	73%	238	11	5	342	2	68	553	426	84	283	162						
Cascade	38	38	48,894	26,177	54%	17,491	867	584	6,378	682	8,208	16,837	21,309	2,699	6,775	16,014						
Chouteau	18	18	3,938	2,684	68%	1,697	71	51	766	35	357	2,034	2,102	279	906	1,250						
Custer	14	15	7,021	4,148	59%	2,679	112	62	1,114	74	1,029	2,962	3,310	465	1,657	1,986						
Dawson	10	10	6,595	3,725	56%	2,286	75	35	1,199	71	1,116	2,427	2,968	388	1,364	1,571						
Deer Lodge	5	11	6,461	3,906	60%	3,169	83	93	439	117	2,165	1,485	2,878	596	1,024	2,087						
Fallon	4	6	1,811	1,332	74%	667	21	7	561	16	204	993	828	171	456	441						
Fergus	15	15	8,385	5,288	63%	2,452	155	109	2,252	118	1,091	3,854	3,753	846	2,458	2,016						
Finland	44	41	53,175	27,257	51%	13,011	989	511	11,069	871	7,072	18,198	19,710	3,764	9,283	13,031						
Gallatin	41	49	51,444	28,220	49%	14,498	900	777	8,091	827	8,339	15,545	18,405	2,919	7,651	11,613						
Gardiner	8	8	914	615	67%	323	15	5	221	8	60	517	379	101	359	119						
Glacier	8	17	7,821	3,516	45%	2,619	88	32	656	75	1,734	1,621	2,491	728	1,063	1,839	1,307	2,044				
Golden Valley	2	2	641	456	71%	223	13	12	185	11	69	370	317	92	213	169						
Granite	3	4	2,207	1,379	62%	604	68	27	585	54	273	976	980	175	425	564						
Hill	21	24	9,922	5,448	55%	3,819	153	106	1,215	116	1,356	3,274	4,240	716	1,767	2,645	1,611	3,693				
Jefferson	8	11	7,499	4,498	60%	2,593	162	98	1,440	112	1,337	2,951	3,509	575	1,353	2,416						
Judith Basin	4	4	1,676	1,192	71%	716	32	18	361	22	207	926	884	157	500	456						
Libby	17	22	17,472	9,535	55%	5,145	314	215	3,568	277	3,004	6,064	7,134	1,380	3,064	4,819						
Libby & Clark	36	46	35,600	23,645	66%	15,543	615	601	5,764	547	8,440	13,986	18,914	2,878	5,808	14,944						
Lincoln	5	4	1,335	1,066	80%	661	37	21	295	20	172	845	788	97	297	479						
Madison	15	16	12,286	6,987	57%	3,428	200	105	3,026	210	1,686	4,869	4,960	1,061	2,282	2,835						
McCone	8	8	5,347	3,211	60%	1,624	113	51	1,291	89	666	2,391	2,733	433	1,191	1,297						
McPherson	5	5	1,277	795	62%	416	21	11	310	26	143	612	622	100	358	316						
Mineral	6	6	2,688	1,424	53%	724	51	29	569	53	369	932	991	226	408	652						
Missoula	33	80	76,671	34,529	45%	22,111	1,191	1,219	8,806	1,152	15,083	17,681	26,694	3,949	8,773	20,161						
Musselshell	3	6	3,107	1,928	62%	1,018	61	39	719	42	354	1,458	1,308	314	797	809						
Park	10	15	11,224	6,300	56%	3,657	185	175	2,661	173	2,072	3,921	4,496	1,015	2,356	2,751						
Pendleton	1	1	397	261	66%	132	19	3	91	9	37	207	169	60	154	62						
Phillips	9	11	2,997	1,868	62%	1,024	50	25	685	28	283	1,505	1,428	230	798	886						
Pondera	10	11	4,155	2,640	64%	1,557	76	36	794	52	567	1,884	1,988	319	974	1,150						
Powder River	10	10	1,349	983	73%	472	28	16	414	25	122	789	645	124	400	317						
Powell	9	12	3,783	2,456	65%	1,349	70	40	893	61	571	1,719	1,883	310	826	1,175						
Pringle	2	4	965	701	73%	390	10	6	264	19	137	522	502	85	263	264						
Ravalli	14	18	26,802	14,160	53%	6,640	457	289	6,270	380	3,539	9,918	10,532	1,943	4,799	6,397						
Richland	13	13	6,899	3,686	53%	2,166	52	23	1,341	68	993	2,498	2,806	485	1,690	1,104						
Rosebud	9	14	6,584	3,148	48%	2,244	50	26	722	52	1,277	1,681	2,109	583	1,037	1,373						
Sandwich	14	14	5,917	3,069	52%	2,138	85	61	720	86	1,102	1,814	2,197	575	1,117	1,510						
Sheridan	11	11	7,294	4,181	57%	2,068	140	71	1,785	151	1,150	2,733	3,126	542	1,429	1,612						
Silver Bow	21	29	23,874	12,597	53%	9,881	301	360	1,692	278	724	2,484	2,402	569	1,288	1,763						
Southern	8	8	5,637	3,358	60%	1,888	110	60	1,207	63	724	2,484	2,402	569	1,288	1,763						
Sweet Grass	5	5	2,854	1,545	54%	699	50	13	711	26	283	1,220	1,080	220	714	564						
Teton	5	5	4,236	2,924	69%	1,734	106	45	893	102	658	2,111	2,249	321	1,046	1,308						
Town	9	12	3,346	2,055	61%	1,225	85	45	594	52	444	1,494	1,464	340	732	898						
Treasure	3	3	630	430	68%	266	16	7	127	13	81	330	298	91	208	166						
Valley	11	9	6,005	3,623	60%	2,520	79	38	845	73	1,053	2,359	2,797	432	1,257	1,425						
Walla Walla	4	5	1,425	850	56%	491	19	13	290	21	174	642	623	143	392	340						
Whitman	2	2	835	579	69%	331	11	5	191	10	134	384	373	66	172	209						
Yellowstone	54	86	88,334	48,097	54%	29,750	1,508	1,053	13,796	1,170	14,432	31,627	37,184	6,623	16,666	25,069						
Total	694	862	624,548	340,772	54%	204,833	10,420	7,653	103,611	8,988	108,233	214,100	256,716	45,281	110,109	170,110						

Laurie Crutcher - RPR

406-442-8262

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STEVE KELLY and CLARICE	) Cause 2:08-CV-25-SEH
DREYER,)
Plaintiffs,)
v.)
LINDA McCULLOCH, in her)
official capacity as)
Secretary of State of the)
State of Montana,)
Defendant.)

30(b)(6) DEPOSITION OF ALAN MILLER

Heard at the Secretary of State Conference Room

State Capitol Building

Helena, Montana

March 23, 2009, 9:20 a.m.

March 24, 2009, 11:00 a.m.

PREPARED BY: LAURIE CRUTCHER, RPR

COURT REPORTER, NOTARY PUBLIC

P.O. BOX 1192

HELENA, MT 59624

(406) 442-8262

LAURIE CRUTCHER, RPR
406-442-8262

Exhibit 7

A P P E A R A N C E S:

APPEARING FOR THE PLAINTIFFS:

MR. BRYAN SELLS (By Telephone)

Attorney at Law

American Civil Liberties Union Foundation, Inc.

230 Peach tree Street, NW, Suite 1440

Atlanta, GA 30303

MS. JENNIFER A. GIUTTARI

Attorney at Law

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P.O. Box 9138

Missoula, MT 59802

APPEARING FOR THE DEFENDANT:

MR. ANTHONY JOHNSTONE, Solicitor

MR. STUART SEGREST, Assistant Attorney General

Montana Attorney General's Office

215 North Sanders

P.O. Box 201401

Helena, MT 59620-1401

MR. JORGE QUINTANA

Staff Attorney

Montana Secretary of State

State Capitol, Room 260

P.O. Box 202801

Helena, MT 59620-2801

ALSO PRESENT: Lisa Kimmet

Anthony Jackson

1 I N D E X

2

3 WITNESS PAGE

4 ALAN MILLER

5 Examination by Mr. Sells. 10

6

7 E X H I B I T S

8 Exhibit No. Marked:

9 Deposition Exhibit A 12

10 Deposition Exhibit B 114

11 Deposition Exhibit C 133

12 Deposition Exhibit D 137

13 Deposition Exhibit E 138

14 Deposition Exhibit F 147

15 Deposition Exhibit G 156

16 Deposition Exhibit H 157

17 Deposition Exhibit I 158

18

19

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25

1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 (Mr. Segrest not present)

5 (Mr. Jackson not present)

6 MR. SELLS: Let's go ahead and go on the
7 record then.

8 MR. JOHNSTONE: Bryan will start with
9 the 30(b)(6) deposition?

10 MR. SELLS: Yes.

11 MR. JOHNSTONE: And we have agreed that
12 the 30(b)(6) deposition of the Secretary of
13 State's Office may be continued to allow -- There
14 is both personal depositions and 30(b)(6)
15 depositions that involve the same witnesses.
16 We've agreed to be flexible with that with the
17 30(b)(6) deposition coming first, and I'll leave
18 it to Bryan for where he'll want to go after the
19 designations of the first witness, Alan Miller,
20 are covered. Do you want me to go into the
21 designations now, Bryan?

22 MR. SELLS: Sure.

23 MR. JOHNSTONE: Based on Plaintiffs'
24 30(b)(6) notice, they have made eight
25 designations. The first, the factual basis for

1 each denial asserted in the Defendant's answer,
2 I'll go through and make our designations, and
3 I'll finish with certain objections to the
4 designations that our designations will be subject
5 to.

6 First, the factual basis for each denial
7 asserted in Defendant's answer, the Secretary of
8 State's Office will designate Alan Miller for
9 that.

10 Second, the factual basis for each
11 affirmative defense asserted in the Defendant's
12 answer, the Secretary of State will designate Alan
13 Miller.

14 Third, the Defendant's discovery
15 responses, the Secretary of State will designate
16 Alan Miller.

17 Fourth, the State interests the
18 Defendant may assert to justify Montana's ballot
19 access scheme for independent candidates for
20 non-presidential offices, and how the scheme
21 advances those interests, the Secretary of State
22 will designate Lisa Kimmet.

23 Fifth, communications between the
24 Defendant and any third parties regarding
25 Montana's ballot access scheme for independent

1 candidates for non-presidential offices, the
2 Secretary of State will designate Alan Miller.

3 Sixth, communications between the
4 Defendant and anyone whom the Defendant may call
5 as a witness at trial, the Secretary of State will
6 designate Alan Miller.

7 Seventh, the administration of Montana's
8 ballot access scheme for independent candidates
9 for non-presidential offices, the Secretary of
10 State will designate Alan Miller.

11 Eighth, the history of Montana's ballot
12 access scheme for independent candidates for
13 non-presidential offices, the Secretary of State
14 will designate Alan Miller.

15 All of these designations are subject to
16 the following objections. First, that the
17 designations are unduly vague, do not describe
18 with reasonable particularity the matters for
19 examination as required by Rule 30(b)(6).

20 Second, the designations call for legal
21 conclusions and other matters outside of the scope
22 of discovery.

23 Third, the designations call for certain
24 information such as election records, other
25 historic documents, or other contention discovery,

1 among other things, for which 30(b)(6) is unduly
2 burdensome discovery given the availability of a
3 more appropriate method, such as interrogatories
4 and document production.

5 Finally, the State reserves the right to
6 present evidence on the designated matters outside
7 of the Secretary of State's knowledge. We have
8 disclosed such evidence, and anticipate putting
9 that in; but again, this is a 30(b)(6) of the
10 Secretary of State, and as you're aware, there are
11 going to be other matters that we will present on
12 some of those subjects at trial or on summary
13 judgment, and we reserve the right to do so
14 notwithstanding the designations of the Secretary
15 of State's witnesses. That's it.

16 MR. SELLS: Okay. I meant No. 5. Is
17 Lisa Kimmet No. 5?

18 MR. JOHNSTONE: Alan Miller is No. 5.
19 Lisa is only No. 4.

20 MR. SELLS: Okay. Great.

21 MR. JOHNSTONE: And we may be able to be
22 flexible if there is something that comes up in
23 terms of decisions in a particular question where
24 Lisa might be the right person, and Alan explains
25 that. So with your permission, we'd have Lisa be

1 available for that after Alan's deposition.

2 MR. SELLS: That's fine with me. On
3 your objections, they sounded to me mostly like
4 boiler objections, but if there is something
5 specific that we can work through to make this
6 deposition go more smoothly, I'm willing to do
7 that.

8 MR. JOHNSTONE: I think that some of the
9 objections obviously with respect to the vagueness
10 may be mitigated by the questions, but some of
11 these are quite broad questions, and the task of
12 preparing any set of witnesses, even the two
13 witnesses we have, to cover all of these issues
14 and all of the discovery I think strains 30(b)(6).

15 So in terms of the vagueness, again, you
16 haven't indicated which of the answers or
17 discovery responses or other discovery requests
18 that you're inquiring about, so it's awfully hard
19 to prepare anyone to be answerable to all of those
20 things.

21 The legal conclusions and the other
22 matters outside the scope of discovery, again,
23 there is going to be some things in the discovery
24 responses that simply are going to be, in terms of
25 requests for admissions and in terms of a lot of

1 the law things, they're going to be outside the
2 scope of any 30(b)(6) witness's proper scope of
3 knowledge.

4 And finally, we know you have follow up
5 Interrogatories. We've made documents available
6 with respect to that third objection. I don't
7 anticipate that you're going to go through in
8 excruciating detail things that you already have
9 answers on or that you have documents about.

10 As long as the questions are subject to
11 those objections, I don't anticipate raising a lot
12 of nitpicky things throughout the deposition, but
13 I do want it on the record that any testimony
14 under 30(b)(6) is subject to those objections.

15 MR. SELLS: Okay. That's fine. And on
16 the last point, if I start asking questions that
17 you think are answered in the documents,
18 particularly in this newest round of documents,
19 feel free to interrupt me. I don't want to be
20 unnecessarily duplicative here. So you at this
21 point know better than I do what's in the
22 documents that you just disclosed, so that may be
23 able to save us a little time.

24 MR. JOHNSTONE: That's fine. I think
25 probably Designations 5 and 6, those

1 communications, that's largely what that stack of
2 paper is, so those would probably be right away
3 something you can probably wait for until you've
4 had a chance to review them.

5 MR. SELLS: Okay. Great. Well, shall
6 we swear the witness.

7 ALAN MILLER,
8 Having been first duly sworn, was examined and
9 testified as follows:

10

11 EXAMINATION

12 BY MR. SELLS:

13 Q. Good morning, Mr. Miller. My name is
14 Bryan Sells, and I represent the Plaintiffs Steve
15 Kelly and Clarice Dreyer in this action against
16 the Secretary of State, who is now Linda
17 McCulloch. And I assume you've met Jen Giuttari
18 who is with the ACLU of Montana there in the room.

19 A. Yes.

20 Q. Okay. Great. Have you ever been
21 deposed before?

22 A. No.

23 Q. Well, there are just a couple of ground
24 rules we should go over to speed things up.

25 Number one, your responses have to be verbal, and

1 in Montana is not often harsh?

2 MR. JOHNSTONE: You can answer that,
3 Alan.

4 A. Again, I would get to the lack of
5 specificity on "often harsh."

6 Q. (By Mr. Sells) Okay. So just to be
7 clear, you do not have any factual basis for your
8 denial?

9 MR. JOHNSTONE: Objection. You can
10 answer.

11 A. I personally do not have a factual basis
12 for that denial.

13 Q. (By Mr. Sells) In your capacity as the
14 designee of the Secretary of State of the State of
15 Montana, you have no factual basis whatsoever for
16 the denial of the factual allegation that the
17 winter in Montana is often harsh; is that correct?

18 MR. JOHNSTONE: Objection.

19 A. Yes.

20 Q. (By Mr. Sells) Let's focus on the first
21 part of that paragraph. As I understood your
22 answer a moment ago, it was you deny that the
23 scheme effectively requires potential candidates
24 to collect a large number of signatures during the
25 often harsh Montana winter. I didn't hear you

1 that's something that Lisa Kimmet may wish to
2 discuss.

3 Q. (By Mr. Sells) I think you're right,
4 that topic No. 4 is something that is related to
5 that, so I'll just go on and ask her.

6 A. Okay.

7 THE WITNESS: Would this be a good time
8 to take a break?

9 MR. SELLS: That would be fine.

10 (Recess taken)

11 MR. SELLS: Back on the record.

12 Q. (By Mr. Sells) I want to go back to the
13 answer, and on Page 4 of the answer are listed
14 five affirmative defenses, and the first one is as
15 follows -- Mr. Miller are you with me?

16 A. Yes.

17 Q. It says, "The Complaint fails to state a
18 claim upon which relief can be granted." What's
19 the factual basis of that affirmative defense?

20 MR. JOHNSTONE: Objection. The same
21 ones I've stated earlier.

22 A. I don't know the factual basis for that
23 affirmative defense.

24 Q. (By Mr. Sells) What investigation did
25 you do in preparation for this deposition to learn

1 the factual basis for that affirmative defense?

2 A. None that I'm aware of.

3 Q. As you sit here today, are you aware of
4 any factual basis for the first affirmative
5 defense?

6 MR. JOHNSTONE: Same objection.

7 A. No.

8 Q. (By Mr. Sells) No. 2, the second
9 affirmative defense says as follows: "Plaintiffs
10 lack standing to challenge a law that has not been
11 applied to Mr. Kelly." What is the factual basis
12 for that affirmative defense?

13 MR. JOHNSTONE: Same objection. You can
14 answer.

15 A. I believe the factual basis to that is
16 that Mr. Kelly has not submitted documentation to
17 run for the United States Senate as an
18 independent.

19 Q. (By Mr. Sells) Is there any other
20 factual basis for that affirmative defense?

21 MR. JOHNSTONE: Same objection.

22 A. Not that I'm aware of.

23 Q. (By Mr. Sells) And what investigation
24 did you do into any other possible factual bases
25 for that affirmative defense?

1 A. The investigation was that in our
2 paperwork, there are no independent filing
3 documents from Mr. Kelly as an independent for
4 United States Senate.

5 Q. But in terms of any other factual basis,
6 did you do an investigation to determine whether
7 there was any other factual basis for the
8 affirmative defense?

9 A. Not that I'm aware of.

10 Q. So as you sit here today, that's the
11 only factual basis that you're aware of for this
12 affirmative defense?

13 MR. JOHNSTONE: Same objection.

14 A. Yes, that I'm aware of.

15 Q. (By Mr. Sells) The third affirmative
16 defense says, "Plaintiffs' claim is moot." What
17 is the factual basis for that affirmative defense?

18 MR. JOHNSTONE: Objection. Same
19 objection.

20 A. I believe that factual basis is that the
21 election has passed.

22 Q. (By Mr. Sells) Okay. Is there any
23 other factual basis for that affirmative defense?

24 A. Not that I'm aware of.

25 Q. Elections occur, elections for statewide

1 offices occur every two years; is that right?

2 A. Yes. For certain statewide offices,
3 yes.

4 Q. And so Mr. Kelly's issue with the ballot
5 access scheme is something that is capable of
6 repetition, correct?

7 MR. JOHNSTONE: Objection. Calls for a
8 legal conclusion and lacks foundation.

9 Q. (By Mr. Sells) Mr. Miller, can you
10 answer that?

11 A. Could you state the question again?

12 Q. Yes. I'm wondering if Mr. Kelly's
13 complaint about the ballot access scheme could
14 come up again in the next election.

15 MR. JOHNSTONE: Objection.

16 A. I suppose it could or it might not.

17 Q. (By Mr. Sells) But it is capable of
18 coming up every election cycle, right?

19 MR. JOHNSTONE: Objection.

20 A. Conceivably.

21 Q. (By Mr. Sells) The fourth affirmative
22 defense is as follows: "Plaintiffs' claim is not
23 ripe for adjudication." What is the factual basis
24 for that affirmative defense?

25 MR. JOHNSTONE: Objection. Same

1 objection.

2 A. I don't know the factual basis for that
3 affirmative defense.

4 Q. (By Mr. Sells) And what investigation
5 did you do in preparation for this deposition here
6 today into the factual basis for that affirmative
7 defense?

8 A. None that I'm aware of.

9 Q. And so as you sit here today, you're not
10 aware of any factual basis for that affirmative
11 defense?

12 MR. JOHNSTONE: Same objection.

13 A. No.

14 Q. (By Mr. Sells) And the fifth
15 affirmative defense is as follows: "Plaintiffs'
16 claim is barred by the doctrine of laches." What
17 is the factual basis for that affirmative defense?

18 MR. JOHNSTONE: Same objection.

19 A. I'm not aware of the factual basis for
20 that affirmative defense.

21 Q. (By Mr. Sells) And what investigation
22 did you do in preparation for this deposition here
23 today to investigate the factual basis for that
24 affirmative defense?

25 A. None that I'm aware of.

1 Q. So as you sit here today, you're not
2 aware of any factual basis for that affirmative
3 defense?

4 MR. JOHNSTONE: Same objection.

5 A. No.

6 MR. SELLS: I want to ask you next about
7 the Interrogatories, the responses, Secretary of
8 State's responses to Interrogatories. Jen, do you
9 have a copy of those?

10 MS. GIUTTARI: I do. (Provides
11 document) Do you need it marked as an exhibit?

12 MR. SELLS: I don't think so.

13 Q. (By Mr. Sells) Mr. Miller, you signed
14 those Interrogatories on Page 11; is that correct?

15 A. That is correct.

16 Q. And did you read the Interrogatory
17 responses before you signed?

18 A. Yes.

19 Q. And as far as the Secretary is
20 concerned, everything in those Interrogatories is
21 true and correct?

22 A. Yes. I believe there may have been some
23 clarifications later, but I'm not certain about
24 that.

25 Q. I'm sorry. Can you say that again?

1 that. Have you sent me one? Is it in this packet
2 or anything like that?

3 MR. JOHNSTONE: It's not in that packet.
4 We've been working on preparing for the
5 depositions, but we still intend to get you those
6 updates. And I think I believe what Alan
7 discussed as clarifications to some of the
8 Interrogatories referred to some of the responses
9 to the Interrogatories and Requests for
10 Admissions, for example, on the electoral history.
11 But those are still in process.

12 MR. SELLS: Okay. Well, I'll try not to
13 get bogged down too much, and if I'm going over
14 something that you know you're going to answer
15 more completely, then jump in.

16 MR. JOHNSTONE: Sure.

17 Q. (By Mr. Sells) Let's start by looking
18 at Request for Admission No. 18.

19 A. (Examines document)

20 MR. JOHNSTONE: And I guess are you
21 going to ask for the factual basis of this
22 admission?

23 MR. SELLS: Well, for the denial. I'm
24 going to ask whether and to what extent the
25 request misstates the law.

1 MR. JOHNSTONE: Okay. And per your
2 request we will, in terms of what is 18 through
3 24, I guess, or 23, the things dealing with the
4 history of the law, we object to those to the
5 extent they obviously call for a legal conclusion,
6 but also we intend to respond to all of those.

7 And I can't remember the exact details,
8 but I can tell you, if it helps, that our position
9 is that your description there is basically
10 correct. I can't think of any exceptions we take
11 to that. And so our aim in our supplemental
12 responses would be to, as we discussed, stipulate
13 or as appropriate admit to your discussion of the
14 history of the laws.

15 MR. SELLS: Okay. I would characterize
16 these as legislative facts, but that's fine. I'll
17 skip over them then.

18 Q. (By Mr. Sells) I guess the next one
19 then to talk about is 25. Mr. Miller, do you have
20 that one in front of you? It's on Page 7 and 8.

21 A. I do.

22 Q. What is the basis, the factual basis for
23 the Secretary of State's denial of that request
24 for admission?

25 MR. JOHNSTONE: I'm going to object to

1 this line of discovery as duplicative to the
2 extent we've already explained the basis for those
3 admissions in our Interrogatories. You can
4 answer.

5 A. Could you restate, say your question
6 again?

7 Q. (By Mr. Sells) Okay.

8 MR. SELLS: And Anthony, I see that some
9 of these are explained, and what I'm going to be
10 asking Mr. Miller to do is to elaborate on what is
11 in your Interrogatory response. So it might help
12 Mr. Miller to have the Interrogatories response
13 handy.

14 MR. JOHNSTONE: Okay. Thank you. Those
15 would be in --

16 MR. SELLS: Page 5 of your response to
17 my Interrogatories, First Set of Interrogatories.

18 MR. JOHNSTONE: Okay. I think he's got
19 both of those in front of him now.

20 A. Okay. The denial is based on -- that a
21 statewide candidate can gather signatures from
22 residents of counties other than the county in
23 which the candidate is gathering signatures.

24 Q. (By Mr. Sells) Okay. Can you explain
25 to me what that means?

1 MR. JOHNSTONE: He's just taking some
2 time to read the scope of the denial.

3 MR. SELLS: That's fine.

4 A. Our denial says, "A statewide candidate
5 therefore has to have at least one set of
6 petitions for each county in which the candidate
7 gathers signatures." And I think maybe it would
8 help to just kind of lay out that process and see
9 if this is just a matter of semantics, or if it's
10 an issue.

11 The person, for example, goes to, say, a
12 county fair, and gathers petition signatures.
13 They could have one set of petitions there. And
14 people would come by, and if those people are,
15 say, Lewis & Clark County residents, say that the
16 person is gathering signatures here in Lewis &
17 Clark County, and a person comes by and is from
18 Lewis & Clark County and wants to sign that
19 petition, they could do so, and the signature
20 gatherer would only need that one set of
21 petitions.

22 If for example there is people from five
23 different counties at the county fair, then the
24 individual gathering signatures could have a copy
25 that's just for signatures from individuals within

1 whatever other county that person is from.

2 So for example, a person who wants to
3 sign who is from Lewis & Clark County would sign a
4 petition that's marked for Lewis & Clark County at
5 the bottom; the person who wants to sign as a
6 resident of Cascade County would sign a different
7 sheet of paper that would be for Cascade County;
8 so that at the time when those signatures are
9 submitted, the Lewis & Clark County petition
10 signatures would go to the Lewis & Clark County
11 elections office, and the Cascade County petitions
12 would go to the Cascade County elections office.

13 So I don't know if that clarifies the
14 process. I think the denial was that a statewide
15 candidate therefore has to have at least one set
16 of petitions for each County in which the
17 individual gathers signatures. The individual --

18 Like I say, I think that's more of a
19 wording difference. It is true that a statewide
20 candidate can gather signatures from residents of
21 counties than the county in which the candidate is
22 gathering signatures, just by having different
23 pieces of paper.

24 Q. (By Mr. Sells) Do you know how many
25 counties there are in Montana?

1 A. 56.

2 Q. So if I'm going to a large event, like a
3 County Fair or a sporting event or something like
4 that, I might need as many as 56 sets of
5 petitions? By set, I mean a petition that has a
6 particular county name on it.

7 A. Yes. Conceivably you're going to -- You
8 may want to have more than one set of petitions.
9 You wouldn't necessarily need 56. I suppose
10 that's conceivable, but I don't know that -- I've
11 not heard of anyone that actually carries 56 sets
12 of petitions to any event.

13 Q. But let's, to use your example, let's
14 say I'm in Lewis & Clark County at a fair, and so
15 I'm going to have a set of petitions that are for
16 people who live in Lewis & Clark County, right?

17 A. Yes.

18 Q. And let's also say that I have a set of
19 petitions for people who live in Silver Bow
20 County.

21 A. Yes.

22 Q. That would be two sets of petitions.
23 And so if someone walks up to me and says, "I'm
24 from Silver Bow County," they would sign the
25 Silver Bow County petition. If they walk up and

1 they say that, "I'm from Lewis & Clark County,"
2 they sign the Lewis & Clark County petition,
3 right?

4 A. Yes.

5 Q. And if someone walks up to me, and
6 they're from a county that I don't have a petition
7 for yet, I'd have to essentially create one with a
8 blank form or something like that?

9 A. Yes. You would write down the name of
10 the county that they reside in at the bottom of
11 the blank form.

12 Q. So as a petitioner, if I'm out there --
13 a signature gatherer, if I'm out there collecting
14 signatures, I have to ask people what county
15 they're registered to vote in before they can
16 sign, right?

17 A. You wouldn't technically have to ask
18 them, but that would be advisable so that the
19 people that are signing each county's petitions
20 are only residents of that county, yes.

21 Q. And what happens if someone from Cascade
22 County signs a petition that says Lewis & Clark on
23 the bottom of it?

24 A. Lewis & Clark County would get that, and
25 they would only certify the signatures from the

1 residents that are residents of Lewis & Clark, or
2 the signers that are residents of Lewis & Clark
3 County.

4 Q. As a practical matter, does that mean
5 that the Cascade County signer's signature doesn't
6 get counted?

7 A. Yes.

8 Q. And if I'm at a big event again, and I'm
9 using a clip board, for example, I've got to have
10 a lot of sheets of paper, and shuffle them around
11 in order to get people to sign; isn't that right?

12 A. I'm not aware of all practices that are
13 used out there, but people probably do have a
14 number of petition sheets that they can put
15 different county names on in case people aren't
16 just from the county in which they're gathering
17 signatures.

18 Q. Do you dispute that that has added a
19 layer of administrative hassle to the petition
20 gathering process?

21 MR. JOHNSTONE: Objection.

22 A. I would say that it adds a different
23 piece of the process. I don't know that I'd
24 characterize it as a hassle. It is different than
25 if a person were able to gather all of the

1 signatures on single sheets, but that applies to
2 all signature gatherers; and also any signature
3 gatherer is going to have multiple pages -- not
4 any -- but in general, I believe they have
5 multiple signature pages just to gather multiple
6 signatures.

7 Q. (By Mr. Sells) Does Montana have a
8 centralized voter registration data base?

9 A. Yes.

10 Q. Is that centralized voter registration
11 data base different from the one used by county
12 auditors?

13 A. In Montana, just to clarify, county
14 Clerks and Records are generally the county
15 election administrators. County auditors is not
16 the term that we use in Montana.

17 Q. Okay. I'm sorry about that. I
18 misspoke. I've spent all my time in South Dakota
19 where they're called county auditors. So do
20 county clerks use that same data base?

21 A. Yes. There are exceptions in the case
22 of -- sometimes a county might not use the data
23 base. Well, they may not certify their petitions
24 using the paperwork that comes through the data
25 base, but there's very few counties that do that.

1 So in general, yes, counties use the data base for
2 certifying petitions.

3 Q. And there is no reason why that couldn't
4 be done centrally at either the Secretary of
5 State's office or distributed back in the county
6 clerk's offices, right?

7 A. Well, there is some issues with that.
8 The petitions, when they're submitted, there is a
9 process where sometimes counties have entered the
10 voter registration cards by the time those come
11 in, and sometimes they haven't.

12 So that would have to be coordinated
13 carefully, so that individuals in one county,
14 where maybe it took a little longer to enter the
15 voter registration cards, wouldn't be
16 disadvantaged, versus those where the county got
17 the voter registration cards in right away. But I
18 believe it's technically possible for that to
19 occur.

20 Q. Is it possible for the county clerk in,
21 let's just say Lewis & Clark County, to use the
22 centralized data base to verify the signature of a
23 Cascade County resident?

24 A. Assuming a few things, that the Cascade
25 County elections office had entered the voter

1 registration information and the signature of that
2 individual into the data base, and assuming that
3 the law was changed to permit that.

4 Q. I want to ask you about the first
5 assumption. Is that a pretty reasonable
6 assumption, that the voter's information is
7 entered into the data base?

8 A. Yes. Again, all of the information for
9 each registered elector is entered. There might
10 be some counties that are still working on getting
11 the signature scanned, because that's a little
12 different process. But in general, yes, that's
13 accurate, that a county could get that signature
14 and registration information even if the
15 individual was not a registered elector in that
16 county election administrator's county.

17 Q. I'm not sure I fully understand your
18 answer. Are you saying that there are some
19 counties that haven't yet fully participated, who
20 aren't yet fully participating in the centralized
21 data base, or are you saying that there are some
22 voter registration cards that may have come in
23 very recently that aren't in the data base?

24 A. I believe the first statement is true to
25 a very small extent, and the second statement is

1 more accurate, that counties may not have entered
2 their voter registration cards in by the time
3 another county would go in to certify a signature
4 from that county, if that were legally possible.

5 Q. Can you tell me approximately what
6 percentage of the state's registered voters are
7 fully in the data base and could therefore be
8 checked by remote locations?

9 A. I couldn't say for certain, but I mean
10 the data base is very up to date, very small time
11 lags. Maybe 95 to 99 percent are in there fully.

12 Q. And tell me a little bit about the
13 history of this data base. How did it come about,
14 when did it get up and running, and that sort of
15 thing.

16 A. Well, it was part of the mandate of the
17 Help America Vote Act, also referred to as HAVA,
18 and the State first implemented it in early 2006,
19 and so it was available for elections in 2006.
20 During that period of time, some counties ran two
21 systems. Some put very little information into
22 the data base. It was a very busy election
23 season. But all counties had access to it.

24 And over time, counties that have done
25 more and more of their work in Montana VOTES, to

1 the extent that the great majority of them do all
2 their voter registration work in Montana VOTES.
3 That's the statewide data base.

4 Q. Is that an acronym for something?

5 A. Montana VOTES?

6 Q. Yes.

7 A. It was never formally made an acronym.
8 It's just V-O-T-E-S, in all caps, and there is no
9 periods in between it.

10 Q. I was just curious about that last
11 point. And using the Montana VOTES system, the
12 Secretary of State could also check signatures for
13 statewide candidates, correct?

14 A. If the laws permitted us to do so. Yes,
15 I believe so.

16 Q. There are no technological barriers that
17 require one petition per county -- or that's not
18 the right way to phrase it -- but that require
19 that each county only certifies the voters of that
20 particular county?

21 A. I'm not aware of any.

22 Q. Do you know what the purpose of the
23 requirements under Montana law that candidates
24 submit their -- statewide candidates submit their
25 petitions to county election officials is?

1 MR. JOHNSTONE: Objection.

2 A. I'm not aware. Before the statewide
3 data base, everything was -- each county had their
4 own set of registered voters, and the law hasn't
5 changed since that data base came into effect.

6 Q. (By Mr. Sells) I'd like to move to
7 Request for Admission 27, and the Secretary of
8 State's denial of that, which is also referenced
9 in the Secretary of State's Responses to the
10 Plaintiffs's First Interrogatories at Page 5.
11 Would you take a look at that, and I'm going to
12 ask you then to explain the Secretary of State's
13 denial.

14 A. (Examines documents)

15 MR. JOHNSTONE: No. 27?

16 MR. SELLS: Yes.

17 A. (Examines document) Okay. Just to
18 clarify, our denial is, "Deny that the deadline
19 for filing petitions with an indigency statement
20 is four weeks prior to the filing deadline for
21 non-indigent independent candidates." Do I have
22 that correct? Is that --

23 Q. (By Mr. Sells) Well, that's what the
24 response says.

25 A. In our --

1 MR. JOHNSTONE: There is not a question.

2 THE WITNESS: I'm not sure of the
3 question. Could you state --

4 Q. (By Mr. Sells) What is the factual
5 basis for denying that the deadline for filing
6 petitions with an indigency statement is four
7 weeks prior to the filing deadline for
8 non-indigent candidates?

9 MR. JOHNSTONE: Objection.

10 A. As our response indicates, the filing
11 deadline is established by Montana Code Annotated
12 Section 13-10-503. That filing deadline is March
13 -- or was in 2008 one week prior to the March 20th
14 filing deadline, and again, with the clarification
15 that the one week deadline is just for the
16 signatures. And then the final filing deadline
17 was the March 20th.

18 The procedure for certifying signatures
19 is under 13-27-303/304, but the deadline for
20 independent candidates to actually file is one
21 week prior to the candidate filing deadline for
22 their signatures, and on that candidate filing
23 deadline for the rest of their paperwork.

24 Q. (By Mr. Sells) I guess I still don't
25 understand when the filing deadline is for people

1 who want to have the filing fee waived as an
2 indigent candidate.

3 A. An indigent candidate who is an
4 independent would have to file by the deadline
5 established in 13-10-503. The procedure is under
6 13-27-303/304, but the filing deadline for an
7 independent is, or was in 2008, for signatures was
8 March 13th.

9 Q. What does the procedural section say
10 about indigent candidates and this filing fee?

11 A. I'd have to refer to it.

12 Q. Do you have it in front of you?

13 A. Yes.

14 Q. Why don't you do that.

15 A. Okay. It's quite lengthy.

16 MR. JOHNSTONE: Could you be more
17 specific, Bryan?

18 MR. SELLS: Yes. My impression is that
19 the procedural section requires indigent
20 candidates to hand in their signatures much
21 earlier, and if that's not correct, I want to know
22 about that.

23 MR. JOHNSTONE: Okay. Well, I'd object
24 to the extent you're asking him to restate the
25 statute. He's provided the basis on which the

1 Secretary of State maintains that the deadline for
2 indigent independents is the same for all
3 independents.

4 MR. SELLS: And I guess from his answer,
5 it sounds to me like we're dealing with a semantic
6 issue.

7 MR. JOHNSTONE: I guess --

8 MR. SELLS: I'm just trying to cut
9 through that.

10 MR. JOHNSTONE: So what's your question?

11 Q. (By Mr. Sells) When must an indigent
12 candidate hand in signatures?

13 A. Well, if an indigent candidate is an
14 independent candidate, then the filing deadline is
15 established by 13-10-503.

16 Q. Does the certification procedure require
17 as a practical matter the candidate to turn in
18 signatures earlier?

19 A. Our position is that the filing deadline
20 is March -- or in 2008 was March 13th for the
21 signatures, and March 20th for the final
22 documentation.

23 MR. JOHNSTONE: Bryan, is the semantics
24 issue because of the earlier discussion? You want
25 clarification that when they say the filing

1 deadline is -- that they mean that the filing
2 deadline in this case is the signature filing
3 deadline?

4 MR. SELLS: I guess that's the nature of
5 the semantic issue. The 503 says March 20th is
6 the deadline, but if you don't turn in your
7 signatures by March 13th, then you can't do it
8 because it says you have to turn in your
9 signatures a week in advance; and Section
10 13-27-303 gives county officials four weeks to
11 check signatures on indigent candidates, which
12 effectively moves up the deadline.

13 So that's how I understand the procedure
14 in Montana. If I'm understanding that
15 incorrectly, I need to know about that.

16 MR. JOHNSTONE: I think Mr. Miller has
17 explained two or three times now that the deadline
18 is set for signatures by 503. He's explained -- I
19 think he's explained that's the basis for the
20 denial of your reading of the statute, which is
21 that it has to happen four weeks before that.

22 Q. (By Mr. Sells) Mr. Miller, does Montana
23 law give county election officials more than one
24 week within which to certify the signatures of an
25 independent, of an indigent independent candidate?

1 MR. JOHNSTONE: Objection.

2 A. If a candidate, if an indigent
3 independent candidate submitted sufficient
4 signatures by March 13th, 2008, or let's just say
5 one week before the filing deadline, the final
6 filing deadline, then that would be sufficient to
7 meet the deadline.

8 Q. (By Mr. Sells) What happens if the
9 County election officials don't review them in one
10 week's time?

11 A. Well, we would make them aware of the
12 deadline for those, and do everything we could to
13 make certain that those signatures were certified
14 and provided to us within the time period. Beyond
15 that, I mean the law requires what it requires
16 under 13-10-503, that the county election
17 officials certify those signatures within the
18 applicable time period.

19 Q. I don't think I heard an answer to the
20 question of what happens if the county officials
21 don't act within the time allowed.

22 A. I suppose they could be subject to suit,
23 to lawsuit.

24 Q. Can the candidate get on the ballot
25 without a lawsuit?

1 A. Well, assuming there was some
2 administrative error on the part of the county, we
3 could work with them to address that issue, but
4 absent that, presumably a court case would be
5 required.

6 Q. So the only way to get on the ballot
7 without a lawsuit, if you're an indigent
8 independent candidate for the US Senate, is to
9 file your signatures more than four weeks in
10 advance of the March 13th signature filing
11 deadline?

12 MR. JOHNSTONE: Objection. That
13 misstates his testimony. You disagree with him on
14 the law. He's told you what the practice of the
15 office is.

16 Q. (By Mr. Sells) Okay. I'd like you to
17 look at Section 13-27-303.

18 A. Okay.

19 Q. Explain to me what Section 1 of that
20 section means insofar as indigent independent
21 candidates for the United States Senate.

22 MR. JOHNSTONE: Objection.

23 A. I can read it all to you if you'd like,
24 but --

25 Q. (By Mr. Sells) I guess I'd like you to

1 explain to me what this phrase means, the first
2 sentence of Section 1, "Except as required by
3 13-27-104, within four weeks after receiving the
4 sheets or sections of petition, the county
5 official shall check the names of all signers to
6 verify that they are registered electors of the
7 county."

8 Does that not mean that county election
9 officials have four weeks to review an indigency
10 petition?

11 MR. JOHNSTONE: Objection.

12 A. I guess there are two laws in question
13 here. Reading this one without 13-10-503, it says
14 that, "Except as required by 13-27-104, within
15 four weeks after receiving the sheets or sections
16 of a petition," just as you said. There is a
17 reference in 13-10-503 to the procedures in
18 13-27-303. In 13-10-503, it provides the
19 independent candidate filing deadlines, and those
20 are what we go -- that's what we would go by
21 whether the person is independent or indigent, or
22 if the person is independent and indigent.

23 Q. (By Mr. Sells) How many times since
24 you've been working for the Secretary of State's
25 Office has there been an indigency petition?

1 A. I can't recall that there has been one.
2 I don't believe that we've received one, although
3 -- I don't believe we have.

4 Q. Now, it's the Secretary of State's
5 position, is it not, that county officials have
6 one week to review the signatures for a
7 non-indigent independent candidate, correct?

8 A. You mean a candidate who is independent
9 but who is not indigent?

10 Q. Right.

11 A. If the independent candidate submits
12 those as late as one week before, then yes, the
13 county election official would have one week to do
14 so.

15 Q. And that's because Section 13-10-503
16 basically says that that's the procedure, correct?

17 A. Yes.

18 Q. I'd like you to look at 13-10-203, and
19 specifically I'd like you to look at Subsection D.

20 A. (Complies) Yes.

21 Q. Can you see that this section is about
22 indigent candidates, right?

23 A. Yes.

24 Q. And Section D says that the signatures
25 are to be certified by the procedure found not in

1 and file certain documentation.

2 Q. (By Mr. Sells) Well, would you explain
3 to me, I guess, in lay person's terms what the
4 Secretary of State's Office does in enforcing the
5 ballot access scheme for independent candidates
6 seeking to run for non-presidential offices?

7 MR. JOHNSTONE: Objection, and I'm just
8 objecting to "scheme" as vague.

9 MR. SELLS: Anthony, would you prefer
10 "ballot access laws"?

11 MR. JOHNSTONE: I think as long as it's
12 intelligible to Mr. Miller, yes.

13 Q. (By Mr. Sells) Mr. Miller, do you
14 understand the question?

15 A. I believe so. More or less our role in
16 the process of independent candidates filing,
17 assuming that these are statewide or state
18 district candidates, is oftentimes they'll contact
19 our office for the materials that they need in
20 order to run for the office. Oftentimes that's by
21 email, or if it's by phone, we provide the --
22 often we provide the documents by email -- not
23 always, but -- and we send them the documentation
24 that includes the deadlines and the forms to file.

25 And they receive those, and determine

1 whether or not to make an effort to be on the
2 ballot as an independent. If they choose to do
3 so, they file their petition signatures with the
4 county election administrators of whatever county
5 the residents are that signed the petitions, and
6 then those county election officials certify those
7 signatures, and send those to our office.

8 We tally those, and determine whether or
9 not the individual has submitted enough certified
10 petition signatures in order to qualify for the
11 ballot through signatures. There are other
12 documents that they submit, the filing fee and
13 their basic statement indicating their name, the
14 way they want it to appear on the ballot, etc.,
15 and mailing addresses, and things like that.

16 And then as long as those documents are
17 received by the legal deadlines, then the person
18 is certified to appear, in the case of an
19 independent candidate, on the general election
20 ballot.

21 And so that's kind of the start to
22 finish of our role in independent candidate
23 filings. If I left anything out, you can let me
24 know, but that's the basic process.

25 Q. Just to distill it even further, the

1 Secretary of State is the one who makes
2 essentially the final call on whether a candidate
3 has met the legal requirements or not, as least
4 insofar as statewide candidates are concerned,
5 right?

6 A. Yes. To the extent that we tally the
7 signatures and determine if they received the
8 correct amount, then yes, we do certify their name
9 for the ballot.

10 Q. Does the Secretary of State have any
11 authority to waive those legal requirements?

12 MR. JOHNSTONE: Objection.

13 A. Not that I'm aware of, absent a Court
14 order, or administrative error of some sort, but
15 not that I'm aware of.

16 Q. (By Mr. Sells) Tell me what happens if
17 a candidate does not meet the legal requirements
18 for getting on the ballot as an independent
19 statewide candidate. What happens in the
20 Secretary of State's Office?

21 A. The procedure depends a little bit. If
22 they've attempted to gather signatures, if they've
23 submitted signatures and they haven't made it,
24 generally they'll call our office and ask us
25 whether or not they've made it, if they don't

1 already know; and we'll inform them if they have
2 not gotten enough signatures to be certified, to
3 have their name certified for the ballot. If they
4 just get the paperwork and don't submit any
5 signatures, there is not necessarily any follow up
6 from our office at that point.

7 Q. I'm not sure what you mean by there is
8 not any follow up at that point.

9 A. I mean we don't contact them and ask
10 them how their paperwork is coming along or
11 anything like that. They get the paperwork, and
12 if they choose to file, that's their option; but
13 if they do not submit any paperwork, we don't
14 contact them and ask them if they're planning to
15 file.

16 Q. What happens, or what would happen in
17 your office if a candidate, say, submitted 5,000
18 signatures -- I'm not talking about a candidate
19 for the Senate where the signature requirements
20 are much higher than that -- submitted only 5,000
21 signatures, and paid the filing fee, and filed the
22 Notice of Intention of Candidacy form. What would
23 your office's response be?

24 A. If the candidate does not meet the
25 requirements for filing a certain number of

1 signatures, we wouldn't by law be able to certify
2 their name for the ballot.

3 Q. Suppose a candidate has enough
4 signatures, but files his paperwork one day after
5 the deadline with you -- paperwork meaning the
6 Statement of Intention of Candidacy and the filing
7 fee. What would happen in that instance?

8 A. Just as with any candidate, we wouldn't
9 be able to accept it.

10 Q. Would it be fair to say that if a
11 candidate doesn't have the number of signatures
12 required, or isn't able to pay the filing fee, it
13 would be a futile act to make those submissions
14 after the deadline?

15 MR. JOHNSTONE: Objection.

16 A. You said after the deadline?

17 Q. (By Mr. Sells) Yes.

18 A. If any candidate submits documentation
19 after the legal deadline, then we wouldn't be able
20 to accept it. So I don't know if that would be a
21 futile effort or not, but we wouldn't be able to
22 accept documentation submitted after the legal
23 deadline.

24 Q. Why don't you know whether that would be
25 futile or not?

1 A. I guess I'd just use different
2 terminology, but it's probably a pretty similar
3 conclusion.

4 Q. So it would be fair to characterize that
5 as futile?

6 A. I would say if a person went out and got
7 the signatures, and at least did something, tried
8 to file paperwork, that would at least be an
9 effort. If they submitted it afterwards, after
10 the legal deadlines, then they would ultimately
11 not be successful; and in that sense, I believe it
12 would be futile.

13 Q. We spoke several hours ago about the
14 difference between qualified parties and
15 unqualified parties; do you remember that?

16 A. Yes.

17 Q. Sometimes people use the terms "major
18 party" and "minor party," but in Montana, there
19 are really only qualified parties and unqualified
20 parties; is that right?

21 A. Well, whenever anybody asks questions
22 about qualified, unqualified, minor, third party,
23 major party, I always refer to the statutes. I
24 think that would probably be an accurate
25 characterization, though, that parties are either

1 qualified or unqualified, although the statutes do
2 mention minor parties.

3 Q. And the rules for getting on the ballot
4 are different for qualified parties than they are
5 for candidates of unqualified parties or
6 independents, right?

7 A. Yes, the laws are different, in that
8 candidates of qualified parties have a certain set
9 of statutes to file under, and candidates of
10 non-qualified or not yet qualified parties have a
11 different set of statutes, although there are
12 intersections between the two.

13 Q. Do you know offhand what parties are
14 qualified in Montana?

15 A. Currently?

16 Q. Yes.

17 A. Yes.

18 Q. What are they?

19 A. Unless I'm leaving any out, I believe
20 it's Libertarian, Constitution, Democratic, and
21 Republican.

22 Q. Let's use the Libertarian party as an
23 example. The Libertarian Party is one that some
24 people would call a minor party, right?

25 A. Well, under the law, minor party I

1 believe is one that's not yet qualified.

2 Q. Right. I'm talking more in the
3 colloquial sense of minor party versus major
4 party.

5 MR. JOHNSTONE: Objection.

6 A. I don't know if I've heard that term or
7 not. Sometimes people use the term "third party."
8 I'm not sure how often people use the term "minor
9 party."

10 Q. (By Mr. Sells) Well, are the
11 requirements for getting on the ballot as a
12 Libertarian party candidate -- just to use an
13 example -- different from the requirements for
14 getting on the ballot as an independent candidate?

15 A. Yes, to the extent that currently the
16 Libertarian party is a qualified party in Montana,
17 and so independent and minor party candidates have
18 a different -- at least some different statutes
19 that they file under.

20 Q. Do qualified party candidates have to
21 collect the same number of signatures as
22 independent candidates for statewide office?

23 A. Well, in the initial qualification
24 procedure for a party, there is a signature
25 requirement; but once a party is qualified, their

1 requirement -- they maintain ballot access through
2 having candidates meet certain percentages of
3 statewide totals and --

4 Q. But I'm talking about once they're
5 qualified. Do qualified party candidates have to
6 collect the same number of signatures as an
7 independent candidate for statewide office?

8 A. No.

9 Q. And is the number of signatures that the
10 qualified party candidate has to collect, is that
11 lower or higher than independent candidates for
12 statewide office?

13 A. Could you ask that again?

14 Q. Is the number of signatures that a
15 qualified party candidate has to collect, in order
16 to appear on the ballot, lower or higher than the
17 number of signatures that's required of an
18 independent candidate for statewide office?

19 MR. JOHNSTONE: Objection.

20 A. I may be missing the question. A
21 qualified party candidate does not submit
22 signatures, so their signatures would be lower,
23 zero, as compared to an independent candidate.

24 Q. (By Mr. Sells) And is the deadline for
25 filing for qualified party candidates earlier or

1 later than the deadline for independent candidates
2 for statewide office?

3 A. For example, in 2008, the final filing
4 deadline was March 20th, 2008 for both a candidate
5 from a political party that was qualified and for
6 an independent or minor party candidate, other
7 than the requirement for the signatures.

8 Q. The signature filing requirement is a
9 pretty significant other than, isn't it?

10 A. Well, I don't know if I'd characterize
11 it as significant. It is a requirement that a
12 qualified party candidate would not have that an
13 independent candidate or minor party candidate
14 would have.

15 Q. And the qualified party candidate
16 doesn't have to file anything a week before the
17 deadline as an independent candidate does,
18 correct?

19 A. That's correct. Yes.

20 Q. You mentioned a signature gathering
21 requirement for party qualification.

22 A. Yes.

23 Q. Tell me your understanding of that
24 requirement.

25 A. If I could, I'd like to refer to the

1 statutes, because that is what I do each time that
2 question is asked of me.

3 Q. Sure.

4 A. (Examines document) The statute is
5 13-10-601, and it states that, "Each political
6 party that had a candidate for a statewide office
7 in either of last two general elections, who
8 received a total vote that was 5 percent or more
9 of total votes cast for the most recent successful
10 candidate for governor, shall nominate its
11 candidates for public office, except for
12 presidential electors by primary election, as
13 provided in this chapter."

14 Then it goes on to say that, "The
15 petition must be signed by a number of registered
16 voters --" Well, that's different. That's in the
17 case of qualification. But is that what you also
18 wanted to know?

19 Q. Yes. I want to know about the party
20 qualification process. I think the part you just
21 read to me was about staying on the ballot as a
22 party, but I want to hone in on getting on the
23 ballot as a party.

24 A. Yes. It says here, "The petition must
25 be signed by a number of register voters equal to

1 5 percent or more of the total votes cast for the
2 successful candidate for governor at the last
3 general election or 5,000 electors, whichever is
4 less," and then there is a requirement, "the
5 voters in more than one-third of the legislative
6 districts equal to 5 percent of the total votes
7 cast for governor in those districts or 150,
8 whichever is less."

9 Q. And what's the filing deadline for a
10 party qualification petition?

11 A. It says, "At least one week before the
12 filing deadline" provided in the next section, and
13 that filing deadline states that the election
14 administrator shall forward that to our office at
15 least 75 days before the date of the primary; and
16 75 days before the date of the primary last year I
17 believe was March 20th.

18 Q. Okay. So let's start with the number of
19 signatures. Is the number of signatures required
20 to form a party lower or higher than the number of
21 signatures required to appear on a ballot as a
22 statewide candidate for the US Senate?

23 A. Are you speaking of as an independent
24 candidate?

25 Q. Yes. I'm sorry. Did I misspeak?

1 A. The number of signatures required to
2 form a party is 5,000 electors currently. The
3 number of signatures required for an independent
4 US Senate candidate is currently more than that
5 number.

6 Q. And the deadlines are the same for
7 filing those petitions, either to qualify the
8 party or to run as an independent candidate; is
9 that correct?

10 A. Yes. The only exception is that under
11 13-10-503, there is a provision that allows that
12 if there are insufficient signatures on the
13 petition, additional signatures may be submitted
14 before the deadline for filing. So there is
15 somewhat of a difference there that I don't see
16 under the party qualification section.

17 Q. So independent candidates can make up
18 signatures between March 13th and March 20th,
19 assuming that's when they file their submission,
20 right?

21 A. The statute says that if there are
22 insufficient signatures, then additional
23 signatures may be submitted before that deadline.
24 So yes on that basis.

25 Q. What else does a party have to do other

1 than gather signatures if it wants to become a
2 qualified party in Montana?

3 A. Well, they have to submit those
4 signatures, and they have to have them verified by
5 the county election administrator; and then those
6 have to be sent to our office, and we have to
7 certify that that party has qualified for the
8 primary election ballot, or at least to file their
9 candidates prior to the primary election.

10 Q. Does a party have to file a
11 constitution, or by-laws, or any other document of
12 that nature?

13 A. I'd have to refer a bit to the statutes,
14 which I believe I could do quickly. But I believe
15 they do have a requirement for filing
16 documentation with our office.

17 Q. Okay. Feel free to refer to the
18 statutes.

19 A. (Examines document) Under 13-38-104, it
20 says that, "The state central committee of each
21 political party in this state must file a current
22 copy of the rules of government of the party with
23 the Secretary of State."

24 Q. So if you want to become a qualified
25 party, you have to have a state central committee,

1 and then you have to have these rules; is that
2 right?

3 A. Since it indicates that the state
4 central committee has to file, then that appears
5 to presume there is one, and they do have to file
6 those with our office.

7 Q. Do you know what's the minimum number of
8 people that would have to be on a central
9 committee?

10 A. I don't.

11 Q. Could you have a committee of one?

12 A. I'm not certain.

13 Q. Can you become a party if you don't
14 submit these rules that are referenced in the
15 statutes that you just looked at?

16 A. There is not a deadline specifically in
17 the law for when those rules have to be filed with
18 our office, so it's not clear exactly when those
19 have to be filed.

20 Q. Are there any other administrative
21 requirements for becoming a qualified party?

22 A. If they are, they're probably under
23 Title 13 Chapter 38, but I'm not aware
24 specifically.

25 Q. Would it be fair to say that the ballot

1 access laws for getting on the ballot as a
2 qualified party are quite different from those to
3 get on the ballot as an independent candidate?

4 MR. JOHNSTONE: Objection.

5 A. I'd say currently the requirement is
6 5,000 signatures to qualify an otherwise
7 unqualified political party for the ballot. That
8 would be a different number than the number that
9 most times would be the requirement for an
10 independent office.

11 And a person who files, or a group of
12 individuals who files as a party would have
13 different requirements than an independent would,
14 in the sense that they would have to file rules at
15 a certain point, and would have certain other
16 signature requirements, such as a certain number
17 of legislative districts, for example.

18 Q. (By Mr. Sells) And are you familiar
19 with the requirements for getting a ballot issue
20 onto the ballot?

21 A. Yes, I am.

22 Q. And could you explain to me briefly what
23 those requirements are.

24 A. An individual who -- I'll try to do this
25 briefly. An individual who wishes to submit a

1 ballot issue submits the information to certain
2 state agencies, and it's reviewed. If it's
3 approved, then they can go out and get signatures;
4 and once those signatures -- and they submit those
5 to the county election offices, and their
6 deadlines for doing so hit around June 20th, for
7 submitting those petitions to the county election
8 administrators would be around June 20th, the June
9 prior to the November election in the even year in
10 which they would like for the ballot issue to
11 appear on the ballot.

12 County election administrators then have
13 up to four weeks to submit those -- to review
14 those signatures, certify them, and send them to
15 our office. We tally those signatures. If there
16 is a sufficient number, then the ballot issue
17 would be certified for the ballot.

18 Q. How many signatures were required to get
19 on the ballot in 2008 as a ballot issue?

20 A. I want to say 22,308 for a statutory
21 initiative; and 44,615 for a constitutional
22 initiative. Those are approximate, but I believe
23 those are accurate.

24 Q. So those numbers are higher than the
25 number of signatures required to get on the ballot

1 as an independent candidate for statewide office,
2 right?

3 A. Yes. As far as I know, that's correct.

4 Q. And the deadlines for submitting those
5 signatures is much later than the deadline for
6 getting on the ballot as an independent candidate
7 for non-presidential statewide office, correct?

8 A. I don't know if I'd say much later. It
9 is different. There is a March deadline for the
10 independent candidates and other candidates,
11 partied candidates; and there is a June deadline
12 for the ballot issues.

13 Q. So it's more than three months, right?

14 A. Yes, about three months.

15 Q. And the ballot issue is to appear on the
16 very same ballot that an independent candidate
17 would be trying to appear on; is that right?

18 A. Yes.

19 Q. Do you have any role in preparing forms
20 related to petition gathering or the ballot access
21 process for independent statewide candidates?

22 A. Yes.

23 Q. And how often do you revise those forms?

24 A. Generally we do a review every few
25 years. If there are forms that we need to change

Laurie Crutcher - RPR

406-442-8262

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STEVE KELLY and CLARICE	) Cause 2:08-CV-25-SEH
DREYER,)
Plaintiffs,)
v.)
LINDA McCULLOCH, in her)
official capacity as)
Secretary of State of the)
State of Montana,)
Defendant.)

30(b)(6)DEPOSITION OF LISA KIMMET

Heard at the Secretary of State Conference Room

State Capitol Building

Helena, Montana

March 23, 2009, 3:12 p.m.

March 24, 2009, 1:25 p.m.

PREPARED BY: LAURIE CRUTCHER, RPR

COURT REPORTER, NOTARY PUBLIC

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Exhibit 8

A P P E A R A N C E S:

APPEARING FOR THE PLAINTIFFS:

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Staff Attorney

Montana Secretary of State

State Capitol, Room 260

P.O. Box 202801

Helena, MT 59620-2801

ALSO PRESENT: Anthony Jackson

Alan Miller

1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 LISA KIMMET,
5 Having been first duly sworn, was examined and
6 testified as follows:

7

8 EXAMINATION

9 BY MR. SELLS:

10 Q. Well, good afternoon, Ms. Kimmet. I
11 understand that you were in the room for most of
12 Mr. Miller's deposition. Did you hear me go over
13 the ground rules for depositions with him?

14 A. I did.

15 Q. And have you been deposed before?

16 A. No.

17 Q. Well, the same rules obviously apply for
18 your deposition. I need you to respond verbally
19 and so forth. If you have any questions,
20 definitely speak up.

21 A. Okay.

22 Q. I understand that you are here as the
23 Secretary of State designee to respond to the
24 fourth item in the designation, which is marked as
25 Exhibit A, and the fourth item, "The State

1 interests that the Defendant may assert justify
2 Montana's ballot access scheme for independent
3 candidates for non-presidential offices, and how
4 the scheme advances those interests;" is that
5 right?

6 A. That's right.

7 MR. JOHNSTONE: Bryan, I'll just
8 reiterate the same objections we had at the top of
9 Alan's portion of it.

10 MR. SELLS: Okay. That's fine.

11 Q. (By Mr. Sells) Ms. Kimmet, did you
12 review the deposition notice before this
13 deposition here today?

14 A. Yes.

15 Q. And tell me what you did to prepare for
16 this deposition as the designee.

17 A. I looked over all of the filings on this
18 case, read them over over the weekend. I also had
19 a short meeting with Anthony late last week, and
20 we went over the paperwork.

21 MR. JOHNSTONE: That's about as far as
22 you should go with that.

23 Q. (By Mr. Sells) Did you talk to anyone
24 other than Anthony in preparation for the
25 deposition today?

1 subject is going to be whether your response to
2 the question that is in the deposition notice is
3 going to include all of these interests that are
4 identified in response to No. 6.

5 A. Could you rephrase that question,
6 please?

7 Q. Yes. Starting with the deposition
8 notice, you're here to testify about the State
9 interests that the Defendant may assert to justify
10 Montana's ballot access scheme, correct?

11 A. Correct.

12 Q. Interrogatory No. 6 asks pretty much the
13 same question. It says, "Please identify all
14 State interests that the Defendant may assert to
15 justify Montana's ballot access scheme." So I
16 want to know if the State interests that you're
17 prepared to discuss, and that the Secretary of
18 State may assert, are the same ones that are
19 listed in Interrogatory No. 6?

20 A. Yes.

21 Q. Are there any other ones, any other
22 State interests that the Secretary of State may
23 assert to justify the ballot access scheme that
24 are not listed in Interrogatory No. 6?

25 MR. JOHNSTONE: Objection.

1 A. I'm not aware of any right now.

2 Q. (By Mr. Sells) In preparation for this
3 deposition, did you do an investigation on that
4 subject?

5 A. I did not do an investigation, no.

6 Q. Did you conduct any sort of inquiry to
7 determine what State interests the Secretary of
8 State may assert to justify the ballot access
9 scheme that's at issue in this case?

10 A. No. I reviewed the State interests that
11 we came up with for the response, and I did try to
12 think about whether there were other State
13 interests that we hadn't thought of when we
14 originally responded, and I did not come up with
15 any more.

16 Q. So as you're sitting here today, you're
17 not aware of any other State interests that the
18 Secretary of State may assert to justify the
19 ballot access scheme that's at issue in this case?

20 A. I'm not aware of any today.

21 Q. Well, with that, I'd like to go through
22 the interests that are asserted in response to
23 Interrogatory 6, and have you explain those to me.

24 A. Okay.

25 Q. The first one is, "Simplifying the

1 timelines for candidates who wish to appear on the
2 ballot." Do you see that one?

3 A. Yes.

4 Q. Explain to me what this is about.

5 A. Simplifying the timelines, the more
6 deadlines and timelines there are, the more
7 complicated the candidate filing process is. One
8 candidate filing deadline significantly simplifies
9 that process, from an election administration
10 standpoint.

11 Q. Well, does the amendment to change the
12 deadline in 2006 really create a simplified
13 timeline?

14 A. The 2007 legislation?

15 Q. Yes, which sets the deadline for filing
16 petitions on the 13th of March in 2008, in other
17 words, one week before the deadline for qualified
18 party candidates.

19 A. The legislation that changed the
20 deadline to file the declaration or the petition
21 for nomination to the same date as the other -- as
22 the date for other candidates is what simplified
23 it. There always was the one week prior to file
24 the petitions.

25 Q. Well, if you've got one week prior,

1 isn't that effectively another deadline that is
2 not uniform?

3 A. We simplified the filing deadline, the
4 deadline by which candidates have to file.

5 Q. Can you quantify for me what that does
6 for the State in terms of less administration,
7 election administration?

8 A. Yes, I believe I can. What that does
9 for the State is, to begin with, it makes our
10 administration and therefore the county election
11 administrator's administration of the elections
12 simpler, because we have one final date for any
13 candidates to file.

14 All the real business of administrating
15 the election begins after that date. So we know
16 who the candidates are on a certain date, who all
17 of the candidates are, and after that date, both
18 my office, the Secretary of State's Office, and
19 the counties, then begin the administration of the
20 election without more candidate filing, I guess,
21 hanging over their heads.

22 Q. Doesn't that create more work at a busy
23 time for election administrators, including in the
24 Secretary of State's Office?

25 A. I don't believe so, no.

1 Q. Wouldn't it be better to spread the work
2 around to different deadlines, so that all of the
3 petitions don't come in at the same time?

4 A. The busy work of the election
5 administration is after candidate filing.

6 Q. How so?

7 A. Well, as soon as candidate filing ends,
8 we begin the ballot certification process for the
9 primary election. The counties track down filers
10 to make sure that they have filed their campaign
11 financial information; they certify that
12 information to our Commissioner of Political
13 Practices; the Commissioner of Political Practices
14 then certifies to our office the names of
15 candidates who have not complied with their
16 filing.

17 We then certify the ballot to the
18 counties; the counties begin the process of ballot
19 printing; they enter all of the ballot information
20 into an online system; send it to the ballot
21 printing company. They begin the process of
22 training their election judges; doing the testing
23 of their equipment. They prepare, start preparing
24 absentee ballot mailings to go out to permanent
25 absentee electors, and to the military, and

1 overseas voters.

2 Q. And all of that happens with respect to
3 the general election prior to the primary date?

4 MR. JOHNSTONE: Bryan, are you going to
5 let her finish her answer?

6 MR. SELLS: Oh, I thought she was
7 finished. Please go on if there is more.

8 A. There is more. They also are --
9 counties are registering voters during this time;
10 and I'll clarify that this happens from the time
11 candidate filing ends through the primary, and
12 then starts all over again for the general
13 election.

14 Q. (By Mr. Sells) Are you finished?

15 A. Those are some of the -- those are most
16 of the major things that are going on. It's a
17 continual process. There may be -- I'm sure there
18 is other things that I might have left off, but
19 those are the things that are consuming the time
20 of both our office and the county election
21 offices.

22 Q. How much of what you just said happens
23 with respect to the general election prior to the
24 primary date? In other words, how many absentee
25 ballots, for example, do you send to overseas

1 voters prior to the primary for the general
2 election?

3 A. None.

4 Q. None. How many independent candidates
5 for statewide office in Montana appear on a
6 primary ballot?

7 A. None.

8 Q. Isn't it true you can't begin certifying
9 candidates for the general election ballot until
10 after the primary is finished?

11 A. Would you repeat that?

12 Q. Isn't it true that you can't really
13 begin to certify candidates for the general
14 election ballot until after the primary is
15 finished?

16 A. We certify -- Any candidates who ran in
17 the primary and were successfully nominated, we
18 certify those candidates for the general election
19 ballot after the primary. That's true.

20 Q. As a practical matter, do county
21 officials for the Secretary of State's Office
22 actually certify independent candidates for a
23 general election ballot before the primary?

24 A. No, we don't. We certify that they
25 completed their requirements for filing; we

1 certify their name for the ballot; when we certify
2 the successful primary candidates.

3 Q. When you distribute candidate
4 information, for example, you don't generally put
5 qualified party candidates' filing information on
6 the same flier as independent candidate
7 information, do you?

8 A. I'm not sure. What flier?

9 Q. Well, I guess what I'm trying to get at
10 is this idea of simplification. It doesn't allow
11 you -- Having what you say is the same deadline
12 doesn't allow you to consolidate pamphlets or
13 anything along those lines as a practical matter,
14 does it?

15 A. I'm not aware of any pamphlets that we
16 do -- The Secretary of State's office doesn't
17 produce any voter information pamphlets about
18 candidates.

19 Q. I'm talking about filing requirements
20 from prospective candidates. If someone inquires
21 about becoming a candidate, you either send them
22 independent information or the qualified party
23 information because they're different, right?

24 A. That's correct.

25 Q. There is no synergy there as far as the

1 same deadline is concerned?

2 A. Well, that's correct. When a candidate
3 inquires from our office about a statewide office,
4 we generally say, "Are you running as a political
5 -- with a major political party or a qualified
6 political party, or are you running as another
7 party, or are you running as an independent?," and
8 then we send them the information that's
9 appropriate.

10 Q. Are you aware of any reason to believe
11 that prospective independent candidates thought
12 that the filing deadlines prior to the amendment
13 in 2007 were too complex?

14 MR. JOHNSTONE: Objection.

15 A. Is your question am I aware of any
16 prospective independent candidate who's complained
17 about the filing deadline?

18 Q. (By Mr. Sells) Well, that complained
19 specifically that not having it on the same day as
20 the primary filing for party candidates was too
21 complex.

22 MR. JOHNSTONE: Objection.

23 A. I'm just aware that candidates in
24 general never seem to know when filing closes, any
25 candidates, including independent candidates.

1 Q. (By Mr. Sells) Well, I don't dispute
2 that for a minute. I guess what I'm getting at is
3 this first justification about simplifying the
4 timelines, and is that simplify for candidates or
5 for the election administrators?

6 A. Both.

7 Q. Well, is there any basis for believing
8 that the pre-existing deadlines were not simple
9 enough for either the candidates or the election
10 administrators?

11 MR. JOHNSTONE: Objection.

12 A. Yes.

13 Q. (By Mr. Sells) What is that basis?

14 A. The basis is the inquiries and the phone
15 calls that we receive from candidates who are
16 confused about when candidate filing ends.

17 Q. How about for election administrators?

18 A. The same question regarding election
19 administrators?

20 Q. Yes. What is the evidence that the
21 pre-existing deadlines weren't simple enough for
22 them?

23 A. That evidence, again, is their phone
24 calls and inquiries to this office about when
25 candidate filing ends for any type of candidate.

1 Q. Did the change eliminate those kinds of
2 phone calls, or emails, or other inquiries?

3 A. Would you repeat that question?

4 Q. Yes. Did the change in 2007 which went
5 into effect in 2008 eliminate those phone calls
6 that are the basis of your believing that the
7 deadlines were not simple enough?

8 A. I'm not sure that for the 2008 elections
9 that the change eliminated those phone calls,
10 because it was the first year for implementation
11 of that law.

12 Q. Do you think that having the petition
13 filing deadline a week before all of the other
14 paperwork is due, is that simple or is that
15 complex?

16 A. For the candidates?

17 Q. Yes. Let's start with the candidates.

18 A. I think it's as simple as it was before
19 the law changed in 2007.

20 Q. How about for election administrators?

21 A. Same answer.

22 Q. I'm sorry. I didn't hear what you just
23 said.

24 A. I said the same answer. I think it's as
25 simple as it was before the law changed.

1 Q. So actually making the change in 2007
2 didn't simplify anything, did it?

3 MR. JOHNSTONE: Objection.
4 Mischaracterizes her testimony.

5 A. It simplified the candidate filing
6 deadlines.

7 Q. (By Mr. Sells) Did it simplify the date
8 on which independent candidates actually have to
9 submit something?

10 A. It didn't change the date or the
11 deadline for independent candidates to submit
12 their petitions. It left that at one week before
13 the filing deadline.

14 Q. And doesn't that separate deadline add a
15 degree of complexity?

16 A. I guess the same degree of complexity
17 that was there before the Legislature changed the
18 filing deadline.

19 Q. Let's move on to the second one. We've
20 only got I think 23 more to go. The second one,
21 as I read it, is "Equalizing the timelines to
22 level the playing field for all Montana
23 candidates, and eliminating a double standard that
24 was unfair to major party candidates." What is
25 the basis for believing that the prior deadline

1 was unfair to major party candidates?

2 A. The basis is the legislation that was
3 introduced was based on concerns from a county who
4 had qualified party candidates complain about
5 independent candidates filing late after the
6 primary election.

7 Q. How was it possible under the old
8 deadline for a candidate, independent candidate,
9 to file after the primary election?

10 A. I may have been mistaken. It may not
11 have been after the primary election.

12 Q. Well, are all complaints well founded?

13 A. No.

14 Q. Were these complaints well founded?

15 MR. JOHNSTONE: Objection.

16 A. I believe the Legislature heard enough
17 testimony and felt like they were well founded.

18 Q. (By Mr. Sells) Well, let me ask you:
19 Unfair can mean a couple of different things. How
20 do you mean it?

21 A. The Secretary of State's Office, I
22 believe, means that an independent candidate under
23 the prior law could wait until they knew who the
24 candidates would be who would be on the primary
25 ballot before they had to decide whether or not

1 they were going to file for the office, so they
2 had an advantage of knowing whether it was a
3 strong field or a weak field, that the qualified
4 party candidates didn't have.

5 Q. So you are saying under the previous
6 system, not only was it unfair, but it put the
7 independent candidates at an advantage over
8 qualified party candidates; is that your
9 testimony?

10 A. No.

11 Q. Well, it seems to me that something
12 could be unfair because it takes away an
13 advantage, or it could be unfair because it puts
14 one at a disadvantage. Do you understand the
15 difference between those two things?

16 A. I think so.

17 Q. Which is it in this case? Does
18 equalizing the deadline take away an advantage of
19 minor party candidates to some extent, or does it
20 actually put -- excuse me -- major party
21 candidates to some extent, or does it actually put
22 those major party candidates at a disadvantage?

23 A. I believe it just levels the playing
24 field. It makes it fair for the independent
25 candidates and for qualified party candidates.

1 Q. So an independent candidate should have
2 an equal chance of winning with a major party
3 candidate or qualified party candidate because the
4 deadlines are now the same?

5 MR. JOHNSTONE: Objection.

6 A. An equal chance of knowing what the
7 competition will be.

8 Q. (By Mr. Sells) What is your basis for
9 believing that the State has a role in equalizing
10 that opportunity?

11 MR. JOHNSTONE: Objection.

12 Q. (By Mr. Sells) Or let me clarify. What
13 is your basis for believing that the State has a
14 legitimate role in equalizing that sort of an
15 opportunity?

16 MR. JOHNSTONE: Objection.

17 A. By the State, do you mean the Secretary
18 of State?

19 Q. (By Mr. Sells) Yes.

20 A. I don't know the answer to that
21 question. I think we're charged with enforcing
22 the ballot deadline laws that the Legislature
23 passes.

24 Q. Well, let me ask more broadly to include
25 the State of Montana. Do you think that the State

1 of Montana has a legitimate interest in equalizing
2 the opportunity that you just talked about?

3 MR. JOHNSTONE: Objection.

4 A. I don't have an opinion on that.

5 Q. (By Mr. Sells) Well, the Secretary of
6 State apparently does because she's asserting that
7 it is a State interest. Was the Secretary of
8 State asserting an illegitimate State interest to
9 justify this law?

10 MR. JOHNSTONE: Objection. This is well
11 beyond what the Interrogatory actually says. You
12 can answer.

13 A. Would you repeat that please, Bryan?

14 Q. (By Mr. Sells) I'll rephrase it to try
15 to make it simpler. Does the Secretary of State
16 believe that this interest asserted is a
17 legitimate interest for the State of Montana?

18 MR. JOHNSTONE: Objection.

19 A. I think that the interest is to level
20 the playing field for all candidates.

21 Q. (By Mr. Sells) In what respect?

22 A. In the respect that all candidates have
23 the same deadline by which they have to file.

24 Q. Okay. But what do major party
25 candidates have to file by that deadline?

1 A. They have to file a declaration for
2 nomination.

3 Q. What do independent candidates have to
4 file by that deadline?

5 A. A petition for nomination.

6 Q. And that includes signatures, right?

7 A. And that includes, yes, petitions with
8 signatures.

9 Q. Just generally speaking, filling out
10 paperwork that has to be filed by a deadline is
11 more burdensome for an independent candidate than
12 for a qualified party candidate, isn't it?

13 MR. JOHNSTONE: Objection.

14 A. I don't know that it is more burdensome
15 or isn't.

16 Q. (By Mr. Sells) Well, how long does it
17 take a qualified party candidate to fill out the
18 paperwork that's necessary to be filed?

19 MR. JOHNSTONE: Objection.

20 A. I'm not sure how long it takes to fill
21 it out.

22 Q. (By Mr. Sells) But we're talking maybe
23 five minutes, ten minutes?

24 A. Yes.

25 Q. An independent candidate for United

1 States Senate couldn't really collect the 11,000
2 approximately signatures that he or she would need
3 in five or ten minutes, could he or she?

4 A. No.

5 Q. So it would take longer to meet those
6 requirements?

7 MR. JOHNSTONE: Objection.

8 A. It would take longer to gather the
9 signatures than it would take to fill out the
10 paperwork, yes.

11 Q. (By Mr. Sells) When I say paperwork, I
12 don't mean just the form. I mean everything that
13 has to be turned in. So in order to gather
14 everything that needs to be turned in, it's a lot
15 more burdensome for an independent candidate than
16 it is for a qualified party candidate?

17 MR. JOHNSTONE: Objection.

18 A. It would take more time to gather
19 signatures on a petition than to fill out a
20 declaration for nomination.

21 Q. (By Mr. Sells) Do you think that's a
22 level playing field?

23 MR. JOHNSTONE: Objection.

24 A. The level playing field is in the
25 context of the filing deadline.

1 Q. (By Mr. Sells) By having the same
2 filing deadline but ignoring the other
3 requirements, doesn't that actually create an
4 unlevel playing field?

5 MR. JOHNSTONE: Objection.

6 A. I think having the same filing deadline
7 levels the playing field for the deadline for
8 candidate filing. As far as I know, the proposed
9 legislation in this change didn't involve any of
10 the other components of the filing process.

11 Q. (By Mr. Sells) Now, your response here
12 says that there was a double standard. Can you
13 explain to me what the double standard is.

14 A. I believe the double standard was the
15 fact that qualified party candidates had to file
16 by a certain deadline, and independent party
17 candidates did not.

18 Q. Is there a double standard with regard
19 to petition signatures?

20 MR. JOHNSTONE: Objection.

21 A. I don't know if it's a double standard.
22 I think qualified party candidates already have,
23 or think they have, the support of potential
24 voters from their party, and an independent
25 candidate does not.

1 Q. (By Mr. Sells) Well, not every
2 candidate who files to run in the primary gets
3 very many votes, do they?

4 MR. JOHNSTONE: Objection.

5 A. Not every candidates gets very many
6 votes -- is that the question -- in a primary?

7 Q. (By Mr. Sells) Yes, in a primary.

8 A. Well, no. Obviously there is a winner,
9 and there is one or more who don't get as many
10 votes as that candidate.

11 Q. And a candidate who is trying to run in
12 the primary doesn't actually have to demonstrate
13 any support before appearing on a primary election
14 ballot, does he or she?

15 MR. JOHNSTONE: Objection.

16 A. I can't think of a way that they have to
17 demonstrate the support, no.

18 Q. (By Mr. Sells) Let's move on to the
19 next one, which is reducing the administrative
20 burden on busy election officials in the weeks
21 before the primary to improve the quality of
22 election administration to voters. Tell me about
23 that.

24 A. As I talked about previously, the
25 busiest time for election officials is from the

1 hour that candidate filing closes until the
2 election. Eliminating one of the tasks during
3 that time that existed previously, which was
4 verifying signatures for independent candidates,
5 helps to ease the administrative burden on those
6 election officials.

7 Q. And explain to me how it's easing the
8 burden to have another set of candidates file
9 their stuff all on the same day.

10 A. It's easing the burden because the
11 period of candidate filing is not the busy
12 administrative time either for this office or for
13 the county offices. Most of the time candidate
14 filings starts and trickles in slowly over that
15 time period, and that's what both this office and
16 county offices are focused on during that
17 approximate 60 days we're focused on candidate
18 filing.

19 That's what we're working on. That's
20 what we're answering questions about. We're
21 collecting those forms. We're disseminating
22 information to prospective candidates and to the
23 public. And it does make it easier to be
24 verifying petition signatures during that time.

25 Q. When you say that time, what do you

1 mean?

2 A. The time period of candidate filing,
3 from the beginning to the last day of candidate
4 filing.

5 Q. So wouldn't it be easier -- would it
6 ease the administrative burden even further to put
7 the filing deadline in January?

8 A. Yes, it's possible.

9 Q. What if the deadline were in August or
10 July? Wouldn't that also ease administrative
11 burden?

12 A. No.

13 Q. Why not?

14 A. Because that's the time period again
15 from the time the canvas is done after the primary
16 election, right up until the general election in
17 November, that is, the election offices are busy
18 that entire time. That's when they get the ballot
19 issue petitions, that I believe in a normal
20 election year are -- we usually have quite a few
21 ballot issues that involve a lot of signature
22 verification. The counties struggle to keep up
23 with that signature verification and get it
24 submitted to our office in time.

25 Q. What is your basis for believing that

1 election officials were already overburdened and
2 this change was necessary to do that? To relieve
3 that burden, I should say.

4 A. Our basis for that was input from county
5 election administrators. County election
6 administrators -- actually the county clerks and
7 recorders submitted this legislation. That was
8 one of the reasons that they gave when requesting
9 that the filing deadline be the same as the filing
10 deadline for the qualified party candidates.

11 Q. About how many statewide independent
12 candidates file on any given election year?

13 A. I don't know the answer to that. I
14 think very few.

15 Q. And isn't the number pretty darn close
16 to zero?

17 A. Yes.

18 Q. And you're saying that zero was too
19 burdensome?

20 MR. JOHNSTONE: Objection.

21 A. Well, zero in 2008.

22 Q. (By Mr. Sells) Are you aware of any in
23 2006?

24 A. I'm not aware of any. I was at the
25 county level in 2006, and I know I didn't have any

1 in my county.

2 Q. How about 2004?

3 A. I don't know.

4 Q. So is there actually any evidence that
5 candidate filings were burdensome, or is that just
6 made up by the county officials who requested the
7 change to the law?

8 MR. JOHNSTONE: Objection.

9 A. The county clerk and recorders who
10 requested it did have, I believe, four local
11 independent candidates.

12 Q. (By Mr. Sells) Do you recall
13 approximately how many signatures needed to be
14 verified for those four candidates?

15 A. I don't.

16 Q. Fairly small number, though, isn't it?

17 MR. JOHNSTONE: Objection.

18 A. I don't know. It may have been a small
19 number.

20 Q. (By Mr. Sells) What's your basis for
21 asserting that relieving the burden was necessary
22 to improve the quality of election administration?
23 What was wrong with it before?

24 A. The greater number of duties and
25 responsibilities that election officials have

1 during that busy time when they are getting the
2 ballot prepared, getting their absentee lists
3 ready to go, the more responsibilities they have
4 during that time, the greater room there is for
5 some kind of administrative error.

6 Q. But you're not aware of any actual
7 deficiencies in the quality of the election
8 administration, are you?

9 A. No.

10 Q. Let's move on to the next one, which is
11 providing sufficient time and staff to scrutinize
12 petition signatures and avoid error or fraud.
13 Explain to me what that one was all about.

14 A. That one, it seems to speak for itself.
15 It's about having sufficient time and sufficient
16 resources to verify those petition signatures
17 during a time when that is what the main
18 responsibility of the office is focused on, rather
19 than at a time when they're preparing ballots and
20 getting absentee ballots ready to be mailed out.

21 Q. Well, if the number of candidates is as
22 small as you just said it was, what's your basis
23 for concluding that there wasn't sufficient time
24 to before?

25 A. I think there were independent, local

1 independent candidates, as evidenced by the county
2 that had four independent candidates.

3 Q. Are you aware of any other situations
4 where county election officials didn't have enough
5 time or staff to scrutinize petition signatures?

6 A. Specific to independent candidate
7 petition signatures?

8 Q. Yes.

9 A. I am not aware of any specific
10 incidences, but county clerk and recorders did
11 join together as an organization to propose this
12 legislation, and supported it across the state.

13 Q. Which county was it that had the four
14 independent candidates?

15 A. It was Rosebud County.

16 Q. And as far as you know, did Rosebud
17 County have sufficient time to scrutinize the
18 petition signatures in that year when they had the
19 four candidates, independent candidates?

20 A. I don't know specifically about Rosebud
21 County, if they had time or didn't have time, but
22 this issue is definitely a concern, the issue of
23 time and resources. There is always a potential
24 for independent candidates.

25 Q. Rosebud County is a small county, is it

1 not?

2 A. It is.

3 Q. Do small counties have small staffs by
4 and large?

5 A. By and large, yes.

6 Q. Do you know how many people are in the
7 Rosebud County clerk's office?

8 A. In the clerk's office, I believe there
9 is three people.

10 Q. The 2007 amendment that changed the
11 deadline, that didn't actually increase the time
12 within which county officials could scrutinize the
13 signatures, did it?

14 A. No, just the time period when it would
15 be done.

16 Q. And it didn't in any way directly
17 increase the number of staff that would be
18 available to scrutinize the signatures, did it?

19 A. Not directly.

20 Q. Could the State have increased the time
21 and staff resources available without changing the
22 petition deadline?

23 A. No.

24 Q. What's your basis for saying that?

25 A. Well, that the State isn't involved in

1 the personnel at the county level.

2 Q. Maybe we're not understanding each
3 other. I understood this response to say that the
4 change in deadline added time and staff to
5 scrutinize the petition signatures. Is that not
6 what you're saying?

7 A. That's not exactly correct.

8 Q. Well, explain to me what is correct.

9 A. The answer says that by changing the
10 deadline, it provides sufficient time and staff.
11 By having the deadline the third week in March or
12 75 days before the election provides the time
13 frame for staff to review the petition signatures.

14 Q. Well, I think I understand that part,
15 but what I'm asking is: Could the State have
16 achieved that same end without changing the
17 deadline?

18 A. Not that I can think of.

19 Q. Well, how about if instead of having a
20 week to review the signatures, the Legislature had
21 changed the review period from one week to four
22 weeks? Would that have given additional --
23 provided sufficient staff for time?

24 A. I don't believe it would have if it was
25 still during the time period between the close of

1 regular candidate filing and the primary.

2 Q. What if the Legislature had given eight
3 weeks during that primary time?

4 A. Same answer. I don't think during that
5 time period it would help out with staff and time.

6 Q. Let's go on to the next one, "Allowing
7 for the investigation and traditional resolution
8 of other election challenges." Explain to me what
9 that one means.

10 A. That one we're talking about the
11 potential for challenges either to signatures that
12 are on the petitions or voter registration
13 challenges.

14 Q. How long do those challenges usually
15 take?

16 A. To resolve?

17 Q. Yes.

18 A. Sometimes the challenges can be resolved
19 immediately. Sometimes they can't be resolved
20 without a judicial review. So it varies.

21 Q. What is it on the long end?

22 A. I don't have a definite time, just those
23 challenges generally come during the busy time
24 when voter registration is closing, which would be
25 that same time period between the close of

1 candidate filing and the election. It could take
2 weeks.

3 Q. Does it generally take more than three
4 months?

5 MR. JOHNSTONE: Objection.

6 A. I don't know.

7 Q. (By Mr. Sells) And isn't the reason why
8 you don't know the fact that there haven't been
9 any such challenges for statewide independent
10 candidates?

11 A. I'm not sure if there has been any
12 challenges to the statewide independent
13 candidates. I know there has been voter
14 registration challenges which affect petition
15 signatures.

16 Q. Let's say in the last -- I don't know --
17 fifty years, has there been a single judicial
18 challenge to a petition effort for a statewide
19 independent candidate?

20 MR. JOHNSTONE: Objection.

21 A. In the last how many years, fifty?

22 Q. (By Mr. Sells) Yes. You can pick a
23 number, fifty, 25, ten, 100.

24 A. There aren't any that I've heard about.
25 I couldn't say for sure whether there had been

1 any.

2 Q. So isn't it true that you really -- that
3 asserted interest isn't a real problem?

4 MR. JOHNSTONE: Objection.

5 A. Would you rephrase that question,
6 please?

7 Q. (By Mr. Sells) Well, since you're not
8 aware of any such challenges, you don't know
9 whether this deadline change was necessary to
10 allow for such challenges or not, do you?

11 A. Well, there are potential challenges.
12 We don't have any way of knowing whether they will
13 or they won't happen, but if they do happen, we
14 want to make sure that we have the time and the
15 resources to get them resolved.

16 Q. But there hasn't been any actual problem
17 with this in the past?

18 MR. JOHNSTONE: Objection.

19 Q. (By Mr. Sells) Right?

20 A. We have had voter registration
21 challenges that were a problem in the past.

22 Q. Okay. But I'm talking about challenges
23 to an independent candidate's petition.

24 A. I'm not aware of any challenges to an
25 independent candidate petition.

1 Q. Tell me about the voter registration
2 challenge. What does that involve?

3 A. Excuse me? What does that --

4 Q. Involve.

5 A. Specifically the one that occurred in
6 2008, or just in general?

7 Q. I just don't know what you mean when you
8 refer to voter registration challenge.

9 A. An individual can challenge the validity
10 of any other individual's voter registration, and
11 then that challenge has to be acted on by the
12 county election administrator.

13 Q. And it has to be acted on before someone
14 can vote, right?

15 A. Yes.

16 Q. What does that have to do with the
17 petitions for independent candidates?

18 A. If the challenge happened in the same
19 time period that signatures were being collected,
20 there could be a question about whether the signer
21 of the petition was a legally registered voter or
22 not.

23 Q. Which would be real important if a
24 petition fell one signature short, right?

25 A. Yes.

1 Q. Other than that, it wouldn't make much
2 difference, would it?

3 MR. JOHNSTONE: Objection.

4 A. Well, it makes a difference
5 administratively in the time it takes to
6 investigate those challenges.

7 Q. (By Mr. Sells) Explain to me what you
8 mean by that.

9 A. I mean depending on when the challenges
10 happened, it takes a lot of administrative time
11 from the county election office to investigate
12 those and resolve them.

13 Q. What exactly does the Secretary of
14 State's Office or county election officials do
15 when there arises such a challenge?

16 A. They send a notice out to the challenged
17 voter or voters notifying them that their
18 registration has been challenged.

19 Q. And about how many of those are there in
20 a given year?

21 A. It varies. In 2008, there were about
22 8,000 across the state.

23 Q. Those are ultimately withdrawn, right?

24 A. Yes, most of them were.

25 Q. And wasn't the fellow who made the

1 challenge actually so ashamed he had to resign his
2 office as an official for the Republican Party?

3 MR. JOHNSTONE: Objection. You have to
4 ask him.

5 Q. (By Mr. Sells) Let's take out the shame
6 part. Isn't it true that the fellow who did that
7 not only withdrew his challenges, but resigned his
8 post with the Republican Party?

9 A. Yes, there were bulk challenges that
10 were withdrawn, but there were other challenges
11 made across the state that weren't part of the
12 mass challenge that was done by the individual
13 from the Republican Party.

14 Q. Right. But those bulk challenges were
15 most of that 8,000 number you just cited, weren't
16 they?

17 A. Yes.

18 Q. That was unusual, wasn't it?

19 A. As far as I know, it was unusual, yes.

20 Q. In fact, it was so unusual that it made
21 everyone upset at him?

22 MR. JOHNSTONE: Objection. Were you
23 upset with him, Bryan?

24 MR. SELLS: I'll withdraw that question.

25 Q. (By Mr. Sells) About how many in an

1 average year are there, challenges?

2 A. I don't know. The challenges usually --
3 They always happen at the county level, and most
4 of the time, the counties, in conjunction with
5 their County Attorneys, resolve those challenges.

6 Q. So the election officials' involvement
7 is pretty much limited to sending out a notice?

8 A. No.

9 Q. What more do the county election
10 officials have to do?

11 A. They have the responsibility of
12 determining if the voters' response is sufficient
13 to lead to further action on the challenger,
14 whether their response is sufficient to leave them
15 as a registered voter.

16 Q. What does the County Attorney do?

17 A. The County Attorney assists in advising
18 the election administrator.

19 Q. What sort of numbers are we talking
20 about? Maybe a handful in any given county in any
21 given year?

22 A. If I had to guess, I would say that's
23 probably right.

24 Q. But again, that doesn't have anything
25 directly to do with candidates, independent

1 candidate petitions, does it?

2 A. It just has to do with the time and
3 resources it takes for election administration.

4 Q. So what you're saying is essentially
5 that election administrators have lots of
6 priorities during this election season, beginning
7 with the candidate filing deadline on March 20 or
8 in the middle of March in any given year?

9 A. Yes.

10 Q. Is there some reason why independent
11 candidates should get a low priority among all of
12 the other priorities?

13 A. No.

14 Q. Don't you think that independent
15 candidates have constitutional rights under the
16 First and Fourteenth Amendment to engage in
17 political activity that is at least as important
18 and fundamental as some of the other political
19 rights that election administrators are dealing
20 with?

21 MR. JOHNSTONE: Objection.

22 A. Could you repeat that question, please,
23 Bryan?

24 Q. (By Mr. Sells) I'm wondering whether
25 you agree with me that independent candidates

1 rights are as important as anyone else's political
2 rights in the process.

3 A. I do.

4 Q. Is there some reason why challenges to
5 voter registration couldn't be done in, let's say,
6 January of an election year? In other words,
7 assigned those a lower priority rather than
8 assigning independent candidates a lower priority?

9 MR. JOHNSTONE: Objection.

10 A. I didn't understand that question.

11 Q. (By Mr. Sells) Well, we're talking
12 about the asserted State interest of allowing for
13 the investigation and judicial resolution of
14 petition or other election challenges, and we've
15 just been talking voter registration challenges,
16 and I'm asking instead of moving the candidates
17 petition filing deadline up for independent
18 candidates to give more time for resolution of
19 these challenges, wouldn't it have been possible
20 for the Legislature to move the challenge deadline
21 up, and leave the petition filing deadline the
22 same place?

23 MR. JOHNSTONE: Objection.

24 A. No, I don't think it would have been.
25 As a practical matter, voter registration

1 challenges happen close to the time of the close
2 of voter registration, and close to an election,
3 and there is a timeline. I believe there is a
4 timeline when they need to be resolved.

5 Q. (By Mr. Sells) Okay. So voter
6 registration challenges are -- we're talking maybe
7 September and October time frame, right?

8 A. Or April, May.

9 Q. And that would be for the primary?

10 A. Yes.

11 Q. Well, either way, a June deadline on
12 independent candidates wouldn't interfere with
13 that, would it?

14 A. It just goes back to the administrative
15 burden during that time period.

16 Q. Well, I understand, but that
17 administrative burden is about other things at
18 that time, because the voter registration
19 challenges occur either before what would have
20 been a June deadline or much later; isn't that
21 right?

22 A. Generally that's right, yes.

23 Q. I want to move on to the next one, which
24 is, "Requiring a modicum of community support
25 early in the election process." Tell me what you

1 mean by that.

2 A. What we mean by that is voters in
3 Montana have, at least for the years I've been
4 involved in election administration, are
5 increasingly interested in politics and elections
6 and candidates earlier and earlier in the election
7 season. In Montana, we had a -- one party had a
8 caucus in February. There has been legislation to
9 have a February presidential primary.

10 So having candidates with their name out
11 there, and engaged with the public, and getting
12 some early support so that they know and so that
13 the voters know that they're a serious viable
14 candidate, helps both the electorate and the
15 candidate.

16 Q. Well, let me just say it this way: I've
17 never seen a state or Court say that a state has
18 an interest in having candidates demonstrate their
19 modicum of support early. Why is that a
20 legitimate state interest?

21 MR. JOHNSTONE: Objection.

22 A. I think it's a legitimate State interest
23 because the State and the counties have to field
24 the questions from the public about the
25 candidates, who's running, who isn't running, and

1 the State has a legitimate interest in being able
2 to provide that information.

3 Q. (By Mr. Sells) Well, I think reading
4 between the lines on this interest is what you're
5 saying is that you have an interest in weeding out
6 candidates who show their support at some point
7 after the filing deadline; is that what I'm
8 hearing you say?

9 MR. JOHNSTONE: Objection.

10 A. No.

11 Q. (By Mr. Sells) Well, if a candidate
12 submits 15,000 signatures on March 15th rather
13 than the 13th, how is that not showing a modicum
14 of support early in the process? I'm not
15 understanding what you're saying the State
16 interest is all about here.

17 MR. JOHNSTONE: Do you have a question
18 then?

19 Q. (By Mr. Sells) What difference does it
20 make to the State when a candidate demonstrates
21 his or her modicum of support?

22 A. I think it makes a difference to the
23 State that there is a well informed electorate,
24 and I think it makes a difference to the State if
25 there is a well informed electorate, and to be

1 well informed early on in the election process.

2 It could make a difference in whether or
3 not a candidate files to run if they know that
4 there is an independent candidate or any other
5 candidate out there who has support; and it could
6 make a difference in how the electorate, how they
7 view the candidates that are out there. It could
8 make a difference in whether they're interested in
9 supporting an independent candidate or not.

10 Q. What is the factual basis for your
11 implication that an electorate can't be well
12 informed -- or I should say -- that a Montana
13 electorate can't get well informed unless this
14 deadline is so early?

15 MR. JOHNSTONE: Objection.

16 A. I don't know the answer to that. I'm
17 sorry.

18 Q. (By Mr. Sells) Do you have any reason
19 to believe that the electorate in Montana is
20 unable to get fully informed about independent
21 candidates if they don't file until June or even
22 later?

23 A. Not specifically about independent
24 candidates, but just about the big pictures of who
25 are candidates.

1 Q. If a filing deadline were around Labor
2 Day, would that give the Montana electorate enough
3 time to become fully informed about those
4 candidates?

5 A. I don't know the answer to that.

6 Q. How can you be so sure that the early
7 filing deadline is necessary for there to be a
8 fully informed electorate?

9 A. I don't have anything more to offer.

10 Q. Was the Montana electorate fully
11 informed about now President Barack Obama, do you
12 think?

13 A. Yes.

14 Q. Do you think that the Montana electorate
15 was fully informed about the McCain/Palin ticket?

16 MR. JOHNSTONE: Objection.

17 A. Yes, I think they were.

18 Q. (By Mr. Sells) Do you think the Montana
19 electorate was fully informed about the vice
20 presidential candidates for Republican and
21 Democrats, Joe Biden and Sarah Palin?

22 MR. JOHNSTONE: Objection.

23 A. Yes, I do.

24 Q. (By Mr. Sells) And isn't it true that
25 they didn't become part of the ticket until August

1 in the case of Joe Biden, and in September in the
2 case of Sarah Palin?

3 A. Well, the presidential candidates
4 certainly had a modicum of support earlier than
5 that.

6 Q. Well, as I understood your original
7 answer to this question, the need for the State's
8 interest in demonstrating that modicum of support
9 early was to ensure that there was a fully
10 informed electorate. Are you changing that answer
11 now?

12 A. I'm not changing that answer, no.

13 Q. Let's move on to the next one.
14 "Preventing voter confusion by limiting ballot
15 access to serious candidates who could demonstrate
16 some level of political viability." What do you
17 mean by that?

18 A. The more candidates there are, the more
19 names on the ballot, the more we who work in
20 election administration deal with voter confusion.

21 Q. And for any given race, what is the
22 maximum number of candidates that you think that
23 the Montana electorate is able to understand
24 without becoming confused?

25 A. I don't know a maximum. There is no

1 maximum.

2 Q. Would six candidates be confusing for
3 any given office?

4 MR. JOHNSTONE: Objection.

5 A. It could be and it could not be. It
6 depends on the race and the candidates.

7 Q. (By Mr. Sells) When was the last time
8 Montana had a ballot with so many candidates on it
9 for a single office that it was confusing to
10 voters?

11 MR. JOHNSTONE: Objection.

12 A. I don't know.

13 Q. (By Mr. Sells) Isn't it true that there
14 never has been a ballot, at least for statewide
15 offices, that had so many candidates it was
16 confusing in Montana?

17 A. I don't know if there never has been.
18 The potential is there.

19 Q. But under the old deadline system, there
20 wasn't a problem, right, in terms of having too
21 many candidates on the ballot for any given
22 office?

23 A. Under the old filing deadline?

24 Q. That's correct.

25 A. Would you rephrase that, please?

1 Q. Under the old filing deadline, the State
2 never had a problem with too many candidates on
3 the ballot for any given statewide office?

4 A. I'm not sure. I'm just not sure about
5 that.

6 Q. Well, as you sit here today, your
7 capacity as the designee for the Secretary of
8 State, can you think of any elections in any
9 period of Montana's history that had so many
10 candidates for a single office, for a statewide
11 office, that voters were confused?

12 A. I can't think of any specific years, but
13 I think our interest is that there is the
14 potential for that to happen in any election.
15 Whether it's happened or not in the past, I'm just
16 not sure.

17 Q. Well, I understand that, and anytime you
18 make the qualification requirements harder, you're
19 going to have fewer candidates who are able to
20 make it. But you never had any problem under the
21 old system, is what I'm asking.

22 MR. JOHNSTONE: Objection.

23 A. There wasn't a problem that I am aware
24 of, but as I said before, there is always -- every
25 election year there is the potential.

1 Q. (By Mr. Sells) Let's move on to the
2 next one, "Lessening the likelihood of multiple
3 independent candidates appearing on the ballot and
4 diluting the will of the majority." What is the
5 State's interest in that objective?

6 A. The State's interests are that we want,
7 just like every voter in the state wants, the
8 person who is elected to have the support of the
9 majority of the voters, or the majority of those
10 voters.

11 Q. Are there other ways to achieve that
12 goal?

13 A. I'm not sure.

14 Q. Are you aware that some states have
15 majority vote requirements?

16 A. I am aware of that.

17 Q. Isn't it true that the State of Montana
18 could achieve that objective by having a majority
19 vote requirement?

20 MR. JOHNSTONE: Objection.

21 A. It's true if the Legislature changed the
22 law, yes.

23 Q. (By Mr. Sells) And taking the first
24 part of this one, "Lessening the likelihood of
25 multiple independent candidates appearing on the

1 ballot," would the State prefer that there be only
2 one independent candidate, or I should say no more
3 than one independent candidate on the ballot?

4 A. No.

5 Q. I didn't hear your answer.

6 A. No.

7 Q. What is the State's preference as far as
8 the number of independent candidates on any given
9 ballot or any given office?

10 MR. JOHNSTONE: Objection.

11 A. I don't think the State has a preference
12 for the number of candidates.

13 Q. (By Mr. Sells) Well, you are asserting
14 that the State has an interest in lessening the
15 likelihood of multiple independent candidates.
16 Are you still asserting that State interest?

17 A. And diluting the will of the majority.
18 That all goes together.

19 Q. So the State doesn't have an interest in
20 multiple independent candidates appearing on the
21 ballot if they don't dilute the will of the
22 majority?

23 A. Yes.

24 Q. Do you recall how many qualified parties
25 there are in Montana?

1 A. In 2008, there were four.

2 Q. Four. And if there are four candidates
3 for a given race, is it possible that a candidate
4 could become elected in Montana with less than a
5 majority?

6 A. Yes.

7 Q. And what has the Legislature done to
8 lessen the likelihood that the will of the
9 majority will be diluted even if there aren't any
10 independent candidates on the ballot?

11 A. I'm not aware of anything that the
12 Legislature has done.

13 Q. Do you think the State has an interest
14 in setting a certain number of candidates that
15 appear on the ballot?

16 A. No.

17 Q. Let's say all four major qualified
18 parties nominated a candidate for United States
19 Senate, and there were two independent candidates
20 who met filing requirements. Could the State just
21 as well protect the will of the majority by
22 knocking off, say, the four qualified party
23 candidates, by striking them from the ballot?

24 A. Could you repeat that, please?

25 Q. Yes. I guess this is a little math

1 experiment. There are four qualified party
2 candidates, and two independent candidates for the
3 United States Senate, and the State wants to
4 protect the will of the majority. The only way to
5 ensure a winner has a majority is to strike four
6 names off of the ballot, correct?

7 MR. JOHNSTONE: Objection.

8 A. Well, hypothetically, yes, that's --
9 What you're saying is mathematically correct.

10 Q. (By Mr. Sells) Is there some reason why
11 the State should prefer qualified party candidates
12 over independent candidates?

13 A. No.

14 Q. Well, then why does the State have an
15 interest in lessening the likelihood of multiple
16 independent candidates appearing on the ballot?

17 MR. JOHNSTONE: Objection.

18 A. Well, I guess because we're just talking
19 about the independent candidate filing date. We
20 already know the major qualified parties are going
21 to each have one candidate on the ballot if there
22 was a race in the primary or candidate in the
23 primary.

24 Q. (By Mr. Sells) I want to move on to the
25 next one, "Preventing multiple potential major or

1 third party candidates from waiting out the
2 primary and appearing as last minute independent
3 candidates." Tell me what you mean by that.

4 A. Well, if there is just hypothetically a
5 strong field of candidates, major or minor party
6 candidates, candidates could take advantage of
7 that by just waiting until the primary is over and
8 those candidates have filtered out and then file,
9 because they know they will have ballot access,
10 rather than running what might be a long expensive
11 campaign to win a primary election.

12 Q. Well, before the 2007 legislative
13 amendment to the filing deadline, the deadline was
14 a week before the primary; isn't that right?

15 A. That's correct.

16 Q. So why was it necessary to change the
17 deadline to March to prevent candidates from
18 waiting out the primary?

19 A. I think this would be a State interest
20 if the filing date were after the primary.

21 Q. So you're not asserting it as a State
22 interest vis-a-vis the previous filing deadline?

23 MR. JOHNSTONE: Objection.

24 A. Well, I guess even with the old
25 deadline, they wouldn't necessarily be waiting out

1 the primary, but they could wait out that whole
2 period of campaign, and file the week before the
3 primary as an independent candidate.

4 Q. (By Mr. Sells) What's wrong with that?

5 A. I don't know if anything is wrong with
6 it. I think if they're aligned with a major or
7 minor party, it's confusing to the voters to have
8 someone who they know is being aligned with a
9 political party not running in the primary, and
10 not getting nominated by that party, and then
11 appearing on the ballot in the general election.

12 Q. Well, that's an issue no matter when the
13 filing deadline is, right? The filing deadline
14 could be six years before the election, and if
15 candidate Joe Smith is identified as a Democrat
16 that chooses instead to run as an independent, you
17 still have that same problem, right?

18 A. Right.

19 Q. And a June deadline a week before the
20 primary doesn't allow someone like candidate Joe
21 Smith to wait out the primary, does it?

22 A. No, not the deadline in May.

23 Q. Right. I think it was the last week of
24 May, something along those lines. And doesn't a
25 candidate who decided to be independent give up

1 some of the benefits of running as a party
2 candidate, or the potential benefits of running as
3 a party candidate?

4 A. Yes.

5 Q. And when you say "last minute
6 independent candidate," by "last minute," do you
7 mean several months before the general election?
8 That's last minute?

9 A. No. We mean last minute as in didn't
10 get involved in the primary at all. A last minute
11 candidate, a surprise to the candidates who are
12 running in the primary.

13 Q. Well, what is the State's interest in
14 that?

15 MR. JOHNSTONE: Objection.

16 A. I think the State's interest, again, is
17 just trying to eliminate confusion for the
18 electorate, and leveling the playing field for all
19 the candidates.

20 Q. (By Mr. Sells) Do you agree that the
21 State has no business or no interest in giving
22 qualified party candidates an electoral advantage?

23 A. Yes.

24 Q. And if the Court were to decide that
25 Montana's ballot access scheme for independent

1 candidates did in fact give qualified party
2 candidates an electoral advantage, you would think
3 that the Court would be correct to strike that
4 ballot access scheme down, right?

5 MR. JOHNSTONE: Objection.

6 A. Well, I think the office would comply
7 with any Court order.

8 Q. (By Mr. Sells) And I understand that
9 you think that the current system does create a
10 level playing field, right?

11 A. It creates a more level playing field,
12 yes.

13 Q. Well, if the Court disagrees with you
14 and finds that it's not a level playing field,
15 would you agree that that's not fair to
16 independent candidates?

17 MR. JOHNSTONE: Objection.

18 A. I hate to stretch this out any longer,
19 but I really didn't understand that question.

20 Q. (By Mr. Sells) I guess what I'm getting
21 at is if the Court finds -- disagrees with your
22 judgment that the deadline creates a more level
23 playing field, and finds it creates a less level
24 playing field, the Secretary of State doesn't have
25 any interest in maintaining an unlevel playing

1 field, does she?

2 MR. JOHNSTONE: Objection.

3 A. No, I don't believe that the Secretary
4 of State has an interest in maintaining an unlevel
5 playing field.

6 Q. (By Mr. Sells) Does the State of
7 Montana have an interest in maintaining an unlevel
8 playing field?

9 MR. JOHNSTONE: Objection.

10 A. I think I can just speak for the
11 Secretary of State's Office.

12 Q. (By Mr. Sells) I want to move on to the
13 next asserted State interest, which is,
14 "Encouraging candidates aligned with major or
15 third parties to appear on the ballot with those
16 party designations to inform voters." How does
17 this ballot access scheme for independent
18 candidates serve that interest?

19 A. I think if candidates are contemplating
20 a run for office, and they're not sure in what
21 capacity they're going to run, and they can get
22 support from a qualified party or a minor party,
23 that they may be inclined to go that way.

24 Q. Well, but I don't understand how making
25 it harder to appear as an independent candidate

1 serves that interest. Can you explain that to me?

2 A. Well, I don't know. I don't think we're
3 making it harder for independent candidates to
4 appear.

5 Q. You don't think that moving the deadline
6 up four months or three months makes it harder for
7 independent candidates to appear on the ballot?

8 MR. JOHNSTONE: Objection.

9 A. I think they have to -- It makes it an
10 earlier deadline, but they have to exert the same
11 amount of energy as they would if the filing
12 deadline was later.

13 Q. (By Mr. Sells) So as you sit here today
14 in your official capacity as the Secretary of
15 State's designee, you don't think that the
16 deadline -- when that deadline is has any effect
17 on the difficulty or lack thereof of getting on
18 the ballot as an independent candidate?

19 A. No, I don't.

20 Q. So if the deadline were 17 years in
21 advance of the election, that's exactly the same
22 difficulty as 17 days in advance of the election?

23 MR. JOHNSTONE: Objection.

24 A. I think no matter when the filing
25 deadline is, they have to put forth the same

1 amount of effort to collect signatures and inform
2 the electorate that they're a candidate.

3 Q. (By Mr. Sells) Well, you agree with me,
4 don't you, that the earlier the deadline is, the
5 earlier one would need to decide to become a
6 candidate?

7 MR. JOHNSTONE: Objection.

8 A. I wouldn't necessarily agree with you,
9 but I think it could happen that way.

10 Q. (By Mr. Sells) And the earlier you make
11 it, the less likely it is that those -- the
12 earlier you make the deadline, the less likely it
13 is that candidates will have decided by then?

14 MR. JOHNSTONE: Objection.

15 A. Could you rephrase that, please, Bryan?

16 Q. (By Mr. Sells) Yes. The earlier that
17 you make the deadline, the more likely it is that
18 you're going to exclude candidates who haven't yet
19 decided to become candidates?

20 A. If they haven't decided to become a
21 candidate by the filing deadline, whenever it is,
22 by law they're going to be excluded.

23 Q. Okay. And if the deadline is 17 years
24 before the election, there aren't going to be very
25 many people who know 17 years in advance they want

1 to run for a particular office, right?

2 A. Right.

3 Q. But you're saying it's not any more
4 difficult to get on the ballot if the deadline is
5 17 years in advance versus 17 days in advance?

6 MR. JOHNSTONE: Objection.

7 A. That's what I'm saying.

8 Q. (By Mr. Sells) Why does the State care
9 whether candidates appear on the ballot as a
10 nominee of a qualified party or as an independent
11 candidate?

12 A. I don't think the State does care.

13 Q. Well, it has asserted an interest in
14 encouraging candidates to appear with party
15 designations.

16 MR. JOHNSTONE: There is not a question
17 there.

18 THE WITNESS: Okay.

19 Q. (By Mr. Sells) So if the State doesn't
20 have an interest in encouraging people to appear
21 as party candidates, this asserted interest
22 doesn't make any sense, does it?

23 MR. JOHNSTONE: Objection.

24 A. If the candidate is aligned with a
25 party, it seems to make practical sense that that

1 candidate that's aligned with a party file as a
2 candidate for that party, for both the candidate,
3 the State's interest, and the electorate's
4 interests.

5 Q. (By Mr. Sells) Well, how does changing
6 the deadline encourage such aligned candidates to
7 do that? What's the incentive?

8 A. The one incentive might be that they
9 have an idea who the candidates are going to be
10 for those parties, and they therefore have an idea
11 of whether they would be a viable candidate for
12 that party.

13 Q. Well, let's suppose I'm someone like
14 Steve Kelly, who is somewhat aligned with the
15 Green Party, but generally prefers to run as an
16 independent. I want you to take my word on that
17 characterization. I'm using him as sort of a
18 hypothetical. What is my incentive to run for the
19 party nomination versus the independent route?

20 A. Support of the party. I mean you have
21 an almost automatic built-in support base.

22 Q. Is it also an incentive that it's a heck
23 of a lot easier to get on the ballot as a
24 qualified candidate than as an independent
25 candidate?

1 A. The fact that you don't have to gather
2 signatures in order to file, yes.

3 Q. What business does the State have
4 incentivizing that kind of behavior?

5 MR. JOHNSTONE: Objection. Do you want
6 an answer to that?

7 MR. SELLS: Yes.

8 A. What kind of behavior?

9 Q. (By Mr. Sells) The decision to favor
10 running as a party candidate. And does the State
11 have an interest in telling Steve Kelly, "We'd
12 rather that you run as a party candidate than as
13 an independent candidate"?

14 MR. JOHNSTONE: Objection.

15 A. I'm not sure of the answer. I don't
16 think the State is telling -- in this case telling
17 Steve Kelly that.

18 Q. (By Mr. Sells) Isn't that what
19 "encouraging" means?

20 A. I still don't think it's the State
21 telling him to run as a party candidate. Having
22 the uniform filing dates might encourage Steve
23 Kelly or another candidate to think about whether
24 they want to run with a party that they're known
25 to be aligned with.

1 Q. I want to move on to the next State
2 interest, which is basically the second to last
3 one, which is, "Encouraging independent and minor
4 party candidates to reach out early to voters who
5 do not have the benefit of the extended media
6 coverage, according to some party candidates."
7 Can you explain what that means?

8 A. With the filing date being uniform for
9 all candidates, the independent candidate, in
10 order to be a viable candidate, would need to let
11 voters know that he is a candidate.

12 Q. Well, do qualified party candidates have
13 to do the same thing?

14 A. Yes.

15 Q. How so?

16 A. How do they reach out to voters early?

17 Q. Yes.

18 A. I'm not sure if I understand the
19 question. Qualified candidates reach out to
20 voters by filing their petition for nomination,
21 and campaigning.

22 Q. Well, do any voters have to sign the
23 candidates' petition for a qualified party
24 candidate?

25 A. No.

1 Q. Let's say I'm a Republican candidate for
2 School and Lands Commissioner. Montana has a
3 School and Lands Commissioner, right?

4 A. No.

5 Q. Superintendent of Public Instruction.

6 A. Okay.

7 Q. Some low level statewide office, is what
8 I'm getting at.

9 MR. JOHNSTONE: The office that the
10 Secretary of State previously held, Bryan?

11 Q. (By Mr. Sells) Fair enough. Let's say
12 I'm a Republican candidate for that, and I don't
13 have any opposition in the primary. How much does
14 State law require me to reach out to voters before
15 the general election?

16 A. Well, State law doesn't require it.
17 Major party candidates most of the time in Montana
18 get a lot of media coverage immediately from the
19 time they announce that they're going to file
20 through the filing period.

21 Q. But the State doesn't encourage the
22 major party candidates or even the minor
23 qualifying party candidates to reach out in any
24 way, does it?

25 A. The State specifically doesn't encourage

1 them to reach out. They don't -- The State
2 doesn't, no.

3 Q. Why does the State have an interest in
4 encouraging independent candidates to reach out?

5 A. The interest is having the independent
6 candidates notify or get word out to the voters
7 that there is an independent candidate.

8 Q. Isn't that the problem of the
9 independent candidate?

10 A. It is a problem of the independent
11 candidate, yes.

12 Q. What business is it of the State?

13 A. I think just engaging, again, engaging
14 all of the potential candidates with the
15 electorate at a time when the electorate is
16 interested in who's filing.

17 Q. What's the State interest in encouraging
18 some candidates but not others to do that?

19 MR. JOHNSTONE: Objection.

20 A. There just isn't a need to encourage the
21 candidates who have built in publicity and media
22 coverage.

23 Q. (By Mr. Sells) And the last one is
24 responding to increased early interest in
25 politics. Tell me what you mean by that.

1 A. As I think I mentioned earlier in
2 response to another State interest, the State of
3 Montana only has two Congressional seats and one
4 Representative seat, and there is huge early
5 interest in those seats. A year, sometimes more
6 than a year, potential candidates announce that
7 they are interested in running for one of those
8 seats.

9 We also have had a political party have
10 a caucus in February, and the last two legislative
11 sessions there has been legislation to propose an
12 early primary date for Montana. So there is
13 increasing interest in the political scene early
14 in the year, and so this earlier filing date for
15 all candidates is response to that early interest.

16 Q. What is the State's interest in making
17 that response?

18 A. The State's interest, again, is engaging
19 candidates, political parties, independent
20 candidates, the electorate, everyone in the
21 political process for Montana.

22 Q. Well, if there was an increased voter
23 interest in Democrats, would the State have an
24 interest in eliminating Republicans from the
25 ballot?

1 A. No.

2 Q. So sometimes increased interest isn't an
3 indication that the State has a role to play;
4 isn't that right?

5 A. Sometimes.

6 Q. What makes you think that the State has
7 a role to play in this instance?

8 A. Other than what I answered to the
9 previous questions, that's the extent of the
10 examples I can think of right now, why the State
11 has an interest in engaging candidates and the
12 electorate early in the election process.

13 Q. Are you aware of any Court anywhere in
14 the United States since the founding of our
15 republic that ever found any single one of the
16 interests that you have asserted here today to be
17 a legitimate State interest?

18 MR. JOHNSTONE: Objection.

19 A. I'm not aware of that, no.

20 MR. SELLS: Can you give me just a
21 second. I think I've got no other questions, at
22 least for now insofar as the 30(b)(6) is
23 concerned.

24 I don't have anything else, Anthony,
25 subject to what we said earlier about -- I'm going

1 asked the staff that does staff them to just put
2 together a little summary of the events that they
3 did, and that's where this 2008 SOS Event
4 Information document originated.

5 Q. How about specifically the four columns
6 that are headed, "Registered, stopped, interest,
7 and rating"?

8 A. I didn't specifically ask for those
9 columns. This spreadsheet is a spreadsheet that
10 one of the election staff, Justus Wendland, he
11 staffs a great many of these events, and this is
12 something that he put together, that he started
13 tracking numbers of people that stopped by the
14 booth; because as I understand it, for the last
15 few years, the Secretary of State's Office has
16 been cutting back on the number of events that
17 they go to, and this was a way -- he was sort of
18 weeding out what were the good events to attend,
19 and so we just used his same format.

20 Q. Let's take a look at Exhibit G.

21 A. Okay.

22 Q. Can you tell me what this is.

23 A. This is a summary of work flow for
24 election administrators between the close of
25 filing and the primary election that I did.

1 Q. When did you do this?

2 A. I did this in the summer of 2008
3 specifically for this case.

4 Q. Can you tell me what this document, what
5 the individual lines on the document are. They
6 look like a list, but generally speaking, what are
7 the list items?

8 A. The list items are tasks that election
9 administrators are responsible for.

10 Q. When you say election administrators,
11 are you talking about county election
12 administrators?

13 A. Yes.

14 Q. And what was the source? What was your
15 source for preparing this document?

16 A. My source mainly was personal
17 experience.

18 Q. Because you used to be a county election
19 official?

20 A. Yes.

21 Q. The first line says, "Certified to COPP
22 names of statewide and State district candidates
23 who have complied with filing requirements." Tell
24 me what that entails.

25 A. That entails sending a letter or some

1 other form of communication to the Commissioner of
2 Political Practice that lists the names of any
3 candidates who file with the clerk and recorder,
4 or who are in one of their districts that says
5 that these candidates did indeed file the required
6 paperwork with the county office.

7 Q. So if I understand you correctly, that's
8 basically sending one email or one letter?

9 A. Yes.

10 Q. How long does it take to complete that
11 task?

12 A. It might take -- The bulk of the task is
13 going back and looking at the paperwork, and
14 making sure it's filed. If there is a candidate
15 that hasn't filed it, usually the clerk will
16 contact them and say, "Hey, you didn't file your
17 ClA with this office." The task might entail an
18 hour to maybe a half a day of work.

19 Q. The second task is, "Certify to the COPP
20 names of county candidates who have complied with
21 filing requirements." Tell me what that entails.

22 A. That's the same process.

23 Q. Just at a different level?

24 A. Yes.

25 Q. How long does that take?

1 A. Probably less time, because most of the
2 time these county candidates are more accessible,
3 and most of the time the county election
4 administrators ensure that the county candidates
5 file their paperwork.

6 Q. Remind me again what county you were
7 election administrator in.

8 A. Prairie.

9 Q. What's the population of Prairie County?

10 A. 1300.

11 Q. Would it be fair to characterize that as
12 a small county?

13 A. It would be fair.

14 Q. The next task is, "Set up election in
15 unity on line, enter candidate information." What
16 does that entail?

17 A. That entails setting up all of the
18 candidates in an online program, and then entering
19 all of the candidate information into the election
20 that's been set up, candidate information being
21 the name of the candidate, their party, what
22 office they filed for. It is something that's
23 relatively new, came about because of the Help
24 America Vote Act, and the use of accessible voting
25 equipment. And it's a system that's a little bit

1 cumbersome and not very user friendly.

2 Q. Is it a system that is operated by the
3 State of Montana or is it a national system?

4 A. It's a system, a vendor system. It's
5 Election Systems and Software, the vendor who sold
6 the State of Montana the accessible voting
7 equipment.

8 Q. How long does that take?

9 A. That probably takes a couple of days.
10 And it's probably not a couple of days working on
11 it the whole entire eight hours each day. So
12 maybe ten to twelve hours.

13 Q. That sounds like a pain to me. For the
14 first three tasks that we just discussed, is there
15 a date before which county election administrators
16 can't begin these tasks?

17 A. The first two tasks they can't begin
18 until the close of candidate filing. The third
19 task, the clerk can begin that task as soon as
20 candidate filing opens, and they start having some
21 filed candidates.

22 Q. So first two tasks, why can't those
23 begin until after the end of the filing period?

24 A. Well, because they don't know who all of
25 the candidates are. It's not such a huge task

1 that they would start it in January, and add to
2 the list as candidates file generally. They wait
3 until the close of filing and then do the letter.

4 Q. So what you're saying is there is no
5 statutory start date, it's just as a practical
6 matter easier to send one email rather than
7 several?

8 A. Correct.

9 Q. So the first three tasks, is there a
10 deadline by which those tasks must be completed?

11 A. There is a statutory deadline for the
12 first two tasks, and there is a vendor deadline
13 for the third task.

14 Q. What is the statutory deadline for the
15 first two tasks?

16 A. Without looking at the statute, I'm not
17 sure. I believe it's within five days of the
18 close of candidate filing, but I'm not positive
19 without looking at the statute.

20 Q. And what's the vendor deadline for task
21 No. 3?

22 A. The vendor deadline changes depending on
23 the election, but the ballots have to be ready to
24 be mailed out 45 days before the election, and the
25 vendor usually likes to get this information 60

1 days before the election.

2 Q. When you say "the election" here, you're
3 talking about the primary?

4 A. I am.

5 Q. For that third task, if there is an
6 independent who files, you don't have to include
7 them, right?

8 A. That's correct.

9 Q. How about the first two tasks, do those
10 apply to independents as well?

11 A. They do not. It's just a certification
12 of candidates that will appear on the primary
13 ballot.

14 Q. So the number of independent candidates
15 that file have no effect on those first three
16 tasks?

17 A. For the primary election, correct.

18 Q. Let me ask you: Is this document
19 complete? Does this contain all of the tasks that
20 election administrators have to do after the close
21 of candidate filing vis-a-vis the election?

22 A. No, it's not a comprehensive list. It's
23 the things that I thought of as I went through my
24 checklist of things to do between the close of
25 filing and the primary election. There is a good

1 possibility I may have left tasks off. I didn't
2 consult with an election administrator from a
3 large county, and there might be tasks that they
4 do in a large county that I'm unaware of.

5 Q. Well, as you sit here as the Secretary
6 of State designee, are you aware of any tasks that
7 you left off of this document?

8 A. No, I'm not aware of any.

9 Q. So the next task is to verify -- excuse
10 me -- is order ballots. Can you explain to me
11 that task.

12 A. Once the information is set up in unity
13 online, at that point, the ballot order is
14 finalized. This involves setting up candidates
15 according to the order they go on the ballot,
16 setting up the headings, the instructions, the
17 warnings.

18 And then there is a back and forth
19 between the ballot printer, the county, and our
20 office. The counties send in the ballot
21 information. The printing company usually within
22 a week to ten days sends a proof to the counties
23 and to our office. We both proof it. We send it
24 back for corrections or modifications, and that
25 goes on during that time period.

1 Q. How long does this task take in terms of
2 hours?

3 A. It's an ongoing process over a couple of
4 weeks. It's time consuming. I have one staff
5 member plus myself who we pretty much do nothing
6 but ballot proofing in our office. Of course,
7 we're doing a lot more counties. We're doing most
8 of the counties in the state, so --

9 Q. Right. But I'm asking now about: What
10 is it election administrators do? And I
11 understood you to be talking about county election
12 administrators. How much does it -- How long in
13 terms of number of hours does it take a county
14 election administrator to complete the task that
15 you have described here as order ballots?

16 A. That entire process goes on off and on
17 for a couple of weeks, but I'm unsure of the total
18 hours. I think it would vary by county, depending
19 on how many ballot rotations you have, how many
20 precincts you have, how many districts you have.

21 Q. Can you give me a ballpark figure?

22 A. I don't believe I can.

23 Q. How many years did you perform this task
24 as an election administrator in Prairie County?

25 A. I was the election administrator for 18

1 and a half years.

2 Q. In your capacity as election
3 administrator, did you either personally do this
4 task or oversee staff members who did?

5 A. I personally did this task.

6 Q. And you can't recall approximately how
7 many hours it took?

8 A. Could I clarify my previous answer?

9 Q. Sure.

10 A. The process has changed. The process
11 changed in 2006. So I did the ballot layout this
12 way for one election cycle, which was the 2006
13 election cycle. I remember that it was very time
14 consuming, more time consuming than it was before
15 2006 when we did a manual process. It was much
16 less technical because we didn't have to depend on
17 equipment to read our ballots.

18 Q. The next task is verify ballot layout.
19 Could you tell me what that entails.

20 A. That task, in conjunction with the
21 previous task of order ballots, is the process
22 that I just described.

23 Q. So you were lumping those two tasks
24 together in your previous description?

25 A. Yes.

1 Q. And so I gather you don't know how many
2 hours it takes to verify the ballot layout?

3 A. I don't. It takes many hours.

4 Q. And for those two tasks, the number of
5 independent candidates on the ballot has no effect
6 on how long it takes?

7 A. Right.

8 Q. The next task is, "Send auto mark and
9 voting equipment media in to ES and ask for
10 programming." Can you explain what that means?

11 A. Once the ballot is verified and signed
12 off on by the county, the counties send in their
13 coding media -- usually it's a data card -- into
14 the vendor for programming for the voting
15 equipment.

16 Q. And how long does it take to do that
17 task?

18 A. It's just a matter of mailing it in, so
19 minutes, part of an hour.

20 Q. And again, that task isn't affected by
21 the number of independent candidates who are
22 filing to be on the ballot?

23 A. No.

24 Q. Is it?

25 A. No.

1 Q. Did you answer?

2 A. I said no.

3 Q. The next task is, "Advertise public test
4 of equipment." Can you explain what that means.

5 A. That's putting a notice in a local
6 newspaper that describes the equipment that will
7 be used in the election, and gives the public
8 notice of when the county election official will
9 be doing a public test.

10 Q. The next task is, "Conduct testing of
11 media on all equipment." What does that entail?

12 A. Once the media is received from the
13 vendor, the county election official or staff will
14 test the media to make sure it's programmed
15 correctly, to make sure the rotations are correct,
16 and that the equipment reads the ballot correctly.

17 Q. And then the next task after that is
18 conduct public test of all equipment. What does
19 that entail?

20 A. That's the public test that was
21 referenced in the previous item, where the public
22 is invited to come and watch the election official
23 test the equipment for assurance that the
24 equipment is reading the ballot and marking the
25 ballot correctly.

1 Q. How long do those three tasks -- They're
2 all related to testing of equipment or media. How
3 long do those tasks take?

4 A. The advertising doesn't take very long.
5 The testing, both the pretesting and the public
6 testing in the larger counties probably takes two
7 days, and in a smaller county, probably takes one
8 day.

9 Q. By day, you mean eight hours of -- eight
10 person hours of work?

11 A. Yes, approximately.

12 Q. How do you distinguish between big and
13 small counties?

14 A. The number of registered voters.

15 Q. I mean what is your line of demarcation?

16 A. Well, generally we refer to the eight
17 largest counties as big counties. Everyone else
18 is kind of lumped into small to medium sized
19 counties.

20 Q. And is it generally true that larger
21 counties, i.e., one of the eight big counties,
22 generally has more election staff than smaller
23 counties?

24 A. That's generally true.

25 Q. Do you have any perspective on whether

1 the ratio of staff to population is bigger or
2 smaller in small counties or big counties?

3 A. Would you repeat that?

4 Q. I'm asking you: Do you know whether the
5 ratio of election staff to registered voters is
6 higher in big counties or small counties?

7 A. I believe it's higher in big counties.

8 Q. So big counties have more election staff
9 per capita than small counties?

10 A. I believe that's generally true.

11 Q. Well, back to the task list. It looks
12 to me like the next four tasks are all related to
13 election judges. Can you explain to me those four
14 tasks.

15 A. Yes. The county election administrator
16 notifies the political parties that it's time to
17 prepare the list of election judges. The
18 political parties then either review a previous
19 list, or they send in a new list of people they
20 would like to serve as election judges. The
21 governing body of the county then appoints from
22 that list an even number of people from the list
23 that were submitted by the political parties.
24 The clerk then sends out a notification that the
25 training will be taking place, and then they

1 conduct the election judge training for the next
2 two years of elections.

3 Q. How long do each of those four tasks
4 take?

5 A. The election judge training is the task
6 that is time consuming. In my county, it took a
7 day to conduct the training of the judges, and I
8 probably spent the better part of a week preparing
9 training materials. The larger counties do
10 training over two or three days during a week, and
11 probably spend about the same amount of time
12 preparing for the training.

13 Q. So the other three tasks don't take very
14 long at all, do they?

15 A. No.

16 Q. So again, we're talking about a few days
17 to complete the training?

18 A. To do the training itself, yes, and then
19 additional days for preparation for the training.

20 Q. So none of those four tasks, or the
21 three tasks before those, about testing, are
22 affected by the number of independent candidates
23 who are trying to be on the ballot, are they?

24 A. No, they're not.

25 Q. The next two tasks are advertising. Can

1 you explain to me what those entail.

2 A. Those two tasks are simply placing legal
3 ads in the newspaper.

4 Q. And those two tasks don't take very
5 long, do they?

6 A. They do not.

7 Q. And those tasks aren't affected by the
8 number of independent candidates who file for
9 office, are they?

10 A. No, they're not.

11 Q. Would you explain to me the next task,
12 which is, "Run voter register and verify."

13 A. Once regular voter registration closes
14 thirty days before the election, the counties
15 prepare the voter register, which is the list of
16 all of the voters eligible to vote in the upcoming
17 election. This is now done electronically through
18 the statewide voter data base.

19 Q. How long does this take?

20 A. The running of the register varies
21 depending on the size of the county. In my
22 county, it took twenty minutes for the actual
23 physical pulling of the register. In the big
24 counties it might take several hours, but someone
25 doesn't have to be sitting there the entire time

1 the register is being pulled.

2 Q. That's a computer task, right?

3 A. Yes.

4 Q. So it's matter of hitting go?

5 A. Yes.

6 Q. Again, we're talking even if a person
7 were sitting there the whole time, it's about an
8 hour or less than that?

9 A. I believe it's several hours in the
10 larger counties. Probably in the two or three
11 largest counties, it's several hours.

12 Q. And that task isn't affected by the
13 number of independent candidates on the ballot, is
14 it?

15 A. No.

16 Q. Now, the next task is, "Prepare tally
17 books, poll books, abstracts." What does that
18 entail?

19 A. These are items that are used on
20 election day or -- Well, they're election day
21 and/or election night when the counting starts.
22 The tally book is where votes are tallied by the
23 counting board; the poll book is the list of
24 voters that the polling place judges keep; and the
25 abstracts are the spreadsheets of election

1 results.

2 Q. And how long does this task take?

3 A. These tasks together probably, in my
4 county, at least were a couple days of work.

5 Q. So about 16 person hours?

6 A. Yes, about.

7 Q. And is that task affected by the number
8 of independent candidates who file to be on the
9 ballot?

10 A. No, not for the primary.

11 Q. The next task is advertise polling place
12 location. That seems pretty self-explanatory to
13 me. How long does that take?

14 A. That one is just a matter of putting an
15 ad in the paper, preparing the ad, and getting it
16 to the paper for publication.

17 Q. So not long, right?

18 A. Right.

19 Q. The next four tasks are about absentee
20 ballots. Can you explain to me what those tasks
21 entail.

22 A. The county election administrator
23 prepares mailings to go out. One mailing is to go
24 out to absent military and overseas voters; the
25 second mailing goes out to permanent voters who

1 are on the permanent absentee list. So this
2 involves getting the envelopes, preparing the
3 instructions that go out to the voter, getting
4 envelopes ready, running labels for the voters,
5 and when the ballots are available, then stuffing
6 the envelopes and preparing them for mailing.

7 Q. And how long do each of those four tasks
8 take?

9 A. In a small county like the county I came
10 from, it usually took me most of a week to prepare
11 those mailings. In the large counties, I'm not
12 positive, but I know there has been discussion
13 that they start that process several weeks in
14 advance of receiving their ballots, and have staff
15 working on those fairly large mailings for their
16 counties.

17 Q. And are any of those tasks affected by
18 the number of independent candidates who are
19 trying to be on the ballot?

20 A. No.

21 Q. Remind me how many staff you had in your
22 Prairie County office.

23 A. Not counting myself, I had one and a
24 half staff members.

25 Q. Did you ever hire additional staff for

1 busy times?

2 A. At one time when I first became the
3 clerk and recorder and election administrator, we
4 had a full-time person who served as the election
5 administrator. But other than that, no.

6 Q. And you were full-time, correct?

7 A. Yes.

8 Q. So there were, including you, two and a
9 half people working on election administration in
10 Prairie County?

11 A. Yes.

12 Q. That would be two and a half what they
13 call full-time equivalents?

14 A. Yes.

15 Q. Was the size of your office fairly
16 typical of a small county in Montana?

17 A. I think I had less staff than most
18 comparable counties, but similar.

19 Q. How many staff would a similar county
20 have?

21 A. Probably four FTE.

22 Q. Do you have a sense of how many
23 full-time equivalents one of the eight large
24 counties have?

25 A. I don't.

1 Q. The next task is, "Late registration
2 begins, registering electors, and issuing absentee
3 ballots." Can you explain to me what that
4 entails.

5 A. Thirty days before an election, once
6 regular registration closes, people can go into
7 the county office, and register, and be issued an
8 absentee ballot. They can only do this at the
9 county election office, and that goes on for the
10 thirty days before the election, and up to and
11 including election day.

12 Q. And how many hours does that task
13 entail?

14 A. I'm not sure. I believe it entails most
15 of the time of most of the election staff during
16 that thirty days.

17 Q. Well, when you say most, is that closer
18 to 20 hours or 40 hours of a full-time equivalent?

19 A. I would say closer to -- I would say
20 right in between 20 and 40 hours, 30 hours.

21 Q. And it would be all of the staff would
22 be -- all of the full-time equivalents would be
23 spending approximately that amount?

24 A. I think a good portion of the staff is
25 working on late registration and issuing absentee

1 ballots.

2 Q. And this only happens during that last
3 thirty day window, right?

4 A. Yes.

5 Q. And is this task affected in any way by
6 the number of independent candidates who are
7 seeking to appear on the ballot?

8 A. No.

9 Q. The next task says, "Absentee voting
10 begins thirty days before the election." Can you
11 tell me about that task.

12 A. That's registrants who are previously
13 registered, not late registrants who are
14 requesting absentee ballots, either calling in and
15 requesting one, or writing and requesting one, or
16 coming into the office to vote.

17 Q. And how much time does that task take?

18 A. And that task is included in the
19 previous task of registering late electors and
20 issuing absentee ballots to those late
21 registrants.

22 Q. The next task is setting up voting
23 booths and polling places. What does that entail?
24 Actually let's take the last three tasks in a
25 group. Can you tell me what the last three tasks

1 entail?

2 A. Sure. And I think this is a task that
3 really varies by county. In my county, I
4 physically had to go to my polling places and
5 actually put the voting booths together. I did
6 that generally the day before the election. It
7 took me half a day to do. I'm guessing -- and I
8 could be wrong -- but I'm guessing big counties,
9 they have maybe volunteers at the polling places
10 that put those together. Every election official
11 is responsible for getting the supplies out to the
12 polling place early in the morning on election day
13 before the polls open.

14 Q. And the last half is just election day
15 itself?

16 A. Right.

17 Q. And all three of those tasks, if I
18 understood you correctly, happen on either
19 election day or the day before?

20 A. Yes.

21 Q. Do any of those three tasks, are any of
22 those three tasks affected by the number of
23 independent candidates who want to appear on the
24 ballot?

25 A. No.

1 Q. Looking back over this entire list, are
2 there any of these tasks that are affected by the
3 number of independent candidates who are seeking
4 to appear on the ballot?

5 A. No.

6 Q. Have you prepared a similar document for
7 tasks election administrators undertake after the
8 primary election and before the general election?

9 A. No, I haven't. I don't believe anything
10 on this list would change. I may have prepared an
11 affidavit earlier this year for the tasks that
12 happen between the primary and the general
13 election, and it may have included most of this
14 same information.

15 Q. Do you know how many days there are
16 between the primary election and the general
17 election?

18 A. Not exactly. It's about five months.

19 Q. It more than 75 days, right?

20 A. Yes.

21 Q. So what you're saying is that between
22 the primary election and the general election, the
23 county election administrators do a lot of these
24 same tasks over again?

25 A. They do most -- I believe everything

1 except the training of the election judges.

2 Q. Are there any other tasks that they do
3 that you could think of right now?

4 A. For the general election?

5 Q. Yes, for the general election that are
6 not on this list.

7 A. I can't think of any right now.

8 Q. Well, for the general election, in other
9 words, when election administrators redo these
10 tasks for the general election, are any of these
11 tasks affected by the number of independent
12 candidates who seek to appear on the ballot?

13 A. Some of them would be.

14 Q. Can you identify for me which ones those
15 are.

16 A. The first two tasks, and the next three
17 tasks that have to do with preparing ballots.

18 Q. Is that it?

19 A. I believe that's it, yes.

20 Q. And can you tell me approximately how
21 much extra time an independent candidate would
22 take up on those tasks?

23 A. I don't know that having independent
24 candidates would take up any more time. It just
25 would add to the complexity of preparing the

1 ballots.

2 Q. So it adds complexity without adding
3 time?

4 A. I don't believe it would add very much
5 time to these tasks.

6 Q. Are you familiar with the Montana VOTES
7 system?

8 A. Yes.

9 Q. Can you tell me briefly what that is.

10 A. Montana VOTES is a statewide voter
11 registration data base. It's a comprehensive
12 election management program.

13 Q. And is that maintained by the Secretary
14 of State?

15 A. Yes.

16 Q. And do you perform that function for the
17 Secretary of State?

18 A. No.

19 Q. Who does?

20 A. We have a program analyst and two help
21 desk staff members. They work under our IT
22 manager. They maintain it.

23 Q. Are you familiar with how to use it?

24 A. Yes.

25 Q. Have you been trained in how to use it?

1 A. Yes.

2 Q. Did you use it when you were election
3 administrator in Prairie County?

4 A. I used it for the 2006 election cycle,
5 yes.

6 Q. Did you receive training in how to use
7 it for that election cycle?

8 A. Yes, we did. I did.

9 Q. Can you tell me what an election
10 administrator does with respect to that system?

11 A. They register voters in that system;
12 they verify petition signatures; and enter
13 petitions in that system; they issue absentee
14 ballots in the system; they track active and
15 inactive registrants; they do the NVRA process
16 through the system; they run the voter register
17 from the system.

18 Q. Would it be fair to say that the Montana
19 VOTES system is now fairly integral to the job of
20 an election administrator?

21 A. Yes.

22 Q. Are election administrators pretty well
23 versed in how to use that system?

24 A. Yes, they are.

25 Q. How long does it take to register a

1 voter in the system if you're an election
2 administrator?

3 A. It varies a little bit, but it probably
4 takes five minutes, maybe ten minutes, depending
5 on if there is any complications or problems with
6 the registration information.

7 Q. And I think the next task you mentioned
8 was checking signatures?

9 A. Yes.

10 Q. How long does it take an election
11 administrator generally to perform that task in
12 the system?

13 A. Are you asking just for one, to check
14 one signature?

15 Q. Yes, one signature.

16 A. To check one signature, two minutes.

17 Q. Would it be different if you had ten
18 signatures to check?

19 A. Would it be different?

20 Q. Would the amount of time it takes per
21 signature be different if you had more signatures
22 to do?

23 A. No, I don't think so.

24 Q. So there is no way to false enter or
25 anything like that, it's just two minutes per

1 signature?

2 A. Yes.

3 Q. And I think the next task you mentioned
4 was checking petitions or entering petitions. Can
5 you explain to me what that entails.

6 A. Sure. They the clerk and recorder
7 enters the petition issue into the system, so that
8 they can track the petition circulators as well as
9 the petition signers. So it's a matter of
10 entering the petition information into the system,
11 and the circulators.

12 Q. How long does that take?

13 A. I'm not sure. It takes fifteen minutes
14 for one petition probably.

15 Q. Are there any other steps that are
16 involved in checking a candidate petition?

17 A. Not that I'm aware of.

18 Q. So you have the fifteen minutes for the
19 entry of the petition, and then two minutes per
20 signature?

21 A. I think that's a good estimate.

22 Q. Ms. Kimmet, as far as checking petitions
23 are concerned, is that something that an election
24 administrator does or that a staff member
25 generally does?

1 A. I think it's a combination of those.

2 Q. It could be anyone?

3 A. Yes.

4 Q. So it's not something that is unique to
5 the election administrator?

6 A. Yes, that's correct.

7 Q. How long does it take to learn how to
8 use the Montana VOTES system?

9 A. It's hard to put a time frame on it.
10 There is training that our office does, and there
11 is training that the election administrator does
12 if they have new staff, and then there is
13 on-the-job training that the staff person gets as
14 they use the system; and as they get more
15 responsibility on the system, they may work with
16 one area or all areas of the election -- of the
17 data base. So I don't know that I can put a time
18 frame on it.

19 Q. Can you give me an approximation of how
20 long it would take to train a new staff member to
21 check petition signatures and enter a petition?

22 A. I think to do that particular task it
23 would take a half hour to an hour to train them on
24 just that task.

25 Q. Is there any reason why a county

1 election administrator couldn't hire a temporary
2 staff member, if necessary, to check petition
3 signatures and enter petitions?

4 A. I don't know the answer to that. It
5 would depend, I guess, on the county's resources.

6 Q. I should have been clearer. I was
7 talking about other than ability to pay them. Is
8 there any other reason why an election
9 administrator, if he or she needed to, couldn't
10 hire a temporary worker to enter petitions?

11 A. I'm not aware of any other reasons.

12 Q. You don't need a background check to use
13 Montana VOTES or something like that?

14 A. I guess that would depend on the county.
15 There is information in Montana VOTES that not all
16 staff members have access to. But that's up to
17 the individual county.

18 Q. Then you wouldn't need access to that
19 information in order to check signatures, would
20 you?

21 A. You wouldn't need it, but if you're
22 checking signatures, you're viewing a scanned copy
23 of a voter registration card that has some of that
24 information on it, like identifying numbers.

25 Q. So an employee might have to sign a

1 non-disclosure agreement or something along those
2 lines in some counties?

3 A. They might.

4 Q. Do you ever use volunteers in an
5 election administrator's office?

6 A. As an election administrator, I did not.
7 I'm not aware of counties that use volunteers for
8 the actual election office.

9 Q. Is there any reason why an election
10 administrator couldn't use a volunteer?

11 A. I'm not aware of any reasons.

12 Q. Let's look at the next exhibit. I think
13 it's "H."

14 A. (Complies) Okay.

15 Q. Do you have Exhibit H in front of you,
16 Ms. Kimmet?

17 A. I do.

18 Q. And tell me what this is.

19 A. This was testimony that I provided to a
20 legislative committee in support of a bill that
21 would move candidate filing deadlines back ten
22 days.

23 Q. When you say back, do you mean earlier
24 or later?

25 A. I mean move it earlier, both the