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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

NEW APPROACH MONTANA, THEODORE J. DICK, and DAVID M. LEWIS, Plaintiffs, v. STATE OF MONTANA, and COREY STAPLETON, SECRETARY OF STATE, Defendants.	Cause No. XBDV-2020-444 Hon. John W. Larson **DEFENDANTS' BRIEF IN OPPOSITION TO EMERGENCY MOTION FOR RELIEF**

INTRODUCTION

Plaintiffs' Complaint was triggered by the Governor's executive actions related to COVID-19, culminating in an Executive Order dated March 26, 2020 ("March 26

Directive").[1] Compl. ¶¶ 15, 17-21. Rather than requesting an interpretation or relief from the Governor, Plaintiffs sued to temporarily suspend certain statutes, requesting that the Court fashion unique and extraordinary relief.

Plaintiffs do not challenge the facial constitutionality of ballot petition statutes. Nor do they argue that the statutes are unduly burdensome to any petition effort. Rather, they claim that due to the "coronavirus pandemic and the associated executive orders and directives" it is "neither ethical nor permitted" to gather signatures under those statutes. Compl. ¶ 21. While framing the statutes as the problem (Compl. ¶ 25), Plaintiffs are admittedly only hindered by events of an unforeseen health emergency, actions by the Governor, and timing. The ballot petition statutes are not the cause of Plaintiffs' dilemma, but simply part of the backdrop.

Having waited over seven months to begin the initiative process, Plaintiffs now seek extraordinary relief but fail to cite any authority suggesting such a remedy is appropriate or even allowable. They merely conclude that they suffer a constitutional deprivation. A last-minute drastic remedy ordering local election officials and the Secretary of State to accept unverified (and unverifiable) electronic petition signatures is claimed as their only hope.

Montana's petition signature requirements are vital to prevent fraud and maintain Montanans' constitutional right to enact laws by initiative. Plaintiffs' situation is not the

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[1] March 26, 2020 Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to stay at home and designating certain essential services, *Declaration of Patrick M. Risken* Ex. 1.

result of "unfair" election statutes. Rather, it springs from a health emergency and a resulting order by the Governor. The request for relief should be summarily denied.

ARGUMENT

I. Plaintiffs have failed to state a cognizable claim.

The Plaintiffs' request that the Court suspend certain election statutes because of societal circumstances, legislate alternatives in lieu and later reinstate existing law is not a cognizable judicial claim. The "political question doctrine" squarely excludes claims like those presented here from judicial consideration. The Court must decline Plaintiffs plea for the judiciary to sidestep policy determinations of the executive and legislative branches.

A. Separation of powers principles prohibit this Court from infringing on the executive or legislative branches.

The "political question doctrine" excludes from judicial review those controversies that revolve around policy choices and value determinations constitutionally committed to other branches of government or to the people. *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241 (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229 (1986)). While no one questions the demand for a response to the COVID-19 crisis, the Governor has responded, exercising authority under Mont. Code Ann. § 10-3-104(2)(a), which includes the authority to suspend laws, order the cooperation of state agencies and "take other measures to cope with the emergency." *Id.* Plaintiffs' claims require extension or modification of the Governor's

March 26 Directive to specifically address ballot petition signature gathering. This Court should decline to take on a role assigned to the executive.

B. Plaintiffs request legislation by the Court.

Plaintiffs seek an injunction suspending ballot measure statutes involving signature gatherers (Mont. Code Ann. § 13-27-102); signature sufficiency (§ 13-27-103); signature certification (§ 13-27-302); signature verification by county clerks (§ 13-27-303(1)); the form of verification (§ 13-27-304); petition forms (§ 13-27-201(1)); and statutory deadlines for the submission of petition sheets (§ 13-27-301) and petition filing with the Secretary of State (§ 13-27-104). Plaintiffs' Br. at 17. Without mention, Plaintiffs also seek to partially suspend Montana Constitution Article III, Section 4(2).[2] While separation of powers principles allow a court to declare certain election laws unconstitutional, that is not the relief Plaintiffs seek. This Court should decline Plaintiffs' invitation to indiscriminately modify the State's election laws.

To grant the relief that Plaintiffs seek, this Court must create an unprecedented form of petition signature gathering and verification not contemplated anywhere in Montana's election statutes. This approach "simply urges courts to be activist and result-oriented." *Stop Over Spending Mont. v. State*, 2006 MT 178, ¶ 70, 333 Mont. 42,

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[2] "Initiative petitions must contain the full text of the proposed measure, shall be *signed* by at least five percent of the qualified electors in each of at least one-half of the counties and the total number of signers must be at least five percent of the total qualified electors of the state. Petitions shall be filed with the secretary of state at least three months prior to the election at which the measure will be voted upon." Mont. Const. art. III, § 4(2) (emphasis added).

139 P.3d 788 (Nelson, J., dissenting). The relief sought is better addressed to the legislature.

> [S]o long as our Constitution distributes the powers of government among the three departments--legislative, executive, and judicial--and forbids one department exercising any powers belonging to another, the courts must decline to legislate or to read statutes as some people may think they ought to be written, rather than read them as they are.

State ex rel. Driffill v. Anaconda, 41 Mont. 577, 583, 111 P. 345, 347 (1910). If a matter is deemed of sufficient importance, it should be called to the attention of the governor or the legislature for proper amendment.[3] "The courts may not legislate thereon." *Carlson v. Cain*, 216 Mont. 129, 134-35, 700 P.2d 607, 610-11 (1985) (court refused to add interest to statutory award).

Plaintiffs cite the Governor's March 26 Directive as the reason for an entirely new process of petition signature gathering, to be achieved only by order of this Court. While Plaintiffs veil the relief sought as a one-time recognition of e-signatures as valid, what they really seek is the *substitution* of e-signatures for the only signatures allowed under petitioning statutes, as well as a substitute (and yet unknown) process for signature verification.

The Montana Legislature adopted the Uniform Electronic Transactions Act (UETA; Mont. Code Ann. tit. 30 ch. 18, pt. 1) expressly for consensual

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[3] Article V, § 6 of the Montana Constitution authorizes either the governor or the legislature to call a special session.

"transactions." Mont. Code Ann. § 30-18-103.[4] The UETA does not refer to Title 13 "Elections," and Title 13 fails to address electronic signatures. Only the Legislature can amend Title 13 to allow UETA electronic signatures in the ballot petition process.

Plaintiffs' relief lies not in this Court but rather through the Governor's office now or later through the 2021 Montana Legislature. This Court cannot cross over into the province of the two other branches of Montana government. *See* Mont. Const. art. III, § 1.

C. The challenged statutes are not the cause of Plaintiffs' claimed inability to gather signatures.

Plaintiffs cite the both the pandemic and the Governor's executive orders (Compl. ¶ 21) to claim that it would be "unethical, improper and impractical" for Plaintiffs to presently gather signatures. Plaintiffs' Br. at 2. Note Plaintiffs have not alleged that gathering signatures is prevented; rather, it is just more difficult under the Directive. Plaintiffs seek a "declaration" whereby this Court *suspends* election statutes while adding new signature gathering requirements based solely upon technology. Plaintiffs do not challenge the statutes themselves. Compl. ¶ 26.

The Governor cited Mont. Code Ann. § 10-3-104(2)(a)[5] as authority for executive action concerning the COVID-19 emergency. Risken Decl. Ex. 1 at 001. That statute

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[4] "[T]ransaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. Mont. Code Ann. § 30-18-102(18). It does not reference elections or efforts involving thousands of signatures.

[5] Mont. Code Ann. tit. 10, ch. 3, provides for Disaster and Emergency Services.

authorizes the Governor to "suspend the provisions of any regulatory statute prescribing the procedures for the conduct of state business . . . ." None of the Governor's orders or directives specifically suspend ballot petition signature gathering, or even mention that activity. Plaintiffs contention that the March 26 Directive prevents that activity is simply their interpretation.

II. Plaintiffs constitutional claims are not supportable, thereby nullifying injunctive relief.

A. Plaintiffs' claims do not meet the threshold for injunctive relief.

"A preliminary injunction is an extraordinary remedy and should be granted with caution based in sound judicial discretion." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (citing *Troglia v. Bartoletti*, 152 Mont. 365, 370, 451 P.2d 106, 109 (1969)). The applicant for a preliminary injunction must demonstrate a prima facie case of a violation of its rights under the Constitution (*Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4) and that "[it] will suffer irreparable injury before the case can be fully litigated." *Citizens for Balanced Use*, ¶ 11 (citing *Sweet Grass Farms v. Bd. of Cnty. Comm'rs.*, 2000 MT 147, ¶ 28, 300 Mont. 66, 2 P.3d 825).

Preliminary injunctions are governed by Mont. Code Ann. § 27-19-201, which sets forth five circumstances under which an injunction may be granted. Plaintiffs rely on the first three:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

Id.; Plaintiffs' Br. at 14.

"The purpose of a preliminary injunction is to preserve the status quo and to minimize the harm to the parties pending trial." *Citizens for Balanced Use*, ¶ 11 (citations omitted). "If a preliminary injunction will not accomplish [its limited] purposes, then it should not issue." *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 265, 405 P.3d 73, 85 (quoting *Porter v. K & S P'ship*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981)) (brackets in original). In other words, "even on proof of any grounds enumerated in § 27-19-201, MCA, a preliminary injunction should not issue absent an accompanying prima facie showing, or showing that it is at least uncertain, that the applicant will suffer irreparable injury *prior to final resolution on the merits*." *Id.* (citing *Porter*, 192 Mont. at 181, 627 P.2d at 839; *Rea Bros. Sheep Co. v. Rudi*, 46 Mont. 149, 160, 127 P. 85, 87 (1912)).

This case does not involve a straightforward request for a preliminary injunction. First, the injunctive relief sought is a drastic change in the status quo. The case directly impacts an ongoing election process in which other ballot proponents are hard at work. *See* Mont. Code Ann. § 13-1-201, requiring the uniform application and operation of

election laws. Second, Plaintiffs do not challenge the Governor's executive orders and directives, yet Plaintiffs in effect seek relief from them. Plaintiffs' predicament is admittedly due to the Governor's March 26 Directive. Any of the three grounds for relief in Mont. Code Ann. § 27-19-201 could simultaneously be requested from the executive branch.

Third, Plaintiffs do not argue that the ballot petition statutes are invalid but seek only to stay their enforcement. The process would then revert to the full application of the ballot initiative statutes; that is, until the next flu season, wildfire/smoke season, late-arriving severe winter weather or any other phenomenon that could make signature gathering more difficult.

Fourth, Plaintiffs cannot show that they are entitled to the requested relief because, though the UETA recognizes electronic signatures, the use of electronic signatures *requires* consent by both parties to the *transaction.* Mont. Code Ann. § 30-18-104(2). There is no evidence that county clerks or the Secretary of State consent to e-signatures for 2020 ballot initiative petitions. Additionally, government agencies are not required to use or accept the use of e-signatures. Mont. Code Ann. § 30-18-117(3). Under the requested relief "consent" would be forced.[6] Finally, even if a government agency consents to use e-signatures it is up to the Secretary of State to specify the manner, format, transmission, type of signature and other rules. *Id.* at (2). Granting the Plaintiffs' relief would require this court to "enjoin" the operation of those UETA statutes as well.

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[6] *See* Emergency Motion For Declaratory And Injunctive Relief at 2:¶ 3.

Plaintiffs have failed to demonstrate a prima facie case of a violation of its rights under the constitution. The injunction request should be denied.

B. Plaintiffs' "emergency" is self-inflicted and of short duration.

A plaintiff's long delay before seeking relief implies a lack of urgency and irreparable harm. *See Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *accord Wreal, LLC v. Amazon.com*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm."); *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (en banc) (holding Plaintiffs' months-long delay in seeking injunction undercut claim of irreparable harm). And, the United States Supreme Court has repeatedly emphasized that it disfavors judicial alteration of election rules on the eve of an election. *Republican Nat'l Comm. v. Dem. Nat'l Comm.*, 589 U.S. ___, 2020 U.S. LEXIS 2195 at *1-3 (April 6, 2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasy v. Perry*, 574 U.S. 951 (2014)).

Plaintiffs' alleged problem is situational, driven by facts pertaining only to a time period between March 26, 2020 and April 24, 2020.[7] The record shows that while ballot petition signature gathering for the 2020 November election was allowed on and after

[7] The March 26 Directive was effective through April 10, 2020. Risken Decl. Ex. 1 at 009, "Limitations." The Directive was extended once and will now expire on April 24, 2020. Risken Decl. Ex. 2 at 3 "Limitations."

June 19, 2019,[8] Plaintiffs failed to submit the ballot issues until January 13, 2020, and February 4, 2020, now respectively designated CI-118 and I-190. Declaration of Dana Corson, ¶¶ 4, 9, 10.

CI-118 was approved for signature gathering on February 26, 2020. Corson Decl., ¶ 6. I-190 was resubmitted by Plaintiffs (New Approach) on February 4, 2020, and after further input by the Secretary of State, was submitted with final language on February 13, 2020. Corson Decl., ¶¶ 10-12. On March 19, 2020, Plaintiffs were notified that I-190 was legally sufficient and prepared a petition. Corson Decl., ¶ 14. Plaintiffs apparently have not pursued signatures after those dates.

By waiting until January 2020 to get started, Plaintiffs wasted at least seven months of petition circulation time after signature gathering was allowed in June 2019. There is no evidence that either initiative was delayed during review. Now, claiming to have lost approximately four weeks of circulation time (from the allowed twelve months) Plaintiffs claim an "emergency."

The alleged "emergency" was self-inflicted. There is neither evidence that the March 26 Directive will be extended beyond April 24, 2020, nor evidence of Plaintiffs' success (or lack thereof) in signature gathering prior to March 26, 2020. Plaintiffs were obviously unconcerned with the constitutionality of any ballot petition statutes before the COVID emergency. The 2020 goal is theoretically still in reach. Because Plaintiffs

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[8] County election administrators have been accepting initiative petition signatures since October 17, 2019. https://sosmt.gov/Portals/142/Elections/Documents/2020-Ballot-Issue-Calendar.pdf at 2.

present their case as a "one-time only" event, they could also pursue their goals in 2021 under the statutes now existing. These facts weigh heavily against "enjoining" (suspending) the ballot petition statutes in favor of judicially fashioned signature gathering processes.

Given the confidence Plaintiffs displayed by filing the initiatives for approval in early 2020 they obviously never intended to challenge the constitutionality of statutes within Title 13, chapter 27, Montana Code Annotated in the first place. But then the COVID emergency was declared and the March 26 Directive was issued. Plaintiffs' "emergency" is the result of their own strategy and a public health emergency as declared by the Governor and has nothing to do with election statutes.

C. Plaintiffs have failed to provide any evidence that their proposal can eliminate potential fraud with the degree of confidence provided by the ballot petition signature gathering statutes and required by Montana case law.

Plaintiffs' represent only that electronic signature gathering is possible, that DocuSign provides that service, and that Montana allows electronic signatures for *transactions* under the UETA. There is no evidence that Montana county clerks have been consulted about Plaintiffs' proposal and no explanation of precisely how county clerks can compare registered voter signatures to the DocuSign electronic signatures to the clerks' satisfaction. Nor is there evidence of any security measures to determine if the registered voter is actually the person responding to an electronic solicitation. Plaintiffs argue about what DocuSign can do (Plaintiffs' Br. at 11) but fail to provide supporting

evidence or explanation how those processes would sufficiently protect the integrity of the ballot petition process.

The Montana Constitution allows the people to enact laws by initiative. Mont. Const. art. III, § 4(1). This right of the people is exercised through adherence to the procedures in Title 13, chapter 27, Montana Code Annotated. Plaintiffs seek suspension of the following procedures. Compl. ¶ 26.

Only qualified Montana electors can sign a petition for an initiative. Mont. Code Ann. § 13-27-102(2). The signature counts if signed in substantially the same manner as on the voter registration form. Mont. Code Ann. § 13-27-103. Signed sheets with original signatures must be submitted to local election officials no sooner than nine months and no later than four weeks before the final date for filing the petition with the Secretary of State. Mont. Code Ann. § 13-27-301(1). An affidavit signed by the petition signature gatherer must be attached to each sheet or section submitted to the county official, swearing to the validity of gathering, the dates gathered, genuineness of signatures, identity of the person signing and that the signer is a Montana elector. Mont. Code Ann. § 13-27-302.

A county official is then required to verify that the signatures submitted are by registered electors in the county, within four weeks of receiving the petitions. Mont. Code Ann. § 13-27-303(1). The official also randomly selects signatures on each sheet or section to compare them with the signatures of the electors as they appear in the registration record of the office. Mont. Code Ann. § 13-27-303(1). If the randomly

selected signatures appear genuine, all signatures on the sheet or section may be certified to the secretary of state without further comparison. However, if any of the randomly selected signatures do not appear to be genuine, all signatures on that sheet or section must be compared with the registration signatures on record. Mont. Code Ann. § 13-27-303(1). Once the county official has verified the number of registered electors[9] who signed the petition, the petition is sent to the Secretary of State. Mont. Code Ann. § 13-27-304.

Under Plaintiffs' scheme, the Secretary would merely count the electronic signatures on the petition, partially complying with Mont. Code Ann. § 13-27-307. After confirming a sufficient number of signatures, the Secretary would certify to the Governor that the completed petition has enough signatures for the ballot. Mont. Code Ann. § 13-27-308. Plaintiffs' approach would discard the requirements of personal voter identification, signature comparison and validity, and other fraud detection.

D. Plaintiffs' cited authorities fail to support such extraordinary relief.

Plaintiffs do not question the Governor's authority to issue executive orders. Rather, they cite those orders as virtual barriers to their ballot petition efforts, making it "unethical, improper and impractical" for Plaintiffs to gather petition signatures.

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[9] Voter registration also requires an actual signature. Mont. Code Ann. § 13-2-110(1). The Governor has already exercised authority over election-related issues under Mont. Code Ann. § 1-3-104(2)(a) by issuing a Directive allowing continued in-person voter registration and in-person voting and imposing social distancing requirements, while also suspending the deadline for voter registration. Risken Decl. Ex. 3 at 004, Section 3 "Measures Required for Safe Registration and Voting."

Plaintiffs' Br. at 1-2. The effort is admittedly more difficult but not impossible. With no citation of authority, Plaintiffs argue that their constitutional rights have been "nullified" by the Governor's actions, translating to the justification for declaratory and injunctive relief. Plaintiffs merely contend that the "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." Plaintiffs' Br. at 16 (quoting *Mont. Cannabis Industry Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161).

The bulk of Plaintiffs' brief is spent discussing DocuSign's protocols and procedures—without specifying the details of those protocols and procedures. Plaintiffs' Br. at 6-12. Plaintiffs assume that this Court has the authority to force 56 county clerks to accept DocuSign's product and accept on faith what DocuSign presents as "verified." Plaintiffs generally state what DocuSign "allows users" to do but go no further. *Id.* at 11. In the end, county clerks and the Secretary of State are cut out of the verification process.

The U.S. General Services Administration (GSA) "Digital Signature Policy" is irrelevant to ballot petition signature gathering. The GSA is concerned with "constructing, managing, and preserving government buildings and [with] leasing and managing commercial real estate." https://www.gsa.gov/about-us. The GSA's policy is the "preferred means of providing signatures for *all GSA documents*." See GSA Digital Signature Policy (2162.2) "Purpose" (emphasis added). GSA's interest is transactional and has nothing to do with elections, voting, or voter registration.

The cases cited by Plaintiffs all involve commercial transactions involving one entity or person on each side of the transaction. The DocuSign protocol used to "verify" the defaulting borrower's single signature in *Alliant Credit Union v. Abrego*, No. 76669-4-1, 2018 Wash. App. LEXIS 2964 (Wash. Ct. App. Dec. 31, 2018),[10] required the borrower to correctly answer 18 separate "security questions" in order to electronically sign the loan documents. *Id.* ¶ 6. The borrower's claim of a forged signature was belied by the fact that she accessed the loan documents only after providing information known only to her. *Id.* ¶ 30. The question in that case was enforceability, not validity. And unlike in *Abrego*, Plaintiffs here fail to provide any information how DocuSign's security protocols will be assigned to ballot petition signature gathering.

Courts have rejected electronic signatures where their use is not contemplated by the relevant election statutes. For example, in *Ni v. Slocum*, 196 Cal. App. 4th 1636 (Cal. Ct. App. 2011),[11] the plaintiff sued to compel a county elections officer to accept a digital memory device containing an electronic image of an initiative petition with a single electronic signature. California law allows only an "eligible registered voter" to sign a petition. Voters must "personally affix" their signature to the petition. The county rejected the plaintiff's signature for not being "personally affixed" to the petition.

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[10] This is an unpublished decision of Division I of the Washington State Court of Appeals. Washington Court Rules prohibit this case from being cited as precedent. *See* General Rule 14.1(a), Washington Court Rules.

[11] California was not under an emergency health order at the time.

The appellate court affirmed under basic rules of statutory construction. *Id.* at 1643. The court noted that an actual signature can prevent forgery and other abuses while affirming the voter's residence. *Id.* at 1647-48. "This affirmation goes to the very heart of the process—the Registrar's ability to verify whether those who signed the petition were entitled to do so." *Id.* at 1646. And even though California had adopted the UETA, the court determined those statutes did not specifically require acceptance of electronic signatures on initiative petitions. *Id.* The specific statute requiring an "affixed" signature on petitions controlled over the general statute allowing electronic signatures for other purposes. *Id.* Montana follows the same rule of statutory construction. Mont. Code Ann. § 1-2-102. Montana's adoption of the UETA in the commercial code does not translate to its use in all situations. The election code is silent on electronic signatures.

Finally, the *Ni* court distinguished *Anderson v. Bell,* 234 P.3d 1147 (Utah 2010)[12] (relied upon by Plaintiffs here) because the Utah statute required the petition to be either "signed" or "completed" by registered voters. Montana statutes require that the petition be "signed." *See* Mont. Code Ann. §§ 13-27-102(1), -103, -301. An attestation that the "signatures on the petition are genuine" is also required. Mont. Code Ann. § 13-27-302. Given these requirements, Montana's statutory scheme more closely resembles

[12] On March 26, 2020, the Utah Lieutenant Governor (a role analogous to Montana's Secretary of State for elections) issued a Memorandum entitled "Governor's Executive Order Regarding Signature Gathering" (Risken Decl. Ex. 4) providing guidance regarding Utah Executive Order 2020-8 (Risken Decl. Ex. 5) "suspending certain provisions of the elections code." Risken Decl. Ex. 4 at 001. The Memorandum confirmed that because "the [petitioning] law requires a handwritten signature" that requirement remains effective and enforceable even during the emergency. *Id.* at 004.

California's than Utah's. This Court, like the *Ni* court, should reject Plaintiffs' attempted use of electronic signatures.

E. The ballot petition statutes meet judicial scrutiny.

Even during a "normal" election cycle electronic signatures are not valid for ballot petition eligibility. Otherwise, all the features and security protocols that DocuSign represents here would be allowed. That and the fact that Plaintiffs are not suing to permanently enjoin the existing statutes illustrates that the ballot petition signature gathering requirements in the Elections Code are constitutional.

Should this Court entertain Plaintiffs' constitutional challenge to Title 13, chapter 27, Montana Code Annotated, they should be required to show that those statutes actually infringe on rights guaranteed by the Constitution. *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 382, 632 P.2d 300, 303 (1981) (citation omitted). As explained above, they have failed to make a prima facie demonstration on this point. Therefore, this Court need not determine the level of scrutiny to apply. Yet even if the election laws did burden Plaintiffs' constitutional rights to some degree, any burden is minimal and far outweighed by the State's interest in maintaining the integrity of elections.

The United States Supreme Court has recognized that states must have an "active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). States that allow "ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) at 191; *Chula Vista Citizens for Jobs & Fair*

Competition v. Norris, 782 F.3d 520, 529 (9th Cir. 2015) (en banc). And while the Supreme Court has held that petition circulation is core political speech, it has also recognized that "because it involves interactive communication concerning political change . . . there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley*, 525 U.S. at 186-87 (quoting *Storer*, 415 U.S. at 730) (internal quotations omitted).

In election law challenges, courts balance the severity of the burden the law imposes against the interests advanced by the State as justifications, considering the "extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (citation omitted). Courts will uphold an election law that imposes a severe burden if the law is narrowly tailored to serve a compelling state interest. *Id.* Courts apply less exacting review to laws that impose lesser burdens and generally will uphold them based on the State's important regulatory interests. *Id.; Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 730 (9th Cir. 2015).

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). This is because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Id.* As preserving the integrity of elections is an important governmental interest, the election statutes meet judicial scrutiny.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed.

DATED the 21st day of April, 2020.

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