

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Montana

Ravalli County Republican Central Committee

Plaintiff(s)

v.

Linda McCulloch, Regina Plettenberg

Defendant(s)

Civil Action No. CV-14-58-H-CCL

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Regina Plettenberg
Ravalli County Election Administrator
215 S. 4th St., Suite C
Hamilton, MT 59840

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Matthew Monforton
Monforton Law Offices, PLLC
32 Kelly Court
Bozeman, MT 59718
(406) 570-2949

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: September 8, 2014



CLERK OF COURT

Heidi Gauthier
Signature of Clerk or Deputy Clerk

PRELIMINARY STATEMENT

1. Plaintiff Ravalli County Republican Central Committee (Committee) brings this action to obtain a declaration that Montana's "open" primary law is unconstitutional as applied to Republican Party primary elections held in Ravalli County. The Committee also seeks to enjoin Montana's Secretary of State Linda McCulloch as well as the Election Administrator in Ravalli County from distributing Republican primary election ballots to non-Republican voters in Ravalli County for all future primaries.

2. The First and Fourteenth Amendments to the United States Constitution guarantee the right of the Committee and its members to associate in a political party and act together within that political party to select party nominees for public office as well as for internal party leadership positions. The Constitution also protects the right of the Committee and its members to limit participation in the selection of (1) Republican nominees for public office and (2) leaders of the Committee itself.

3. Montana's open primary law unconstitutionally permits Democrats and other non-Republican voters to select Republican nominees for public office as well as Republican precinct committeemen who serve as the Committee's internal leaders.

JURISDICTION AND VENUE

4. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution.

5. Venue for this action properly lies in the Helena Division of the District of Montana because Defendant Linda McCulloch resides within the Helena Division.

PARTIES

6. Plaintiff Ravalli County Republican Central Committee is the county-level organization of the Republican Party in Ravalli County and has its principal place of business in Hamilton, Montana.

7. Defendant Linda McCulloch is Montana's Secretary of State. Plaintiff is informed, believes, and thereon alleges that Defendant McCulloch resides in Lewis and Clark County, Montana.

8. Defendant Regina Plettenberg is the Election Administrator for Ravalli County. Plaintiff is informed, believes, and thereon alleges that Defendant Plettenberg resides in Ravalli County, Montana.

9. The Defendants are sued in their official capacity only.

STATEMENT OF FACTS

I APPLICATION OF MONTANA'S OPEN PRIMARY LAW TO ELECTIONS FOR NOMINEES FOR PUBLIC OFFICE

10. As Montana's Secretary of State, Defendant McCulloch is the chief election officer of the state and is responsible to "obtain and maintain uniformity in the application, operation, and interpretation of the election laws" at issue in this matter. § 13-1-201, MCA.

11. Pursuant to Montana law, she and Defendant Plettenberg oversee and administer all primary elections in Ravalli County, which are held in every even-numbered year on the first Tuesday after the first Monday in June. §§ 13-1-104(1)(a); 13-1-107(1), MCA.

12. Montana law requires the two major political parties to use the state's primary system to nominate their candidates for public office. § 13-10-601(1), MCA.

13. Defendants prepare primary election ballots for each qualifying political party. § 13-10-209(1)(a), MCA.

14. For a political party's ballot, the name of the political party appears at the top of the ballot and the names of the party's candidates for public office appear on the ballot as well. *Id.*

15. Defendants are responsible for providing both party's primary election ballot to voters during each primary election. § 13-10-209(7), MCA § 13-12-212, MCA.

16. Each voter casts votes on one of the party ballots and disposes of the other ballot. § 13-10-301(2), MCA.

17. These rules enable every voter to choose which party's primary they desire to participate in and thereby establish what is commonly referred to as an "open" primary.¹

II APPLICATION OF MONTANA'S OPEN PRIMARY LAW TO ELECTIONS FOR PARTY PRECINCT COMMITTEEMEN

18. When Montanans select a party ballot in a primary election, they vote not only for the party's nominees for public offices, but also for the party's precinct committeemen. § 13-38-202(1), MCA.

19. A party's precinct committeemen must be elected during primary elections and serve two-year terms. §§ 13-38-201(1), MCA, 13-38-202(4), MCA.

20. The names of candidates for a party's precinct committeemen must appear on the party ballot in the same manner as candidates for public office and are voted for in the same manner as other candidates. § 13-38-201(3), MCA.

¹ See *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 445 n.1 (2008).

21. A party's county central committee is constituted by the party's precinct committeemen residing in the county. § 13-38-202(2), MCA.
22. Each county central committee has authority to, *inter alia*:
- make rules for the government of the political party in each county, § 13-38-203(1)(a), MCA;
 - elect two members of the party's state central committee, § 13-38-203(1)(b), MCA;
 - fill vacancies caused by a death or withdrawal, occurring after the primary and before the general election, of legislative or other candidates running in districts within the county, § 13-10-327(1)(b)(c);
 - select three persons whenever a legislator from the same party as the central committee dies or resigns, one of whom must be appointed by the board of county commissioners to fill the vacancy, §§ 5-2-402 and 5-2-403.
23. During the primary elections in Ravalli County in June 2014, five of the Committee's 24 precinct committee seats were contested by multiple candidates.

III STATE PARTY BYLAW AMENDMENTS REGARDING CLOSED PRIMARIES

24. At the Republican Party's state convention in June 2014, convention delegates voted, almost unanimously, to add the following plank to the Party's platform:

The members of the Montana Republican Party have the right to freely associate as guaranteed by the US and Montana constitutions. Therefore it is the position of the Montana Republican Party that the voters that select candidates to appear on the general election ballot should be limited to members of the Republican Party who have registered themselves as members of the party if a primary election process is used, or by state or local conventions of the party if a primary election system is not used.

25. The Party's state central committee convened at that time and unanimously approved the following amendment to the Party's bylaws:

The state Republican Party of Montana supports a closed primary voting system in Montana. This is because the Party asserts that the State of Montana's use of an open primary system to determine the Party's nominees for the general election violates the Party's first Amendment rights to associate as the present voting system allows substantial numbers of voters associate with other political parties to cross over to, to participate in, and impact the outcome of the selection of this Party's nominees. Montana law does not presently require a Montana voter to declare a party affiliation to register or vote in primary or general elections. In the event that Montana law is changed to allow for closed primary elections to be held in the State, the following closed Republican Party Primary Rule will immediately to into effect and be controlling: "Only persons who have registered as a Republican prior to the Primary Election will be allowed to vote on a Montana Republican party ballot in that Primary Election."

IV EFFECTS OF MONTANA'S OPEN PRIMARY LAW UPON THE REPUBLICAN PARTY

26. No mechanism is provided under Montana law for the Committee to exercise its right to limit participation in its nomination process and precinct committeemen selection process and, therefore, the Committee cannot protect its

members from forced vote dilution and party raiding by Democrats and other non-party members.

27. As a result, many Democrats and independent voters cross-over to participate in and raid the Republican Party's primary elections in Ravalli County and throughout Montana.

28. On average, 20 to 30 percent of voters participating in the Republican Party's primaries are Democrats or other non-Republican voters.

29. Many of these cross-over voters are openly antagonistic to the ideology and principles of the Republican Party.

30. Although the Montana Republican Party has adopted a closed primary rule in its platform and bylaws, neither the state party nor the Committee can implement this rule because of the state statutes described above.

31. Montana's continued application of its open primary law in Ravalli County will unconstitutionally infringe upon the right of the Committee, Republican party members, supporters, and voters to freely associate with respect to (1) the nomination of Republican candidates for public office and (2) the selection of the Committee's internal leadership.

32. This will result not only in the selection of different candidates than would otherwise be selected, but also in the alteration of the Party's message.

CAUSES OF ACTION

FIRST CAUSE OF ACTION - 42 U.S.C. § 1983

Montana's Open Primary Law Severely Burdens the Committee's First Amendment Right of Association By Enabling Non-Republicans to Select Its Nominees for Public Office

33. All previous paragraphs are incorporated by reference.
34. Montana law forces the Republican Party to have its nominees for public office selected by the state's open primary system.
35. Montana's open primary system permits all voters to select Republican primary election ballots during each primary election.
36. Many of the non-Republican voters who participate in Republican primaries are openly antagonistic to the ideology and principles of the Republican Party.
37. The continued participation of non-Republican voters in Republican primary elections will result not only in the selection of different candidates than would otherwise be selected, but also in the alteration of the Party's message.
38. Montana's open primary law therefore severely burdens the Committee's First Amendment right of association. *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000); *Miller v. Brown*, 503 F.3d 360, 368 (4th Cir. 2007); *Idaho Republican Party v. Ysursa*, 765 F.Supp.2d 1266, 1276 (D. Idaho 2011).

39. Application of Montana's open primary law to the election of Republican nominees for public office in Ravalli County serves no compelling state interest.

40. The law is therefore unconstitutional as applied to Republican primary elections in Ravalli County.

SECOND CAUSE OF ACTION - 42 U.S.C. § 1983

Montana's Open Primary Law Violates the Committee's First Amendment Right of Association By Enabling Non-Republicans to Select the Committee's Internal Leadership

41. All previous paragraphs are incorporated by reference.

42. Montana law forces the Republican Party's precinct committeemen to be elected in the state's open primary system.

43. This system enables all voters -- including non-Republicans who are openly antagonistic to the ideology and principles of the Republican Party -- to select the internal leadership of the Republican Party.

44. The application of Montana's open primary law to the selection of Republican precinct committeemen in Ravalli County violates the Committee's First Amendment right of association. *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214, 230-31 (1989); *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277, 1280-81 (9th Cir. 2003).

45. Application of Montana's open primary law to Republican precinct committeemen elections in Ravalli County serves no compelling state interest.

46. The law is therefore unconstitutional as applied to Republican precinct committeemen elections in Ravalli County.

PRAYER FOR RELIEF

WHEREFORE, the Committee prays for the following relief:

- a) A declaration that Montana's open primary law is unconstitutional as applied to Republican primary elections occurring in Ravalli County;
- b) An injunction prohibiting Defendants from applying Montana's open primary law in Ravalli County and distributing Republican party ballots to non-Republican voters;
- c) An award to the Committee of nominal damages against Defendants;
- d) An award to the Committee of its costs of litigation, including reasonable attorneys fees and expenses, pursuant to 42 U.S.C. § 1988; and
- e) All other relief to which the Committee is entitled and which this Court deems necessary and proper.

DATED: September 8, 2014


Respectfully submitted,

/s/ Matthew G. Monforton
Attorney for Plaintiff

Verification By Terry Nelson

1. I am the Chairman of the Ravalli County Republican Central Committee.
2. I have personal knowledge of the allegations set out in this Complaint and, if called as a witness, I could and would competently testify as to the matters stated herein.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this Complaint are true and correct.

Executed on September 7th, 2014, in Hamilton, Montana



Terry Nelson, Chairman
Declarant

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**UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION**

RAVALLI COUNTY REPUBLICAN)	
CENTRAL COMMITTEE,)	Case No. 6:14-cv-00058-CCL
)	
Plaintiff,)	BRIEF IN SUPPORT OF
v.)	PLAINTIFF'S MOTION FOR
)	PARTIAL SUMMARY JUDGMENT
LINDA McCULLOCH, in her official)	OR, IN THE ALTERNATIVE, FOR
capacity as Montana's Secretary of State;)	A PREMINARY INJUNCTION
REGINA PLETTENBERG, in her official)	
capacity as the Election Administrator of)	
Ravalli County,)	
)	
Defendants.)	
)	

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INTRODUCTION

This motion concerns the constitutional right of a political party to have its internal leadership selected by its own members. Montana conducts “open” primary elections. Thus, Democrats may select a Republican Party ballot during a primary election and vote not only for Republican candidates for public offices, but also for candidates for Republican precinct committeemen who form the internal leadership of the Republican Party’s county central committees.

In its Second Cause of Action, Plaintiff Ravalli County Republican Central Committee (hereinafter, the “Committee”) seeks to prohibit non-Republicans from voting for candidates for Republican precinct committeemen. The Committee believes its internal leadership should be chosen instead by Republicans. The Ninth Circuit’s ruling in *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003), is directly on point. That case involved a challenge by the Libertarian Party to an Arizona election law permitting independents to vote for Libertarian precinct committeemen during Arizona primary elections. The Ninth Circuit in *Bayless* held that Arizona’s law violated the First Amendment.

Montana’s open primary law similarly allows non-Republicans to vote for the Committee’s leadership and is unconstitutional as applied to the election of Republican precinct committeemen in Ravalli County. The Committee is therefore entitled to partial summary judgment regarding its Second Cause of Action.

As explained in detail below, the statutes governing precinct committeemen elections are not severable from the remainder of Montana's open primary law. Thus, Republican primary election ballots cannot be lawfully distributed to non-Republicans in Ravalli County until the Montana Legislature cures the constitutional defects in Montana's open primary law.

STATEMENT OF FACTS

I APPLICATION OF MONTANA'S OPEN PRIMARY LAW TO ELECTIONS FOR PARTY PRECINCT COMMITTEEMEN¹

As Montana's Secretary of State, Defendant McCulloch is the state's chief election officer and is responsible to "obtain and maintain uniformity in the application, operation, and interpretation of the election laws" of Montana. Mont. Code Ann. § 13-1-201.² She oversees primary elections held in June of every even-numbered year. §§ 13-1-104(1)(a); 13-1-107(1).

Defendant Regina Plettenberg, Ravalli County's election administrator, is responsible for preparing primary election ballots and providing them to Ravalli

¹ Montana primary election ballots instruct voters to select "committeemen" and "committeewomen." See Pltf's Mtn to Take Judicial Notice, Exhibit 1, p. 9, filed contemporaneously with this motion. In the interests of brevity, Plaintiff will follow the Ninth Circuit's practice in *Bayless* of referring to all such persons as "committeemen" irrespective of gender.

² All subsequent statutory references are to the Montana Code Annotated unless otherwise noted.

County voters during each primary. § 13-12-201(2); § 13-12-212. Voters must receive a complete set of party ballots during primary elections. § 13-10-209(7).³ Each voter may cast votes on only one party ballot, Republican or Democrat, and must dispose of the other ballot. § 13-10-301(2).⁴ These rules enable every voter to choose the party primary in which to participate and therefore establish what is commonly referred to as an “open” primary. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 445 n. 1 (2008). The major political parties are required to participate in this system. § 13-10-601(1).

Montanans vote for candidates for party precinct committeemen during primary elections when voting for candidates for public office. § 13-38-201(1). The names of candidates for a party’s precinct committeemen *must* appear on the party’s ballot in the same manner as candidates for public office. § 13-38-201(3).⁵

The Committee exercises authority on behalf of the Republican Party in Ravalli County in accordance with § 13-38-203, and a copy of its rules of government are on file with the election administrator. (Declaration of Terry

³ Nonpartisan offices and ballot issues may appear on party ballots or, instead, may be placed on separate ballots. § 13-10-209(1)(b).

⁴ Primary election ballots can also be prepared for other parties that satisfy the criteria established by § 13-10-209(2), something that rarely happens.

⁵ A sample primary election ballot published by the Secretary of State’s office shows the effect of this rule. See Pltf’s Mtn to Take Judicial Notice, Exhibit 1, p.9.

Nelson, ¶ 5.) Precinct committeemen constitute Ravalli County's central committee. (Nelson Decl., ¶ 7; see also § 13-38-202(2).)

II RECENT ELECTIONS FOR REPUBLICAN PRECINCT COMMITTEEMEN IN RAVALLI COUNTY

Republican precinct committeemen elections in Ravalli County have been competitive. In the June 2014 primary, five of the precinct committeemen seats were contested by multiple candidates. (Nelson Decl., ¶ 6.) The Committee desires to limit participation in future elections for Republican precinct committeemen in Ravalli County to Republican voters. (Nelson Decl., ¶ 8.)

III RECENT STATE PARTY BYLAW AMENDMENTS REGARDING CLOSED PRIMARIES

At the Republican Party's state convention in late June 2014, party delegates voted almost unanimously to add the following plank to the Party's platform:

The members of the Montana Republican Party have the right to freely associate as guaranteed by the US and Montana constitutions. Therefore it is the position of the Montana Republican Party that the voters that select candidates to appear on the general election ballot should be limited to members of the Republican Party who have registered themselves as members of the party if a primary election process is used, or by state or local conventions of the party if a primary election system is not used.

(Nelson Decl. ¶ 11.)

The Party's state central committee convened at that time and unanimously approved the following amendment to the Party's bylaws:

The state Republican Party of Montana supports a closed primary voting system in Montana. This is because the Party asserts that the State of Montana's use of an open primary system to determine the Party's nominees for the general election violates the Party's first Amendment rights to associate as the present voting system allows substantial numbers of voters associate with other political parties to cross over to, to participate in, and impact the outcome of the selection of this Party's nominees. Montana law does not presently require a Montana voter to declare a party affiliation to register or vote in primary or general elections. In the event that Montana law is changed to allow for closed primary elections to be held in the State, the following closed Republican Party Primary Rule will immediately to into effect and be controlling: "Only persons who have registered as a Republican prior to the Primary Election will be allowed to vote on a Montana Republican party ballot in that Primary Election."

(Nelson Decl. ¶ 12.)

ARGUMENT

I THE COMMITTEE IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON ITS SECOND CAUSE OF ACTION

A party may move for summary judgment on all claims or defenses or a part of a claim or defense. Fed.R.Civ.P. 56(a). Parties "may file a motion for summary judgment at any time until 30 days after the close of discovery." Fed.R.Civ.P. 56(b). Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Of course, a requirement that there be no "genuine issue as to any material fact" does not mean that summary judgment is inappropriate if

there is some dispute as to any fact. “By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

This case does not present a genuine issue as to any material fact regarding the Committee’s Second Cause of Action. The Committee is therefore entitled to partial summary judgment as a matter of law regarding its Second Cause of Action.

A. Montana Unconstitutionally Permits Non-Republicans To Select Republican Precinct Committeemen

The First Amendment to the United States Constitution ensures not only a right to free speech for individuals but also a right to associate with other like-minded speakers in order to more effectively convey their message. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). The First Amendment’s right of association applies to political parties. *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741 (9th Cir. 2012) (“because the exercise of these basic first amendment freedoms traditionally has been through the media of political associations, political parties as well as party adherents enjoy rights of political expression and association”). This right “encompasses a political party’s decisions about the identity of, and the

process for electing, its leaders.” *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989), citing *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 490-91 (1975) (states cannot dictate selection of party’s national delegates).

In *Bayless*, 351 F.3d 1277, the Ninth Circuit addressed, *inter alia*, a challenge by the Libertarian Party to Arizona statutes governing the elections of party precinct committeemen. Arizona at that time required voters registered as party members to vote on their party’s primary ballot, but permitted registered independents to select the primary ballot for the party of their choice. *Id.* at 1280. Arizona included on party ballots candidates for both public offices as well as the party’s precinct committeemen. *Id.* The *Bayless* court noted that Arizona party precinct committeemen were “important party leaders” because they constituted the state party’s central committee and were authorized to choose replacements for candidates who died or withdrew before an election. *Id.* at 1281. The court also acknowledged “the strength of a party’s interest in selecting its own leaders” and the “important role party leaders play in shaping the party’s message.” *Id.*, citing *Eu*, 489 U.S. at 230-31. Given the leadership role assigned to party precinct committeemen by Arizona law, the court held that allowing non-party members to vote for the Libertarian Party’s precinct committeemen violated the party’s First Amendment associational rights. *Bayless*, 351 F.3d at 1281.

Party precinct committeemen in Montana exercise the same (or more) authority as those in Arizona. Like their Arizona counterparts, party precinct committeemen in Montana constitute their party's county central committees, which have authority to:

- make rules for the government of the political party in each county, § 13-38-203(1)(a), MCA;
- elect two members of the state central committee, § 13-38-203(1)(b), MCA;
- fill vacancies caused by a death or withdrawal, occurring after the primary and before the general election, of legislative or other candidates running in districts within the county, § 13-10-327(1)(b)(c).

In addition, Montana's county central committees select three persons whenever a legislator from the same party as the central committee dies or resigns, one of whom must be appointed by the board of county commissioners to fill the vacancy. §§ 5-2-402 and 5-2-403. Montana precinct committeemen, like their counterparts in Arizona, are "important party leaders." *Id.* at 1281.

Recent elections for Republican precinct committeemen in Ravalli County have been competitive – five committeemen seats were contested in June 2014. (Nelson Decl., ¶ 6.) The Committee desires that these elections -- from which the Committee's leaders are selected -- be limited to Republican voters. (Nelson Decl., ¶ 8.) Montana's open primary law, however, opens these elections to non-Republicans and therefore violates the Committee's associational rights in the same way that the Arizona law in *Bayless* violated the Libertarian Party's

associational rights.⁶ And like Arizona, Montana lacks “any state interest to justify allowing nonmembers to vote for [Republican] Party precinct committeemen....” *Bayless*, 351 F.3d at 1281. The Court must therefore declare §§ 13-10-209(7) and 13-38-201 unconstitutional as applied to Republican precinct committeemen elections in Ravalli County.

B The Unconstitutional Provisions Are Not Severable From Other Provisions Governing Primary Elections

The unconstitutionality of Montana’s statutory provisions pertaining to party precinct committeemen requires this Court to apply a severability analysis to Montana’s open primary law. *Bayless*, 351 F.3d at 1282. The severability of a state statutory provision is a question of state law. *Id.* at 1283.

When a Montana law contains both constitutional and unconstitutional provisions, courts must first determine whether the law contains a severability clause. *Williams v. Bd. of County Commissioners*, 2013 MT 243, ¶ 64, 371 Mont. 356, 308 P.3d 88, citing *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 25, 314 Mont. 314, 65 P.3d 576. If the law lacks a severability clause, courts “must

⁶ In fact, Montana law violates party associational rights more significantly than Arizona law did. Arizona’s semi-closed primary limited a party’s primary to members of that party and independent voters – registered members of other parties were excluded. *Bayless*, 351 F.3d at 1280. Montana’s open primary law, by contrast, allows anyone to vote for Republican precinct committeemen, including Democrats who oppose the Republican Party platform.

determine whether the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment.” *Williams*, ¶ 64, quoting *Finke* ¶ 25. In order for the remainder of the statute to survive, it “must be complete in itself and capable of being executed in accordance with the apparent legislative intent.” *Williams*, ¶ 64, quoting *Finke*, ¶ 26.

Both of the statutory provisions at issue in this case, § 13-10-209(7) (requiring distribution of both party ballots to all voters) and § 13-38-201(3) (requiring the names of candidates for both party precinct committeemen and public offices to appear on the same ballot), arose from the same bill enacted by the Legislature in 1969. 1969 Mont. Laws 992, ch. 368, §§ 63, 72. The bill did not contain a severability clause.

More problematic for the State, however, is that § 13-10-209(7) and § 13-38-201(3), are interlocking provisions. Section 13-10-209(7) requires that both Republican and Democratic primary ballots be distributed to all voters. And § 13-38-201(3) requires that those ballots contain the names of the party’s candidates for both its precinct committeemen as well as for public offices. See also Pltf’s Mtn to Take Judicial Notice, Exhibit 1, p. 9 (sample Montana primary ballot). Because Montana primary ballots must contain the names of all Republican candidates, withholding from non-Republican voters ballots containing the names

of candidates for Republican precinct committeemen (as required by *Bayless*) necessarily requires withholding the entire Republican ballot from them.

Events in Arizona subsequent to the decision issued in *Bayless* illustrate this point. Shortly after the Ninth Circuit remanded the case to the district court, the Arizona Legislature modified its election statutes to require (1) placement of candidates for a party's precinct committeemen on a separate ballot and (2) distribution of a party's precinct committeemen ballots only to registered members of that party. Ariz .Rev.Stat. § 16-822(C); see also Exhibit 2 to Pltf's Mtn to Take Judicial Notice. Arizona authorities subsequently argued to the district court that, because of these modifications, the applicable statutory provisions were severable. Pltf's Mtn to Take Judicial Notice, Exhibit 3, p. 2, fn. 2. The district court agreed.⁷ Pltf's Mtn to Take Judicial Notice, Exhibit 4, p. 2.

The Montana Legislature can similarly modify its election statutes when it convenes in January 2015. Until it does, however, § 13-10-209(7) and § 13-38-201(3) are not severable and Defendants therefore cannot lawfully distribute Republican primary election ballots -- which, under current law, must include both Republican precinct committeemen candidates as well as Republican public office candidates -- in Ravalli County.

⁷ The *Bayless* case ultimately did not turn on severability, however, because the district court held that Arizona's open primary law was unconstitutional as applied to both party precinct committeemen elections and elections for public office. Pltf's Mtn to Take Judicial Notice, Exhibit 4, p. 2.

II THE COMMITTEE IS ENTITLED TO INJUNCTIVE RELIEF

If this Court is not inclined to grant summary judgment at this time, then it should, at a minimum, protect the Committee with a preliminary injunction that requires the Defendants to cease application of Montana's open primary law to Republican elections in Ravalli County pending final judgment. To obtain injunctive relief, a plaintiff must show (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm if injunctive relief is not granted, (3) the balance of equities tips in the plaintiff's favor, and (4) an injunction is in the public interest. *Sanders County Rep. Cent. Comm.*, 698 F.3d at 744 (citations omitted). As shown below, the Committee can satisfy each of these requirements.

A The Committee is Likely to Succeed on the Merits

The Committee previously demonstrated that Montana's open primary law, which allows non-Republicans to vote for candidates for Committee leadership, violates the Committee's First Amendment right of association.⁸ The Committee is therefore likely to succeed on the merits.

B The Committee Will Suffer Irreparable Harm

Ongoing or future constitutional violations by a defendant satisfy the irreparable harm requirement because "unlike monetary injuries, constitutional

⁸ See Part I, *supra*, pp. 6-12.

violations cannot be adequately remedied through damages.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009); *Monterey Mechanical Co v. Wilson*, 125 F.3d 702, 715 (9th Cir.1997) (“an alleged constitutional infringement will often alone constitute irreparable harm”). Moreover, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (citations omitted).

As stated previously, Montana’s open primary law violates the Committee’s rights under the First Amendment.⁹ This deprivation will continue until this Court grants relief, relief that cannot be obtained from monetary damages. This factor thus weighs in favor of granting injunctive relief.

C The Balance of Equities Tips in the Committee’s Favor

When First Amendment rights are at stake, the balance of hardships is presumed to tip toward plaintiffs except when they cannot establish their likelihood of success on the merits. *Paramount Land Co. LP v. California Pistachio Comm’n*, 491 F.3d 1003, 1012 (9th Cir. 2007). Because the Committee has established the likelihood of success on its First Amendment claim, the Court should find the balance of hardships tips in its favor.

⁹ See Part I, *supra*, pp. 6-12.

D Enjoining the Defendants is in the Public Interest

The Committee's First Amendment rights are ones that, if protected, will advance the public interest. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1129 (9th Cir. 2011) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles"); *Joelner v. Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) ("it is always in the public interest to protect First Amendment liberties"). This factor therefore favors granting injunctive relief as well.

CONCLUSION

For all of the foregoing reasons, Plaintiff Ravalli County Republican Central Committee respectfully requests that this Court grant its motion for partial summary judgment or, alternatively, for a preliminary injunction and enjoin the Defendants from applying Montana's open primary law to Ravalli County.

DATED: September 9, 2014

Respectfully submitted,

/s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE WITH L. R. 7.1(d)(2)(E)

I hereby certify that this document, excluding caption, tables and certificate of compliance, contains 3219 words, as determined by the word processing software used to prepare this document, specifically Microsoft Word 2007.

DATED: September 9, 2014

/s/ Matthew G. Monforton
Matthew G. Monforton

Attorney for Plaintiff

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**UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION**

RAVALLI COUNTY REPUBLICAN)	
CENTRAL COMMITTEE,)	Case No. _____
)	
Plaintiff,)	DECLARATION OF TERRY
v.)	NELSON
)	
LINDA McCULLOCH, in her official)	
capacity as Montana's Secretary of State;)	
REGINA PLETTENBERG, in her official)	
capacity as the Election Administrator of)	
Ravalli County,)	
)	
Defendants.)	

I, Terry Nelson, declare under oath as follows:

1. I am a registered voter residing in Hamilton, Montana. I have personal knowledge of the facts stated in this declaration and could testify to them as a witness at a trial or hearing.
2. I am currently the Chair of the Ravalli County Republican

Central Committee (Committee) and have held that position continuously since 2009.

3. I am a member of the central committee for the state party and have held that position since 2009.

4. I am also a member of the Executive Board for the state party and have held that position since 2009.

5. The Committee exercises authority on behalf of the Republican Party in Ravalli County in accordance with §13-38-203, MCA, and a copy of its rules of government are on file with the election administrator in accordance with §13-38-105, MCA.

6. During the primary elections three months ago, five of the Committee's 24 precinct committeeman/women seats were contested by multiple candidates.

7. Precinct committeemen/women constitute the leadership of the Committee.

8. The Committee believes that participation in primary elections for precinct committeemen/women should be limited to Republican voters.

9. The Committee likewise believes that participation in Republican primary elections for public offices should be limited to Republican voters.

10. I attended the state Republican convention held in Billings, Montana from June 19th through 21st, 2014.

11. Delegates to the convention voted, almost unanimously, to add the following plank to the Party's platform:

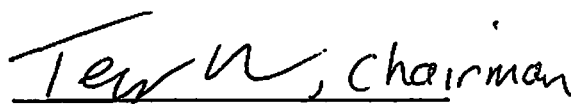
The members of the Montana Republican Party have the right to freely associate as guaranteed by the US and Montana constitutions. Therefore it is the position of the Montana Republican Party that the voters that select candidates to appear on the general election ballot should be limited to members of the Republican Party who have registered themselves as members of the party if a primary election process is used, or by state or local conventions of the party if a primary election system is not used.

12. The Party's state central committee convened at that time and unanimously approved the following amendment to the Party's bylaws:

The state Republican Party of Montana supports a closed primary voting system in Montana. This is because the Party asserts that the State of Montana's use of an open primary system to determine the Party's nominees for the general election violates the Party's first Amendment rights to associate as the present voting system allows substantial numbers of voters associate with other political parties to cross over to, to participate in, and impact the outcome of the selection of this Party's nominees. Montana law does not presently require a Montana voter to declare a party affiliation to register or vote in primary or general elections. In the event that Montana law is changed to allow for closed primary elections to be held in the State, the following closed Republican Party Primary Rule will immediately to into effect and be controlling: "Only persons who have registered as a Republican prior to the Primary Election will be allowed to vote on a Montana Republican party ballot in that Primary Election."

I declare under penalty of perjury under the laws of the United States
that the foregoing is true and accurate.

Executed in Hamilton, Montana on September 7th, 2014


Terry Nelson, Chairman
Terry Nelson, Chairman
Declarant

1. Montana law requires that Ravalli County voters receive a complete set of party ballots during primary elections. Mont. Code Ann. § 13-10-209(7)¹.

2. The names of candidates for a party's precinct committeemen must appear on the party's ballot in the same manner as candidates for public office. Pltf's Mtn to Take Judicial Notice, Exhibit 1, p. 9; see also § 13-38-201(3).

3. The Committee exercises authority on behalf of the Republican Party in Ravalli County in accordance with § 13-38-203, and a copy of its rules of government are on file with the election administrator. Nelson Decl., ¶ 5.

4. Precinct committeemen constitute the Committee's leadership. Nelson Decl., ¶ 7; see also § 13-38-202(2).

5. In the June 2014 primary, five of the precinct committeemen seats for the Committee were contested by multiple candidates. Nelson Decl, ¶ 6.

¹ All subsequent statutory references are to the Montana Code Annotated unless otherwise noted.

6. The Committee desires to limit participation in future elections for Republican precinct committeemen in Ravalli County to Republican voters. Nelson Decl., ¶ 8.

7. At the Republican Party's state convention in June 2014, party delegates voted almost unanimously to add the following plank to the Party's platform:

The members of the Montana Republican Party have the right to freely associate as guaranteed by the US and Montana constitutions. Therefore it is the position of the Montana Republican Party that the voters that select candidates to appear on the general election ballot should be limited to members of the Republican Party who have registered themselves as members of the party if a primary election process is used, or by state or local conventions of the party if a primary election system is not used.

Nelson Decl. ¶ 11.

8. The Party's state central committee convened at that time and unanimously approved the following amendment to the Party's bylaws:

The state Republican Party of Montana supports a closed primary voting system in Montana. This is because the Party asserts that the State of Montana's use of an open primary system to determine the Party's nominees for the general election violates the Party's first Amendment rights to associate as the present voting system allows substantial numbers of voters associate with other political parties to cross over to, to participate in, and impact the outcome of the selection of this Party's nominees. Montana law does not presently require a Montana voter to declare a party affiliation to register or vote in primary or general elections. In the event that Montana law is changed to allow for closed primary elections to be held in the State,

the following closed Republican Party Primary Rule will immediately to into effect and be controlling: “Only persons who have registered as a Republican prior to the Primary Election will be allowed to vote on a Montana Republican party ballot in that Primary Election.”

Nelson Decl. ¶ 12.

DATED: September 9, 2014

Respectfully submitted,

/s/ Matthew G. Monforton

Matthew G. Monforton

Attorney for Plaintiff

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Attorney for Plaintiff

**UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION**

RAVALLI COUNTY REPUBLICAN
CENTRAL COMMITTEE,

Plaintiff,

v.

LINDA McCULLOCH, in her official
capacity as Montana’s Secretary of State;
REGINA PLETTENBERG, in her official
capacity as the Election Administrator of
Ravalli County,

Defendants.

)
) Case No. 6:14-cv-00058-CCL
)
) **PLAINTIFF’S MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
) **OR, ALTERNATIVELY, FOR A**
) **PREMINARY INJUNCTION**
)
) *** RELIEF REQUESTED BY**
) **JANUARY 5, 2015**
)
)
)

Plaintiff Ravalli County Republican Central Committee (hereinafter, the “Committee”) moves this Court for an order granting partial summary judgment as to the Committee’s Second Cause of Action or, alternatively, for a preliminary injunction. The motion is based upon (1) Plaintiff’s Brief in Support of Motion, (2) Plaintiff’s Statement of Undisputed Facts, (3) Exhibits attached to Plaintiff’s Motion to Take Judicial Notice (filed contemporaneously with this motion), (4) the

Declaration of Terry Nelson, and any other evidence the Court deems appropriate to consider.

REQUEST FOR EXPEDITED RELIEF

The Committee is requesting that, if at all possible, the Court consider and rule upon this motion no later than January 5, 2015, the date that the Montana Legislature convenes. The motion concerns the application of Montana's "open" primary law to the election of Republican precinct committeemen who form the leadership of the Party. As explained in detail in the Committee's Brief, the statutes governing precinct committeemen elections are not severable from the remainder of Montana's open primary law. Thus, Republican primary election ballots cannot be lawfully distributed to non-Republicans in Ravalli County until the Montana Legislature cures the constitutional defects in Montana's open primary law. A ruling from this Court on or before January 5, 2015, will enable the Legislature to address these defects, which in turn will enable Montana's June 2016 primary elections to occur in a fair and constitutional manner.

COMPLIANCE WITH LOCAL RULE 7.1(c)(1)

Pursuant to Local Rule 7.1(c)(1), the Committee states that the Defendants have not yet appeared in this matter and therefore need not be contacted prior to the filing of this motion.

CONCLUSION

For all of the foregoing reasons, the Committee respectfully requests that this Court grant its motion for partial summary judgment or, alternatively, for a preliminary injunction on or before January 5, 2015, and enjoin the Defendants from applying Montana's open primary law to Ravalli County.

DATED: September 9, 2014

Respectfully submitted,

/s/ Matthew G. Monforton
Matthew G. Monforton
Attorney for Plaintiff



Case 6:14-cv-00058-CCL Document 6-1 Filed 09/10/14 Page 1 of 10
Ballot Form and Uniformity Pursuant to 13-12-202 MCA
Ballot Layout Instructions and Sample Ballots

PRIMARY ELECTION BALLOT LAYOUT

FEDERAL STATE AND COUNTY PRIMARY PARTISAN ELECTIONS

Prescribed as required by Section 13-12-201, MCA, in accordance with provisions of Chapters 10 and 12 of Title 13, MCA.

The primary election ballot shall consist of the correspondingly numbered ballots of each political party entitled to nominate candidates at the primary election.

A stub shall extend the entire width of the sheet and be separated from the sheet by perforations allowing the stub to be detached.

The names of all candidates printed upon the ballots shall be in type of the same size and character. When the stubs are detached, it must be impossible to distinguish any one of the ballots from another ballot for the same office or issue. The type of paper for all party ballots printed that are used in each precinct must be the same. If a ballot issue is to be voted on at a primary election, it may be placed on the nonpartisan ballot, after the nonpartisan candidate section if the nonpartisan section is printed at the end of each party's ballot, or on a separate ballot. A separate ballot may be a different size and color than the other ballots in the election, but the stubs shall be numbered in the same order.

On the face of the stub of each ballot and at the top of the first column on the left of the ballot shall be printed the following instructions:

"1. TO VOTE, BLACKEN (●) THE OVAL COMPLETELY. An oval blackened completely to the left of the candidate or ballot issue choice indicates a vote for that candidate or a vote on the ballot issue.

2. To write in a name, blacken the oval to the left of the line provided, and write in the name (or affix a pre-printed label) in the blank space(s) for the write-in candidate(s) for whom you wish to vote.

3. DO NOT CROSS OUT. If you make a mistake or change your mind, exchange your ballot for a new one.

**VOTE IN ALL COLUMNS
[VOTE BOTH SIDES]"**

The stub must be of sufficient size to allow for the printed instructions and to allow for the printing or stamping of the ballot number.

On the face of the stub of the ballot of each party, for each precinct, district, or ward, as applicable, shall be printed or stamped the consecutive number of the ballot, beginning with number one and increasing in regular numerical order to the total number of ballots required for the precinct, district or ward.

At the top center of each ballot shall be printed in large boldface capital letters the words "**OFFICIAL PRIMARY ELECTION BALLOT – [NAME OF PARTY] PARTY**" unless the party name is placed on the next line or follows the date of the election. Immediately beneath shall appear the name of the county and a comma followed by "MT", followed by the date of the election. Below the words a line shall extend the width of the sheet less margins.

Beneath the heading, the ballot shall be divided into columns by lines extending the length of the ballot from the line to the bottom margin. The columns shall be as nearly equal in length as possible without dividing any section for an office or ballot issue and without changing the spacing of the printing.

After the instructions, at the head of the first column to the left shall be printed, in boldface capital letters, the words, "**FEDERAL AND STATE**" with a line extending the entire width of the column above and below the words.

In Presidential election years, beneath the line shall be printed, in boldface capital letters, "**FOR PRESIDENT**". (Vice presidential candidates, if any, do not appear on the primary ballot.) Names of presidential candidates, as certified by the Secretary of State, shall be listed in alphabetical order under the boldface, capitalized instruction "**(VOTE FOR ONE)**". A designated voting area shall appear to the left of the name of each candidate for president. A designated voting area followed by the capitalized words "**NO PREFERENCE**" shall be printed beneath the name of the last candidate. A blank write-in space shall then follow, with a line below it extending the width of the column.

Updated August 14, 2014

EXHIBIT 1

PRIMARY ELECTION BALLOT LAYOUT – FEDERAL, STATE AND
COUNTY PRIMARY PARTISAN ELECTIONS (CONTINUED)

Beneath the line, the list of federal and state offices for which nominations are to be made at the election, and the names of the respective candidates for such offices, shall be progressively printed down the column and continued to the top of the next column, if necessary, in the relative sequence prescribed by Section 13-12-207, MCA, excluding nonpartisan offices.

In Governor/Lt. Governor election years, beneath the line above the prior office shall be printed, in boldface capital letters, the words "FOR GOVERNOR AND LT. GOVERNOR". Beneath these words shall be printed, in boldface capital letters, the words "(VOTE IN ONE OVAL)". A designated voting area shall appear to the left of the name of each candidate for governor. Below the name of each candidate for governor shall be indented and printed in capital letters the words "FOR GOVERNOR" and below the name of each candidate for Lt. governor shall be indented and printed in capital letters the words "FOR LT. GOVERNOR". Below the name of the last candidate, two blank write-in lines shall be provided, with the words "FOR GOVERNOR" indented and printed underneath the first line and the words "FOR LT. GOVERNOR" indented and printed underneath the second line. The section for the offices of governor and Lt. governor shall be separated from the other offices in the federal and state category by a line.

For other offices, beneath the title of each office shall be printed, in capital letters, the words "(VOTE FOR [UP TO] [insert the number to be elected to such office])" followed below by the names of each candidate of the political party for nomination to such office. (At your option you may use, for example, the "VOTE FOR UP TO TWO" language instead of "VOTE FOR TWO".) A designated voting area shall be printed immediately to the left of each name. Below the name of the last candidate, blank spaces shall be provided for write-in candidates, in the same number as the number of votes the elector may cast for that particular office. Each blank write-in space is to be indicated by a line with a designated voting area immediately to the left of the line. Beneath the write-in space or spaces a line shall extend the entire width of the column.

Following the line below the names and spaces for the last office in the federal and state category, the word "COUNTY" shall be printed in boldface capital letters with a line extending the entire width of the column below the word. The titles of partisan county offices for which nominations are to be made at the election and the names of the respective candidates for nomination to such offices shall follow, in the relative sequence prescribed by Section 13-12-207 (2), MCA, excluding nonpartisan offices, continuing into the next column, if necessary.

The word "PRECINCT" shall be printed, in boldface capital letters, below the line beneath the names and spaces for the last office in the county category with a line extending the entire width of the column below the word. The names of candidates for precinct committeeman and for precinct committeewoman shall be listed under the headings for the respective offices and blank spaces provided in the same manner as for the offices in the federal and state and the county categories.

The proper heading (FEDERAL AND STATE or COUNTY or PRECINCT or BALLOT ISSUES) shall be printed in boldface capital letters at the top of each column to the right of the first column with the word "(Continued)" printed immediately beneath, in parentheses. Following the line at the bottom of the section for the last office at the bottom of each column, except the last one on the right of the sheet, shall be printed the words "VOTE IN NEXT COLUMN", [and "VOTE BOTH SIDES", if applicable] in boldface capital letters, with a line extending the width of the column beneath the words.

If, for example, in the instance of a County Commissioner position, an additional line is required to indicate the commissioner position district number, the number shall appear immediately below the position name.

When there is a short-term and long-term election for the same office, each term shall be treated as a separate office on the ballot. Beneath the title of each such office or the line containing a district number if one is required, in boldface capital letters, an appropriate statement, such as, "FULL TERM", "UNEXPIRED TERM" or "_____-YEAR TERM" shall be printed. The long-term office shall precede the short-term office on the ballot.

The names of the candidates for each office on the ballot shall be listed alphabetically as to surname beneath the office titles and rotated in the manner prescribed by Section 13-12-205, MCA. The names of all candidates shall be printed with the surname last.

As nearly as possible, the ballot for each political party shall be substantially in the form described above. An example is printed on a sample page at the end of these instructions. Specific written approval by the Secretary of State must be given for any substantial deviation and received by the election administrator responsible for printing of the ballot.

See Example of Primary Election Partisan Ballot in Ballot Layout Samples Section

EXHIBIT 1

STATE AND COUNTY PRIMARY NONPARTISAN ELECTIONS
Prescribed Ballot Format required by Section 13-14-115,
in accordance with provisions of Chapters 10, 12 and 14 of Title 13

If printed separately from the partisan ballots, the Nonpartisan Primary Election Ballot may be printed as a separate ballot of a different size or color but in the same form as prescribed for the ballot for the partisan primary election ballot.

Nonpartisan offices and ballot issues may appear on the same ballot as partisan offices if each section is clearly identified as separate and such nonpartisan offices and ballot issues appear on each party's ballot, after the last partisan office on the ballot and before ballot issues, if any. If the nonpartisan ballot is printed as a section on each party ballots, the headings "NONPARTISAN - STATE" or "NONPARTISAN - COUNTY", as applicable, should be used to differentiate the nonpartisan state offices from nonpartisan county offices.

If printed as separate ballots, the ballots shall be numbered in the same order as the party ballot and must contain the following differences:

At the top of the ballot the words "OFFICIAL NONPARTISAN PRIMARY BALLOT" shall be printed in large boldface capital letters.

The nonpartisan offices to be voted on at the election, with the names of the candidates and write-in spaces, shall be printed below the line in the same form as prescribed for the partisan primary election ballots.

The heading for each office shall list the position number for that office, if applicable, and judicial district number for district court judges and justices of the peace (if applicable for justices of the peace). The word "Nonpartisan" need not be used after each candidate's name on the primary ballot, since all candidates on the nonpartisan ballot or nonpartisan section of the ballot are identified as nonpartisan by the "Nonpartisan" heading.

If a ballot issue is to be voted on at the primary it appears immediately after all nonpartisan offices on the same ballot. As nearly as possible, the ballot, if printed separately from the partisan ballot, shall be substantially in the following form:

OFFICIAL NONPARTISAN PRIMARY BALLOT

_____ COUNTY

June _____, 20 ____

FOR SUPREME COURT JUSTICE #1

(VOTE FOR ONE)

() ALBERTA BROWN

() RICHARD JOHNSON

() _____

DISTRICT COURT JUDGE

DISTRICT 5, DEPT. 1

(VOTE FOR ONE)

() JOHN POTTS

() JANE RICHARDS

() _____

FOR JUSTICE OF THE PEACE DEPT. 1

(VOTE FOR ONE)

() MARY JONES

() SANDY HOUSTON

() _____

STUB (as prescribed for primary ballot)

EXHIBIT 1

Prescribed as required by Section 13-12-201 and 202, MCA, in accordance with provisions of Chapters 10 and 12 of Title 13, MCA.

Municipal primary partisan ballots shall be printed the same as state and county primary partisan election ballots, except for the following:

At the top center of each ballot shall be printed in large boldface capital letters the words "OFFICIAL MUNICIPAL PRIMARY BALLOT" and immediately beneath, the words "City [or Town] of _____".

Party precinct offices are not printed on the municipal election ballots, only on the federal partisan primary ballots.

At the head of the first column to the left shall be printed the list of offices and the names of the respective partisan candidates for such offices as determined by the election administrator pursuant to Section 13-12-207(3), MCA.

~~MUNICIPAL PRIMARY NONPARTISAN ELECTIONS~~

Prescribed as required by Section 13-12-201 and 202, MCA,
in accordance with provisions of Chapters 10, 12 and 14 of Title 13, MCA.

Municipal primary nonpartisan ballots shall be printed the same as state and county primary nonpartisan election ballots, except for the following:

Unless the municipal primary nonpartisan ballot is printed as part of the municipal primary partisan ballot, at the top center of each ballot shall be printed in large boldface capital letters the words "OFFICIAL MUNICIPAL PRIMARY NONPARTISAN BALLOT" and immediately beneath, the words "City [or Town] of _____".

At the head of the first column to the left shall be printed the list of offices and the names of the respective nonpartisan candidates for such offices as determined by the election administrator pursuant to Section 13-12-207(3), MCA.

The balance of the nonpartisan ballot shall be printed as prescribed for municipal primary partisan elections except that no party designations are to be used. The word "Nonpartisan" need not be used after each candidate's name on the primary ballot, since all candidates on the nonpartisan ballot or nonpartisan section of the ballot are identified as nonpartisan by the "Nonpartisan" heading.

FEDERAL, STATE AND COUNTY GENERAL ELECTIONS

Prescribed as required by 13-12-201 and 202, MCA, in accordance with provisions of Chapters 10 and 12 of Title 13, Montana Code Annotated.

General election ballots shall be printed the same as primary election ballots, except for the following:

At the top center of each ballot, shall be printed in large boldface capital letters the words "OFFICIAL GENERAL ELECTION BALLOT". Immediately beneath shall appear the name of the county followed by the date of the election. Below the words a line shall extend the width of the sheet less margins.

In Presidential election years, beneath the line that appears below "FEDERAL AND STATE" shall be printed, in boldface capital letters, "FOR PRESIDENT AND VICE PRESIDENT". Beneath these words shall be printed, in boldface capital letters, the words "VOTE IN ONE OVAL".

Names of state-certified presidential and vice-presidential candidates, as certified by the Secretary of State, shall be progressively printed down the column, arranged by the surname of the candidate for president. The words "[INSERT NAME OF POLITICAL PARTY] FOR PRESIDENT" and "[INSERT NAME OF POLITICAL PARTY] FOR VICE PRESIDENT" shall be indented and printed after the name of the respective candidates and a designated voting area shall be printed immediately to the left of the name of each party's candidates for president.

Two blank spaces, indicated by write-in lines, with one designated voting area to the left of the first line, shall be printed below the names of the last candidates for president and vice president. Below the first blank line, in capital letters shall be indented and printed "FOR PRESIDENT". The words "FOR VICE PRESIDENT" shall be similarly indented and printed below the second blank line. The section for the offices of president and vice president shall be separated from the other offices in the federal and state category by a line.

The names of candidates for political offices shall be followed by their respective political affiliation. For nonpartisan offices, the words printed after the names of each of the candidates shall be "Nonpartisan". If an incumbent judicial candidate has no opposition, the retention language prescribed in Section 13-14-212, MCA, shall be used, if applicable.

Following the line below the names and spaces for the last office in the federal and state category, the word "COUNTY" shall be printed in boldface capital letters with a line extending the entire width of the column below the word. The titles of county offices to be filled at the election, including nonpartisan offices, and the names of the respective candidates for such offices shall follow, in the relative sequence prescribed by Section 13-12-207(2), MCA, continuing into the next column, if necessary.

Party precinct offices are not printed on any general election ballots, only on the federal partisan primary ballots.

Following the line below the names and spaces for the last candidate office shall be printed, in boldface capital letters, the words "BALLOT ISSUES" with a line extending the entire width of the column below the words. The statewide ballot issues shall follow, in the relative order prescribed in Section 13-12-207(4), MCA, and in the sequence certified by the Secretary of State.

Beneath the line, first shall come the name/number of the issue, second the method of placement on the ballot followed by the title, all as certified by the Secretary of State. Due to a law change, abbreviated statewide ballot issue language is not permitted to be used. Any titles provided by the legislature for constitutional amendments and referendums, placed on the ballot by legislative action, shall precede the Attorney General's title.

Beneath the titles of each issue shall be printed, in capital letters, "YES ON [insert statement from certified ballot language]" and below these words shall be printed, also in capital letters, "NO ON [insert statement from certified ballot language]". Each of the above phrases shall have a designated voting area to the left of them.

See Example of General Election Ballot at End of Ballot Layout Samples Section

Prescribed as required by Section 13-12-201 and 202, MCA, in accordance with provisions of Chapters 10 and 12 of Title 13, MCA.

Municipal general ballots shall be printed the same as state and county general election ballots, except for the following:

At the top center of each ballot shall be printed in large boldface capital letters the words "OFFICIAL MUNICIPAL GENERAL BALLOT" and immediately beneath, the words "City [or Town] of _____"

A municipal general partisan election that also includes nonpartisan offices must include each partisan and nonpartisan office sequentially as provided in 13-12-207(3), MCA. For nonpartisan offices, the words printed after the names of the candidates shall be "Nonpartisan". If an incumbent judicial candidate has no opposition, the retainer language prescribed in Section 13-14-212, MCA, shall be used, if applicable.

Party precinct offices are not printed on the municipal election ballots, only on the federal partisan primary ballots.

At the head of the first column to the left shall be printed the list of offices and the names of the respective candidates for such offices as determined by the election administrator pursuant to Section 13-12-207(3), MCA.

~~MUNICIPAL GENERAL NONPARTISAN ELECTIONS~~

Prescribed as required by Section 13-12-201 and 202, MCA,
in accordance with provisions of Chapters 10, 12, 14 and 27 of Title 13, MCA.

In cases in which all offices on a municipal general election ballot are nonpartisan, ballots shall be printed the same as municipal general partisan election ballots, except for the following:

At the top center of each ballot, shall be printed in large boldface capital letters the words "OFFICIAL MUNICIPAL GENERAL NONPARTISAN BALLOT" and immediately beneath, the words "City [or Town] of _____".

At the head of the first column to the left shall be printed the list of offices and the names of the respective candidates for such offices as determined by the election administrator pursuant to Section 13-12-207(3), MCA. If an incumbent judicial candidate has no opposition, the retention language prescribed in Section 13-14-212, MCA, shall be used, if applicable.

Party precinct offices are not printed on the municipal election ballots, only on the federal partisan primary ballots.

The balance of the nonpartisan ballot shall be printed as prescribed for municipal general partisan elections except that no party designations are to be used.

~~GENERAL OR SPECIAL DISTRICT ELECTIONS~~

Prescribed as required by Section 13-12-202, MCA

The following is an outline format to be followed in conjunction with the specific ballot requirements specified in the statute requiring the special district election or election in any other political subdivision in which a ballot format has not been prescribed.

Special district election ballots shall be printed the same as state and county primary election ballots, except for the following:

At the top center of each ballot shall be printed in large boldface capital letters the words "(GENERAL DISTRICT BALLOT or SPECIAL DISTRICT BALLOT)" and immediately beneath, the words "_____ District".

Beneath the line shall be printed the list of offices, the names of the respective candidates for such offices and/or ballot issues as determined by the election administrator pursuant to Section 13-12-207 (3), MCA.

As required by 13-12-207, MCA

**Note: In a primary election, all partisan offices are placed on the ballot before all nonpartisan offices.
In a general election, partisan and nonpartisan offices are placed on the ballot as listed below.**

(1) The order on the ballot for state and federal offices must be as follows:

(a) If the election is in a year in which a president of the United States is to be elected, in spaces separated from the balance of the party tickets by a line must be the names and spaces for voting for candidates for president and vice president. The names of candidates for president and vice president for each political party must be grouped together.

(b) United States senator;

(c) United States representative;

(d) governor and lieutenant governor;

(e) secretary of state;

(f) attorney general;

(g) state auditor;

(h) state superintendent of public instruction;

(i) public service commissioners;

(j) clerk of the supreme court;

(k) chief justice of the supreme court;

(l) justices of the supreme court;

(m) district court judges;

(n) state senators;

(o) members of the Montana house of representatives.

(2) The following order of placement must be observed for county offices:

(a) clerk of the district court;

(b) county commissioner;

(c) county clerk and recorder;

(d) sheriff;

(e) coroner;

(f) county attorney;

(g) county superintendent of schools;

(h) county auditor;

(i) public administrator;

(j) county assessor;

(k) county treasurer;

(l) surveyor;

(m) justice of the peace.

(3) The secretary of state shall designate the order for placement on the ballot of any offices not on the above lists, except that the election administrator shall designate the order of placement for municipal, charter, or consolidated local government offices and district offices when the district is part of only one county.

(4) Constitutional amendments must be placed before statewide referendum and initiative measures. Ballot issues for a county, municipality, school district, or other political subdivision must follow statewide measures in the order designated by the election administrator.

(5) If any offices are not to be elected they may not be listed, but the order of the offices to be filled must be maintained.

(6) If there is a short-term and a long-term election for the same office, the long-term office must precede the short-term.

- ◆ If an appointment has been made to replace a candidate as provided by law, or if a candidate for lieutenant governor has been advanced to the candidacy for governor, after the ballots have been prepared but before the election, the election administrator may:
 - 1) Correct the ballot so that it meets the requirements of the instructions above and the sample ballots below;
 - 2) Have the entire ballot redone; or
 - 3) Have a separate ballot prepared only for the office for which the new candidate is a candidate.
- ◆ Provisions must be made as specified in the instructions above and sample ballots below for write-in candidates.
- ◆ The instructions above and sample ballots below specify the content of stubs on paper ballots. The stubs should be of the same width as the ballot and of a size that is optimal to facilitate their removal from the ballot.
- ◆ Unvoted ballots must be handled as indicated in statute and in the election judge handbook.
- ◆ The number of individuals voting and the number of ballots cast must be recorded on a form(s) or through a system provided by the election administrator for that purpose.
- ◆ The order and arrangement of voting system ballots are as specified in the instructions above and the sample ballots below.
- ◆ The names of all candidates to appear on the ballots must be in the same font size and style.
- ◆ When the stubs are detached, it must be impossible to distinguish any one of the ballots from another ballot for the same office or issue.
- ◆ The ballots must contain the name of each candidate whose nomination is certified under law for an office and no other names, except that the names of candidates for president and vice president of the United States must appear on the ballot as provided in 13-25-101.

June 3, 2014

Sample County	State of Montana	June 3, 2014
	COUNTY (Continued)	NONPARTISAN - STATE (Continued)
<p>INSTRUCTIONS TO VOTERS</p> <p>1. TO VOTE, BLACKEN (●) THE OVAL COMPLETELY. An oval blackened completely to the left of the candidate or ballot issue choice indicates a vote for that candidate or a vote on the ballot issue.</p> <p>2. To write in a name, blacken the oval to the left of the line provided, and write in the name (or affix a pre-printed label) in the blank space(s) for the write-in candidate(s) for whom you wish to vote.</p> <p>3. DO NOT CROSS OUT. If you make a mistake or change your mind, exchange your ballot for a new one.</p> <p>VOTE IN ALL COLUMNS [VOTE BOTH SIDES]</p>	<p>FOR COUNTY CLERK AND RECORDER (VOTE FOR ONE)</p> <p><input type="radio"/> ANDREW JACKSON</p> <p><input type="radio"/> MARTIN VAN BUREN</p> <p><input type="radio"/> WILLIAM H. HARRISON</p> <p><input type="radio"/> JOHN TYLER</p> <p><input type="radio"/> _____</p> <p>Text</p>	<p>FOR DISTRICT COURT JUDGE DISTRICT X, DEPT. X (VOTE FOR ONE)</p> <p><input type="radio"/> JAMES BUCHANAN</p> <p><input type="radio"/> ABRAHAM LINCOLN</p> <p><input type="radio"/> _____</p> <p>NONPARTISAN - COUNTY</p> <p>FOR JUSTICE OF THE PEACE DEPT. X (VOTE FOR ONE)</p> <p><input type="radio"/> _____</p>
<p>FEDERAL AND STATE</p> <p>FOR UNITED STATES SENATOR (VOTE FOR ONE)</p> <p><input type="radio"/> JOHN ADAMS</p> <p><input type="radio"/> GEORGE WASHINGTON</p> <p><input type="radio"/> NO PREFERENCE</p> <p><input type="radio"/> _____</p>	<p>PRECINCT</p> <p>FOR PRECINCT COMMITTEEMAN (VOTE FOR ONE)</p> <p><input type="radio"/> JAMES K. POLK</p> <p><input type="radio"/> ZACHARY TAYLOR</p> <p><input type="radio"/> _____</p> <p>For information on precinct offices, see Title 13, Chapter 38. Precinct offices only appear on the federal Primary election ballot, not on the General election ballot.</p>	<p>BALLOT ISSUES</p> <p>CI-01</p> <p>This ballot issue would change local ordinance H-101 to allow for printing of lengthy ballots on scrolls.</p> <p>The estimated savings would be \$5,000.</p> <p><input type="radio"/> YES on Constitutional Initiative No. CI-01</p> <p><input type="radio"/> NO on Constitutional Initiative No. CI-01</p>
<p>FOR UNITED STATES REPRESENTATIVE (VOTE FOR ONE)</p> <p><input type="radio"/> THOMAS JEFFERSON</p> <p><input type="radio"/> JAMES MADISON</p> <p><input type="radio"/> _____</p>	<p>FOR PRECINCT COMMITTEEWOMAN (VOTE FOR ONE)</p> <p><input type="radio"/> SARAH POLK</p> <p><input type="radio"/> MARGARET TAYLOR</p> <p><input type="radio"/> _____</p>	
<p>COUNTY</p> <p>FOR COUNTY COMMISSIONER DISTRICT X (VOTE FOR TWO/ VOTE FOR UP TO TWO)</p> <p><input type="radio"/> JOHN QUINCY ADAMS</p> <p><input type="radio"/> JAMES MONROE</p> <p><input type="radio"/> _____</p> <p><input type="radio"/> _____</p>	<p>NONPARTISAN - STATE</p> <p>FOR SUPREME COURT JUSTICE #1 (VOTE FOR ONE)</p> <p><input type="radio"/> MILLARD FILLMORE</p> <p><input type="radio"/> FRANKLIN PIERCE</p> <p><input type="radio"/> _____</p>	<p>Nonpartisan offices, if placed on each party's ballot, are placed at the end of the candidates and before any ballot issues.</p>
VOTE IN NEXT COLUMN	VOTE IN NEXT COLUMN	[VOTE BOTH SIDES]

Remember to use the word "Continued" at the top of each column, where applicable.

The instructions at right are standardized to apply to as many ballots as possible. They may be customized if necessary. They should appear on the stub as well.

"FEDERAL AND STATE" is the proper heading for all federal, state and state-district offices, down to and including legislative.

In some cases, you may have a "VOTE FOR TWO" or similar option, based on the number of spots open.

Counties can choose whether to use the language "VOTE FOR TWO" or "VOTE FOR UP TO TWO".

Also, make sure you have write-in spots matching the number to be voted for.

Ballot issues go after all candidates. You are not required to do a separate heading for each jurisdiction's (state, county, etc.) issues, although this is permissible.

For information on precinct offices, see Title 13, Chapter 38. Precinct offices only appear on the federal Primary election ballot, not on the General election ballot.

Nonpartisan offices, if placed on each party's ballot, are placed at the end of the candidates and before any ballot issues.

NOTE: If you happen to have at-large positions such as county commissioners that are for different term lengths, put the full-term office(s) first, and then the shorter-term office(s). Indicate which is the longer term by using phrases such as "4-YEAR TERM" and "2-YEAR TERM" or "FULL TERM" and "UNEXPIRED TERM".

Remember to put "VOTE IN NEXT COLUMN" at the end of each column other than the final column.

NOTE: The stub, with instructions, should be placed at the bottom of the ballot.

EXHIBIT 1

OFFICIAL GENERAL ELECTION BALLOT
 [NAME OF COUNTY] COUNTY, MT

November 4, 2014

Remember to use the word "continued" at the top of each column, where applicable.

NOTE: Do not put precinct committeemen and women on the General election ballot. They only go on the Federal Primary election ballot, and are elected at that time.

The instructions at right are standardized to apply to as many ballots as possible. They may be customized if necessary. They should appear on the stub as well.

"FEDERAL AND STATE" is the proper heading for all federal, state and state-district offices, down to and including the legislative offices.

Note that in the General election, you will need to put the nonpartisan offices with the partisan offices, not at the end of the ballot. Also, on the General election ballot, use the WORD "NONPARTISAN" to identify each nonpartisan candidate.

Sample County	State of Montana COUNTY	November 4, 2014 BALLOT ISSUES (Continued)
<p>INSTRUCTIONS TO VOTERS</p> <p>1. TO VOTE, BLACKEN (●) THE OVAL COMPLETELY. An oval blackened completely to the left of the candidate or ballot issue choice indicates a vote for that candidate or a vote on the ballot issue.</p> <p>2. To write in a name, blacken the oval to the left of the line provided, and write in the name (or affix a pre-printed label) in the blank space(s) for the write-in candidate(s) for whom you wish to vote.</p> <p>3. DO NOT CROSS OUT. If you make a mistake or change your mind, exchange your ballot for a new one.</p> <p>VOTE IN ALL COLUMNS VOTE BOTH SIDES</p>	<p>FOR CLERK OF THE DISTRICT COURT (VOTE FOR ONE)</p> <p><input type="radio"/> ANDREW JACKSON DEMOCRAT</p> <p><input type="radio"/> MARTIN VAN BUREN REPUBLICAN</p> <p><input type="radio"/> _____</p> <p>FOR COUNTY COMMISSIONER (VOTE FOR ONE)</p> <p><input type="radio"/> WILLIAM HENRY HARRISON DEMOCRAT</p> <p><input type="radio"/> JOHN TYLER REPUBLICAN</p> <p><input type="radio"/> _____</p>	<p>LEGISLATIVE REFERENDUM NO. 2014</p> <p>AN ACT REFERRED BY THE LEGISLATURE</p> <p>AN ACT SUBMITTING A MILL LEVY TO THE ELECTORATE AND PROVIDING EFFECTIVE DATES AND A TERMINATION DATE.</p> <p>The Legislature submitted this proposal for a vote. The proposal asks Montana voters to continue the statewide levy. Without voter approval, the current levy will expire.</p> <p><input type="radio"/> YES on Legislative Referendum No. LR-2014</p> <p><input type="radio"/> NO on Legislative Referendum No. LR-2014</p>
<p>FEDERAL AND STATE FOR PRESIDENT (VOTE FOR ONE)</p> <p><input type="radio"/> THOMAS JEFFERSON REPUBLICAN FOR PRESIDENT</p> <p>AARON BURR REPUBLICAN FOR VICE PRESIDENT</p> <p><input type="radio"/> _____ FOR PRESIDENT</p> <p>_____ FOR VICE PRESIDENT</p>	<p>FOR JUSTICE OF THE PEACE DEPT. 1 (VOTE IN ONE OVAL)</p> <p>Shall Justice of the Peace James K. Polk of the Justice Court of XXXX County of the state of Montana be retained in office for another term? Fill in the oval before the word "YES" if you wish the official to remain in office. Fill in the oval before the word "NO" if you do not wish the official to remain in office.</p> <p><input type="radio"/> YES</p> <p><input type="radio"/> NO</p>	<p>This language is used only on the General election ballot for incumbent judicial candidates with no opposition.</p>
<p>FOR PUBLIC SERVICE COMMISSIONER DISTRICT 1 (VOTE FOR ONE)</p> <p><input type="radio"/> ALEXANDER HAMILTON DEMOCRAT</p> <p><input type="radio"/> JAMES MADISON REPUBLICAN</p> <p><input type="radio"/> _____</p>	<p>BALLOT ISSUES</p> <p>CONSTITUTIONAL AMENDMENT NO. 1000</p> <p>AN AMENDMENT TO THE CONSTITUTION PROPOSED BY THE LEGISLATURE</p> <p>AN ACT SUBMITTING TO THE QUALIFIED ELECTORS OF MONTANA AN AMENDMENT TO THE STATE CONSTITUTION FOR A SALES TAX.</p> <p><input type="radio"/> YES on Constitutional Amendment No. C-1000</p> <p><input type="radio"/> NO on Constitutional Amendment No. C-1000</p>	<p>Ballot issues go after all candidates. You are not required to do a separate heading for each jurisdiction's (state, local, etc.) ballot issues, although this is permissible.</p> <p>For the General election, the Secretary of State's office will provide to ES&S all the statewide candidates and ballot issue language.</p>
<p>FOR SUPREME COURT JUSTICE #5 (VOTE FOR ONE)</p> <p><input type="radio"/> JOHN QUINCY ADAMS NONPARTISAN</p> <p><input type="radio"/> JAMES MONROE NONPARTISAN</p> <p><input type="radio"/> _____</p>	<p>Remember to put "VOTE IN NEXT COLUMN" at the end of each column, except the final column.</p>	
VOTE IN NEXT COLUMN	VOTE IN NEXT COLUMN	VOTE BOTH SIDES

NOTE: If you happen to have at-large positions such as county commissioners that are for different term lengths, put the full-term office(s) first, and then the shorter-term office(s). Indicate which is the longer term by using phrases such as "4-YEAR TERM" and "2-YEAR TERM" or "FULL TERM" and "UNEXPIRED TERM".

NOTE: The stub, with instructions, should be placed at the bottom of the ballot.

EXHIBIT 1



Forty-sixth Legislature - Second Regular Session

change session | printer friendly version

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Senate

House

Legislative Council

JLBC

More Agencies

Bills

Committees

Calendars/News

HOUSE OF REPRESENTATIVES

SB 1050

JPs; appeals; technical correction
(NOW: election law amendments)

Sponsor: Senator Jarrett

- DPA Committee on Judiciary
- DPA Committee on Government & Retirement
- DPA Caucus and COW
- DP Third Read
- X As Transmitted to the Governor

SB 1050 makes several changes to election laws regarding precinct committeemen, recall of appointed officers and consolidation of polling places.

History

In June 2003, the Ninth Circuit Court of Appeals concluded that the semi-closed primary system in Arizona violated the associational rights of Libertarian party members because it allowed nonmembers to vote for Libertarian precinct committeemen (Arizona Libertarian Party, Inc. v. Bayless). The Court noted that precinct committeemen are important party leaders who choose replacement candidates for persons who die or resign before an election and collectively constitute the state party committee. Therefore, the Court stated that it saw no reason for allowing nonmembers to vote for Libertarian precinct committeemen.

A.R.S. § 16-467 currently provides separate ballots for each party entitled to participate in primary elections. Voters registered as independent/no party preference or members of parties not entitled to continued representation on the ballot are allowed to choose which ballot they would like to vote by political party. Since primary ballots include precinct committeemen, a person who is not a member of the political party represented on the ballot has the opportunity to vote for the precinct committeemen of that party. SB 1050 requires the creation of a separate ballot for the election of precinct committeemen. Only voters registered as members of the specific party represented on the ballot will be able to vote for the precinct committeemen of that party.

Provisions

Precinct Committeemen

- Requires a Board of Supervisors (Board) to wait to cancel the election for precinct committeemen until at least 75 days before the election if the number of nominating petitions filed is less than or equal to the number of positions available.
 - A.R.S. § 16-822 allows the Board to cancel an election for precinct committeemen if the number of persons filing petitions is less than or equal to the number of available positions. The current law does not specify an amount of time that the Board must wait before canceling the election.
- Requires a separate ballot to be prepared for the election of precinct committeemen if there are more nominating petitions than the number of positions.

- Prescribes the format for the separate ballot.
- Allows only persons registered as members of the specific political party in that precinct to vote the precinct committeemen ballot.
- Requires the election board/official to provide the partisan precinct committeemen ballot to voters registered with that party in addition to the official ballot prepared for that party in the primary election.

Recall of persons appointed to the office/deemed elected due to the absence of opposing candidates

- Provides that if an officer being recalled was appointed to the office or was deemed elected (after an election was cancelled due to the lack of opposing candidates), the recall petition must be signed by at least 10% of the number of the active registered voters in the jurisdiction/district.
 - A.R.S. § 19-201 subjects every public officer holding an elective office to recall from the office if a recall petition is signed by at least 25% of the number of votes cast at the last general election for all of the candidates for the office held by the person, divided by the number of offices being filled at that election.
- States that candidates for an office that is currently filled by an officer being recalled must file a nomination signed by at least ½ of 1% of the number of active registered voters in the jurisdiction/district. Persons signing the nomination petition must be qualified electors of the district that the officer being recalled represents.
 - A.R.S. § 19-212 provides that if a person is subject to recall, that person's name is automatically added to the official ballot and does not require nomination. Other candidates are placed on the ballot if they are able to secure a number of signatures for the nominating petition equaling at least 2% of the number of votes cast for all candidates for that office at the last election.

Miscellaneous

- Allows the Board, for any election in which there are no candidates for elected office appearing on the ballot, to consolidate polling places and precinct boards along with the tabulation of results for that election, if all of the following apply:
 - All affected voters are notified by mail of the change at least 33 days before the election.
 - Notice of the change in polling places includes notice of the new voting location, notice of the hours for voting on election day and notice of the telephone number to call for voter assistance.
 - All affected voters receive information on early voting that includes the application used to request an early voting ballot.
- Removes ability of a school principal to request that an election not be held in the principal's school because a disruption of the normal school activities would occur.
 - A.R.S. § 16-411 allows the principal of a school to deny a request to provide space for use as a polling place if the principal provides a written statement within two weeks of the request that states that space is not available at the school, a disruption of activities would occur or that the safety or welfare of children would be jeopardized.
- Allows a person whose information is protected to request an early ballot before the 90 days proceeding the Saturday before the election.
 - A.R.S. § 16-153 contains a list of persons that may request that the general public be prohibited from accessing their information. They must petition the court to have their information kept confidential, and if the court approves, the county recorder must seal the registration information.
- Allows a voter whose information is protected to request to have early ballot materials provided through two general elections for federal office.
 - A.R.S. § 16-542 allows an absent uniformed services or overseas voter to request early ballot materials through the next two regularly scheduled general elections for federal office.
- Allows a county officer in charge of elections to implement an electronic filing system for statements, designations and reports required under the campaign contributions and expenses laws. The county officer may also require written or printed copies of filings during the implementation of the electronic filing system.
 - A.R.S. § 16-916.01 currently allows statements, designations and reports to be filed in an electronic format to the Secretary of State (SOS). The SOS is required to provide computer software to accommodate electronic filings and during the implementation of the system, the SOS may require statements to also be filed with a written or printed copy.
- States that a facility used as a polling place must allow electioneering and political activity outside of the 75-foot limit in public areas and parking lots used by voters.
- Makes other technical and conforming changes.

----- DOCUMENT FOOTER -----

46th Legislature

Second Regular Session

3

May 27, 2004

----- DOCUMENT FOOTER -----

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Conference Engrossed

State of Arizona
Senate
Forty-sixth Legislature
Second Regular Session
2004

CHAPTER 330

SENATE BILL 1050

AN ACT

AMENDING SECTIONS 16-411, 16-467, 16-542, 16-822, 16-916.01, 19-201 AND 19-212, ARIZONA REVISED STATUTES; RELATING TO ELECTIONS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

S.B. 1050

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 16-411, Arizona Revised Statutes, is amended to
3 read:

4 16-411. Designation of election precincts and polling places

5 A. ~~Except as prescribed by subsection H,~~ The board of supervisors of
6 each county shall, on or before December 1 of each year preceding the year of
7 a general election, by an order, establish a convenient number of election
8 precincts in the county and define the boundaries thereof. Such election
9 precinct boundaries shall be so established as included within election
10 districts prescribed by law for elected officers of the state and its
11 political subdivisions including community college district precincts, except
12 those elected officers provided for in titles 30 and 48.

13 B. Not less than twenty days before a general or primary election, and
14 at least ten days before a special election, the board shall designate one
15 polling place within each precinct where the election shall be held. Upon a
16 specific finding of the board, included in the order or resolution
17 designating polling places pursuant to this subsection, that no suitable
18 polling place is available within a precinct, a polling place for such
19 precinct may be designated within an adjacent precinct. Adjacent precincts
20 may be combined if boundaries so established are included in election
21 districts prescribed by law for state elected officials and political
22 subdivisions including community college districts but not including elected
23 officials prescribed by titles 30 and 48. The officer in charge of elections
24 may also split a precinct for administrative purposes. Any such polling
25 places shall be listed in separate sections of the order or resolution.

26 C. If the board fails to designate the place for holding the election,
27 or if it cannot be held at or about the place designated, the justice of the
28 peace in the precinct shall, two days before the election, by an order,
29 copies of which he shall immediately post in three public places in the
30 precinct, designate the place within the precinct for holding the election.
31 If there is no justice of the peace in the precinct, or if ~~he~~ THE JUSTICE OF
32 THE PEACE fails to do so, the election board of the precinct shall designate
33 and give notice of the place within the precinct of holding the
34 election. FOR ANY ELECTION IN WHICH THERE ARE NO CANDIDATES FOR ELECTED
35 OFFICE APPEARING ON THE BALLOT, THE BOARD MAY CONSOLIDATE POLLING PLACES AND
36 PRECINCT BOARDS AND MAY CONSOLIDATE THE TABULATION OF RESULTS FOR THAT
37 ELECTION IF ALL OF THE FOLLOWING APPLY:

38 1. ALL AFFECTED VOTERS ARE NOTIFIED BY MAIL OF THE CHANGE AT LEAST
39 THIRTY-THREE DAYS BEFORE THE ELECTION.

40 2. NOTICE OF THE CHANGE IN POLLING PLACES INCLUDES NOTICE OF THE NEW
41 VOTING LOCATION, NOTICE OF THE HOURS FOR VOTING ON ELECTION DAY AND NOTICE OF
42 THE TELEPHONE NUMBER TO CALL FOR VOTER ASSISTANCE.

43 3. ALL AFFECTED VOTERS RECEIVE INFORMATION ON EARLY VOTING THAT
44 INCLUDES THE APPLICATION USED TO REQUEST AN EARLY VOTING BALLOT.

45 D. The board is not required to designate a polling place for special
46 district mail ballot elections held pursuant to article 8.1 of this chapter,

S.B. 1050

1 but the board may designate one or more sites for voters to deposit marked
2 ballots until 7:00 p.m. on the day of the election.

3 E. Except as provided in subsection F, a public school shall provide
4 sufficient space for use as a polling place for any city, county or state
5 election when requested by the officer in charge of elections.

6 F. The principal of the school may deny a request to provide space for
7 use as a polling place for any city, county or state election if, within two
8 weeks after a request has been made, he provides a written statement
9 indicating a reason the election cannot be held in the school, including any
10 of the following:

11 1. Space is not available at the school.

12 ~~2. A disruption of the normal school activities would occur.~~

13 ~~3.~~ 2. The safety or welfare of the children would be jeopardized.

14 G. The board shall make available to the public as a public record a
15 list of the polling places for all precincts in which the election is to be
16 held including identification of polling place changes that were submitted to
17 the United States department of justice for approval.

18 ~~H. Notwithstanding subsection A, the board of supervisors of a county
19 shall not change precinct lines in 1999, 2000 or 2001. The board of
20 supervisors may subdivide an election precinct for administrative purposes or
21 may provide for more than one polling place within the boundaries of the
22 election precincts established for use in voting in elections held in 1999,
23 2000 and 2001. In providing for multiple polling places within a precinct
24 the board of supervisors shall consider the particular population
25 characteristics of each precinct in order to provide the voters the most
26 reasonable access to the polls possible.~~

27 H. EXCEPT IN THE CASE OF AN EMERGENCY, ANY FACILITY THAT IS USED AS A
28 POLLING PLACE ON ELECTION DAY SHALL ALLOW ELECTIONEERING AND OTHER POLITICAL
29 ACTIVITY OUTSIDE OF THE SEVENTY-FIVE FOOT LIMIT PRESCRIBED BY SECTION 16-515
30 IN PUBLIC AREAS AND PARKING LOTS USED BY VOTERS.

31 Sec. 2. Section 16-467, Arizona Revised Statutes, is amended to read:
32 16-467. Method of voting on ballot

33 A. At primary elections there shall be provided a separate ballot for
34 each party entitled to participate in the primary.

35 B. Each party ballot shall be designated by the name of the party, and
36 for a voter who is registered as a member of a political party that is
37 entitled to continued representation on the ballot pursuant to section
38 16-804, the voter shall be given by the judge of election one ballot only of
39 the party with which the voter is affiliated as it appears in the precinct
40 register. For a voter who is registered as independent, or no party
41 preference or as a member of a political party that is not entitled to
42 continued representation on the ballot pursuant to section 16-804, the voter
43 shall designate the ballot of only one of the political parties that is
44 entitled to continued representation on the ballot and the judge of election
45 shall give the elector only that political party's ballot.

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1 C. If a person is nominated on more than one ticket, the person shall
2 promptly file with the officer in charge of the preparation of election
3 ballots a written declaration indicating the party name under which the
4 person's name is to be printed on the official election ballot, and the
5 person's name shall be printed only under the party name.

6 D. FOR ANY POLITICAL PARTY THAT IS ENTITLED TO CONTINUED
7 REPRESENTATION ON THE BALLOT, SECTION 16-822 APPLIES TO THE ELECTION OF
8 PRECINCT COMMITTEEMEN.

9 Sec. 3. Section 16-542, Arizona Revised Statutes, is amended to read:
10 16-542. Request for ballot

11 A. Within ninety days next preceding the Saturday before any election
12 called pursuant to the laws of this state, an elector may make a verbal or
13 signed request to the county recorder, or other officer in charge of
14 elections for the applicable political subdivision of this state in whose
15 jurisdiction the elector is registered to vote, for an official early
16 ballot. In addition to name and address, the requesting elector shall
17 provide the date of birth and state or country of birth or other information
18 that if compared to the voter registration information on file would confirm
19 the identity of the elector. If the request indicates that the elector needs
20 a primary election ballot and a general election ballot, the county recorder
21 or other officer in charge of elections shall honor the request. For any
22 partisan primary election, if the elector is not registered as a member of a
23 political party that is entitled to continued representation on the ballot
24 pursuant to section 16-804, the elector shall designate the ballot of only
25 one of the political parties that is entitled to continued representation on
26 the ballot and the elector may receive and vote the ballot of only that one
27 political party. The county recorder may establish on-site early voting
28 locations at the recorder's office or any other locations in the county the
29 recorder deems necessary.

30 B. Notwithstanding subsection A of this section, a request for an
31 official early ballot from an absent uniformed services voter or overseas
32 voter as defined in the uniformed and overseas citizens absentee voting act
33 of 1986 (P.L. 99-410; 42 United States Code section 1973) OR A VOTER WHOSE
34 INFORMATION IS PROTECTED PURSUANT TO SECTION 16-153 that is received by the
35 county recorder or other officer in charge of elections more than ninety days
36 next preceding the Saturday before the election is valid. If requested by
37 the absent uniformed services or overseas voter, OR A VOTER WHOSE INFORMATION
38 IS PROTECTED PURSUANT TO SECTION 16-153, the county recorder or other officer
39 in charge of elections shall provide to the requesting voter early ballot
40 materials through the next two regularly scheduled general elections for
41 federal office immediately following receipt of the request.

42 C. The county recorder or other officer in charge of elections shall
43 mail postage prepaid to the address provided by the requesting elector, which
44 address shall be the elector's residence address or the location where the
45 elector is temporarily residing while absent from the precinct, the early
46 ballot and the envelope for its return within five days after receipt of the

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1 official early ballots from the officer charged by law with the duty of
2 preparing ballots pursuant to section 16-545. If a statewide voter
3 registration database is not yet operational and if the requesting elector
4 registered to vote for the first time in this state after January 1, 2003 and
5 has not yet voted in this state or is reregistering after January 1, 2003
6 after moving from one county in this state to another county in this state
7 and is voting for the first time at the new registration address, the early
8 ballot materials shall include notice that the person shall submit a
9 photocopy of a current form of identification that bears a photograph of the
10 person and the name of the person or a photocopy of a current utility bill,
11 bank statement, paycheck, government issued check or other government
12 document that shows the name and registration address of the person and
13 notice that if the person does not submit photocopies of the required
14 documents, the person may only vote a provisional ballot.

15 D. Only the elector may be in possession of that elector's unvoted
16 early ballot. If a complete and correct request is made by the elector
17 within thirty days next preceding the Saturday before the election, such
18 mailing must be made within forty-eight hours after receipt of the
19 request. Saturdays, Sundays and other legal holidays are excluded from the
20 computation of the forty-eight hour period prescribed by this subsection. If
21 a complete and correct request is made by an absent uniformed services voter
22 or an overseas voter more than ninety days next preceding the Saturday before
23 the election, the mailing shall be made within twenty-four hours after the
24 early ballots are delivered pursuant to section 16-545, subsection B,
25 excluding Sundays.

26 E. In order to be complete and correct and to receive an early ballot
27 by mail, an elector's request that an early ballot be mailed to the elector's
28 residence or temporary address must include all of the information prescribed
29 by subsection A of this section and must be received by the county recorder
30 or other officer in charge of elections no later than 5:00 p.m. on the
31 eleventh day preceding the election. An elector who appears personally no
32 later than 5:00 p.m. on the Friday preceding the election at an on-site early
33 voting location that is established by the county recorder or other officer
34 in charge of elections shall be given a ballot and permitted to vote at the
35 on-site location. If an elector's request to receive an early ballot is not
36 complete and correct but complies with all other requirements of this
37 section, the county recorder or other officer in charge of elections shall
38 attempt to notify the elector of the deficiency of the request.

39 F. Unless an elector specifies that the address to which an early
40 ballot is to be sent is a temporary address, the recorder may use the
41 information from an early ballot request form to update voter registration
42 records.

43 G. The county recorder or other officer in charge of early balloting
44 shall provide an alphabetized list of all voters in the precinct who have
45 requested and have been sent an early ballot to the election board of the

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1 precinct in which the voter is registered not later than the day prior to the
2 election.

3 H. As a result of an emergency occurring between 5:00 p.m. on the
4 second Friday preceding the election and 5:00 p.m. on the Monday preceding
5 the election, qualified electors may request to vote early in the manner
6 prescribed by the county recorder of their respective county. For the
7 purposes of this subsection, "emergency" means any unforeseen circumstances
8 which would prevent the elector from voting at the polls.

9 I. A candidate or political committee may distribute early ballot
10 request forms to voters. If the early ballot request forms include a printed
11 address for return to an addressee other than a political subdivision, the
12 addressee shall be the candidate or political committee that paid for the
13 printing and distribution of the request forms. All early ballot request
14 forms that are received by a candidate or political committee shall be
15 transmitted as soon as practicable to the political subdivision that will
16 conduct the election.

17 Sec. 4. Section 16-822, Arizona Revised Statutes, is amended to read:
18 16-822. Precinct committeemen; eligibility; vacancy; duties

19 A. Any member of a recognized political party who is a registered
20 voter in the precinct is eligible to seek the office of precinct committeeman
21 of his party in that precinct.

22 B. If the number of persons who file nominating petitions for an
23 election to fill precinct committeeman positions is less than or equal to the
24 number of precinct committeeman positions, the county board of supervisors
25 may cancel the election for those positions NOT SOONER THAN SEVENTY-FIVE DAYS
26 BEFORE THE ELECTION and appoint the person who filed the nominating petition
27 to fill the position. If no person has filed a nominating petition to fill a
28 position, the position is deemed vacant and shall be filled as otherwise
29 provided by law. A precinct committeeman who is appointed pursuant to this
30 subsection after filing a nominating petition shall be deemed and elected
31 precinct committeeman.

32 C. IF THE NUMBER OF PERSONS WHO FILE NOMINATING PETITIONS FOR AN
33 ELECTION TO FILL PRECINCT COMMITTEEMAN POSITIONS IS MORE THAN THE NUMBER OF
34 PRECINCT COMMITTEEMAN POSITIONS FOR A RECOGNIZED POLITICAL PARTY IN A
35 PRECINCT, A SEPARATE BALLOT SHALL BE PREPARED FOR THE ELECTION OF PRECINCT
36 COMMITTEEMEN FOR THE POLITICAL PARTY IN THAT PRECINCT. THE BALLOT SHALL
37 CONFORM AS NEARLY AS PRACTICABLE TO BALLOT REQUIREMENTS IN THIS TITLE, AND TO
38 THE OFFICIAL BALLOT PREPARED FOR THAT PARTY IN THE PRIMARY ELECTION, BUT
39 SHALL BE DESIGNATED AS THE "OFFICIAL BALLOT FOR ELECTING PRECINCT
40 COMMITTEEMEN OF THE _____ PARTY, PRIMARY ELECTION (DATE), _____
41 PRECINCT, _____ COUNTY, STATE OF ARIZONA." ONLY PERSONS WHO ARE
42 REGISTERED AS MEMBERS OF THAT POLITICAL PARTY IN THAT PRECINCT MAY VOTE THAT
43 PRECINCT COMMITTEEMAN BALLOT. THE ELECTION BOARD OR OFFICIAL SHALL PROVIDE
44 THE PARTISAN PRECINCT COMMITTEEMAN BALLOT TO VOTERS WHO ARE REGISTERED WITH
45 THAT PARTY IN ADDITION TO THE OFFICIAL BALLOT PREPARED FOR THAT PARTY IN THE
46 PRIMARY ELECTION.

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1 Sec. 6. Section 19-201, Arizona Revised Statutes, is amended to read:
2 19-201. Officers subject to recall; number of petitioners

3 A. Every public officer holding an elective office, either by
4 election, appointment or retention, is subject to recall from such office by
5 the qualified electors of the electoral district from which candidates are
6 elected to that office. Such electoral district may include the whole
7 state. A number of qualified electors equaling twenty-five per cent of the
8 number of votes cast at the last preceding general election for all the
9 candidates for the office held by the officer, even if the officer was not
10 elected at that election, divided by the number of offices that were being
11 filled at that election may, by recall petition, demand his recall.

12 B. In the case of a public officer holding office in a newly created
13 division or district of an elective office, either by election or
14 appointment, a number of qualified electors equaling twenty-five per cent of
15 the number of votes cast at the last preceding general election for all those
16 who were candidates for other divisions or districts of the same office held
17 by the officer in that county or city divided by the number of offices that
18 were being filled at that election may, by recall petition, demand his
19 recall.

20 C. IF THE ELECTIVE OFFICER TO BE RECALLED WAS APPOINTED TO THE OFFICE
21 OR WAS DEEMED ELECTED AFTER AN ELECTION WAS CANCELED DUE TO THE ABSENCE OF
22 OPPOSING CANDIDATES AS PROVIDED IN SECTION 15-424, 48-802, 48-1012, 48-1208,
23 48-1404, 48-1908, 48-2010, 48-2107 OR 48-2208, THE RECALL PETITION MUST BE
24 SIGNED BY THE NUMBER OF QUALIFIED ELECTORS THAT IS EQUAL TO AT LEAST TEN PER
25 CENT OF THE NUMBER OF ACTIVE REGISTERED VOTERS IN THE JURISDICTION OR
26 DISTRICT REPRESENTED BY THAT ELECTIVE OFFICER AS DETERMINED ON THE DATE OF
27 THE LAST GENERAL ELECTION.

28 Sec. 7. Section 19-212, Arizona Revised Statutes, is amended to read:
29 19-212. Nomination petition; form; filing

30 A. Unless the officer otherwise requests in writing, the name of the
31 officer against whom a recall petition is filed shall be placed as a
32 candidate on the official ballot without nomination. Other candidates for
33 the office may be nominated to be voted upon at the election and shall be
34 placed upon the official recall ballot after filing a nomination petition
35 that is signed by a number of qualified electors that is equal to at least
36 two per cent of the total votes cast for all candidates for that office at
37 the last election for that office. Nomination petition signers shall be
38 qualified electors of the electoral district of the officer against whom the
39 recall petition is filed.

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1 B. IF THE OFFICER AGAINST WHOM A RECALL PETITION IS FILED WAS
2 APPOINTED TO THE OFFICE OR WAS DEEMED ELECTED AFTER AN ELECTION WAS CANCELED
3 DUE TO THE ABSENCE OF OPPOSING CANDIDATES AS PROVIDED IN SECTION 15-424,
4 48-802, 48-1012, 48-1208, 48-1404, 48-1908, 48-2010, 48-2107 OR 48-2208,
5 OTHER CANDIDATES FOR THE OFFICE TO BE VOTED ON IN THE RECALL ELECTION SHALL
6 BE PLACED ON THE OFFICIAL RECALL BALLOT AFTER FILING A NOMINATION PETITION
7 THAT IS SIGNED BY THE NUMBER OF QUALIFIED ELECTORS THAT IS EQUAL TO AT LEAST
8 ONE-HALF OF ONE PER CENT OF THE NUMBER OF ACTIVE REGISTERED VOTERS IN THE
9 JURISDICTION OR DISTRICT REPRESENTED BY THAT ELECTIVE OFFICER AS DETERMINED
10 ON THE DATE OF THE LAST GENERAL ELECTION WITH NO LESS THAN FIVE SIGNATURES.
11 NOMINATION PETITION SIGNERS SHALL BE QUALIFIED ELECTORS OF THE ELECTORAL
12 DISTRICT OF THE OFFICER AGAINST WHOM THE RECALL PETITION IS FILED.

13 ~~B.~~ C. The title and body of the nomination petition shall be
14 substantially in the following form:

15 Nomination Petition--Recall Election

16 We, the undersigned electors, qualified to vote in the
17 recall election mentioned herein, residents of the precinct
18 indicated by the residence addresses given, and residents of the
19 county of _____, state of Arizona, hereby nominate _____, who
20 resides at _____, in the county of _____ to be a candidate in
21 the recall election for the office of _____ to be held on
22 _____, and we further declare that

23 (date)

24 we have not signed and will not sign any nomination paper for
25 any other person for such office.

26 The remainder of the petition shall be substantially in the form
27 prescribed in section 16-315.

28 ~~C.~~ D. If recall petitions have been filed against more than one
29 member of a multimember public body whose members serve at large, the
30 nomination petition and paper of the other candidates shall state which
31 member they oppose.

32 ~~D.~~ E. To each nomination petition shall be appended a certificate by
33 a person who is qualified to register to vote pursuant to section 16-101
34 stating that to the best of his knowledge and belief all the signers of the
35 nomination petition are qualified electors of the precinct which they give as
36 their residence.

37 ~~E.~~ F. Such nomination petition shall be filed not more than ninety
38 days nor less than sixty days prior to the date of the recall election.

APPROVED BY THE GOVERNOR JUNE 3, 2004.

FILED IN THE OFFICE OF THE SECRETARY OF STATE JUNE 3, 2004.

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11 ARIZONA LIBERTARIAN PARTY, INC.;
12 BARRY HESS; PETER SCHMERL; JOHN
13 JASON AUVENSHINE; and ED KAHN,

14 Plaintiffs,

15 v.

16 JANICE K. BREWER, Arizona Secretary
17 of State,

18 Defendant.

NO. CV02-144 TUC RCC

**SECRETARY OF STATE'S
MEMORANDUM OF LAW
OPPOSING RELIEF FOR
PLAINTIFFS ON REMAND**

(Assigned to the Hon. Raner C. Collins)

(Oral Argument Requested)

19 Pursuant to the stipulation of the Parties, which this Court approved in its Order
20 dated June 23, 2005 (dk. 50), the Secretary of State (the "Secretary"), through counsel,
21 hereby submits the following Memorandum of Points and Authorities to resolve the
22 issues remanded by the Ninth Circuit on the merits. This Memorandum is supported by
23 the Joint Statement of Stipulated Facts ("SOF"), which the Parties filed on September
24 30, 2005, and by the additional exhibits attached hereto.¹

25 _____
26 ¹ Pursuant to the Court's June 23, 2005 Order, the Parties have up to and including
November 30, 2005 to submit responsive briefs.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This action is on remand from the Ninth Circuit Court of Appeals to decide the limited question whether the participation of voters who are not registered with the Arizona Libertarian Party (hereafter, the “Libertarian Party” or the “Party”) in the selection of its candidates is constitutional under *California Democratic Party v. Jones*, 530 U.S. 567 (2000). See *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1282 (9th Cir. 2003). Under Arizona’s primary election system, voters that are registered as “no party preference,” as independent or as members of parties that are not represented on the ballot are allowed to participate in the primary election of a party that does enjoy ballot access. See *Ariz. Const. art. VII, § 10; A.R.S. §§ 16-467; -542.*

In earlier proceedings, this Court held that Arizona’s entire primary election system was unconstitutional. (dkt. 24.) On appeal, the Ninth Circuit agreed that the State’s system violated Plaintiffs’ associational rights by allowing voters who are not formally members of the Libertarian Party to vote for its precinct committeemen. See *id.* at 1281. The Appeals Court stated, however, that the separate question of whether the participation of non-members in the selection of the Libertarian Party’s candidates is constitutional turns on factual issues not developed previously. See *id.* at 1280.

The Ninth Circuit remanded for this Court to consider the severity of the burden, if any, this aspect of the State’s primary system places on the Libertarians, and the State’s justifications for any burden.² The Appeals Court noted that in *Jones*, the

² If Arizona’s system is constitutional as to the selection of the Libertarian Party’s candidates, the Ninth Circuit also remanded to determine whether the provision regarding the selection of precinct committeemen is severable. See *id.* at 1282. The Parties have already agreed that it is (dkt. 36), as the Legislature amended State law to provide a separate ballot for precinct committeemen. See *A.R.S. § 16-822(C)*. The Ninth Circuit also stated that this Court’s judgment only applies to the Libertarian Party,

1 Supreme Court focused on whether the participation of non-party members, including
2 members of rival parties, altered the selection of a party's nominees, and whether party
3 nominees were forced to change their message. The Ninth Circuit noted that "the Court
4 in *Jones* treated the risk that nonparty members will skew either the primary results or
5 candidates' positions as a factual issue, with the plaintiffs having the burden of
6 establishing that risk." *Id.* at 1282.

7 Plaintiffs cannot carry their burden here. In *Jones*, Californians intended their
8 blanket system to compel parties to accept candidates they may not want and, in doing
9 so, to change their message. Arizonans specifically designed their primary system to
10 improve the electoral process in the State without harming political parties. Arizonans
11 achieved this balance by requiring members of opposing parties with ballot access to
12 vote in their own party's primary, while allowing voters who could not participate under
13 the State's prior system the opportunity to vote a single recognized party's ballot.

14 The Supreme Court specifically stated that a system in which the voter is limited
15 to one party's ballot may be "constitutionally distinct" from the blanket primary struck
16 down in California. *Jones*, 530 U.S. at 577 n.8. It is. Unlike in *Jones*, the decision to
17 vote exclusively in the Libertarian primary is an act of affiliation by the voter.
18 Moreover, the evidence does not show that the participation of voters who are not
19 formally enrolled has skewed the Party's nominee, or caused Libertarians to jettison
20 their message. The burden if any on Plaintiffs is minor, and is justified by important
21 interests.

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25 as no other parties have joined this litigation. *See Ariz. Libertarian Party*, 351 F.3d at
26 1283.

1 **II. BACKGROUND.**

2 **A. Arizona's Primary Election System.**

3 Arizonans amended their State Constitution in 1998 to allow voters who are
4 registered as "no party preference," as independent, or as members of parties that are not
5 represented on the ballot to participate in the State's primary elections. Ariz. Const. art.
6 VII, § 10. Before the amendment, Arizona had a "closed primary" system in which only
7 registered members of political parties that were represented on the ballot could
8 participate. [SOF, ¶ 2.] The Arizona Constitution now provides:

9 The Legislature shall enact a direct primary election law, which shall
10 provide for the nomination of candidates for all elective State, county and
11 city offices, including candidates for United States Senator and for
12 Representative in Congress. *Any person who is registered as no party
13 preference or independent as the party preference or who is registered
14 with a political party that is not qualified for representation on the ballot
may vote in the primary election of any one of the political parties that is
qualified for the ballot.*

15 Ariz. Const. art. VII, § 10 (emphasis added).

16 The Arizona Legislature subsequently enacted implementing legislation
17 consistent with the voters' will. A.R.S. §§ 16-467; -542. A voter who is registered as
18 no party preference, as independent or with a party without ballot access may receive
19 and vote the ballot of only one recognized party. [SOF, ¶ 4.] A voter that is registered
20 as a member of a recognized political party may only vote in that party's primary and is
21 not permitted to vote in the primary of any other party. [SOF, ¶ 5.]

22 **B. Arizona's Voter Registration Law.**

23 A person who registers to vote in Arizona is offered the opportunity to indicate a
24 "party preference" on the voter registration form. [SOF, ¶ 6.] A voter may declare
25 himself to be a member of a recognized political party, a non-recognized political party,
26 or no party at all. [SOF, ¶ 7.] The voter may also declare that he is an "independent."

1 [SOF, ¶ 7.] A voter may change his party registration simply by filling out a new voter
2 registration form and submitting it to the appropriate county recorder. [SOF, ¶ 8.]

3 A voter may change party preference at any time up to twenty-nine days before a
4 primary or general election. [SOF, ¶ 9.] In Arizona, early voting begins thirty-three
5 days before a primary or general election. [SOF, ¶ 10.] Thus, a voter may lawfully
6 change his party preference on the same day that he casts a primary election ballot.
7 [SOF, ¶¶ 9, 10.]

8 C. Political Parties In Arizona.

9 In Arizona, a political party may become “recognized” and therefore eligible to
10 have its candidates on the ballot by satisfying criteria set forth in A.R.S. §§ 16-801
11 through -804. [SOF, ¶ 11.] A party may gain recognition as a “new” party by filing a
12 sufficient number of petition signatures with the Secretary of State or local election
13 officials in accordance with procedures set forth in A.R.S. §§ 16-801 through -803.
14 [SOF, ¶ 12.]

15 Alternatively, a party may be recognized as having continued representation on
16 the ballot if the party (i) received five percent of the total votes cast in designated races
17 in the previous general election, A.R.S. § 16-804(A), or (ii) registered electors
18 amounting to at least two-thirds of one percent of all registered electors in the
19 jurisdiction, A.R.S. § 16-804(B). [SOF, ¶ 13.] For the 2004 primary and general
20 elections, the Libertarian, Democratic and Republican parties qualified for
21 representation on the ballot in Arizona. [SOF, ¶ 14.]

22 III. STATEMENT OF THE CASE.

23 In *Jones*, the Supreme Court struck down California’s blanket primary system as
24 a violation of political parties’ associational rights. *See* 530 U.S. at 570. Under the
25 blanket system, each voter was free to vote for any candidate in a particular race,
26

1 regardless of party. *See id.* at 570. The candidate from each party receiving the most
2 votes advanced to the general election as that party's nominee. Because Californians
3 could vote for any party's candidate for each elective office, the Supreme Court
4 observed that the blanket primary "[i]n effect . . . simply moved the general election one
5 step earlier in the process." *Id.* at 580.

6 The Supreme Court concluded that California's system imposed a severe burden
7 on a party's rights of association, and subjected the law to strict scrutiny. *Id.* at 580-81.
8 The Supreme Court focused on the prospect of adherents of opposing parties altering the
9 identity of a party's nominee. *See id.* at 578. The Court also inquired if candidates
10 were forced to change their message to appeal to voters not registered with their party.
11 *See id.* at 578-79.

12 As the Ninth Circuit noted, however, the blanket system reviewed in *Jones* is not
13 akin to Arizona's system, which restricts members of recognized voters to voting in their
14 own party's primary. *See Ariz. Libertarian Party*, 351 F.3d at 1282. In addition,
15 Arizona's system limits independent voters and voters who are not registered with a
16 recognized political party to selecting the candidates of only one party for all offices.
17 *See id.* Indeed, the Court in *Jones* stated that a system like Arizona's "in which the voter
18 is limited to one party's ballot" may be "constitutionally distinct" from the blanket
19 primary system in California. 530 US. at 577 n.8.

20 As signaled in *Jones*, not all State regulations of party primaries impose a severe
21 burden on associational rights. Only months ago, the Supreme Court turned away a
22 constitutional challenge to Oklahoma's "semi-closed" primary system, under which
23 political parties can invite their own registered members and voters registered as
24 independents to vote in their primary. *See Clingman v. Beaver*, __ U.S. __, 125 S.Ct.

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1 2029, 2042 (2005).³ Ironically, the Libertarians in that case sued to *open* their primary
2 to voters that were registered with opposing political parties. *See id.* at 2035.

3 The *Clingman* case made clear that a flexible standard applies to judicial review
4 of election laws. *See* 123 S.Ct. at 2038 (“[N]ot every electoral law that burdens
5 associational rights is subject to strict scrutiny.”); *see also Timmons v. Twin Cities Area*
6 *New Party*, 520 U.S. 351, 359 (1997) (“No bright line separates permissible election-
7 related regulation from unconstitutional infringements on First Amendment freedoms”).
8 Under that standard, a court weighs the “character and magnitude” of the burden on First
9 Amendment rights against the interests advanced to justify the burden. *Ariz. Libertarian*
10 *Party*, 351 F.3d at 1281; *see also Clingman*, 125 S.Ct. at 2039 (stating that subjecting
11 every election law to strict scrutiny would “hamper the ability of States to run efficient
12 and equitable elections”).

13 Only regulations that impose a “severe” burden on associational rights are subject
14 to strict scrutiny, and must be narrowly tailored to serve a compelling state interest.
15 *Clingman*, 125 S.Ct. at 2038. A law that imposes a lesser burden is subject to more
16 relaxed review, and “important regulatory interests are sufficient to justify it.” *Ariz.*
17 *Libertarian Party*, 351 F.3d at 1281. Applying these standards, Arizona’s primary
18 system strikes the proper balance between the rights asserted by the Libertarian Party
19 and State interests that the Court in *Jones* indicated might be achieved in a system like
20 Arizona’s.

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24 ³ The Ninth Circuit labeled Arizona’s primary system as being semi-closed. *See Arizona*
25 *Libertarian Party*, 351 F.3d at 1280. According to the Supreme Court, semi-closed
26 primaries are found in 23 states. *See Clingman*, 125 S.Ct. at 2035 n.1.

1 **IV. ARIZONA'S PRIMARY SYSTEM PLACES A MINIMAL, IF ANY,**
2 **BURDEN ON PLAINTIFFS' ASSOCIATIONAL RIGHTS.**

3 **A. Arizonans Who Vote A Single Party's Ballot Have Made An**
4 **Affiliation.**

5 There is a constitutional distinction between the blanket primary struck down in
6 *Jones* and Arizona's system that Plaintiffs attempt to challenge here. In *Jones*, each of
7 California's voters received a single ballot containing the candidates from each of the
8 parties participating in the primary. Thus, the same voter could freely choose between
9 candidates for different offices, regardless of party.

10 In Arizona, voters are limited to voting the ballot of one party for all elective
11 offices. [SOF, ¶ 4.] Members of opposing parties with access to the ballot may only
12 vote in the primary of their party. The voter who is not registered with a recognized
13 party is likewise limited to the candidates of only one recognized party. By selecting
14 one party's ballot for the purpose of voting in the primary, the voter has made an
15 affiliation unlike the blanket primary voters in *Jones*.

16 Indeed, a voter who limits himself to one party's ballot under Arizona's present
17 system is fundamentally the same as a voter who re-registers with a party to vote in a
18 closed primary. In Arizona, the deadline to register to vote is twenty-nine days before
19 the election. [SOF, ¶ 9.] Early balloting begins thirty-three days before the election.
20 [SOF, ¶ 10.] Thus, a voter could re-register with the Libertarian Party before the
21 twenty-nine day deadline, cast an early ballot in its primary, and then change his
22 registration back before the deadline expires. This process is even easier in other states,
23 some of which allow voter registration on the day of the election. *See, e.g.*, Minn. Stat.
24 § 201.061; Wis. Stat. § 6.55.

25 Moreover, voters can and do form an association with political parties in ways
26 that extend beyond formal enrollment. In *Clingman*, Justice O'Connor rejected the

1 premise that voters can only affiliate with a political party through the act of registering:

2 [R]egistration with a political party surely may signify an important
3 personal commitment, which may be accompanied by faithful voting and
4 even activism beyond the polls. But for many voters, registration serves
5 principally as a mandatory (and perhaps even ministerial) prerequisite to
6 participation in the party's primaries. The act of casting a ballot in a given
7 primary may, for both the voter and the party, constitute a form of
8 association that is at least as important as the act of registering. The fact
9 that voting is episodic does not, in my judgment, undermine its
10 associational significance; it simply reflects the special character of the
11 electoral process, which allows citizens to join together at regular intervals
12 to shape government through the choice of public officials.

13 125 S.Ct. at 2043 (citation omitted)⁴; *see also Tashjian v. Republican Party of Conn.*,
14 479 U.S. 208, 215 (1986) (noting that enrollment is one element in a continuum of voter
15 participation in party affairs).

16 Even leaders of the Libertarian Party suggest that a voter's kinship with the Party
17 is not measured solely by a voter registration form.⁵ George Squyres is chairman of the

18 ⁴ Justice O'Connor, joined by Justice Breyer, concurred in the Court's judgment, but did
19 not join with the other justices with respect to Part IIA of the opinion. In Part IIA,
20 Justices Thomas, Scalia and Rehnquist advocated a restrictive view of party affiliation.
21 *See* 125 S.Ct. at 2042. As to that view, the three justices could not form a majority.

22 ⁵ Indeed, it appears that registration in the Libertarian Party does not in the eyes of the
23 Party faithful determine a true Libertarian:

24 Q. I want you to help me understand a little more the difference
25 between a registered Libertarian and a true Libertarian.

26 A. A registered Libertarian you can define very simply. You go down
and you fill out a voter registration form and you fill in the word
"Libertarian" where it says "Party Affiliation." That makes you a
registered Libertarian. There is no philosophical belief inherent in that
activity. It is merely an activity of filling out a piece of paper and turning it
in. You can believe anything you want and still do that. You know.
Simply because you're registered as a Libertarian, capital "L", doesn't

1 Coconino County Libertarian Party and second vice chair of the Arizona Libertarian
2 Party. When deposed by State's counsel, Mr. Squyres noted the philosophical bond that
3 may be shared by voters not formally enrolled with the Party:

4 Q. Why do you suppose voters who are not registered with the
5 Libertarian Party want to participate in the primaries?

6 A. If you're asking me why independents would want to be able to
7 vote in a Libertarian primary, I would suspect that there are people who
8 are registered as independent who are Libertarian, just as there are people
9 who are registered as independent who are Republican or Democrat or
10 Green Party or Constitution Party or national, or whatever. There are
11 many people who simply don't register in a party because they don't want
12 to get all of the mailings from a party. They don't want to be solicited all
13 the time from fund-raisers. So there's obviously a lot of people who might
14 want to vote in a primary but who are not registered in a political party's
15 system.

12 Q. But those who are affiliated in some way with that party?

13 A. They may be philosophically affiliated with a party but register as
14 an independent simply because they don't want the invasiveness that
15 comes from having your name on the list.

15 Squyres Dep. 58:9-59:5.

16 Barry Hess was the Libertarian Party's nominee for Arizona Governor in 2002.
17 He is also a Plaintiff in this action. Mr. Hess also believed that a voter who has not
18 enrolled can feel a kinship with the Libertarian Party:

19 Q. Do you believe that a voter can feel a connection with the
20 Libertarian Party without having to, without being registered as a
21 Libertarian?

22 A. Sure. Sure, feel some sort of kindred spirit with a Republican and
23 Democrat, too. I think all of us can if we have any sense.

23 Hess Dep. 22:9-22:14, August 13, 2004, attached hereto as Exhibit 2.

24
25 mean that you hold to any of those positions.

26 Squyres Dep. 67:20-68:9, August 9, 2004, attached hereto as Exhibit 1.

1 In *Jones*, blanket primary voters were allowed to participate in the primaries of
2 multiple parties on a single occasion. Arizona's system is constitutionally distinct.
3 Voters that have not formally enrolled with a recognized political party are forming an
4 association by selecting the ballot of one party with ballot access. Unlike in *Jones*, this
5 system respects political parties and does not burden the Libertarians' associational
6 rights.

7 **B. Participation By Voters Who Are Not Registered As Libertarian Has**
8 **Not Skewed The Party's Election Results.**

9 In *Jones*, the Court applied strict scrutiny after concluding that under California's
10 blanket primary system, "the prospect of having a party's nominee determined by
11 adherents of an opposing party is far from remote – indeed, it is a clear and present
12 danger." 530 U.S. 578. The Court relied on evidence that 37 percent of Republicans
13 said they planned to vote in a Democratic primary. *See id.* An expert also testified that
14 in another blanket State, only 25 to 33 percent of voters limited themselves to one party
15 throughout the ballot. *See id.* With regard to minor political parties, and the Libertarian
16 Party in particular, the evidence showed that the total votes cast in some races more than
17 doubled the total number of voters registered with the party. *See id.*

18 In Arizona, voters who are registered with a recognized party may only vote in
19 that party's primary. Thus, unlike in *Jones*, there is no danger of a Libertarian Party's
20 nominee being determined by adherents of the Democratic Party, or of the Republican
21 Party. Not surprisingly, Plaintiffs were unable to identify a single contested race since
22 2000 – the first election under Arizona's present primary system – where they concluded
23 that the Party's nominee did not represent the will of the majority of registered
24 Libertarians. *See Auvenshine Dep. 28:13–28:23, August 11, 2004, attached hereto as*
25 *Exhibit 3; Euchner Dep. 34:2–34:5, August 11, 2004, attached hereto as Exhibit 4.*

26 There have only been four contested races on the ballot between candidates from

1 the Libertarian Party since 2000, with none occurring in 2004. [SOF, ¶¶ 16, 19, 22.]
2 The only statewide race on the ballot between two Libertarian candidates was the contest
3 for Governor in 2002. [SOF, ¶ 19.] In that race, voters cast only 2,772 Libertarian
4 ballots, though there were 14,119 registered Libertarians in Arizona at that time. [SOF,
5 ¶¶ 18, 21.] Not only is there no evidence that non-members doubled the votes cast by
6 registered Libertarians, but the number of Libertarian ballots cast totaled less than one-
7 fifth of registered Party members.

8 The record in *Jones* also demonstrated that the substantial number of cross over
9 voters in California had policy views that diverged from the party faithful. *See* 530 U.S.
10 at 578-79. There also was expert testimony that parties would inevitably be forced to
11 bless a candidate that did not represent the views of the majority or even plurality of
12 party members. *See id.* at 579. In Arizona, there are no cross-over voters from
13 recognized political parties. And, as noted, there is no suggestion that the Party has been
14 forced to accept a candidate that a plurality or even majority of members did not want.
15 Far from “clear and present,” *id.* at 578, the danger of non-members of the Libertarian
16 Party changing the identity of its nominee is at best speculative.

17 **C. Libertarian Candidates Have Not Abandoned Their Libertarian**
18 **Principles.**

19 In *Jones*, the Court concluded that the blanket primary caused party candidates to
20 alter their positions in an effort to appeal to the political center. *See* 530 U.S. at 580.
21 The Court heard from an expert that the policy positions of Members of Congress
22 elected from blanket states are “more moderate, both in an absolute sense and relative to
23 the other party, and so are more reflective of the preferences of the mass of voters at the
24 center of the ideological spectrum.” *Id.* Indeed, the Court noted that the very purpose
25 behind the blanket primary in California was to moderate party doctrine. *See id.*
26

1 Unlike in *Jones*, the primary system in Arizona was not designed to change the
2 positions of the parties, and certainly has had no such effect on the Libertarian Party. In
3 fact, when questioned by State counsel on this issue, Party leaders could not demonstrate
4 a nominee in a contested race that ever jettisoned his Libertarian principles to satisfy the
5 preference of the mass of voters.

6 The only suggestion of a nominee advocating a non-Libertarian position stemmed
7 from the 2002 Libertarian contest for Governor, a race in which Plaintiff Barry Hess
8 competed against Gary Fallon. Gary Fallon states that he entered the race because Mr.
9 Hess refused to state during the campaign whether he would accept Clean Elections
10 funding. *See* Fallon Dep. 12:16–12:20, August 13, 2004, attached hereto as Exhibit 5.

11 David Euchner, a former candidate himself and the Pima County chair, concluded
12 that Mr. Hess was simply trying not to offend either side of a party divided over the
13 Clean Elections issue. *See* Euchner Dep. 36:9–37:11. Indeed, Mr. Hess made clear that
14 his intention was anything but to appease voters that favored publicly-funded
15 campaigns:

16 Q. Why did you refuse to give an answer as to whether or not you
17 were going to seek clean elections funding?

18 A. I was looking for publicity, because it was such an obvious that a
19 Libertarian couldn't have anything to do with what we believe is stolen
20 money.

21 Q. Can you explain a little further, when you say looking for
22 publicity, for what?

23 A. As a Libertarian, it is philosophically opposed, that the philosophy
24 is opposed to taking them. And that is why I never requested certification
25 or why I obviously would never take it.

26 Q. So you had no intention of taking clean elections money?

A. I can say that there was – I left it open probably 2 percent of a
chance that I might have taken it, if I felt and believed that I could use it
to make fun of that program. That became less important to me as we
went on.

1 Q. So when you say publicity, it was to highlight your opposition to –

2 A. Absolutely.

3 Q. -- clean elections funding?

4 A. And I felt that, once I was faced with that possibility, when it was
5 within grasp, I thought that might be a little duplicitous and I couldn't go
6 through with it. But otherwise we had envisionings of billboards saying
7 look what your money is paying for, aren't you an idiot.

8 Hess Dep. 14:7–15:10.

9 This is hardly the doctrinal change that resulted from the blanket primary system
10 in *Jones*.⁶ In fact, David Euchner confirmed that Mr. Hess “was fantastic at taking the
11 Libertarian message to the voters” in the 2002 campaign. Euchner Dep. 37:25–38:3.

12 Arizona's primary system was not intended to force parties to accept a candidate
13 or a message they do not want. Not surprisingly, therefore, it has not created the
14 deleterious effects on the Party that were documented in *Jones*. Any burden on
15 Plaintiffs is minimal, and does not merit strict scrutiny. *See Clingman*, 125 S.Ct. at 2038
16 (“There must be more than a minimal infringement on the rights to vote and of
17 association . . . before strict judicial review is warranted”) (citation omitted).

18 **V. ARIZONA'S PRIMARY SYSTEM IS SUPPORTED BY IMPORTANT
19 STATE INTERESTS.**

20 Given that Arizona's primary law does not severely burden the rights of the
21 Libertarian Party and its members, it is subject to less stringent review. *See Ariz.
22 Libertarian Party*, 351 F.3d at 1281. Accordingly, “‘important regulatory interests’ are
23 sufficient to justify it.” *Id.* (quoting *Timmons*, 520 U.S. at 358.)

24 This flexible standard of review acknowledges the need to balance the
25 associational interests pressed by political parties like the Libertarians against the
26 interests of voters and the States. *See Clingman*, 125 S.Ct. at 2044 (O'Connor, J.,

⁶ Indeed, Mr. Hess and the other Plaintiffs commenced this action before the 2002
elections to keep independents from participating in Libertarian primaries.

1 concurring). In *Jones*, California failed to achieve that balance. The State in that case
2 argued that the blanket primary was intended to promote voter participation and fairness
3 in the political process, among other interests. The State's justifications failed because
4 its mechanism for furthering its interests placed a severe and unjustifiable burden on the
5 parties:

6 Encouraging citizens to vote is a legitimate, indeed essential, state
7 objective; for the constitutional order must be preserved by a strong,
8 participatory democratic process. In short, there is much to be said in
9 favor of California's law; and I might find this to be a close case if it were
10 simply a way to make elections more fair and open or addressed matters
purely of party structure.

11 The true purpose of this law, however, is to force a political party to
12 accept a candidate it may not want and, by doing so, to change the party's
13 doctrinal position on major issues. From the outset the State has been fair
and candid to admit that doctrinal change is the intended operation and
effect of its law.

14 530 U.S. at 587 (Kennedy, J., concurring). The Court, therefore, subjected the law to
15 strict scrutiny. *See id.* at 582.

16 Arizona's primary is a reasonable, non-discriminatory law that serves important if
17 not compelling interests, including increasing voter participation, enhancing the integrity
18 and legitimacy of the primary process, and promoting fairness by ensuring that voters
19 who help pay for the election have a full opportunity to vote, especially given that the
20 general election can often be decided in the primary contest. Unlike in *Jones*, however,
21 Arizonans did so with the specific goal of not harming political parties. Arizona
22 balanced its interests in fair and open elections with the associational interests of voters
23 and parties by requiring members of recognized parties to continue voting the ballot of
24 their parties and permitting those registered voters who were not eligible to vote under
25 the former system the opportunity to affiliate with the party of their choice by selecting a
26

1 single party's ballot.

2 In fact, Arizonans crafted this system in response to a proposal floated in 1998
3 that would have created the type of blanket primary system later stuck down in *Jones*.
4 See Ariz. Sec'y of State, 1998 Ballot Propositions: General Election November 3, 1998
5 at p. 28, attached hereto as Exhibit 6. Arizonans responded with the present option
6 precisely because it was respectful of our State's political parties. Thus, Arizonans
7 sought to preserve the integrity of parties and protect against the destabilizing effects of
8 party raiding. These interests also are sufficient to justify the minor – if any – burden
9 placed on the Libertarian Party in this case. See *Clingman*, 125 S.Ct. at 2040.

10 **VI. CONCLUSION.**

11 For each of the reasons above, the Secretary of State respectfully requests that the
12 Court deny Plaintiffs relief on any and all claims remanded in this action.

13 RESPECTFULLY SUBMITTED this 31st day of October, 2005.

14 TERRY GODDARD
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21
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23 this 31st day of October, 2005.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARIZONA LIBERTARIAN PARTY,
INC.; BARRY HESS; PETER
SCHMERL; JASON AUVENSHINE; ED
KAHN,

Plaintiffs,

vs.

JANICE K. BREWER, Arizona Secretary
of State,

Defendant.

No. 02-144-TUC-RCC

ORDER

The Court of Appeals remanded this action to determine “whether non-member’s participation in the selection of Libertarian candidates is unconstitutional and, if not whether the provisions related to the election of Libertarian precinct committeemen are severable.” *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1282 (9th Cir. 2003).

The Court holds the burden imposed by Arizona’s Primary Election System allowance of non-Libertarian’s participation of the selection of Libertarian candidates on the Arizona Libertarian Party’s (“ALP”) associational rights is severe. The State has failed to show a narrowly tailored, compelling interest sufficient to justify the imposition of such a burden. Therefore, Arizona’s primary system as applied to the ALP is unconstitutional.

1 Since the Court finds Arizona's primary system as applied to the ALP is unconstitutional,
2 the Court need not answer the question of whether the provisions related to the election of
3 Libertarian precinct committeemen are severable from the remainder of Arizona's primary
4 system. However, if the offending provisions were constitutional, the parties agree and the
5 Court joins in agreement that the unconstitutional provisions related to the election of
6 Libertarian precinct committeemen would be severable from the remainder of Arizona's
7 primary system.

8 Background

9 The ALP brought suit against the State of Arizona challenging Arizona's semi-closed
10 primary system. Arizona's primary system allows voters who are unaffiliated, registered as
11 independents, or registered as members of parties not on the ballot to vote in the party
12 primary of their choice. AZ Const. Art. VII § 10, ARS §§ 16-467, -542. Voters who were
13 registered with a party on the ballot could vote only in their party's primary. The primary
14 ballot consists of all of the party's candidates for all governmental offices and candidates for
15 the party precinct committeemen.

16 In Arizona, a voter can change party preference any time up to twenty-nine days before
17 a primary or general election. The State also permits early voting to begin thirty-three days
18 before a primary or general election.

19 For a candidate to enter a primary, the candidate must be a registered member of the party,
20 obtain a number of signatures on a nominating petition, the number is determined by a
21 percentage of the party's registered members (0.5% to 2% depending on the office), and the
22 signatures can come from any person eligible to vote for the candidate. A.R.S. § 16-322.
23 Therefore, the signatures do not have to come from registered party members, but can be the
24 signatures of registered independents or registered members of a party not on the ballot in
25 the election year. *See* A.R.S. §§ 16-322(A), -121.

26 For the 2004 primary election, there were 856,705 registered Democrats, 976,280
27 registered Republicans, 17,249 registered Libertarians, and 590,360 voters registered as
28 Independents or as members of non-recognized political parties.

1 In 2002, Andy Fernandez temporarily registered as a Libertarian and acquired the fewer
2 than twenty signatures required to enter the ALP primary for the U.S. House seat in District
3 1. Mr. Fernandez had a genuine interest in the ALP and reached out to the party's leaders
4 with help for his candidacy. One of Mr. Fernandez's major issues was promoting
5 nationalized healthcare. On the final day for registering a candidate, the county chairman for
6 the Libertarian Party in Cochino County recruited another candidate, Ed Porr, acquired the
7 required signatures, and filed the petition allowing Mr. Porr to challenge Mr. Fernandez for
8 the nomination.

9 The ALP used its limited resources to promote Mr. Porr in the primary. Mr. Fernandez
10 lost the primary by forty-three votes, 286-243. There is no evidence in the record of how
11 many registered Libertarians were in District 1. However, to get on the ballot for the primary
12 would require one-half of one percent of the registered Libertarians in the district. Mr.
13 Fernandez needed less than twenty signatures to become a candidate. Therefore, based on
14 the limited evidence it is highly likely significantly fewer people voted in the primary than
15 there was registered Libertarians eligible to vote.

16 The District 1 Libertarian Primary in 2002 had 529 people vote in the primary, the District
17 3 Libertarian primary in 2002 had 320 vote in the primary, and the District 4 Libertarian
18 Primary in 2000 had 220 people vote in it. While the District 1 Libertarian primary had
19 significantly more people vote in it than any previous or subsequent primary for a Libertarian
20 primary for the party's nomination for a US Representative, there is no evidence in the record
21 to indicate whether the increase was due to more registered Libertarians in District 1 than the
22 other districts or because many more people whom were not registered Libertarians voted in
23 the District 1 primary in 2002.

24 This Court ruled Arizona's primary system was an unconstitutional violation of the
25 freedom of association, the State appealed. *Arizona Libertarian Party v. Bayless*, 351 F.3d
26 1277 (9th Cir. 2003). On appeal the Ninth Circuit Appellate Court affirmed the Court's
27 judgment in part and vacated it in part. *Id.* The Appellate Court affirmed the Court's
28 judgment with regard to the finding that Arizona's primary system was an unconstitutional

1 burden in the selection of the Libertarian Party precinct committeemen. *Id.* However, the
2 Appellate Court ruled this Court could not determine Arizona's primary system violated the
3 constitutional rights of the Democrat or Republican party because neither were party to the
4 suit. *Id.* The Appellate Court also ruled this Court erred in failing to consider whether the
5 participation of nonmembers in the selection of the ALP candidates is constitutional under
6 *Jones*. *Id.* (citing *California Democratic Party v. Jones*, 530 U.S. 567 (2000)). The
7 Appellate Court instructed this Court to consider the severity of the burden of Arizona's
8 primary system on the Libertarian Party's associational rights, whether the State sufficiently
9 justified the burden, and if the State has justified the burden whether the selection of precinct
10 committeemen is severable from the remainder of the system. *Id.*

11 Discussion

12 The Court must first determine the burden, if any, imposed on the party challenging the
13 election law. *Miller v. Brown*, 465 F. Supp. 2d 584, 588 (E.D. Va. 2006). The court
14 determines the burden by weighing the character and magnitude of the burden imposed. *Id.*
15 If the burden imposed is severe or something less than severe, the level of scrutiny used to
16 determine whether the law is constitutional is then determined. A flexible standard applies
17 to election laws, "not every electoral law that burdens associational rights is subject to strict
18 scrutiny." *Clingman v. Beaver*, 544 U.S. 581, 592 (2005).

19 When a law places a severe burden on the right to associate freely, the law will be upheld
20 only if it is narrowly tailored to serve a compelling state interest. *Clingman*, 544 U.S. at 587.
21 However, the Constitution grants states broad powers to regulate the times, places, and
22 manners of holding elections, so when the law imposes a burden less than severe, the State's
23 "important regulatory interests will usually be enough to justify reasonable non-
24 discriminatory restrictions." *Id.* at 587 (quoting *Timmons v. Twin Cities Area New Party*,
25 520 U.S. 351, 358 (1997)). Regulatory interests are "generally-applicable and evenhanded
26 restrictions that protect the integrity and reliability of the electoral process." *Anderson v.*
27 *Celebreeze*, 460 U.S. 780, 788 n.9 (1987).

28

1 There is no *per se* rule determining when a burden is severe and strict scrutiny is
2 applicable. However, in *California Democratic Party v. Jones* the Supreme Court found
3 California's blanket primary system imposed a severe burden on political parties' rights
4 because the record plainly demonstrated "the prospect of having a party's nominee
5 determined by adherents of an opposing party is far from remote - indeed it is a clear and
6 present danger." 530 U.S. 567, 578 (2000). The Supreme Court also stated, "In no area is
7 the political association's right to exclude more important than in the process of selecting its
8 nominee." *Id.* at 575.

9 The Supreme Court reasoned further, even when a candidate favored by the majority of
10 the party wins, "he will have prevailed by taking somewhat different positions - and, should
11 he be elected, will continue to take somewhat different positions in order to be renominated."
12 *Id.* at 579-80. Based on this standard a severe burden exists when a fundamental aspect of
13 the freedom of association is threatened by a clear and present danger.

14 In *Clingman*, Oklahoma's Libertarian party attempted to open up its primary to all
15 registered voters regardless of affiliation, but Oklahoma law allowed a party to only invite
16 those voters registered as independents. *Clingman*, 544 U.S. 581. The Court found the
17 restriction did not create a severe burden because an individual could easily participate in a
18 party's primary by changing their registration and the law did not compel a political party
19 to associate with unwanted members, therefore the burden was only minimal. *Id.* at 587.

20 In *Jones*, the Court noted "the blanket primary also may be constitutionally distinct from
21 the open primary in which the voter is limited to one party's ballot." 530 U.S. at 578, n. 8.
22 The Fourth Circuit Court of Appeals has held the type of association forced by a mandatory
23 open primary causes significant injury to the first amendment rights of a political party,
24 therefore triggering strict scrutiny. *See Miller v. Brown*, 462 F.3d 312, 318 (4th Cir. 2006).

25 The burden imposed on the ALP by Arizona's primary system is severe. Arizona's
26 primary system compels the ALP to associate with registered independents and those
27 registered with other parties who do not have a candidate in the general election. This
28 creates the danger the Libertarian candidate will be selected by voters who are not

1 Libertarians, but by people who are taking advantage of the election laws making it easier
2 to get a person on the ballot as a Libertarian than as an independent or a smaller party.¹ The
3 candidate can then appeal to independent voters and voters registered with smaller parties.
4 The voters can then vote in the Libertarian primary without even changing their registration.

5 The burden imposed in this case is more similar to the burden imposed in *Jones* than the
6 burden imposed in *Clingman*. In *Jones*, the burden involved forced association in the
7 primary election as it does in this case. However, the amount of forced association was much
8 greater in *Jones* than in the present case because everyone could vote in every primary.
9 However, there is still forced association in this case.

10 As in *Jones*, Arizona's primary system has created a clear and present danger of a party's
11 candidate being chosen by people other than party members. The clearest example of this
12 is Mr. Fernandez losing by only forty-three votes as a Libertarian candidate while advocating
13 for nationalized healthcare. While political parties can change their viewpoints on
14 everything from nationalized healthcare to "clean election" funds or any other issue. Under
15 the current Arizona primary system it is impossible to identify whether the party is actually
16 changing its position and not invaders changing the party's position. "[A] single election
17 in which the party nominee is selected by nonparty members could be enough to destroy the
18 party." *Jones*, 530 U.S. at 579. Therefore, the uncertainty about who is changing the
19 direction of the party imposes a severe burden on a political party's association rights.

21 ¹As of July 2007, there are 2,649,367 registered voters in Arizona, 1,023,508
22 registered Republicans, 873,301 registered Democrats, 18,706 Libertarians, and 733,852
23 Independents or as members of non-recognized political parties. See *State of Arizona Voter*
24 *Registration Report*, http://www.azsos.gov/election/VoterReg/Active_Voter_Count.pdf (last
25 visited September 24, 2007). Based on these numbers if a person wanted to run for the office
26 of United States senator or state office, excepting members of the legislature and superior
27 court judges, an independent candidate would have to get approximately 3,769 signatures
28 from qualified electors who are either registered independents or members of non-recognized
political parties. See A.R.S. § 16-322. However, if the same independent person re-
registered as a Libertarian, the person would only need approximately 94 signatures from
Libertarians, registered independents, or members of non-recognized political parties to get
on the ballot as a Libertarian. See *Id.*

1 Although the Libertarian candidate will not be chosen by registered Democrats or
2 registered Republicans, the nominee could still be chosen by registered members of other
3 parties like the Green or National party. As in *Jones*, the Arizona primary system “forces
4 political parties to associate with—to have their nominees, and hence their positions,
5 determined by—those who, at best, have refused to affiliate with the party, and at worst, have
6 expressly affiliated with a rival.” 530 U.S. at 577. The Supreme Court concluded there is
7 “no heavier burden on a political party’s associational freedom.” *Id.* at 582.

8 A political party’s right to choose its own nominees is a core associational activity and the
9 mandatory inclusion of unaffiliated persons with the political party may seriously distort the
10 party’s decision. *Democratic Party of the United States v. Wisconsin ex. rel. LaFollette*, 450
11 U.S. 107, 122 (1981). Due to the potential distortion forced on the Libertarian party by the
12 mandatory inclusion of those not affiliated with the party, Arizona’s primary system imposes
13 a severe burden on the ALP.

14 Arizona’s primary system is similar to the Virginian primary system found
15 unconstitutional in *Miller v. Brown*, 465 F. Supp. 2d 584 (E.D. Va. 2006). The primary
16 system challenged in *Miller* allowed for any eligible voter to vote in any one party’s primary.
17 *Id.* The Republican party in Virginia, desired to have a primary to elect its candidate, but did
18 not want to allow anyone who had voted in another party’s primary in the last five years to
19 be able to participate. *Id.* The Virginia election board statutorily required all primaries to
20 be open. *Id.* A voter could vote in any one primary regardless of affiliation. The Court in
21 *Miller* while reviewing case law noted regulations that were “mandatory and exclusive” were
22 found to be a severe burden. *Id.* at 591. While Arizona’s primary system is different from
23 Virginia’s system because Arizona’s system does not allow a voter registered in another
24 party represented on the ballot to vote in any primary, the primary system still is mandatory
25 and exclusive. The system is mandatory because the system forces the Libertarian party to
26 accept the votes of registered independents and members of other registered parties. AZ
27 Const. Art. VII § 10, ARS §§ 16-467, -542. The system is exclusive because the Libertarian
28 party must select their candidates through a primary process. A.R.S. §16-301. In *Miller*, the

1 Court found the burden imposed by forced association imposed a severe burden on the
2 Republican party even though the primary system in Virginia was not exclusive. *Id.* at 595.

3 The State argues the burden imposed by the primary is less than severe because a person
4 could register as a Libertarian and then vote in the primary. This argument fails. The
5 constitutionality of the State's registration process is not before the Court. If the State's
6 registration policy were changed or found unconstitutional and the primary system remained
7 in place, the burden on the ALP would remain the same because registered independents and
8 registered members of other parties would still be able to vote in Libertarian primaries. If
9 anything the ease of changing registration goes to the interest of the state in the statute, but
10 not the burden imposed on the ALP.

11 Arizona's primary system is not justified under a strict scrutiny review. The law is not
12 narrowly tailored to serve a compelling interest. The Court in *Jones* found the interest of
13 fairness and increasing voter participation were not compelling in the circumstances of the
14 California law. *Jones*, 530 U.S. at 584. While these are highly significant values, the aspect
15 of the interest addressed by the law must be highly significant. *Id.*

16 The State asserts the primary law serves the compelling interests of increasing voter
17 participation, enhancing the integrity and legitimacy of the primary process, and promoting
18 fairness by ensuring voters who help pay for elections have a full opportunity to vote. While
19 all of these interests are essential and indeed compelling in the abstract, the aspects of the
20 interests addressed by Arizona's primary law are not compelling. As the Supreme Court
21 found in *Jones* with regards to the California's primary law, this Court finds the aspects of
22 the asserted values do not justify the burden. Integrity and legitimacy are not promoted by
23 the Arizona primary law, "the inequity of not permitting non-party members...to determine
24 the party nominee. If that is unfair at all...it seems to us less unfair than permitting nonparty
25 members to hijack the party." *Id.* at 584.

26 The States interest in increasing voter participation and fairness by allowing voters who
27 help pay for the election to have full opportunity to vote is also not compelling. "A 'non-
28 member's desire to participate in the party's affairs is overborne by the countervailing and

1 legitimate right of the party to determine its own membership qualifications.” *Id.* at 583
2 (quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215-216, n. 6 (1986)).
3 The State asserts no compelling interest to justify the severe burden Arizona’s primary law
4 places on the ALP.

5 If the Court found the burden imposed on the ALP was less than severe the interests
6 asserted by the State still would not be sufficient to justify the burden because the interests
7 are not “regulatory interests.” Regulatory interests promote efficiency, reliability, and
8 integrity of the election process. *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th
9 Cir. 2002). The Federal Courts have upheld laws which burden the freedom of association
10 such as prohibiting write-in entries, requiring people to present a photo idea when they
11 register to vote, rules barring political party officials and their families or associates from
12 receiving court appointments as fiduciaries, and upholding a percentage signature
13 requirement to get on the ballot. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Gonzalez v.*
14 *Arizona*, 485 F.3d 1041 (9th Cir. 2007); *Kraham v. Lippman*, 478 F.3d 502 (2nd Cir. 2007);
15 *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007). However, none of these laws forced
16 people to associate and all of them promoted either efficiency or reliability.

17 The State does not make it clear how or if Arizona’s primary system enhances the
18 integrity, efficiency, or reliability of the election process. If anything, Arizona’s primary
19 system detracts from the reliability of the primary process because it increases the likelihood
20 a party will be represented by a person who does not represent the party’s ideals.

21 The State never attempts to define “regulatory” and continually asserts its interests are
22 important. The closest the State comes to asserting an interest is regulatory is the Kennedy
23 concurrence from *Jones* asserting the state’s interest in increasing voter participation is
24 essential to the constitutional order and therefore regulatory.

25 Encouraging citizens to vote is a legitimate, indeed essential, state objective; for
26 the constitutional order must be preserved by a strong, participatory democratic
27 process. In short, there is much to be said in favor of California’s law; and I
28 might find this to be a close case if it were simply a way to make elections more
fair and open or addressed matters purely of party structure.

1 *Jones*, 530 U.S. at 587 (Kennedy, J., concurring). No Court has ever stated increasing voter
2 participation is anything less than essential. However, no court has upheld a state regulation
3 burdening a first amendment right because increasing voter participation was the important
4 regulatory interest asserted by the State. Therefore, even if the burden is less than severe the
5 state failed to carry its burden by asserting an important regulatory interest.

6 Based on the foregoing reasons the Court finds Arizona's Primary System allowing
7 for independents and members of non-recognized political parties to participate in the
8 Libertarian primary unconstitutionally burdens the Arizona Libertarian Party's right to freely
9 associate.

10 Therefore, IT IS HEREBY ORDERED:

11 The Defendant is permanently enjoined from requiring the Libertarian party to allow
12 voters who are not registered as Libertarians from casting a ballot in any Libertarian primary.

13 The Clerk shall enter Judgment and CLOSE the case.

14 DATED this 25th day of September, 2007.

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Raner C. Collins
United States District Judge

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Attorney for Plaintiff

**UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION**

RAVALLI COUNTY REPUBLICAN)
CENTRAL COMMITTEE,)

Plaintiff,)

v.)

LINDA McCULLOCH, in her official)
capacity as Montana’s Secretary of State;)
REGINA PLETTENBERG, in her official)
capacity as the Election Administrator of)
Ravalli County,)

Defendants.)

Case No. 6:14-cv-00058
**MOTION TO TAKE JUDICIAL
NOTICE; DECLARATION OF
COUNSEL**

MOTION TO TAKE JUDICIAL NOTICE

Plaintiff hereby moves this Court to take judicial notice of the attached documents, which are true and correct copies of documents posted on governmental websites. These documents constitute evidence supporting Plaintiff's Motion for Partial Summary Judgment filed contemporaneously with this motion. The documents attached to this motion are as follows:

- Exhibit 1: Document posted on the Montana Secretary of State's website which describes the preparation of primary election ballots and includes a sample primary ballot.
- Exhibit 2: Documents obtained from the Arizona Legislature's website pertaining to the legislative history of Arizona SB 1050, which modified the election of Arizona precinct committeemen in response to *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003).
- Exhibit 3: Arizona Secretary of State's brief filed on Oct. 31, 2005 (D. Ariz., Case No. 4:02-cv-00144-RCC) after *Bayless* was remanded by the Ninth Circuit. The brief addresses the severability of Arizona's open primary statute.
- Exhibit 4: Order issued by the U.S. District Court for the District of Arizona on Sept. 27, 2007, after the case was remanded by the Ninth Circuit.

BASIS FOR JUDICIAL NOTICE

Federal courts may judicially notice facts that are "generally well known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

Fed.R.Evid. 201(b). This rule applies to documents obtainable from a government website. *Daniels-Hall v. Nat'l Educ. Assn.*, 629 F.3d 992, 998-99 (9th Cir. 2010) (F.R.Evid. 201(b) permits judicial notice of official information posted on a governmental website); *In re Amgen Inc.*, 544 F.Supp.2d 1009, 1023-24 (C.D. Cal. 2008) (taking judicial notice of drug labels posted on the FDA's website); *County of Santa Clara v. Astra USA, Inc.*, 401 F.Supp.2d 1022, 1024 (N.D. Cal. 2005) (taking judicial notice of information posted on a Department of Health and Human Services website).

All four exhibits attached to the motion were obtained from government websites and are relevant to Plaintiff's Motion for Partial Summary Judgment filed contemporaneously with this motion. (See attached declaration of counsel). Plaintiff therefore respectfully requests that this Court take judicial notice of Exhibits 1 through 4.

COMPLIANCE WITH LOCAL RULE 7.1(c)(1)

Pursuant to Local Rule 7.1(c)(1), Plaintiff states that the Defendants have not yet appeared in this matter and therefore need not be contacted prior to the filing of this motion.

Respectfully submitted,

DATED: September 8, 2014

/s/ Matthew G. Monforton
Matthew G. Monforton

Attorney for Plaintiff

DECLARATION OF MATTHEW MONFORTON

I, Matthew G. Monforton, declare under oath as follows:

1. I am the attorney of record for Plaintiff in the instant matter. I am licensed to practice before the courts of Montana as well as the U.S. District Court for Montana. I have personal and firsthand knowledge of the facts stated in this declaration and could testify to them as a witness at a trial or hearing.

2. Exhibit 1 is a true and correct copy of the Montana Secretary of State's "Ballot Layout Instructions and Sample Ballots" obtained at <http://sos.mt.gov/elections/Officials/Forms/index.asp#BallotLayout>

3. Exhibit 2 is a true and correct copy of legislative history of Arizona SB 1050, obtained from http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/46leg/2r/summary/h.s.b1050_05-24-04_astransmittedtogovernor.doc.htm&Session_ID=79

4. Exhibits 3 and 4 were both obtained from the court file of the U.S. District Court for the District of Arizona (Case No. 4:02-cv-00144-RCC) as stored on www.pacer.gov

5. I last accessed these government websites on September 8, 2014.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Bozeman, Montana on September 8, 2014.

/s/ Matthew Monforton

Matthew G. Monforton
Declarant