

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

MONTANANS FOR JUSTICE: VOTE NO  
ON CI-98, NOT IN MONTANA:  
CITIZENS AGAINST CI-97, AND  
PROPERTY OWNERS AGAINST I-154,  
Political Ballot Committees,

Plaintiffs,

-vs-

STATE OF MONTANA, By And Through  
Brad Johnson In His Official  
Capacity As Secretary Of State,  
MONTANANS IN ACTION, a Montana  
Corporation, CITIZENS RIGHT TO  
RECALL MONTANA, PROTECT OUR  
HOMES MONTANA, STOP OVERSPENDING  
MONTANA, Political Ballot  
Committees, AND TREVIS BUTCHER,

Defendants,

-vs-

KENDALL COX, ERVIN J. HANKS,  
AND ROBERT G. COOPER,  
Individually,

Interveners.

Cause No.: CDV-06-1162 (d)

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER INVALIDATING  
CERTIFICATION OF CI-98,  
CI-97, AND I-154.**

On September 8, 2006, the above-captioned matter came on for bench trial. Plaintiffs appeared through counsel Peter Michael Meloy, Robin A. Meguire, and former Justice William Hunt. Defendant State of Montana appeared through counsel Assistant

Attorney General Anthony Johnstone and Assistant Attorney General Pamela Bucy. All other defendants appeared through counsel Chris Gallus. Interveners appeared through counsel Patrick R. Watt. Upon due consideration of the pleadings, evidence, and arguments of the parties, the Court hereby enters the following findings of fact, conclusions of law, and order invalidating the Secretary of State's certification of CI-97, CI-98, and I-154.

### **FINDINGS OF FACT**

CI-97 is a proposed constitutional initiative imposing limits on the spending and taxation authority of the State of Montana. CI-98 is a proposed constitutional initiative revising the process for removing judges from office, including justices of the Montana Supreme Court. I-154 is a proposed statutory initiative revising the legal definition of a government taking as it relates to the principle of eminent domain to expand in a broader scope of cases the obligation of state and local governments to compensate property owners subject to government action and restrictions.

Plaintiff *Montanans For Justice: Vote No On CI-98* is a political committee formed for the purpose of opposing CI-98. Plaintiff *Not In Montana: Citizens Against CI-97* is a political committee formed for the purpose of opposing CI-97. Plaintiff *Property Owners Against I-154* is a Montana non-profit corporation

and a political committee formed for the purpose of opposing I-154.

Defendant *Stop Over Spending Montana* is a political committee formed for the purpose of promoting CI-97. Defendant *Citizens Right To Recall* is a political committee formed for the purpose of promoting CI-98. Defendant *Protect Our Homes* is a political committee formed for the purpose of promoting I-154. Defendant Trevis Butcher is the treasurer of all three of the above-named political committees. Defendant *Montanans In Action* is a Montana non-profit corporation that worked in concert with the above-named political committees and provided the financial backing for their signature gathering efforts in this case. In addition to serving as the treasurer of the above-referenced political committees, Defendant Trevis Butcher is also the executive director of *Montanans In Action*. The above-named Defendants are hereinafter referred to as Proponents and the above-referenced initiatives are hereinafter referred to as the Ballot Initiatives.

Defendant State of Montana (State) is implicated in this action by and through Brad Johnson in his official capacity as the duly-elected Montana Secretary of State and, as such, the chief administrator of the Montana election laws governing the initiative process under Title 13, Chapter 27, MCA. Interveners Kendall Cox, Ervin J. Hanks, and Robert G. Cooper are duly-registered electors of the State of Montana who have signed

petitions in support of placing the Ballot Initiatives on the ballot for public consideration in the statewide general election scheduled for November 7, 2006.

To qualify a constitutional initiative for the ballot pursuant to § 13-27-204, MCA, petition gatherers must obtain the signatures of 10% of the total number of qualified voters in the state, including 10% of the voters in each of 40 legislative districts. To qualify a statutory initiative for the ballot pursuant to § 13-27-204, MCA, petition gatherers must obtain the signatures of 5% of the total qualified voters in the state, including 5% of the voters in each of 34 legislative districts. Accordingly, signature gatherers must submit a standard form certification affidavit with each sheet of 20 signatures. The language of the standard form affidavit requires the affiant to attest:

- (1) that the signature gatherer gathered or assisted in gathering the signatures;
- (2) that the signature gatherer believes that the signatures are genuine;
- (3) that the signature gatherer believes that the signatures are the signatures of the persons whose names they purport to be;
- (4) that the signature gatherer believes that the signatures are the signatures of Montana electors who are registered at the address or have the telephone number following the person's signature;
- (5) that the signers knew the contents of the petition before signing; and

(6) to the affiant's true address.

§ 13-27-302, MCA.

Throughout the spring and early summer of 2006, Proponents organized and executed a signature gathering effort to gather enough signatures to qualify the Ballot Initiatives for the ballot pursuant to Title 13, Chapter 27, Parts 1-3, MCA. To accomplish this objective, Proponents used paid signature gatherers to gather the necessary petition signatures. Although a number of their signature gathers were Montana residents, Proponents brought in professional, out of state, migrant signature gathers to do most of the work. These out of state signature gatherers gathered the overwhelming majority of signatures for the Ballot Initiatives. As listed in Plaintiffs' Exhibit 5, at least 43<sup>1</sup> of the out of state signature gathers were not Montana residents and were in Montana only for the time necessary to gather signatures for the Ballot Initiatives and, thus, had no permanent or established Montana residence and no significant ties to the state.

With funding provided by *Montanans In Action*, Proponents paid their signature gatherers on a per signature unit basis.

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<sup>1</sup> Plaintiff's Ex. 5 lists 44 signature gatherers who gave false addresses, including Debra L. Mart of 325 Second Avenue North in Great Falls. This is not a false address. Ms. Mart is the Deputy Cascade County Election Administrator. Her listed address is the address of the Cascade County Elections Office. Thus, Plaintiff's Ex. 5 actually lists only 43 signature gatherers who gave false addresses.

Proponents ultimately paid a total of \$673,658.81 to signature gathers in this effort. Proponents paid 94% (\$633,073.09) of this total to professional, out of state, migrant signature gathers and only 6% (\$40,585.72) to Montana signature gathers.<sup>2</sup> At trial in this action, *Montanans In Action*, by and through Trevis Butcher, admitted that unidentified "out of state national organizations" provided the financial backing for Proponents' signature gathering efforts. However, Butcher refused to specifically identify these out of state contributors and the Court declined to compel him to do so on relevance grounds.

In the course of soliciting Montanans for signatures, the out of state signature gatherers often skirted procedural requirements and were evasive and deceptive. Robert Arthur Colby was one of the paid, out of state signature gatherers who worked to qualify the Ballot Initiatives in this case. Over the last four years, Colby has worked in six other states on ballot initiatives similar to some of the Ballot Initiatives at issue here. During this period, Colby has worked as an independent contractor obtaining and selling signatures to political committees and to "petition management companies," including the *American Petition Company* out

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<sup>2</sup> Of the total amount (\$673,658.81) spent on gathering signatures for all three initiatives, Proponents spent 41% (\$274,101.21) of the total on CI-97, 37% (\$249,920.66) on CI-98, and 22% (\$149,636.94) on I-154.

of California, *Jackson Ballot Access*, and *National Voter Outreach*, a company also employed by Proponents in this case.

Consistent with the practices employed in Montana in this case and in other states in similar cases, Colby has received between 50¢ and \$6.00 per signature, depending upon the state, ballot committee, and any "bonuses or incentives for gathering . . . signatures on a weekly basis and . . . [for] staying on until the end of the drive." On the occasion he made \$6.00 per signature in Nebraska, he was actually paid \$2.50 a signature on each of two initiatives and \$1.00 per signature on another for a total of \$6.00 per signature. Prior to working in Montana, Colby gathered signatures for initiative drives in Alaska, Oklahoma, and Oregon.

Consistent with Colby's testimony, Proponents paid *National Voter Outreach* \$98,000.00 to gather signatures for the Ballot Initiatives in this case. Further, although the signature certification affidavits filed with the Montana Secretary of State indicate that Colby officially submitted only 68 signatures in this case, he in fact worked on the Proponents' 2006 Montana signature drive for at least one month before moving on to Nebraska. While gathering signatures in Montana, Colby worked for Lorraine Horner, a/k/a Lorraine Cazerman, of Edmond, Oklahoma. Proponents ultimately paid Lorraine Horner \$28,659.55 for gathering signatures for CI-97, CI-98, and I-154. Moreover, on at

least one occasion, Colby earned \$1,000.00 in a single day for gathering signatures in Montana, and on other occasions, earned as much as \$600.00 per day in Montana. Thus, in addition to the 68 signatures he personally certified by affidavit, Colby actually gathered a significantly larger number of signatures in this case which were in fact certified by someone else.

In the professional signature gathering business or industry it is a common and prevailing practice for professional migrant signature gatherers to:

- (1) certify signatures gathered by other signature gatherers;
- (2) "not leave a trail" as to their "whereabouts" in order to avoid "harassment" by "state officials" in different states;
- (3) conceal or withhold identifying and contact information;
- (4) obtain different telephone numbers in each state; and
- (5) stay in hotels and apartments paid by and registered to someone else, such as a crew manager.

(*E.g.*, Colby Tr., p. 15-16 and 34-36). The petition companies or crew managers generally make all necessary logistical arrangements to bring in and temporarily set up migrant signature gatherers during petition drives. As further evidence of common practices in the professional signature gathering business or industry, the petition management company employing Colby in Oklahoma encouraged and assisted him in obtaining an Oklahoma state ID card in order to skirt the residency requirement of Oklahoma law. In Alaska,

Colby likewise obtained an Alaska state ID card for similar purposes.

In this case, consistent with these common practices, Colby knowingly falsified his address in his certification affidavit under § 13-27-302, MCA. Likewise, 42<sup>3</sup> other out of state signature gatherers gave false or fictitious addresses in their certification affidavits, including but not limited to Marvin King who, at the direction of Trevis Butcher, gave the Billings address of Butcher's sister as King's Montana address.<sup>4</sup> King never stayed at that address and Butcher's sister never met him.

Moreover, of the 43 out of state signature gathers who gave false or fictitious addresses in their certification affidavits, Proponents reported direct payments only to Eric Rittberg, Larry Schumacher, Grace Meyer, Jacob Witmer, Theresa Moore, and Esther Thompson, thus indicating that Colby, King, and the 35 other out of state signature gatherers who gave false or fictitious addresses worked for one or more of the Proponents' reported out of state payees, *i.e.*, *National Voter Outreach*, Schumacher, Meyer, *Campaign Finance Co.*, Ronald Cook, *Ricca Petition Service*, *Data*

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<sup>3</sup> See, fn 1. Note further that the references in this order to the 43 signature gatherers who gave false or fictitious addresses (Pl. Ex. 5) vary from 43 to 35, depending upon the context and the number of those who are referenced by name in each context.

<sup>4</sup> Trevis Butcher did not advise or instruct King to give a false address in his affidavit. Rather, Butcher told King to use the Billings address as a mailing address for communications between Butcher and King.

*Jogger, Renewal Voter Outreach*, Lorraine Horner, Rittberg, *American Voter Drives*, Caroline T'Star, Dale Munk, Jose Pena Reynosa, Ralph Muecke, Felisha Rodgers, Rob Beiswenger, or Dan Zukowski.

Marvin King was one of less than 10 signature gatherers who certified signatures in the Billings area. Under the standard form required by § 13-27-302, MCA, King certified a total of 41,761 signatures (16,856 for CI-97, 14,890 for CI-98, and 10,015 for I-154), by far the vast majority of signatures gathered in the Billings area. Based on the total signatures he claimed for the two week period from June 1, 2006, through June 15, 2006 (almost 15,000 signatures), King would have had to obtain approximately 1 signature every minute during that period. This rate is even more incredible upon considering that the claimed signatures were gathered from people living in various areas of the state geographically distant from Billings. For example, 288 of the signatures King collected during this period were from residents of Missoula County. Thus, there is no question that King certified a substantial number of signatures gathered by other people outside his presence.

In contrast, out of state signature gatherer Larry Schumacher, who collected signatures in various areas of the state, certified significantly fewer signatures than King, but

Proponents paid him significantly more (\$84,103.00) than King<sup>5</sup>, thus indicating that Proponents paid Schumacher for a significant number of signatures above and beyond what he personally certified. As another example, Proponents paid out of state signature gatherer Grace Meyer \$70,170.94 for collecting signatures primarily in the Missoula area. Proponents likewise paid out of state signature gatherer Ronald Cook \$69,214.78 for collecting signatures primarily in the Missoula area. Thus, by comparison to King, there is evidence indicating that Meyer and Cook likewise were paid for signatures that were gathered by another person outside of their presence.

In another example, upon being challenged by the Site Manager (Connor Molloy) at the Eastgate Shopping Center in Missoula for again soliciting at the Shopping Center without permission just two days after being told to leave, an out of state signature gatherer refused to identify himself to the Site Manager because he asserted that it would be illegal for him to do so and that he would lose his job if he did. He then further represented that the Attorney General for the State of Montana hired him to gather signatures for the Ballot Initiatives on behalf of the Attorney General who believed that the initiatives were necessary for Montana. Upon further challenge, the signature gatherer provided a

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<sup>5</sup> The parties presented no evidence as to the actual amount King was paid.

telephone number and identified himself only as "Mike" from California. He also then admitted that he did not work directly for the Attorney General, but still asserted that he worked for an unidentified employer who did.

In another example of patently deceptive practices, a number of paid out of state signature gatherers used bait-and-switch tactics to fraudulently induce countless Montanans to sign petitions other than the petitions they thought they were signing. In Helena, a signature gatherer approached a Helena woman (Jan Novy) as she entered a grocery store and asked her to sign the eminent domain petition (I-154), but said nothing about any other petition. After signing the face sheet on a clipboard, Novy flipped the sheet over and asked whether she needed to sign the underlying petition sheets. The signature gatherer told her that she needed to sign both of the underlying sheets because they were the same petition and he had no carbon paper to make duplicates. He did not tell her that she was signing anything other than the I-154 petition. After reading about this bait-and-switch tactic in the newspaper, Novy called the Lewis and Clark County Clerk and Recorder and, upon verification that she had in fact signed all three of the Ballot Initiatives, requested removal of her name from the CI-97 and CI-98 petitions. Proponents certified Novy's signatures to the Lewis and Clark County election administrator under an affidavit of out of state signature gatherer Larry

Schumacher. Incident to this encounter, Novy also witnessed another signature gatherer employ the same tactic on an acquaintance.

In Basin, Montana, a signature gatherer came to a woman's home (Jessica Overturf) during the dinner hour, at approximately 5:45 p.m., and said he was collecting signatures for an eminent domain initiative (I-154). He did not explain the purpose or effect of the petition. Moreover, he did not tell Overturf that the petition addressed any issue other than I-154. After Overturf signed the face sheet on the clipboard, the signature gatherer flipped to another different-colored page and pointed to where she needed to sign again. He then flipped to a third different-colored page and showed her where she needed to sign a third time. Overturf hurriedly signed all three of the petitions without knowing what she was signing. Proponents certified Overturf's signatures to the Lewis and Clark County election administrator under an affidavit of out of state signature gatherer Eric Rittberg.

In another example, on or about June 3, 2006, a signature gatherer approached a Helena man (Joseph Stauffer) while he was pumping gas into his vehicle at a Safeway gas station in Helena and asked him to sign an eminent domain petition (I-154). After a brief statement from the gatherer as to the need for the initiative, Stauffer signed the petition. The signature gatherer

then told him he needed to sign two other copies of the initiative because the gatherer didn't have any carbon paper. Somewhat puzzled, Stauffer hurriedly signed the other two petition sheets, admittedly in ignorance. The signature gatherer did not tell Stauffer that he was signing anything other than the I-154 petition. After reading about this tactic in the newspaper, Stauffer called the Secretary of State's Office and requested removal of his name from all of the Ballot Initiatives. Proponents certified Stauffer's signatures to the Lewis and Clark County election administrator under an affidavit of out of state signature gatherer Larry Schumacher.

In Butte, in June of 2006, a Butte man (Michael Samples) encountered a signature gatherer, a young woman, soliciting several other people at the entrance to an Albertson's grocery store. As the signature gatherer was explaining the eminent domain initiative (I-154), Samples waited to hear more. In a brief discussion with Samples, the signature gatherer stated that the essential purpose of the initiative was to limit the government's ability to "toss" people out of their homes to benefit the government or corporations. After Samples signed the petition, the signature gatherer told him he needed to sign two other copies of the petition to verify his signature on the first petition. She did not tell him that he was actually signing two additional petitions for two other initiatives. Samples witnessed the

signature gatherer do the same thing to "several people that were there at the time."

Upon subsequently becoming aware of this tactic, Samples witnessed another signature gatherer, an unidentified male who indicated that he was from Alaska, use the same tactic on several people, approximately "a dozen," outside the Butte Civic Center on the day of the June primary election. When Samples told the other people that that "this fellow is lying to you," the man responded angrily.

In yet another example, on or about June 10-13, 2006, a male signature gatherer approached a Helena woman (Marci Barfknecht) at a Safeway gas station in Helena and asked her to sign the eminent domain petition. Familiar with I-154, Barfknecht gladly signed the petition. However, the signature gatherer then told her that she had "to sign these other two sheets." When Barfknecht asked why, the signature gatherer said, "because I don't have a carbon copy . . . underneath to make copies." Believing she was signing only the I-154 petition, Barfknecht unsuspectingly signed the other two petitions. The signature gatherer did not tell her she was signing a petition for any other ballot initiative. Proponents certified Barfknecht's signatures to the Lewis and Clark County election administrator under an affidavit of out of state signature gatherer Larry Schumacher.

Obviously, the manifest purpose of these bait-and-switch tactics was to fraudulently induce otherwise voluntary signers of one petition to unknowingly sign the other two. In that regard, 65% (3,932) of the 6,053 people in Cascade County who signed the I-154 petition also signed the CI-97 and CI-98 petitions. Likewise, 57% (941) of the 1,651 people in Lewis and Clark County who signed the I-154 petition also signed the CI-97 and CI-98 petitions. In Lake County, 60% (274) of the 452 people who signed the I-154 petition also signed the CI-97 and CI-98 petitions. Similarly, almost 60% (2,456) of the 4,097 people in Gallatin County who signed the I-154 petition also signed the CI-97 and CI-98 petitions. Moreover, almost 67% (959) of the 1,434 people in Flathead County who signed the I-154 petition also signed the CI-97 and CI-98 petitions. Thus, of the 13,687 people in Cascade, Lewis and Clark, Lake, Gallatin, and Flathead counties who signed the I-154 petition, 60% (8,562) signed all three petitions. Further, of the 7,448 signatures certified by Meyer in Missoula, Gallatin, Flathead, Yellowstone, Cascade, Lewis and Clark, and Butte-Silver Bow counties, almost 97% of the people who signed the I-154 petition also signed the I-97 petition. Likewise, almost 83% of the people who signed the I-154 petition also signed the I-98 petition, another indication of a bait-and-switch. See Figure 2.

Based on the totality of the foregoing circumstances, it is more probable than not, that Marvin King, Larry Schumacher, Ronald

Cook, Grace Meyer, and other paid out of state signature gatherers, in accordance with common industry practices, commonly executed certification affidavits attesting that they personally gathered or assisted in gathering signatures that someone else gathered outside of their presence without any direct assistance from them. Although this record precludes a precise determination of how many signatures Schumacher, Cook, and Meyer certified statewide, it is certain that, at a minimum, they certified 22,702 signatures in the counties listed in footnotes 8-10, *infra*. See Figure 2, *infra*. Given that King certified 41,761 signatures and that Proponents paid Schumacher, Cook, and Meyer a total of \$223,489.02 for their signatures, this practice implicates a substantial number of signatures in this case. Further, in accordance with common industry practices, King, Schumacher, Meyer, Colby and 39 other paid, out of state signature gatherers knowingly listed false or fictitious addresses on their signature certification affidavits in this case. Moreover, based on the totality of the circumstances, it is more probable than not that a significantly large percentage of the paid, out of state signature gatherers, including but not limited to Schumacher, Rittberg, and Meyer employed bait-and-switch tactics to induce people who knowingly signed one petition to unknowingly sign the other two. It is more probable than not that this bait-and-switch tactic deceptively induced as many as 60% of the petition signers (8,562)

in Cascade, Lewis and Clark, Lake, Gallatin, and Flathead counties to sign all three petitions when they thought they were signing only one. Finally, based on the totality of the circumstances, it is more probable than not, that paid, out of state, migrant signature gatherers similarly induced countless other Montanans statewide to sign all three petitions.

Pursuant to Mont. Const. art. XIV, § 9, and § 13-12-204, MCA, the number of validated signatures required for qualification of a constitutional initiative is currently 44,615 in 40 legislative districts. Pursuant to Mont. Const. art. III, § 4, and § 13-12-204, MCA, the number of validated signatures required for qualification of a statutory initiative is currently 22,308 in 34 legislative districts.

Pursuant to § 13-27-201, MCA, the deadline for submission to the county election administrators of all certified signature sheets from signature gatherers was on or about May 23, 2006. The county election administrators generally submit the validated petition sheets to the Secretary of State in batches of signatures submitted by individual signature gatherers under their certification affidavits. Pursuant to § 13-27-304, MCA, the county election administrators certify the total number of validated signatures for each legislative district in each county. However, the batches contain both validated and invalid signatures because the county certifications do not uniformly indicate which

signatures in each batch the counties actually validated or invalidated for each signature gatherer. Consequently, the Secretary of State currently has no means to determine in all cases which signatures in each batch were validated or invalidated for each signature gatherer.

Pursuant to §§ 13-27-104 and 13-27-303, MCA, the deadline for counties to forward certified petition sheets to the Secretary of State was July 21, 2006. In reviewing the petition sheets, the Secretary of State separately processed and tabulated signature sheets with clerical or technical errors pursuant to § 13-27-201, MCA. As a matter of practice, the Secretary of State generally interprets "clerical or technical errors" to include errors or omissions regarding printed names (by county staff, notaries, or signature gatherers), seals or signatures (by county staff or notaries), county or addresses (by notaries or signature gatherers), date of first signature (by signature gatherers), and incorrect addresses of signature gatherers in their certification affidavits.<sup>6</sup> Thus, for every sheet containing an error deemed as technical or clerical, the Secretary of State set the entire batch

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<sup>6</sup> In this case, pursuant to § 13-27-207, MCA, the Secretary of State remitted some technical or clerical errors for remedy by the counties. However, when he was unable to contact signature gatherers for correct addresses or other questions, the Secretary of State characterized those defects as non-fatal technical errors and included them in his final count.

aside, counted it last, and later included those signatures in his final count.

On or about July 21-23, 2006, the Secretary of State tabulated and certified the Ballot Initiative petition sheets as follows pursuant to §§ 13-27-307 and 13-27-308, MCA:

Figure 1

<u>Initiative</u>	<u>Number Required</u>	<u>Number Certified</u>	<u>Final Count</u>	<u>Final Count W/Errors</u>	<u>Margin (No Error)</u>	<u>Margin (W/Error)</u>
CI-97	44,615	47,905 (55 dist.)	48,016 (60 dist.)	52,084 (60 dist.)	<b>3,401</b>	<b>7,469</b>
CI-98	44,615	49,956 (60 dist.)	50,097 (60 dist.)	51,706 (60 dist.)	<b>5,482</b>	<b>7,091</b>
I-154	22,308	27,748 (54 dist.)	35,871 (71 dist.)	36,604 (72 dist.)	<b>13,563</b>	<b>14,296</b>

In contrast, at a minimum, Marvin King<sup>7</sup>, Larry Schumacher<sup>8</sup>, Ronald Cook<sup>9</sup>, and Grace Meyer<sup>10</sup> certified the following numbers of signatures for each of the Ballot Initiatives:

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<sup>7</sup> For King, the evidentiary record accounts for signatures certified by him in a large number of geographically diverse counties, including but not limited to Yellowstone, Lewis and Clark, Gallatin, Flathead, Glacier, Powell, Valley, and Cascade. (Pl. Ex. 1).

<sup>8</sup> For Shumacher, the evidentiary record accounts for signatures certified by him in 5 counties, *i.e.*, Lewis and Clark, Gallatin, Flathead, Cascade, and Butte-Silver Bow.

<sup>9</sup> For Cook, the evidentiary record accounts for signatures certified by him in 6 counties, *i.e.*, Missoula, Gallatin, Flathead, Lewis and Clark, Cascade, and Butte-Silver Bow.

<sup>10</sup> For Meyer, the evidentiary record accounts for signatures certified by her in 6 counties, *i.e.*, Missoula, Gallatin, →

Figure 2

<u>Initiative</u>	King <u>(Unverified)</u>	Shumacher <u>(Unverified)</u>	Cook <u>(Unverified)</u>	Meyer <u>(unverified)</u>	Potential <u>Tainted</u>
CI-97	16,856	2,442	3,552	2,576	25,426
CI-98	14,890	1,715	3,228	2,208	22,041
I-154	<u>10,015</u>	<u>3,052</u>	<u>1,265</u>	<u>2,664</u>	<u>16,996</u>
	41,761	7,209	8,045	7,448	64,463

Consequently, these signatures result in the following potential qualification deficiencies for each of the Ballot Issues:

Figure 3

<u>Initiative</u>	Potential <u>Tainted</u>	Margin <u>(No Error)</u>	Margin <u>(W/Error)</u>	<b><u>Potential Qualification Deficiency</u></b>	
				(No Error)	(W/Error)
CI-97	25,426	3,401	7,469	<b>22,025</b>	<b>17,957</b>
CI-98	22,041	5,482	7,091	<b>16,559</b>	<b>14,950</b>
<u>I-154</u>	16,996	13,563	14,296	<b>3,433</b>	<b>2,700</b>

These qualification deficiencies are only potential because none of the parties, including the Secretary of State, presented any evidence indicating how many of the signatures certified by King, Schumacher, Cook, and Meyer are actually included in the Secretary of State's certification and final count. This critical evidence is not currently available because, to date, the Secretary of

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Flathead, Yellowstone, Cascade, Lewis and Clark, and Butte-Silver Bow.

State has not directed the counties to review the signature sheets for the ballot initiatives and certify how many signatures the counties actually validated for each of the referenced out of state signature gatherers. Due to the various signature validation methods used by the individual counties, it would take at least 2-3 weeks for the Secretary of State and county election administrators to review the certified petition sheets to determine which signatures in each batch the counties actually validated or invalidated for each signature gatherer. There is no evidence as to why the Secretary of State declined or was unable to conduct such a review at the outset of this action.<sup>11</sup>

On August 24, 2006, pursuant to § 13-12-201, MCA, the Secretary of State certified ballots containing all three Ballot Initiatives back to the county election administrators for preparation and printing of ballots for the election. Pursuant to the Court's order, filed August 28, 2006 (Doc. 5), the Secretary

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<sup>11</sup> Note further that, upon awareness of various citizen complaints regarding bait-and-switch tactics by signature gatherers, both the Secretary of State and Proponent *Montanans In Action*, by and through Trevis Butcher, independently attempted to contact migrant signature gatherers King and/or Colby but were unsuccessful because they had no way to do so. There is no evidence that the Secretary of State took any other investigative action, such as referring these concerns to the Attorney General, appropriate county attorney, or the Commissioner on Political Practices for investigation pursuant to §§ 13-35-103 through 105, 13-27-106, 13-27-303, or 13-37-110, MCA, or otherwise. Similarly, there is evidence that the Commissioner on Political Practices also received complaints about the bait-and-switch tactics. There is no evidence that the Commissioner investigated this practice pursuant to § 13-37-111, MCA.

of State notified the county election administrators of the pendency of this action. Despite this notice, the counties are currently in the process of printing ballots for the election. Pursuant to § 13-1-104(1), MCA, the county election administrators must send out absentee and military ballots no later than September 22, 2006.

Although the evidence necessary to determine how many of the signatures certified by King, Schumacher, Cook, and Meyer were actually validated by the counties and thus included in the Secretary of State's certification and final count is not currently available, the potential qualification deficiencies for the Ballot Initiatives are not limited to the signatures gathered by those individuals. First, the signatures certified by Eric Rittberg are tainted by or associated with the above-referenced bait-and-switch tactics and with any legal consequence of attesting to a false address. Second, in addition to those certified by King, Schumacher, Meyer, and Rittberg, the signatures certified by the 39 other out of state signature gatherers who gave false or fictitious addresses are similarly tainted by or associated with any legal consequence of those falsifications. Third, of the total amount paid to out of state signature gatherers (\$633,073.09), Proponents paid 45.37% of that money to 8 reported payees whose signatures are tainted or associated with false or fictitious addresses and/or bait-and-switch tactics. See

Figure 4. Thus, notwithstanding that the counties may not have validated all of these signatures, this percentage indicates that the legal consequences of procedural defects and bait-and-switch tactics would implicate a significant percentage of signatures in relation to the potential qualification deficiencies shown in Figure 1, and thus that these problems and defects are pervasive and permeate the entire signature gathering process.

Figure 4

Rittberg	\$18,155.68
Schumacher	\$84,103.30
Witmer	\$7,225.59
Moore	\$7,276.88
Thompson	\$2,439.50
Colby/Horner	\$28,659.55
Cook	\$69,214.78
Meyer	<u>\$70,170.94</u>
	\$287,246.22

Moreover, as significant as it is in relation to the potential qualification deficiencies shown in Figure 1, this percentage still does not include and account for the signatures that correspond to the amounts Proponents paid to reported payees for the 41,761 signatures gathered by King and the additionally significant number certified by 38 other signature gatherers who gave false or fictitious addresses. Consequently, upon consideration of the totality of the circumstances, it is highly probable, more probable than not, that invalidation of the signatures certified by King, Schumacher, Cook, Meyer, Rittberg,

together with those certified by the other 39 out of state signature gatherers who gave false or fictitious addresses, would easily exceed the Secretary of State's certification and final count margins as shown in Figure 1, Columns 3 and 7.

### **CONCLUSIONS OF LAW AND ANALYSIS**

In adopting Montana's 1972 Constitution, the people of the State of Montana "reserved unto themselves the exclusive right of" self-government and to thereby "alter or abolish the constitution whenever" they deem necessary. State ex rel. Montanans For Preservation Of Citizens Rights v. Waltermire (1988), 231 Mont. 406, 412, 757 P.2d 746, 750 (citing Mont. Const. art. II, § 2). In furtherance of this right of self-government, the Montana Constitution reserves unto the people the right to amend the constitution and enact laws by initiative. Mont. Const. art. XIV, § 9 (constitutional amendment); Mont. Const. art. III, § 4 (enactment of laws). The circulation of direct initiative petitions is "core political speech" protected by the First Amendment to the U.S. Constitution. Maine Taxpayers Action Network v. Secretary of State (Maine 2002), 795 A.2d 75, 78; San Francisco Forty-Niners v. Nishioka (Cal. App. 1999), 89 Cal. Rptr.2d 388, 395. Thus, state regulation of the initiative process is impermissible unless narrowly tailored to further a compelling state interest. Maine Taxpayers Action Network, 795 A.2d at 78.

However, a state has a compelling interest in requiring substantial compliance with procedural requirements for ballot initiatives in order to prevent fraud and to ensure the integrity, fairness, and efficiency of the initiative process. Buckley v. American Constitutional Law Foundation (U.S. 1999), 525 U.S. 182, 191 n.10, 119 S.Ct. 636 n.10; Citizens Committee For D.C., 860 A.2d at 814 n.3; Roberts v. Priest (1998), 975 S.W.2d 850, 856 (J. Glaze, concurring); San Francisco Forty-Niners, 89 Cal. Rpter.2d at 396-97.

Accordingly, to the extent not in conflict with the constitutional provisions, the Legislature has the constitutional authority to enact laws to implement the constitutional initiative process, including but limited to:

the procedure for procuring signatures to petitions, the forms of petitions, [and] the filing and certification of the same.

State ex rel. Montanans For Preservation Of Citizens Rights, 231 Mont. at 412, 757 P.2d at 750. Likewise, the Montana judiciary has the constitutional authority and duty to preserve and enforce the constitution and the laws enacted in furtherance thereof. Id. To carry out this important duty, the judiciary must avoid intervention in the initiative process "unless it *appears to be absolutely essential.*" State ex rel. Montanans For Preservation Of Citizens Rights, 231 Mont. at 412, 757 P.2d at 750; see also Cobb v. Montana (1996), 278 Mont. 307, 310, 924 P.2d 268, 269.

Prior to an election, a person may contest "a ballot issue submitted by initiative" by filing a complaint "within 30 days after the date on which" the Secretary of State certified the initiative to the governor pursuant to § 13-27-309, MCA. § 3-5-302(6), MCA. However, a person may contest a ballot issue for only a limited number of causes, including, as pertinent here, "violation of the law relating to qualifications for inclusion" of the initiative on the ballot or "illegal petition signatures or an erroneous or fraudulent count" of petition signatures. §§ 3-5-302(6)(i) and (iii), MCA. In this case, Plaintiffs timely filed a ballot issue contest within the authorized scope of §§ 3-5-302(6)(i) and (iii), MCA. The Court therefore has personal and subject matter jurisdiction over the parties and subject matter in this case.

To qualify a constitutional initiative for the ballot, petition gatherers must obtain the signatures of 10% of the total number of qualified voters in the state, including 10% of the voters in each of 40 legislative districts. Mont. Const. art. XIV, § 9; § 13-27-204, MCA. Similarly, to qualify a statutory initiative for the ballot, petition gatherers must obtain the signatures of 5% of the total qualified voters in the state, including 5% of the voters in each of 34 legislative districts. Mont. Const. art. III, § 4; § 13-27-204, MCA. As an integral part of this process, signature gatherers must submit a standard form

"affidavit" certifying the genuineness and authenticity of the signatures to the county election administrators. §§ 13-27-301 and 13-27-302, MCA. The language of the standard form "affidavit" attests that "the person who is the signature gatherer" swears under oath that:

- (1) he or she "gathered or assisted in gathering the signatures on the petition to which this affidavit is attached on the stated dates;"
- (2) he or she "believe the signatures on the petition are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana electors who are registered at the address or have the telephone number following the person's signature;" and
- (3) "the signers knew the contents of the petition before signing the petition."

§ 13-27-302, MCA. The standard form affidavit further requires the signature gatherer to attest to the "address of the signature gatherer." Id.

Montana law defines an "affidavit" as a "written declaration under oath, made without notice to the adverse party." § 26-1-1001, MCA. The manifest purpose of a statutory affidavit requirement is to obtain a true, accurate, and reliable statement of fact. The contemplated circumstantial guarantee of trustworthiness and reliability is that the affiant attests to the truth of the facts asserted subject to the criminal penalty of perjury. Climate Control Co. Inc. v. Bergsieker Refrigeration Inc. (1982), 196 Mont. 405, 409, 640 P.2d 442, 444; see also McDermott v. Carie LLC, 2005 MT 293, ¶ 27, 329 Mont. 295, ¶ 27, 124 P.3d

168, ¶ 27; Sheehy v. Ferda (1988), 235 Mont. 63, 67, 765 P.2d 722, 724-25. Consequently, except as otherwise expressly provided by statute, an affidavit is legally defective unless the affiant has "personal knowledge of the information contained in the statement" and swears "to its validity." McDermott, ¶ 26 (citing Mountain States Resources, Inc. v. Ehlert (1981), 195 Mont. 496, 504, 636 P.2d 868, 873); Sheehy, 235 Mont. at 67, 765 P.2d at 724; see also Climate Control, 196 Mont. at 408-09, 640 P.2d at 444.

Accordingly, pursuant to §§ 13-27-302 and 26-1-1001, MCA, a signature gatherer's affidavit is legally defective unless, based on the affiant-signature gatherer's personal knowledge, the following facts are true:

- (1) that he or she "*gathered or assisted* in gathering the signatures on the petition;"
- (2) that he or she *has reason to believe* that the "signatures on the petition are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana electors who are registered at the address or have the telephone number following the person's signature;" and
- (3) that "the signers knew the contents of the petition before signing the petition."

(Emphasis added).

As a preliminary matter, the language "has reason to believe" in § 13-27-302, MCA, is textually and substantively similar to less demanding statutory provisions that authorize affidavits based upon "the best of the affiant's knowledge" or upon "information and belief." See Sheehy, 235 Mont. at 67, 765 P.2d at

724. Thus, the provisions of § 13-27-302, MCA, modified by the language "has reason to believe" can seemingly be construed to allow a signature gatherer to properly attest to facts that occurred outside his or her presence as long as he or she had reason to believe they occurred.

However, as in McDermott and Sheehy, the other clauses in § 13-27-302, MCA, are not similarly modified or qualified by such language. Thus, as in McDermott and Sheehy, §§ 13-27-302 and 26-1-1001, MCA, require the signature gatherer to attest to his or her true address and to have personal knowledge that "the signers knew the contents of the petition before signing." In this case, King, Schumacher, Meyer, and 40 other paid, out of state signature gatherers knowingly listed false or fictitious addresses on their certification affidavits. Thus, all of their affidavits were false and are legally defective to that extent.

Moreover, King, Schumacher, Cook, Meyer, and other out of state signature gatherers routinely attested that they personally gathered or assisted in gathering signatures that, in fact, were gathered by other persons outside of their presence and without any direct assistance from them. The validity of these affidavits turns on the proper construction of the requirement of § 13-27-302, MCA, that each signature gatherer "gathered *or assisted* in *gathering* the signatures on the petition." (Emphasis added). Proponents and the State assert that the plain meaning of the

phrase "assisted in gathering" broadly encompasses the situation at issue here - the use of signature gathers other than the affiant to assist the affiant by gathering signatures outside of the affiant's presence and without the affiant actually assisting the others in any direct manner in the actual gathering of signatures at another location. In contrast, Plaintiffs more narrowly construe the phrase to mean that another person directly assisted the affiant in the affiant's presence or immediate vicinity. In construing statutes, the "role of the Court is simply to ascertain and declare what is in terms or in substance contained" in the Code and "not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. Moreover, the court must construe statutes according to their plain meaning. Ravalli County v. Erickson, 2004 MT 35, ¶ 11, 320 Mont. 31, ¶ 11, 85 P.3d 772, ¶ 11. If the language of a statute "is clear and unambiguous, no further interpretation is required." Id. When further interpretation is necessary, the intent of the Legislature "is controlling." Ravalli County, ¶ 12.

The plain or common meaning of the term "assist" is:

to help, stand by . . . to give support or aid . . . to be present as a spectator . . . to give support or aid . . . in some undertaking or effort.

*Websters 3<sup>rd</sup> New Int'l Dictionary*, 132 (2002). The Montana Supreme Court has similarly recognized the term "assistant" to mean "one who stands by and aids or helps another." State ex rel. Dunn v.

Ayers (1941), 112 Mont. 120, 126, 113 P.2d 785, 788. As applied here, the plain meaning of the term "assist" is consistent with either interpretation and further construction is therefore necessary.

The court must construe statutory terms by their usage in the context of the statute as a whole. In 2003, the Legislature amended § 13-27-111, MCA, to more narrowly define the term "signature gatherer," to wit:

"Signature gatherer" means an *individual who collects or intends to collect* signatures on a petition for the purpose of an initiative, a referendum, or the calling of a constitutional convention.

§ 13-27-111(4), MCA (2003 Mont. Laws Ch. Ch. 323, § 1) (HB 203, § 1) (emphasis added). The 2003 Legislature similarly amended § 13-27-302, MCA, to narrow the scope of the standard form certification affidavit for signature gatherers, to wit:

An affidavit, in substantially the same form, must be attached to each sheet or section submitted to the county official:

I, (name of person who ~~circulated the petition~~ is the signature gatherer), swear that I ~~circulated~~ gathered or assisted in ~~circulating~~ gathering the signatures on the petition to which this affidavit is attached on the stated dates . . .

§ 13-27-302, MCA (2003 Mont. Laws Ch. Ch. 323, § 9) (HB 203, § 9).

Moreover, in pertinent part, the title to HB 203 stated as follows:

An Act Generally Revising Laws Governing Ballot Measures; Revising The Definition Of "Signature Gatherer"; *Clarifying That Petitions For Ballot Measures Are To Be Circulated By*

Signature Gatherers; . . . Revising Requirements For Submission Of Petition Sheets For Ballot Measures For Verification Of Signatures . . .; Authorizing The Secretary Of State To Reject Petitions For Ballot Measures Submitted For Tabulation Of Signatures That Do Not Meet Statutory Requirements . . .

(2003 Mont. Laws Ch. Ch. 323, § 9) (HB 203, § 9) (emphasis added).

Upon comparison of the amended and former text of §§ 13-27-111(4) and 13-27-302, MCA, the Court concludes that the 2003 Legislature intended to allow submission of petition signatures for verification only by persons who actually, physically gathered the signatures, or alternatively, persons who directly and immediately assisted another person at the same time and place in the actual physical gathering of the signatures. This construction is consistent with the requirements of §§ 13-27-302 and 26-1-1001, MCA, for the affiant-signature-gatherer to have personal knowledge of the gathering of the signatures to which he or she is attesting.

In this case, King, Schumacher, Cook, Meyer, and other paid out of state signature gatherers attested that they personally gathered or assisted in gathering signatures that in many cases were gathered by other persons outside of their presence and without any direct assistance from them at the time and place of the actual gathering of the signatures to which they were attesting. Consequently, under the foregoing construction of §§ 13-27-302 and 26-1-1001, MCA, the certification affidavits of King, Schumacher, Cook, Meyer, and other paid out of state

signature gatherers who similarly engaged in this practice were false and are legally defective on the grounds that those individuals falsely attested that they gathered or assisted in gathering signatures gathered by others outside their presence.

Further, §§ 13-27-302 and 26-1-1001, MCA, also require that the affiant-signature-gatherers have personal knowledge that the signers knew the contents of the petition before signing. As a preliminary matter, the certification affidavits of King, Schumacher, Cook, Meyer, and other paid out of state signature gatherers who similarly certified signatures gathered by others outside their presence are also legally defective on the additional grounds that the affiants could not and did not have personal knowledge upon which to truthfully attest that the signers knew the contents of the petitions before signing.

Moreover, it is highly probable, more probable than not, that a number of paid, out of state, migrant signature gatherers routinely, as a matter of course, employed the above-referenced bait-and-switch tactic and that this tactic deceptively induced countless Montanans to sign all three petitions when they were led to believe that they were only signing one. Consequently, by implication based on the inherently deceptive nature of this tactic, the affiant-signature-gatherers who attested to signatures induced by this deceptive practice could not truthfully attest that those signers knew the contents of the petitions before

signing them. Therefore, all affidavits containing signatures induced by this fraudulent practice are legally defective on the grounds that the affiants could not and did not have personal knowledge upon which to truthfully attest that the signers knew the contents of the petitions before signing. Accordingly, for the foregoing reasons, there are three classes of certification affidavits submitted by the paid, out of state signature gatherers that are legally defective as a result of statutory non-compliance and fraud:

- (1) all affidavits submitted by the 43 people listed on Plaintiff's Exhibit 5 who gave false or fictitious addresses;
- (2) all affidavits certifying signatures gathered outside the affiant's presence by someone other than the affiant; and
- (3) all affidavits containing signatures induced by bait-and-switch tactics.

Initiative petitions and signatures obtained and filed by circulation upon approved forms are presumptively valid. In re State Question No. 138 v. State Taxpayers' Assoc. (Okla. 1926), 244 P. 801, 803-04. However, the presumption of validity may be rebutted and overcome by affirmative proof of conscious or willful fraud or procedural non-compliance. See Id. (invalidating signatures collected by person other than the affiant-gatherer); Initiative Petition No. 272 v. Christian (Okla. 1964), 388 P.2d 290, 293. The presumption of validity of petition signatures is critically dependent on the role of the signature gatherer "and

the truthfulness and completeness of the representations made" in the gatherer's certification affidavit. Roberts, 975 S.W.2d at 853 (distinguishing conscious fraud or procedural violation from inadvertence or negligence); Williams v. D.C. Board of Elections (D.C. App. 2002), 804 A.2d 316, 319 (circulator's role critical to ensuring integrity of the collection process).

Moreover, "clerical or technical errors that do not interfere with the ability to judge the sufficiency of signatures on the petition do not render a petition void." § 13-27-201(1), MCA. Substantial compliance with the procedural requirements for qualification of an initiative is therefore sufficient. Initiative Petition No. 272, 388 P.2d at 293; see also § 13-27-201(1), MCA. However, the filing of a false affidavit by a signature gatherer is much "more than a technicality" because it destroys the primary procedural safeguard for ensuring the integrity of the signature gathering process unless the associated signatures and petitions are invalidated. Citizens Committee For D.C., 860 A.2d at 818; Williams, 804 A.2d at 319; Barkley v. Pool (Neb. 1919), 173 N.W. 600, 602; Brousseau v. Fitzgerald (Ariz. 1984), 675 P.2d 713, 715-16. As similarly recognized by the Maine Supreme Court:

it is evident that the circulator's role in a citizen's initiative is pivotal. Indeed, the integrity of the initiative . . . process in many ways hinges on the trustworthiness and veracity of the circulator. In reviewing the signatures gathered by the circulators, the Secretary [of State] has the ability to verify . . . that a signing voter is actually registered . . . to vote. In contrast, the Secretary has no way, without engaging in a separate

investigation, to verify that a signing voter actual signed the petition. Thus, the circulator's oath is critical to the validation process. Indeed, the oath is of such importance that the law requires it to be sworn in the presence of a notary. . . .

\* \* \*

. . . In addition to obtaining truthful information from the circulator, the oath is intended to assure that the circulator is impressed with the seriousness of his or her obligation to honesty. . . and to assure that the person taking the oath is clearly identified should questions arise regarding particular signatures. . . . As early as 1917, we held that verification of the signatures and the subsequent oath taken by the circulator is an indispensable accompaniment of a valid petition, and accordingly, that the invalidation of signatures lacking this prerequisite is necessary to preserve the integrity of the initiative . . . process.

Maine Taxpayers Action Network, 795 A.2d at 80. The Maine Supreme Court further recognized that:

[t]he entire signature collection process is designed to allow citizens interested in changing the laws to obtain the support of other citizens, through their signatures, thus signaling significant support to trigger a statewide vote. If the circulator has provided a false identity, the veracity of his attestation to other matters is seriously in question . . . and the ability of the Secretary of State to find him for purposes of inquiring into any irregularity in signatures contained on his petition becomes difficult or impossible.

Id. at 81-82. The California Court of Appeals also eloquently recognized that:

the ballot box is the sword of democracy. A court will intervene in the initiative process only when there are clear, compelling reasons to do so. . . [D]espite the court's duty to jealously guard the people's right of initiative, . . . noncompliance with the Elections Code can result in an initiative's disqualification from the ballot. . . . Although courts are charged to construe the Elections Code to favor the people's awesome initiative power, the statutes designed to protect the elector from confusing or misleading

information should be enforced so as to guaranty the integrity of the process.

San Francisco Forty-Niners, 89 Cal. Rpter.2d at 392-93. The California court further recognized that:

the people have a right to rely on the integrity of the initiative process from beginning to end. Because the initiative process bypasses the normal legislative process, safeguards are necessary to prevent abuses and provide for an informed electorate. . . The limited power of the court to act rests on the premise that while errors of opinion must be exposed by the clash of public debate, the contest should not be distorted by deliberate and demonstrable acts of fraud.

Id. at 397-98. As further indication of the significance of the affidavit requirement of § 13-27-302, MCA, knowingly falsifying a certification affidavit is a criminal offense, subject to a \$500.00 fine and 6 months in the county jail. §§ 13-27-106 and 45-7-203, MCA. Consequently, upon proof of conscious circumvention of procedural requirements or fraud, the court should invalidate all signatures and petitions *tainted by or associated with* the fraud or procedural non-compliance in order to preserve the integrity of the process and prevent benefit from fraud or conscious circumvention of the procedural safeguards for qualification of the initiative. Brousseau, 675 P.2d at 715; In re State Question No. 138, 244 P. at 803-04 (invalidating signatures collected by person other than the affiant-gatherer); Maine Taxpayers Action Network, 795 A.2d at 82; Initiative Petition No. 272, 388 P.2d at 293; Citizens Committee For D.C., 860 A.2d at 817-828 (pervasive pattern and practice of fraud permeating the signature gathering

process); Williams, 804 A.2d at 319-21 (invalidation of signatures tainted with or having the strong appearance of fraud); Weisberger v. Cohen (N.Y. Sup. 1940), 22 N.Y.S.2d 1011, 1012 (only sure way to prevent fraud is to invalidate all signatures tainted by fraud); McCaskey v. Kirchoff (N.J. 1959), 152 A.2d 140 (function of court is to effect justice through equity, not sit as a bookkeeper engaged in mathematical calculation); see also, § 13-27-307, MCA (rejection of signatures and petitions for non-compliance with statutory requirements for qualification).

Invalidation of all signatures or petitions associated with fraud or procedural non-compliance "does not disenfranchise legitimate voters" because invalidation "upholds the integrity of an initiative process that has been undermined" by the fraud or non-compliance and because legitimate voters have no right to vote on an initiative absent compliance with the procedural requirement for qualification. See Citizens Committee For D.C., 860 A.2d at 818; see also, e.g., § 13-27-307, MCA (rejection of signatures and petitions for non-compliance with statutory requirements for qualification). The proponents of an initiative measure have the affirmative onus and burden of ensuring compliance with the simple and straightforward procedural requirements for qualification. Roberts, 975 S.W.2d at 856.

Affirmative proof of specific instances of fraud or conscious circumvention of procedural requirements for qualification,

coupled with proof of an established or common practice of fraud or non-compliance, may support an inference of a pervasive pattern and practice of fraud or procedural non-compliance, particularly in the absence of credible evidence rebutting the inference and where the proponents fail to present testimony from the signature gatherers to verify the regularity of the process. See Citizens Committee For D.C., 860 A.2d at 816-28 (court may draw negative inference from failure of initiative proponents to present a single signature gatherer as a witness). In this case, there is evidence that it is a common practice in the professional signature gathering business or industry to bring migrant signature gatherers, with no substantial ties to a state, in from out of state for the sole purpose of hustling up the necessary signatures to qualify local ballot initiatives and then immediately move on to the next state without leaving a trace, thereby preventing any effective accountability or means to verify the integrity and regularity of the signature gathering process. There is also evidence that, while the out of state migrant signature gatherers are working in a state, it is a common industry practice for them to certify signatures gathered by other signature gatherers and to conceal, withhold, or misrepresent identifying and contact information. More significantly, there is evidence that it is a common practice to pay migrant signature gatherers by the signature, thereby creating an incentive and

profit motive to engage in deceptive, fraudulent, and procedurally irregular signature gathering practices.

In addition to these common industry practices, there is ample evidence of specific and widespread instances of deceptive practices and conscious circumvention of procedural safeguards in this case. For example, in Missoula, an out of state signature gatherer, upon being challenged by a private business upon whose property he was soliciting signatures without permission, concealed his identity and misrepresented that he was gathering signatures for the Montana Attorney General who he also alleged was promoting the Ballot Initiatives. There is evidence that, in Helena, Butte, and Basin, paid out of state signature gatherers fraudulently induced signatures of countless Montanans. There is evidence that 43 out of state signature gatherers listed false or fictitious addresses in their certification affidavits.

As a result, there is evidence that the Secretary of State, and Proponents themselves, were unable to contact out of state signature gatherers to inquire about their practices or verify information on their petition sheets. Similarly, there is evidence that the small number of out of state signature gatherers who certified the majority of the signatures gave false affidavits that they gathered or assisted in gathering signatures when they did not. Moreover, there is evidence that Proponents paid approximately \$673,658.81 to migrant out of state signature

gatherers and that the lions share of this money went to a relatively small number of migrant signature gatherers who gathered the majority of the necessary signatures while engaged or associated in the above-referenced deceptive and procedurally irregular signature gathering practices. Under the totality of the circumstances, it is more probable than not that this pattern and practice of fraud and procedural defect was prevalent throughout the statewide signature gathering process.

In contrast, the Proponents presented no credible evidence to rebut Plaintiffs' showing of a pervasive and general pattern and practice of fraud and conscious circumvention of procedural safeguards. As the parties who commissioned the professional migrant signature gatherers, the Proponents should have been in the best position to contact their signature gatherers and bring a sufficient number of them into court to rebut the Plaintiffs' showing of fraud and irregularity. However, either because they were unwilling or themselves unable to locate them, Proponents failed to present any direct evidence from the best and most knowledgeable source to rebut Plaintiffs' showing. Consequently, under the totality of the circumstances, the Court finds and concludes for the foregoing reasons that the signature gathering process for CI 97, CI-98, and I-154 was permeated by a pervasive and general pattern and practice of deceit, fraud, and procedural non-compliance.

To the prejudice of the merits of the underlying political debate and all of the people of Montana, these deceptive, fraudulent, and procedurally defective practices seriously and substantially undermined the fundamental integrity, fairness, and purpose of our precious right and process of self-government by initiative of the people. Consequently, irrespective of the legitimate political merits of the Ballot Initiatives, the Court cannot in good conscience approve, sanction, or countenance this needless and manifest taint on the political process. Thus, in order to preserve and ensure the integrity of the initiative process inviolate, it is necessary to invalidate all signatures *tainted by or associated with* the pervasive pattern and practice of deceptive, fraudulent, and procedurally defective practices employed in this case by the migrant out of state signature gatherers. Unfortunately, it is virtually impossible to do so with any degree of mathematical certainty on this record. As recognized by courts in other states who have faced this dilemma, in order to preserve and ensure the integrity of the process, any imprecision or doubt must cut against the proponents of the initiatives, rather than the people, because the proponents had the burden and responsibility to substantially comply with the simple and straightforward procedural requirements of the law and were the only parties in a position to do so in order to qualify these

significant ballot measures for a vote of the people on the merits.

Although precise mathematical certainty is not necessary or possible in this case, any invalidation must still be rationally related to the identified pattern and practice of fraud and procedural non-compliance. At a minimum, Plaintiffs have shown that the signatures certified by out of state signature gatherers King, Schumacher, Cook, and Meyer are more probably than not associated with the pervasive pattern and practice of fraud and procedural non-compliance in this case. Further, Plaintiffs have also shown that it is more probable than not that the signatures certified by Rittberg and the other 39 signature gatherers who gave false or fictitious address significantly increase the number of tainted or associated signatures well beyond the Secretary of State's certification and final count margins shown in Figure 1, Columns 3 and 7. The presumption of validity of the signatures certified by the migrant signature gatherers is gone. Coupled with the 41,761 signatures certified by King and the additionally significant number of signatures certified by all others who gave false or misleading addresses, the signatures corresponding to the amounts paid to the signature gatherers listed in Figure 4, representing 45.37% of the money paid to out of state signature gatherers, make it more probable than not that in excess of 50% of the signatures certified by the migrant, out of state signature

gatherers are *tainted by or associated with* a pervasive pattern and practice of fraud and procedural non-compliance.

Therefore, invalidation of the total number of signatures gathered by King, Schumacher, Cook, and Meyer<sup>12</sup>, together with all signatures gathered by the 40<sup>13</sup> other out of state signature gatherers listed on Plaintiff's Exhibit 5, is a reasonable means to remedy the identified pattern and practice of fraud and procedural non-compliance under the totality of the circumstances in this case. The only alternative is to order a Florida-style retabulation on a county-by-county, affiant-by-affiant basis that would likely extend the process into the absentee voting period and, in the final analysis, most probably reach the same result.

As recognized by other courts, and contrary to the politically-provocative rhetoric that is certain to follow, invalidation of the signature gathering process does not result in disenfranchisement of the people who support the Ballot Initiatives. As a matter of law and reason, the people who support the initiatives have no political or legal right to vote on them until Proponents have duly qualified them for the ballot *in the manner provided by law, free from the taint of fraud*. Thus, this decision does not preclude Proponents from fairly and lawfully qualifying the initiatives for a vote of the people on the merits in the next election cycle.

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<sup>12</sup> Figure 2, Column 6, and Figure 3, Column 2.

<sup>13</sup> See fn 1-2.

ORDER AND JUDGMENT

Therefore, based on the foregoing findings of fact and conclusions of law and analysis, the Court hereby orders, adjudges, and decrees as follows pursuant to § 3-5-302(6), MCA:

- (1) the 2006 signature gathering process under Title 13, Chapter, 27, MCA, for CI-97, CI-98, and I-154 is permeated by a pervasive and general pattern and practice of fraud and procedural non-compliance perpetrated by paid, out of state, migrant signature gatherers commissioned by Proponents;
- (2) all signatures gathered by out of state signature gatherers King, Schumacher, Cook, and Meyer, together with all signatures gathered by the 40 other out of state signature gatherers listed on Plaintiff's Exhibit 5, are hereby invalidated; and
- (3) as result of this invalidation, the Secretary of State's certified and final counts, referenced in Figure 1 are hereby invalidated; and
- (4) consequently, the Secretary of State's certifications of CI 97, CI-98, and I-154 pursuant to §§ 13-27-307, 13-27-308, 13-27-311, and 13-27-312, MCA, are hereby invalidated.

**SO ORDERED** this 13th day of September, 2006.

DIRK M. SANDEFUR  
DISTRICT JUDGE

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