

1 John W. Larson, District Judge
Missoula County Courthouse
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5 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

6 NEW APPROACH MONTANA,
7 THEODORE J. DICK and DAVID
8 M. LEWIS,

Cause No. XBDV-2020-444

9 Petitioners,

And

10 STATE OF MONTANA, and
11 COREY STAPLETON,
12 SECRETARY OF STATE

Respondent.

ORDER DENYING PLAINTIFFS'
EMERGENCY MOTION FOR
DECLARATORY AND
INJUNCTIVE RELIEF

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14 Before the Court is the Plaintiff's Emergency Motion for Declaratory and
15 Injunctive Relief.
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17 **Background**

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19 The Court finds facts relevant to the motion as the following. On
20 January 13, 2020, the Montana Secretary of State's Office received a
21 submission by Plaintiff New Approach Montana for CI-118. See April 21,
22 2020, Declaration of Corson. On February 26, 2020, the submission was
23 approved for signature filing effective February 26, 2020. *Id.* I-190 was
24 submitted by Plaintiff New Approach Montana to the Secretary of State on
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1 January 13, 2020; on February 4, 2020, the initiative was resubmitted; and on
2 March 17, 2020, the Secretary of State notified New Approach that I-190 was
3 legally sufficient. *Id.*

4 On April 6, 2020, Plaintiffs filed this Complaint against the State of
5 Montana and the Secretary of State (State Defendants) seeking declaratory
6 and injunctive relief to obtain signatures in support of their Petition to place
7 Constitutional Initiative 118 (CI-118) and Statutory Initiative 190 (I-190) on the
8 2020 ballot, pursuant to Montana's Uniform Electronic Transactions Act, Mont.
9 Code Ann. §§ 30-18-101 *et. seq.* and to suspend the enforcement of certain
10 statutory requirements in Title 13 and deadlines governing the initiative
11 process. On April 6, 2020, Plaintiffs filed a Motion for Expedited Consideration
12 and Hearing on Plaintiffs' Emergency Motion for Declaratory and Injunctive
13 Relief. The Court issued an expedited briefing schedule on Plaintiffs' motion
14 and set a hearing for April 28, 2020.
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19 Due to COVID-19, the Court held a telephonic hearing in the matter on
20 April 28, 2020. The Lewis & Clark County Clerk and Court Reporter were
21 present in Helena via video conferencing. James P. Molloy, Esq., from the
22 law firm of Gallik, Bremer & Molloy, was present telephonically representing
23 Plaintiffs. Matthew T. Cochenour, Esq., Hannah E. Tokerud, Esq., and Patrick
24 M. Risken, Esq., from the Montana Attorney General's office were present
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1 telephonically representing Defendants. Austin James, Esq., of the Secretary
2 of State's Office also appeared as counsel for the Defendants. Patrick M.
3 Risken and Austin James argued for the Defendants. The Court allowed
4 supplemental submissions, and the matter is now deemed submitted.

5 **Standards**

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7 Pursuant to Mont. Code Ann. § 27-8-202, "[a]ny person...whose rights,
8 status, or other legal relations are affected by a statute...obtain a declaration
9 of rights, status or other legal relations thereunder." Pursuant to Mont. Code
10 Ann. § 27-19-201, a preliminary injunction order may be granted (1) when it
11 appears that the applicant is entitled to the relief demanded and the relief or
12 any part of the relief consists in restraining the commission or continuance of
13 the act complained of...(2) when it appears that the commission or
14 continuance of some act during the litigation would produce a great or
15 irreparable injury to the applicant; (3) when it appears during the litigation that
16 the adverse party is doing or threatens or is about to do or is procuring or
17 suffering to be done some act in violation of the applicant's rights..."
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22 **Discussion**

23 Plaintiffs argue that they are entitled to an order granting declaratory and
24 injunctive relief to gather in-person signatures in support of CI-118 and I-190
25 for purposes of the current election only. Plaintiffs contend that based on the
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1 State of Montana's Governor's executive orders issued in response to COVID-
2 19, Plaintiffs are prevented from exercising their right to enact laws by initiative
3 pursuant to Mont. Const. Art. III, § 4 and the First and Fourteenth
4 Amendments of the United States Constitution. Plaintiffs contend that if all of
5 the statutes governing the initiative process are enforced, Plaintiffs'
6 constitutional rights are nullified. Plaintiffs assert that when rights protected by
7 the First and Fourteenth Amendments are subjected to "severe" restrictions,
8 as in this case, the regulation must be "narrowly drawn to advance a state
9 interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434
10 (1992). Plaintiffs contend that they should be allowed to gather electronic
11 signatures through the use of DocuSign, which program complies with
12 Montana Electronic Transactions Act, MCA §§ 30-18-101, *et seq.* (UETA) and
13 provides all of the information required by M.C.A. § 13-27-204. Plaintiffs cite
14 *Anderson v. Bell*, 2010 UT 47, 234 P.3d 1147 (Utah S. Ct. 2010), for the
15 proposition that electronic signatures were allowed to support a nomination
16 petition in a statewide ballot. Plaintiffs also seeks to suspend the statutory
17 deadlines governing the signature gathering process, subject to the
18 requirement that all petitions should be submitted no later than August 3,
19 2020, as required by Article III, § 4 of the Montana Constitution.
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25 The State Defendants respond that the "political question doctrine"
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1 excludes from judicial review those controversies that revolve around policy
2 choices and value determinations constitutionally committed to other branches
3 of government or to the people. *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont.
4 167, 434 P.3d 241 (citation omitted). State Defendants asserts that the UETA
5 does not refer to Title 13 “Elections” of the Montana Code Annotated and Title
6 13 fails to address electronic signatures. State Defendants contend that
7 Plaintiffs request the Court to impermissibly create legislation, as only the
8 Legislature may amend Title 13 to allow UETA electronic signatures in the
9 ballot petition process. Defendants contend that Plaintiffs have failed to
10 demonstrate a prima facie case of a violation of its rights under the
11 Constitution. Defendants contend that Plaintiffs waited until January 13, 2020,
12 and February 4, 2020, to submit the ballot issues for CI-118 and I-190 after
13 signature gathering was allowed as early as June 2019, making any asserted
14 emergency a self-created one. Defendants also contend that Plaintiffs have
15 failed to provide any evidence that the DocuSign proposal can eliminate
16 potential fraud with the degree of confidence provided by the ballot petition
17 signature gathering statutes and case law. Defendants further argue that
18 Montana’s adoption of the UETA in the commercial code does not translate to
19 its use in the election code.
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25 Here, Plaintiff seeks the following specific declaratory relief: 1)
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1 entitlement to submit electronic signatures of qualified electors in Montana in
2 support of CI-118 and I-190, subject to the condition that the electronic
3 signatures comply with the requirements of the UETA; 2) electronic signatures
4 gathered in compliance with the UETA satisfy the verification requirements
5 under Montana law; 3) the provisions of MCA §§ 13-27-102, 103, 302, and
6 304 are suspended and deemed satisfied by the processes employed by
7 DocuSign pursuant to UETA; 4) the statutory deadlines governing the
8 signature gathering process are suspended, subject to the requirement that all
9 petitions must be submitted to the Secretary of State no later than August 3,
10 2020; and 5) the Secretary of State shall coordinate with local elections
11 officials to establish the procedures for verifying the number of signatures
12 gathered in support of CI-118 and I-190 after the petitions have been
13 submitted to the Secretary of State by no later than August 3, 2020.
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17 Plaintiffs seek temporary injunctive relief enjoining the enforcement
18 statutes governing the process for submitting petitions in support of ballot
19 initiative (MCA § 13-27-102, MCA § 13-27-103, MCA § 13-27-302, MCA § 13-
20 27-304). Plaintiffs also seek relief enjoining the enforcement relating to the
21 gathering of signatures and submission of petitions in support of ballot
22 initiatives (MCA § 13-27-301, MCA § 13-27-104, MCA § 13-27-303(1), and
23 MCA § 13-12-201(1)).
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Under the *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (citations omitted), framework, “[w]hen a state promulgates a regulation which imposes a ‘severe’ burden on individuals’ rights, that regulation will only be upheld if it is ‘narrowly drawn to advance a state interest of compelling importance...If regulations enacted do not seriously burden a plaintiff’s rights, a state’s important regulatory interests will typically be enough to justify ‘reasonable nondiscriminatory restrictions.’”

Article V, § 6 of the Montana Constitution authorizes either the governor or the legislature to call a special session. This Court is not inclined to invade the role of the executive or legislative branches. None of the Governor’s recent orders or directives specifically suspend ballot initiative petition gathering at this time although the Governor has selectively addressed issues such as voting by mail and early voting in the upcoming primary election. The Governor’s March 25, 2020, Directive specifically states, in part, the following:

With election timelines rapidly approaching, I have consulted with representatives for county clerks and county election administrators, the Secretary of State, and political leaders from both parties, including the Speaker of the House and the President of the Senate, about how to conduct the upcoming June 2 primary election in a manner that protects public health and minimizes the spread of communicable disease. While the Secretary of State has, appropriately, not taken a position, the others...the option to expand voting by mail, to make in-person polling places safer against the transmission of disease...have determined that typical election procedures in Montana could hinder the response to the emergency by promoting community transmission of COVID-19...First, the Directive provides additional time for local discretion, to expand

access to mail voting procedures *and* early voting...

1 In creating the March 25, 2020, Directive, the Governor conferred with the
2 Secretary of State and County Clerks and County Election Administrators
3 when addressing various election concerns. The Governor made a well-
4 informed decision in this regard, and the Court finds Plaintiffs are best situated
5 to approach the Governor's Office for a more formal request for the desired
6 relief. The Court also is not in a position to ascertain fifty-six (56) county
7 clerks' ability to implement to any of the requested relief under the current
8 circumstances with many courthouses closed and operating with limited
9 staffing. The Governor is in the best position with his emergency authority to
10 suspend certain laws.
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15 Next, Plaintiffs cannot show that they are entitled to the requested relief
16 because the use of electronic signatures under the UETA requires the consent
17 by both parties. Mont. Code Ann. § 30-18-104(2). Plaintiffs acknowledge that
18 state agencies are not required to accept electronic signatures. Reply, p. 13.
19 There is no evidence presented that the Secretary of State or county clerks
20 have been consulted or consented to any use of electronic signatures.
21 Instead, the Secretary of State must specify the manner, format, transmission,
22 type of signature. Mont. Code Ann. § 30-18-104(2). There is no showing that
23 DocuSign in the election initiative context meets the requirements of the
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1 UETA, assuring validity, authenticity, reliability, and security of the electronic
2 transactions. The Court also notes that counsel has conceded that there are
3 no other known cases where DocuSign was used in the context of seeking
4 voter signatures for state or local initiatives. As such, the Court is not inclined
5 to address the novelty of using DocuSign and force the widespread application
6 of the service across the fifty-six (56) county clerk's offices or the Secretary of
7 State.
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9 As to Plaintiffs' request for a thirty-day (30) or other equitable extension
10 of time to file the required signatures, the Declaration of Corson, Elections
11 Director, provides that "July 17, 2020, is the date by which county election
12 administrators must file certified constitutional and statutory initiative petitions
13 to the Secretary of State." April 29, 2020, Declaration of Corson, ¶ 7. The
14 Declaration of Corson states provides that "[s]hould the Secretary of State
15 receive petition submissions from County Election Administrators after July 17,
16 2020, statutory deadlines regarding ballot certification and the Voter
17 Information Pamphlet will be placed in jeopardy." Declaration of Corson, ¶ 14.
18 As argued by the State Defendants during the hearing, the Court notes that
19 the processes by which individual county clerks must examine signature
20 veracity would likely be disrupted or frustrated if such an equitable extension is
21 allowed.
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1 Plaintiffs cite *Goldstein v. Secretary of the Commonwealth*, 2020 Mass.
2 LEXIS 196 (Mass. S. Ct., April 17, 2020), where the Massachusetts Supreme
3 Court granted plaintiffs' application for declaratory relief brought by candidates
4 seeking to qualify for the primary ballot. The Court notes that the *Goldstein*
5 Court granted limited relief, including allowing the number of signatures
6 required to qualify for the primary be reduced by 50% for all offices, extending
7 deadlines to submit nomination papers, and allowing submission of
8 nomination papers with electronic signatures. This case is distinguishable
9 from *Goldstein v. Secretary of the Commonwealth*, 2020 Mass. LEXIS 196, as
10 there has been no expiration of relevant submission deadlines under the
11 current Governor's order. Additionally, the Court notes that cases cited in
12 support of Plaintiffs' position required a collection of fewer numbers of voter
13 signatures, i.e., (a) *Esshaki v. Whitmer*, 2020 U.S. Dist. LEXIS 68254, ¶ 4,
14 where Plaintiff was required to collect 1,000 signatures by April 21, 2020, and
15 700 were already collected by March 23, 2020; and (b) *Goldstein v. Secretary*
16 *of the Commonwealth*, 484 Mass. 516, 519, where Plaintiff Goldstein seeking
17 election as a representative to Congress was required to collect 2,000
18 signatures and other candidates were required between 150-10,000
19 signatures. Article XIV, Section 9(1) of the Montana Constitution provides that
20 constitutional amendments by initiative shall be signed by at least ten percent
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1 of the qualified electors of the state, which number shall include at least ten
2 percent of the qualified electors in each of two-fifths of the legislative districts.
3 Article III, Section 4(2) provides that initiative petitions shall be signed by at
4 least five percent of the qualified voters in each of at least one-third of the
5 legislative representative districts and the total number of signers must be at
6 least five percent of the total qualified electors of the state.
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8 In this case, due to nature of the Constitutional Initiative and the
9 magnitude of the change required, many more signatures are required. Of
10 note, the *Goldstein* Court specifically commented on the inherent difficulties
11 with collecting and verifying electronic submissions when stating,
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13 “...there are too many issues and unanswered questions to allow us
14 confidently to impose a remedy that would transform a nomination
15 system that required “wet” signatures into one that permitted a broad
16 range of electronic signatures, including a printed name. To name just a
17 few, there are the inherent time constraints discussed *supra*; there are
18 potential logistical, legal, and cyber-security related concerns; and, of
19 course, there is the fact that local and State governments are already
operating under severe constraints, and often with skeletal staffing, due
to the pandemic.”

20 *Goldstein v. Sect.*, ¶ 28. Similarly, many Montana courthouses, particularly in
21 large populated counties, remain closed with limited staffing. The Court does
22 not find sufficient grounds to adopt and operate an untried system. Nothing in
23 the Governor’s directives prohibit Plaintiffs from continuing to make efforts to
24 attain the required number of signatures. Plaintiffs still have the option of
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1 seeking formal relief from the Governor's office, pursuing legislative change in
2 the 2021-2022 session, or otherwise satisfying the Governor's present
3 directives while seeking the signatures Plaintiffs require in the remaining time
4 allowed.

5 Plaintiffs have failed to show that the statutes at issue in Title 13,
6 chapter 27, Mont. Code Ann., infringe on Plaintiffs' rights guaranteed by the
7 Constitution under the present circumstances of this case. The State's
8 compelling interest in maintaining the integrity and security of its election
9 process outweighs any burden on Plaintiffs' constitutional rights. The Court
10 finds that Plaintiffs claims do not meet the threshold for injunctive relief at this
11 time. Accordingly,
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15 IT IS HEREBY ORDERED that Plaintiff's Motion for Declaratory and
16 Injunctive Relief is DENIED.

17 DATED this 30th day of April, 2020.

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21 JOHN W. LARSON, District Judge
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Copies of the foregoing were sent to:

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