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PREVIEW; Pierce v. Jacobsen: *Burdens on Speech Under Montana's Ballot Initiative Restrictions*

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The United States Court of Appeals for the Ninth Circuit will hear oral argument in *Pierce v. Jacobsen* on Wednesday, February 9, 2022 at 9:00 a.m. in the Pioneer Courthouse, Portland, Oregon. Paul A. Rossi of IMPG Advocates is expected to appear on behalf of appellants Nathan Pierce, Montana Coalition for Rights, Montanans for Citizen Voting, Liberty Initiative Fund, and Sherri Ferrell. Austin Knudsen, Hannah E. Tokerud, and Patrick M. Risken are expected to appear on behalf of appellees Christi Jacobsen, in her official capacity as the Secretary of State for the State of Montana, Austin Knudsen, in his official capacity as the Attorney General of Montana, and Jeff Mangan, in his official capacity as the Commissioner of the Montana Commission on Political Practices.

I. INTRODUCTION

The issue in this case is whether a Montana statute requiring that petition circulators be state residents, and prohibiting initiative proponents from compensating petition circulators on a per-signature basis, imposes a severe burden on political speech protected by the First Amendment. If the court of appeals determines the answer to either of these questions is yes, the court will apply strict scrutiny—or else remand to the district court to do so—which will likely result in one or both of the challenged provisions being struck down.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Constitutional Initiatives in Montana

The Montana Constitution provides that Montana citizens may amend the Constitution by initiative.[1] Petitions that include the full text of the proposed amendment must be signed by at least 10% of Montana voters, including at least 10% of voters in each of two-fifths of the state's legislative districts.[2] The initiative's proponents must then file the petitions with the Secretary of State; if the Secretary determines that the petitions have been signed by the required number of voters, the proposed amendment will be

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[1] MONT. CONST. art. XIV, § 9(1).

[2] *Id.*

published twice each month for the two months leading up to the next state-wide election.[3]

At that election, the proposed amendment will be submitted to the voters, and if a majority of the voters approve the initiative, the amendment becomes a part of the Constitution.[4]

B. 2006 Fraud and Legislative Response

Understanding the context of the instant case requires looking at the events of the 2006 elections in Montana. That year, proponents of three initiatives submitted their signed petitions with the requisite signatures to election officials.[5] Parties opposing the initiatives subsequently filed a complaint alleging that the proponents' signature gatherers had obtained signatures in a deceptive manner and had perjured themselves in swearing to the contents on the form affidavits.[6] Following a bench trial in Montana district court, the court found that the proponents had engaged in fraud and procedural non-compliance in the gathering of signatures.[7] The proponents had relied primarily on paid out-of-state petition circulators to obtain the vast majority of signatures, and had paid the circulators based on the number of signatures they obtained.[8] The district court determined that the signature gatherers (1) falsely attested that they personally gathered the signatures when they were actually gathered by other persons, (2) used false addresses on their certification affidavits, and (3) employed deceitful "bait and switch" tactics when interacting with voters.[9] The Montana Supreme Court affirmed the district court's findings and its order invalidating the Secretary of State's certification of the initiatives.[10]

In 2007, the Montana Legislature responded to the prior year's instances of fraud by passing Senate Bill 96, requiring persons circulating an initiative petition to be Montana residents, and prohibiting their compensation based on the number of

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[3] *Id.* art. XIV, § 9(2).
[4] *Id.* art. XIV, § 9(3).
[5] Montanans for Just. v. State, 146 P.3d 759, 764 (Mont. 2006).
[6] *Id.* at 764–65.
[7] *Id.* at 763.
[8] *Id.*
[9] *Id.* at 770.
[10] *Id.* at 778.

signatures gathered.[11] The relevant provisions were codified at Montana Code Annotated § 13-27-102(2).[12]

C. Current Litigation and Procedural Posture

In March 2018, Paul Jacob came to Montana to form a committee to secure ballot access for an initiative that would amend the Montana Constitution to limit voting in state elections to United States citizens.[13] In April 2018, Montanans for Citizen Voting was incorporated for this purpose.[14] Jacob solicited bids for the petition drive from two firms: Advanced Micro Targeting ("AMT"), based in Texas, and Silver Bullet, based in Wyoming.[15] AMT bid $500,000 for the petition drive, and although AMT expressly stated it would not pay signature gatherers based on the number of signatures obtained—because AMT believed such a compensation system encouraged fraud—Jacob was concerned about the effect Montana's per-signature compensation ban would have on the petition drive, as well as the residency requirement.[16] Silver Bullet bid $469,000 to obtain 80,000 signatures, and additionally agreed that if Montana officials were enjoined from enforcing the residency requirement and pay-per-signature ban, Silver Bullet would charge one dollar less per signature.[17]

On May 9, 2018, Montanans for Citizen Voting, alongside Jacob's Liberty Initiative Fund; Montana Coalition for Rights—a lobbying group involved in advancing previous ballot initiatives in Montana[18]—and its founder Nathan Pierce; and Sherri Ferrell, a professional signature gatherer who performed initiative petitioning services across the country[19] (collectively "MCV") filed suit in United States District Court for the District of Montana.[20] Naming then-Secretary of State Corey Stapleton and Attorney General Tim Fox (collectively "the State") as defendants in their official capacities,[21] MCV asserted that the pay-per-signature ban and

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[11] Pierce v. Stapleton, 505 F. Supp. 3d 1059, 1064 (D. Mont. 2020); *see* MONT. CODE ANN. § 13-27-102(2) (2007) ("A person gathering signatures for the initiative, the referendum, or to call a constitutional convention: (a) must be a resident . . . of the state of Montana; and (b) may not be paid anything of value based upon the number of signatures gathered.").
[12] *See* § 13-27-102(2).
[13] *Pierce*, 505 F. Supp. at 1064–65.
[14] *Id.* at 1064.
[15] *Id.* at 1065.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1064.
[19] *Id.*
[20] *Id.* at 1065.
[21] *Id.* at 1059.

residency requirement in § 13-27-102(2) violated the First and Fourteenth Amendments of the United States Constitution.[22]

The July 22, 2018 deadline for submitting signatures for the 2018 election passed without MCV attempting to qualify its citizen-voting initiative for the ballot.[23] MCV and the State filed cross-motions for summary judgment,[24] and on December 4, 2020, the district court granted the State's motion,[25] finding that MCV failed to show that either of the challenged restrictions on signature gathering violated their rights under the First and Fourteenth Amendments.[26]

D. District Court's Reasoning

In granting summary judgment for the State, the district court agreed with MCV that speech associated with petition circulation involves "interactive communication concerning political change" and is therefore political speech protected by the First Amendment.[27] However, the court also noted that the power to propose ballot initiatives is a state-created right, not one protected by the federal constitution,[28] and cited Ninth Circuit precedent in *Prete v. Bradbury*[29] establishing that "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to the election processes generally."[30]

The district court cited the United States Supreme Court's *Anderson-Burdick* framework for evaluating the constitutionality of a ballot access measure that is challenged on First Amendment grounds, in which "the character and magnitude of the asserted injury" to the plaintiffs' rights are weighed against "the precise interests put forward by the State as justifications for the burden imposed by its rule," considering "the extent to which those interests

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[22] *Id.* at 1062; *see* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").
[23] *Pierce*, 505 F. Supp. at 1065–66.
[24] *Id.* at 1062.
[25] Appellants' Opening Brief at 11, *Pierce v. Jacobsen*, No. 21-35173 (9th Cir. July 2, 2021), https://perma.cc/C6G2-ML5H.
[26] *Pierce*, 505 F. Supp. at 1075–76.
[27] *Id.* at 1066 (quoting Meyer v. Grant, 486 U.S. 414, 422 (1988)).
[28] *Id.* at 1067 (citing *Meyer*, 486 U.S. at 424).
[29] 438 F.3d 949 (9th Cir. 2006).
[30] *Pierce*, 505 F. Supp. at 1066–67 (quoting Prete v. Bradbury, 438 F.3d 949, 961 (9th Cir. 2006)).

make it necessary to burden the plaintiff's rights."[31] Applying this framework to Montana's residency requirements for signature gatherers, the district court found that MCV failed to demonstrate "that there are not enough Montana residents to serve as circulators or that Montana residents are inferior communicators" and offered "little to no actual evidence that the residency requirement put a limitation on the voices or the audience they were able to reach."[32]

In addition to citing the United States Supreme Court in *Meyer v. Grant*,[33] regarding burdens on political speech arising from state regulation of petition circulation—including regulations that make it less likely that proponents will obtain the requisite number of signatures[34]—the district court also cited the Ninth Circuit in *Angle v. Miller*,[35] where the court of appeals held that strict scrutiny only applied when a reasonably diligent campaign could not normally secure its initiative on the ballot, as a result of such regulations creating a severe burden on the proponents' speech.[36] Applying this *Angle* test, the district court determined that MCV did not act with reasonable diligence, as the proponents of the citizen-voting initiative waited until April 2018 to incorporate, and in May 2018, instead of gathering signatures, MCV filed a lawsuit and took no further steps to qualify the initiative for either the 2018 or 2020 ballots.[37] The district court therefore could not conclude that the residency requirement created a severe burden on MCV's rights, and thus held that there was no basis to apply strict scrutiny.[38] The court determined that the State's regulatory interests were sufficient to uphold the residency requirement in § 13-27-102(2), and granted summary judgment to the State on that claim.[39]

Regarding MCV's First Amendment challenge to the prohibition on per-signature compensation, the district court again cited *Prete*, where the court of appeals upheld Oregon's ban on paying signature gatherers on a per-signature basis,[40] in part because the challengers' assertions—regarding the difficulty of signature gathering under state election law— were based on "unsupported

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[31] *Id.* at 1067 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)) (internal quotation marks omitted); *see also* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
[32] *Id.* at 1070.
[33] 486 U.S. 414 (1988).
[34] *Pierce*, 505 F. Supp. at 1067 (citing Meyer v. Grant, 486 U.S. 414, 422–23 (1988)).
[35] 673 F.3d 1122 (9th Cir. 2012).
[36] *Pierce*, 505 F. Supp. at 1067 (citing Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012)).
[37] *Id.* at 1071.
[38] *Id.* at 1072.
[39] *Id.* at 1072–73.
[40] *Id.* at 1073 (citing Prete v. Bradbury, 438 F.3d 949, 951 (9th Cir. 2006)).

speculation," and the Oregon law thus constituted a lesser burden under the *Anderson-Burdick* framework which was not subject to strict scrutiny.[41] In applying *Prete* to MCV's claims, the district court found that the MCV's assertion that the pay-per-signature ban constituted a severe burden was similarly speculative and unsupported by the record.[42] In applying "a relaxed level of scrutiny," the court determined that the State's interests were sufficient to uphold the pay-per-signature prohibition in § 13-27-102(2),[43] and granted summary judgment to the State on that claim as well.[44]

III. SUMMARY OF THE ARGUMENTS

A. Appellants' Arguments

On appeal, MCV offers two arguments: (1) The district court should have applied a strict scrutiny analysis to MCV's challenge to Montana's residency requirement; and (2) the district court should have applied strict scrutiny to MCV's challenge to Montana's ban on compensating professional petition circulators based on the number of valid signatures collected.

First, MCV asserts that strict scrutiny is the correct standard of review for the residency requirement because those restrictions impose a severe burden on First Amendment speech.[45] MCV concedes that lesser burdens require a less exacting level of scrutiny,[46] but cites the Ninth Circuit case *Nader v. Brewer*,[47] asserting that the severity of the burden is assessed based on the number of people the residency requirement excludes from gathering signatures.[48] MCV discusses how, in *Nader*, the court applied strict scrutiny to Arizona's residency requirement for candidate ballot access petitions because the law reduced the pool of available signature gatherers.[49] MCV argues that by excluding all individuals outside Montana, § 13-27-102(2) constitutes a severe burden,[50] and like the Arizona law in *Nader*, § 13-27-102(2) is not narrowly tailored, because the state could instead require that non-

[41] *Id.* (citing *Prete*, 438 F.3d at 964–65).
[42] *Id.*
[43] *Id.*
[44] *Id.* at 1075.
[45] Appellants' Opening Brief, *supra* note 25, at 23.
[46] Appellants' Opening Brief, *supra* note 25, at 18 (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358–59 (1997)).
[47] 531 F.3d 1028 (9th Cir. 2008).
[48] Appellants' Opening Brief, *supra* note 25, at 28 (citing Nader v. Brewer, 531 F.3d 1028, 1035–36 (9th Cir. 2008)).
[49] Appellants' Opening Brief, *supra* note 25, at 20.
[50] Appellants' Opening Brief, *supra* note 25, at 33

resident signature gatherers submit to Montana's jurisdiction, rather than impose a blanket ban.[51]

Second, MCV argues that the district court should have also applied strict scrutiny to the ban on compensating signature gatherers based on the number of valid signatures collected.[52] MCV asserts strict scrutiny is the appropriate standard of review because the compensation ban imposes a severe burden on political speech by (1) making it less likely that the initiative proponents will gather the requisite number of signatures, (2) reducing the pool of available signature gatherers, (3) eliminating the professionals who are best able to convey the initiative's message, (4) reducing the size of the audience the proponents can reach, and (5) increasing the overall cost of signature gathering.[53] In arguing that § 13-27-102(2) is not narrowly tailored, MCV asserts that Montana could discourage fraud by allowing compensation based on *valid* signatures gathered, as opposed to compensation based on *all* signatures regardless of validity.[54] MCV argues that Montana could additionally protect against fraud by implementing a registration system, whereby signature gatherers would be required to register with the Secretary of State and provide proof of their identity and current legal address before starting work circulating any petitions.[55] MCV also argues that the State's restrictions are underinclusive because they do not apply to signature campaigns that seek to qualify political candidates for the ballot.[56]

B. Appellees' Arguments

In response, the State—with current Secretary of State Christi Jacobsen and Attorney General Austin Knudsen automatically substituted for Corey Stapleton and Tim Fox[57]—argues that (1) the district court was correct in determining that the provisions of § 13-27-102(2) do not impose a severe burden on MCV, and (2) even if strict scrutiny does apply, the statute survives.

First, the State argues that neither the residency requirement nor the pay-per-signature ban constitutes a severe burden on MCV's political speech.[58] The State cites Ninth Circuit precedent that the severity of the burden imposed by an election law is a question of

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[51] Appellants' Opening Brief, *supra* note 25, at 41–42.
[52] Appellants' Opening Brief, *supra* note 25, at 44.
[53] Appellants' Opening Brief, *supra* note 25, at 17–18.
[54] Appellants' Reply Brief at 19, *Pierce v. Jacobsen*, No. 21-35173 (9th Cir. Oct. 22, 2021), https://perma.cc/RH2W-2URK.
[55] Appellants' Opening Brief, *supra* note 25, at 54.
[56] Appellants' Reply Brief, *supra* note 54, at 21.
[57] Brief of Appellees at 1 n.1, *Pierce v. Jacobsen*, No. 21-35173 (9th Cir. Sep. 1, 2021), https://perma.cc/AGZ2-C739.
[58] Brief of Appellees, *supra* note 57, at 16.

fact, not a question of law.[59] The State then notes the district court's finding that MCV failed to show actual evidence—such as data, expert opinion, or comparison information—of the burden caused by the residency requirement, and contends that MCV's brief continues to provide only conclusory and speculative claims.[60] The State also notes that much of the authority MCV cites regarding challenges to residency requirements in other states—including the Ninth Circuit decision in *Nader*—were cases dealing with candidate petitions, not ballot initiatives, and are therefore irrelevant.[61] Of MCV's cases that the State acknowledges are relevant, the State distinguishes the facts in those cases from the facts here, as the challengers to the residency requirements cited by MCV had actually launched initiative drives, and had either failed to obtain the requisite number of signatures or had been inhibited in recruiting quality signature gatherers as a result of the restrictions.[62] In addition, the states in those cases had not shown any history of fraud committed by non-resident signature gatherers, in contrast to Montana's experience.[63]

Regarding the ban on per-signature compensation, the State asserts that *Prete* controls, and in that case, the Ninth Circuit rejected similar arguments that a pay-per-signature ban severe burdened the plaintiffs, *e.g.*, by allegedly reducing the pool of signature gatherers, creating higher costs, and making it more difficult to obtain valid signatures.[64] The State asserts that MCV's relies on irrelevant authority to evade the clear applicability of *Prete*.[65]

Finally, the State argues that even if the court were to apply strict scrutiny, the provisions of § 13-27-102(2) should be upheld because, in addition to Montana's compelling interest in election integrity, the statute is narrowly tailored to target the specific abuses that Montana has actually experienced[66]—fraud committed by non-resident circulators, who were compensated on a per-signature basis.[67]

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[59] Brief of Appellees, *supra* note 57, at 16 (citing Democratic Party of Hawaii v. Nago, 833 F.3d 1119, 1122–23 (9th Cir. 2016)).
[60] Brief of Appellees, *supra* note 57, at 17–18.
[61] Brief of Appellees, *supra* note 57, at 22.
[62] Brief of Appellees, *supra* note 57, at 23–24.
[63] Brief of Appellees, *supra* note 57, at 25.
[64] Brief of Appellees, *supra* note 57, at 28 (citing Prete v. Bradbury, 438 F.3d 949, 963–66 (9th Cir. 2006)).
[65] Brief of Appellees, *supra* note 57, at 31.
[66] Brief of Appellees, *supra* note 57, at 35–36.
[67] Brief of Appellees, *supra* note 57, at 44.

IV. ANALYSIS

As both sides note in their briefs, the crux of these issues comes down to whether § 13-27-102(2) places such a burden on protected political speech that strict scrutiny applies, and thus the district court erred in applying only a "less exacting scrutiny."[68]

As the United States Supreme Court has held, "[r]egulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest," while lesser burdens "trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[69] However, "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."[70]

By arguing that the residency requirement's effect of reducing the pool of available signature gatherers warrants strict scrutiny, MCV arguably suggests a bright-line test. However, MCV's strongest argument comes in its citations to *Nader*, where the Ninth Circuit held—relying on the United States Supreme Court's opinion in *Buckley v. American Constitutional Law Foundation, Inc.*[71]—that "significantly reducing the number of potential circulators impose[s] a severe burden on rights of political expression."[72] The State responds by attempting to distinguish *Nader* as applying only to candidate petitions, but fails to say more as to why the same rule would not apply to initiative petitions, especially in considering that the latter had been the subject of the Court's opinion in *Buckley*.[73]

However, as the State argues more effectively, the court will look to the facts of the case, and as the district court noted in its summary judgment order, the Ninth Circuit provided in *Angle*—four years after *Nader*—the test for determining what facts create a severe burden on initiative proponents:

> [A]s applied to the initiative process, we assume that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot.
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> This is similar to the standard we apply to ballot access restrictions regulating candidates. In that

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[68] *See* Pierce v. Stapleton, 505 F. Supp. 3d 1059, 1068 (D. Mont. 2020).
[69] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).
[70] *Id.* at 359.
[71] 525 U.S. 182 (1999).
[72] Nader v. Brewer, 531 F.3d 1028, 1036 (9th Cir. 2008) (citing Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 194–95 (1999)).
[73] *See Buckley*, 525 U.S. at 205.

> setting, we have held that 'the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, *reasonably diligent* candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so.'[74]

In determining the appropriate level of scrutiny, the court in *Angle* went on to say:

> [The plaintiffs] have not presented any evidence that, despite *reasonably diligent* efforts, they and other initiative proponents have been unable to qualify initiatives for the ballot as a result of the geographic distribution requirement imposed by the [challenged law]. On this record, no severe burden has been shown. Strict scrutiny therefore does not apply.[75]

Between the enactment of § 13-27-102(2) in 2007 and the district court's summary judgment order in December 2020, 14 initiative petitions qualified for the ballot in Montana.[76] This average of two initiatives on the ballot for each biennial state-wide election would indicate that initiative proponents in Montana can, in fact, normally gain a place on the ballot when exercising reasonable diligence.

In addition, although MCV cites *Nader* extensively throughout its brief, nowhere does MCV acknowledge *Angle* or this reasonable diligence test—which the court borrowed from its prior opinion in *Nader.*

Because MCV did not exercise any reasonably diligent efforts, having never actually started the initiative campaign, and instead brought this litigation in hopes of receiving injunctive relief from § 13-27-102(2) before commencing the signature drive, MCV cannot demonstrate a severe burden on its First Amendment rights under *Angle*'s test.

Further, the court of appeals stated in *Angle*—citing *Prete*—that because the plaintiffs' failed to show the challenged law imposed severe burdens, the state needed only to show that the law furthered "an important regulatory interest."[77] Because MCV does not contest in its briefs that the State has such important interests, and because the State asserts in its brief that this interest is one the

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[74] Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012) (quoting *Nader*, 531 F.3d at 1035) (internal quotation marks omitted) (emphasis added).
[75] *Id.* at 1134 (emphasis added).
[76] Pierce v. Stapleton, 505 F. Supp. 3d 1059, 1071 (D. Mont. 2020).
[77] *Angle*, 673 F.3d at 1134–35 (citing Prete v. Bradbury, 438 F.3d 949, 969 (9th Cir. 2006)).

court should find compelling,[78] the State has likely satisfied its burden in justifying the provisions of § 13-27-102(2).

Angle's broad language would apparently help to answer the question of burdens for both the residency requirement and the pay-per-signature ban. However, the district court cited *Angle* only in its discussion of the former, and the State does not rely on *Angle* in its brief except for one citation in the introduction of its argument.[79]

Turning to Montana's ban on per-signature compensation, the district court relied primarily on the court of appeals in *Prete*, holding that unsupported speculation regarding the difficulty of signature gathering is not adequate to show a severe burden. MCV attempts to distinguish the *Prete* plaintiffs' "incomplete factual record" from its own "undisputed and unequivocal record," but in expanding on this record, MCV proceeds to state only a series of conclusory statements based on deposition testimony, an anecdote about "a lady, being paid $15.00 per hour in her home, doing nothing," an excerpt from a 2011 veto message by then-California governor Jerry Brown, and testimony from a witness who "does not disagree" with the sentiments in Governor Brown's 2011 message.[80] Therefore, even without *Angle*, Ninth Circuit precedent under *Prete* would lead to the conclusion that MCV's arguments, lacking evidence and based on speculation, fail to show that the pay-per-signature ban in § 13-27-102(2) severely burdens its rights.

Thus, the court of appeals will likely side with the appellees and affirm the district court's grant of summary judgment for the State regarding the per-signature compensation ban. The court of appeals will likely also affirm regarding the residency requirement, but given *Nader*, this is a closer call.

V. CONCLUSION

In considering, first, the sum of applicable Ninth Circuit precedent on election restrictions and their burden on First Amendment speech; next, the history of specific abuses that prompted the Montana Legislature to enact the residency requirement and ban on per-signature compensation for circulators of initiative petitions; and finally, the facts of this litigation—in particular, that MCV never actually attempted to gather signatures to qualify its initiative for the ballot—the court of appeals will likely affirm the district court's determination that strict scrutiny does not apply to either provision in § 13-27-102(2) and affirm the grant of summary judgment for the State in MCV's claims against it. However, given that the question of scrutiny for the residency

[78] Brief of Appellees, *supra* note 57, at 35–36.
[79] *See* Brief of Appellees, *supra* note 57, at 14.
[80] Appellants' Opening Brief, *supra* note 25, at 47–49.

requirement is a closer call, the court's decision may depend on whether the State, at oral argument, can more adequately distinguish the challenged law in *Nader* from this statute and the precedents that apply.