No. 10-35174

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE KELLY and CLARICE DREYER,
Plaintiffs–Appellants

v.

LINDA McCULLOCH, in her official capacity as
Secretary of State of the State of Montana,
Defendant–Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

APPELLANTS' REPLY BRIEF

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I. McCulloch misrepresents the facts.

The two sides in this appeal present very different views of the facts. In our opening brief, we described a ballot-access scheme that has made it virtually impossible for independent candidates for the U.S. Senate to get on Montana's ballots. In fact, no such candidates have appeared on the ballots since 1936. In her response, McCulloch paints a picture of a ballot-access scheme that has seen hundreds of independent and minor-party candidates on the state's ballots over the last 120 years.

What accounts for the difference? McCulloch includes so-called minor-party candidates and candidates for offices other than U.S. Senate, and we do not.

There are three reasons why we don't include so-called minor-party candidates in our view of the relevant facts.

First, McCulloch's so-called minor parties are not minor parties under Montana law. McCulloch's brief uses the term "minor party" in the vernacular sense to refer to any party other than the Democratic or Republican parties. She includes candidates of the Libertarian and Constitution parties, for example, in her tally of "independent and minor-party candidates." This makes sense in the

vernacular, but it does not correspond to any distinction in Montana law.

Under Montana law, the term "minor party" means a political party that has not qualified to nominate candidates by primary election. Section 13-10-604 of the Montana Code is entitled "Nominations for minor parties," and it provides that minor parties may nominate candidates "as provided in 13-10-501 through 13-10-505." Those provisions detail the nomination procedures for independent candidates and "political parties not eligible to nominate by primary election." Mont. Code Ann. § 13-10-501. *See also* Mont. Code Ann. §§ 13-10-504 ("Independent or minor party candidates for president or vice president"), 13-10-601 ("Parties eligible for primary election--petitions by minor parties"). The Constitution and Libertarian parties are currently qualified to nominate by primary election, so they are not minor parties under Montana law.[1] Including their candidates in a tally of "independent and minor-party candidates" is therefore inconsistent with Montana law.

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[1] *See* http://sos.mt.gov/elections/Parties/index.asp.

Second, the ballot-access scheme for McCulloch's so-called minor parties is different from the ballot-access scheme for actual minor parties. *Compare* Mont. Code Ann. §§ 13-10-201 to -203 (rules for qualified-party candidates) *with* Mont. Code Ann. §§ 13-10-501 to -504 (rules for independent candidates and parties not eligible to nominate by primary election). McCulloch's so-called minor parties nominate by primary election, and their nominees appear automatically on the general-election ballot. Mont. Code Ann. § 13-10-202(4). The party can nominate a candidate for each partisan office, and no petitions are required for any candidates.

An unqualified party can become qualified, moreover, by submitting a single petition containing the signatures of only 5,000 registered voters. Mont. Code Ann. § 13-10-601(2). The party can then remain ballot-qualified by having one of its statewide candidates in the last two elections receive votes surpassing 5% of the votes cast in the last election for governor. Mont. Code Ann. § 13-10-601(1).

Actual minor parties, by contrast, must comply with the nominating procedures for independent candidates. Mont. Code Ann. § 13-10-501(1). They must submit a nominating petition and a

filing fee for each candidate in each election. *Id.* The petition for each candidate must contain signatures of eligible voters equal in number to 5% of the votes cast for the successful candidate for the office in the last general election—which, for statewide candidates, is generally more than 10,000 signatures. Mont. Code Ann. § 13-10-502(2). The petition is due one week before the filing deadline for qualified-party primary candidates, 92 days before the primary election for qualified parties, and approximately 250 days before the general election at which the unqualified party seeks to have its candidate appear on the ballot. Mont. Code Ann. § 13-10-503(1). The route to the ballot for candidates of McCulloch's so-called minor parties is thus very different from the ballot-access scheme for actual minor parties under Montana law.

Third, Kelly and Dreyer aren't challenging the ballot-access scheme for McCulloch's so-called minor parties. The verified complaint does mention "minor-party candidates," but it uses the term in the manner defined by Montana law. That is, it uses "minor party" to mean a party that has not qualified to nominate by primary election. Even so, the plaintiffs long ago stopped using the term "minor-party candidates" in this case because of the potential

for confusion with the vernacular meaning of the term and because Kelly actually wanted to be on the ballot as a true independent and not as the candidate of an unqualified party. (R.E. 657-58.)

We have generally not included candidates for offices other than U.S. Senate in our description of the facts because Kelly did not want to be a candidate for any other office. This has always been an as-applied challenge by a would-be independent Senate candidate. The plaintiffs do not claim, for example, that Montana's ballot-access scheme is unconstitutional as applied to the Libertarian Party or to state legislative candidates. It may be, but that's not the issue in this case.

We made it clear in the district court that Kelly and Dreyer aren't challenging the ballot-access scheme for McCulloch's so-called minor parties or as applied to candidates for other offices. (R.E. 79-84.) McCulloch likely persists in including so-called minor parties and candidates for other offices in her view of the facts because their inclusion paints a much rosier picture. But she does not alert the reader of her brief to this factual sleight of hand, nor does she offer any justification for using inflated numbers. The result is a very misleading picture of Montana's ballot-access

scheme for candidates like Kelly who choose not to affiliate with one of the qualified political parties.

For example, McCulloch asserts on page two of her brief that "more than 200 statewide independent and minor party candidates have qualified for the general-election ballot" since Montana became a state in 1889. (Appellee's Br. 2.) A review of the record reveals that there have indeed been more than 200 so-called minor-party candidates but only five independent candidates—only one of which was a candidate for the U.S. Senate—and there is no evidence of any candidates of an actual "minor party" as that term is used in Montana law. (R.E. 371-76.)

On page six of her brief, McCulloch claims that "[o]ver 200 minor party and independent candidates for state offices have qualified for the ballot in Montana since 1970, including 36 independents." (Appellee's Br. 6.) The record shows that there have indeed been 36 independent candidates for state offices—all of them for state legislative offices. (R.E. 380.) There have been about 190 candidates of so-called minor parties (all of which were qualified parties), but there is no evidence of candidates of actual minor parties. (R.E. 377-79.) McCulloch also claims that 46 of "those" so-

called minor-party and independent candidates appeared on the ballot for a statewide nonpresidential office. (Appellee's Br. 6.) Here she is including federal and state offices, and there have indeed been 46 such candidates since 1970. (R.E. 374-75.) All but one of those candidates came from a qualified party.

Similar misrepresentations permeate McCulloch's brief. At several points, McCulloch implies either that the ballot-access rules for so-called minor parties are the same as those for independent candidates or that we have challenged the ballot-access rules for so-called minor parties, neither of which is true. (Appellee's Br. 27, 45, 60-61.) She claims, for instance, that "hundreds of minor parties and independent candidates have achieved ballot access *under the rules at issue*." (Appellee's Br. 27 (emphasis added).) As we noted above, the number of signatures for party qualification are lower than the number of signatures required of a U.S. Senate candidate, and the party can run an unlimited number of candidates after filing a single petition. It is beyond a stretch to say that the Libertarian Party's candidates achieved ballot access under the rules at issue in this appeal.

McCulloch also refers at several points to statistical analysis performed by her expert witness, Professor Todd Donovan, who found no statistical relationship between Montana's filing deadline and the number of so-called minor-party and independent candidates on the ballot. (Appellee's Br. 30, 36, 37, 41, 45-46.) Like McCulloch's brief, Donovan's analysis includes so-called minor-party candidates alongside independent candidates and candidates of actual minor parties (all of which he calls "non-major party candidates") even though the ballot-access rules are quite different. (R.E. 228.) In his deposition, moreover, Donovan admitted that there is a statistically significant relationship between the number of signatures required and the number of *independent* candidates that appear on the ballot. (R.E. 111, 125.) Donovan even went so far as to admit that his analysis shows that Montana's ballot-access scheme for independent Senate candidates is burdensome enough that one can expect that there will be no such candidates on the ballot. (R.E. 111-18.)

As should now be apparent, McCulloch has twisted the facts to paint a much rosier picture of ballot access for independent candidates than actually exists. The reality is that independent

candidates and true minor-party candidates have been almost completely shut out of Montana's elections. There hasn't been an independent statewide non-presidential candidate on Montana's ballots since 1994, when the filing deadline was in June.

II. Kelly and Dreyer have standing.

In our opening brief, we argued that the district court improperly granted summary judgment on standing despite at least a genuine issue about the timing of Kelly's decision to run and despite this Circuit's well-established law on voter standing in ballot-access cases. (Appellants' Br. 28-32.) In her response, McCulloch does not discuss either point, and she spends not a word defending the district court's ruling that both Kelly and Dreyer lack standing as a matter of law because Kelly did not actually decide to run for office until more than a week *after* Kelly filed his verified complaint in which he affirmatively declared that he wanted to run. She also doesn't dispute our argument that both Kelly and Dreyer have standing as voters to challenge Montana's ballot-access scheme for independent Senate candidates.

Instead, McCulloch simply repeats the argument she made in the district court that Kelly lacks standing because he didn't submit

any signatures or take any other official steps to become a candidate even though doing so would have been futile. (Appellee's Br. 18-21.)

That is not the law in this or any other circuit. The Ninth Circuit has repeatedly held that "standing does not require exercises in futility." *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002). Submitting a petition after the deadline or without the required number of signatures or filing fee would have been futile because the Secretary of State has no discretion under Montana law to accept a petition that comes in after the deadline or without the required number of signatures and filing fee. Filing a petition was therefore not necessary to establish a constitutional injury.

The plaintiffs established constitutional injury in their verified complaint and discovery on file, which provide sufficient evidence that Kelly was qualified to run for the Senate as an independent candidate and that he wanted to do so. *See, e.g., Jackson v. Ogilvie*, 325 F. Supp. 864, 865-66 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971). That injury is fairly traceable to the ballot-access scheme that he challenges (in the absence of which he would have been on the ballot) and to the Secretary of State's conduct as the state official

who receives petitions and certifies independent Senate candidates for the ballot. And because the district court has the power to issue declaratory and injunctive relief prohibiting the enforcement of the statutes at issue, the injury is sufficiently redressable in this suit. *See, e.g., Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000).

It is also well established in the Ninth Circuit that a would-be candidate has standing as a voter to challenge a state's ballot-access laws even if those laws played no role in keeping the candidate off the ballot. In *Erum v. Cayetano,* 881 F.2d 689 (9th Cir. 1989), the State of Hawaii argued that a would-be candidate had no standing to challenge a particular piece of that state's ballot-access scheme, known as Section 12-41, because that piece played no role in the candidate's absence from the ballot. *Id.* at 691. The Ninth Circuit expressly rejected this argument:

> Erum brought this action in his capacity as a registered voter of the State of Hawaii as well as in his capacity as an erstwhile and potentially future candidate. Candidate eligibility requirements implicate basic constitutional rights of voters as well as those of candidates....Therefore, even if the Lieutenant Governor's contention is meritorious, Erum possesses standing to challenge the whole of section 12-41's ballot access restrictions in his capacity as a registered voter.

Id. (citations omitted). This obviously means, by extension, that a would-be candidate need not submit any petition signatures before he or she has standing to challenge a state's petition requirement. The candidate need not submit petitions late in order to challenge the filing deadline. And the candidate need not withhold a check before challenging its filing fee. Under *Erum,* both of the plaintiffs here have standing as voters to challenge Montana's ballot-access scheme.

Other circuits have been even clearer on this issue. *See Nader v. Keith,* 385 F.3d 729, 735 (7th Cir. 2004) (Posner, J.) ("There would be no question of [the candidate's] standing to seek [an injunction placing his name on the ballot] in advance of the submission or even collection of any petitions."); *Texas Indep. Party v. Kirk,* 84 F.3d 178, 187 (5th Cir. 1996) (independent candidate for Senate had standing to challenge ballot-access statute even though he had not submitted any petitions); *Stevenson v. State Bd. of Elections,* 638 F. Supp. 547, 549 (N.D. Ill. 1986) (failure to tender petition and have it rejected does not deprive candidate of standing), *aff'd,* 794 F.2d 1176 (7th Cir. 1986); *see also Anderson v. Hooper,* 498 F. Supp. 898, 901-02 (D.N.M. 1980) (independent

candidate had standing to challenge ballot-access statutes even though he had failed to submit any petitions). No circuit has held otherwise.

The principle that a would-be candidate need not submit petitions in order to challenge a ballot-access scheme is also consistent with unquestioned Supreme Court practice. In *Williams v. Rhodes,* 393 U.S. 23, 28 (1968), the Supreme Court granted declaratory relief to the Socialist Labor Party even though the party had submitted no petitions before bringing its challenge to Ohio's ballot-access scheme. Similarly, in *Storer v. Brown,* 415 U.S. 724 (1974), the Supreme Court vacated the judgment against would-be candidate Gus Hall even though he had submitted no signatures before challenging California's ballot-access laws. And, in *McCarthy v. Briscoe,* 429 U.S. 1317, 1319 (1976), Justice Powell, sitting as a circuit justice, ordered Texas to put Eugene McCarthy's name on the presidential ballot even though McCarthy had submitted no petitions and made no attempt to qualify for the ballot under current or former Texas law.

Other examples are legion. *See, e.g., Lee v. Keith,* 463 F.3d 763, 765 (7th Cir. 2006) (entertaining challenge to ballot-access

scheme even though candidate had not submitted any signatures); *Lendall v. Bryant,* 387 F. Supp. 397, 401 (E.D. Ark. 1975) (three-judge district court) (per curiam); *Libertarian Party v. Ehrler,* 776 F. Supp. 1200, 1202-03 (E.D. Ky. 1991) (reviewing relevant cases). *Cf. Sporhase v. Nebraska,* 458 U.S. 941, 944 n.2 (1982) (failure to submit permit application does not deprive plaintiff of standing to challenge permit requirements)*; Nyquist v. Mauclet,* 432 U.S. 1, 6 n.7 (1977) (plaintiff need not have applied for a loan to challenge loan requirements).

McCulloch complains that we have failed to cite even one case in which a candidate "has not declared a candidacy, gathered a signature, identified supporters, or prepared or filed paperwork for a candidacy or party status, or even expressed an interest in a future candidacy." (Appellee's Br. 19.) There are three problems with this assertion.

First is that it isn't true. In responding to this argument in the district court, we cited *Ehrler* and *Lee*, both of which fit McCulloch's description. (R.E. 78.) We could also have cited *Jackson v. Ogilvie* or the recent case of *Daien v. Ysursa,* ___ F. Supp. 2d ____, 2010 WL 1815999 (D. Idaho May 5, 2010), in which the court held that a

potential petition-circulator had standing to challenge Idaho's ballot-access scheme for independent presidential candidates. Second, McCulloch's laundry list of factors doesn't accurately describe this case. Kelly has gathered signatures in the past; he identified at least one supporter (Dreyer); and he expressed an interest in a future candidacy. (R.E. 659-60.) There is no dispute that Kelly is a longtime political activist and a viable candidate for statewide office in Montana. Third, McCulloch hasn't established that all of those factors matter. To the contrary, the overwhelming weight of authority and the law of this Circuit make clear that they do not.

The facts that do matter here are not in dispute. Kelly and Dreyer are eligible voters. (R.E. 452.) Kelly was qualified to run for the Senate as an independent candidate. (R.E. 453.) And, while there appears to be a dispute about *when* Kelly decided to run for office and what he did about it, there is no dispute that Kelly did, in fact, want to run for the U.S. Senate as an independent candidate. (Appellee's Br. 12.) Under these circumstances, Kelly and Dreyer had standing to bring this case.

III. Joining or forming a political party is no substitute for an independent candidacy.

The gravamen of McCulloch's brief on the merits is that the relatively high number of so-called minor-party candidates that have appeared on Montana's ballots somehow excuses the almost complete absence of independent candidates. After all, she argues, Kelly could have sought ballot access under the aegis of an existing party or formed one of his own. (Appellee's Br. 37-41.)

The Supreme Court considered—and rejected—this very argument in *Storer*. The State of California argued that Gus Hall's challenge to that state's signature requirement for independent candidates should fail because California had provided a valid way for new political parties to qualify for ballot position. *Storer*, 415 U.S. at 744. (Although he sought access as an independent, Hall had long been identified with the Communist Party.) The Supreme Court flatly rejected the argument: "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Id.* at 745. And, finding "no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political

party," the Court vacated and remanded the judgment against Hall. *Id.* at 746.

The Supreme Court reaffirmed *Storer*'s holding two years later in *McCarthy v. Briscoe*, 429 U.S. at 1320, and other circuit courts have applied it in rejecting arguments identical to the one now offered by McCulloch. *See, e.g., Lee v. Keith*, 463 F. 3d 763, 772 (7th Cir. 2006); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 592 (6th Cir. 2006); *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir. 1980).

On pages 28 and 29 of her brief, McCulloch claims that "the proper inquiry" is whether we have cited a case in which a court has invalidated a filing deadline that has produced "so many independent and minor-party candidates." (Appellee's Br. 28-29.) We have. We have cited *Nader v. Brewer,* in which this Court struck down Arizona's ballot-access scheme for independent candidates despite that state's long and robust history of ballot access for minor parties. *See Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008),

cert. denied, 129 S. Ct. 1580 (2009) (mem.).[2] We have also cited *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d. Cir. 1997), which enjoined New Jersey's April filing deadline for alternative parties despite the fact that "hundreds" of independent and minor-party candidates had been able to qualify for the ballot in the preceding four years. *Id.* at 887 (Scirica, J., dissenting). We don't agree with McCulloch that this is the "proper inquiry," but, if it were, we have satisfied it.

McCulloch's argument, taken to its logical end, is that a state need not even permit independent candidates as long as it allows ballot access for minor parties. That is a notion that Eugene McCarthy put to rest almost 35 years ago, when he ran for president as an independent. Many states at the time did not have any means for an independent candidate to get on the ballot for president. McCarthy successfully sued at least 12 states, several of which had seen hundreds, if not thousands, of minor-party candidates on its ballots. *See, e.g., McCarthy v. Briscoe,* 429 U.S. at 1320 (Texas); *McCarthy v. Askew*, 540 F.2d 1254 (5th Cir. 1976)

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[2] *See generally* http://www.azsos.gov/election/PreviousYears.htm (official statewide canvass results showing more than 380 minor-party candidates between 1974 and 2008).

(Florida); *McCarthy v. Tribbet,* 421 F. Supp. 1193 (D. Del. 1976); *McCarthy v. Exon*, 424 F. Supp. 1143 (D. Neb. 1976); *McCarthy v. Austin,* 423 F. Supp. 990 (W.D. Mich. 1976).

There is at least one additional problem with McCulloch's argument: the government has no business telling Kelly that he should have joined or formed a party. The First Amendment protects not only the freedom to associate with others for the advancement of political beliefs but also the freedom not to associate. *See Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). The choice to run as an independent is no less expressive, or constitutionally protected, than the choice to run as a Democrat or Republican, and it is not the government's place to tell any candidate what his or her message should be.

All of these cases foreclose McCulloch's argument, yet she mentions not one of them. She offers no argument to persuade this Court, notwithstanding the authority, to accept so-called minor-party ballot access as a substitute for a truly independent candidacy. Instead, she relies on the factual slight of hand that we described above, simply conflating the success of candidates

nominated by qualified parties like the Libertarians and Constitutioners with the lack of success of actual independents and implying that both kinds of candidates get on the ballot with the same rules.

When this artifice is stripped away, McCulloch's brief contains no argument that the constitutional burdens here are any lower than they were in *Anderson* or *Nader*. Accordingly, as we argued in our opening brief, this Court should conclude under step one of the *Anderson* test that the ballot-access scheme at issue here imposes heavy constitutional burdens that warrant strict scrutiny in step two.

IV. *Anderson* and *Nader* are controlling.

We argued in our opening brief that *Anderson* and *Nader* should determine the outcome of this case. (Appellants' Br. 47-48, 62-63.) In her response, McCulloch does nothing to distinguish those cases except to note that both dealt with presidential elections. (Appellee's Br. 25.) She doesn't explain, though, why that fact should matter, and we argue that it shouldn't.

It is true that this Court recognized in *Nader* that presidential candidates are "situated differently from candidates for state offices,

or even other federal offices in Arizona." *Nader*, 531 F.3d at 1038. That's because Arizona, like Montana, has different ballot-access rules for presidential candidates than for candidates for other offices. *See id.* In light of that difference, this Court rejected Arizona's argument that its long history of ballot access for independent candidates for non-presidential offices should excuse the fact that no independent presidential candidates had appeared on the state's ballots since 1993, when the legislature changed the filing deadline from late September to June. *See id.* But that does not matter here, because Montana's ballot-access scheme for independent Senate candidates is more burdensome than Arizona's ballot-access scheme for independent presidential candidates. The deadline is earlier, and the signature requirement and filing fee are both higher in Montana.

It is also true that the Supreme Court noted in *Anderson* that Ohio's ballot-access restrictions for presidential candidates "implicate a uniquely important national interest." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). The courts of appeals are divided on the question of whether that fact played any role in the Supreme Court's analysis in *Anderson*, with the most considered

cases taking the position that it did not. *See Hooks*, 121 F.3d at 882 & n.6 (discussing cases); *see, e.g., Cromer v. South Carolina*, 917 F.2d 819, 822 (4th Cir. 1990) (rejecting the distinction). Those taking the opposite position have nonetheless applied the *Anderson* test to the state election challenges before them. *See Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740, 743, 746 n. 9 (10th Cir. 1988); *Dart v. Brown*, 717 F.2d 1491, 1503-04 (5th Cir. 1983). The Ninth Circuit has not yet weighed in on the question. The Supreme Court, however, has applied the *Anderson* test to state election challenges in subsequent cases without mentioning the distinction. *See, e.g., Norman v. Reed*, 502 U.S. 279, 290 (1992).

Furthermore, it is not clear that an election for the U.S. Senate implicates the national interest any less than does a presidential election. Although each state elects its own senators, the Senate has an undeniably national impact. Legislation crafted by that assembly influences the entire country, and the Senate has unique responsibilities under our constitutional system. *See* U.S. Const. art. I, § 3, cl. 6 (trying impeachments); U.S. Const. art. II, § 2, cl. 2 (ratification of treaties and confirmation of presidential appointees).

In any event, if the distinction matters at all, it matters only to the second step in the *Anderson* test, when a court must weigh the interests asserted by the state to justify its restrictions on First Amendment freedoms. *See, e.g., Stevenson v. State Bd. of Elections,* 638 F. Supp. 547, 555 (N.D. Ill. 1986). Because McCulloch flunks step two of the *Anderson* test, as we describe below, the distinction matters not at all in this appeal.

V. McCulloch flunks step two of the *Anderson* test.

McCulloch agrees that this Court must apply the balancing test first set forth in *Anderson v. Celebrezze*, 460 U.S. at 788-89, and later clarified in *Burdick v. Takushi*, 504 U.S. 428 (1992). (Appellee's Br. 24-25.) The second step in that test requires this Court to: (1) "determine the legitimacy and strength of each of [the state interests asserted to justify the challenged scheme];" and (2) to "consider the extent to which those interests make it necessary to burden the [plaintiffs'] rights." *Anderson,* 460 U.S. at 789; *accord Burdick*, 504 U.S. at 434. McCulloch bears the burden of proof on both elements, *see Nader,* 531 F.3d at 1037, and she has failed to meet her burden on the second element in this case.

McCulloch asserts the same four interests that she asserted in the district court. (Appellee's Br. 46-60.) She argues that the ballot-access scheme for independent candidates advances those interests in various ways, but she does not even claim, much less establish, that any of those interests "make it necessary" to burden Kelly and Dreyer's First Amendment rights. *Anderson*, 460 U.S. at 789. She does not claim, for example, that Montana's election officials would not be able to comply with the applicable deadlines for preparing the November general-election ballot if the filing deadlines for independent candidates fell sometime after early March. This failure alone is reason to reverse the district court on the merits.

We explained in our opening brief that the ballot-access scheme for independent candidates is not necessary for Montana to achieve its interests, and we cast doubt on whether the scheme even advances those interests in any substantial way. (Appellants' Br. 49-61.) We will not repeat those arguments here.

We will point out, however, that McCulloch's failure to provide any coherent explanation for the scheme strongly suggests that the asserted justifications are "merely a pretext for exclusionary or anticompetitive restrictions." *Clingman v. Beaver*, 544 U.S. 581, 603

(2005) (O'Connor, J., concurring). Indeed, McCulloch concedes that the legislation establishing the March filing deadline was a response to the 2006 election for Sheriff in Rosebud County, where the major-party nominee thought he was "safe" after winning the June primary only to find out that five or six independent candidates entered the race just before the deadline (which was then one week before the primary election). (Appellee's Br. 56; R.E. 334, 338.) The scheme as it currently exists thus appears designed to make primary-winners safer by reducing competition from independent candidates and not to advance any compelling state interest.

CONCLUSION

We noted in our opening brief that this is not a particularly difficult case, and McCulloch's brief does nothing to change that. She doesn't even attempt to defend the district court's ruling on standing. Instead, she makes a standing argument that this Court has already rejected, and she does so without even acknowledging the weight of authority against her. On the merits, she relies on a factual sleight of hand, using the term "minor party" in a way that is plainly inconsistent with Montana law. She would have this Court excuse the almost total exclusion of independents from

Montana's ballots because of its somewhat better record of access for so-called minor parties, even though the ballot-access rules for political parties are quite different than those at issue in this appeal. And she flunks the second step in the *Anderson* test by failing to establish that any compelling state interests make it necessary to burden Kelly and Dreyer's First Amendment rights.

Under these circumstances, *Anderson* and *Nader* still permit only one conclusion in this case: the Court should reverse the judgment in McCulloch's favor and remand the case to the district court with instructions to enter summary judgment in the plaintiffs' favor.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,039 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 Bookman Old Style 14-point font.

/s/Bryan Sells

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 29, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Bryan Sells