

Dear Secretary of State Stapleton:

April 8, 2020

Please issue an expedited declaratory ruling authorized pursuant to MCA § 2-4-501;ⁱ ARM § [1.3.302](#) (the Secretary of State rule on application of the APA);ⁱⁱ ARM § [44.2.101](#) (your adoption of the relevant rules relating to declaratory rulings);ⁱⁱⁱ ARM § [1.3.226](#) (indicating a party may seek a declaratory ruling);^{iv} and ARM § [1.3.227](#) (outlining the contents of a declaratory ruling petition).^v

BEFORE THE SECRETARY OF STATE OF THE STATE OF MONTANA

In the matter of the Application of Rev. Susan DeBree, Rep. Mary Ann Dunwell, Tom Towe and Russ Doty, proponents of a ballot initiative, for a declaratory ruling on the applicability of § 1-6-105, MCA, to § 13-27-302, MCA, and whether petitioners’ proposed verification form complies with the substantially like requirements of the § 13-27-302, MCA form.))))))))	PETITION FOR EXPEDITED DECLARATORY RULING
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1. Petitioners’ names and addresses are:

Rev. Susan K. DeBree 428 Wilder Ave. Helena, MT 59601 Phone: 406-422-3302 Email: su.debree70@gmail.com	Rep. Mary Ann Dunwell 2811 Alexis Ave. Helena, MT 59601 Phone: 406-461-5358 Email: maryann.dunwell@mtleg.gov
Russ Doty 4957 W. 6 th St. Greeley, CO 80634 406-696-2842 Email: rd@mtcares.org	Tom Towe 2525 6 th Av. N. Billings, MT 59101-1390 406-248-7337 Email: towe@tbems.com

2. Facts: Dozens of volunteers (mostly seniors) have been working for months to gather signatures by June 19 to place Initiative 187 on the November 2020 ballot. We were about 43% of the way there when the COVID-19 situation made it impossible to continue obtaining signatures in the traditional face-to-face manner. Consequently, to protect our volunteers and those they encountered and to comply with various emergency orders (which we support) we suspended face-to-face signature gathering and notarization of signature gathering affidavit efforts.

Since people are not allowed to assemble in large groups, it becomes more difficult:

A. for people to exercise their US First Amendment Constitutional right to assemble and gain signatures to petition government by initiative during those assemblies;

B. for people to exercise their Montana Constitution:

- i. Article III, Section 4 right to “enact laws by initiative;
- ii. Article II, Section 6 right to petition for redress governmental action;

C. for people to obtain their Montana Constitution Article II, Section 3 right to a “clean and healthful environment”; and

D. for persons to enforce compliance with social distancing requests by preventing an individual from “attempting to obtain signatures on a petition for a ballot issue” without simultaneously infringing on constitutional rights and statutory restrictions;

However, we still do not want to leave our kids with a future they cannot fix because the pandemic has interrupted our constitutional right to petition government to mitigate the concurrent climate crisis.

Consequently, we must modify the methods of gathering signatures to incorporate more online, phone and mail tools to inform voters about I-187 and obtain their signatures in a safe manner. Realistically, we cannot do that if the notarization requirement of § 13-27-302, MCA remains operative.

Therefore, we are asking that you apply § 1-6-105, MCA (as is being done in other contexts by Montana Courts) to replace the notarization requirement with a sworn or affirmed statement made under penalty of perjury. And we are asking that a verification form that is “substantially” the same as the form suggested in § 13-27-302, MCA be accepted.

3. The statutes relating to petitioners’ request for a declaratory ruling are § 13-27-302, MCA and § 1-6-105, MCA.

§ 13-27-302, MCA, provides” **“Certification of signatures. An affidavit, in substantially the following form,** must be attached to each sheet or section submitted to the county official: ...” [Underlining added. That form is set forth below with proposed changes indicated.]

Also, § 1-6-105, MCA, establishes that an unsworn verification to replace a sworn, notarized affidavit may be attached to each sheet or section submitted to an election administrator.

4. The questions presented for an expedited declaratory ruling by the agency are:

- A) Pursuant to § 1-6-105, MCA, must a county election worker or election administrator accept an unsworn verification to replace a sworn notarized affidavit attached to each sheet or section of signatures collected on a proposed ballot initiative?
- B) Is the following verification form “in substantially the ... form” specified in § 13-27-302, MCA so a county election worker or election administrator must accept it to replace a notarized affidavit when processing signatures on a proposed ballot initiative?

(As indicated, the following verification adopts the language of § 13-27-302, MCA, with additions underlined, and deletions (including text related to notarization) interlineated:)

Affidavit Verification of Petition Signature Gatherer

Pursuant to § 1-6-105, MCA, a verification to replace a notarized ~~An~~ affidavit must be attached to each sheet or section submitted to the election administrator. Separate sheets of a petition may be fastened to this affidavit-verification in sections of not more than 25 sheets.

AFFIDAVIT-VERIFICATION TO BE FILED WITH ELECTION
ADMINISTRATOR:

I, _____,

(printed name of person who is the signature gatherer or who is the person signing
[if only one person signs the initiative signature sheet])

swear or affirm under penalty of perjury that the following statements are true that I gathered the signatures on the petition to which this affidavit is attached on the stated dates, by (check all that apply):

 1) signing the attached initiative petition;

 2) gathering signatures while safely observing a person signing (e.g. via skype, watching occupants in my house, etc.);

 3) receiving by mail or pre-arranged social distancing drop-pick up, attached petition(s) containing original signature(s);

 4) receiving authenticated electronic signature(s) on attached petition(s); or

 5) doing the thing named on the following line to obtain authenticated signature(s) on attached petition(s)

_____ ;

that I believe the signatures on the petitions to which this form is attached, 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 indicated, or have the telephone number following the person's signature, and (in the case of an electronic signature) have the last four digits of the elector's social security number, and that the signers knew the contents of the petition before signing the petition.

(Date on which the first signature attached was gathered)

(Do not sign on the line below before gathering the signatures on the petition(s) that you attach to this verification affidavit.)

Signature of petition signature gatherer

Address of petition signature gatherer

City, state and zip code of signature gatherer

~~NOTARY OR AUTHORIZED OFFICER — DO NOT FILL OUT THIS SECTION UNTIL AFTER THE SIGNATURES GATHERED HAVE BEEN ATTACHED TO THIS AFFIDAVIT~~

State of Montana

County of _____

Signed and sworn to before me this _____ day of _____, 20____ by _____

~~Printed Name of Signature Gatherer~~

~~Signature of Notary or Public Official~~

Where to file (mail) your Petition(s) and Affidavit Verification Form: County Election Administrator's Office. A list of County election offices addresses may be found at: sosmt.gov/elections
<https://sosmt.gov/Portals/142/Elections/Forms/electionadministrators.pdf>

5. Petitioners contends that the answer is “yes” to both 4(A) & 4(B). Pursuant to the federal and state emergency declarations citizens are being urged to practice social distancing. That makes face-to-face gathering of signatures on an initiative petition and obtaining multiple face-to-face notarizations or expensive electronic notarizations now required by § 13-27-302, MCA, for signatures from each county difficult if not impossible.

To replace a sworn notarized statement, § 1-6-105, MCA, permits an unsworn written declaration subscribed with the date and place of signature by a Montanan declaring “... under penalty of perjury that the foregoing is true and correct.”^{vi}

On March 27, 2020, (¶ 15)^{vii} the Chief Justice of Montana’s Supreme Court ordered all courts to apply the provisions of §1-6-105, MCA, that provide for the use of declarations rather than requiring notarized affidavits.

Likewise, nominations for State Bar of Montana elections have been modified. The bar has suspended the signature-gathering requirement for nomination petitions in light of social distancing guidelines and will instead accept electronic means to convey the required number of signatures and/or emails supporting a candidacy along with a signed nomination form.

The federal False Claims Act (18 USC § 1001 et seq.) generally prohibits knowingly and willfully making false or fraudulent statements, or concealing information, in "any matter within the jurisdiction" of the federal government of the United States;^[1] The federal False Claims Act is used in many contexts, for example to reach cover-up crimes such as perjury, false declarations, and obstruction of justice and government fraud cases, and^[10] in 1934, the requirement of an intent to defraud was eliminated.

The Montana False Claims Act (§ 17-8-401, MCA, et seq.) is modeled after the federal False Claims Act and allows individuals with information related to fraud, waste, and abuse being perpetrated on the Montana government to file a lawsuit on behalf of the government. Thus, notarization is not needed to prosecute or deter fraud because of § 1-6-105, MCA, and the federal and state false claims acts as indicated by the fact that:

- a. electors can register to vote based on their dated signature on a voter registration card mailed to the county where they live without that registration card being notarized;^{viii}
- b. pursuant to § 13-27-304, MCA, county officials are not required to submit a notarized affidavit when forwarding verified sheets containing the signatures of electors on a ballot initiative to the secretary of state but can submit an unnotarized form;^{ix}
- c. pursuant to § 13-13-241, MCA, persons voting absentee are not required to submit a notarized absentee ballot when providing their signature to the county with the signed signature envelope containing their ballot secrecy envelope; and

- d. pursuant to § 13-10-501, MCA, *et. seq.*, independent candidates not participating in a primary are not required to submit a notarized affidavit when forwarding the signatures of electors to a county.

A 2019 Montana law (§ 1-5-602(8), MCA) allows for electronic notarization of documents but no electronic notary currently exists in Montana. Notaries existing outside of Montana charge \$25 per electronic notarization. § 13-27-201(2), MCA, imposes a limit of no more than 25 sheets (containing in some cases approximately 250 signatures) that can be notarized at a time. Sometimes a petition sheet with only one or two signatures must be notarized and sent to one of 56 Montana counties. These electronic notarization and sheet limitation requirements create an outrageously expensive obstruction like a *de facto* “poll tax” levied for signature gatherers and citizens to exercise their constitutional right to enable persons to petition their government;

In summary, it is incongruent to require signature gatherers to present a notarized form when submitting signatures to the county, when county officials, independent candidates petitioning to run in an election, electors voting absentee, or electors registering to vote are not required to present a notarized form when submitting signatures to the county or state. The fact that notarization is not currently needed to protect against fraud is further evidenced by the fact that federal courts have adopted a statute that allows any person to avoid the cumbersome and expensive requirement of a notary by signing a simple statement that his or her statement is true and given under the penalties of perjury--this system works well and is much more convenient for persons wishing to give an unsworn statement.

Finally, the Constitution does not require notarization of a signature gatherer’s work. So, pursuant to § 2-4-501, MCA, and to provide equal protection of the law pursuant to the 14th amendment of the US Constitution and Article II, Section 4 of the Montana Constitution, the Secretary of State may declare that following the law in § 1-6-105, MCA, may replace the notarization requirement.

In other jurisdictions, action like that requested herein have already taken place. For example, On April 1, 2020, Utah Gov. Gary Herbert (R) suspended some laws governing local ballot measures in Utah including the law requiring referendum signature gatherers to physically witness the signing of petitions. The executive order allowed petition gatherers to distribute and gather physically signed petitions through fax and email. ^x Thus, allowing an elector to send their own signature to the county or to send it to a gatherer, etc. as provided in enumerated items 1 through 5 of the proposed verification form is reasonable and facilitates the right to petition government.

No rational basis or compelling state interest exists to support the § 13-27-302, MCA initiative signature gathering notarization requirements or to limit the methodology of gathering signatures to watching a person sign if other methods of gathering signatures also protect the process. If such a basis exists it is the government’s burden to articulate it. That is in our 9th circuit federal jurisdiction, “The government has the burden of justifying its restriction on speech” [i.e., petitioning]. *Thalheimer v. City of San Diego* (9th Cir. 2011) [645 F.3d 1109](#), 1116.) quoted at p. 664 in *Prigmore v. City of Redding*, 211 Cal.App.4th 1322, 150 Cal.Rptr.3d 647 (2012).

6. Petitioner respectfully requests a declaratory ruling that:

- a. Pursuant to § 1-6-105, MCA, a county election worker or election administrator must accept an unsworn verification to replace a sworn notarized affidavit

attached to each sheet or section of signatures collected on a proposed ballot initiative.

- b. The attached verification form is “in substantially the ... form” specified in § 13-27-302, MCA so a county election worker or election administrator must accept it to replace a notarized affidavit when processing signatures on a proposed ballot initiative.

7. Petitioners know of the following parties who are similarly affected or interested in the ballot initiative process:

- a. Proponents and Opponents of proposed and approved Montana ballot issues,
- b. Montana county election officials,
- c. all utilities under the jurisdiction of the Montana Public Service Commission,
- d. the Montana Consumer Council,
- e. Montana Rural Electric Cooperatives, and
- f. various consumer, environmental, business and industry groups, other initiatives in process, and news media.

8. A copy of the proposed verification form (without underlining and interlineations) is attached.

Thank you.

Dated April 8, 2020.

SS// Russell L. Doty

Russell L. Doty, Montana Attorney # 2472

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ⁱ MCA § 2-4-501 provides:

Declaratory rulings by agencies. Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A copy of a declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.

ⁱⁱ The Secretary of State Rule ARM § [1.3.302 APPLICATION OF MONTANA ADMINISTRATIVE PROCEDURE ACT](#) provides:

(1) MAPA applies to all state agencies as defined in [2-4-102\(2\)](#), MCA. ...

ⁱⁱⁱ ARM § [44.2.101 INCORPORATION OF MODEL RULES](#) provides:

(1) The Secretary of State adopts and incorporates by reference ARM [1.3.102](#) and [1.3.205](#) through [1.3.233](#) relating to citizens' participation, noticing and hearing procedures, and declaratory rulings. ...

^{iv} ARM § [1.3.226 DECLARATORY RULINGS, INTRODUCTION](#) provides:

(1) A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights.

^v ARM § [1.3.227 DECLARATORY RULINGS, CONTENT OF PETITION](#) provides:

(1) A petition for declaratory ruling must be typewritten or printed.

(2) The petition must include:

- (a) the name and address of petitioner;
 - (b) a detailed statement of the facts upon which petitioner requests the agency to base its declaratory ruling;
 - (c) sufficient facts to show that petitioner will be affected by the requested ruling;
 - (d) the rule or statute for which petitioner seeks a declaratory ruling;
 - (e) the questions presented;
 - (f) propositions of law asserted by petitioner;
 - (g) the specific relief requested; and
 - (h) the name and address of any person known by petitioner to be interested in the requested declaratory ruling.
- (3) See sample form 227a.
- (4) The record in a declaratory ruling proceeding shall include:
- (a) the petition;
 - (b) a statement of matters officially noticed;
 - (c) if for good cause shown the agency has held hearings on the petition, a stenographic record of the proceedings when demanded by a party; and
 - (d) the ruling.

Sample Form 227a: Petition for Declaratory Ruling

BEFORE THE [agency] OF THE STATE OF MONTANA

In the matter of [summary; for example: Application of John Doe, an insurance producer, for a declaratory ruling on the applicability of 33-17-1001 (1)(d), MCA, to his trust account]))))))	PETITION FOR DECLARATORY RULING
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1. Petitioner's name and address is [name, address].
2. [Facts, for example: Petitioner maintains an insurance office in his residence in Anytown, Montana. As part of his business, petitioner maintains a trust account and a joint checking account under one number. Petitioner regularly deposits checks received from clients into the checking account for future transmittal to petitioner's employer, Sandy Bottom Insurance Company of North Dakota. The insurance commissioner has threatened to bring proceedings under [33-17-1001](#)(1)(d), MCA, for revocation of petitioner's license.]
3. The [statute, regulation, order] as to which petitioner requests a declaratory ruling is [number], which provides that [pertinent provisions].
4. The question presented for declaratory ruling by the agency is [for example: whether the above statute makes the producer's license subject to revocation for maintaining a combination trust account and private account].
5. Petitioner contends that [for example: his activity is not an illegal withholding, because he does not use any of the deposited money in trust for his own use].
6. Petitioner requests a declaratory rule that [for example: he maintains one checking account for both trust and private moneys without violation of [33-17-1001](#)(1)(d), MCA].

7. (Option 1): Petitioner knows of no other party similarly affected; or (Option 2): Petitioner knows of the following parties who are similarly affected: [names].

Dated this _____ day of _____, 20____.

[name]

^{vi} **1-6-105. Unsworn declarations -- penalty of perjury.** (1) Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by a person's sworn written declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved by an unsworn written declaration, certificate, verification, or statement that is subscribed by the person as true under penalty of perjury in substantially the following form:

(a) If executed within the state:

"I declare under penalty of perjury that the foregoing is true and correct.

.....

Date and place Signature"

(b) If executed in any place outside the state:

"I declare under penalty of perjury and under the laws of the state of Montana that the foregoing is true and correct.

.....

Date and place Signature"

(2) A deliberate falsification in any declaration pursuant to this section constitutes the offense of perjury as provided in **45-7-201** and is punishable as the offense of false swearing as provided in **45-7-202**. A declaration under penalty of perjury executed in accordance with any provision of this code is not limited to the official proceedings referenced in **45-7-201**.

(3) This section does not apply to writings requiring an acknowledgment, deposition, oath of office, or oath required to be taken before a special official other than a notary public.

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https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/covid19/shelter_in_place_032720_ord.pdf

viii

APPLICANT AFFIRMATION	
<i>I affirm under penalty of perjury that the information on this application is true, that I am a citizen of the United States, that I will be at least 18 years old on or before the next election, that I will have been a resident of Montana for at least 30 days prior to the next election, and that I am not serving a felony conviction in a penal institution nor have been found to be of unsound mind by a court. I understand that if I have given false information on this application, I may be subject to a fine or imprisonment, or both, under federal and/or state law.</i>	
Signature* _____	Date* _____
<small>THE AFFIRMATION ON THIS APPLICATION FOR VOTER REGISTRATION MUST BE SIGNED BY THE APPLICANT – FAILURE TO DO SO WILL PREVENT APPLICATION FROM BEING PROCESSED.</small>	

^{ix} **MCA § 13-27-304. County official to forward verified sheets.** The county official verifying the number of registered electors signing the petition shall forward it to the secretary of state by certified mail with a certificate in substantially the following form attached:

To the Honorable _____, Secretary of State of the state of Montana:

I, _____, _____ (title) of the County of _____, certify that I have examined the attached sheets of the petition for (referendum, initiative, constitutional convention, or constitutional amendment) No. ____ in the manner prescribed by law; and I believe that ____ (number) signatures in (Legislative Representative District No. ____ or the County of ____) (repeat for each district or county included in sheet or section) are valid; and I further certify that the affidavit of the signature gatherer of the petition is attached.

Signed: _____ (Date) _____ (Signature)

Seal _____ (Title)

^x <https://www.deseret.com/utah/2020/4/2/21203003/olympia-hills-referendum-approved-salt-lake-county-council-governor-gary-herbert-executive-order>