DA 21-0378

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 93

JOHN MEYER,

Plaintiff and Appellant,

v.

CHRISTI JACOBSEN, in her official capacity as Secretary of State; and ERIC SEMERAD, in his official capacity as Gallatin County Election Administrator,

Defendants and Appellees.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV-20-362c
Honorable John C. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John Meyer, Self-Represented, Bozeman, Montana

For Appellee Christi Jacobsen:

Dale Schowengerdt, E. Lars Phillips, Crowley Fleck PLLP, Helena, Montana

Austin Markus James, Montana Secretary of State Chief Legal Counsel, Helena, Montana

For Appellee Eric Semerad:

Erin L. Arnold, Chief Civil Deputy County Attorney, Bozeman, Montana

Submitted on Briefs: March 9, 2022

Decided: May 17, 2022

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 John Meyer sought to run as an Independent candidate for Montana Attorney General in the 2020 general election, but the Gallatin County Election Administrator (Administrator) denied his petition for nomination forms because they contained only electronic signatures. Meyer filed a complaint against the Secretary of State (Secretary) and the Administrator alleging that they violated Montana election laws and the Uniform Electronic Transactions Act (UETA). He appeals the District Court's dismissal of his complaint for failure to state a claim that the Election Officials violated Montana law when they rejected his petition for nomination. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Meyer intended to run as an Independent candidate in the 2020 election for Montana Attorney General. Ineligible to participate in the primary election, Meyer sought to add his name to the general election ballot through the petition for nomination process established by Title 13, chapter 10, part 5, MCA. To satisfy the requirements of the statute, Meyer needed to submit signatures of at least five percent of the total vote cast for the successful candidate for Attorney General in the previous general election. In March 2020, Meyer submitted five petition for nomination forms to the Gallatin County Election Office containing only electronic signatures. Meyer claimed he was unable to gather "wet ink" signatures due to the Governor's stay-at-home directive issued in response to the COVID-19 pandemic. The Administrator refused to process Meyer's petition forms because they contained only electronic signatures.

¶3 Later that month, Meyer filed a complaint against the Administrator and the Secretary, seeking a writ of mandamus to compel the Election Office to accept his petition forms and a declaration that the office violated Montana election laws and the UETA. The District Court granted the Administrator's motion to dismiss for failure to state a claim on the ground that neither Montana election laws nor the UETA required the Administrator to accept electronic signatures. The court then granted Meyer's motion for default judgment against the Secretary, who had not yet responded to the complaint. When the Secretary advised the court that she had not been properly served, the District Court vacated the default judgment. It held that its dismissal of Meyer's complaint fully and finally determined Meyer's claims against the Secretary as well.

STANDARD OF REVIEW

¶4 We review a district court's ruling on a motion to dismiss for failure to state a claim de novo. *Doty v. Mont. Comm'r of Political Practices*, 2007 MT 341, ¶ 9, 340 Mont. 276, 173 P.3d 700. On motion to dismiss under M. R. Civ. P. 12(b)(6), the district court construes the complaint in the light most favorable to the plaintiff and takes all non-conclusory allegations of fact as true. *Doty*, ¶ 9; *Barthel v. Barretts Minerals, Inc.*, 2021 MT 232, ¶ 9, 405 Mont. 345, 496 P.3d 541. Dismissal of the complaint is proper if the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim. *Doty*, ¶ 9.

¶5 We review a trial court's "interpretation and construction of a statute or rule of law" de novo. *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 19, 368 Mont. 101, 293 P.3d 817 (citation omitted).

DISCUSSION

¶6 Meyer argues that the Administrator violated Montana election laws and the UETA when he refused to accept the electronic signatures that Meyer submitted in support of his petition for nomination.[1] Defendants assert that Meyer's claim is moot because the election occurred in November 2020, and the District Court can no longer grant meaningful relief. Alternatively, Defendants contend the District Court correctly concluded that neither Montana election laws nor the UETA require the Administrator to accept electronic signatures. Because mootness is a threshold question, we address this argument first.

a. Mootness

¶7 The Montana Constitution limits the judicial power of the courts to "justiciable controversies." *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 18, 408 Mont. 39, ___ P.3d ___ (citing *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881) (other citations omitted); Mont. Const. art. VII, § 4(1) ("The district court has original jurisdiction in all . . . civil matters and cases at law and in equity."). A court lacks jurisdiction to decide a case that does not present a justiciable controversy. *Greater Missoula*, ¶ 23 ("[C]ourts lack jurisdiction to decide moot issues insofar as an actual 'case or controversy' no longer

[1] Meyer also argues for the first time on appeal that the Administrator violated the Montana Constitution by refusing to accept the electronic signatures Meyer gathered. Meyer did not raise this theory in the District Court, and we conclude that he has not made the case for plain-error review. *See State v. Fleming*, 2019 MT 237, ¶ 40, 397 Mont. 345, 449 P.3d 1234 (declining to invoke plain-error review when a party raises such a request for the first time on appeal). Without benefit of a record, developed argument, and district court consideration of Meyer's First Amendment challenge, we decline to consider it.

exists[.]"). "Justiciability therefore is a threshold requirement that must be met before a court may grant relief." *Advocates*, ¶ 18 (citation omitted). "The central concepts of justiciability have been elaborated into more specific categories of doctrines, including standing, ripeness, and mootness." *Advocates*, ¶ 19 (citation and quotation omitted).

¶8 "Mootness is the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Greater Missoula*, ¶ 23 (citation and quotation omitted). If the controversy presented at the outset of the litigation "has ceased to exist or is no longer 'live,'" or if an intervening event or change in circumstances leaves the court unable "to grant effective relief or to restore the parties to their original positions, then the issue before the court is moot." *Greater Missoula*, ¶ 23 (citations omitted).

¶9 Though a case presents only moot questions, it may be eligible nonetheless for judicial review if it meets an exception to mootness. *Skinner Enters. v. Lewis & Clark City-Cty. Health Dep't*, 1999 MT 106, ¶ 12, 294 Mont. 310, 980 P.2d 1049. Our cases have recognized several such exceptions to the doctrine. *See Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867 (citing *Gateway Opencut Mining Action Grp. v. Bd. of Cty. Comm'rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133 (recognizing the "public interest" exception)); *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 34, 333 Mont. 331, 142 P.3d 864 (adopting the "voluntary cessation" exception); *In re N.B.*, 190 Mont. 319, 323, 620 P.2d 1228, 1231 (1980) (adopting the "capable of repetition, yet could evade review" exception) (citing *Roe v. Wade*, 410 U.S. 113, 125, 93 S. Ct. 705, 713 (1973)).

¶10 To prove that a given situation is capable of repetition, yet could evade review, a party must show: (1) the challenged action was in its duration too short to be fully litigated prior to the cessation or expiration of the action; and (2) there was a reasonable expectation the same complaining party would be subjected to the same action. *In re Mental Health of D.V.*, 2007 MT 351, ¶ 30, 340 Mont. 319, 174 P.3d 503; *Sch. Dist. v. Bd. of Pers. Appeals*, 214 Mont. 361, 364, 692 P.2d 1261, 1263 (citing *Sosna v. Iowa*, 419 U.S. 393, 400-01, 95 S. Ct. 553, 557-58 (1985)). The party invoking the exception bears the burden of establishing these two elements. *Serena Vista, L.L.C. v. State Dep't of Nat. Res. & Conserv.*, 2008 MT 65, ¶ 15, 342 Mont. 73, 179 P.3d 510. This exception typically applies "to situations involving governmental action where it is feared that the challenged action will be repeated." *Missoula City-Cty. Air Pollution Control Bd. v. Bd. of Envtl. Review*, 282 Mont. 255, 264-65, 937 P.2d 463, 469 (1997) (citation omitted). "Election cases often fall within this exception because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003) (citing *Norman v. Reed*, 502 U.S. 279, 287-88, 112 S. Ct. 698, 704-05 (1992)) (other citations omitted).

¶11 As the Secretary correctly points out, Meyer's requests for relief—a declaration that the Administrator violated Montana election laws and the UETA and a writ of mandamus requiring the Administrator to accept Meyer's petition forms—were specific to the 2020 election, which concluded nearly two years ago. The Secretary therefore is correct that Meyer's claims as pled are moot because "the court is unable due to an intervening event or change in circumstances" to grant the relief Meyer's complaint sought "or to

restore the parties to their original positions." *See Greater Missoula*, ¶ 23. *See also Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S. Ct. 1493, 1494 (1969); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 987-88 (9th Cir. 2016); *Libertarian Party v. Herrera*, 506 F.3d 1303, 1305 n.1 (10th Cir. 2007); *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005); *Misso v. Oliver*, 666 So. 2d 1366, 1368-69 (Miss. 1996) (all cases finding that requests for relief specific to a completed election were moot).

¶12 We turn to Meyer's argument that a valid exception to the mootness doctrine applies. *See Moore*, 394 U.S. at 816, 89 S. Ct. at 1494; *Ariz. Green Party*, 838 F.3d at 987-88; *Libertarian Party*, 506 F.3d at 1305 n.1; *Lawrence*, 430 F.3d at 371-72; *Misso*, 666 So. 2d at 1368-69 (all cases considering whether the "capable of repetition, yet could evade review" exception applied after concluding that the plaintiffs' requests for relief specific to a completed election were moot). Meyer argues that the Administrator's refusal of electronic signatures is capable of repetition but evades review because the issue will arise in future election cycles and there is a reasonable expectation that Meyer will be subjected to that refusal again.

¶13 Under the first prong of the "capable of repetition, yet could evade review" exception, Meyer must establish that the duration of the challenged action was too short to be fully litigated prior to its cessation. *See In re Mental Health of D.V.*, ¶ 30. Meyer filed his complaint approximately seven months before the November 2020 general election and

five months before the deadline for certifying candidates' names for the ballot.[2] Meyer's Notice of Appeal was filed in August 2021, at which time the Secretary had not yet filed any pleadings or motions in the case. As the Ninth Circuit Court of Appeals has recognized, "Appellate courts are frequently too slow to process appeals before an election determines the fate of a candidate." *Porter*, 319 F.3d at 490 (citation omitted). Courts recognize challenges to election laws as a quintessential category of controversies that are too short-lived to survive the litigation lifespan. *See Stop Reckless Econ. Instability Caused by Democrats v. FEC*, 814 F.3d 221, 232 (4th Cir. 2016); *Barr v. Galvin*, 626 F.3d 99, 106 (1st Cir. 2010); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000); *Couey v. Atkins*, 355 P.3d 866, 880 (Or. 2015); *Anderson v. Vt.*, 82 A.3d 577, 581 n.2 (Vt. 2013); *Socialist Workers Party v. Sec'y of State*, 317 N.W.2d 1, 4 n.11 (Mich. 1982); *see also Yoshimura v. Kaneshiro*, 481 P.3d 28, 42 (Haw. 2021) (applying public interest exception to address merits of mooted election issues involving electronic petition signatures).

¶14 Without suggesting that Meyer's claims could have been fully litigated in the few months between his rejected petitions and the certification of ballots, the Secretary contends that the claims do not evade review because the requested relief is specific to the 2020 election. She adds that Meyer did not raise a constitutional challenge in the District Court that would be capable of transcending a single election cycle.

[2] The Secretary of State needed to certify for the ballot the names and designations of statewide and state district candidates for the 2020 general election by August 20, 2020. *2020 Ballot Issue Election Calendar*, Montana Secretary of State, https://perma.cc/8V5S-NBFT.

¶15 That all of Meyer's requests for relief were specific to the 2020 election is why we must consider whether he meets a mootness exception. *See Moore*, 394 U.S. at 816, 89 S. Ct. at 1494; *Ariz. Green Party*, 838 F.3d at 987-88. In addition to a writ of mandamus, Meyer requested a declaratory judgment that the Administrator violated Montana election laws and the UETA. The question his declaratory judgment complaint presented—whether the Administrator violated Montana law when he refused to accept electronic signatures—could continue to affect Montana candidates and voters. *See Libertarian Party*, 506 F.3d at 1305 n.1 (permitting an action for declaratory judgment to proceed under the "capable of repetition, yet could evade review" exception after the election concluded) (citing *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-22, 945 S. Ct 1694, 1698 (1974)). Meyer therefore has satisfied the first prong of the exception because, due to the short-lived nature of the challenged action, his claims "*could* evade review." *See In re N.B.*, 190 Mont. at 323, 620 P.2d at 1231 (emphasis added).

¶16 Under the second prong of the exception, Meyer must establish a reasonable expectation that the same complaining party would be subject to the same action in the future. *See In re Mental Health of D.V.*, ¶ 30. A number of courts, including the Ninth Circuit, have recognized that this is a "relaxed" standard in the context of election law cases. *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164-65 (5th Cir. 2009) (citing *Honig v. Doe*, 484 U.S. 305, 335-36, 108 S. Ct. 592, 611 (1988) (Scalia, J., dissenting)); *Lawrence*, 430 F.3d at 372 (citing *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, 93 S. Ct. 1245, 1249 n.5 (1973)) (other citations omitted); *Merle v. United States*, 351 F.3d 92, 95 (3rd Cir. 2003); *Schaefer*, 215 F.3d at 1033; *contra Hall v. Sec'y of State*

of Ala., 902 F.3d 1294, 1298-99 (11th Cir. 2018) (holding that there was no reasonable expectation the plaintiff would run for another special election in the future because those elections occur only once about every twenty years). The question is not whether "recurrence of the dispute [is] more probable than not" but whether it is "*capable* of repetition." *Lawrence*, 430 F.3d at 371 (quoting *Honig*, 484 U.S. at 319 n.6, 108 S. Ct. at 601-02) (emphasis in original) (other alterations omitted). This prong requires a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463, 127 S. Ct. 2652, 2663 (2007) (citation and quotation marks omitted).

¶17 The Secretary maintains that Meyer cannot satisfy the "capable of repetition" prong because the record does not demonstrate Meyer's intent to run for elected office and gather signatures in the same way. But this "asks for too much." *See FEC*, 551 U.S. at 463, 127 S. Ct. at 2652. Recurrence of "every legally relevant characteristic" is unnecessary to find a reasonable probability that the same controversy will recur. *FEC*, 551 U.S. at 463, 127 S. Ct. at 2652. Though some courts have found that the "capable of repetition" prong is satisfied when the record demonstrates the claimant's intent to run in future elections, this is not an express requirement, and Meyer does not bear the burden to prove either that he intends to run for elected office again or that he plans to submit petitions for nomination containing electronic signatures in the future. *See Schaefer*, 215 F.3d at 1033; *Lawrence*, 430 F.3d at 371; *Merle*, 351 F.3d at 95. The question he raises, moreover, has broader application, as signatures also must be submitted for ballot issue and third-party petitions, §§ 13-10-604, 13-27-201, MCA, both of which carry similarly short deadlines.

¶18 Montana case law supports review of Meyer's claims. Outside the election context, we held in *Heisler v. Hines Motor Co.* that a challenge to the State Compensation Insurance Fund's (State Fund) refusal to compensate Heisler on the ground that he changed physicians without pre-authorization was "capable of repetition" even though Heisler did not establish an intent to change physicians in the future. 282 Mont. 270, 273, 275-76, 937 P.2d 45, 46-47, 48 (1997). We noted that, because the State Fund had "not abandoned its contention that [it had] the absolute right to pre-approve a claimant's change of treating physician[,] . . . should Heisler again change his treating physician without the prior approval of the State Fund, the Fund could again refuse to pay the expenses incurred." *Heisler*, 282 Mont. at 276, 937 P.2d at 48.

¶19 As in *Heisler*, Defendants have not abandoned their assertion that they are statutorily entitled to reject Meyer's electronic signatures. Should Meyer seek to submit petitions or decide to run for office as an Independent using electronic signatures in the future, the Administrator could again refuse to accept his petitions. It is reasonable to expect that Meyer will seek to submit petitions with electronic signatures in the future. Indeed, Meyer asserts in his reply brief that he intends to gather electronic signatures for Ballot Issue #24, a citizen initiative for the November 2022 general election ballot, a petition of which we take judicial notice.[3] And given the societal shift towards increasingly conducting affairs remotely and electronically, it is reasonable also to expect that other

[3] *See Cottonwood Envtl. Law Ctr. v. Knudsen*, 2022 MT 49, 408 Mont. 57, ___ P.3d ___; *Issues Qualified for the 2022 General Election Ballot*, Montana Secretary of State, https://perma.cc/K4UW-4X9X.

aspiring candidates will attempt to use electronic signatures in future election cycles. We are satisfied that the controversy is sufficiently "capable of repetition" to meet the second prong of the exception.

¶20 Though the election in which he sought to run has long passed, Meyer's claims are capable of repetition, yet could evade review. We conclude that a justiciable controversy exists and proceed to the merits of Meyer's claims.

b. Montana Election Law

¶21 "The legislature shall provide by law the requirements for resident, registration, absentee voting, and administration of elections." Mont. Const. art. IV, § 3. "Subject to constitutional protections, the election process is purely statutory." *Mont. Democratic Party v. State*, 2020 MT 244, ¶ 23, 401 Mont. 390, 472 P.3d 1195 (Baker, J., dissenting).

¶22 Title 13, chapter 10, part 5, MCA, governs the method of nomination for candidates not eligible for participation in primary elections. Section 13-10-501 et seq., MCA. Nominations for public office by an Independent candidate may be made by a petition for nomination and must contain signatures in an amount of five percent or more "of the total vote cast for the successful candidate for the same office at the last general election." Sections 13-10-501(1), -502(2), MCA. "If sufficient signatures are verified and certified . . . the county election administrator shall file the petition for nomination with the same officer with whom other nominations for the office are filed." Section 13-10-503(1), MCA. The election administrator verifies and certifies petition signatures "by the procedures provided in 13-27-303 through 13-27-306[,]" MCA, the statutes governing ballot issue petitions. Section 13-10-503(1), MCA.

¶23 Section 13-27-303(1), MCA, prescribes with particularity the duties of the county official. The official must: "check the names of all signers to verify they are registered electors of the county"; "randomly select signatures on each sheet or section and compare them with the signatures of the electors as they appear in the registration records of the office"; and, if "all the randomly selected signatures appear to be genuine," certify the total number of signatures of registered electors on the sheet or section "to the [S]ecretary of [S]tate without further comparison of signatures." Section 13-27-303(1), MCA.

¶24 Meyer's complaint alleges that the Administrator violated Title 13, MCA, by failing to "randomly select signatures on each sheet or section and compare them with the signatures of the electors as they appear in the registration records of the office." *See* § 13-27-303(1), MCA. But notably absent from the county official's duties in Title 13, chapter 27, part 3, MCA, is any suggestion that the county official is required to accept electronic signatures or how to compare such signatures with those in the registration records. "In the construction of a statute," the Court is obliged to "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA.

¶25 Unlike other sections of the Montana Code Annotated, Title 13, MCA, does not define "signature" or "electronic signature." *Compare* § 13-1-101, MCA (defining the terms applicable throughout Title 13, MCA), *with* Montana Business Corporation Act, § 35-14-140(51), MCA (expressly including "an electronic signature" in its definition of a signature); UETA, § 30-18-102(9), MCA (defining an "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a record

and executed or adopted by a person with the intent to sign the record"); Revised Uniform Law on Notarial Acts, § 1-5-602(9), MCA (defining "signature" as "a tangible symbol or an electronic signature that evidences the signing of a record"); Uniform Commercial Code, § 30-1-201(2)(ll), MCA ("'Signed' includes any symbol executed or adopted with present intention to adopt or accept a writing."); Uniform Probate Code, § 72-1-103(46), MCA (defining "sign" as "to execute or adopt a tangible symbol; or . . . to attach to or logically associate with the record an electronic symbol" with "present intent"); Uniform Collaborative Law Act, § 25-40-102(14), MCA (defining "sign" as "to execute or adopt a tangible symbol; or . . . to attach to or logically associate with the record an electronic symbol" with "present intent").

¶26 There is one Section within Title 13, MCA—the Montana Absent Uniformed Services and Overseas Voter Act—that expressly authorizes the use of "digital signatures" for active-duty United States military members and United States citizens residing outside the United States but eligible to vote. Sections 13-21-102(1), -107(1), MCA. The Act limits the use of digital signatures to "proof that the voter is the sender when the voter is electronically transmitting" a federal postcard application, an application for voter registration, a request for an absentee ballot, or the voter's marked ballot. Section 13-21-107(1), MCA. The Act expressly provides that "[a]n election administrator shall verify a digital signature received pursuant to this section and accept a validated digital signature as proof that a document has been transmitted by the voter." Section 13-21-107(2), MCA. The Act also mandates that the Secretary adopt rules regarding electronic registration and voting. Section 13-21-104, MCA.

¶27 Title 13 does not, by contrast, define "signature" or its relation to electronic signatures in the context of petitions. We cannot assume, therefore, that the Legislature intended a "signature" to encompass the definition of an "electronic signature" for purposes of ballot petitions. Nothing in Title 13, MCA, requires an election administrator to accept electronic signatures on petitions for nomination of Independent candidates or other petitions. And Meyer has not convinced us that the plain language of Title 13, MCA, imposes any such obligation. He advances no arguments regarding the text, structure, or legislative intent of the statute and instead urges us to assume that the Administrator was obligated under § 13-27-303, MCA, to verify Meyer's electronic signatures. We find no legal support for this conclusory allegation. As such, "no set of facts" can be proven to support the claim that the Administrator violated Montana election laws by rejecting Meyer's petition forms. *See Doty*, ¶ 9.

c. <u>UETA</u>

¶28 Title 30, chapter 18, MCA, referred to as the UETA, "applies to electronic records and electronic signatures relating to a transaction." Section 30-18-103(1), MCA. The UETA defines a "transaction" as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." Section 30-18-102(18), MCA. It applies "only to transactions between parties each of which has agreed to conduct transactions by electronic means." Section 30-18-104(2), MCA. This is a threshold requirement that must be met before the UETA can apply. *Kluver*, ¶ 24 ("[T]he parties intended to memorialize their agreement electronically. The UETA therefore applies.").

¶29 Meyer first contends that the "transaction" was between himself and the signers, who agreed to transact electronically by signing his petition forms. True as that may be, the transaction at issue is not the transaction between Meyer and the signers of the petition but between Meyer and the Secretary. As an aspiring candidate, Meyer needed to submit his petition for nomination to the Administrator, who is an agent of the Secretary. Sections 13-10-501(1), -502(2), MCA. The Secretary then needed to approve his petition and certify it to the Governor. Section 13-27-308, MCA. This is a "set of actions occurring between two persons"—Meyer and the Secretary—"relating to the conduct of . . . governmental affairs"—Meyer's inclusion on the official election ballot. *See* § 30-18-102(18), MCA (defining "transaction"). Though the signers may have agreed to transact electronically with Meyer, the Secretary did not.

¶30 The UETA specifically excludes from its scope laws "governing the creation and execution of wills, codicils, or testamentary trusts" and the Uniform Commercial Code. Section 30-18-103(2), MCA. It provides further, "A record or signature may not be denied legal effect or enforceability solely because it is in electronic form." Section 30-18-106(1), MCA. Additionally, "[i]f a law requires a signature, an electronic signature satisfies the law." Section 30-18-106(4), MCA. Meyer relies on these provisions to argue that election laws are within the scope of the UETA and that its provisions compelled the Administrator to accept Meyer's electronic signatures. But Meyer ignores other limitations the Act includes. The UETA states that "[w]hether an electronic record or electronic signature has legal consequences is determined by [the UETA] *and other*

applicable law." Section 30-18-104(5), MCA (emphasis added). We therefore must construe the UETA in conjunction with Montana's election laws.

¶31 When we interpret a statute, we must construe it "as a whole and in light of its surrounding sections to avoid conflicting interpretations." *City of Missoula v. Sadiku*, 2021 MT 295, ¶ 14, 406 Mont. 271, 498 P.3d 765 (citation omitted). Under the UETA, a government agency has discretion to accept or deny electronic signatures. Section 30-18-117(1), MCA ("[E]ach governmental agency shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures[.]"). The only exception is that the government is required to accept electronic records when the law requires that a record be retained. *See* §§ 30-18-117(3), -111(1), (6), MCA. "To the extent that" an agency does allow electronic signatures, the statute permits the Secretary to specify the particulars, including among others "control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records[.]" Section 30-18-117(2)(c), MCA. But the UETA is clear that it "does not require a governmental agency of this [S]tate to use or permit the use of electronic signatures." Section 30-18-117(3), MCA.

¶32 As noted, the UETA is not triggered unless the parties to a "transaction" have "agreed to conduct transactions by electronic means." *See* § 30-18-104(2), MCA; *Kluver*, ¶ 24. Meyer points to nothing in the record suggesting that the Administrator or the Secretary have agreed to accept signatures for ballot petitions electronically. The Secretary has invoked its discretionary authority to implement processes for accepting electronic signatures "by the business services division" if certain criteria are met.

See Admin. R. M. 44.2.301(2)-(4) (2016). It also has implemented rules allowing the electronic transmission of voting materials to electors with disabilities. Admin. R. M. 44.3.116 (2015). And the Secretary allows electronic filing of declarations of candidacy.[4] But the Secretary has not adopted similar procedures for Independent candidates to submit petitions for nomination. There is no indication, therefore, that the Secretary has consented to transact electronically regarding signatures in support of such petitions or that the Secretary has invoked its discretionary authority to implement such processes. Reading § 30-18-117, MCA, together with "applicable [election] law," which does not authorize electronic voter signatures in any context save for the military and non-resident exception, it is plain that no law requires the Secretary to accept the electronic signatures at issue in this case. The UETA simply does not impose any requirement on the Administrator or the Secretary to accept electronic signatures in support of petitions for nomination by Independent candidates.

¶33 We conclude that the plain language of the UETA is clear. We therefore "need not engage in further construction." *State v. Felde*, 2021 MT 1, ¶ 22, 402 Mont. 391, 478 P.3d 825.

¶34 Meyer cites three out-of-state cases to support his interpretation of the UETA: *Goldstein v. Sec. of the Commonwealth*, 142 N.E.3d 560 (Mass. 2020); *Benjamin v. Walker*, 786 S.E.2d 200 (W. Va. 2016); and *Anderson v. Bell*, 234 P.3d 1147 (Utah 2010). Though not binding on this Court, we find the cases unpersuasive to our analysis.

[4] *Candidate Filing*, Montana Secretary of State, https://perma.cc/KPS7-EFK7.

¶35 In *Goldstein*, three candidates sought a declaration that the signature requirements imposed by Massachusetts election law were unconstitutional as applied to them because the circumstances of the COVID-19 pandemic made it impossible to gather signatures safely and reasonably. *Goldstein*, 142 N.E.3d at 563-64, 568. The court granted the plaintiffs declaratory relief "in the limited context of the current pandemic," concluding that "the minimum signature requirements . . . for candidates in the September 1, 2020 primary election [we]re unconstitutional." *Goldstein*, 142 N.E.3d at 574-75. But *Goldstein* involved different legal arguments and a separate set of considerations. Unlike *Goldstein*, Meyer did not seek a declaration that the signature requirements of Title 13, MCA, were unconstitutional in the context of the COVID-19 pandemic. He contended that the Administrator violated Title 13, MCA, and the UETA by rejecting his electronic signatures. Though he claimed he was unable to gather "wet ink" signatures due to COVID-19, Meyer's legal argument was unrelated to the pandemic, emergency public health exceptions, or the constitutionality of Montana election laws. Meyer raised a constitutional challenge for the first time on appeal, and we declined to consider it for that reason. *Goldstein* is inapposite.

¶36 *Benjamin* held that the West Virginia Election Commission must accept electronic signatures for qualifying contributions under its public campaign financing program because the UETA mandates that "if a law requires a signature, an electronic signature satisfies the law." *Benjamin*, 786 S.E.2d at 210-12. There are, however, critical differences between the West Virginia statutes and the Montana statutes that render *Benjamin* inapplicable. First, the West Virginia UETA does not grant government agencies

discretion to accept or deny electronic signatures. *Compare* W. Va. Code § 39A-1-1 et seq., *with* § 30-18-117(1), MCA. Unlike the Secretary in this case, the election commission in *Benjamin* did not have discretion to decide whether it would or would not accept electronic signatures. Second, West Virginia's campaign financing statutes did not require the election commission to verify the signers. *Benjamin*, 786 S.E.2d at 211. Indeed, the *Benjamin* decision specifically turned on the absence of this statutory requirement. *See Benjamin*, 786 S.E.2d at 211 (distinguishing *Ni v. Slocum*, 127 Cal. Rptr. 3d 620 (Cal. App. 1st Dist. 2011)). Under Montana law, by contrast, the Administrator is required to "check the names of all signers to verify they are registered electors of the county" and certify the signatures to the Secretary. Section 13-27-303, MCA. Meyer's reliance on *Benjamin* is unfounded.

¶37 In *Anderson*, the Utah Supreme Court held that electronic signatures may satisfy Utah's election code requirements regarding unaffiliated candidates for nomination to office. *Anderson*, 234 P.3d at 1155-56. The court relied on three primary considerations: first, a Utah statute setting forth default definitions the legislature imposed "upon the entire Utah code" that included electronic means in the definition of "signature"; second, a statute explicitly requiring courts to construe "liberally" the statutes governing nomination petitions of unaffiliated candidates; and third, its conclusion that Utah's version of UETA required governmental agencies to promulgate rules before exercising discretion to accept or not accept electronic signatures. *Anderson*, 234 P.3d at 1151-54. The Hawaii Supreme Court recently rejected a plaintiff's similar reliance on *Anderson* because Hawaii's UETA, identical to Montana's § 30-18-117, MCA, does not impose such a

rulemaking requirement but "grants governmental agencies the discretion to accept or not accept electronic signatures." *Yoshimura*, 481 P.3d at 48. Montana, in addition, lacks the other statutes on which the Utah court relied when construing its UETA in harmony with other provisions of Utah law. *Anderson* does not reflect Montana law, and we therefore decline to follow that case as well.

¶38 Because the UETA did not require the Administrator to accept electronic signatures, there is no set of facts that can support Meyer's claim.

CONCLUSION

¶39 Because neither Montana election laws nor the UETA required the Administrator to accept electronic signatures, there is no set of facts under which Meyer could prevail. Taking all non-conclusory allegations in the complaint as true, Meyer failed to state a claim that would entitle him to relief. We conclude that the District Court did not err when it granted Defendants' motion to dismiss, and we affirm its September 4, 2020 order.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶40 I respectfully dissent from the Court's decision to find an exception to the justiciable controversy requirement. Further, I disagree that we should provide a gratuitous advisory opinion about the authority of the Secretary and Administrator when the provisions of the UETA are dispositive.

¶41 Meyer asks this Court to declare the Administrator should have accepted *five* electronic signatures he submitted in his effort to appear on the 2020 general election ballot, an amount far below the statutory requirement of § 13-10-502(2), MCA ("The number of signatures must be 5% or more of the total vote cast for the successful candidate for the same office at the last general election."). Even if Meyer had collected the requisite number of electronic signatures, the 2020 election has come and gone, and we cannot devise a remedy that will put Meyer on the ballot for that election cycle. Under the justiciable controversy doctrine, our authority as a court is limited to those matters in which we can grant effective relief. *Clark v. Roosevelt Cty.*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48. Any specific demands for relief—such as the mandamus relief requested here, which would require the Administrator to accept Meyer's electronic signatures—is moot once effective relief cannot be granted. Reversing the District Court's Order and remanding for further proceedings will not offer Meyer effective relief. Meyer's appeal "has lost any practical purpose for the parties" and is moot. *Serena Vista*, ¶ 14.

¶42 The "capable of repetition, yet evading review" exception is improperly used by the Court because the record does not demonstrate that the same party—Meyer—or the same action—Meyer's electronic signature-gathering efforts—is either capable of repetition or

of evading review. Additionally, Meyer represented in his Complaint for Mandamus and Declaratory Relief that former Governor Steve Bullock's Order directing all Montana residents to stay at home prevented Meyer from collecting "wet ink signatures" in support of his petition. The Order, effective March 28, 2020, was lifted on April 22, 2020. Thus, Meyer makes a request specific to himself, raises a specific averment pertaining to an Order that no longer exists, and does so on the basis of circumstances specific to the spring of 2020. In comparison, the Ninth Circuit recognized, in *Arizona Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016), that the Green Party would need to requalify as a new party every two election cycles and, therefore, the constitutionality of a state statute setting a petition-filing deadline was an issue "capable of repetition, yet evading review." The court, nonetheless, held that specific demands for relief relating to a particular election are moot once that election has already occured. *Arizona Green Party*, 838 F.3d at 987. Here, Meyer does not share the same status as a political party with a history of being on the ballot. Instead, Meyer has failed to demonstrate there is a reasonable expectation that he will be the same complaining party subject to the same action in the future, which is required to invoke the "capable of repetition, yet evading review" exception to mootness. Furthermore, the question of whether electronic signatures satisfy the requirements of the UETA is not one which "evades review"; rather, this issue remains reviewable if, in the future, a justiciable controversy arises.

¶43 Importantly, the Order which Meyer challenges on appeal was issued by the District Court on September 4, 2020. Meyer could have applied to this Court for supervisory control pursuant to M. R. App. P. 14, prior to the November 2020 general election, but he

did not. Instead, Meyer waited until May 2021 to serve the Secretary of State—nearly nine months after the District Court's Order dismissing his case. Under the facts of this case, Meyer has not demonstrated that the challenged action was so short-lived that it could not have been litigated prior to its cessation or expiration. Meyer, himself, did not move expeditiously; yet, he asks this Court to conclude the challenged action is so short-lived that it cannot be fully litigated.

¶44 Contrary to the Court's ruling, we frequently have held that "a party seeking to invoke the 'capable of repetition, yet evading review' exception to the mootness doctrine" bears the burden of establishing both that the challenged action "is too short in duration to be litigated fully before its cessation and that there is a reasonable expectation that the same complaining party would be subject to the same action again." *Serena Vista*, ¶ 15. *Accord Billings High Sch. Dist. v. Billings Gazette*, 2006 MT 329, ¶ 14, 335 Mont. 94, 149 P.3d 565; *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, 333 Mont. 331, 142 P.3d 864. We held in *Serena Vista* that a petitioner "failed to establish or even argue that there is a reasonable expectation that it will again be the victim of the [defendant agency's] failure to properly implement new water regulations." *Serena Vista*, ¶ 15. Thus, I disagree with the Court's reliance on federal precedent to hold that Montana does not require any showing from a party seeking to invoke the "capable of repetition, yet evading review" exception. Opinion, ¶ 17. Montana precedent has always protected the principle underlying the requirement that there be a justiciable controversy—that is, an appreciation for the separation of powers doctrine and for the concomitant authority and jurisdiction of a court to act. And while cases involving election laws may present challenges to the timely

and effective litigation of a claim—especially in the context of statutory deadlines and a looming election—courts are accustomed to handling issues on an expedited basis. I would not create, as the Court does, a "quintessential category of controversies that are too short-lived to survive the litigation lifespan." Opinion, ¶ 13.

¶45 I am similarly troubled by the Court's reliance on Hawaii authority that recognizes a "public interest exception" to the mootness doctrine. Opinion, ¶ 13. Judicial power is limited by the requirement that there be a justiciable controversy. Given the circumstances here, where Meyer himself significantly delayed the litigation process, the Court's reliance on the "public interest exception" to the mootness doctrine is unnecessary. There is no need under the circumstances here to resort to a "public interest exception." If we properly decide the narrow and specific issue before us—that is, whether Meyer's electronic signatures should be accepted—it is clear our holding would be advisory.

¶46 Unfortunately, however, the Court accepts Meyer's invitation to expand the issue to a broader declaratory holding that concerns *all* electronic signature gathering efforts, including ballot issues and third-party petitions. By *sua sponte* expanding the pool of potential parties to include all election signature-gathering efforts, the Court satisfies its view that the problem created by Meyer is "capable of repetition." *See* Opinion, ¶ 17 ("The question [Meyer] raises, moreover, has broader application, as signatures also must be submitted for ballot issue and third-party petitions . . . ."). Here, Meyer did not ask the District Court to hold that *any* party can satisfy Montana's election laws by submitting electronically-signed petitions; rather, he asked that *his* electronically signed petitions be accepted. Meyer asked for a declaration that the Secretary and Administrator violated the

UETA and sought mandamus relief compelling them to *accept* electronic signatures filed in support of *his* candidacy even though he did not meet the statutory minimum number of signatures to be placed on the 2020 ballot. Meyer has never represented to this Court any intention of again running for office and again collecting electronic signatures in support of his bid. Therefore, I take serious issue with the Court's improper expansion of the scope of Meyer's appeal to include other parties not at issue before the District Court so that this Court can avoid justiciability concerns.

¶47 The judicial power of the courts is limited, and that limitation invokes important constitutional separation of powers principles. As we have recognized, the United States Supreme Court has held that a "controversy," in the constitutional sense, must be "one that is appropriate for judicial determination," is definite and concrete, touches legal relations of parties having adverse legal interests, and is a real and substantial controversy "admitting of specific relief through decree of conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon abstract proposition." *Chovanak v. Matthews*, 120 Mont. 520, 525-26, 188 P.2d 582, 584-85 (1948) (quoting an array of opinions issued by the United States Supreme Court). In *Marbut v. Sec'y of State*, 231 Mont. 131, 135, 752 P.2d 148, 150 (1988), we further defined the limitations on judicial power:

> The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.

(Citations omitted.) The requirement that there must be a justiciable controversy assures our decisions are sound and that we are deciding controversies rather than rendering advisory opinions.

¶48 Further, while the merits of whether the Secretary or Administrator must accept Meyer's five electronically filed signatures under the provisions of the UETA is not a justiciable controversy, I believe the Court's analysis extends far beyond what is required to resolve the issue. Here, the plain language of the UETA requires that the parties "*agree*[] to conduct a transaction by electronic means." Section 30-18-104(2), MCA (emphasis added). Where there is no agreement to accept electronic signatures, the UETA does not apply. The parties do not dispute that there was no agreement. I always feel grateful when I can rely, in my analysis, on the clear and plain meaning of a statutory provision. Section 30-18-104(2), MCA, provides this clarity and recitation to the point where it should end the discussion. However, the Court goes on to discuss other UETA provisions; the signature requirements of other states; Montana Administrative Rules that have no relevance to this proceeding; and, ultimately, provides an advisory opinion on Montana election law and an overview of the Secretary's statutory authority. I am not sure why the Court sets forth and reviews an executive agency's authority when that authority is not at issue. When a court follows rules of law and respects the process put in place by separation of powers principles, there is consistency in the law. Precedent is meant to evolve slowly through the resolution of cases and controversies, with each new issue providing further contour, depth, and definition to the rule of law. Advisory opinions are not only at odds with these fundamental principles ordering our government, but they likewise are at odds

with the development of a consistent and stable source of rules of law. Very simply, advisory opinions on moot cases do not produce good law.

¶49 I dissent from the Court's conclusion that the "capable of repetition, yet evading review" exception renders this case a justiciable controversy. In my opinion, we have no jurisdiction to issue a decision where the controversy is moot.

/S/ LAURIE McKINNON

Justice Ingrid Gustafson joins in the dissenting Opinion of Justice McKinnon.

/S/ INGRID GUSTAFSON