IN THE SUPREME COURT OF THE STATE OF MONTANA
No. _____

STATE OF MONTANA and CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State

Petitioners,

v.

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY, the Honorable Mike Menahan, Presiding,

Respondent.

EMERGENCY PETITION FOR WRIT OF SUPERVISORY CONTROL

Appearances:

Austin Knudsen
Montana Attorney General
Michael Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Attorneys for Petitioners

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PETITION FOR WRIT OF SUPERVISORY CONTROL

Montana's Constitution allows the people of Montana to amend the constitution by initiative. Mont. Const. Art. XIV, § 9. To amend the constitution by initiative, the proposed amendment petition must be signed by at least ten percent of the qualified electors of the state, which must also include at least ten percent of the qualified electors in each of two-fifths of the legislative districts. *Id.* The number of qualified electors required for the filing of a constitutional amendment initiative shall be determined by the number of votes cast for the office of governor in the preceding general election. Mont. Const. Art. XIV, § 10.

The Montana Constitution also provides that any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector, with some exceptions. Mont. Const. Art. IV, § 2. The Montana Secretary of State is required to maintain lists of active and inactive electors (those who did not vote in the preceding federal general election and failed to respond to an appropriate confirmation notice and/or whose addresses cannot be verified after attempts to contact them). Mont. Code Ann. § 13-2-220. Inactive electors may reactivate their active status in several ways. *See* Mont. Code Ann. §§ 13-2-304, 13-2-222. Signing an initiative petition is not one of the ways an inactive voter can become an active voter. § 13-2-222. Inactive electors are not qualified electors. Mont. Code Ann. § 13-19-313(2). Rather, Montana law expressly

provides: "In order to become a qualified voter, an elector shall follow the procedure in 13-2-222 or 13-2-304, as applicable." *Id.*[1]

On July 16, 2024, Judge Menahan entered a Temporary Restraining Order ("TRO") (attached as **Exhibit 1**) requiring all Montana counties and the Montana Secretary of State to count inactive voters as qualified electors for purposes of the three proposed constitutional amendment initiatives this election cycle—CI-126, CI-127, and CI-128. The Court's TRO contains a number of serious mistakes of law that improperly interfere with election processes and the statutes governing those processes.[2] Urgency and emergency factors exist because the statutory deadlines for the review and certification of petition signatures must be followed and are quickly approaching. A writ of supervisory control is necessary to ensure the orderly and lawful review of petition signatures proceeds according to statute and to prevent a grave injustice.

PROCEDURAL HISTORY

On July 10, 2024, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief (attached as **Exhibit 2**), seeking a determination that inactive voters are "qualified electors" for purposes of signing CI-126, CI-127, and CI-128 petitions,

[1] This provision was enacted by SB 498 (2023), sponsored by Shane Morigeau (D–SD 48), which was unanimously passed by the Montana Senate and passed the Montana House by a vote of 91–9. It became effective July 1, 2023.

[2] Importantly, the plaintiffs did not challenge those statutes or the statutory deadlines in the district court.

requesting that the District Court enjoin the counties and the Secretary of State from rejecting inactive elector signatures. (Ex. 2 at 11–12.) Plaintiffs simultaneously filed a Motion for Temporary Restraining Order and Preliminary Injunction, Brief in Support, and supporting documents. (**Exhibits 3–6**.) The State of Montana and Secretary Jacobsen filed their opposition brief on July 16, 2024. (**Exhibit 7**.)

The District Court held a hearing on the Motion for TRO on July 16, 2024. Plaintiffs, although bearing the burden of proof, relied on briefing and argument. Defendants provided testimony from three witnesses[3] and concluded on argument. The District Court informed the parties it intended to enter a TRO, but did not know how to craft the TRO, and therefore required the parties to confer to create a proposed order, despite Defendants' strong opposition to the Motion. The District Court issued the TRO by the end of the day. (Ex. 1.)

The District Court's TRO contains at least the following legal errors, resulting in gross injustice:

1. Inactive electors do not meet the requirements of qualified electors pursuant to Mont. Const., art. IV, § 2 and Mont. Code Ann. § 13-19-313(2) until they become active voters pursuant to Mont. Code Ann. §§ 13-2-304 or 13-2-222. The District Court improperly ignored the Montana Constitution and several

[3] One of the witnesses was Secretary of State attorney Clay Leland, whose affidavit supporting this Petition is attached as **Exhibit 8**.

Montana statutes in finding that inactive voters are "qualified electors" eligible to sign constitutional initiative petitions.

2. The District Court unilaterally altered statutory election deadlines by ordering the Secretary to accept from counties signatures counted through 12:00 PM on July 24, 2024, despite the strict timeline imposed by Mont. Code Ann § 13-27-303(1) requiring that all signatures be turned in by July 19, 2024. Plaintiffs did not challenge this statute (or any other statute) in their Complaint. The District Court lacked the authority to rewrite statutory election deadlines. Moreover, no Montana county is a party to the underlying action, and the District Court therefore lacked personal jurisdiction to require any action by any county.

3. The District Court's TRO provides affirmative relief rather than prohibitory relief and is therefore a writ of mandamus in disguise. The District Court erred in issuing a writ of mandamus not placed at issue by the pleadings.

A writ of supervisory control is necessary to vacate the District Court's TRO and allow the orderly, normal, statutory election process for constitutional initiative petitions to proceed according to law.

ARGUMENT

Rule 14(3) of the Montana Rules of Appellate Procedure provides: "The supreme court has supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control."

Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when the other court is proceeding under a mistake of law and is causing a gross injustice and/or constitutional issues of state-wide importance are involved. *Id.*; *see also Barrus v. Mont. First Jud. Dist. Ct.*, 2020 MT 14, ¶ 17, 398 Mont. 353, 456 P.3d 577. Here, the requisite factors are present to invoke the extraordinary remedy of supervisory control.

I. URGENCY OR EMERGENCY FACTORS MAKE THE NORMAL APPEAL PROCESS INADEQUATE.

The Court has unilaterally and arbitrarily altered statutory election deadlines despite no challenge to these statutes by the Plaintiffs. The final day for the submission of signatures to the counties by the initiative proponents was June 21, 2024. Mont. Code Ann § 13-27-301(1). "[W]ithin 4 weeks after receiving the sheets or sections of a petition, the county official shall check the names of all signers to verify they are registered electors of the county" and complete the verification process. *Id.* The end of the 4-week period is July 19, 2024. The District Court has extended this statutory timeline to July 24, 2024. Moreover, both the county election administrators and the Secretary of State's Office are required to follow the law regarding what signatures must (and must not) be counted. This determination must be made in very short order because the Secretary of State's Office needs to begin

its certification process in mere days. *See* Mont. Code Ann. §§ 13-27-307, 13-27-308, and 13-12-201(1). The normal appeal process is therefore inadequate under the circumstances presented here.

II. THIS CASE INVOLVES PURELY LEGAL QUESTIONS OF STATUTORY INTERPRETATION.

This case is about whether a "qualified elector" includes inactive voters for the purposes of initiative petitions to amend the constitution. Additionally, this case involves whether the District Court exceeded its authority in changing statutory election deadlines and granting affirmative, mandatory relief in the form of an injunction. These are legal questions appropriate for a writ of supervisory control.

III. THE DISTRICT COURT IS PROCEEDING UNDER A MISTAKE OF LAW AND BECAUSE THIS CASE INVOLVES INITIATIVES TO AMEND MONTANA'S CONSTITUTION, THEY ARE CONSTITUTIONAL ISSUES OF STATEWIDE IMPORTANCE.

The District Court acted under a mistake of law because it improperly determined that inactive electors are "qualified electors." Additionally, the District Court acted without subject matter jurisdiction when it modified a statute not challenged by Plaintiffs. Lastly, the District Court assumed that affirmative relief was proper and within its discretion to grant, despite the prohibitory nature of a Temporary Restraining Order being requested.

A. THE DISTRICT COURT ERRED IN DETERMINING INACTIVE VOTERS ARE QUALIFIED ELECTORS.

Inactive electors are not "qualified electors." *Whitehead v. Fagan*, 369 Ore. 112, 128, 501 P.3d 1027, 1035 (2021). "In construing statutes, [the Court's] role 'is simply to ascertain and declare what is in terms or in substance contained therein, [and] not to insert what has been omitted or to omit what has been inserted.'" *Larson v. State*, 2019 MT 28, ¶ 28, 394 Mont. 167, 434 P.3d 241 (quoting Mont. Code Ann. § 1-2-101). "When statutory language is clear and unambiguous, [the Court] must discern and effect legislative intent from the plain meaning of the language used without further resort to means of statutory construction." *Larson*, ¶ 28 (citing *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499). "If several statutory 'provisions or particulars' are involved, [the Court] must, to the extent possible, construe them in harmony, giving effect to all." *Larson*, ¶ 28 (quoting Mont. Code Ann. § 1-2-101). "And [the Court] interpret[s] a statute 'as a part of a whole statutory scheme and construe it so as to forward the purpose of that scheme.'" *State v. Talksabout*, 2017 MT 79, ¶ 34, 387 Mont. 166, 392 P.3d 574 (quoting *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 18, 383 Mont. 523, 373 P.3d 836).

The constitution is clear that a voter is not a qualified elector unless he or she has met the registration requirements provided by law to vote. Mont. Const., art. IV, § 2. (emphasis added.) An individual is qualified to vote under Montana law if they

are "(a) registered as required by law; (b) 18 years of age or older; (c) a resident of the state of Montana and of the county in which the person offers to vote for at least 30 days; [] (d) a citizen of the United States" and is not currently serving a sentence in a penal institution for a felony conviction or been adjudicated to have an unsound mind. Mont. Code Ann. § 13-1-111(1)–(3). Title 13 also defines "elector" as "an individual qualified to vote under state law." Mont. Code Ann. § 13-1-101(20). Similarly, a legally registered elector "means an individual whose application for voter registration was accepted, processed, and verified as provided by law." Mont. Code Ann. § 13-1-101(30).

Verification of the elector registration is mandated not just by state law, but also by federal law.[4] State law requires county election administrators to maintain an accurate voter list by continually verifying voter registration. Every year, county election administrators must take certain steps to verify their voter registration lists. Mont. Code Ann. § 13-2-220. These steps include "compar[ing] the entire list of registered electors . . . against the national change of address list"; "mail[ing] . . .

[4] "The National Voter Registration Act of 1993 (also known as the "NVRA" or "motor voter law") sets forth certain voter registration requirements with respect to elections for federal office." *The National Voter Registration Act Of 1993 (NVRA)*, United States Department of Justice (Aug. 6, 2015), https://www.justice.gov/crt/national-voter-registration-act-1993-nvra. "Section 8 of the NVRA contains requirements with respect to the administration of voter registration by States and requires States to implement procedures to maintain accurate and current voter registration lists. *Id*.

notice to all registered electors . . . to confirm their addresses"; or "mail[ing] targeted mail[] to electors . . . who failed to vote in the preceding federal general election [and] applicants who failed to provide required information on registration forms." § 13-2-220(1)(a)–(c). If an "elector fails to respond within 30 days" or if "the election administrator is not able to verify the elector's address, the elector must be placed on the inactive list until they follow the procedure in 13-2-222 or 13-2-304." § 13-2-220(2)(b)–(c). Absentee ballot voters can become inactive if they fail to return a confirmation notice. Mont. Code Ann. § 13-19-313(2). By failing to do so, the elector "shall [be] place[d] on the inactive list provided for in 13-2-220 until the elector becomes a qualified elector." *Id*. "In order to become a qualified voter, an elector shall follow the procedure in 13-2-222 or 13-2-304, as applicable." *Id*. Thus, an inactive elector is someone who "failed to respond to confirmation notices and whose name was placed on the inactive list pursuant to 13-2-220 or 13-19-313." Mont. Code Ann. § 13-1-101(24).

An inactive elector can be "reactivated," but not by signing a petition. There are two statutes governing this process: Mont. Code Ann. §§ 13-2-304 and 13-2-222. *See* Mont. Code Ann. § 13-2-220(2)(c). The first statute provides the means by which an elector can vote if they follow the "late registration" steps. Mont. Code Ann. § 13-2-304. The second statute lists out several means by which the inactive elector can become active: vote in an election or by submitting an application to vote

absentee; notify their county election administrator in writing of their current address; or complete a reactivation form. Mont. Code Ann. § 13-2-222(1)(a)-(c). Once the inactive elector completes any of the three tasks, they are "reactivated pursuant to subsection (1)(a) [and] is a legally registered elector for purposes of the election in which the elector voted." Mont. Code Ann. 13-2-222(3). There is no lawful means of transitioning between inactive and active status by signing a petition. Unlike signing a petition, each of the statutorily prescribed means of reactivation require interaction with a county official and verification of current address.

The statutory scheme is clear. An inactive elector is someone whose registration could not be verified—thereby *not* a legally registered elector until the issue is corrected. If the elector is not legally registered, they are *not* a qualified elector. If they are not a qualified elector, their signature on a petition for a constitutional initiative cannot be counted. This interpretation is confirmed by the constitution itself, which provides that petitions "shall be signed by at least ten percent of the qualified electors of the state. That number shall include at least ten percent of the qualified electors in each of two-fifths of the legislative districts." Mont. Const. Art. XIV, § 9. "The number of qualified electors required…shall be determined by the number of votes cast for the office of governor in the preceding

general election."[5] Only active voters could vote for the office of governor. Thus, ten percent of active voters (including at least ten percent in two-fifths of the legislative districts) is the required number of signatures to amend Montana's constitution by initiative. The District Court erred in finding that an inactive elector is a "qualified elector."

B. THE DISTRICT COURT LACKED AUTHORITY TO REWRITE STATUTORY ELECTION DEADLINES AND COMPEL ACTION BY THE COUNTIES.

The District Court had no power to modify the timing of the process. A court may exercise subject matter jurisdiction only with regard to issues that a party places before it. *LaPlante v. Town Pump, Inc.*, 2012 MT 63, ¶ 16, 364 Mont. 323, 274 P.3d 724 citing *Old Fashion Baptist Church v. Mont. Dept. of Revenue,* 206 Mont. 451, 457, 671 P.2d 625, 628 (1983). A District Court does not have jurisdiction to grant relief outside of the issues presented by the pleadings unless the parties stipulate that other questions be considered, or the pleadings are amended to conform to the proof. *Old Fashion Baptist Church*, 206 Mont. at 457, 671 P.2d at 628 (citing *Heller v. Osburnsen*, 162 Mont. 182, 510 P.2d 13 (1973)); *Natl. Corp. v. Kruse*, 121 Mont. 202, 192 P.2d 317 (1948); *Welch v. All Persons*, 78 Mont. 370, 254 P. 179 (1927); *Wallace v. Goldberg*, 72 Mont. 234, 231 P.56 (1925). It has long been the case that

[5] Similarly, the required signatures by district are calculated by dividing the total votes cast for governor in the last gubernatorial election by the number of legislative representative districts. Mont. Code Ann. 13-27-303(2).

"the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) (quoting *Mollan v. Torrance*, 22 U.S. 537 (1824)).

The final day for proponents of the initiatives to submit petition signatures to the counties was June 21, 2024.[6] Mont. Code Ann § 13-27-301(1). "[W]ithin 4 weeks after receiving the sheets or sections of a petition, the county official shall check the names of all signers to verify they are registered electors of the county" and complete the verification process. Mont. Code Ann § 13-27-303(1). The end of the 4-week period is July 19, 2024.[7] *See* Mont. Code Ann. § 13-27-104. After July 19, the county administrators must forward the verified signatures to the Secretary. Mont. Code Ann. § 13-27-304. The Secretary then begins the process of consideration and tabulation of the signatures received by the counties. Mont. Code Ann. § 13-27-307. "When a petition containing a sufficient number of verified signatures has been filed with the secretary of state within the time required by the constitution or by law, the secretary of state shall immediately certify to the governor that the completed petition qualifies for the ballot." Mont. Code Ann. § 13-27-308. "Seventy-five days before a general election, the secretary of state shall certify to the election administrators . . . the ballot issues as shown in the official records of

[6] Montana Secretary of State, *2024 Ballot Issue Calendar*, (Aug. 23, 2023), *available at*: https://tinyurl.com/ypv5skhb.
[7] *Id*.

the secretary of state's office." Mont. Code Ann. § 13-12-201(1). The deadline is August 22, 2024.[8]

The District Court's Temporary Restraining Order altered this statutory timeline, despite Plaintiffs not challenging any of the above statutes. (*See* Exs. 2 and 3.) No statute was found unconstitutional. Other than an acknowledgement of the role each statute plays in this process, Plaintiffs failed to raise any of them as an unconstitutional hinderance on any right. (Ex. 2 at ¶¶ 6, 11, 23, 24; Ex. 3 at 5, 10, 13, 14.) If the District Court "does not have jurisdiction to grant relief outside of the issues presented by the pleadings," and there was no "stipulat[ion] that other questions be considered," then the Court simply did not have the authority to take control of the timing of election deadline statutes and modify them to Plaintiffs' benefit. *Old Fashion Baptist Church*, 206 Mont. at 457, 671 P.2d at 628. If "jurisdiction . . . depends upon the state of things at the time of the action brought," then the pleadings themselves demonstrate the failure now before this Court. *Grupo Dataflux,* 541 U.S. at 570. The District Court lacked subject matter jurisdiction to amend the timing of a process provided by law.

The District Court likewise lacked jurisdiction to require any action by individual Montana counties. No county is a party to the underlying action, and no county was served with process. The District Court never acquired personal

[8] *Id*.

jurisdiction over any county, and therefore lacked the power to require any action by any county.

C. A TRO WAS AN IMPROPER REMEDY.

The District Court order compels performance by the Secretary and county administrators (who are not parties to the underlying case) rather than prohibits conduct. "In general, a TRO, like other injunctive relief, is designed to stop conduct, not require it." *Keshishyan v. El-Batrawi*, 2015 U.S. Dist. LEXIS 178754, at **5–6 (C.D. Cal. June 18, 2015) (citing *Anderson v. U.S.*, 612 F.2d 1112, 1114–15 (9th Cir. 1979) ("Courts are more reluctant to grant a mandatory injunction than a prohibitory one and . . . generally an injunction will not lie except in prohibitory form"); *King v. Saddleback Junior Coll. Dist.*, 425 F.2d 426, 427 (9th Cir. 1970) ("It is the function of a preliminary injunction to preserve the status quo pending a determination of the action on the merits.")). When a party "seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction." *Martin v. Intl. Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). On the other hand, a writ of mandamus is issued "to compel performance of an official duty where there is no 'plain, speedy, and adequate remedy in the ordinary course of law.'" *Richards v. Gernant*, 2020 MT 239, ¶ 19, 401 Mont. 364, 472 P.3d 1189 (quoting Mont. Code Ann. § 27-26-102.)

Plaintiffs' Complaint does not sound in prohibitory relief. Instead, Plaintiffs sought to "Requir[e] the Secretary of State and her agents, officers, employees, successors, and all persons acting in concert with each or any of them, and the State of Montana, to immediately restore the signatures of 'qualified electors' unlawfully removed under the inactive voter guidance." (Ex. 2 at 12.) (emphasis added.) The TRO likewise requires in relevant part:

- "The Secretary shall restore the state software system. . .,"
- "The Secretary shall produce a report. . .,"
- "Counties . . . shall review the signatures . . . and shall submit them. . .,"
- "The Secretary shall. . . accept from counties and count the signatures. . .."

(Ex. 1 at 1–2.) These orders are not prohibitions, but compelled performance. In effect, the District Court granted a writ of mandamus, but without Plaintiffs seeking any writ of mandamus in their pleadings. The District Court did not have jurisdiction to issue a writ of mandamus, nor did it have the authority to compel performance under the guise of a TRO.

CONCLUSION

For the reasons discussed in this application, the Court should immediately exercise supervisory control, vacate the July 16, 2024, Temporary Restraining Order, and allow the orderly counting of petition signatures to proceed according to Montana law.

DATED this 18th day of July 2024.

Austin Knudsen
MONTANA ATTORNEY GENERAL

/s/ Michael Noonan
Michael Noonan
Michael D. Russell
Thane Johnson
Alwyn Lansing
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 and Rule 14 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately-spaced, 14-point Times New Roman font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 3,717 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and index of exhibits.

/s/*Michael Noonan*
Michael Noonan

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CERTIFICATE OF SERVICE

I, Michael Noonan, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 07-18-2024:

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana, Secretary of State
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: State of Montana, Secretary of State
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana, Secretary of State
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana, Secretary of State
Service Method: eService

Miike Menahan (Respondent)
228 Broadway, 2nd Floor
Helena MT 59601
Representing: Self-Represented
Service Method: E-mail Delivery

Electronically signed by Kara Thompson on behalf of Michael Noonan

Dated: 07-18-2024