IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 24-0431

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, HON. MIKE MENAHAN, Presiding,

Respondent.

On Petition for Writ of Supervisory Control from the Montana First Judicial District Court, Lewis and Clark County, Cause No. ADV 2024–463, the Honorable Mike Menahan, Presiding

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INITIATIVE PROPONENTS' RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

Appearances:

Raph Graybill
Graybill Law Firm, PC
300 4th Street North
P.O. Box 3586
Great Falls, MT 59403
(406) 452-8566
raph@graybilllawfirm.com

Attorney for CI-128 Plaintiffs

Martha Sheehy
Sheehy Law Firm
P.O. Box 584
Billings, MT 59102
(406) 252-2004
msheehy@sheehylawfirm.com

Attorney for CI-126 and CI-127 Plaintiffs

**additional appearances on next page*

Austin Knudsen
Michael Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Fax: 406-444-3549
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

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

Attorneys for Petitioners

Hon. Mike Menahan
First Judicial District Court
228 Broadway
Helena, MT 59601

Respondent

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INTRODUCTION

The Secretary of State seeks to exclude thousands of registered Montana voters from the constitutional initiative process. Her unilateral change would upend decades of settled practice and is contrary to the clear requirements of the Montana Constitution and state law.

The District Court correctly enjoined the Secretary from further unlawful conduct and restored the parties to the status quo ante—the last peaceable, uncontested condition which preceded the pending controversy—by providing that unlawfully-excluded signatures be counted. It did so well within its broad equitable and remedial authority.

Under normal circumstances, supervisory control would be inappropriate because the District Court did not err. However, since the District Court's hearing, new information has come to light regarding the existence of a second lawsuit against the Secretary, and a collusive settlement—entered just one day before the TRO hearing in this matter—committing the Secretary to do exactly the opposite of what Judge Menahan correctly ordered. While that settlement has since been vacated in light of Judge Menahan's order, it makes no sense to have two separate district courts adjudicate the Initiative Proponents' rights and the Secretary's responsibilities, particularly where the Secretary and her political supporters have deliberately excluded the Initiative Proponents from one of those cases. The tight

timelines of the initiative qualification process and the parties' strong interests in finality also counsel against continued district court litigation. Accordingly, and because only legal issues are involved, the Court should assume supervisory control under Rule 14(3)(b) and issue permanent declaratory and injunctive relief affirming the District Court's analysis of the issues and enjoining Respondents from excluding the otherwise-valid signatures of qualified electors who appear on the "inactive" registered voters list.

JURISDICTION

The Court has jurisdiction to issue a supervisory writ under Rule 14(3)(b) because this matter involves "purely legal questions" and "[c]onstitutional issues of statewide importance," in the context of an urgent election matter for which prompt and final resolution is needed. A writ under Rule 14(3)(a) would be improper because the District Court did not err and did not cause injustice.

BACKGROUND AND PROCEDURAL HISTORY

For years, the Montana Secretary of State has directed county election administrators verifying initiative petition signatures to accept the signatures of electors who appear on the "inactive" registered voter list, an administrative classification that Montana adopted in 1997 to comply with the National Voter Registration Act ("NVRA"). *See* § 13-2-220, MCA. As the Secretary's longstanding guidance explained, such signatures must be counted because voters

on the "inactive" list "are legally registered." Pet. Ex. 4 at Ex. A. This guidance is so well-established that the Secretary maintains it on her website even today.[1]

On June 28, 2024—in the middle of a statutory four-week window for counties to verify petition signatures—the Secretary purported to unilaterally change the law to require election administrators to exclude signatures from voters on the "inactive" list. She initially disclosed her decision in an email to a single county election administrator. On July 2, she then performed a "hotfix" on the state's election software to automatically reject signatures from "inactive" voters, effectively forcing counties to reject them. The change affects thousands of signatures of registered Montana voters. It is impossible to know whether the rejection of inactive signatures will ultimately disqualify constitutional initiatives 126, 127, or 128 ("the Initiatives") until the window for challenges runs, 30 days after certification of each initiative to the Governor. Section 13-27-606, MCA.

On July 10, Initiative Proponents sued in the First Judicial District Court and moved for a TRO and preliminary injunction. After an evidentiary hearing on July 16, the District Court entered a TRO returning the parties to the status quo ante—the last peaceable, uncontested condition. The District Court's order enjoined the Secretary from rejecting "inactive" voters' signatures and provided for counties to

[1] *See* https://sosmt.gov/Portals/142/Elections/Documents/Petition-Processing.pdf (last accessed July 22, 2024).

verify these signatures under pre-litigation conditions. The District Court extended by two-and-one-half business days the deadline for counties to verify previously-rejected "inactive" voter signatures.

Meanwhile, unbeknownst to MER and MSRR, legislators and political candidates opposing the initiatives brought a separate, collusive lawsuit against the Secretary in the Twentieth Judicial District Court, Lake County on July 12, seeking precisely the opposite relief. On July 15, the day before the First Judicial District Court's hearing, the Secretary stipulated to a TRO in the Twentieth Judicial District Court case prohibiting certification of CI-126 and -127 and agreeing to reject the signatures of "inactive" voters. Only after the First Judicial District Court hearing did the Secretary disclose the existence of the Twentieth Judicial District Court matter to MER and MSRR. On learning of the conflicting TRO issued in the First Judicial District Court, Judge Molly Owen promptly vacated the stipulated-TRO in the Lake County matter and set a hearing for July 24. The Initiative Proponents today moved to intervene in that matter, vacate the July 24 hearing, and transfer venue to Lewis and Clark County.

ARGUMENT

I. Inactive Registered Voters Are "Qualified Electors."

A. A "Qualified Elector" Is a Registered Voter, Whether or Not the Voter Has Been Administratively Classified as "Inactive."

The plain text of the Montana Constitution and state law entitle registered voters to sign constitutional initiative petitions whether or not they are on an "inactive" list. The Montana Constitution empowers every "qualified elector[]" to sign petitions proposing constitutional amendments. Mont. Const., art. XIV, § 9. The constitution defines "qualified elector" as "[a]ny citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law," unless serving a felony sentence or found by a court to have an unsound mind. *Id.* art. IV, § 2. State law establishes the same requirements in § 13-1-111, MCA. *See Reichert v. State*, 2012 MT 111, ¶ 68, 365 Mont. 92, 278 P.3d 455 (defining the term "qualified elector" by reference to Mont. Const., art IV, § 2 and § 13-1-111, MCA). Section 13-27-303, MCA, which governs the signature verification process for initiative petitions, confirms that no more is required to sign a petition and be counted: county officials need only verify that that petition signers "are registered electors of the county."

These provisions are clear, complete, and make no reference whatsoever to whether an elector appears on the "active" or "inactive" list of registered voters. Both lists are made up of "electors," defined as "individual[s] qualified to vote

under state law." Section 13-1-101(2), (20), (25), MCA. The "inactive" list is simply a list of registered voters who election officials have some reason, specified by statute, to think may have moved. *See* §§ 13-2-220, -402(7), MCA. Placement on the "inactive" list in Montana has no substantive effect on a voter's right to vote, and it certainly does not cancel a voter's registration. Cancellation is a separate step, governed by separate statutory procedures. *See* § 13-2-402, MCA. Voters on the "inactive" list may still vote in person or request an absentee ballot, without any added barriers. *See* § 13-2-222, MCA. "Inactive" list voters are registered voters, full stop: qualified electors who, under the Montana Constitution, are entitled to sign initiative petitions.

This plain text reading of the Montana Constitution and state law is consistent with the provisions' purpose. Proponents of a constitutional amendment must demonstrate support from the electorate before the measure appears on the ballot. It makes sense to condition participation in the initiative process based on whether a signer can ultimately vote for the measure, *i.e.* to limit signature participation to registered voters. All qualified electors—"active" or "inactive"—are eligible to cast votes for a measure. Conversely, it makes little sense to exclude, arbitrarily, the signatures of "inactive" list voters who can still vote for a measure but who have been administratively classified as possibly having a new

address. Their signatures are every bit as indicative of public support from eligible voters as the signatures of voters on the "active" list.

The Secretary's directive that counties must reject signatures from registered voters on the "inactive" voter registration list violates the Montana Constitution and statute by imposing new, unlawful barriers to participation in the initiative process—barriers not seen before June 28, 2024 in the initiative process. The Secretary enjoys no such authority to manufacture new conditions on participation in the constitutional initiative process. *See Larson v. State ex rel. Stapleton*, 2019 MT 28, ¶ 41, 394 Mont. 167, 434 P.3d 241 (holding that the Secretary is not vested with unilateral discretion to determine the substantive or procedural requirements for political party ballot qualification petitions).

In arguing that "inactive" voters may not sign constitutional initiative petitions, the Secretary relies on two provisions governing different issues wholly unrelated to the initiative process: §§ 13-2-222(3) and 13-19-313(2), MCA. Both provisions were in place for the years that the Secretary advised counties to include "inactive" registered voters in the "accepted" count.[2] These extraneous statutory

[2] In an effort to justify her abrupt change in position, the Secretary argues that § 13-19-313(2) was amended in 2023. But the 2023 amendment did not materially change the relevant language in this provision, which has provided since 1997 that if a confirmation notice is returned to the election administrator, the "the election administrator shall place the elector on the inactive list provided for in 13-2-220 until the elector becomes a qualified elector." *See* 2023 Mont. Laws Ch. 688, § 2.

sections cannot overcome the clarity of the directly applicable constitutional and statutory provisions defining "qualified elector," entitling all "qualified electors" to sign petitions, and providing that county officials need only verify that petition signers are "registered electors."

Section 13-2-222(3), MCA's statement that "[a]n elector reactivated pursuant to subsection (1)(a) is a legally registered elector for purposes of the election in which the elector voted" serves only to ensure that the elector's vote is counted. It does not say, or imply, that the elector was not a registered voter before reactivation. To the contrary, §§ 13-2-220 and 13-2-402, MCA, make clear that inactive electors are registered, unless and until they are removed from the rolls through the cancellation process.

Similarly, § 13-19-313(2), MCA, governs only what a county official should do if a mail ballot is returned as undeliverable. The Secretary seizes on the phrase "in order to become a qualified voter, an elector shall follow the procedure in 13-2-222 or 13-2-304, as applicable." But § 13-19-313(2) simply has nothing to do with petition signature verification: it applies only in the context of a returned mail ballot and says nothing about an inactive voter's right to sign a petition. Moreover, as a statutory enactment, § 13-19-313(2), MCA, cannot supersede the plain text of the constitutional definition of "qualified elector." The first section of Chapter 19, Title 3, in which that provision appears, confirms that the Chapter governs only the

conduct of "certain specified elections as mail ballot elections." Section 13-19-101, MCA. This isolated phrase concerning mail ballots should not be construed to fundamentally alter the terms "qualified elector," "elector," and "legally registered elector" in the Montana Constitution and as it pertains to the initiative process—especially where those terms are expressly defined, and where statutes specific to the initiative process confirm their plain-text meaning. *See, e.g.*, § 13-27-303, MCA.

The Secretary also argues that an "inactive" voter does not fall within § 13-1-101(30), MCA's definition of "legally registered elector." That provision defines a "legally registered elector" as "an individual whose application for voter registration was accepted, processed, and verified as provided by law." Section 13-1-101(30), MCA. The Secretary argues that an "inactive" voter is "someone whose registration could not be verified." Pet. at 10. This is entirely wrong.

Section 13-1-101(30)'s description of a voter registration application as being "accepted, processed, and verified" refers to the steps taken when voters first apply for registration: their application is "accepted and processed" under a set of administrative rules providing procedures to "verify[] the accuracy of voter registration information" submitted. Sections 13-2-109, -110, MCA. That process is complete when the voter first becomes a registered voter. *See* § 13-2-110(5)(a), MCA ("If information provided on an application for voter registration is sufficient

to be accepted and processed and is verified pursuant to rules adopted under 13-2-109, the election administrator shall register the elector as a legally registered elector."). Every voter on the "inactive" list was previously an active registered voter, so every such voter has already been through that process and already had their application "accepted, processed, and verified." *See* § 13-2-220, MCA. Voters who attempt to register but do not clear that hurdle are in a different category—"provisionally registered elector[s]." Section 13-2-110(5)(b), MCA. They are not on the "inactive" list. *See id.* Voters on the "inactive" list thus meet the definition of "legally registered elector" in § 13-1-101(30), so that definition provides no justification for refusing to allow such voters to sign initiative petitions.

B. Oregon Law Is Inapplicable.

The Secretary also attempts to justify her 180-degree change of position based on an Oregon court decision from three years ago, *Whitehead v. Fagan*, 369 Or. 112, 501 P.3d 1027 (2021). But Oregon law is distinguishable from Montana law, because the Oregon Constitution does not define the term "qualified elector" and under Oregon law, "voters whose registrations are inactive are not eligible to vote" without submitting a new registration form to update their registration. *Whitehead,* 369 Or. at 115, 119 (emphasis added); Or. Rev. Stat. § 247.013(7). Oregon applies this stringent rule because Oregon is a vote-by-mail only state—

there are no polling places at which voters can appear to vote. *See* Or. Rev. Stat. § 254.465(1). In contrast, Montana law allows voters on the inactive list to cast ballots simply by appearing at their normal polling place or requesting an absentee ballot, either of which will move the voter's registration to the active list as a result of the simple acts required to vote. Section 13-2-222, MCA.

Moreover, other states that do not conduct mail-only elections have reached the opposite conclusion, holding that voters on the "inactive" list are eligible to sign initiative petitions and to have their signatures count. *See State ex rel. Bellino v. Moore*, 254 Neb. 385, 390, 576 N.W.2d 793, 796–97 (1998) (holding that inactive voters are "registered voters" for purpose of the laws governing Nebraska ballot initiatives); *Maryland Green Party v. Maryland Bd. of Elections*, 377 Md. 127, 150, 832 A.2d 214, 227–28 (2003) (holding an express statutory prohibition on inactive voters signing petitions unconstitutional under the Maryland constitution).

C. Signing a Petition Should Reactivate Inactive Voters in Any Event.

Even if the Secretary were right to demand that only active voters' signatures be counted, under Montana law, the very act of signing a petition submitted to a county election official should remove a registered voter from the "inactive" list, entitling their signature to be counted. Section 13-2-222(1)(b), MCA, requires the movement of a voter from the inactive to the active list if the

voter "notifies the county election administrator in writing of the elector's current residence, which must be in that county"—as every voter who signs and provides their residence address on a petition necessarily does. Thus, even crediting the Secretary's incorrect reading of the law, registered Montana voters who sign initiative petitions and provide their residential address would have already restored their "active" status just by signing, and their signatures should therefore be counted.

D. Holding that Inactive Voters are Not Legally Registered Voters Would Violate Federal Law and Criminalize Petition Signing.

Adopting the Secretary's new reading that "inactive" voters are not registered at all would have broad and harmful consequences. *See* Pet. at 7–8.

First, it would run headlong into federal law. The NVRA prohibits states from removing voters "from the official list of eligible voters" based on a change of residence until they fail to vote in two consecutive federal elections after failing to return an address-confirmation notice. 52 U.S.C. § 20507(d)(1), (d)(2)(A). Thus, under the NVRA, voters who fail to return an address-confirmation notice must be "kept on the list" of eligible voters "for a period covering two general elections for federal office" before their name may be removed. *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 763–64 (2018).

Montana created the inactive voter list in 1997 for the express purpose of complying with that federal-law requirement. *See* 1997 Mont. Laws Ch. 246,

§§ 11, 12, 14 (codified as amended at §§ 13-2-220, -222, MCA). No surprise, then, that Montana law provides for voters to be listed on the inactive list under precisely those circumstances in which the NVRA demands they not be removed "from the official list of eligible voters": they have failed to respond to a mailed confirmation notice, but they have not yet failed to vote in two consecutive federal general elections. *Compare* §§ 13-2-220(2), -402(7), MCA; *with* 52 U.S.C. § 20507(d).

If the Secretary were right that voters on the inactive list are not lawfully registered, however, then the procedures Montana adopted specifically to comply with the NVRA would instead violate it, by requiring the Secretary to remove voters from the "official list of eligible voters" at exactly the time that the NVRA says voters may not be removed from that list. Montana statutes may not be construed to defeat the Legislature's manifest intent in that way. *See* § 1-2-102, MCA. And if they did what the Secretary says they do, they would be preempted by the NVRA's contrary command. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013) (holding that the NVRA preempts inconsistent state election laws). Montana did not, and may not, provide that voters on the inactive list are not registered voters.

Second, adopting the Secretary's interpretation would subject inactive voters who sign petitions to the possibility of a $500 fine, 6 months in jail, or both.

Sections 13-27-303(3), 45-7-203, MCA. This contradicts the statutorily-mandated language for the petition form itself, which warns prospective signers that they must be "a legally registered Montana voter" in order to sign the petition, making no mention of a voter's active or inactive status. Section 13-27-241, MCA. It is ludicrous to suggest that an inactive registered voter whose registration has not been cancelled would be prosecuted for signing a petition, especially since during the entirety of signature-gathering period the Secretary, through her website, directed that inactive voter signatures counted "since they are legally registered." Preposterous though that would be, it is exactly this scenario—the prosecution of thousands of registered voters on the inactive list—that the Plaintiffs in the Lake County action argue for in their complaint, providing all the more reason this Court should provide declaratory relief. *See* Pet. ¶ 38, *Sharp v. Jacobsen*, No. DV-24-154 (20th Jud. Dist. Ct. July 12, 2024) (Owen, J., presiding) (Exhibit A hereto).

II. The District Court's Remedy Was Proper.

There was no defect in the District Court's remedy. This Court should affirm and extend it, in addition to providing declaratory relief.

The facts supporting the TRO are not disputed. Petitioners' affidavit testimony confirms the timing of the Secretary's change of position, June 28, and modification of the computer system, July 2. Pet. Ex. 8. Beyond that, Mr. Leland's affidavit consists of inadmissible and incorrect legal opinions, along with

testimony the District Court rightly did not credit: that "the Secretary did not order a change of how signatures were counted," but merely "advised" where the law stood prior to submission of the signed petitions. *Id.* ¶ 32. And while Mr. Leland argues that these TRO proceedings are "wholly unripe," *id.* ¶ 27, that contention is impossible to square with the Secretary's stipulation to a TRO in the Lake County case on July 15, before the July 16 hearing in Lewis and Clark County.

On the law, Petitioners argue that by requiring Defendants to accept and restore petition signatures from electors on the inactive list, the district court's TRO improperly provides "mandatory preliminary relief" rather than "maintaining the status quo." Pet. at 14 (quoting *Martin v. Int'l Olympic Comm'n*, 740 F.2d 670, 675 (9th Cir. 1984)). Not so. The relevant "status quo" that preliminary relief strives to preserve is "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Cole v. St. James Healthcare*, 2008 MT 843, ¶ 25, 348 Mont. 68, 199 P.3d 810 (quoting *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254 ¶ 14, 334 Mont. 86, 146 P.3d 714); *see also Boyer v. Karagacin*, 178 Mont. 26, 32, 582 P.2d 1173, 1177 (1978) (applying that "status quo" definition in appeal of temporary restraining order); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). And where a defendant's actions have already disrupted that status quo, it is entirely appropriate for preliminary relief to require that the defendant "restore[]" the status quo pending final

resolution of the case. *See Cole*, 2008 MT 843 ¶ 25 (holding that preliminary relief appropriately "restored Dr. Cole to his status as an active staff member").

Here, the TRO did no more than restore and preserve the relevant, pre-dispute status quo: the years of prior practice, including the months during which Initiative Proponents gathered and submitted the signatures at issue, in which the Secretary had affirmatively directed that signatures from voters on the "inactive" list must be accepted. The Secretary's effort to change that practice in the midst of signature review was not "peaceable," and it was immediately contested by Initiative Proponents. The District Court therefore properly concluded that a TRO was appropriate to restore and preserve the prior status quo, while the matter was adjudicated.

Contrary to Petitioners' arguments, the District Court also appropriately adjusted signature submission deadlines to give force to the TRO's restoration of the status quo. District courts have a "high degree of discretion . . . to maintain the status quo through injunctive relief." *Shammel v. Canyon Res. Corp.*, 2003 MT 372 ¶ 12, 319 Mont. 132, 82 P.3d 912. Here, the Secretary's disruption of the status quo in the middle of signature review meant that a small adjustment to the deadline was needed to protect Initiative Proponents from irreparable harm. The District Court did not abuse its discretion in making its TRO effective by granting that adjustment.

Finally, Petitioners' argument that the District Court lacked jurisdiction over individual Montana counties also fails. Initiative Proponents brought this case not only against the Secretary, but also against the State of Montana. And counties are "political division[s] of the state." Section 7-1-2101(1), MCA. The District Court's jurisdiction over the State therefore included the power to order necessary relief against the counties. Were it otherwise, Petitioners—the State and the Secretary, but no individual county—would have no standing to complain. *See Carbon County v. Schwend*, 182 Mont. 89, 98, 594 P.2d 1121, 1126 (1979) (holding that "[a] party who is not aggrieved by a judgment or order may not appeal from it." (quoting *In Re Stoian's Estate*, 138 Mont. 384, 393, 357 P.2d 41, 46 (1960))).

REQUESTED RELIEF

In the interests of clarity and finality, and to reduce duplicative litigation, the Court should grant the writ and provide permanent declaratory and injunctive relief in favor of the Initiative Proponents. It should declare, as a matter of law, that qualified electors in Montana may sign and be counted on initiative petitions, whether or not they appear on the inactive list. It should then enjoin the State and the Secretary from rejecting any otherwise-valid signatures of qualified electors on the inactive list. It should extend the relief provided in the TRO, requiring that process and its conditions to continue—providing that counties continue to count

inactive voters unlawfully rejected by the Secretary's directive or software change. The Court should vacate the hearing in Lake County set for July 24. The Court should also vacate the hearing in Lewis and Clark County set for July 26, if this Court's relief issues before that date. If it does not, it should allow the July 26 preliminary injunction hearing before Judge Menahan to proceed apace.

Respectfully submitted this 22nd day of July, 2024.

_/s/ Raph Graybill_____
Raphael Graybill
Graybill Law Firm, PC
300 4th Street North
PO Box 3586
Great Falls, MT 59403
(406) 452-8566
raph@graybilllawfirm.com

Attorney for CI-128 Proponents

_/s/ Martha Sheehy_____
Martha Sheehy
Sheehy Law Firm
P.O. Box 584
Billings, MT 59102
(406) 252-2004
msheehy@sheehylawfirm.com

Attorney for CI-126 and CI-127 Proponents

CERTIFICATE OF COMPLIANCE

The undersigned, Raph Graybill, certifies that the foregoing complies with the requirements of Rules 11 and 12, Mont. R. App. P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 3,996 words, excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Raph Graybill_____
Raph Graybill
Attorney for CI-128 Proponents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 22nd day of July, a copy of the foregoing document was served on the following persons through the Court's electronic filing system and by electronic mail:

Austin Knudsen
Michael Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Fax: 406-444-3549
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

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

Attorneys for Petitioners

Hon. Mike Menahan, First Judicial District Court (via email only)
228 Broadway
Helena, MT 59601
christine.mcmurry@mt.gov

Respondent

/s/ Raph Graybill
GRAYBILL LAW FIRM, P.C.

CERTIFICATE OF SERVICE

I, Raphael Jeffrey Carlisle Graybill, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 07-22-2024:

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

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

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

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

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: Secretary of State, Office of the, State of Montana
Service Method: eService

Martha Sheehy (Attorney)
P.O. Box 584
Billings MT 59103

Representing: Montanans Securing Reproductive Rights, Samuel Dickman, M.D., Montanans for Election Reform Action Fund, Frank Garner
Service Method: eService

Mike Menahan (Respondent)
First Judicial District Court
228 Broadway
Helena MT 59601
Service Method: E-mail Delivery

Electronically Signed By: Raphael Jeffrey Carlisle Graybill
Dated: 07-22-2024