IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0153

WILD MONTANA, MONTANA WILDLIFE FEDERATION, AND MONTANA ASSOCIATION OF COUNTIES,

Petitioners/Plaintiff and Appellees,

v.

GREG GIANFORTE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MONTANA; AND CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE.

Defendants and Appellants.

APPELLANT SECRETARY OF STATE JACOBSEN'S OPENING BRIEF

On appeal from the Montana First Judicial District, Lewis and Clark County, Cause No. DV-25-2023-411, the Honorable Mike Menahan, Presiding

---

Appearances:

Austin Markus James
Chief Legal Counsel
Clay R. Leland, Attorney
MONTANA SECRETARY OF STATE
1301 E. 6th Ave., Rm. 260
Helena, MT 59620
(406) 444-6197
austin.james@mt.gov
clay.leland@mt.gov

Attorneys for Appellant Secretary Jacobsen

Dale Schowengerdt
Timothy Longfield
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
Telephone: 406-457-5496
dale@landmarklawpllc.com

Anita Milanovich
General Counsel
OFFICE OF THE GOVERNOR
1301 East 6th Ave.
Helena, MT 59601
406-449-9173
anita.milanovich@mt.gov
Attorneys for Appellant Governor Gianforte

Rylee Sommers-Flanagan
Dimitrios Tsolakidis
UPPER SEVEN LAW
P.O. Box 31
Helena, MT 59624
rylee@uppersevenlaw.com
dimitrios@uppersevenlaw.com

Attorneys for Appellees Wild Montana and Montana Wildlife Federation

Michael Black
BLACK LAW OFFICE
7 West 6th Ave., Suite 514
Helena, MT 59601
406-546-0017
blacklaw@blackfoot.net

Attorney for Appellee Montana Association of Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE ISSUES

I. Did the District Court err in holding that the Secretary of State's duties under Article VI, Section 10(4) met the definition of a clear legal duty for purposes of a writ of mandamus when it ordered that even though the Legislature was in session at the time of the Governor's veto, the Secretary was required to conduct a veto override poll?

STATEMENT OF THE CASE

The Montana Constitution and the implementing statutes provide the duties and obligations of the Secretary of State ("Secretary") when it comes to a Governor's veto of a bill passed by the Legislature.[1] If the Governor vetoes a bill while the Legislature is in session, the bill is returned to the Legislature – not the Secretary. Mont. Const. art. VI, § 10(1). If the Governor vetoes a bill when the Legislature is not in session, then the Governor must return to the bill to the Secretary for the Secretary to conduct a veto override poll. Mont. Const. art. VI, § 10(4)(a) ("If the Legislature is not in session when the governor vetoes a bill approved by two-thirds of the members present, he shall return the bill with his reasons therefor to the secretary of state."). Along with the veto provisions as laid out in the Montana Constitution and in the Montana Code, the Legislature maintains the ability to call for a special session to override a veto or to pass the same bill. Mont. Const. art. V § 6.

---

[1] Mont. Const. art V, Section 1. makes clear that the Legislature consists "of a senate and a house of representatives." (Emphasis added.)

Here, the events center around a veto by the Governor of Senate Bill 442 ("SB 442" or "the bill"), on the final day of the 2023 legislative session. The Governor's veto of SB 442 occurred while the 68th Legislature was still in session. *See*, Doc. 45; Pet'r Pet. 2, ¶ 2 ("The Senate voted to adjourn after the Governor had vetoed SB 442…") (emphasis added); Mont. Const. art. VI, § 10 (4)(a).

After certain Interest Groups, namely Wild Montana, Montana Wildlife Federation, and the Montana Association of Counties ("Interest Groups"), lobbied for SB 442 and unsuccessfully demanded that the Secretary conduct a veto override poll in accordance with Article VI, Section 10(4)(a), these Interest Groups filed suit, in the First Judicial District on June 7, 2023, including as part of that suit an Application for Writ of Mandamus. Doc. 1. The Interest Groups' suit dealt with the actions taken by the Montana Legislature, the Governor, and the Secretary of State.

The District Court granted the Interest Groups' Writ of Mandamus on Summary Judgment, while recognizing that the Governor vetoed SB 442 "prior to the Legislature's adjournment." Doc. 45. The District Court held that "[t]he governor and secretary of state's duties under Article VI, Section 10(4) meet the definition of clear legal duties for the purposes of a writ… Petitioners and Plaintiff are entitled to the performance of these legal duties. Therefore, they have met the first requirement for obtaining a writ of mandamus." Doc. 45 at 7-8. The writ also required the "governor must transmit the veto message, and the secretary of state must conduct the override poll in the manner established by Article VI, Section 10(4)." Doc. 45.

The Secretary maintains that the Interest Groups' request to compel the Secretary to perform a legislative poll, an act which the Secretary was unable to perform without certain conditions existing, was inappropriate for mandamus relief because no clear legal duty existed. Importantly, the letter of the Constitution and the rules that implement the Constitution were followed by the Legislative Branch and Chief Executive Branch, including the Secretary, as well as other actors of Government prescribed by law to be involved in the process.

The Secretary has no legal duty to act on a veto poll unless the Legislature is not in session when the governor vetoes the bill, and the bill is returned to the Secretary with the veto message. Mont. Code. Ann. § 5-4-306(2). As a practical matter, the Governor did not return SB 442 to the Secretary. The bill is still in the possession of the Legislature. Letter from Senator Jason Ellsworth to Secretary of State Christi Jacobsen (March 18, 2024).

The Constitution and the code do not provide an action for the Secretary to take when the Secretary is carbon copied to the Governor's veto message returned to the Legislature with the bill while the Legislature is in session. Although courteous, it is not required that the Governor provide the Secretary with a copy of a veto message of a bill returned during the legislative session. The Secretary has as much legal obligation upon receipt as the other carbon copied parties on the veto message for the bill that she did not receive – nothing. The Secretary is limited to what the law allows and mandates.

Additionally, a writ against the Secretary was inappropriate, because even the District Court acknowledged, when considering whether the District Court should grant attorney fees in this case, that this is a "case of first impression" and a "constitutional anomaly." Doc. 72 at 10.

In the end, SB 442 was not the first or the last policy idea that died in the gray area of the rules for majority body votes. When Montana became a territory, law was created by her government according to legislative rules, and lawmakers practiced political gamesmanship alongside of policy making. At the same time, the lawmaking process has improved alongside gamesmanship by state officers in the process to fill some gaps and leave others open.[2] The 1899 statehood constitution incorporated laws that were statutorily adopted to close loopholes in the lawmaking process into the supreme document, as did the "Con-Con" delegates in 1972[3]. Since adopting our constitution 54 years ago, pursuant to Article VI, §10 (4), Montana has adopted and

---

[2] *See generally*, Clark C. Spence, Territorial Politics and Government in Montana 1864-89 (1975).

[3] For example, the "pocket veto" revisions. Montana Constitutional Convention, Committee Proposals, February 17, 1972, p. 451; Montana Constitutional Convention, Verbatim Transcript, February 25, 1972, Volume IV, p. 954.

amended statutes[4] and constitutional amendments[5] to try to prevent exploitation of established norms by the legislative rules adopted by the majority. During each constitutional stage, the Legislature has defined and refined the process implementing the constitutional provision of the day concerning veto power.

Today, the Secretary has no legal duty to issue a veto poll when a bill is vetoed by the Governor during the legislative session. Thus, the writ of mandamus cannot be allowed to stand, because if it does, further loopholes will be created in the legal process and exploited by opportunists in the sausage making that the Secretary of State should not have a hand in.

STATEMENT OF FACTS

On May 1, 2023, the Montana Legislature passed SB 442. Doc. 45 at 3. The next day, on May 2, 2023, SB 442 was enrolled and sent to the Governor. Also on May 2, 2023, which was the 87th and final day of the 2023 legislative session, the Governor vetoed SB 442. Doc. 45 at 3. That afternoon, the Governor transmitted the

---

[4] Mont. Code Ann. § 5-4-306, the statute implementing Article VI, § 10(4), has been amended numerous times dating back to 1895. *See*, En. Sec. 273, Pol. C. 1895; re-en. Sec. 103, Rev. C. 1907; re-en. Sec. 87, R.C.M. 1921; Cal. Pol. C. Sec. 312; re-en. Sec. 87, R.C.M. 1935; amd. Sec. 1, Ch. 63, L. 1973; R.C.M. 1947, 43-504; amd. Sec. 7, Ch. 3, L. 1985; amd. Sec. 1, Ch. 317, L. 1989; amd. Sec. 2, Ch. 685, L. 1991; amd. Sec. 229, Ch. 61, L. 2007; amd. Sec. 1, Ch. 102, L. 2009.

[5] Mont. Const. Amend. XII, Voter Information Pamphlet, at p. 6 (1982).

veto to the Legislature with a statement of reasons. Doc. 44. The vetoed bill and the attached veto message were never transmitted to the Secretary of State.

A. The Governor's veto occurred on the last day of the 68th Legislative Session.

At the time the Governor vetoed Senate Bill 442, the Legislature was still in session. *See* Doc. 45 at 3; Doc. 46 at 2; Doc. 27. Later in the afternoon, the Senate adjourned *sine die* after a *surprise sine die* motion, which precludes debate under the rules. Rules of the Mont. Leg., Sen. R. 50-60 (1). Senate Minority Leader Pat Flowers brought forth a sine die motion around 3:20 p.m. The Senate retained the vetoed bill in its offices, of which it remains today.[6] The House continued to work on legislation into the night, reading SB 442 across the rostrum around 8:39 p.m., declining to vote on the issue, and eventually adjourned *sine die* at 9:14 p.m., officially ending the 68th Legislative Session.[7]

---

[6] Maddison Seipp, NonStop Local, "Montana Senate claims action made by Montana Supreme Court is unconstitutional on Senate Bill 442," https://www.montanarightnow.com/elections/montana-senate-claims-action-made-by-montana-supreme-court-is-unconstitutional-on-senate-bill-442/article_b391152a-e578-11ee-b38d-27f5320d13e1.html (March 18, 2024).

[7] See Agenda: Messages from the Governor, House Floor Session, https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230502/-1/46180#agenda (reading Governor's veto message beginning at timestamp 20:39:45).

B. Interest Groups filed suits against the Governor and Secretary of State

On June 7, 2023, Interest Groups (Wild Montana and Montana Wildlife Federation) filed a Petition for Declaratory Judgment and Application for Writ of Mandate with the Lewis & Clark County First Judicial District Court. Doc. 1. Additionally, on June 7, 2023, the Montana Association of Counties (MACo) filed a similar complaint seeking declaratory relief. *Montana Association of Counties v. Gianforte, et al.*, DV-25-2023-0000413-DK, Doc. 1. MACo then filed on July 14, 2023, a motion to consolidate the two cases. Doc. 9.

The Interest Groups *Petition* and consolidated case hinged entirely upon the actions taken by the Montana Legislature and the Governor. The question presented by Petitioners related to the effectiveness of a veto during the legislative session that was returned to the Legislature prior to, but on the same day as, the successful motion to adjourn. The Interest Groups sought a writ of mandamus that the Secretary has a duty to poll the Legislature and an order directing the same, or alternatively, a declaratory judgment that the Governor's veto of Senate Bill 442 was "ineffective and remains ineffective unless and until the Governor returns the bill and his veto letter to the Secretary to allow for a poll of the Legislature." Doc. 1 at 16.

C. Polling, Court Proceedings, and Letters from the Legislature

On June 30, 2023, the Secretary of State's Office concluded the polling process for each of the qualifying vetoed bills received.[8] A few weeks after, on July 14, 2023, the Secretary moved the District Court to dismiss the Interest Groups petition. Doc. 11. A month later, the Governor moved the District Court to dismiss the Interest Groups Petition. Doc. 23. The parties ultimately filed cross motions for Summary Judgment. On October 2, 2023, the Governor filed for Summary Judgment. Doc. 26, 34. In December 2023, the Court held oral argument on the pending motions. Doc 43.

The District Court granted the Interest Groups Motion for Summary Judgment in the form of a Writ of Mandamus. Doc. 45. On the same day, the court denied both the Governor and the Secretary of State's Motion to Dismiss. On February 2, 2024, the Court entered judgment issuing a writ of mandamus directed the "governor must transmit the veto message and the secretary of state must conduct the override poll in the manner established by Article VI, Section 10(4)." Doc. 45. A few days later, the Governor moved to stay the District Court's order pending appeal, followed by a motion from the Interest Groups for attorney fees. Doc 50, 52.

---

[8] Montana Secretary of State, "Secretary Christi Jacobsen releases veto polling results," https://media.sosmt.gov/secretary-christi-jacobsen-releases-veto-polling-results/#:~:text=HELENA,%20Mont.%20%E2%80%94%20Montana%20Secretary%20of%20State%20Christi%20Jacobsen%20released.

On March 15, 2024, the Montana Supreme Court issued an order denying the Governor's Motion for a stay and ordered that the Governor and the Secretary comply with the Court's writ of mandate, assuring an opportunity in future proceedings. Doc. 59. Pursuant to that Order, on March 18, 2024, the Secretary received a letter from the Governor attaching a copy of his veto message that he sent to the Legislature for Senate Bill 442 noting that he does not have the bill. Letter from Governor Greg Gianforte to Secretary of State Christi Jacobsen (March 18, 2024) ("In keeping with the requirements of the Montana Constitution, I transmitted the attached veto message and the bill, which both the President of the Senate and the Speaker of the Senate signed, to the Legislature while it was in session on May 2, 2023.")

The same day, the Secretary of State received a copy of a letter from the President of the Senate, Senate Pro Tempore, and Majority Leader directed to the District Court and this Court that stated in part the following: "The timing of the Governor's veto and the Minority Leader's successful sine die motion meant that the Legislature had possession of the bill when the session ended. The Senate remains in possession to this day." The letter further read that "We do not believe the Executive Branch has the authority to conduct an action on a bill that is in the Legislature's possession and that was vetoed when the Legislature was in session based on Article VI Section 10(4)(a)." Letter from Senator Jason Ellsworth to the Justices of the Montana Supreme Court and Judge Mike Menahan (March 18, 2024).

On March 19, 2024, pursuant to the writ and under the threat of contempt, the Secretary expended staff time and resources to conduct an expedited veto override poll without the ordinarily required information. The veto override poll failed.[9]

On July 9, 2024, the District Court denied the Interest Groups motion for attorney fees. Doc. 73. The Court noted the present matter required the Court to address a novel legal issue. All parties acknowledge the question at issue was a matter of first impression. *Id.*, Trans. P. 10 ("And so in other cases where there's a clear legal duty in a mandamus case, I can understand attorney fees. But in this case...everybody agrees is a case of first impression..."); Doc. 73 at 4 ("Specifically, Petitioners and Plaintiff asked the Court to determine the proper procedure for facilitating a legislative poll to override a governor's veto in circumstances under which the Montana Constitution does not anticipate.").

STANDARD OF REVIEW

A district court's decision on whether to grant a writ of mandamus is a legal conclusion the supreme court review for correctness. *Allied Waste Servs. of N. Am., LLC v. Mont. Dep't of Pub. Serv. Regulation*, 2019 MT 199, ¶ 12, 397 Mont. 85, 447 P.3d 463 (citing *Boehm v. Park Cty.*, 2018 MT 165, ¶ 7, 392 Mont. 72, 421 P.3d 789). Justiciability is a legal question subject to de novo review. *City of Great Falls v. Bd. of*

---

[9] Veto Polling Results - Official Montana Secretary of State Website - Christi Jacobsen (sosmt.gov) https://sosmt.gov/elections/veto-polling-results/.

Comm'rs, 2024 MT 118, ¶ 9, 416 Mont. 494, 549 P.3d 1158. Summary judgment and motion to dismiss rulings are likewise subject to *de novo* review. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552. This Court exercises plenary review over questions of constitutional law. *Mont. Indep. Living Project v. Dep't of Transp.*, 2019 MT 298, ¶ 14, 398 Mont. 204, 454 P.3d 1216.

SUMMARY OF ARGUMENT

The District Court erred in holding that the Secretary of State's duties under Article VI, Section 10(4) met the definition of a clear legal duty for purposes of a writ of mandamus when it ordered that even though the Legislature was in session at the time of the Governor's veto, the Governor was required to send Senate Bill 442 and its veto message to the Secretary, and the Secretary was required to conduct the veto override polling procedures.

This case centers around the last couple days of the 2023 legislative session. The Governor vetoed SB 442 while the legislature was in session and returned the bill to the legislature. *See*, Pet'r Pet. 2, ¶2 ("The Senate voted to adjourn after the Governor had vetoed SB 442…") (emphasis added); Mont. Const. art. VI, § 10 (4)(a). As provided by the Montana Const. art. VI, § 10, if the Governor vetoes a bill while the legislature is in session, the Governor shall return the bill to the legislature – not the Secretary. Montana Const. art. VI, § 10. The Governor transmitted SB 442 to the legislature. The Governor did not return SB 442 to the Secretary.

Throughout the lower court proceedings, the District Court recognized that the veto procedures in Article VI, Section 10 of the Montana Constitution contained a "procedural gap." With that said, the District Court was incorrect in determining that the case met the test for a writ of mandamus because no clear legal duty existed as to the Secretary and there were other legal remedies more appropriate. Further, the Interest Groups' claims presented nonjusticiable political questions, and the Interest Groups lacked standing to vindicate the Legislature's veto override authority.

The Secretary of State fully, properly, and repeatedly carried out her constitutional and statutory obligations set forth in the Montana Constitution and in Montana law, including conducting numerous legislative veto polls, when appropriate. As required by Mont. Code Ann. Section 5-4-306(2), the Secretary issued a veto poll for every bill that she received from the 2023 session affecting Petitioners' or any Montanans' rights.

ARGUMENT

I. The District Court incorrectly issued a writ of mandamus requiring the Secretary of State to conduct a veto poll for a bill vetoed by the Governor during the 2023 legislative session despite the absence of a clear legal duty in Mont. Const. art. VI, § 10(4).

A writ of mandate is "an extraordinary remedy" available in only "rare" cases. *State ex rel. Thomas v. District Court of Seventeenth Judicial Dist. In and For Valley County*, 224 Mont. 441, 442, 731 P.2d 324, 324-25 (1986). The Supreme Court reviews a writ of mandate as a legal conclusion for correctness. *Becky v. Butte–Silver Bow Sch. Dist. No. 1*

(1995), 274 Mont. 131, 135, 906 P.2d 193, 195. A two–part standard must be satisfied for the issuance of a writ of mandate. *Becky*, 274 Mont. at 135, 906 P.2d at 195. The writ is available where the party who applies for it is entitled to the performance of a clear legal duty by the party against whom the writ is sought. *Boehm v. Park Cty.*, 2018 MT 165, ¶ 7, 392 Mont. 72, 421 P.3d 789. If there is a clear legal duty, the district court must grant a writ of mandate if there is no speedy and adequate remedy available in the ordinary course of law. Mont. Code Ann. § 27–26–102. Additionally, even upon a showing of both parts, "a writ of mandate will not lie to correct or undo an action already taken. An action already done cannot be undone by mandamus, however erroneous it may have been." *State ex rel. Thompson v. Babcock*, 147 Mont. 46, 50, 409 P.2d 808, 810 (1966). The District Court ruled incorrectly at every inquiry.

A. The District Court identified and stated in the Summary Judgment Order and in the lower court proceedings that there was a "procedural gap" in the veto procedures in Article VI, Section 10 of the Montana Constitution and in law that led to this unique situation.

A clear legal duty exists where the law prescribes and defines the duty to be performed with such precision and certainty the act is purely ministerial, as to leave nothing to the exercise of discretion or judgment. *Bostwick Properties, Inc. v. Montana Dep't of Nat. Res. & Conservation*, 2009 MT 181, ¶ 17, 351 Mont. 26, 34, 208 P.3d 868, 873. Where the act to be done involves the exercise of discretion or judgment, however, it is not deemed merely ministerial." *Beasley v. Flathead Co. Bd. of Adjustments*,

2009 MT 120, ¶ 17, 350 Mont. 171, 205 P.3d 812 (citing *Smith v. County of Missoula*, 1999 MT 330, ¶ 28, 297 Mont. 368, ¶ 28, 992 P.2d 834, ¶ 28).

The District Court repeatedly acknowledged throughout the proceedings the lack of an existing legal duty under the Montana Constitution. Order-MSJ, P 4, ¶3. ("[Appellees] seek "to clarify a narrow procedural ambiguity in Montana's constitutionally established veto process."); Order-MSJ, P5, ¶4. (Explaining the Constitutional provisions "appear to leave a procedural gap"); Dkt. 73 at 4, ¶3. (Describing the case as "circumstances under which the Montana Constitution does not anticipate.") Yet, the Court held "the Secretary of State's duties under Article VI, Section 10 (4) meet the definition of a clear legal duty for the purpose of a writ." Doc. at 7. This is a reversible error.

The law prescribes the Secretary of State five business/working days after the receipt of the veto message and the bill from the Governor to conduct a veto poll on applicable legislation. Mont. Code Ann. 5-4-306(2). In this case, it is undisputed in the record that the Governor vetoed the bill and returned the same to the Legislature while both chambers were in session. Doc. 44. The District Court erred in that the Secretary must be in possession of the actual numbered, vetoed bill in order to conduct a veto poll according to the precise ministerial duty prescribed for the office

to do so by law[10]. Mont. Code Ann. § 5-4-306(2) ("The secretary of state shall within 5 working days of **receipt of the bill** and veto message send by certified mail to each legislator, at an address provided by the legislator, **a copy of the bill** and the veto message, a ballot, a return envelope, instructions for casting a vote, and notice of the date by which each legislator shall return a vote.) (emphasis added)

B. The District Court erred when it held that this case met the test for a writ of mandamus because there is no clear and prescribed legal duty for the Secretary of State.

The Court acknowledged that Article VI, Section 10 (4) provisions contemplate the delivery from the Governor to the Secretary of a vetoed bill along with the veto message at the same time and the same manner, but ultimately held "there is no basis for her claim the veto message she did receive did not trigger her constitutional obligations." Doc. 46, at 5¶2. The Court's opinion fails to clear the test for writ of mandate because the District Court's opinion runs counter to the plain language of

---

[10] For the Secretary of State of Montana, the significance of being in possession of documents requiring minister functions affects numerous prescribed duties. For example, unofficial returns of the 1869 election indicated the electorate approved relocation of the capitol to Helena. However, after the returns were sent to the Secretary in Virginia City, but before they could be officially canvassed, the office and all its contents burned, and the seat of government remained in Virginia City. *House Journal*, 4 Session (1867), pp. 84-88; *Montana Post*, November 30, December 7, 1867; Act of January 2, 1869, *LM*, 5 Session (1868-69), p. 106; Larry Barsness, Gold Camp, (1962), pp. 131-32. According to Waldron the vote was Helena, 4,769; Virginia City, 4,677; and "other locations," p. 139. Ellis Waldron, Montana Politics, (1958), p. 22.

the law which clearly dictates the circumstances in which a ministerial duty is triggered for the Secretary of State. Mont. Code Ann. § 5-4-306(2).

A legal duty exists where a statute provides an action to a public body upon completion of conditions, and the record shows a failure to act after completion of the conditions prescribed. *Smith v. County of Missoula*, 297 Mont. 368 (1999). Conversely, a clear legal duty does not exist if the clearly defined condition has yet to occur. This court made this distinction clear in *Phillips v. City of Livingston*, 268 Mont. 156, 885 P.2d 528 (1994). In *Phillips*, the City of Livingston suspended an employee of the fire department. Pursuant to the applicable statute, the City Council was required to conduct a hearing at the next meeting after the suspension. *Id.* at 158, 530. Because the firefighter was suspended, the Court held the City of Livingston violated a clear legal duty by failing to schedule a hearing at the next city council meeting after the suspension. *Id.*

Like the statute analyzed in *Phillips*, Section 5-4-306, MCA provides an action required by the Secretary of State within five days after receipt of a bill and veto message for legislation vetoed after session that received more than two-thirds of the votes. However, the record in *Phillips* demonstrated the city suspended a fireman and did not hold a hearing at the next meeting. That Court found a violation of a clear legal duty where the mandamus applicant showed a failure to act after all conditions provided by statute had been exhausted.

Here, the conditions set forth by statute to create a duty do not exist., and have not occurred, nor has the time allotted under law passed. Should the Secretary of State refuse to poll applicable bills within five working days, a violation of the clear legal duty would exist. Under the record of this case, that is not what happened. Just as a writ would be improper in *Phillips* in the absence of a termination and/or a city council meeting, the writ issued by the District Court was improper as the Secretary of State was never returned the bill. The bill was returned to the legislation during the session.

If the District Court's interpretation is allowed to stand, the Secretary can predict that political machinations regarding vetoes will continue and cost the taxpayers in time and money for the Secretary to discern what does and does not constitute an actual vetoed bill.

C. The District Court erred when it found that this case met the test for a writ of mandamus because there are other legal remedies which were more appropriate.

Even if there is a clear legal duty, the District Court may not grant a writ of mandate if an adequate remedy is timely available in the ordinary course of law. Section 27-26-102, MCA. *See also, Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 274 Mont. 131, 135, 906 P.2d 193, 195 (1995). The relief entered in this case by the court was a writ of mandamus, not declaratory relief. Doc 49. The court had alternative relief options at its disposal. Moreover, the Interest Groups in this case had numerous other legal remedies available that are more appropriate than a writ of mandate, and still are.

In fact, all the Interest Groups need is a written request signed by ten members of the Legislature to poll the Legislature for a special session override vote. Mont. Const. Art. V, § 6, VI, §10; Mont. Code Ann. §§ 5-3-106, 5-4-306.

The Interest Groups and the members in support of the bill could have asked whether any bills had been returned prior to the vote to adjourn, but they did not. Indeed, the Interest Groups could have commenced an action against the Legislature, considering the Legislature is the branch of government that remains in possession of the bill and ended the session abruptly following the delivery of the veto by the Governor. Letter from Senator Jason Ellsworth to Secretary of State Christi Jacobsen (March 18, 2024). Other relief from the Secretary is available undermining the appropriateness of a writ.

Additionally, if the Legislature thought it was not in session when the Governor vetoed the bill, it could have returned the bill to the Governor. By not doing so, the act of the veto and return was complete. "It is axiomatic that an action already done may not be undone by mandamus." *State ex rel. Popham v. Hamilton City Council*, 185 Mont. 26, 29, 604 P.2d 312, 314 (1979). That is what the Interest Groups asked the District Court to do. The writ cannot be used to undo action already taken, or to correct or revise such action, however erroneous it may have been. *Id.* at 29, 314. The writ was incorrectly issued.

II. The Interest Groups' claims presented nonjusticiable political questions, and the Interest Groups lacked standing to vindicate the Legislature's veto override authority.

The Interest Groups' claims presented nonjusticiable political questions. The Constitution's veto provisions are non-self-executing. *See* Mont. Const. art. VI, § 10. As the Court recognized, the Constitution does not anticipate or answer the Interest Groups' legislative process claims.

Plus, the Interest Groups lacked standing to vindicate the Legislature's veto override authority, and thus, the District Court should have dismissed the case on standing grounds. The Interest Group's alleged financial injury was not caused by the Secretary or the Governor, nor was it redressable by the Interest Groups obtaining the writ of mandamus. Moreover, without possession of the bill, even a successful poll as issued by the District Court could not have alleviated the supposed harms because the Secretary of State is unable to assign a chapter number and enroll in law a bill located in the Senate President's desk. Doc 62 at 8.

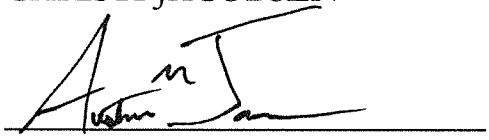
For the foregoing reasons, the Secretary concurs with the legal arguments that have been brought forth by Appellant Governor Greg Gianforte in "Appellant Governor Gianforte's Opening Brief." Therefore, the Secretary substantially incorporates herein Appellant Governor's brief and all arguments pertaining to (1) the Interest Groups having raised nonjusticiable political questions and (2) the Interest Groups lacking constitutional standing in this interbranch dispute.

CONCLUSION

The District Court is bound by established mandamus doctrine and separation of powers principles and precedent, which were not followed. Those principles and precedent exist to avoid the circumstances which transpired during this case. Mandamus against a public officer must not lie where the constitution and law are silent. The writ of mandamus issued by the District Court was incorrect.

DATED this 9th day of October, 2024.

MONTANA SECRETARY OF STATE
CHRISTI JACOBSEN



AUSTIN MARKUS JAMES
CLAY R. LELAND
Attorneys for Secretary of State

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4970 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and any appendices.

/s/ _____
AUSTIN MARKUS JAMES
CLAY R. LELAND
Attorneys for Secretary of State

CERTIFICATE OF SERVICE

I, Austin Markus James, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-09-2024:

Dale Schowengerdt (Attorney)
7 West 6th Avenue, Suite 518
Helena MT 59601
Representing: Greg Gianforte
Service Method: eService

Anita Yvonne Milanovich (Attorney)
1301 E 6TH AVE
HELENA MT 59601-3875
Representing: Greg Gianforte
Service Method: eService

Michael G. Black (Attorney)
PO Box 318
Clinton MT 59825
Representing: Montana Association of Counties (MACo)
Service Method: eService

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
Helena MT 59624
Representing: Montana Wildlife Federation, Wild Montana
Service Method: eService

Dimitrios Tsolakidis (Attorney)
PO box 31
Helena MT 59601
Representing: Montana Wildlife Federation, Wild Montana
Service Method: eService

Austin Markus James (Attorney)
1301 E 6th Ave
Helena MT 59601
Representing: Secretary of State, Office of the
Service Method: eService

Clay Richard Leland (Attorney)
1301 E 6TH AVE
HELENA MT 59601-3875
Representing: Secretary of State, Office of the
Service Method: eService

Timothy Longfield (Attorney)
7 West 6th Avenue
Helena MT 59601
Representing: Greg Gianforte
Service Method: eService

Electronically Signed By: Austin Markus James
Dated: 10-09-2024