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MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

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WILD MONTANA, and MONTANA  
WILDLIFE FEDERATION,

*Petitioners,*

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.

*Respondents.*

Cause No. DV-25-2023-411

Hon. Mike Menahan

**BRIEF IN SUPPORT OF THE  
SECRETARY OF STATE'S MOTION TO  
DISMISS**

Respondent, Christi Jacobsen, in her official capacity as Secretary of State (hereinafter referred to as the "Secretary," or "Secretary of State"), by and through her counsel of record, files this brief in support of her Motion to Dismiss the Secretary as a party from Petitioners' *Petition for Declaratory Judgment and Application for Writ of Mandate*, pursuant to Montana Rules of Civil Procedure 12(b)(1) and/or Rule 12(b)(6).

## INTRODUCTION

Petitioners' *Petition for Declaratory Judgment and Application for Writ of Mandate* hinges entirely upon the actions taken by the Montana Legislature (hereinafter referred to as "legislature") and Governor Greg Gianforte (hereinafter referred to as "Governor"). 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 ("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.")

It is undisputed that the Governor vetoed Senate Bill 442 (hereinafter referred to as "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). The question presented by Petitioners relates to the effectiveness of a veto during the session that was returned to the legislature prior to, but on the same day as, the successful motion to adjourn by the House. Regardless, this alleged controversy does not impact the Secretary of State as to this suit.

Count One seeks a Declaratory Ruling that the Governor's veto occurring during session prior to adjournment was ineffective. However, the Secretary legally lacks the authority to conduct a poll of bills vetoed if the legislature is in session. Mont. Code Ann. § 5-4-306(2). And as a practical matter, the Governor did not

return SB 442 to the Secretary. Without the bill, the Secretary cannot conduct a veto poll.

Count Two seeks a mandate from this Court that the Governor return the bill and his veto letter that was returned to the legislature while the legislature was in session to the Secretary and mandating that the Secretary is required to poll the legislature. Count Three seeks further or supplemental relief.

The Secretary should be dismissed from this action because the Secretary has fulfilled her legal obligations set forth in the Montana Constitution and in Montana law, and there is no justiciable controversy or claim upon which relief can be granted with regard to the Secretary. The Court's determination as to whether the Constitution requires a Governor's veto during the legislative session to be communicated to the full body after it is delivered is a determination of a constitutional process that does not involve a legal duty of the Secretary of State whatsoever. Even if the Court determines that the bill should be returned to the Secretary of State, the Secretary of State would then fulfill her legal duty. Here, the Secretary of State is not a necessary party.

The Secretary of State serves all Montanans in carrying out the Constitutional and Statutory duties prescribed by law. The Courts jurisdiction under the Uniform Declaratory Judgment Act aids dismissal against the Secretary pursuant to Mont. Code Ann. § 27-8-20, and the writ seeks to compel the Secretary of State's office to perform an act which it is unable to do under the law as

prescribed with a bill the Secretary does not have. This action as to the Secretary should be dismissed.

## ARGUMENT

Petitioners have no clear legal right to the relief requested. The Secretary of State has carried out all statutory and constitutional duties prescribed by law and will continue to do so.<sup>1</sup> The Secretary of State has no legal duty, nor has the legal authority, to issue a veto poll when a bill is vetoed during session, or when a bill vetoed after adjournment and reasons therefore have not been delivered by the Governor.

### A. PETITIONERS LACK UDJA JURISDICTION AGAINST THE SECRETARY.

Petitioners' involvement in the legislative process is respected by the Secretary, but Petitioners do not have a justiciable controversy against her. Before a court may exercise jurisdiction, a justiciable controversy must exist. *Kageco Orchards, LLC v. Montana Department of Transportation*, 2023, 2023 WL 3193176. A justiciable case presents issues that are ripe for determination, not merely speculative or hypothetical. *Mont. Power Co. v. Mont. Pub. Serv. Comm'n.*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91. Count I does not present a justiciable controversy against the Secretary regarding an existing right, and to the extent that it could, the controversy is merely speculative, hypothetical, and unripe.

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<sup>1</sup> Secretary of State Christi Jacobsen is honored Montana entrusted her with the faithful execution of the duties set forth in the Constitution and prescribed by law, including her ministerial function administrating the veto polling process for bills vetoed after sine die. As of this filing, the Secretary's office has administered over 4,650 ballots for bills vetoed after session, with differing due dates, all of which are posted at <https://sosmt.gov/elections/veto-polling-results/>. The Secretary has faithfully executed her duties and obligations and will continue to do so.

Petitioners' speculation as to what is anticipated by the Constitution regarding SB 442 does not amount to responsibility by the Secretary for any wrongdoing or violation of actual legal rights by the Secretary's Office. Petitioners do not ask this Court to declare any wrongdoing by the Secretary and recognize the present conditions require no obligation of the Secretary. Instead, they ask the Court to declare the Governor's veto during session ineffective "unless and until" the Governor takes certain actions. As a result, Petitioners recognize the lack of any existing legal right for the Secretary to conduct a poll in the status quo. Moreover, even if the Court declares as Petitioners ask, a poll by the Secretary exists only as a speculative hypothetical situation. This is the very type of theoretical or hypothetical problems as applied to the Secretary that this Court lacks jurisdiction to decide.

The Secretary acknowledges<sup>2</sup> Petitioners' argument concerning the timing and timelines of a veto as an intriguing philosophical, political, and academic question. At the same time, courts have no jurisdiction to determine matters like this that are purely speculative, deals with theoretical problems, seeks an advisory opinion by adjudicating academic matters, and provide for contingencies which may arise in the future. *See Montana Dept. of Nat. R. & C. v. Intake Water Co.* (1976), 171 Mont. 416, 440, 558 P.2d 1110, 112.

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<sup>2</sup> In 2019, before this District Court, in *Bullock v. Stapleton*, then Secretary Stapleton argued in an action brought by then Governor Bullock that the failure to deliver a bill vetoed when the legislature is not in session and reasons therefore pursuant to Mont. Code Ann. § 5-4-306 establishes a loophole in which the Governor could prevent the legislature from the constitutional override authority. This Court rejected that argument, which is identical to the theory Petitioners' offer in this case. In doing so, the Court held "Contrary to the [Secretary's] position, the controlling "Veto Power" constitutional section and statute simply do not impose any time limit for the Montana Governor to "return" a vetoed bill to the Montana Secretary of State. *Bullock v. Stapleton*, BDV-2019-635, at P. 7, ¶¶17-19.

Likewise, Petitioners lack an existing legal right to require the Secretary to conduct a poll on a bill vetoed when the legislature is not in session until the Secretary has received the bill and the veto message for over five days. As is the case here, the Secretary has complied with Mont. Code Ann. § 5-4-306 (2) for every bill that she has received from the 2023 session affecting Petitioners' or any other Montanans' rights. Lacking the justiciable controversy required for Petitioners' action against the Secretary, Petitioners' Count I action against the Secretary fails and dismissal of the Secretary is appropriate.

**B. AN EXTRAORDINARY WRIT AGAINST THE SECRETARY IS UNWARRANTED: SECRETARY JACOBSEN IS UNDER NO LEGAL DUTY TO ACT.**

The Secretary has conducted a poll for every qualifying bill vetoed when the 2023 legislature was not in session within five days of receipt of the bill and veto message and will continue to do so. This is not a rare case where such extraordinary relief is warranted because Petitioners admit the Secretary has no clear legal duty to act under the current conditions, while at the same time, the Secretary has acted pursuant to her duties in every instance that she has been required to do so.

A writ of mandamus “is an extraordinary remedy” to be granted only in “rare cases.” *State ex rel. Chisholm v. District Court*, 224 Mont. 441, 442, 731 P.2d 324, 324–25 (1986). Mandamus is appropriate only when the public official involved is under a “clear legal duty” to act. *O'Brien v. Krantz*, 2018 MT 191, ¶ 8, 423 P.3d 572, 392 Mont. 265 (internal quotation omitted). The party first must establish that he is entitled to performance of a clear legal duty by the party against whom it seeks the

writ. Mont. Code Ann. § 27–26–102(1). A party who seeks a writ of mandamus accordingly possesses a “heavy burden.” *State v. Bd. of Cty. Commrs.*, 181 Mont. 177, 179, 592 P.2d 945, 946 (1979).

The Secretary is under no legal duty, nor does the Secretary have the legal authority, to act on a veto bill 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). Petitioners concede the circumstances in which the Secretary is required to act do not currently exist. Pet’r Pet. 2. ¶2, 14, ¶48. In the case that (1) the Court declares the Governor vetoed SB 442 when the legislature was not in session, and (2) the Governor returns the bill to the Secretary with his reasons, and (3) more than five days have lapsed—then Secretary would be obligated to perform her legal duty. The Secretary has performed her duty whenever all three conditions exist, and no evidence suggests she would not do so in the future. At this time, as to SB 442, all three conditions are hypothetical, and the Secretary has performed all legal duties required of her to Petitioners. As such, Petitioners’ Count II action against the Secretary fails and dismissal is similarly appropriate.

**C. PETITIONERS’ FAIL TO STATE A CLAIM AGAINST THE SECRETARY.**

Counts I and II should also be dismissed, as they pertain to the Secretary, for failure to state a claim upon which relief can be granted.

An asserted claim is subject to dismissal if, as pled, it is insufficient to state a cognizable claim entitling the claimant to relief. Mont. R. Civ. P. 12(b)(6). Under

Rule 12(b)(6), the court must take all well-pled factual assertions as true and view them in the light most favorable to the claimant, drawing all reasonable inferences in favor of the claim. *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 161 (1996). A claim is subject to Mont. R. Civ. P. 12(b)(6) dismissal if it either “fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim.” *Anderson v. ReconTrust Co, N.A.*, 2017 MT 313, ¶ 8. Construing all allegations in the Complaint as true, they can prove no set of facts that constitute a cause of action requested by Montana law. *General Constructors, Inc. v. Chewculator, Inc.*, 2001 MT 54, 17. The Secretary has performed all legal duties required of her. Petitioners’ Petition and Writ have failed to state any wrongdoing undertaken by the Secretary of State or the State of Montana that would be tortious or otherwise actionable. Indeed, it does not allege a single fact that shows the Secretary has done anything whatsoever related to Petitioners “claims” in this matter. For the reasons stated above, there are no uncertainties or controversies as to the Secretary’s rights or duties. The Secretary has properly carried out her duties under the law.

Therefore, Rule 12(b)(6) is an alternate and independent basis for dismissal.

#### **D. PETITIONERS ARE NOT ENTITLED TO SUPPLEMENTAL RELIEF.**

Petitioners seek to be awarded supplemental relief pursuant to Mont. Code. Ann. § 27-8-313. As noted above, Petitioners’ *Petition for Declaratory Judgment and Writ of Mandate* should be dismissed for failure to state a claim upon which relief



can be granted. Petitioners have no clear legal duty to act on the 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.

For the same reasons, Petitioners are not and should not be a successful applicant for its Writ of Mandate against the Secretary. Additionally, Petitioners are not entitled to “supplemental relief” or an award of attorneys fees. This suit against the Secretary is unnecessary and cannot change the way that the Secretary has and continues to fulfill her duties prescribed under law.

### CONCLUSION

Respondent, Christi Jacobsen, in her official capacity as Secretary of State, moves the Court pursuant to Montana Rules of Civil Procedure Rule 12(b)(6) and/or Rule 12(b)(1) for an Order dismissing Petitioners’ *Petition for Declaratory Judgment and Application for Writ of Mandate* against the Secretary. The Secretary has faithfully executed all her duties and obligations in accordance with the law and will continue to do so. Petitioners have no clear legal right to the relief requested.

DATED this 14 day of July, 2023.



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MONTANA SECRETARY OF STATE

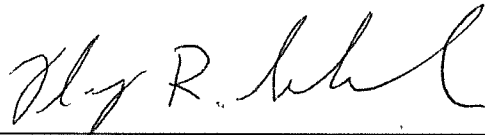
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CERTIFICATE OF SERVICE

I, Clay R. Leland, hereby certify that on the 14<sup>th</sup> day of July, 2023, I have served true and accurate copies of the foregoing Brief - BRIEF IN SUPPORT OF THE SECRETARY OF STATE'S MOTION TO DISMISS - to the following persons at the addresses set out below their names:

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