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MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

WILD MONTANA, and MONTANA  
WILDLIFE FEDERATION,

MONTANA ASSOCIATION OF  
COUNTIES,

*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

RESPONDENT CHRISTI JACOBSEN'S  
REPLY BRIEF IN SUPPORT OF  
RESPONDENT'S MOTION TO DISMISS

Respondent, Christi Jacobsen, in her official capacity as Secretary of State (hereinafter referred to as the "Secretary," "Secretary of State," or "Respondent"), by and through her counsel of record, files this reply 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*.<sup>1</sup>

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<sup>1</sup> After the Respondent filed its Motion to Dismiss, on July 25, 2023, the Court consolidated Cause No. DV-25-2023-411 (of which the Respondent previously issued its Motion to Dismiss) with Lewis &

## INTRODUCTION AND SUMMARY OF REPLY BRIEF

The Montana Constitution and implementing statute provides the Secretary and this Court with concrete direction, and it is clear the Secretary does not belong as a party to the present dispute.

Our Montana Constitution: Article VI, Section 10. Veto Power (4)

**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...** (Emphasis added.)

Defined in the same document at Mont. Const. Art V, Section 1., the Legislature consists “of a senate **and** a house of representatives.” (Emphasis added.)

The implementing statute, MCA § 5-4-306 (2), of Article VI, Section 10, directs:

**If the legislature is not in session when the governor vetoes a bill, the governor shall return the bill with the reasons for the veto to the secretary of state. If the bill was not approved by two-thirds of the members voting on the final vote on the bill, the secretary of state shall within 5 working days of receipt of the bill and veto message mail a copy of the title of the bill and the veto message to each member of the legislature...** (Emphasis added.)

Here, the Governor’s veto of Senate Bill 442 occurred *while* the Legislature was in session. Secretary Christi Jacobsen has fully, properly, and completely executed her obligations set forth in the Montana Constitution and established in Montana law. The Secretary issued a veto poll within five days for every bill

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Clark County District Court Cause No. DV-25-2023-413. The Order granting the consolidation of the two cases provided that “[T]he Governor and Secretary of State shall respond to the Petition filed in [Cause No. DV-25-2023-411] and the Complaint filed in Cause No. DV-25-2023-413 on or before August 18, 2023.” Thus, this reply brief, in addition to Respondent’s Brief in Support of its Motion to Dismiss, shall also constitute the Secretary’s response as directed by the Court.

required that she received from the 2023 session affecting Petitioners' or any Montanans' rights.

The Constitution and Statute 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 and unrequired by the Governor to provide the Secretary with the veto message of a bill returned during the session, the Secretary has equal legal obligation upon receipt as the other carbon copied party, Legislative Services Division (LSD), on the veto message for the bill that she did not receive: nothing.

Like LSD, the Secretary is limited to what the law allows and mandates. The law contemplates both (1) a bill vetoed after the session; and (2) received by the Secretary for a period of five days. Neither condition exists in this case. The only thing the Secretary refused was to violate her oath to the Montana Constitution and the law. The request for a Writ seeking the Secretary to do what she cannot legally do must fail at the outset.

Despite Petitioners' *Petition for Declaratory Judgment and Application for Writ of Mandate* (hereinafter referred to as "Petition") failing to allege a single fact showing any wrongdoing undertaken or on behalf of the Secretary and despite their Petition recognizing the lack of any existing legal right for the Secretary to conduct a poll in the status quo, Petitioners now shift their position and attempt in their Brief in Opposition to the Secretary of State's Motion to Dismiss (hereinafter referred to as "Brief" or "Response") to circumvent the law. Petitioners attempt to persuade this Court that the Secretary should take it upon herself to initiate a poll

for a bill the Governor received, vetoed, and returned to the legislature on May 2, 2023, while both chambers remained in session. What is asked and advocated for by Petitioners on a bill that the Secretary does not have because the veto occurred during the session is unlawful. Not only does the Secretary have no legal duty to issue a veto poll when a bill is vetoed during session, but she has no legal authority to do so here. Considering the present circumstances, a poll exists only as a speculative hypothetical situation.

In both Petitioners brief and in Petitioners Petition, Petitioners concede that the Governor's veto of Senate Bill 442 (hereinafter referred to as "SB 442") occurred while the legislature was still in session. Pet'r Pet. 2, ¶2, 38. ("The Senate voted to adjourn *after* the Governor had vetoed SB 442...")(emphasis added). This material fact is undisputed and is even evidenced by the fact that the House read the veto across the rostrum later that day. 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. This is exactly what happened in this matter. Pet'r Pet. 12, ¶39, ¶48; Pet'r Brief 4. The Governor did not return SB 442 to the Secretary, as the Secretary has no role for a bill transmitted to and returned as a veto to the body during the session—no matter how close to the end of the session and regardless of whether all of which occurred on the same day.

Thus, any issues presented in Petitioners' Petition as they pertain to the Secretary do not exist. Petitioners have no legal right to any relief requested, and there is no meaningful relief that this Court could grant as to any allegation in

Petitioners' Complaint pertaining to the Secretary. This action as to the Secretary should be dismissed.

### REPLY ARGUMENT

Article VII, Section 4, of the Montana Constitution limits the judicial power of the courts of Montana to justiciable controversies. *Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100, 13, 404 Mont. 89, 485 P.3d 731 at 736. A controversy, in the constitutional sense, is one that is definite and concrete, touching legal relations of parties having adverse legal interests; it is a real and substantial controversy, admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts or upon an abstract proposition. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 145, 355 Mont. 142, ¶ 145, 226 P.3d 567, ¶ 145.

The Montana Supreme Court has dismissed causes of action without a justiciable controversy on the basis of lack of jurisdiction, but also on the basis of failure to state a claim upon which relief can be granted. Mont. R. Civ. P. 12(b)(6). Rule 12(b)(6) is an alternate and independent basis for dismissal. Here, (1) Petitioners do not have a justiciable controversy against the Secretary, (2) there is no meaningful relief that this Court could grant as to any allegation in Plaintiff's Complaint pertaining to the Secretary, and (3) an extraordinary writ against the Secretary is unwarranted.

I. A JUSTICIABLE CONTROVERSY DOES NOT EXIST AGAINST THE SECRETARY.

Article VII, Section 4, of the Montana Constitution limits the judicial power of the courts of Montana to justiciable controversies. *Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100, 13, 404 Mont. 89, 485 P.3d 731 at 736. A justiciable controversy must exist before a court may exercise jurisdiction. *Kageco Orchards, LLC v. Montana Department of Transportation*, 2023 WL 3193176. Petitioners do not present a justiciable controversy against the Secretary regarding an existing right. If a plaintiff lacks standing, a court can grant no relief because a justiciable controversy does not exist. *Powder River County v. State*, 2022 MT 259.

“Standing is a threshold requirement of justiciability applicable to all claims for relief as a matter of constitutional law and related prudential policy considerations.” *Larson v. State*, 2019 MT 28, ¶ 45 (citing *Reichert v. State*, 2012 MT 111, ¶¶ 53–55.) “Standing narrowly focuses on whether, at the time of assertion of a claim, a particular claimant is a proper party to assert the claim regardless of whether the claim is otherwise cognizable or justiciable.” *Larson*, id. (citing *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 31–34). To have standing, a plaintiff “must clearly allege past, present, or threatened injury to a property of civil right. Mont. *Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19. The alleged injury must be “concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical... *Bullock v. Fox*, 2019 MT 50, ¶ 31 (quoting Mont. *Immigrant Justice All.*, ¶ 19).

Petitioners' response belief makes several false assertions. First, in Petitioners response brief, Petitioners are wrong when discussing the Secretary of State's duties and obligations under the law regarding polling of the legislature. Petitioners argue in their brief that Petitioners "claims are ripe because the Secretary can poll the Legislature at any time..." Pet'r Brief. 8. This assertion is incorrect and completely disregards Montana law. Notably, Petitioners never cite or support any of their arguments made in their response with the Montana Code.

Petitioners also contradict their own Petition as in their Petition, Petitioners conceded the circumstances in which the Secretary is required to act do not currently exist. Pet'r Pet. 2. ¶2, ¶48. ("Unless immediate action is taken to return the bill and veto to the Secretary – allowing her the opportunity to poll the legislature pursuant to her constitutional obligation – the veto cannot stand.") Even if the Court declares as Petitioners seek in the Petitioner (declare the Governor's veto during session ineffective "unless and until" the Governor takes certain actions), a poll by the Secretary exists only as a speculative hypothetical situation. Courts have no jurisdiction to determine purely speculative matters. See *Montana Dept. of Nat. R. & C. v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 112 (1976).

Second, Petitioners' brief stating that "the Secretary's duty is . . . the sole action that stands between the Legislature and its constitutional authority to override a veto" fails to account for the law outlining the veto process for a veto occurring during the legislative session. Pet'r Brief 9. While it is proper for Petitioners to acknowledge that the Secretary and Governor have independent

constitutional obligations with respect to the Legislature's constitutional override power, this only further supports the Secretary's position that the Secretary is not a necessary party and that the Secretary's dismissal from the suit is appropriate. In simple terms, the Governor did not return both SB 442 and the reasons for his veto to the Secretary. Without the bill, the Secretary cannot conduct the veto poll. Any alleged controversy, if one exists, does not impact the Secretary of State as to this suit.

Third, Petitioners' response attempts to say that Petitioners claim is ripe because Petitioners' "injury – the Legislature's inability to vote to override the Governor's veto of SB 442 – is on going." Pet'r Brief 9. Petitioners alleged injury has nothing to do with the Secretary of State. In fact, Petitioners did not ask the Court in their Petition to declare any wrongdoing on behalf of the Secretary.

Fourth, Petitioners' response discusses how a court's subject matter jurisdiction is not coextensive with, nor even dependent on, the separate doctrine of justiciability. *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶ 14, 340 Mont. 56, 172 P.3d 1232. While Petitioners correctly assert this point, the Respondent is aware of the close link between standing requirements and a court's jurisdiction. To be clear, Respondent's position is that the threshold requirements for justiciability have not been fulfilled and that the court lacks the power to resolve the case, as it pertains to the Secretary, because Petitioners can present no actual case or controversy. Petitioners' Petition states no cognizable claim for relief against the Secretary, which is addressed in the Secretary's brief in support of its motion to dismiss framed under Mont. Rule of Civ. P. 12(b)(6).



Here, the Governor did not return the bill to the Secretary. The Petition's request to compel the Secretary of State's office to perform a legislative poll, an act which Secretary is unable to do at this time, is inappropriate for mandamus relief and demonstrates the non-justiciability of the present dispute. Petitioners have not suffered any cognizable harm through any act of the Secretary of State's office. This lawsuit does not pass constitutional muster as a case or controversy because of the nonexistence of a judicial controversy and the failure to state any wrongdoing by the Secretary of State.

## II. PETITIONERS FAIL TO STATE A CLAIM AGAINST THE SECRETARY UPON WHICH RELIEF CAN BE GRANTED.

Rule 12(b)(6) allows for the dismissal of a cause of action that fails 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). 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. To survive a motion to dismiss, a plaintiff's complaint must allege sufficient facts to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679.

In Petitioners' response, Petitioners make several inaccurate claims that contradict not only the facts but also Petitioners own concessions. In arguing that "[t]he Governor must return the vetoed bill with his reasons to the Secretary," Petitioners turn to Montana Const. art. VI, § 10(4)(a). This is false. Section 10(4)(a) specifically outlines what a Governor must do "[i]f the legislature is not in session when the governor vetoes a bill approved by two-thirds of the members present..." Pet'r Pet. 2, ¶2 ("The Senate voted to adjourn after the Governor had vetoed SB 442...")(emphasis added). The Secretary has no authority to conduct a poll of bills vetoed if the legislature is in session. Mont. Code Ann. Section 5-4-306(2).

There is no way that the actions taken (or not taken) by the Secretary of State could possibly result in any wrongdoing on behalf of the Secretary of State. Petitioners have no clear legal right to the relief requested. The Secretary of State has carried out all of her Statutory and Constitutional duties prescribed by law.

### III. A WRIT OF MANDATE AGAINST THE SECRETARY IS INAPPROPRIATE.

A court may issue a writ of mandamus to compel performance of an official duty where there is no "plain, speedy, and adequate remedy in the ordinary course of law." Section 27-26-102, MCA. 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). In other words, the official act sought to be compelled cannot be a "discretionary function." *Jeppeson v. Dep't. of State Lands*, 205 Mont. 282, 288, 667 P.2d 428, 431 (1983) (citation omitted).

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). 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).

In Petitioners’ response brief, Petitioners argue that “[r]egardless of whether the Governor must take further action, the Secretary will have to poll the legislature.” Pet’r Brief 12. Not only do Petitioners once again contradict their own Petition (*see* Pet’r Pet. 14 ¶48), but also, as outlined the Secretary’s brief in Support of her Motion to Dismiss, even if the Court determines that the bill should be returned to the Secretary of State, the Secretary of State would only then, under the existence of a condition that does not exist, be required to fulfill the ministerial legal duty she has always fulfilled. An extraordinary remedy, that being a writ of mandamus, is inappropriate as it pertains to the Secretary here.

### CONCLUSION

Based on the forgoing and Respondent’s brief in support of her Motion to Dismiss, Petitioners’ Petition for *Declaratory Judgment and Application for Writ of Mandate* should be dismissed as it pertains to the Secretary. Petitioners fail to state a claim upon which relief can be granted, as it pertains to the Secretary. There are no uncertainties or controversies as to the Secretary’s duties, and Petitioners have no clear legal right to the relief requested.

DATED this 18<sup>th</sup> day of August, 2023.

MONTANA SECRETARY OF STATE

A handwritten signature in black ink, appearing to read "Clay R. Leland". The signature is written in a cursive style with a large, prominent "C" at the beginning.

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## CERTIFICATE OF SERVICE

I, Clay Richard Leland, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 08-18-2023:

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