



CHRISTI JACOBSEN

MONTANA SECRETARY OF STATE



April 2, 2024

Jason Ellsworth, President of the Senate
Matt Regier, Speaker of the House
Montana Legislature
State Capitol Building
Helena MT 59620

Dear President Ellsworth and Speaker Regier,

Yesterday, the Montana Supreme Court issued its decision in the matter of *Montanans Securing Reproductive Rights (MSRR), et al. v. Knudsen, et al.* OP 24-0182; 2024 MT 67. This case was brought as an original proceeding by MSRR on March 26, 2024, challenging the Attorney General's ballot statement that was forwarded to the Secretary of State on March 25, 2024.

The Supreme Court granted MSRR's petition and rejected the Attorney General's ballot statement for Ballot Initiative 14 for failing to comply with § 13-27-212 (1), and ordered that the Court certified a separate ballot statement to the Secretary of State's Office.

Unusually, in the decision, the Court agreed with MSRR that expeditious disposition is warranted but disagreed with MSRR that § 13-27-228, MCA, applies in this instance. Opinion Page 6. The Court's explanation for their statement in passing was reduced to a footnote and does not appear in the text of the order.

Importantly, two months ago, in the recent *Forward Montana* Supreme Court opinion, the Chief Justice of the Supreme Court rejected an argument relating to the State's reliance on "dicta" in a decision. In that decision, the Court specifically instructed that the State should not rely on judicial comments made that fall beyond the scope of the decision itself.

Here, the Court's dicta in *MSRR v. Knudsen* regarding § 13-27-228 was not necessary to its decision regarding whether the petition warranted expeditious disposition. The Court is very clear in the decision as to the issues before the Court. The portion of the petition concerning the legislature support or opposition to a ballot issue was not one of the issues before the Court and in no way related to the issues that were.

Moreover, the analysis contained in the footnote is confusing because the Court's reasoning would also apply to other statutes in the chapter such as finalizing the petition form. (For instance, Section

13-27-233(1), MCA, which is entitled “Provision of Finalized Petition for Signature” *also references the sufficiency determination as a condition precedent* identified by the Court’s footnote.

The Supreme Court’s footnote related to an interim committee review is mentioned in relation to “expeditious disposition” and specifically whether expedited consideration of the petition is warranted. The footnote is certainly not central to the decision as to the attorney general’s ballot statements - or even his review of such for that matter. If the issue wrote about in the footnote was before the Court and fully briefed, this would have been analyzed in-depth by the parties. This falls in line with the Chief Justice’s statements in *Forward Montana* for the State.

As you know, not having a committee vote is a substantial deviation from how our state has administered constitutional issues with an Attorney General’s legal sufficiency determination that was reversed by the Supreme Court. For instance, the recently challenged Ballot Issue No. 12 (*Montanans for Election Reform Action Fund, et al. v. Knudsen, et al., No. OP 23-0634*) received an interim committee review vote.

With that said, and even considering the Chief Justice’s *Forward Montana* decision referenced above, failing to rely here upon the dicta may appear to the public and members of the highest court in the land that the Secretary of State’s Office, a member of the executive branch, is circumventing your bodies’ instructions. Such could not be further from the truth. The Secretary of State’s Office is simply committed to the ministerial process prescribed by the Legislative body to the executive branch and is hopeful that the branches will work in harmony for respectful resolution. The inverse positions our state in waters that governance must avoid in the interest of foundational American governance and responsibility to those governed. Here, with assertions of urgency by the submitter as a factor, the Court’s mixed signals from two recent Supreme Court decisions has created a double-edged sword.

Historically, there have been instances in which the legislature and the Secretary of State have collaborated to ask the Attorney General to bring an original action with the Supreme Court to clarify issues in an expedient manner. In a time in which the separation of powers has become the center of attention, this example provides an illustration in which each branch worked respectfully and without over muscle at each stage.

However, when it comes to the ballot issue, the Secretary is ministerial in the process. At this point, the legislature’s interest in providing the voter with information related to the legislature’s support has not been met. As you know, depending on the circumstances, this ballot issue may be confusing for voters to understand as to why the ballot appears so differently, despite sharing commonality of a legal insufficiency determination by the Attorney General that was later overruled. In any case, to ministerially perform our duties of making a petition form outside of § 13-27-233, as the conditions precedent of that statute also do not exist, we need to know your branch’s position as soon as possible.

It would be inappropriate for the Secretary of State, as a ministerial Executive Branch Officer in this process, to make the determination related to a legislative component of the process and the legal

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effect of the order. If you deem the footnote controls, it is unclear as to what our office should or should not include on the petition pertaining to the review by the legislative committee.

We stand ready to administer according to the legally established process that will guide the ministerial work by the office regardless of the party of its future officer. However, under the current rule of law, with conflicting jurisprudence by the high court on identical issues, clarity is sorely needed for Montana citizens.

Sincerely,

A handwritten signature in black ink that reads "Christi Jacobsen". The signature is written in a cursive, flowing style.

CHRISTI JACOBSEN
Secretary of State