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IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Montanans Securing Reproductive Rights, Samuel Dickman, M.D., Montanans for Election Reform Action Fund, and Frank Garner

Plaintiffs,

v.

State of Montana and Christi Jacobsen, in her official capacity as Montana Secretary of State,

Defendants.

Case No. DV-25-24-463

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION

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INTRODUCTION

Absent immediate protection from this Court, thousands of registered Montana voters will be disenfranchised from the constitutional initiative process. Due to imminent irreparable injury, Plaintiffs seek an immediate temporary restraining order. Plaintiffs have notified the Secretary of State ("Secretary") of this request before and after filing of this lawsuit, and personally served the documents upon the Secretary in addition to serving electronically.

For many weeks, Montana counties have been verifying signatures submitted in support of three Constitutional Initiatives—Constitutional Initiatives 126, 127 and 128 ("CI-126," "CI-127" and "CI-128")—each of which submitted over 100,000 signatures. The counties initially conducted the verification process in compliance with the Secretary's longstanding guidance, prior practice, and the plain text requirements of state law and the Montana Constitution. These requirements direct county officials to validate the signatures of registered voters regardless of whether they appear on the "active" or "inactive" registrant lists, because both lists are comprised of registered voters who are entitled to sign constitutional initiative petitions.

Then the Secretary changed the rules. A week into the verification process, and without notice, the Secretary directed county election administrators to reject valid signatures by qualified Montana electors, based solely on the fact that the registered electors appear on the "inactive" voter registration list. The Secretary even modified the software counties must use to verify signatures to automatically reject signatures from "inactive" voters, no matter what the county officials determine. As a result, thousands of registered voters in Montana have been or will be unlawfully disenfranchised from the constitutional initiative process.

The Secretary's new directive conflicts with the clear requirements of the Montana Constitution and state law. It came out of nowhere and was issued only after the deadline for gathering and submitting signatures had passed—in the middle of the verification process. For

years, the Secretary required county election administrators to do precisely the opposite: to "accept the signatures of" electors who appear on the "inactive" voter list, "since they are legally registered." Presentation on Petition Processing in MT Votes, 2020 Election Administrator Certification Training (updated March 2021), Coburn Aff., Ex. A. The "inactive" list is just a list of voters whose addresses may have changed based on mail records. Voters on the "inactive" list are registered voters, are still entitled to vote, and are plainly "qualified electors" under state law. *See* § 13-1-111, MCA (defining "qualifications of voter"); *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 68, 365 Mont. 92, 125, 278 P.3d 455, 477 (definition for "qualified elector" is contained in § 13-1-111, MCA). The Montana Constitution entitles all "qualified elector[s]" to sign initiative petitions, not just registrants identified on an "active" list. Mont. Const. art. XIV, § 9.

Plaintiffs request immediate declaratory and injunctive relief to prevent further constitutional injury by requiring the Secretary to restore the unlawfully invalidated signatures of registered voters on the inactive list, withdraw and correct the unlawful directive, and reverse the reprogramming of the software counties use to verify signatures.

The Montana Constitution grants "[t]he people" the power to "propose constitutional amendments by initiative." Mont. Const. art. XIV, § 9. Exercising that right, Montanans Securing Reproductive Rights ("MSRR") and Montanans for Election Reform Action Fund ("MER") have proposed citizen-led initiatives. The Secretary's lawless directive threatens to withhold CI-126, CI-127, and CI-128 from the ballot by rejecting thousands of signatures that, by law, must be accepted. This Court should immediately issue a temporary restraining order and preliminary injunction to prevent that irreparable constitutional harm.

STATEMENT OF FACTS

MSRR was formed as a citizen-led initiative working to secure reproductive rights for Montanans in the state constitution. *Id.* To accomplish its mission, MSRR sponsored CI-128, which would amend the Montana Constitution to expressly provide a right to make and carry out decisions about one's own pregnancy, including the right to abortion. Verified Complaint ("Compl.") ¶ 7. Starting in April 2024, more than 500 MSRR volunteers gathered signatures in support of CI-128. Compl. ¶ 7. MSRR submitted approximately 117,000 signatures from voters in every county in the state by the deadline of June 21, 2024. *See* § 13-27-301, MCA; Compl. ¶ 7.

MER was incorporated on July 26, 2023, to advocate for electoral reforms. MER sponsored CI-126, intended to change Montana's current party primary election system to a primary election for specified offices open to all candidates and all voters, with the top four candidates advancing to the general election. MER also sponsored CI-127, which would provide that elections for certain offices must be decided by majority vote rather than by a plurality or the largest amount of the votes. Starting in early 2024, MER began gathering signatures in support of CI-126 and CI-127 throughout the state, and submitted approximately 217,000 signatures to county election administrators in advance of the June 21, 2024 submission deadline.

Now, two steps remain before CI-126, CI-127, and CI-128 can appear on the ballot in November: county election administrators must verify the signatures submitted in support of CI-126, CI-127, and CI-128 by July 19, *see* § 13-27-0303, MCA, and then the Secretary of State must certify that the initiative qualifies for the ballot. Sections 13-27-307 and -308 MCA; Compl. ¶¶ 20-22. But on June 28, 2024, after the impressive number of signatures in favor of the three initiatives were submitted to county election administrators and the deadline for

gathering and submitting signatures had passed, and while verification of those very signatures was well underway, the Secretary inexplicably changed her longstanding directive regarding who may sign initiative petitions. For the first time, she instructed county election administrators that they must reject signatures by qualified electors who are registered voters but who appear on the "inactive" voter list, Compl. ¶ 6, even though such voters meet all eligibility requirements and may vote like any other elector simply by showing up at their polling place, § 13-2-222(1)(a), MCA. A few days later, the Secretary then unilaterally reprogrammed ElectMT, the state's software program used to verify petition signatures, to "Auto Reject" the signatures of electors flagged as inactive. Compl. ¶ 17; Email from Sadie Dallaserra, Elections Specialist, Business Analyst, to SOS Elections (July 2, 2024), Coburn Aff., Ex. D. As county officials continue their review, they are therefore effectively forced to invalidate the signatures of qualified electors based solely on the Secretary's change of position.

The Secretary's "July surprise" directive conflicts with her prior position in the review of the pending initiatives. County reviews conducted prior to June 28, 2024 included inactive registered voters in the count of "accepted" signers in the initiative process. Miller Decl., ¶ 10 The Secretary's new position is also inconsistent with the counties' and the Secretary's calculation of accepted signatures in other similar processes. The counties, and subsequently the Secretary, included inactive registered voters in the count of "accepted" signatures in the petitions for independent candidates Colton Little for House District 5, Janna Hafer for House District 51, Kelley Durbin-Williams for Senate District 45, and Elena Evans for PSC District 4 and in the petitions for the No Labels Party to qualify for minor party ballot access. Miller Decl, ¶¶ 11, 12. The Secretary's after-the-bell change in position injects unnecessary and unlawful inconsistency into the statutorily controlled verification process.

LEGAL STANDARD

"A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." Section 27-19-201(1), MCA. The Legislature intended this standard to "mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." Section 27-19-201(4), MCA. Accordingly, the balance of equities and the public interest factors merge here because the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

ARGUMENT

The Court should enter a temporary restraining order and preliminary injunction prohibiting the rejection of voters' signatures on CI-126, CI-127, and CI-128 on the ground that the registered voters are on the "inactive" voter list, or advising county officials to do so. Plaintiffs are likely to succeed on the merits of their claims; the consequent deprivation of a constitutional right is an irreparable harm; and the balance of interests weighs in favor of counting all valid signatures.

I. Plaintiffs are likely to succeed on the merits of their claim that voters marked "inactive" are qualified electors whose signatures on petitions are valid.

Plaintiffs are likely to show that the rejection of signatures from registered voters on the "inactive list" violates Montana law. The plain text of the Montana constitution and state law entitle registered voters to sign constitutional initiative petitions, and do not qualify participation based on whether a registered voter appears on the "inactive" list. There is no reference to "active" or "inactive" registration lists, at all.

Under the Montana Constitution, every "qualified elector[]" is entitled to sign petitions proposing constitutional amendments. Mont. Const., art. XIV, § 9. The Constitution defines "qualified elector," providing that "[a]ny citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector," unless serving a felony sentence or found by a court to have an unsound mind. *Id.* art. IV, § 2. State law imposes the same requirements, along with a residency requirement of 30 days. Section 13-1-111, MCA; *see Reichert*, 2012 MT 111, ¶ 68 ("qualified elector" is defined by Mont. Const., art IV, § 2 and § 13-1-111, MCA). The Montana Code also provides that a "legally registered elector" is "an individual whose application for voter registration was accepted, processed, and verified as provided by law" and the Secretary of State's own regulations define "legally registered elector" as "an elector who was properly registered prior to January 1, 2003, or one who registered on or after that date whose application for voter registration was accepted, processed, and verified as provided by law." Section 13-1-101(30); Mont. Admin R. 44.3.2002(6).

These definitions are clear, complete, and make no reference whatsoever to whether an elector appears on the "active" or "inactive" list of registered voters. *See* § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). The Secretary has no authority to add to these constitutional and statutory requirements. *Larson v. State By & Through 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).

The rejection of signatures from registered voters on the "inactive" voter registration list violates these provisions by imposing new, unlawful barriers on participation in the initiative process unsupported by law—barriers not imposed prior to June 28, 2024 by the Secretary or the counties in this initiative process or in other signature reviews. Miller Decl., ¶¶ 10-12 The Secretary now argues that an "inactive" voter is not registered and therefore not "a qualified voter." Letter from Clay Leland, Attorney for the Secretary of State to Crysal Cole, Election Administrator of Glacier County (July 28, 2024), Coburn Aff., Ex. C; Email from Austin James, Chief Legal Counsel of the Montana Secretary of State to Raph Graybill (Jul. 9, 2024), Coburn Aff., Ex. F. But the inactive voter list is a list of registered voters who election officials have some reason, specified by statute, to think may have moved and therefore may be subject to cancellation of their voter registration in the future. *See* §§ 13-2-220 and 13-2-402(7), MCA. Critically, placement on the inactive list does not cancel a voter's registration. *Id.* To the contrary: voters on the inactive list may still vote in person or request an absentee ballot. *See* § 13-2-222, MCA. Cancellation of registration is a separate step, which may occur only if the voter fails to vote in two consecutive federal general elections after placement on the inactive list, *see* § 13-2-402(7), MCA, or if election administrators receive certain other information confirming the voter's ineligibility, § 13-2-402(1)-(6), (8), MCA. Indeed, federal law requires that inactive voters remain registered and treated as eligible voters. The National Voter Registration Act demands that voters may not be "removed from the list of eligible voters" based on a change of address until they have failed to vote in two consecutive federal elections: precisely what Montana law achieves by keeping voters registered and eligible to vote but on the "inactive list" until they fail to vote in two consecutive federal general elections. *See* 52 U.S.C. § 20507(d)(2)(A).

By definition, inactive voters are registered voters: their registrations have not been cancelled. And they are therefore "qualified electors" under the Montana Constitution who are entitled to sign initiative petitions and to have those signatures counted. Section 13-27-303, MCA, which governs the signature verification process for initiative petitions, confirms that no more is required: county officials need only verify that that petition signers "are registered electors of the county," and not whether they are "active" or "inactive." Section 13-27-303(1), MCA (emphasis added). For this reason, the Secretary had long directed, until less than two weeks ago, that election administrators must "accept the signatures of inactive voters, since they are legally registered." Presentation on Petition Processing in MT Votes, 2020 Election Administrator Certification Training (updated March 2021), Coburn Aff., Ex. A (emphasis added); *see also* Secretary of State's Petition Processing Tips (downloaded Feb. 13, 2024), Coburn Aff. Ex. B.

The evident purpose of the relevant provisions confirms this interpretation. It makes perfect sense to require proponents of a constitutional amendment to demonstrate substantial support from the electorate before the measure is placed on the ballot. But the relevant metric for gauging such support is the set of voters who are eligible to cast ballots in support of the proposed amendment. All qualified electors, whether on the "active" or "inactive" list, are eligible to cast ballots under Montana law: inactive voters may vote 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. Since voters on the "inactive" list will be able to cast ballots in support of the proposed initiative, it makes perfect sense that Montana law allows them to sign petitions: their signatures

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

In arguing otherwise, the Secretary disingenuously relies on two provisions governing different issues unrelated to the initiative process: Sections 13-2-222(3) and 13-19-313(2), MCA. Coburn Aff., Ex. C, F. Both of these provisions were in place for the years and months that the Secretary advised counties to include inactive registered voters in the "accepted" count. Now the Secretary draws strained inferences from the wording of these extraneous statutory sections which 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 proviso 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. Similarly, § 13-19-313(2), MCA, governs only what a county official should do if a mail ballot is returned as undeliverable. It says nothing about an inactive voter's right to sign a petition, and it cannot overcome the plain text of the constitutional definition of "qualified elector." In fact, 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. Quite simply, the statute has nothing whatsoever to do with petition signature verification.

The Secretary's 180-degree change of position is purportedly based on an Oregon court decision, *Whitehead v. Fagan*, 369 Or. 112, 501 P.3d 1027 (2021). Again, this decision has been in place for the years and months that the Secretary advised counties to include inactive registered voters in the "accepted" count. And Oregon law is distinguishable from Montana law because, under Oregon law, "voters whose registrations are inactive are *not eligible to vote*" without submitting a new registration form to update their registration, so they are not "qualified electors." *Whitehead,* 369 Or. at 115, 119 (emphasis added); Or. Rev. Stat. Ann. § 247.012(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.

Not only is *Whitehead* distinguishable, but other states have reached the opposite conclusion. *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 (2003) (holding an express statutory prohibition on inactive voters signing petitions unconstitutional under the Maryland constitution).

Moreover, 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, , the very act of signing a petition submitted to the county election administrator satisfies the requirements of § 13-2-222(1)(b), MCA, for movement of a voter to the active list. County election administrators have a duty to place such voters on the active list, as § 13-2-222(2), MCA, provides that "After an elector has complied with subsection . . . (1)(b) . . .the county election administrator shall place the elector's name on the active voting list for that county." Thus, even crediting the Secretary's incorrect reading of the law—which this Court should not—registered Montana voters who sign initiative petitions and provide their residential address have already taken the steps required to be on the "active" list by signing, and thus for their signatures to be counted even on the Secretary's telling.

The Secretary's lawless about-face on the validity of inactive voters' signatures alone warrants immediate reversal. But the Secretary made matters worse on July 2, 2024, when her office unilaterally reconfigured the software program that election officials use to verify petition signatures so that it auto-rejects signatures from inactive voters. Compl. ¶ 33; Coburn Aff. Ex. D. This abrupt change in the middle of the signature verification process not only unlawfully imposed a new requirement found nowhere in the Montana Code or Constitution, it also usurped for the Secretary the county officials' sole authority to determine the sufficiency of petition signatures. The statute is clear: county officials—not the Secretary—verify each signer's registration and certify the number of valid signatures to the Secretary. Sections 13-27-303 to -304, MCA. And the Secretary counts the number of signatures statewide and certifies that total to the Governor. Sections 13-27-307 to -308, MCA. If, in doing so, the Secretary deems a petition faulty, she "shall return [the] petition to the proper county official" who either corrects

the error or returns it to the signature gatherer. Section 13-27-307, MCA (emphasis added).[1] By reprogramming ElectMT, the Secretary has functionally taken over the task of verifying voters' signatures, which she has no authority to undertake. Coburn Aff. Ex. D.

Plaintiffs are therefore likely to succeed in showing that the rejection of signatures on CI-126, CI-127 and CI-128 from registered voters on the "inactive" list violates the Montana Constitution and Montana law.

II. Plaintiffs will suffer irreparable harm absent immediate relief from the Secretary's new inactive voter directive.

Absent immediate relief, there is a substantial risk that CI-126, CI-127, and CI-128 will not appear on the Montana ballot in November. Plaintiffs' efforts to submit an adequate number of signatures have already been harmed by the unlawful rejection of valid signatures. Compl. ¶ 35. Absent an immediate restraining order, the scale of this harm will only grow as additional signatures from inactive voters are marked for rejection. Plaintiffs' constitutional right to propose a constitutional amendment is therefore directly threatened. "For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 414, 473 P.3d 386, 392.

Federal courts have routinely held that organizers and supporters of ballot initiatives are irreparably harmed when their initiative will not appear on the ballot due to circumstances beyond their control. *See, e.g.*, *Fair Maps Nevada v. Cegavske*, 463 F. Supp. 3d 1123, 1149 (D. Nev. 2020); *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988, 1001 (D. Idaho 2020); *People Not Politicians Oregon v. Clarno*, 472 F. Supp. 3d 890, 899 (D. Or. 2020). Here, too, Plaintiffs will

[1] The Secretary's only statutory authority to act on individual signatures is the ability to count signatures that were erroneously rejected, as proven by a notarized affidavit. The fact that the statute includes this narrow and explicit delegation of authority proves that the legislature did not grant the Secretary unfettered power to pick and choose among signatures.

be irreparably harmed if their initiative does not appear on the November 2024 ballot due to the Secretary's lawless directive.

III. The remaining equitable factors weigh in favor of immediate relief.

The remaining injunction factors—balance of equities and the public interest—also weigh decidedly in Plaintiffs' favor. These factors "merge into one inquiry when the government opposes a preliminary injunction." *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). Plaintiffs will be irreparably harmed if an injunction does not issue because the Secretary will violate their right to propose a constitutional initiative. In contrast, counting the signatures of electors marked as inactive imposes a minimal burden on the Secretary. The Secretary's communications adopting the unlawful directive prove that little effort is required to advise county officials of the correct procedures. Likewise, the Secretary has proven capable of making the changes in ElectMT and apparently needs to take the system offline for only an hour to do so. Coburn Aff. Ex. D. As counting electors marked inactive will be a return to the status quo ante for county officials, the burden should be even less than that imposed by the Secretary's erroneous changes.

The Secretary's unprecedented actions after the submission of signatures and in the middle of the verification process, further tips the equities in Plaintiffs' favor. Plaintiffs submitted their signatures in reliance on the Secretary's existing directive, which, consistent with the plain text requirements of the Constitution and state law, required inactive voters' signatures to be counted. Compl. ¶ 31. Until a week and a half ago, counties were conducting the verification process in accord with the Secretary's prior directive that inactive registered voters be counted. Miller Decl., ¶ 10 It is unjust and highly inequitable for the Secretary to change her position once it was too late for Plaintiffs to change their circulation strategy or gather more signatures in response. *Cf. In re Marriage of K.E.V.*, 267 Mont. 323, 331–32, 883 P.2d 1246,

1252 (1994) (equitable estoppel where a party induces reliance by another party to the other party's detriment).

Moreover, the Secretary's chaotic and inconsistent implementation of her new directive is patently inequitable. County reviews conducted prior to June 28, 2024 included inactive registered voters in the count of "accepted" signers in the initiative process. Miller Decl., ¶ 10. The counties, and subsequently the Secretary of State, included inactive registered voters in the count of "accepted" signatures in the petitions for independent candidates Colton Little for House District 5, Janna Hafer for House District 51, Kelley Durbin-Williams for Senate District 45, and Elena Evans for PSC District 4 and in the petitions for the No Labels Party to qualify for minor party ballot access. Miller Decl., ¶ ¶ 11-12. The Secretary's recent and unlawful change in position results in disparate treatment of otherwise similarly situated registered voters, which violates the public interest.

The public interest is served by granting Plaintiffs' requested relief. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks and citation omitted). Safeguarding Montanans' right to propose and vote on a constitutional amendment is inherently in the public interest "because the public itself [will] be the final arbiter of whether the initiative is passed into law." *Reclaim Idaho*, 469 F. Supp. 3d at 1002. Indeed, the public interest would be severely impinged if CI-128 were excluded from the November ballot, relegating Montanans' reproductive rights to the whims of the legislature when the people have taken the required steps to lead on the issue. Similarly, the public's interest would be severely prejudiced if CI-126 and CI-127 were excluded from the November ballot, depriving Montanans of the right to consider election reform. Conversely, there is no public interest in the arbitrary and unlawful exclusion of

thousands of valid signatures—Montanans exercising their constitutional rights to participate in direct democracy, and who the Constitution and state law make clear are entitled to sign and be counted.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a temporary restraining order, followed by a preliminary injunction providing declaratory and injunctive relief to require the counting of signatures of qualified electors on CI-126, CI-127, and CI-128 and the restoration of any unlawfully rejected signatures.

Dated: July 10, 2024

Respectfully submitted,

By: */s/ Raph Graybill*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 10th day of July, 2024, by email on the following:

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I, Raphael Jeffrey Carlisle Graybill, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 07-10-2024:

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