

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 24-0431

STATE OF MONTANA and CHRISTI  
JACOBSEN, in her official capacity as  
MONTANA SECRETARY OF STATE,

Petitioners,

v.

ORDER

MONTANA FIRST JUDICIAL DISTRICT  
COURT, LEWIS & CLARK COUNTY, HON.  
MIKE MENAHAN, Presiding,

Respondent.

FILED

JUL 23 2024

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

Petitioners State of Montana and Christi Jacobsen, in her official capacity as Montana Secretary of State (collectively "Jacobsen"), seek an emergency writ of supervisory control to vacate the July 16, 2024 Temporary Restraining Order of the First Judicial District Court, Lewis and Clark County, in its Cause No. ADV-25-2024-463. At our invitation, Montanans Securing Reproductive Rights and Samuel Dickman, M.D., and Montanans for Election Reform Action Fund and Frank Garner, Plaintiffs in the case below (collectively "Initiative Proponents"), filed expedited responses in which they argue the District Court is not proceeding under an error of law.

On July 10, 2024, Initiative Proponents filed a Complaint for Declaratory and Injunctive Relief, seeking a determination that inactive voters are "qualified electors" for purposes of signing ballot initiative petitions for CI-126, CI-127, and CI-128. Initiative Proponents alleged that Jacobsen was unlawfully blocking the verification of valid petition signatures by qualified electors. They alleged that on June 28, 2024, after the counties had already undertaken signature verification, Jacobsen reprogrammed the software that county election administrators use to process petitions so that the signatures of voters who appear

on the State's "inactive" voter list would be automatically rejected, contrary to longstanding practice and the Secretary's own longstanding direction to county election administrators that they "accept the signatures of inactive electors, since they are legally registered." Initiative Proponents argued this change unlawfully and unconstitutionally excludes qualified electors from having their signatures counted. They further moved for a temporary restraining order (TRO) and preliminary injunction, asking the District Court to enjoin the counties and Jacobsen from rejecting petition signatures from inactive voters.

Jacobsen responded in opposition and the District Court held a hearing on the motion for TRO on July 16, 2024. After hearing testimony and argument, the court ruled that it would grant the TRO. It directed counsel for the respective parties to confer and propose an order for the court's consideration.

In the TRO that the court issued after the parties conferred, it granted immediate relief to Initiative Proponents as follows:

- Under the Montana Constitution and state law, "qualified electors" may sign initiative petitions and be counted; whether or not the elector appears on the inactive voter list, for the purposes of this temporary restraining order only.
- For the purposes of qualifying a ballot initiative, the Secretary shall not prevent the verification or counting of the otherwise-valid signature of an elector who is on the "inactive voter" rejected list.
- To minimize impact to the current counting of initiative petitions, the Secretary shall make no changes to the state software system related to the verification of signatures prior to the July 19, 2024 deadline.
- Between July 20 and 21, 2024, the Secretary shall restore the state software system to allow the verification of inactive voters' signatures, such that county clerks may begin reviewing said voters on Monday, July 22, 2024.
- By 9:00 AM on Monday, July 22, 2024, the Secretary shall produce a report to each county of any inactive voters whose signatures were not verified. . . .

- Counties, which are political subdivisions of Defendant the State of Montana, shall review the signatures of previously-rejected inactive voters, starting Monday, July 22, 2024, and shall submit them to the Secretary by 12:00 PM on July 24, 2024.
- The Secretary shall, through 12:00 PM on July 24, 2024, accept from counties and count the signatures of any previously-rejected inactive voters identified above, who have been verified by a county and submitted to the Secretary.
- The Court may revisit the 12:00 PM, July 24, 2024 deadline on receipt of clear and convincing evidence that a county is unable to meet this deadline.
- The Secretary shall file a copy of this Court's order with the Clerk of Court in Lake County as soon as possible.

Jacobsen then filed this emergency petition for writ of supervisory control with this Court.

Supervisory control is an extraordinary remedy that may be invoked when the case involves purely legal questions and urgent or emergency factors make the normal appeal process inadequate. M. R. App. P. 14(3). The case must meet one of three additional criteria: (a) the other court is proceeding under a mistake of law and is causing a gross injustice; (b) constitutional issues of state-wide importance are involved; or (c) the other court has granted or denied a motion for substitution of a judge in a criminal case. M. R. App. P. 14(3)(a)-(c). Consistent with Rule 14(3), it is the Court's practice to refrain from exercising supervisory control when the petitioner has an adequate remedy of appeal. *E.g., Buckles v. Seventh Jud. Dist. Ct.*, No. OP 16-0517, 386 Mont. 393, 386 P.3d 545 (table) (Oct. 18, 2016); *Lichte v. Mont. Eighteenth Jud. Dist. Ct.*, No. OP 16-0482, 385 Mont. 540, 382 P.3d 868 (table) (Aug. 24, 2016). "[A] writ of supervisory control is not to be used as a means to circumvent the appeal process. Only in the most extenuating circumstances will such a writ be granted." *State ex rel. Ward v. Schmall*, 190 Mont. 1, 617 P.2d 140 (1980).

Jacobsen argues that emergency factors make this matter appropriate for supervisory control because her office needs to begin its certification process “in mere days,” and the normal appeal process is therefore inadequate. She further argues that the issue on petition—whether a “qualified elector” includes inactive voters for purpose of being counted as signatures on ballot initiative petitions—is purely one of law, and that in this instance the District Court is proceeding under a mistake of law and causing a gross injustice by forcing her to count signatures of inactive voters on these ballot initiative petitions. Jacobsen challenges the TRO on three grounds: (1) the court erred in determining that inactive voters are qualified electors; (2) the court improperly altered statutory election deadlines; and (3) the TRO provides affirmative relief and is therefore “a writ of mandamus in disguise.” Jacobsen admits that her counsel conferred with opposing counsel to craft the language of the TRO that she now challenges. However, she asserts that, prior to the court ordering the parties to confer, she demonstrated “strong opposition” to the motion for TRO.

In response, Initiative Proponents assert that the District Court did not err as a matter of law. However, they argue this Court should accept the petition and resolve the legal issues in dispute because the case involves constitutional issues of statewide importance.

We agree that the primary issue—whether the District Court erred as a matter of law in determining that voters who are considered “inactive voters” nonetheless remain “qualified electors” for the purpose of counting signatures on ballot initiative petitions—is a question of law. However, the burden of persuasion is on the petitioner to convince this Court to issue a writ. *Westphal v. Mont. Eleventh Jud. Dist. Ct.*, No. OP 21-0387, 405 Mont. 438, 495 P.3d 421 (Aug. 17, 2021). At this juncture, Jacobsen has not persuaded us that the District Court is proceeding under a mistake of law. The court issued a TRO upon a determination that the equities and public interest favored immediate relief. However, the court has yet to fully consider the legal issues and the parties have the opportunity to present further argument to that court regarding Initiative Proponents’ request for a preliminary injunction, which is set for hearing in that court this Friday, July 26, 2024, at 9:00 a.m.

We further disagree with Jacobsen that the TRO is causing a gross injustice, as Jacobsen's actions in reprogramming the petition-processing software after county election administrators had commenced processing petitions created the circumstances that gave rise to this litigation. Section 13-1-201, MCA, provides that the Secretary bears the responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws. Jacobsen's decision to change the Secretary's longstanding practice to count the signatures of inactive voters—and to do so without notice to county election administrators after they had commenced petition processing—failed to maintain uniformity in the application, operation, and interpretation of the election laws in this instance. The Declaration of Clay Leland, attorney for Secretary of State, which Jacobsen includes as an exhibit to her petition, explains that, after an elections division staff member in the Secretary's office provided guidance to an elections administrator to count the signatures of inactive voters, consistent with longstanding practice, Leland devised a different interpretation of Montana law and countermanded the advice the staff member had provided. This caused confusion among county election administrators, and ultimately culminating in the decision to reprogram the petition-processing software, in the midst of petition processing, to automatically reject the signatures of voters who were on the "inactive list" as defined by § 13-1-101(25), MCA.

We further decline Initiative Proponents' invitation to grant this writ and provide permanent declaratory and injunctive relief in favor of Initiative Proponents. Initiative Proponents chose to litigate this matter in the District Court and we will not interfere with the District Court's authority to hear this case.

Furthermore, we conclude that the remaining issues Jacobsen raises, concerning the relief granted in the TRO, provide no basis for this Court to exercise supervisory control or revisit the District Court's rulings. Even though Jacobsen strongly opposed Initiative Proponents' motion for TRO, once the District Court ruled that it would grant the TRO, Jacobsen, via counsel, participated in crafting the language of the July 16, 2024 Temporary Restraining Order. Although Jacobsen argues to this Court that the District Court improperly altered statutory deadlines and granted improper relief, she notably does not

claim that these provisions of the TRO were not in fact agreed upon by her counsel in conference with counsel for Initiative Proponents. We will not disturb a remedy that arose from a conference between the litigants.

Lastly, on July 22, 2024, Jacobsen moved for leave to file a reply brief to the petition for writ, pursuant to M. R. App. P. 14(7)(a). We do not find that the interest of justice would be served by further delay of disposition as justice will be most expediently served by allowing the District Court to proceed in making its ruling unimpeded by any delay.

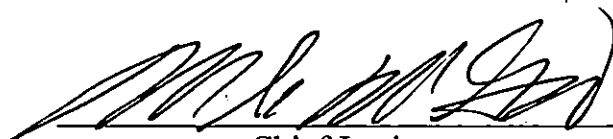
We conclude that Jacobsen has not demonstrated that a writ should issue in this case, as she has not persuaded this Court that the District Court is operating under a mistake of law and causing a gross injustice as M. R. App. P. 14(3)(a) requires.

IT IS THEREFORE ORDERED that this Emergency Petition for Writ of Supervisory Control is DENIED and DISMISSED.

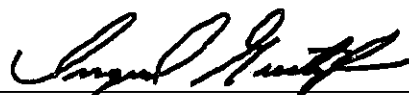
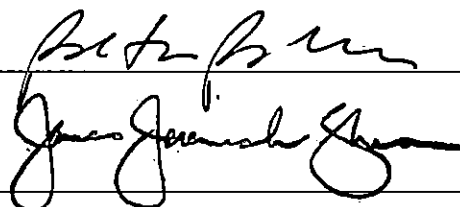
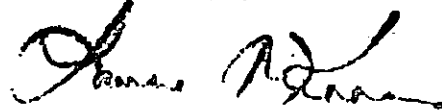
IT IS FURTHER ORDERED that the Motion for Leave to File Reply is DENIED.

The Clerk is directed to provide immediate notice of this Order to counsel for Petitioners, all counsel of record in the First Judicial District Court, Lewis and Clark County, Cause No: ADV-25-2024-463, and the Honorable Mike Menahan, presiding.

DATED this 23rd day of July, 2024.



Chief Justice



*Dick M. Sandberg*

*Jim Rice*

Justices

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