



CHRISTI JACOBSEN

MONTANA SECRETARY OF STATE



July 9, 2024

Raph,

On July 8, 2024, I received your letter with three requests, one of which you imposed a deadline for a response by the next day, July 9, at 10:00 AM. My aim is to clarify some of the inaccurate statements and/or assumptions made by your letter in writing, and then confer with you thereafter as planned.

Please be advised that the Secretary did not issue "guidance" on this topic. Secretary of State staff directly answered an email inquiry with the answer that corresponds with Montana law, and a more efficient process was developed as a result. No county procedures or processes were disrupted.

We agree that Montana law makes clear that initiative petitions must be signed by "Qualified Electors." Article IV, Section 2 of the Montana Constitution. However, the assertions thereafter are squarely undermined by the plain language of Montana law.

First, your letter alleges an incorrect assumption that an inactivated registration has "nothing to do with whether they are a 'qualified elector.'" Yet, Montana law plainly indicates that it does. For example, 13-19-313 provides that an inactivated elector on the inactive list must become a qualified elector and indicates to **become** a qualified elector, the elector must comply with reactivation procedures. MCA 13-19-313 (2) ("...the election administrator shall place the elector on the inactive list provided for in 13-2-220 until the elector becomes a qualified elector. In order to become a qualified voter, an elector shall follow the procedure in 13-2-222 or 13-2-304, as applicable.") (Emphasis added.) The obvious logic by the letter of the law is that a person becomes a qualified elector by becoming an active voter.

Second, your letter incorrectly asserts that inactive voters are eligible to vote, citing the reactivation statute. Inactivated electors are not eligible to vote. Inactive electors are not eligible to receive a mail ballot or absentee ballot, nor are they eligible to vote at the polling place in inactive status. While it is correct that one of the statutory options provided by law for inactivated voters **to become** a qualified elector is to appear at a polling place and **activate** the registration, the ballot is cast only after completing one of the means provided by law to return to active, qualified elector status via reactivation.

Finally, yes, it appears that a rebranded PowerPoint from the archives suggested counties process inactive electors, while providing an explanation that "it is not the burden of the SOS or election administrators to prevent non-registered electors from signing a petition." I think we both agree that county and state election officials have a duty to ensure only qualified elector signers are certified, even if we (at least at this point) disagree as to whether an inactivated registrant is a qualified elector.

Although, I believe you were unaware that Montana law clearly establishes that an inactivated registration requires steps from the elector to become a qualified elector.

You may recall that the document you cite was heavily criticized by the Montana Supreme Court in the past due to deviating from the plain language of the law. Although past practice is a consideration under certain circumstances, we took an oath to the Montana Constitution and Montana law, our commitment to ensuring that statutory compliance is satisfied is of paramount importance. There is no dispute that a petition may *only* be signed by qualified electors. The integrity of the petition process is satisfied by ensuring that only the signers of qualified electors are certified.

Montana law is clear, inactive electors remain inactivated until the same *becomes* a qualified elector, but while inactivated, they remain unqualified. Nonetheless, your categorical dismissive of the Oregon Supreme Court's evaluation of this identical issue leads me to believe you ignored reviewing the persuasive authority altogether.

As you are aware, Oregon Supreme Court decisions have been cited by the Montana Supreme Court on numerous occasions, and at times referred to as a sister court. Oregon's Constitution, like Montana's, vests Qualified Electors with the right to sign a petition, with nearly identical language in both states. The Plaintiff's in that case sued the Secretary of State with the same exact arguments set forth by your letter. The Oregon Supreme Court categorically rejected those same arguments. *Whitehead v. Fagan*, 369 Or. 112, 115, 501 P.3d 1027, 1028 (2021) ("We conclude, like the secretary, that because voters whose registrations are inactive are not eligible to vote, they are not "qualified voters" within the meaning of [the Constitution]. Accordingly, we hold that their signatures on initiative petitions may not be counted, and that the secretary properly excluded them when determining the number of signatures submitted in support of [ballot issue]")

Moreover, your dismissal of a state supreme court's recent holding that the Secretary of State properly rejected inactive electors from a petition because they are not qualified electors is interesting in that I am not aware of a single court anywhere in the country that has accepted the arguments set forth by your letter, but *Whitehead* is an example where the arguments you asserted were categorically rejected.

Finally, Raph, we were born and raised here. We've both heard responsible signature gatherers approach citizens with "Are you currently a registered voter in X County?" For good reason, "Did you used to be a registered voter?" is not a follow up I've heard or would expect to hear.

It is critical that the Secretary of State follow the law to the tee to best serve Montanans. Your threat of a TRO doesn't add up under the facts, as your ask is to force the Secretary of State to deviate from the manner which every petition has been certified (and will be) during this election cycle. Moreover, as it pertains to CI-128, only one of many ballot issues this election cycle, with the unprecedented holding of all petitions to dump in the final hours (against both state and county election official advice) has caused numerous challenges for election officials. Unnecessary litigation will brew confusion in the process and slow down the processing of petitions during the final days of statutory period given to counties to certify petitions to the state. I heed warning that litigation on this topic is premised on incorrect facts, wrong on the law, and will likely frustrate the pace of processing your clients petitions within the statutory period allotted to counties to do so.

Raph Graybill
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With that in mind, let's confer and work through the first issue. I will respond to the other, nonemergent, issues raised by your letter thereafter.

Sincerely,



AUSTIN JAMES
Chief Legal Counsel