IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause: DA 23-0382

ACORN INTERNATIONAL
Plaintiff/Appellant.

v.

STATE OF MONTANA, by and through, THE SECRETARY OF STATE CHRISTI JACOBSON

Defendant/Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court
Lewis and Clark County
District Court Cause No. ADV 2022-229
Honorable Mike Menahan, Presiding

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that the Secretary State may charge more than the cost of production for the Montana voter file in conflict with its language and the National Voter Registration Act.
2. Whether the State violated ACORN International's (ACORN's) right to know when it failed to produce public information related to the costs of the voter file.

STATEMENT OF THE CASE

This case concerns the Secretary of State charging excessive costs for the voter information and refusing to provide information about those costs prior to ACORN filing suit.

On March 21, 2022, ACORN filed a complaint and application for injunctive relief. *See*, *Complaint*, Dkt. 1. It brought two separate claims against the Secretary of State for violating Montana's right to know statutes. *Id.*, ¶¶ 16-26. First, ACORN alleged that the Secretary of State's fee schedule for access to the voter information file was unrelated to the actual costs of the register. *Id.*, And, second that the Secretary of State did not fulfill its statutory obligation under § 2-6-1006, MCA, to provide public information in response to a request for information.

The parties conducted discovery and filed cross motions for summary judgment on February 10, 2023. *See, Cross Motions for Summary Judgement*, Dkts. 27, 28. After briefing and a hearing, the District Court issued its order on summary judgment on June 15, 2023. *See, Order – Motions for Summary Judgment* ("*Order")*, Dkt. 46. In its order, the Court

granted summary judgment to the State and found that the fee schedule was permissible. The District Court did not address the claims under § 2-6-1006, MCA. On June 15, 2023, the State filed its notice of entry of judgment. *See*, *Notice of Entry of Judgment*, Dkt. 47. Then it appealed to this Court on July 12, 2023. *See*, *Notice of Appeal*, Dkt. 49.

STATEMENT OF FACTS

The Secretary of State is required to provide access to Montana's voter information file upon request. Section 13-2-122, MCA; 52 U.S.C. § 20507(i). It can do so almost instantaneously if the requester has a login for the State's electronic access system – Okta. *Acorn Br. In Supp. Summary Judgment,* Dkt. 27 at p. 4, Exs. 4, 5. If the person is not registered, the requested information can be emailed to the requester, or they can download it. *Id.* Yet the State charges $1,000 for a person who makes a one-time request, or $5,000 for a yearly subscription. *See,* Admin. R. Mont. 44.3.1101.

These fees date back to 2006, when they were adopted to replace the preceding fee schedule setting fees based on the number of records requests. *See* Exhibit 9, Montana Administrative Register (MAR), 20-10/26/06. As far back as 1998, the Secretary of State calculated fees for the access to the voter information file on the number of records ordered. MAR-9-5-98. For example, if a person ordered 0-99,999 records, the charge was $16 per 1,000 voters for CDs, $28 per 1,000 for diskette, and $60 per thousand for paper. *Id.* In 2002, the amounts were amended to $0.009 per electronic record, with $0.50 per page charge for copies. MAR 3/28/02. The charge for

copies was to account for the office costs associated with making copies. *Id.* However, there was no financial explanation to the change to $0.009 per record for electronic information. *Id.*

Then, in 2006, the Secretary of State amended the fees to their present amounts - $1,000 for one time access, and $5,000 for an annual subscription. The proposal potentially decreased the cost of the file, but nonetheless, the rule notice provided no justification for the price. *Id.* To date, those charges remain the same. *See* Admin. R. Mont. 44.3.1101 (2023).

Beyond the administrative rule history, the Secretary of State is unaware of what it actually costs to give the voter file to a person or entity that requests it. Dkt. 27, p. 4, Exs. 4, 5. The only costs that the Secretary of State references are those related to the ongoing maintenance and operation of the voter file and the Secretary of State's office. *Id.* At the District Court, the Secretary of State asserted that its annual costs for the voter file are around $565,000. Dkt. 46, p. 6. These ongoing costs include things such as licensing from Oracle and Citrix; office expenses such as for telephones, email, Zoom access, a VPN system, Office 365, various maintenance fees and server costs; ongoing staff time; and miscellaneous costs. Dkt. 27, p. 4, Exs. 4, 5. The State provided no information as to how these costs relate to a person or entity's request for a copy of the voter file, or what costs the Secretary of State incurs when a person requests the voter file. *Id.* The State is completely unaware of what it costs to give the file to a requester;

it cannot identify a single cost attributable to a request rather than ongoing office costs. *Id.*

Indeed, the Secretary of State is required to incur these costs, regardless of any request for information. Section 13-2-107, MCA; 52 U.S.C. § 20507. So, whether one person asks for the records, or 1,000 people ask for the records, the Secretary of State must pay to maintain the voter file.

Because the Secretary of State must maintain these systems, the cost of accessing the voter file is practically nothing. Dkt. 27, p. 4, Exs. 4, 5. All of the information is stored electronically and can be accessed with the click of a button. *Id.*, at Ex. 5. For subscription users – the $5,000 a year fee – the requester simply has to access their Okta account. *Id.* From there, the subscriber can download data an unlimited number of times and may make a request any time. *Id.* The data is updated nightly. *Id.*

For non-subscribers, the process is similar. Instead of setting up an Okta account, the user signs in as a public user, and makes a specific request. *Id.* After paying for the specific request, the State emails the information or, depending on the request, the information can be downloaded instantly. *Id.* In either scenario, the information is provided electronically, and involves minimal human involvement. *Id.*

Despite the limited costs for accessing the voter file, the Secretary of State refuses to produce the voter file unless the requester pays the $1,000 or $5,000 fee. *See Hrg. Transcr.* 29: 14-16 ("the Secretary of State stands ready to produce the voter file as soon as Plaintiffs pay the fee. . . "). That's what happened here. On October 27, 2021,

ACORN sent a request to the Secretary of state to obtain the voter file. Dkt. 27, p. 2, Exs. 1, 2. In its request for the file, ACORN advised that it was unable to pay the annual fee but wanted the information to assist in its Voter Purge Project, which works to ensure voters are not being inappropriately purged from State voter rolls. *Id.* In the letter, Acorn also asked for documentation of the "actual costs" for a yearly subscription. *Id.*

The Secretary of State responded on November 8, 2021. *Id.*, Ex. 1, 3. The response was three paragraphs. *Id.* In relevant part, the Secretary of State's office explained:

> The Secretary of State's Office is authorized to develop and implement a statewide electronic filing system as described in 2-15-404, MCA, and the Office is required to charge for elector lists under 13-2-122, MCA.
>
> The fees for those products are set in the Montana Administrative Rule at 44.3.1101. . .

Id. The response included a copy of Administrative Rule 44.3.1101 but did not provide any information regarding the "actual costs" for a yearly subscription. *Id.* It did not include any information related to the $565,000 that the Secretary of State now asserts are the "actual costs" for the voter file. *Id.*

In all, the Secretary of State's fee structure is not consistent with the language in § 13-2-122, MCA, because the costs alleged are not the "actual cost" of accessing the register for a requester, and the Secretary of State failed to provide information in

response to a public information request. Nevertheless, the District Court granted the Secretary of State summary judgment. This was an error.

STANDARD OF REVIEW

The Supreme Court reviews a district court's ruling on motions for summary judgment using the same Rule 56, M. R. Civ. P., criteria used by the district court. *Chapman v. Maxwell*, 2014 MT 35, ¶ 7, 374 Mont. 12, 322 P.3d 1029

SUMMARY OF THE ARGUMENT

Montana's right to know is liberally construed, with a presumption that every document is subject to production for public review. This includes the voter file. Under both the National Voter Registration Act, 52 U.S.C. § 20507, and § 13-2-122, MCA, the Secretary of State is required to produce a voter file upon request and may charge a fee for doing so.

Section 13-2-122, MCA, allows the Secretary of State to charge the "actual costs" of the voter file. The actual costs of the voter file mean the costs incurred as the result of a request for the information. It does not include the costs of *maintaining* the file or paying for ongoing office costs of the Secretary of State. Under that rationale, the Secretary of State cannot charge $1,000 or $5,000 for the voter file because the only cognizable costs the Secretary of State can identify are all related to ongoing operations. Those costs include software licenses, staff time, and general operations and maintenance costs. Because § 2-15-405(b), MCA requires the Secretary of State to

maintain the file, and expend these costs, it cannot charge for them pursuant to § 13-2-122, MCA.

Permitting these costs to be charged would also violate the National Voter Registration Act (NVRA). The NVRA only allows a state to charge a "reasonable cost" for photocopying or electronic production of a voter file. It does not allow a state to charge amounts that are unrelated or untethered from the costs a state incurs in the act of providing the documents to the public. It does not allow a state to subsidize its operations by passing the cost along to people requesting a voter file. Thus, the only interpretation that avoids a constitutional and preemption issue is concluding that the costs allowed under § 13-2-122, MCA, are the costs of providing the information to the requester. Otherwise, Montana's law would be preempted.

Beyond the cost issues, the Secretary of State did not respond to ACORN's request for information. ACORN requested documents supporting the Secretary of State's charges for access to the voter file. The Secretary of State only provided a copy of the administrative rule, but later claimed that the fees for the voter file are based on various operating expenses. The Secretary of State did not produce any information related to those operating expenses until this suit was filed. It thus violated ACORN's right to know. The District Court, though, did not rule on this issue, which was in error. This Court should simply rule on the public records request in lieu of remanding it to the District Court.

ARGUMENT

ACORN brought two claims for violations of its right to know. First, that the Secretary of State had no constitutional or statutory authority to charge more than the actual cost of production of voter file based on § 13-2-122, MCA. And second, that the Secretary of State failed to respond to a request for public information pursuant to § 2-6-1006, MCA. While both claims are based on the right to know, the language of each statute is different and must be evaluated separately.

A. Montana's right to know is broadly construed in favor of providing public access to public information.

The basis for the public's "right to know," and the starting point for any dispute involving access to the workings of government, is Article II, Section 9 of the Montana Constitution:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demands of individual privacy clearly exceeds the merits of public disclosure.

Because this right is contained in the Constitution's Declaration of Rights, it is a fundamental right. *State v. Tapson* 2001 MT 292, ¶ 15, 307 Mont. 428, 41 P.3d 305.

The provision contains two components: the right to examine documents and the right to observe the deliberations of public bodies. The Supreme Court considers the provision "unique, clear and unequivocal." *Associated Press v. Board of Public Education*, 246 Mont. 386, 391, 804 P.2d 376, 379 (1991). The Court has repeatedly observed that

the provisions of the right-to-know laws are to be liberally construed. *e.g., Associated Press v. Croft,* 2004 MT 120, ¶ 15, 321 Mont. 193, 89 P.3d 971.

Based on the liberal construction, there exists a strong presumption against withholding documents. Indeed, "[t]his constitutional provision *generally requires* information regarding state government to be disclosed to the public, *except* in cases where the demand of individual privacy clearly exceeds the merits of public disclosure." *Krakauer v. State,* 2016 MT 230, ¶ 35, 384 Mont. 527, 381 P.3d 524, (quotations and citations omitted) (emphasis added). The Court went on: "our constitution gives a *high priority* to the public's right to know." *Id. citing Lence v. Hagadone Inv. Co.*, 258 Mont. 433, 447, 853 P.2d 1230, 1239 (1993), *overruled on separate grounds by Sacco v. High Country Independent Press*, 271 Mont. 209, 896 P.2d 411 (1995) (emphasis added).

The Court's explanation in *Krakauer* is consistent with the Constitutional Convention delegates' intent, where they "essentially declared a constitutional *presumption that every document within the possession of public officials* is subject to inspection." *Bryan v. Yellowstone County Elementary School District*, 2002 MT 264, ¶ 23, 312 Mont. 257, 60 P.3d 381 (Emphasis added). So, "While the Legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the protections found within the Constitution." *Id.*, ¶ 23.

B. The Secretary of State may not charge more than the actual costs of associated with a request for the voter file.

In the context of the fundamental constitutional rights underpinning the Plaintiff's request, the Secretary of State must provide the names and addresses of individuals who are registered to vote in the State of Montana. Section 13-2-122, MCA. In doing so, the Secretary of State "may collect a charge *not to exceed the actual cost of the register, list, mailing labels or available extracts and reports.*" Section 13-2-122(1), MCA (emphasis added.) It charges $1,000 or $5,000 to access the voter information system. Admin. R. Mont. 44.3.1101. The District Court erred in upholding these costs, despite the State's inability to identify the "actual costs" of the register.

1. The Secretary of State did not meet its burden to establish the fees it charges are consistent with § 13-2-122, MCA.

The Secretary of State also bears the burden of establishing that any fees it charges are consistent with § 13-2-122, MCA. This burden exists because there is a presumption that the public has access to public documents, *Cf. Nelson v. City of Billings*, 2018 MT 36, ¶¶ 32-34, 390 Mont. 290, 412 P.3d 1058, because the State is required to maintain records sufficient to justify the fees charged § 2-15-405, MCA. In other words, the State is the party with access to the records/costs, so it must be able to establish the legality of such costs. *See,* § 2-15-405(2)(b), MCA.

To determine whether the Secretary of State is complying with § 13-2-122, MCA, the Court must analyze the meaning of the "actual cost of the register, list, mailing labels, or available extracts and reports" means. Specifically at issue is the undefined term "actual cost".

In interpreting this section of code, the judge's role is to interpret § 13-2-122, MCA, consistent its plain language. *Hines v. Topher Realty, LLC*, 2018 MT 44, ¶ 15, 390 Mont. 352, 413 P.3d 813. The Court does not go beyond the plain language if the language is clear and unambiguous. *Id.* And its role 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." Section 1-2-101, MCA.

Under the plain language, § 13-2-122, MCA, only allows for the actual costs of providing the information to the public. The term 'actual' means "existing in fact; real". Black's Law Dictionary (3d pocket edition, 2006). 'Cost' means the amount paid for charged for something; price or expenditure. *Id.* Using these definitions, the Secretary of State may only charge up to the "real price" of the register or list, which would include mailing labels and extracts or reports. Section 13-2-122, MCA. When read together, this language is necessarily limiting. *Schulz v. N.Y. State Bd. of Elections*, 633 N.Y.S.2d 915, 922 (Sup. Ct. 1995) ("'Actual cost' would reasonably seem to mean something more finite, direct and less inclusive than '[indirect] cost', which is a concept as infinite and expandable as the mind of man.") It would not include costs associated with the Secretary of State's statutory obligation to create the voter file. Section 13-2-107, MCA (requiring Secretary of State to create, and maintain, a voter registration system); *See, e.g., Livecchia*, 22 A.3d at 149.

The District Court rejected this argument and held that § 13-2-122, MCA, allows the Secretary of State to charge the actual cost "of creating and maintain the list." *Order*

Dkt. 46, p 6. This is inconsistent with the facts before the District Court. As discussed above, the Secretary of State is arbitrarily charging $1,000 to $5,000 for electronic records that can be produced almost instantaneously. The Secretary of State is ignorant of the "actual cost" of the list. It provides costs for Zoom, Microsoft 365, server costs, staff time, licensing costs, and other miscellaneous costs. Dkt. 27, p. 4, Exs. 4, 5. But these are not "costs of the list" they are costs the state incurs to comply with its statutory obligation to maintain a voter file. Section 13-107, MCA. They exist regardless of any request for the voter file, so they cannot be classified as "real" or "existing in fact" of the list because they are not contingent upon a request. If no person requests access, those costs still exist.

In considering analogous issues, state and federal courts across the country agree that charging for maintenance costs is not an "actual cost" of a register because those fees are indirect. For example, in *Schulz v. N.Y. State Bd. Of Elections*, 633 N.Y.S.2d 915, 922 (Sup. Ct. 1995), the Court explained that the phrase "actual costs" must have some definite meaning, it cannot include all "indirect costs." *See also*, *State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 963 N.E.2d 1288, 1297 (Ohio 2012) ("actual cost" is the cost of production, not staff time); *Livecchia v. Borough of Mount Arlington*, 22 A.3d 140, 150 (Super. Ct. App. Div. 2011) ("actual cost" does not include technology costs); *Hammet v. Schwab*, 518 P.3d 48 (Kan. App. 2d 2022) ("actual costs" do not include vendor fees); *Assessor v. Freedom of Info. Comm'n*, 1998 Conn. Super. LEXIS 1550, at *9 (Super. Ct. June 2, 1998) (actual costs do not include third party fees

to produce public data or for unnecessary work to provide a copy); *State ex rel. Warren Newspapers v. Hutson*, 640 N.E.2d 174, 180 (Ohio 1994) (costs are for copying, not staff time). These interpretations make sense, the Secretary of State should not be able to subsidize its budget through public information requests. *Schulz v. N.Y. State Bd. of Elections*, 167 Misc. 2d 404, 416, 633 N.Y.S.2d 915, 923 (Sup. Ct. 1995) (producing records "shall not constitute a subsidy to any other function of government.").

Most recently, in 2022, a Kansas Appellate Court ruled against the Secretary of State for its attempts to hinder access to public voter information. *See generally, Hammet v. Schwab*, 518 P.3d 48 (Kan. App. 2d 2022). There, the Secretary of State attempted to charge the requester based on the amounts the Secretary of State was billed by a third-party vendor who maintained the database. In rejecting the Secretary of State's argument, the Court noted that while the Secretary of State may recoup costs, it "would cost the Secretary little to nothing" to provide access to the data. *Id.*, 518 P.3d at 56; *See also*, *Assessor v. Freedom of Info. Comm'n*, 1998 Conn. Super. LEXIS 1550, at *9 (Super. Ct. June 2, 1998) (Cannot charge fees for a third party to produce public data or for unnecessary work to provide a copy).

The District Court did not reconcile these cases with Montana law, which it was required to do. Section 2-15-405, MCA, only allows the Secretary of State to charge costs that "reasonably reflect the prevailing rates charged in the public and private sectors for similar services." The above cases show that the "prevailing rates" are limited to the actual cost of providing the records, and not to pay for ongoing

operations and maintenance budgets. Tellingly, our neighboring states charge only a fraction for the very same information. *See, e.g.*, Idaho Secretary of State, *Voter Registration Data Report Order Form*, https://sos.idaho.gov/pressrelease/commissiondetails/VR_order_form.pdf (last accessed Mar. 17, 2023) ($20 access fee); Wyoming Secretary of State's Office, *Wyoming Voter Registry List Request Form*, https://sos.wyo.gov/Forms/Elections/General/VoterProductOrderForm.pdf (last accessed Mar. 17, 2023) ($125 fee).

Applying those prevailing practices, here, means that the Secretary of State cannot charge for the ongoing operations and maintenance costs of the file, or other office technology like Zoom or Microsoft 365. This is particularly true because the Secretary of State has an independent obligation to maintain the voter file. Section 13-2-122, MCA. So, charging for "creating and maintaining the list" are not costs that are directly incident to accessing the voter information file. *Schulz*, 633 N.Y.S.2d at 923 (records requests should not "constitute a subsidy to any other function of government.") The District Court's conclusion otherwise was, thus, in error.

2. Any potential ambiguities in the § 13-2-122, MCA, must be construed in favor of ACORN to promote the Right to Know and to ensure compliance with the NVRA.

The District Court's ruling, and analysis, create a significant conflict with that National Voter Registration Act (NVRA),[1] which would render Montana non-

[1] The Secretary of State argued at the District Court that ACORN had not exhausted its administrative remedies under the NVRA, so any NVRA claims were not appropriate. *Hrg. Transcr.*, 26:23-27:4. However, ACORN's

compliant with the NVRA, and would potentially subject the State to future liability. Rather than addressing this conflict, the District Court summarily ignored it and interpreted § 13-2-122, MCA, to be preempted under the NVRA and the Supremacy Clause of the U.S. Constitution.

This Court can remedy that error. Rather than accept non-compliance with Federal law, the Court can interpret § 13-2-122, MCA, liberally and conclude that it only allows only for the "actual costs" created by the request for the voter file. Doing so would ensure that Montana is not in violation of the NVRA.

When interpreting a statute, it must be construed to avoid an unconstitutional interpretation and preemption whenever possible. *State v. Roundstone*, 2011 MT 227, ¶ 12, 362 Mont. 74, 261 P.3d 1009; *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 896 (5th Cir. 2012). Doing so, here, means, interpreting § 13-2-122, MCA, so that it is consistent with the NVRA. Otherwise, § 13-2-122, MCA, would be preempted as violating the Supremacy clause. *See, e.g.*, *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005)

The NVRA, with which Montana must comply, *MEA-MFT v. State*, 2014 MT 33, ¶ 6, 374 Mont. 1, 318 P.3d 702, provides that Montana "shall make available for public inspection, and where available, photocopying at a *reasonable cost*, all records concerning the implementation of programs and activities conducted for the purpose

claims are not that the statutes facially violate the NVRA, but rather that interpreting § 13-2-122, MCA, to allow any and all costs would be inconsistent with the NVRA. This claim does not require administrative exhaustion.

of ensuring the accuracy and currency of official lists of eligible voters . . ." 52 U.S.C. § 20507(i) (emphasis added). This includes voter files or compilation of state voter information. *Pub. Interest Legal Found., Inc. v. Bellows*, 588 F. Supp. 3d 124, 133 (D. Me. 2022); *Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012). To obtain the voter file, then, a party must simply pay a "reasonable cost" for a copy of the list. 52 U.S.C. § 20507(i). In the past, these costs were related to photocopying, but as voter systems modernized, so did the NVRA, and a State may now charge for producing records on an electronic device like a thumb drive. *Greater Birmingham Ministries v. Merrill*, 2022 U.S. Dist. LEXIS 181339, at **17-18 (M.D. Ala. Oct. 4, 2022). But those costs are limited to the costs of reproduction, and do not include a State's maintenance and operation costs. *Id.*

The matter of excessive costs was addressed in *Greater Birmingham Ministries*. There, the Plaintiff sought certain records from Georgia's voter file, and the Secretary of State only offered to provide them at a cost of $1,123.10, which was a cost of $0.01 per voter. *Greater Birmingham Ministries*, 2022 U.S. Dist. LEXIS 181339, at *4). The Court implicitly held that the $1,123.10 was not "reasonable," and ordered the parties to agree on a "reasonable cost" which Plaintiffs agreed would include "costs of a thumb drive to transfer information or staff time required to execute a request." *Id.*, 2022 U.S. Dist. LEXIS 181339, at *18. The Court then declined to create a schedule of reasonable costs but ruled that whatever schedule the Secretary created "must be tethered to the actual costs he incurs in producing responsive voter records." *Id.*; *Campaign Legal Ctr. v. Scott*,

618 F. Supp. 3d 376, 385 (W.D. Tex. 2022) (NVRA applies to requests for electronic records access).

Thus, a State is non-compliant with the NVRA if its costs are not related to the production of the actual voter file. In other words, it may not charge for maintenance and operations of the voter file (or Zoom). Any law that does include those "untethered costs" would frustrate the purpose of the NVRA and be preempted. *Id.*; *citing Charles H. Wesley Educ. Found.,* 408 F.3d at 1354 (recognizing that the NVRA "overrides state law inconsistent with its mandates").

In order to avoid this constitutional and preemption conflict, the statutes can be read harmoniously to give effect to each. *Mashek v. Dep't of Pub. HHS*, 2016 MT 86, ¶ 10, 383 Mont. 168, 369 P.3d 348; § 1-2-101, MCA. Under that reading, § 13-2-122, MCA, would only allow for the Secretary of State to charge the costs associated with the production of the records, and not for the maintenance. This is the preferred interpretation. *See Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 434 (2005) ("duty to accept the reading disfavoring pre-emption."); *Andrade*, 488 F. App'x at 896.

3. The District Court's rationale would allow the Secretary of State to Charge $565,000 for every entity requesting the information.

The District Court's reasoning is untenable. In its holding, the District Court agreed that the states fees constitute the "relevant 'actual costs' limiting language." In practice, then, the Secretary of State may charge up to $565,000 per request for access to the voter file. Such an interpretation would be inconsistent with Montana's

fundamental constitutional right to know, and the ability to use those records. *Greater Birmingham Ministries v. Merrill*, 2022 U.S. Dist. LEXIS 181339, at *13-14 (M.D. Ala. Oct. 4, 2022) ("Inspection need not be--and generally is not--an aim unto itself. Rather, the right to access voter records serves as a necessary foundation for a broad array of opportunities to engage and to make use of those records as the requesting party sees fit.")

C. The Secretary of State violated ACORN'S right to know when it failed to produce any information justifying the fees it charges for access to the voter file.

The District Court ignored ACORN's second claim for relief, which was based on the Secretary of State's failure to provide any information related to the basis of its fees. *ACORN MSJ*, p. 2, Exs. 1, 2. In its order, the District Court makes no mention of ACORN's October 7, 2021, request for information from the Secretary of State.

In that request, ACORN specifically requested that the Secretary of State provide it with "documentation of what the 'actual costs' are for a yearly subscription." *Id.*, Ex. 1, 3. In response to the letter, the Secretary of State did not provide any documentation other than a copy of Administrative Rule 44.3.1101. Dkt. 27, p. 2, Exs. 1, 3. Yet, once suit was filed, the Secretary of State claimed that the "actual costs" were $565,000, and not $5,000. It can't have it both ways.

Importantly, *this* request for information is controlled by § 2-6-1006, MCA, and not § 13-2-122, MCA, because it is not a request for the voter registration file, but rather a request for the costs of providing that information. Section § 2-6-1006(6), MCA,

specifically contemplates the Secretary of State providing information subject to disclosure, so a party may make a request for non-registrar related information, and the Secretary of State must act in accordance with the provisions of § 2-6-1006, MCA.

As such, the basic principles behind the Public Records Act apply. The purpose of the Act is to, "ensure efficient and effective management of public records and public information, in accordance with Article II, sections 8 through 10 of the Montana constitution." Section 2-6-1001, MCA). Read together with the Constitutional Right to know, the Public Records Act provides a method for the public to access public records and guarantees that "every person has a right to examine and obtain a copy of *any public information of this state*."[2] Section 2-6-1003(1), MCA (emphasis added); *Yellowstone Cty. v. Billings Gazette*, 2006 MT 218, ¶ 17, 333 Mont. 390, 143 P.3d 135.

A person may request public information from a public agency. Section 2-6-1006(1), MCA. Upon receiving such a request, a "public agency *shall* respond in a *timely manner*" by *either* producing the information *or* providing an estimate of the time it will take to fulfill the request and any fees that may be charged. Section 2-6-1006(2), MCA (emphasis added). Because the statute uses the word "shall" it is mandatory; the public agency must provide the information in a timely manner.[3] *Swearingen v. State*, 2001 MT

[2] Section 2-6-1003, MCA, provides exceptions for privacy, safety, and historical records - none of which are at issue here.
[3] There are certain exceptions, but they are inapplicable here.

10, ¶ 6, 304 Mont. 97, 18 P.3d 998 ("We have held that 'shall' means 'must' and that use of the term 'shall' connotes a mandatory obligation.").

In evaluating any right to know claim under the Public Records Act, a court must: (1) consider whether the provision applies to the particular political subdivision against whom enforcement is sought; (2) determine whether the documents in question are "documents of public bodies" subject to public inspection; and (3) if the first two requirements are satisfied, determine whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure. *Bryan*, ¶ 33. Where a privacy interest is not implicated, the third prong need not be considered. *Id.*

Applying the above discussion here, the Secretary of State had an obligation to produce the requested documents. The first element of the inquiry is met. The Secretary of State's office is a political subdivision of the State of Montana to which the right to know attaches. *See, e.g.*, § 2-6-1006(6), MCA (applying the Public Records Act to the Secretary of State); Mont. Const. Art. VI, § 1 (the Secretary of State is part of the executive branch).

Second, the documents being requested are documents of public bodies subject to public inspection. Specifically, the Secretary of State is required to maintain records "sufficient to support" the fees it charges. Section 2-15-405(3), MCA. Thus, the records are "public information" subject to disclosure because they are "prepared, owned, used or retained by" the Secretary of State for the transaction of public business. Section 2-

6-1002(11), MCA; *see also Krakauer v. State*, 2019 MT 153, ¶ 9, 396 Mont. 247, 253, 445 P.3d 201 (there is a presumption that all documents in the hands of public officials are amenable to inspection). And the information is not confidential information because there is no privacy interest in the costs, does not related to judicial deliberations, is not necessary to maintain the security and integrity of secure facilities for information systems, or statutorily designated as confidential. Section 2-6-1002(1), MCA. The Secretary of State also did not object to producing the documents in discovery based on the confidentiality of the records of *costs*. *See*, Dkt. 27, Ex. 4-6. Accordingly, the Secretary of State had an obligation to respond to the request for documents justifying its alleged actual costs of $565,000.

The Secretary of State, however, did not provide any documentation supporting its alleged costs of $565,000. Instead, it only produced a copy of Admin. R. Mont. 44.3.1101, which states that the "actual cost" of the register is $1,000 or $5,000. But once litigation commenced, the Secretary of State argued that the "actual cost" of the register is $565,000. These inconsistent positions demonstrate that the Secretary of State did not provide the required information. For example, it did not provide any information related to its maintenance and operations costs, or information related to its remote meeting, word processing, or email costs. Dkt. 27, p. 4, Exs. 4, 5. It noted the only cost was the $1,000 or $5,000 fee. If the Secretary of State believes that the "actual cost" of the register is $565,000 then it had an obligation under § 2-6-1006,

MCA to produce information related to those requests. It failed to do so, and the District Court failed to rule on this issue.

Accordingly, the District Court erred when it granted summary judgment to the Secretary of State because it did not rule on one of ACORN's claims, and ACORN demonstrated that the Secretary of State did not comply with § 2-6-1006, MCA.

CONCLUSION

The Secretary of State is charging fees in excess of those allowed under § 13-2-122, MCA, and its interpretation is inconsistent with the National Voter Registration Act. The District Court erred in finding otherwise and should be reversed.

The Secretary of State also violated ACORN's constitutional and statutory rights by failing to provide information regarding the $565,000 "actual costs," but the District Court never ruled on this issue. This Court should find that the Secretary of State violated § 2-6-1006, MCA.

DATED this 22nd day of November, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Garamond text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2016 is 5,816 not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

BY: /S/ROBERT FARRIS-OLSEN
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