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 REPLY 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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INTRODUCTION

Montana implements the National Voter Registration Act's (NVRA's) public access requirements through § 13-2-122(1), MCA. In doing so, though, the Secretary of State has interpreted the fee provisions in § 13-2-122(1), MCA, in a manner that is inconsistent with the NVRA and undermines its very purposes. In order to avoid this conflict, § 13-2-122(1), MCA, can only be interpreted as allowing the Secretary of State to charge for the actual costs related to providing a voting file to a requester. She may not charge for the $565,000 ongoing operations and maintenance (and other ancillary costs) that her office is required to incur in fulfilling its statutory obligations. The Secretary of State misapprehends this argument and fails to address it.

The Secretary of State's arguments related to "actual cost" is equally without merit. She fails to address case law across the country providing the definition of "actual costs" which, like the NVRA, require the costs to be tethered to the production of the file.

And last, the Secretary of State failed to provide public documents in response to a right to know request. The District Court failed to rule on this portion of the briefing, but the Court can nonetheless reverse the District Court because the law is clear. The Secretary was required to produce documentation related to the $565,000 asserted "actual cost" of the register upon the filing of the public records request, and she failed to do so.

ARGUMENT

A. Adopting the Secretary of State's argument would create a direct conflict with National Voter Registration Act.

The NVRA "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to

administrative chicanery, oversights, or inefficiencies." *Project Vote / Voting for Am., Inc. v. Long*, 682 F.3d 331, 334-35 (4th Cir. 2012); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1336 (N.D. Ga. 2016). In order to protect that right, the NVRA requires that the States provide access to voter information, which may be obtained at a "reasonable cost" of reproduction. 52 U.S.C. § 20507(i). If a state fails to comply with this provision, it is subject to civil enforcement by the U.S. Attorney General or private parties. 52 U.S.C. § 20510.

Nevertheless, The Secretary of State's brief does not address this clear Federal law, or the conflict its interpretation of § 13-2-122(1), MCA, creates with the NVRA. Instead, the Secretary of State makes two arguments with respect to the NVRA: (1) that it is not ambiguous and (2) that ACORN did not plead a violation of the NVRA. Each of these arguments ignores the realities of this case.

With respect to ambiguities, ACORN continues to assert that the § 13-2-122(1), MCA, is not ambiguous. It only allows the Secretary of State to charge for the cost of production of the voter file – which is nominal at best. *Acorn Br. In Supp. Summary Judgment,* Dkt. 27 at p. 4, Exs. 4, 5. Alternatively, the Secretary claims that the § 13-2-122(1), MCA, is not ambiguous and the Secretary of State should be able to charge any person up to $565,000 per request for access. At best, the Secretary of State's argument demonstrates a potential ambiguity in § 13-2-122(1), MCA, at which point the Court should look to consistency with other laws, including the NVRA. Doing so here, demonstrates that under § 13-2-122(1), MCA, the Secretary can only charge photocopy costs.

Secondly and more importantly, the Secretary continues to obfuscate ACORN's argument regarding the NVRA. ACORN acknowledges that it has not raised a claim under

the NVRA. Rather, ACORN has asserted that by adopting the Secretary's interpretation of the NVRA, it would put Montana's law in direct conflict with the NVRA.

The Secretary of State claims that ACORN has "pivot[ed] to an argument that the fee is not a reasonable cost and therefore violates the [NVRA]." State Br. at 14. Significantly, ACORN has not "pivoted," and the Secretary of State completely misreads the NVRA. ACORN has highlighted the conflict between the Secretary's interpretation of § 13-2-122(1), MCA, and the NVRA throughout this case, including in the summary judgment briefing. For example, in ACORN's Brief in Support of Summary Judgment, ACORN explained that including "maintenance and operations expenses as part of the 'actual cost' would be inconsistent with the [NVRA]." Dkt. 27, *Ps. Combined Mot. and Br. for Summary Judgment*, p. 12. This same argument was raised in each of ACORN's summary judgment related briefs. *See*, Dkt. 34, *Ps. Br. in Opp. State Summary Judgment,* p. 11; Dkt. 39, *Ps. Reply Br. in Supp. Of Summary Judgment*, pp. 6-7. Instead of addressing the arguments, the Secretary of State, once again, simply ignores it, and now claims it is "new".

In ignoring the argument, the Secretary of State also ignores case law describing the reach of the NVRA. The plain language of the NVRA and case law demonstrate that charges may only relate to the production of the voter file, even electronic files. *Campaign Legal Ctr. v. Scott,* 618 F. Supp. 3d 376, 385 (W.D. Tex. 2022) reversed on other grounds *Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 934-35 (5th Cir. 2022).[1] The plain language is not simply about the

1 In ACORN's opening brief, it cited to *Campaign Legal Center,* unintentionally omitting that the decision had been reversed by the 5th Circuit, which found that the Plaintiffs did not have standing. The reversal did not address the right to certain records. *Campaign Legal Ctr.* 49 F.4th at, 936 ("Even if Plaintiffs had a right to the records sought, an issue we do not reach, they have not established an injury in fact.")

"reasonable cost" but how that cost relates to "photocopying". 52 U.S.C. § 20507(i) ("*photocopying* at a reasonable cost." (emphasis added). That relationship necessarily means that the costs of producing a voter file must relate to the production of the file itself. *Greater Birmingham Ministries v. Merrill*, 2022 U.S. Dist. LEXIS 181339, at *18-19 (M.D. Ala. Oct. 4, 2022). Indeed, the "actual costs" must be "tethered to the actual costs [incurred] in producing responsive voter records." *Id.* This ensures that the purposes of the "NVRA are not frustrated." *Id.*

Any state law that contradicts or is inconsistent with this "tethering" of actual costs to production would be preempted. *Id.* (contradictory Alabama law would be preempted). Thus, even if the Court finds that the plain language of § 13-2-122(1), MCA, allows the Secretary of State to charge for Zoom, Office 365, and other operations and maintenance costs, the law would be preempted. *Id.*; *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 732 (S.D. Miss. 2014) (if laws conflict, preemption exists). Such a result is not allowed under this Court's presumption that the "the Legislature would not pass meaningless legislation," *Mashek v. Dep't of Pub. HHS*, 2016 MT 86, ¶ 10, 383 Mont. 168, 171, 369 P.3d 348, or its "duty to accept the reading that disfavors pre-emption," *Am. Ass'n of Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1208 (D.N.M. 2010). *See also*, § 1-3-232, MCA ("An interpretation which gives effect is preferred to one which makes void.")

Under the foregoing precepts, then, the Secretary of State's interpretation allowing it to charge $1,000 or $5,000 is inconsistent with the NVRA and must be rejected.

A. The plain language of the statute also does not allow the Secretary of State to charge amounts related to the operations and maintenance of the voter file.

The Secretary of State does not respond to ACORN's argument about the plain language. Indeed, the Secretary of State's only argument is that "actual cost" means every cost that this Secretary of State incurs related to the voter file can be charged to individuals seeking access. *See State's Br.* at 9-12. In making this argument, the Secretary of State ignores that "actual cost" must have meaning, and it must be interpreted consistent with "prevailing rates charged in public and private sectors for similar services." § 2-15-405, MCA.

With respect to "actual cost", the Secretary of State's interpretation would eviscerate any meaning of the phrase because the Secretary of State could charge for an infinite number of things such as telephones, email addresses or even coffee. *Schulz v. N.Y State Bd. Of Elections*, 633 N.Y.S.2d 915, 922 (Sup. Ct 1995). A more reasoned, and plain language reading of "actual costs" demonstrates that those costs must be "real" or "existing" and related to the production of the file itself, not its ongoing operations and maintenance. *See, e.g., Livecchia v. Borough of Mount Arlington*, 22 A.3d 140, 150 (N. J. Super. Ct. App. Div. 2011); *State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 963 N.E.2d 1288, 1297 (Ohio 2012); *Hammet v. Schwab*, 518 P.3d 48 (Kan. App. 2d 2022); *Assessor v. Freedom of Info. Comm'n*, 1998 Conn. Super. LEXIS 1550, at *9 (Super. Ct. June 2, 1998); *State ex rel. Warren Newspapers v. Hutson*, 640 N.E.2d 174, 180 (Ohio 1994); *Schulz*, 633 N.Y.S.2d at 923.

The Secretary of State dismisses these cases as not having "any bearing" on the definition of actual costs. State Br. at 12. However, these cases are important because "actual cost" is undefined. When a term is undefined, this Court "may consider similar statutes from other jurisdictions . . . for guidance in interpreting a statute". *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 19-20, 221 P.3d 666, 670. This is also consistent with § 2-

4-415(2)(b), MCA, which requires the Secretary of State to set rates that "reasonably reflect the prevailing rates" in the public sector.

The Secretary of State, nonetheless, attempts to discredit these decisions by citing to § 2-6-1006, MCA, to claim that it *may* charge for ongoing maintenance and operations costs. This argument is non-responsive, though. The Secretary simply notes that it is "permitted to charge fees to obtain public records they are required to maintain." State Br. at 10. ACORN doesn't dispute that a fee is allowed, but simply that it must be tethered to providing the voter file.

Moreover, the fees charged by the Secretary are not all related to the "register" or "list" Many of them are simply for office management. *See* State Br., at 9-12. For example, Sharepoint, phone, email, Zoom, Office 365, VPN, etc., exist regardless of the register. Presumably, even if the Secretary of State did not have the register, it would still need office 365, phones, and email to simply fulfill its other statutory obligations such as rule writing and business filings. To that end, the Secretary of State cannot point to the "actual costs of the list".

Regardless, the Secretary of State has provided no evidence that providing access to the file costs the office anything above and beyond the normal operations and maintenance costs. It claims that the file changes in real time, State Br., p. 10, but that has no bearing on its costs or ability to produce the data. Indeed, the Secretary of State admitted it can provide almost instantaneous access, through Okta or email, to the file. Dkt. 27, p. 4, Exs. 4, 5

B. The Secretary of State violated § 2-6-1006, MCA, by failing to provide the requested records.

The Secretary of State asserts that it fulfilled its responsibility under the Public Records Act by providing the Plaintiff with a copy of an administrative rule setting forth the $5,000 fee. However, once the suit was filed, the Secretary of State asserted that the "actual costs" are $565,000 per year. *See* State Br. at 11. Clearly, then, the Secretary of State did not fulfill its obligation at the time of the request to provide public information when it provided no "documentation" of the $565,000 of "actual costs."

The District Court failed to consider this claim, but this Court can still rule in favor of ACORN. The facts are undisputed. The Secretary of State does not dispute that it is required to maintain records "sufficient to support" the fees it charges. § 2-15-405(3), MCA. The Secretary of State does not dispute that ACORN asked for documentation of the "actual costs." And the Secretary of State does not dispute that her office only provided the administrative rule. Thus, the only question is whether the Secretary of State failed to provide "documentation" of the "actual cost."

Based on the Secretary of State's representations throughout this lawsuit, the "actual cost" of the register is $565,000, not the $5,000 that is charged. Because that is her interpretation, then, the Secretary of State had an obligation to provide documentation related to the $565,000, which she undisputedly did not due. Moreover, this information should be readily accessible, and easily produced, since she is required to maintain it under § 2-15-405(3), MCA. The Secretary of State's failure to provide it, therefore, violates § 2-6-1006, MCA.

CONCLUSION

The Secretary of State's decision to charge $1,000 to $5,000 to provide access to the voter file violates § 13-2-122(1), MCA, and the charges are incompatible with the NVRA. This

information can be provided almost instantaneously, yet the Secretary of State believes it is entitled to charge up to $565,000 per user based on its costs of maintaining and operating the voter file and its office. These fees are unrelated to the "cost of the register" but rather based on its statutory obligation to maintain the file. Allowing the Secretary of State to continue charging these exorbitant fees undermines the purpose of the NVRA and infringes upon Montanan's fundamental right to access the voter file. For those reasons, the District Court's decision must be reversed.

DATED this 6th day of March, 2024

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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 2,268 not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

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