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ATTORNEYS FOR PLAINTIFFS

**MONTANA SECOND JUDICIAL DISTRICT COURT  
BUTTE-SILVER BOW COUNTY**

SISTER MARY JO MCDONALD; LORI  
MALONEY; FRITZ DAILY; BOB BROWN;  
DOROTHY BRADLEY; VERNON  
FINLEY; MAE NAN ELLINGSON; and the  
LEAGUE OF WOMEN VOTERS OF  
MONTANA,

Plaintiffs,

v.

CHRISTI JACOBSEN, Montana Secretary of  
State,

Defendant.

Cause No. DV-21-120

Hon. KURT KRUEGER  
Judge, Dept. 1

**Complaint**

**FILED**  
MAY 10 2021  
By Toni Powers, Clerk  
Deputy Clerk \$120  
Replaces e-mail filed  
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This is a complaint for declaratory and injunctive relief challenging the constitutionality of the recently-enacted HB 325, a measure which purports to eliminate the longstanding constitutional process of at-large voting for all justices of the Montana Supreme Court by

dividing Montana into seven separate districts for the purpose of electing the seven justices, one from each district.

## PARTIES

1. Plaintiff Sister Mary Jo McDonald, a Member of the Sisters of Charity of Leavenworth, Kansas, was born in Butte, Montana in 1941. At age 20, she left Montana to enter the convent and thereafter held several positions before returning to Butte in 1980, where she taught for three years at Butte Central Catholic Junior High School. Then, she began parish work at St. Anne's Parish in Butte, where she remained until her retirement in 2017. She has long been active in helping the poor and striving for social, economic, and environmental justice. In her leadership on social and economic issues, she has, from time to time, involved herself in the Montana court system, most famously in leading a class-action lawsuit against Dennis Washington for a cleanup of Butte's municipal water system. *See McDonald v. Washington*, 261 Mont. 392, 862 P.2d 1150 (1993). That suit resulted in the transfer of the Butte Water Company from Washington's ownership to the Butte-Silver Bow government, as well as other substantial benefits for the people of Butte. Also, Sister Mary Jo McDonald has been active in issues regarding environmental cleanup of the Butte area and the protection of Silver Bow Creek. Along with plaintiff Fritz Daily and others, she was one of the founders of the Silver Bow Creek Headwaters Coalition and was instrumental in pursuing successful litigation regarding the name of Silver Bow Creek (described below in ¶ 3).

2. Plaintiff Lori Maloney was born, raised, educated, and has lived and worked in Butte her entire life. She served in the office of the Clerk of District Court for Butte-Silver Bow County for 39 years, including eight terms as the duly elected Clerk of Court before retiring in 2016. Over the decades, she gained a true understanding of and appreciation for the Montana

Constitution's distinction between District Courts — where judges are elected only by voters in that prescribed District—and the Supreme Court—where the seven justices are each elected on a statewide basis to reflect the Court's statewide jurisdiction over all the District Courts of Montana. Ms. Maloney is committed to preserving an independent judiciary in Montana, which HB 325 threatens. HB 325 would deprive her of her Constitutional right to vote for each and all of the seven Supreme Court justices in Montana, a right which she has exercised for decades, by unconstitutionally limiting her vote to just one justice in her gerrymandered "district."

3. Plaintiff Fritz Daily was born in Butte, Montana, raised there, and has resided in Butte for his entire life. He represented the Butte area in the Montana House of Representatives for seven sessions between 1979 and 1993. Mr. Daily was an educator/counselor in the Butte school system for more than 31 years. He has a master's and bachelor's degrees from Western Montana College in Dillon, Montana, which he earned while commuting back and forth to Dillon daily. He served in the Montana Legislature from 1979 to 1995, during a very difficult time for his community. During that time, the Atlantic Richfield Company closed the Anaconda Smelter and the Berkeley pit, shut off the underground mine pumps in the Kelley Mine which caused the flooding of Butte Mine and Berkeley Pit, and closed the East Continental Pit, which ended mining as Montana had known it for over 100 years. Mr. Daily served on the Community Leaders Network, a national environmental committee sponsored by the Department of Energy which evaluated new and innovative cleanup and resource recovery technologies. Mr. Daily has been a Butte community leader on issues regarding the Natural Resource Damage suit and the environmental remediation efforts in Butte, particularly regarding the Parrott Tailings and protection of Silver Bow Creek in the face of degrading efforts by the State. Mr. Daily was one of

the founders of the Silver Bow Creek Headwaters Coalition and was instrumental in procuring a district court ruling in 2015 regarding preserving the status and name of the iconic “Silver Bow Creek” in the face of efforts by the State, ARCO, and the federal government to rename and degrade the creek. *See Silver Bow Creek Headwaters Coalition, LLC, v. State of Montana* No. DV-10-431 (Mont. 2d Jud. Dist. Ct. 2010). Also, in 1989, Fritz was instrumental in challenging the Montana Legislature’s diversion of funds from Montana’s Resource Indemnity Trust (*see* § 15-38-101, MCA, *et seq.*), the State’s general fund. *See Butte-Silver Bow Local Gov’t v. State*, 235 Mont. 398, 768 P.2d 327 (1989). Fritz’s interest in the present challenge is particularly keen because he is concerned about sectionalism in the Montana court system. *See generally id.* at 407 (Justice John “Skeff” Sheehy, dissenting):

This decision continues what has become a commonplace in the history of the state of Montana: the State gets the gold mine, Butte gets the shaft.

4. Plaintiff Bob Brown was elected to the Montana House of Representatives in 1970 and served two terms as a representative from Flathead County. He was a member of the House Judiciary Committee in 1973 when the Montana Legislature enacted legislation to implement the judiciary article of the new Montana Constitution, including amendments to § 3-2-102 to provide for at-large elections of Supreme Court justices. He later served twenty-two years in the Montana Senate, serving in various leadership positions, including President of the Senate. Mr. Brown served on the State Board of Public Education for four years and as Montana Secretary of State for a four-year term beginning in 2000. He was the Republican nominee for Governor in 2004.

5. Plaintiff Dorothy Bradley served in the House of Representatives in the Montana Legislature as a representative from Gallatin County from 1971–1978 and 1985–1992, including in 1973 when she voted with the majority to adopt legislation to implement the judiciary article of

the new Montana Constitution, including amendments to § 3-2-102 to provide for at-large elections of Supreme Court justices. She has, over the course of her career, been active in Montana politics and in efforts to ensure good government. In 1991-92, Ms. Bradley was the Democratic nominee for Governor of Montana.

6. Plaintiff Vernon Finley was born and raised on the Flathead Indian Reservation in his grandparents' home. He credits his grandparents with teaching him the traditional cultural perspective. His western education consists of a Bachelor's, Master's, and Doctoral degrees in Education from the University of Montana, Oklahoma City University, and the University of Georgia, respectively. Mr. Finley is a former teacher and served on the Confederated Salish and Kootenai Tribes' Tribal Council for four years, including for three years as Chairman. He is currently the Director of the Kootenai Culture Committee.

7. Plaintiff Mae Nan Ellingson, a resident of Missoula, was the youngest delegate to serve in the 1972 Montana Constitutional Convention and is now one of the few surviving delegates. Now retired, Ms. Ellingson previously practiced public finance law, including serving as a bond counsel for State and local governments. She is a long-time advocate for good government and equality under the law.

8. Each of the individual plaintiffs is a resident of Montana, votes in Montana, and has a strong interest in good government and making sure that the Montana court system is not politicized. They each have a constitutional right to cast a ballot for each of the candidates for each position of justice on the Montana Supreme Court, including chief justice, and each has exercised that right in the past.

9. Plaintiff the League of Women Voters of Montana is a nonpartisan political

organization that encourages informed and active participation in government, seeks to defend and improve our democracy, works to increase understanding of major public policy issues, and influences public policy through education, advocacy and litigation. It supports an independent judiciary with judges selected on the basis of merit and elections that protect the citizens' right to vote.

10. Defendant Christi Jacobsen is the duly-elected Montana Secretary of State and in that position is the person responsible for certifying legislative referenda proposed for approval by the electorate.

### **GENERAL ALLEGATIONS**

11. Plaintiffs incorporate herein all of the foregoing allegations in paragraphs 1-10 as if set forth in full.

12. HB 325, enacted by the 2021 Montana Legislature and filed with the Montana Secretary of State on May 6, 2021, is a legislative referendum measure which proposes to submit HB 325 to the Montana electorate on the general election ballot to be held in November 2022. If adopted by the electorate, HB 325 would eliminate voting at large by all electors of the State of Montana on each candidate for the position of justice on the Montana Supreme Court. Instead of at-large voting, the measure would balkanize the state into seven judicial districts, with one justice elected by each district and the chief justice selected by majority vote of the seven justices.

13. HB 325, if allowed to stand, will result in a tectonic shift in Montana's system of electing Supreme Court justices. Montana's voters have always been able to vote at-large for each candidate for the position of justice of the Montana Supreme Court and for the office of chief justice. This has been a bedrock feature of Montana's system of government throughout its history, and that right was embedded in Article VIII, § 6 of the 1889 Constitution. In 1972, when

the framers debated adoption of the new 1972 Constitution, they had contentious debates on whether to preserve Montana's system of electing judges or whether a minority proposal of the Con-Con Judiciary Committee (which proposed a modified merit-selection system) should be adopted. The delegates ultimately voted for a hybrid system which preserved the rights of the voters to elect Supreme Court justices and district court judges, but which also retained the modified merit-selection system found in Article VII, § 8(2)(3), Mont. Const.

14. In the legislative session immediately following the adoption of the 1972 Montana Constitution, the Legislature took action to implement Montana's new amendment to the Constitution's judiciary article, adopting amendments to § 3-2-102(1), MCA, which provide for at-large election of Supreme Court justices.

15. This act (Ch. 13, L. 1973) was explicitly proposed to implement the new Article VII of the Montana Constitution. Its title is "An Act to Provide for Eight (8) Year Terms for the Justices of the Supreme Court in Accordance with Article 7, Section 2(2) of the 1972 Montana Constitution...."

16. Plaintiffs have no adequate remedy in law or otherwise and, if implemented, HB 325 threatens imminent, irreparable injury to plaintiffs and to all voters of Montana. The deprivation of a constitutional right, such as the right to vote, constitutes irreparable injury per se.

17. Pursuant to Rule 5.1, M.R.Civ.P., the Montana Attorney General is being notified of the filing of this complaint which challenges the constitutionality of a Montana statute.

#### **COUNT ONE (*Stare Decisis*)**

18. Plaintiffs incorporate herein all of the foregoing allegations in paragraphs 1-17 as if set forth in full.

19. HB 325 is similar to SB 268, an unconstitutional measure enacted in 2011 which also divided the state into seven judicial districts, with each district to elect one Supreme Court justice.

20. SB 268 was challenged by a group of Montana voters, culminating in a finding of its unconstitutionality in *Reichert v. State ex rel. McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455. The court held SB 268 to be facially unconstitutional. *Id.* ¶ 83.

21. The Montana Supreme Court, in *Reichert*, addressed the 2012 measure, SB 268, later called “LR-119,” on two separate aspects. “First, LR-119 would create new qualifications for the office of Supreme Court justice...” *Reichert*, ¶ 66. “Second, LR-119 would alter the structure of the Supreme Court. It would revise § 3-2-101, MCA, to delete the language ‘[the justices] are elected by the qualified electors of the state at large’ and replace it with ‘[each justice is] elected from a separate district of the state.’” *Id.* ¶ 69. The Court found LR-119 unconstitutional on both bases.

22. The 2021 Montana Legislature, in enacting HB 325, attempted to address the first constitutional defect found in *Reichert* by eliminating any new qualifications for the office of Supreme Court justice. The second aspect of LR-119 found in *Reichert* to be unconstitutional (the attempt to alter the “structure of the Supreme Court”) is not addressed at all in HB 325. Thus, *Reichert*’s holding on that point is *stare decisis* and dispositive.

23. In determining that the language and structure of the Montana constitution requires election of Supreme Court justices on a statewide basis, the Court in *Reichert* determined that the intent of the Constitutional Convention delegates was that

Supreme Court justices would be selected on a statewide basis and district court judges would be selected on a district-specific basis.



The Constitutional Convention record thus supports our “structural” analysis of Article VII.

*Id.* ¶ 64.

24. The Supreme Court further found:

This structure is consistent with the Supreme Court’s function. Under Article VII, Section 2, the Supreme Court has statewide appellate jurisdiction general supervisory control over “all other courts[.]” ... Given this statewide jurisdiction, it would be incongruous to interpret the Constitution as contemplating a Supreme Court made up of justices who are elected from districts and implicitly “represent” regional interests. Such an interpretation would be inimical to the judicial function.

*Id.* ¶ 65. The Court added:

The obligation of Supreme Court justices is to interpret and apply the law on a uniform basis statewide. The requirements and protections of the Constitution and the law do not vary from one county or district to another. They are the same whether one is from Yaak, Broadus, Wisdom, or Plentywood. Ethical rules do not permit judges to “represent” particular constituencies or interest groups.

*Id.*

25. *Reichert* found:

This attempt to alter the structure of the Supreme Court by making it into a representative body composed of members elected from districts is likewise facially unconstitutional.

*Id.* ¶ 71.

26. The *Reichert* Court further addressed the amendments made by the Montana Legislature to § 3-2-102(1), MCA, which, among other features, provides for at-large election of Supreme Court justices. The Court found this amendment, adopted in the legislative session immediately following the adoption of the 1972 Montana Constitution, to be “consistent with Article VII.” *Reichert*, ¶ 66.

27. In sum, under *Reichert* and the constitutional principles enunciated therein, HB 325 is facially unconstitutional.

**COUNT TWO (Attempt to Amend the Constitution by Statute)**

28. Plaintiffs incorporate herein all of the foregoing allegations in paragraphs 1–27 as if set forth in full.

29. The attempt to implement this draconian change in how Supreme Court justices are elected, by means of a simple majoritarian vote for a statutory change, constitutes a violation of the Montana Constitution’s procedures for amendment. Article XIV, § 8 (“Amendment by legislative referendum”) provides that amendments to the Constitution may be submitted to qualified electors of the state only “if adopted by an affirmative roll-call vote of two-thirds of all the members thereof.” HB 325 does not purport to be a measure to amend the Constitution and it does not comply with this supermajority requirement.

30. Among other findings, the *Reichert* court found that:

LR-119 (SB 268) would eliminate the right presently held by all Montana voters to select all seven justices of the Supreme Court.... These changes constitute amendments to the Constitution, which cannot be achieved by means of a statutory referendum.

*Id.* ¶ 82.

31. *Reichert* also found:

Neither the Legislature nor the people have the power to alter the constitutionally established structure of government by means of a statutory referendum. Again, such amendments to the Constitution must be made through one of the methods permitted by the Constitution itself. *See* Mont. Const. art. XIV, §§ 1, 2, 8, 9.

*Id.* ¶ 71.

32. In short, the method employed by the Montana Legislature in HB 325 is defective

in that it essentially attempts to accomplish a constitutional amendment without complying with the Montana Constitution.

### COUNT THREE (HB 325 Is Facially Unconstitutional)

33. Plaintiffs incorporate herein all of the foregoing allegations in paragraphs 1-32 as if set forth in full.

34. The Montana Constitution provides that the “judicial power of the state is vested in **one supreme court**, district courts, justice courts and such other courts as may be provided by law.” Art. VII, § 1 (emphasis added).

35. The Constitution provides for “judicial districts,” but only for district court judges, not for the state’s “one supreme court[.]” Art. VII, § 6 provides that the Legislature shall divide the state into judicial districts, “and provide for the number of **judges** in each district...” Art. VII, § 6(1). The Legislature is permitted, under the Constitution, to change the number and boundaries of judicial districts and also “the number of judges in each district.” But this districting power is confined to district court **judges**, not to the Supreme Court or its **justices**. *Id.* § 6(2) (emphases added).

36. Throughout, the Constitution makes a clear distinction between “justices” (of the Montana Supreme Court) and “judges” (of the district courts). *See, e.g.*, Art. VII, § 3(1), (2), § 6(1), (2), (3), § 7(1), (2) (“Terms of office shall be eight years for supreme court justices, six years for district court judges....”), § 8 (1) (“Supreme Court justices and district court judges”), and (2) (“for any vacancy in the office of Supreme Court justice or district court judge....”).

37. Article VII, § 7(9) is particularly clear on the difference between the two, providing in subsection (4) “Supreme Court justices shall reside within the state. During his term of office, a district court judge shall reside in the district...in which he is elected or

appointed.”

38. Thus, although the Montana Constitution explicitly provides for “districting” in Article VII, § 6, such districting is explicitly limited to “judges.”

39. In *Reichert*, the Montana Supreme Court emphasized language in Article VII, § 9, Mont. Const., which provides for the qualifications and methods of selection of the persons running for judicial offices and sets forth the criteria for justices and judges and “other” courts.

*Reichert*, ¶ 62. The *Reichert* Court, emphasizing the word “other,” held:

This much is apparent from the last sentence of Article VII, Section 9(1), which states that “[q]ualifications and methods of selection of judges of *other* courts shall be provided *by law*... a clear indicator that the Legislature may establish the qualifications and methods of selection of judges of other courts, but the qualifications and methods of selection of Supreme Court justices and district court judges are set by the Constitution alone....

*Id.* (emphasis in original).

40. This distinction is particularly important with respect to the selection of justices and judges. Article VII, § 8(3) requires incumbents, under circumstances, to face reelection, even if there is no opponent. With respect to who gets to vote in such election, subsection (3) provides:

If an incumbent files for election and there is no election contest for the office, the name of the incumbent shall nevertheless be placed on the general election ballot to allow the voters **of the state** or district to approve or reject him....

(emphasis added). Thus, Article VII provides that the “voters of the state” may vote for Supreme Court justices, whereas voters of the “district” are allowed to vote for their respective district court judges. This is the way it has been at least since the 1889 Constitution, until the adoption of HB 325.

41. In sum, HB 325's attempt to eliminate at-large voting for Supreme Court justices is facially unconstitutional.

**COUNT FOUR (Unconstitutional Infringement on the Rights of Voters)**

42. Plaintiffs incorporate herein all of the foregoing allegations in paragraphs 1-41 as if set forth in full.

43. All voters in Montana, including the individual plaintiffs listed in paragraphs 1-7 and members of the organization plaintiff the League of Women Voters of Montana, have the right to vote for each of the Supreme Court justices. *Reichert*, ¶ 82.

44. The right to vote is a fundamental constitutional right in Montana, Art. I, § 13, Mont. Const., and under the federal Constitution, and once conferred, it may not be denied absent a compelling state interest. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“Undeniably, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights....”).

45. HB 325, if allowed to stand, would effect an unconstitutional taking of this vital constitutional right of each Montanan. No public purpose, much less a compelling one necessary to sustain constitutionality, exists to justify this unconstitutional infringement on the right to vote.

**PRAYER FOR RELIEF**

Wherefore, plaintiffs pray that this Court enter:


1. A declaratory judgment declaring that HB 325 is unconstitutional;
2. An order enjoining defendant Christi Jacobsen from certifying any legislative referendum which purports to be pursuant to HB 325, and from presenting any legislative

resolution based on HB 325 to the voters on any election ballot; and

3. An award of costs and attorney's fees, as the Court deems just and appropriate.

Respectfully submitted this 6th day of March, 2021.


GOETZ, BALDWIN & GEDDES, P.C.

By:   
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James H. Goetz

and

EDWARDS & CULVER

  
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