AUSTIN KNUDSEN
Montana Attorney General
KRISTIN HANSEN
Lieutenant General
DAVID M.S. DEWHIRST
Solicitor General
CHRISTIAN CORRIGAN
Assistant Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
christian.corrigan@mt.gov

Attorneys for Defendants

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,

Plaintiff,

v.

CHRISTI JACOBSEN, Montana Secretary of State,

Defendant.

Cause No. DV-2021-120

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Montana's constitution recognizes the right of initiative—both through the people directly and the legislature. Mont. Const., art. III, §§ 4–5. The 2021 Montana Legislature exercised its article III, § 5 power to submit House Bill 325 to the people. HB 325 provides, by law, the method of election for Supreme Court justices in accord with article VII, § 8(1) of the Montana Constitution ("Supreme court justices and district court judges shall be elected by the qualified electors as provided by law."). HB 325 will ask the people at the November 2022 general election if Supreme Court justices should be elected by district.

The plaintiffs[1] don't want the people to decide, or even have a say. They'd prefer this Court preemptively declare HB 325 unconstitutional before the people have a chance to consider it. Plaintiffs ask this Court to intervene in the democratic process and issue an advisory opinion on the constitutionality of a referendum that may or may not become law. This Court lacks power to do so. This Court can only exercise its authority when it properly has jurisdiction.

Still, plaintiffs say, *Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, makes this an open-and-shut case. It doesn't. Precedent controls how this Court may exercise its judicial power. Precedent can't *give* this Court power where the

[1] Plaintiffs are voters who allege they'll suffer harm if the People can vote on HB 325. Some of the same plaintiffs recently brought an unsuccessful constitutional challenge to SB 140. *See Brown v. Gianforte*, 2021 MT 149, ¶¶ 19, 24 ____ P.3d ____.

Constitution does not. And in any event, there are important differences between this case and *Reichert* that make *Reichert*'s justiciability analysis inapplicable here.

Finally, if this Court determines it may reach the merits of a premature constitutional challenge to a referendum that isn't yet—and may never become—law, HB 325 passes constitutional muster. Article VII, §8 clearly directs the Legislature to provide, "by law," the method of election for Supreme Court justices. In submitting HB 325 to the people, the legislature did just that.

I. Background

The facts of this case are straightforward. On May 6, 2021, the Legislature enacted HB 325 and filed it with the Secretary of State for placement on the November 2022 ballot. *See* Mont. Leg. Rev., 2021, ch. 402.

If adopted in November 2022, HB 325 will change how Montanans elect Supreme Court justices. Instead of a statewide election for all seven justices, HB 325 would create seven Supreme Court districts of roughly equal population. *Id.* Each district would elect one justice to the Supreme Court. *Id.*

Article VII, § 9 sets forth qualifications for the office of Supreme Court justice:

> A citizen of the United States who has resided in the state two years immediately before taking office is eligible to the office of supreme court justice or district court judge if admitted to the practice of law in Montana for at least five years prior to the date of appointment or election.

Unlike LR-119—the referendum the Court struck down in *Reichert*—HB 325 does not add any new or change the existing qualifications for Supreme Court justices. *See Reichert*, ¶ 68.

II. Applicable Standards

Summary judgment is proper where no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). The moving party bears the initial burden of showing the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. *McDaniel v. State*, 2009 MT 159, ¶ 13, 350 Mont. 422, 208 P.3d 817.

Courts entertain pre-election challenges to legislative referenda only when "absolutely essential." *State ex rel. Montana Citizens for Preservation of Citizens' Rights v. Waltermire*, 224 Mont. 273, 276, 729 P.2d 1283, 1285 (1986).

If plaintiffs want this Court to treat HB 325 like an enacted statute, they must overcome the presumption of constitutionality afforded to all enacted statutes. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a toothless presumption. "The constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* ¶¶ 73–74. To overcome this presumption, plaintiffs must show that HB 325 is unconstitutional beyond a reasonable doubt. S*atterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566.

ARGUMENT

Plaintiffs' challenge to HB 325 is not ripe for judicial review. This Court lacks jurisdiction to opine on the constitutionality of a potential law. But even if the Court treats HB 325 like an enacted law and reaches the merits, plaintiffs' claim fails. Article VII, § 8(1) gives the Legislature power to decide on the method of election for

supreme court justices. Article III, § 5(1) allows the legislature to submit referenda like HB 325 to the people. HB 325 is, therefore, constitutional. This Court should grant summary judgment in favor of the State and let the people decide the fate of HB 325.

I. This Case is Not Justiciable.

Plaintiffs' premature request for an advisory opinion on the constitutionality of a potential law is not ripe. Courts in Montana entertain pre-election challenges to legislative referenda only when it is "absolutely essential." *Montana Citizens for Preservation of Citizens' Rights*, 224 Mont. at 276. This Court lacks jurisdiction to intervene in the referendum process.

A. Plaintiffs' challenge is not ripe for judicial review.

Montana courts have power only to address justiciable cases and controversies. *See BNSF Ry. Co. v. Asbestos Claims Court,* 2020 MT 59 ¶ 54, 399 Mont. 180, 459 P.3d 857. "A justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion." *Clark v. Roosevelt Cnty.*, 2007 MT 44, ¶11, 336 Mont. 118, 154 P.3d 48. Article VII, § 4(1) of the Montana Constitution confers original jurisdiction on district courts in "all civil matters and cases at law and in equity." Article VII, § 4(1) "embodies the same limitations … imposed on federal courts by the 'case or controversy' language of Article III" in the federal constitution. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567 (quoting U.S. CONST. art. III, § 2, cl. 1). So, federal precedents applying article III requirements for justiciability are "persuasive

authority for interpreting the justiciability requirements of Article VII, section 4(1)." *Id.*

At the state and federal level, the case-or-controversy requirement "contemplates real controversies and not abstract differences of opinion." *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881; *see also Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

For a case to meet the case-or-controversy requirement, it must be ripe. *Greater Missoula*, ¶ 23. A case is ripe when it presents "an actual, present controversy," not "when the legal issue raised is only hypothetical or the existence of a controversy merely speculative." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 19, 333 Mont. 331, 142 P.3d 864.

Ripeness doctrine overlaps with the idea that courts lack power to issue advisory opinions explaining "what the law would be upon a hypothetical state of facts or upon an abstract proposition." *Plan Helena*, ¶ 12;

Plaintiffs ask this court to issue an advisory opinion. They want a prospective ruling on the hypothetical constitutionality of a referendum that could, potentially, become law if the voters approve it. Plaintiffs don't ask the Court to weigh the constitutionality of a law; they ask the Court to intervene in the referendum process. *See Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650, 656 (1988) ("A referendum is

not a single act, it is a process. That process is not complete until the electorate has spoken.").

It's important to be clear about the nature of the challenged legislative action in this case. When it passed HB 325, the Legislature submitted a referendum to the people. This is clearly within its article III, § 5 power. *See* Mont. Const., art. III, § 5(1). Plaintiffs don't claim that the Legislature stepped outside the scope of its article III, § 5 referendum power when it decided to submit HB 325 to the people. *Cf. State ex rel. Livingston v. Murray*, 137 Mont. 557, 568, 354 P.2d 552, 558 (1960) (exercising jurisdiction over a pre-election initiative improperly submitted under the election laws). Instead, they want the court to say that *if* HB 325 were to become law, it would be unconstitutional. There is no room for "if" in this Court's jurisdiction. This Court lacks power to issue rulings that depend upon contingent future events. *Havre Daily News*, ¶ 19; *cf. Chafin v. Chafin*, 568 U.S. 165 ,172 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.") (internal quotations omitted) (citation omitted)

Challenging the constitutionality of HB 325 before November 2022 amounts to an abstract debate about a hypothetical state of facts. The Constitution requires this Court to stake its judicial power in much firmer ground.

B. A ruling at this stage of the referendum process would violate the separation of powers.

"The power of the government in" Montana "is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the

exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art. III, § 1.

The Constitution gives the Legislature power to submit an act to the people for approval or rejection by referendum — or reserves it to the people. "The people may approve or reject by referendum any act of the legislature except an appropriation of money. A referendum *shall* be held either upon order by the legislature...." *Id.* art III, § 5(1) (emphasis added).

"A referendum is not a single act, it is a process. That process is not complete until the electorate has spoken." *Harper*, 234 Mont. at 269, 763 at 656. And it is a process in which the judiciary has no part. *See generally* Mont. Const. art. III, § 5(1) ("The people may approve or reject by referendum any act of *the legislature* except an appropriation of money. A referendum shall be held either upon order by *the legislature* or upon petition signed by at least five percent of the qualified electors in each of at least one-third of the legislative representative districts") (emphasis added); *see also Reichert*, ¶¶ 93-95, (Baker, J., dissenting).

Unsurprisingly, courts are deeply reticent to intervene "in referenda or initiatives prior to an election." *Cobb v. State*, 278 Mont. 307, 310, 924 P.2d 268, 269 (1996). *Cf. State ex rel. Montana Sch. Bd. v. Waltermire*, 224 Mont. 296, 300-01, 729 P.2d 1297, 1300 (1986) (declining to entertain a pre-election challenge to an initiative because "the issue could have been addressed following the election, had the Initiative

been adopted."). And with good reason. The implications of a judicial intervention in the referendum process are deeply troubling.

Suppose the State had asked this Court to "pre-approve" HB 325 as constitutional before the people voted on the measure. One can see the inherent impropriety of such a claim. Any court would summarily reject it as unripe. And it would be improper for the Court to place its thumb on the scales of the referendum process by giving its imprimatur to a measure on the ballot. *See Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 621, 338 Mont. 259, 165 P.3d 1079 ("[A court] should avoid constitutional issues whenever possible.") Why is the outcome different if the roles are reversed? *Cf. Reichert*, ¶ 99 (Baker, J., dissenting) (criticizing *Reichert*'s "patronizing" decision to "protect the voters from a measure referred by the legislature"). If a court can opine about the prospective constitutionality of a prospective law in the referendum context, there's no principled reason it couldn't do the same with a prospective statute before that statute is enacted.

Before *Reichert*, only one Montana Supreme Court case had upheld judicial review of a pre-election *legislative* referendum: *Cobb v. State*, 278 Mont. at 309, 924 P.2d at 269. Like *Reichert*, *Cobb* represents the exception, not the rule. At the time the Court decided *Cobb*, a statute allowed for pre-election judicial review of an initiative or referendum if it challenged a "constitutional defect in the substance of a proposed ballot issue." MCA § 3-5-206(6)(a)(ii) (1995); *see also Cobb*, 278 Mont. at 309, 924 P.2d at 269. The Legislature has since repealed MCA § 3-5-206(a)(ii). *See Reichert*, ¶ 95 (Baker, J., dissenting).

The framers of the 1972 Constitution believed the people could decide important issues of statewide policy. Similarly, Montana courts have long recognized that "initiative and referendum provisions of the Constitution should be broadly construed to maintain the maximum power *in the people*." *Chouteau Cnty v. Grossman*, 172 Mont. 373, 378, 563 P.2d 1125, 1128 (1977) (emphasis added), *overruled on other grounds by Town of Whitehall v. Preece*, 1998 MT 53, 288 Mont. 55, 956 P.2d 743. The people don't need a court to protect them from HB 325. *See Reichert*, ¶ 99 (Baker, J., dissenting) ("[P]rotect[ing] the voters from a measure referred by the legislature is patronizing and elevates judicial economy above respect for the constitutional process and the people's role in it.").

The Legislature is the people's branch. And in this case, the people's branch has returned the decision directly back to the people – which is one of the purest embodiments of a democratic republic. The ballot box—not the courtroom—is the appropriate forum for plaintiffs to challenge a referendum. This Court should let the voters decide the fate of HB 325.[2]

---

[2] Plaintiffs also lack standing. Like ripeness, standing is a threshold jurisdictional question which "must always be met." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187 (citation omitted). To have standing, a plaintiff "must clearly allege past, present, or threatened injury to a property or civil right." *Id.* "The alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical[.]" *Id.* And, importantly, the injury must be "distinguishable from injury to the public generally." *Id.* Plaintiffs allege only one injury: that HB 325 "threatens imminent, irreparable injury to plaintiffs and to all voters in Montana. The deprivation of a constitutional right, such as the right to vote, constitutes irreparable injury per se." Compl., ¶ 16. Notwithstanding the strange logic of a claim that this HB 325 would violate plaintiffs' right to vote if they—and everyone else in Montana— were to vote on it in November 2022, this "injury" is too speculative to confer standing. By its terms, this is an "injury" that would apply to "all voters of

C. *Reichert* doesn't require this Court to reach the merits.

Plaintiffs try to evade the justiciability question by arguing that *Reichert* singlehandedly settles it. *See* Pls.' Br. Supp. of Mot. Summ. J., 3. But precedent can't give this Court jurisdiction. Only the Constitution can do that. *See* Mont. Const. art VII, § 1. And the Constitution gives this Court power only to decide only actual controversies. *See Greater Missoula*, ¶ 23 (describing justiciability as a threshold constitutional limit on courts' power). So even if *Reichert*'s justiciability reasoning were on point—it isn't— that wouldn't stop the analysis.

In any event, *Reichert*'s justiciability analysis doesn't apply here. In *Reichert*, the Court considered the constitutionality of LR-119, a 2012 legislative referendum that would have implemented district election for Supreme Court justices and added a residency requirement for candidates. *Reichert,* ¶¶ 4-7. The Supreme Court concluded that a pre-election challenge to LR-119 was ripe for its review. *Id.* ¶¶ 58-60. But when it explained this conclusion, the Court relied on unique concerns about LR-119's effect in the 2012 election cycle:

> [T]he Legislature has placed a referendum on the June 5 ballot concerning the election of Supreme Court justices. If passed, the statutory changes outlined in the referendum are effective immediately.… While all registered voters in the state may vote in the June primary election for the candidates running for Seats 5 and 6, only registered voters in the Fifth and Sixth Supreme Court districts,

---

Montana." But to confer standing, an alleged injury must be "distinguishable from injury to the public generally." *Fox*, ¶ 31; *cf. State ex rel. Mitchell v. First Judicial Dist. Ct.*, 128 Mont. 325, 339, 275 P.2d 642, 649 (1954) (no standing to challenge legality of nomination of candidate process absent allegation of resulting personal injury to plaintiff).

> respectively, will be permitted to vote for those seats in the November election (if LR-119) is adopted. . . For those Plaintiffs who do not reside in the Fifth and Sixth Supreme Court districts, the disenfranchisement will occur this election cycle.... The issues presented are definite and concrete, not hypothetical or abstract, and this case thus presents a controversy in the constitutional sense.

Id. ¶ 58.

If the voters approved it, LR-119 could have caused a statewide primary to select candidates for seats 5 and 6 in the June 2012 primary election and district-only elections to select justices from those candidates in the November 2012 general election.

HB 325 does not present the same concern. The voters will decide on HB 325 at the November 2022 general election ballot. If the voters adopt HB 325, it won't impact any elections until the 2024 primaries.

The Montana Supreme Court was also concerned about whether it would have time to issue an opinion on LR-119 before the November 2012 general election if the Court waited to hear a challenge until after the June 2012 election. *Id.* ¶ 58; *see also id.* ¶ 97 (Baker, J., dissenting) ("The Court determines that LR-119 presents unique grounds for pre-election review because of its effect in the current election cycle.... [A]s illustrated by the efficiency with which this appeal was briefed, considered and decided, we easily could have held the appeal in abeyance, awaited certification of the June [2012] election results, and decided the case—if necessary—within a few weeks.").

This case doesn't threaten such a quick turnaround. If the voters approve it in November 2022, the first election HB 325 will impact will be the 2024 primary

election. There will be ample time to consider the constitutional merits of HB 325 between November 2022 and 2024.

Reichert cited two cases in support of its conclusion that plaintiffs' challenge to LR-115 satisfied "the constitutional component of ripeness": *Missoula City-County Air Pollution Control Bd. v. Bd. Of Env't. Rev.*, 282 Mont. 255, 261-63, 937 P.2d 463, 467-68 (1997) and *Gryczan v. State*, 283 Mont. 433, 442-43, 942 P.2d 112, 118 (1997). *Reichert,* ¶ 58. Neither applies here.

Reichert cited *Air Pollution Control Board* for the proposition that "'potential economic harm' is sufficient to establish a threatened injury." *Reichert*, ¶ 58 (quoting *Air Pollution Control Bd.*, 282 Mont. at 262–63). *Air Pollution Control Board*'s reasoning doesn't apply here because plaintiffs aren't claiming that HB 325 will cause them potential economic harm.

This case differs significantly from *Gryczan*. *Gryczan* involved an enacted criminal statute under which the state could have prosecuted the plaintiffs at any time. 283 Mont. at 442–43. The Court concluded that the mere existence of the statute created an ongoing psychological injury to the plaintiffs in that case. *Id.* In contrast, the plaintiffs here allege an abstract and prospective injury that they *might* suffer *if* the voters approve HB 325. *See Havre Daily News*, ¶ 19 ("[A] court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative.").

Finally, it's implausible that *Reichert* condones pre-election judicial review of any legislative referendum that seems unconstitutional to a court. This would

smuggle the merits into the threshold question of jurisdiction. *See Greater Missoula*, ¶ 23 (justiciability is a threshold requirement which a court must establish before reaching the merits). It would also contradict well-settled Montana precedent urging courts to practice extreme reticence before reaching the merits of pre-election challenges to legislative referenda. *See, e.g.*, *Montana Citizens for Preservation of Citizens' Rights* 224 Mont. at 276 (cautioning that courts must refrain from reviewing pre-election measures unless "absolutely essential").

A close reading of *Reichert* suggests, instead, that the Court believed the unique circumstances resulting from the timing of the 2012 election cycle justified departure from the Court's usual reticence to intervene in the referendum process. *See Reichert*, ¶¶ 57-60; *see also id.*, ¶ 97 (Baker, J., dissenting) ("The Court determines that LR-119 presents unique grounds for pre-election review because of its effect in the current election cycle.... [A]s illustrated by the efficiency with which this appeal was briefed, considered and decided, we easily could have held the appeal in abeyance, awaited certification of the June [2012] election results, and decided the case—if necessary—within a few weeks.").

Those unusual circumstances aren't present here. And, absent the circumstances presented in *Reichert*, the strong presumption against judicial review of unripe challenges to pre-election referenda remains. *Reichert* does not require this Court to step beyond its jurisdictional limits and issue an advisory opinion.

II. HB 325 is constitutional.

If this Court determines it may reach the merits of a too-early constitutional challenge to a potential law, HB 325 is constitutional. On its face, article VII, § 8(1) gives the legislature power to provide, "by law," the method of election for Supreme court justices. *See* Mont. Const., art. VII, § 8(1). Throughout Article VII, "provided by law" means the Constitution has delegated a matter to the Legislature. It means the same thing in § 8(1).

To the extent that this Court determines that *Reichert* requires it to ignore the plain meaning of article VII, § 8(1), the State preserves the following arguments for appeal.

A. Article VII, § 8(1) of the Montana Constitution gives the Legislature power to provide, "by law," how Supreme Court justices are elected.

When construing a provision of the constitution, Montana courts first look to the plain meaning of the provision's words, and resort to extrinsic aids of interpretation only when the express language is vague or ambiguous. *See, e.g.*, *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. When interpreting any provision—whether clear or ambiguous—courts consider the context of the "historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Id.*

Article VII, § 8(1) says, in relevant part, "Supreme court justices…shall be elected by the qualified electors *as provided by law*." (emphasis added). On its face, article VII, § 8(1) gives the legislature power to adopt and alter the method of election

for supreme court justices in Montana. One way the legislature may do this is through its article III, § 5(1) power to submit referenda to the people. *See* Mont. Const. art. III, § 5(1).

The next question is: what does "provided by law" mean in Article VII?

B. "Provided by law" means the Constitution delegated a matter to the Legislature.

A fundamental principle of statutory interpretation presumes that the same word carries the same meaning throughout the Constitution. *See Kottel v. State*, 2002 MT 278, ¶ 43, 312 Mont. 387, 60 P.3d 403 (applying to the Constitution the "rule that language is presumed to have the same meaning throughout a document"); *see also Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 – 173 (2012).

The 1972 Constitution used the phrase "provided by law" throughout Article VII. A look at how the Legislature has interpreted other "provided by law" provisions in Article VII removes any doubt about the meaning of that phrase.

By the State's count, Article VII alone contains the phrase "provided by law" in thirteen other places. *See* Mont. Const., art. VII §§ 1 ("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."), 2(1) ("[The supreme court] has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law."), 4(2) ("The district court shall hear appeals from inferior

courts as trials anew unless otherwise provided by law."), 5(1) ("There shall be elected in each county at least one justice of the peace with…monthly compensation provided by law."), 5(2) ("Justice courts shall have such original jurisdiction as may be provided by law."), 7(1) ("All justices and judges shall be paid as provided by law…."), 7(2) ("Terms of office shall be eight years for supreme court justices, six years for district court judges, four years for justices of the peace, and as provided by law for other judges."), 8(2) ("For any vacancy…the governor shall appoint a replacement from nominees selected in the manner provided by law"), 8(2) ("Appointments made under this subsection shall be subject to confirmation by the senate, as provided by law."), 8(2) ("The appointee shall serve until the election for the office as provided by law"), 9(1) ("Qualifications and methods of selection of judges of other courts shall be provided by law."), 9(4) ("The residency requirement for every other judge must be provided by law.").

The Legislature has passed numerous laws pursuant to the Article VII "provided by law" provisions. *See generally* MCA §§ 3-1-101 – 3-20-105. For example:

- Pursuant to its article VII, § 1 power to provide "by law" courts other than the Supreme Court and district courts, the legislature has authorized small claims courts, *see* MCA § 3-12-102, established city courts, *see* MCA § 3-11-10(1), established municipal courts, *see* MCA § 3-6-101; and established water courts, *see generally* MCA §§ 3-7-101–502.
- Pursuant to its article VII, § 2(1) power to establish jurisdiction for the supreme court to "issue, hear, and determine…such other writs as may be

provided by law," the legislature has given justices of the supreme court jurisdiction to "issue and hear and determine writs of certiorari in proceedings for contempt in the district court." MCA § 3-2-212(2).

- Pursuant to its article VII, § 5(1) power to set compensation for justices of the peace, the legislature sets the salaries for justices of the peace. MCA § 3-10-207.
- Pursuant to its article VII, § 5(2) power to determine the jurisdiction of justice courts, the legislature has done just that. *See* MCA §§ 3-10-301—304.
- Pursuant to its article VII, § 7(1) power to set compensation for supreme court justices and district court judges, the legislature has done so. *See* §§ 2-16-403 (supreme court justice salaries), MCA 3-5-211(1) (district court judge salaries).

Earlier this year, the Supreme Court considered the meaning of "provided by law" in article VII, § 8. *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548. In *Brown*, the Court considered whether SB 140—which abolished the Judicial Nomination Commission—violated article VII, § 8(2). *Id.* ¶¶ 23-24. Article VII, § 8(2) says, in relevant part, "[f]or any vacancy in the office of supreme court justice … the governor shall appoint a replacement from nominees selected in the manner *provided by law* …." (emphasis added).

The Court determined that the phrase "in the manner provided by law" in article VII, § 8(2) "delegates the process for selecting judicial nominees to the Legislature …" *Brown*, ¶ 41. In reaching this common-sense conclusion, the Court examined transcripts from the Constitutional Convention and observed:

> some individual delegates supported a committee or commission to screen candidates for a judicial vacancy, [while] others voiced distrust in such a commission…the result was a system that was not entirely what either side wanted—a process that neither mandated a commission/committee, nor precluded it, but rather delegated the process for selecting nominees to the Legislature in broad language that the selection of nominees be "*in the manner provided by law*."

Id. (quoting Mont. Const., art. VII, § 8(2)) (emphasis added).

Throughout Article VII, then, the phrase "as provided by law" or "in the manner provided by law" means the Constitution has delegated a matter to the Legislature. Plaintiffs suggest a one-time only exception—they believe "provided by law" means something different in § 8(1) than it means in the rest of § 8 and throughout Article VII. This argument defies the principle that a term carries the same meaning throughout the same provision of the Constitution. *Kottel*, ¶ 43.

But as the Supreme Court recognized in *Brown*, throughout Article VII, the phrase "provided by law" means the Constitution delegates a matter to the legislature to implement as it will—consistent with other constitutional limits, of course. It means the same thing in § 8(1).

So when article VII, § 8(1) provides that "Supreme court justices…shall be elected by the qualified electors as provided by law," it means that that the Constitution directs the Legislature to provide the method of election for supreme court justices.

Some of the "as provided by law" provisions remove certain matters from the power of the legislature, while leaving other matters to be "as provided by law." For example, article VII, § 9(4) sets constitutional residency requirements for supreme

court justices and district court judges but leaves it to the legislature to set residency requirements for "every other judge." Mont. Const., art. VII § 9(4). But not article VII, § 8(1)–that provision leaves it *entirely* up to the legislature to determine the method of elections for Supreme Court justices.

In sum, the Legislature and the Supreme Court have consistently construed the phrase "as provided by law" in article VII to mean that the constitution leaves a matter to the discretion of the Legislature. The plain meaning of article VII, § 8(1) is that the Constitution leaves it up to the Legislature to set the method of election for supreme court justices to the legislature. *See Brown*, ¶ 41.

C. The 1972 Constitutional Convention debates support the obvious reading of article VII, section 8(1).

The initial majority proposal for what was to become Article VII would have required, as a constitutional matter, statewide elections for supreme court justices: "The justices of the supreme court shall be elected by the electors of the state at large, and the term of the office of the justices of the supreme court, except as in this Constitution otherwise provided, shall be six years." Mont. Const. Conv., Vol. 1 at 487 (1986).

The convention rejected this proposal and adopted the language of the minority proposal, which today largely comprises article VII, §§ 8(2), (3).

So, the transcripts of the Constitutional Convention don't reflect intent by the framers to require statewide elections. They rejected the one proposal that would have required statewide elections as a constitutional matter and, instead, drafted a constitution that said nothing about the method of election for justices of the Supreme

Court. The record of the Constitutional Convention also demonstrates that the delegates preferred, as a matter of principle, to leave matters to the legislature than to button down every detail in the Constitution. *See generally*, Vol. IV at 1020-1120.

If any ambiguity remained after the 1972 Convention, the people settled the question in 1992. That year, the people approved amendments to the Constitution, including article VII, § 8(1). As the State has argued, § 8(1) expressly directs the legislature to prescribe and alter the method of election for supreme court justices.

To the extent that *Reichert* rejected this argument, the State preserves it for appeal.

D. *Reichert* doesn't mandate a different result.

Reichert concluded that LR-119 was unconstitutional for two reasons. *Reichert*, ¶¶ 62-72. First, LR-119 would have required candidates to reside in the supreme court district in which they were running, at the time of election. *Id.* ¶ 68. *Reichert* explained that this provision added a qualification for Supreme Court justices. *Id.* But, *Reichert* pointed out, article VII, § 9 already set qualifications for Supreme Court justices and didn't allow other qualifications to be provided by law. *Reichert*, ¶¶ 66 – 68.

As plaintiffs concede, HB 325 contains no residency requirement and adds no new qualifications for the office of Supreme Court justice. *See* Pls.' Br. Supp. of Mot. Summ. J., 4. So, the first half of *Reichert*'s constitutional analysis plainly doesn't apply to HB 325.

Second, *Reichert* concluded that LR-119 would have unconstitutionally altered the structure of the Supreme Court by changing it from a statewide body to a representative body composed of members from seven districts. *Id.* ¶¶ 69-72. But in reaching this conclusion, the Court repeatedly referred back to LR-119's residency requirement. *See id.* ¶ 70. It observed that "LR-119 … requires a candidate for the Supreme Court to be a qualified elector…of the district from which the candidate is elected." *Id.* And the Court found it notable that "the State characterize[d] the intent of [LR-119] as being to tie Justices to the districts from which they are elected." *Id.* (internal quotation marks omitted). These passages suggest that the *Reichert* Court thought that LR-119's residency requirement, coupled with district elections, unconstitutionally changed the structure of the Court from a neutral, statewide body, to a representative one.

But, as plaintiffs concede, HB 325 eliminated LR-119's residency requirement. HB 325 breaks the link that caused *Reichert* Court relied on in concluding that LR-119 unconstitutionally altered the structure of the supreme court. *See id.*, ¶¶ 69-70. Because HB 325 doesn't have a residency requirement, it would not convert the Supreme Court into a representative body. *Reichert* does not foreclose the ability of the Legislature to follow its article VII, § 8(1) directive to "provide by law" a district-based election for Supreme Court justices.

If this Court determines that *Reichert* directly controls the outcome of this case, the State preserves the following arguments for appeal.

1. Article VII, § 8(1) provides: “Supreme court justices and district court judges shall be elected by the qualified electors as provided by law” The plain, unambiguous meaning of this provision is that the legislature has power to change the way the people elect Supreme Court justices.
2. Courts may not issue advisory opinions on the prospective constitutionality of any law — including referenda — before the law is enacted.
3. Courts lack jurisdiction to review a challenge to any law — including referenda — before the law is duly enacted.
4. Plaintiffs lack standing.
5. Concerns about judicial economy cannot override bedrock constitutional principles like the separation of powers.
6. To the extent that *Reichert* contradicts these principles, it was wrongly decided, and the Supreme Court should overrule it. *See State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)) ("[S]tare decisis is not a mechanical formula of adherence to the latest decision…and does not require [the Supreme Court] to follow a manifestly wrong decision.") (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court grant summary judgment in favor of the State. The State requests 20 minutes for oral argument.

DATED this 10th day of December, 2021.

AUSTIN KNUDSEN
Montana Attorney General

KRISTIN HANSEN
Lieutenant General

DAVID M.S. DEWHIRST
Solicitor General

CHRISTIAN B. CORRIGAN
Assistant Solicitor General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
p. 406.444.2026
christian.corrigan@mt.gov

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by email to the following:

James H. Goetz
GOETZ, GEDDES & GARDNER P.C.
35 North Grand
PO Box 6580
Bozeman, MT 59771-6580
jim@goetzlawfirm.com

A. Clifford Edwards
EDWARDS & CULVER
1648 Poly Drive, Suite 206
Billings, MT 59102
cliff@edwardslawfirm.org

Hon. John C. Brown
kristi.long@mt.gov
sarah.johnson@mt.gov

Date: December 10, 2021

BUFFY EKOLA