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 **ORDER RE MOTIONS FOR SUMMARY JUDGMENT**

This matter comes before the Court on cross-motions for Summary Judgment filed by Plaintiffs and Defendant. Plaintiffs filed their Motion for Summary Judgment and their Brief in support of the Motion on July 1, 2021. Defendant did not file a responsive brief. On December 10, 2021, Defendant filed her Motion for Summary Judgment with her Brief in Support of Motion for Summary Judgment. Plaintiff filed a Reply Brief on December 15, 2021. The Court heard oral argument on January 26, 2022. The Court is fully advised.

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This litigation arises out of the Montana Legislature's passage of HB 325, a law that proposes to eliminate at-large voting for candidates for the Montana Supreme Court. Instead of state-wide elections for each justice, HB 325 divides the State into seven judicial districts, with one justice elected in each district. HB 325 also provides that the chief justice will be selected by a majority vote of the seven justices of the Court. Section 8 of HB 325 contains a legislative referendum measure which requires that the proposal be placed on the general election ballot to be held in November 2022. By their Complaint filed on May 10, 2021, Plaintiffs challenge HB 325 as being in violation of the Montana Constitution. Plaintiffs further request the Court to enjoin Defendant from certifying any legislative referendum pursuant to HB 325 and from presenting any legislative resolution based on HB 325 to the voters on any election ballot.

In their Motion, Plaintiffs assert they are entitled to judgment as a matter of law on the claims in their Complaint because HB 325 is facially unconstitutional in that the Montana Constitution requires that Supreme Court justices be elected on a state-wide basis. Plaintiffs rely on *Reichert v. State ex rel. McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, in arguing that the Montana Supreme Court has held that a previous legislative attempt to implement voting for Supreme Court justices by district violated provisions of the Montana Constitution and assert that *Reichert* dictates the same result in this case.

Defendant contends she is entitled to judgment as a matter of law on Plaintiffs' Complaint first because the issue raised regarding the constitutionality of HB 325 is not ripe for review and, therefore, does not present a justiciable controversy. Defendant asserts the Court "lacks jurisdiction to opine on the constitutionality of a potential law,"

and that any ruling the Court entered would be an impermissible advisory opinion. According to Defendant, because it is unknown at this time whether the voters of Montana will pass the referendum, any ruling on the constitutionality of HB 325 would be grounded only on a hypothetical state of facts based on contingent future events. Second, Defendant argues that, even if the issue before the Court is justiciable, she is entitled to summary judgment in her favor because HB 325 passes constitutional muster.

1. Whether the Plaintiffs have Standing

As an initial matter the Court must consider whether Plaintiffs have standing. "Standing is a threshold jurisdictional requirement that limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing) . . . . Case-or-controversy standing limits the courts to deciding actual, redressable controversy, while prudential standing confines the courts to a role consistent with the separation of powers." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187 (internal citations omitted).

There are numerous Montana cases that hold the status of "elector" is, in itself, sufficient to confer standing. See, *Butte-Silver Bow Local Gov't v. State* (1989), 235 Mont. 398, 401, 768 P.2d 327, 329 (1989) (individual petitioners met the criteria necessary to establish standing to challenge the constitutionality of a statute "both as registered voters and as affected taxpayers."); *State ex rel. Boese v. Waltermire*, 224 Mont. 230, 730 P.2d 375 (1986) (petitioner had standing to challenge an initiative as a taxpayer, property owner, and elector); *Jones v. Judge*, 176 Mont. 251, 254, 577 P.2d 846, 848 (1978) (an elector who is denied the right to vote is sufficiently affected to

invoke the judicial power to challenge the validity of an act which denies them such right).

In this case, under HB 325 all citizens of the State would lose the right to vote for every justice of the Montana Supreme Court. Accordingly, because Plaintiffs are Montana registered voters and because the organizational Plaintiff, League of Women Voters of Montana, represents electors, the Court concludes the Plaintiffs have standing to bring the present challenge.

2. Ripeness and Justiciability

Defendant's primary argument is that this case is not justiciable.

> In general terms, a justiciable controversy is one that is "definite and concrete, touching legal relations of parties having adverse legal interests" and "admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition." To be justiciable, the parties must have existing and genuine (rather than theoretical) rights or interests, the questions must be presented in an adversary context, and the controversy must be one upon which a court's judgment will effectively and conclusively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical, or academic conclusion.

Reichert, ¶ 53 (internal citations omitted).

"The central concepts of justiciability have been elaborated into more specific doctrines—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions—each of which is governed by its own set of substantive rules." *Reichert*, ¶ 54. Defendant's central thesis on justiciability is that this case is not ripe for review unless and until the ballot measure is approved by the Montana voters. She argues that courts are reluctant to consider pre-election challenges. Ripeness concerns whether a case presents an "actual, present" controversy. *Reichert*,

¶ 54. "Ripeness is predicated on the central perception that courts should not render decisions absent a genuine need to resolve a real dispute; hence, cases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Reichert*, ¶ 54.

There is both a constitutional and a prudential aspect to the ripeness inquiry. *Reichert*, ¶ 56. The constitutional component of ripeness concerns whether the issues presented are definite and concrete, not hypothetical or abstract. *Reichert*, ¶ 56. "The prudential component, on the other hand, involves a weighing of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Reichert*, ¶ 56.

Here, there is no question that this case is presented in a suitable adversary posture. This Court can issue clear, binding, and effective relief, including a declaratory judgment with the authority to enjoin the Defendant from placing HB 325 on the ballot. In fact, this is exactly the remedy mandated by *Reichert*. Thus, as to the question of whether there is a suitable case or controversy, it is clear there is. There is no constitutional justiciability problem.

With regard to the prudential component of ripeness, the *Reichert* court faced the same argument that courts are reluctant to consider pre-election challenges and rejected it. The Montana Supreme Court in *Reichert* noted that pre-election judicial review of legislative referenda should not be routinely conducted, but then stated that

> such deference and restraint do not apply, however where the challenged measure is facially defective. In that event, the courts have a duty to exercise jurisdiction and declare the measure invalid.

Reichert, ¶ 59. The Supreme Court relied on *State ex rel. Steen v. Murray*, 144 Mont. 61, 69, 394 P.2d 761, 765 (1964) (enjoining the Secretary of State from placing on the ballot an initiative that was "unquestionably and palpably unconstitutional on its face"); *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 428, 691 P.2d 826, 828 (1984) (entertaining a pre-election challenge to an initiative that, on its face, was "beyond the power of initiative granted the people by the Montana Constitution"); and *Cobb v. State*, 278 Mont. 307, 310, 311, 24 P.2d 268, 270 (affirming an injunction that prohibits the Secretary of State from placing on the ballot a referendum, which, if enacted would leave an obvious defect in the Constitution "). *Reichert*, ¶ 59.

In its Brief, Defendant stated that "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." Defendant reiterated this statement in oral argument. Considering the question presented regarding the constitutionality of a legislative enactment relating to election of Supreme Court justices by district has already been squarely addressed by the Montana Supreme Court in *Reichert*, this Court does not find itself to be issuing an advisory opinion – it is simply acting in conformance with an opinion that has already been issued by the Montana Supreme Court.

Defendant attempts to distinguish the ripeness inquiry conducted by the Supreme Court in *Reichert* by arguing that the residency requirement and the establishment of districts in LR-119 are "impossible to disentangle" and thus the Court cannot rely on *Reichert* and the same issues do not exist in HB 325. However, in *Reichert* the Supreme Court considered three distinct changes effected by LR-119—(1) the candidate must be a "qualified elector" of the district from which they are elected; (2) the creation of seven

districts with each justice elected from a separate district; and (3) selection of the chief justice by the justices instead of the electors — and addressed each change separately. Accordingly, the Supreme Court in *Reichert* did not entangle the issues it faced when analyzing LR-119 but rather neatly separated them into 3 different questions. See, *Reichert*, ¶ 7.

At both the beginning and end of ¶ 64 in *Reichert*, the Court clearly stated the Montana Constitution intended Supreme Court justices to be selected on a statewide basis – exactly what HB 325 prohibits. Nowhere does *Reichert* say the constitutional mandate of selection on a statewide basis vanishes so long as selection is by district without a residency requirement. In fact, the paragraph cited by Defendant's counsel in oral argument to support her entanglement claim - ¶ 70 – compares the residency requirement for legislators to the residency requirement in LR-119. It does not say the residency requirement is the reason district elections are unconstitutional. The preceding paragraphs in *Reichert* already explicitly and repeatedly state as much, and are not dependent on the existence or non-existence of a mandate that a justice must reside in the district from which they are elected.

Simply to clarify the point, the Court notes that the *Reichert* Court held statewide election of Supreme Court justices was unconstitutional multiple times:

> The language and structure of these sections demonstrate that the Constitution intends the Supreme Court justices to be elected and serve on a statewide basis, district court judges to be elected and serve on a district-wide basis, and justices of the peace to be elected and serve on a countywide basis.

Reichert ¶ 64.

> [T]he 1972 Constitutional Convention delegates debated whether justices and judges should be elected, appointed, or some combination of the two, but the assumption of all who spoke on the question was that, under whatever system the

> delegates finally adopted, Supreme Court justices would be selected on a statewide basis and district court judges would be selected on a district-specific basis.

Reichert ¶ 64. Given the Supreme Court's "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." *Reichert,* ¶ 65. "These principles are implicit in the constitutional design, which establishes the office of Supreme Court justices as one subject to election by electors statewide." *Reichert,* ¶ 65. "As with the attempt to add qualifications to the office of Supreme Court justice, however, this attempt to alter the structure of the Supreme Court by making it a representative body composed of members elected from districts is likewise facially unconstitutional." *Reichert*, ¶ 71.

As is clear from these passages, nowhere does the *Reichert* Court condition its holding that district election of Supreme Court justices is unconstitutional on the first issue highlighted in paragraph 7 regarding the residency of candidates. The three questions raised by LR-119 were not entangled and removing one does not affect the analysis of the others at all.

Defendant cited *State ex rel. Montana Sch. Bd. v. Waltermire*, 224 Mont. 296, 729 P.2d 1297 (1986), in her oral argument. Specifically, counsel stated as follows:

> Even if HB 325 were to be facially and undisputably (sic) unconstitutional, this Court has no jurisdiction to adjudicate a pre-election challenge to a legislative referendum absent what the Montana Supreme Court called extraordinary cause --- and that's in the *Montana School Boards v. Waltermire* case, 224 Mont. at 299. Hearing on Summary Judgment, p. 20, lns. 18-24.

The Court has reviewed the cite provided by Defendant and it does not support her argument. In actuality, the Montana Supreme Court stated that:

> this Court accepted jurisdiction over pre-election initiative challenges only where the challenged initiative was not properly submitted under the election laws, e.g., *State ex rel. Livingston v. Murray* (1960), 137 Mont. 557, 354 P.2d 552, and where the challenged initiative was unconstitutional on its face, e.g., *State ex rel. Steen v. Murray* (1964), 144 Mont. 61, 394 P.2d 761.

Waltermire, 224 Mont. at 299, 729 P.2d at 1298.

In this case the subject of the challenged initiative already has been found to be facially unconstitutional. *Reichert,* ¶ 89. The *Waltermire* Court noted the distinction, recognizing in that case that "[t]he impairment of contract challenge does not suggest that the Initiative is unconstitutional on its face as was the initiative in *Steen*." *Waltermire,* 224 Mont. at 299. Accordingly, it is appropriate for a court to accept jurisdiction of a pre-election initiative where, as here, the challenged initiative was—and is—unconstitutional on its face.

Furthermore, HB 325 is procedurally flawed—and that procedural flaw has a constitutional dimension. *Reichert* was clear that the measure there in question amounted to an attempt to amend the Constitution by statutory means. *Reichert*, ¶ 71. Article XIV, Section 8 of the Montana Constitution sets forth the exclusive procedure by which the Constitution may be amended through legislative referendum. HB 325 does not comply with the requirements of that constitutional provision. Considering the Legislature was on notice via *Reichert* that election of Supreme Court justices by districts was unconstitutional, that body was free to submit a constitutional amendment to the electors, however, it did not do so. The Court in *State ex. rel. Livingstone v. Murray*, 137 Mont. 557, 568, 354 P.2d 552, 558 (1960), also held that, where a legislative action is in conflict with the mandatory provisions of the Montana Constitution limiting legislative action, "our plain duty is to declare the attempted amendment unconstitutional and void."

Thus, given the defect in the attempt to amend the Constitution by legislative action, it does not make sense to await a vote. The procedural defect infects the entire process. This defect cannot be cured by a subsequent vote of the electorate.

As to the argument that it would be more "prudent" to wait until after the election, the opposite is true—it would be a waste of time and resources and deceive the voters. *Reichert* is clear on that point:

> Where a measure is facially defective, placing it on the ballot does nothing to protect voters' rights. It instead creates a sham out of the voting process by conveying the false appearance that a vote on the measure counts for something, when in fact the measure is invalid regardless of how the electors vote. Placing it on the ballot would also be a waste of time and money for all involved—putting the Secretary of State, local election officials, and ultimately taxpayers to the expense of the election; putting proponents and opponents to the expense of needless campaigning; and putting voters to the task of deciding a ballot issue which this Court already knows cannot stand even if passed. Deferring decision to a later date so the measure can go forward is senseless. It consumes resources with no corresponding benefit. Nothing in ripeness doctrine mandates such an approach. Indeed, "the prudential concerns of the ripeness doctrine [are] not implicated)' where the possible Constitutional infirmity [is] clear on the face "of the measure.

Reichert, at ¶ 59 (citing *Portman v. County of Santa Clara*, 995 F.2d 898, 903 (9th Cir. 1993)).

Defendant also argues that the ripeness analysis in *Reichert* is distinguishable because the time issues were more pressing in *Reichert*. Although the *Reichert* facts were somewhat different, this is a distinction without a difference. The bill in *Reichert* called for it to be voted on in the June 2012 primary election and that such vote would affect several judicial positions in the ensuing general election. The *Reichert* Court could have delayed consideration until after the election, but found nothing in the justiciability doctrine that required it to do so. Although the time constraints were more narrow in

Reichert than they are here, it was made very clear in the dissenting and concurring opinion of Justice Baker that there would have been time to consider the case after the primary election. Nevertheless, the Court for the reasons explained there and set forth in this opinion, found it appropriate not to delay consideration. The *Reichert* Court rejected the justiciability argument, finding it unpersuasive. Thus, there is no material difference between *Reichert* and the present case.

As far as the Court can tell, the Defendant would like this Court to overrule *Reichert*, which it does not have the authority to do. If this referendum would have come before the Court in the same nature prior to *Reichert* the Court could review the case in a largely independent light, however, since the Montana Supreme Court has already found the referendum to be facially unconstitutional, the Court cannot ignore that fact. Because the Montana Supreme Court has already found the proposal submitted by the Legislature to be unconstitutional, the Court has a difficult time looking beyond that fact to reconsider in a novel way justiciability issues that have already been resolved in *Reichert*.

The Court concludes the Plaintiffs have standing, the case is ripe for review, and the case presents a justiciable controversy upon which the Court can rule.

3. The Merits

Plaintiffs argue that, on the merits, *Reichert* is controlling and indistinguishable. The Court agrees that *Reichert* is on point and controlling. First, the *Reichert* Court firmly held that the Constitutional Convention made it clear that Supreme Court justices would be selected on a "state-wide" basis. As the Court in *Reichert* observed:

> [T]he 1972 Constitutional Convention delegates debated whether justices and judges should be elected, appointed, or some combination of the two, but the assumption of all who spoke on the question was that, under whatever system the delegates finally adopted, 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.

Reichert, ¶ 64. The *Reichert* Court determined that "[t]his structure is consistent with the Supreme Court's function" of serving as a general appellate court on a statewide basis and that "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." *Reichert*, ¶ 65.

The Constitution makes a careful and repeated distinction between "judges" and "justices". The *Reichert* Court addressed this distinction:

> The language and structure of these sections demonstrate that the Constitution intends Supreme Court justices to be elected and serve on a statewide basis, district court judges to be elected and serve on a district-wide basis. . . .When a justice or judge is to be selected from a discrete geographic area, the Constitution states that requirement expressly—as it does with district court judges....With respect to Supreme Court justices, however, the Constitution could, but does not, specify district elections.

Reichert, ¶ 64.

Defendant also argues that the 1992 amendment to Article VII of the Montana Constitution supports the Legislature's prerogative to change the at-large voting system. Among other changes, Section 8(1) was added to Article VII via House Bill 353 (HB 353). This section provides that justices and judges are to be elected "as provided by law." Defendant argues that the language "as provided by law" grants license to the Legislature to establish the mode of election of justices.

The same argument was thoroughly addressed by the *Reichert* Court, which noted that the sole purpose of the 1992 Constitutional Amendment was to address a defect in the language of Article VII, regarding the filling of judicial vacancies, and that there was no indication of any ancillary purpose to change the way justices are elected. *Reichert*, ¶¶ 73-78.

> Nothing in the plain language of Article VII, Section 8 (as amended) or in the history of HB 353 indicates that the 1992 amendments were intended—or even contemplated—to grant the Legislature power to convert the Supreme Court from an institution composed of members elected on a statewide basis into a representative body composed of members elected from separate districts.

Reichert, ¶ 78. The logic of the *Reichert* Court is persuasive to this Court and, as noted above, binding on it.

Although the Defendant argues that the plain language of the 1992 Amendment is to be followed without resort to context, that is not the rule, particularly where important constitutional questions are involved. Recently in *Brown v. Gianforte*, 2021 MT149, ¶ 33, 404 Mont. 269, 488 P.3d 548, the Court followed its precedent in *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. Citing *Nelson*, the Court stated, "the principle of reasonable construction 'allows courts to fulfill their adjudicatory mandate and preserve the [Framers'] objective. " Nelson, ¶ 16. The *Brown* Court further quoted *Nelson* as follows:

> "Even in the context of clear and unambiguous language ... we have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light 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."

Brown, ¶ 33 (quoting *Nelson*, ¶ 14).

In the context of the 1992 Amendment, there is nothing in the voter information pamphlet of 1992 that suggests to the voters of Montana that they were voting to change the method of at-large voting for Supreme Court justices, or that they were enabling the Legislature to abandon at-large voting. If the intent of the 1992 Amendment was to eliminate at-large voting for justices, a draconian change, one would expect serious discussion of the proposed change. More to the point, the voters would be entitled to a full explanation of why there is such an important change in the matter of voting for Supreme Court justices. The fact that there was plenty of discussion on the real purpose of the Amendment (addressing a problem with the way judicial vacancies are filled), but no discussion at all on elimination of at-large voting for justices, is further compelling evidence that the Defendant's argument is incorrect.

4. Severability

For the same reasons cited in *Reichert,* ¶¶ 83-88, the Court concludes the selection of the Chief Justice by the justices instead of an election by the electors cannot be severed from the constitutionally infirm portion of HB 325, as referenced above.

Conclusion

Although *stare decisis* is not a rigid doctrine that forecloses the reexamination of cases when necessary, weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Certain v. Tonn*, 2009 MT 330, ¶ 19, 353 Mont. 21, 220 P.3d 384 (quotation marks omitted; internal citation omitted). "Faced with viable alternatives, *stare decisis* provides the 'preferred course.'" *Certain*, ¶ 19 (citation omitted). If this Court were to follow Defendant's recommendations it would in effect be

overruling *Reichert*. That being the case, and because this Court is bound by *Reichert*, the Court determines Plaintiffs are entitled to summary judgment. Therefore,

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Summary Judgment is GRANTED. This order constitutes a summary judgment that HB 325 is unconstitutional.

2. Defendant's Cross-Motion for Summary Judgment is DENIED.

3. Defendant Jacobsen, the Montana Secretary of State, and all persons, acting in concert with her or under her authority, are ENJOINED from placing HB 325 on Montana's 2022 general election ballot.

Dated this 21st day of March, 2022.

Peter B. Ohman
District Court Judge

cc: James H. Goetz / A. Clifford Edwards
Christian Corrigan / Emily Jones