IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 22-0229

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

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, Montana Secretary of State,

Defendant and Appellant.

PLAINTIFFS/APPELLEES' OPPOSITION TO MOTION TO DISQUALIFY

On Appeal from the Montana Second Judicial District Court, Silver Bow County, Cause No. DV-21-120, The Honorable Peter Ohman, Presiding

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Appellant Jacobsen's Motion to Disqualify all of the Judges of this Court must be denied. The identical motion was raised and rejected by this Court in *Reichert v. State ex. Rel. McCulloch,* 2012 MT 111, 365 Mont. 92, 278 P.3d 455, ¶23-51. *Reichert's* holding was recently affirmed in *McLaughlin v. Montana State Legislature*, 2021 MT 120, 404 Mont. 166, 489 P.3d 482 ("*McLaughlin I*").

Given the strength and recency of these cases, it seems unlikely that the present motion to disqualify amounts to a good faith argument **on the law**. This seems to be just a continuation of the effort to undermine the public's confidence in and respect for the Court. *See McLaughlin v. Montana State Legislature,* 2021 MT 178, ¶82 (*Sandefur* concurring), 405 Mont. 1, 493 P.3d 980 ("*McLaughlin II*").

I. *Reichert* Controls

In rejecting a virtually identical motion to disqualify, this Court made a number of points in *Reichert*:

- "There is 'a presumption of honesty and integrity in those serving as adjudicators.'" *Id*. ¶39
- "Charges of disqualification should not be made lightly." *Id.*
- "The law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea (citing *W.*

Blackstone, Commentaries)" ¶31

- "It is sheer conjecture at this point whether the adoption of district-based elections…in lieu of state-wide elections under the current system, would help or hinder the justices' chance for reelection." *Id.* ¶38

Reichert ultimately rejected the argument of the legislators that the mere "potential" to seek reelection constituted an adequate ground for disqualification:

> "The fact that the justices have "the potential" to seek reelection, and "possibly" be hindered in their reelection bids by [the act in question]…does not create the sort of 'extreme,' 'extraordinary,' 'exceptional,' and 'rare' circumstances that the Supreme Court has indicated must exist before a due process violation would be found."

Id. ¶38

Reichert also rejected the argument that State district judges could step in and fill the slots of disqualified supreme court justices, finding that each of the State district judges **might** also, someday, seek election as a justice of the supreme court. *Id* ¶37[1] If all of the district court judges were conflicted the result would be

[1] Jacobsen requests disqualification not only of the Justices of this Court, she also seeks to disqualify an unspecified number of district court judges [those who "participated in a court-administered poll or opined on HB 325 during the 2021 legislative session"]. *Jacobsen Brief*, p. 5 fn.1 Plaintiffs are unaware of any district judge who participated in a poll on HB 325. Even if they had, it would be no ground to disqualify. Participating in **any** "court-administered poll" would be entirely irrelevant to this case, even if it were otherwise improper, which it is not.

no judges being available. *Reichert* applied the Rule of Necessity:

> Under a logical extension of Legislators' argument, no judge in the State—indeed, no otherwise qualified person with "the potential to run for Supreme Court justice—could sit on this case. Hence, applying the Rule of Necessity, none of the justices would be disqualified.

Id. ¶37

Jacobsen attempts to distinguish *Reichert*, by arguing that *Reichert's* disqualification decision was *dicta*. It was not. The rationale of *Reichert* on disqualification was essential to the opinion—it is a **holding**.

More disturbing is the mendacious statement by Jacobsen's attorney that "…only **four justices** addressed the issue of disqualification." *Jacobsen Motion*, p. 12 (emphasis added). This is absolutely false. **In fact**, the *Reichert* holding on disqualification was **unanimous**. The vote was 7-0. *See Reichert*, ¶90-91.

Recognizing the strength and applicability of *Reichert*, Jacobsen falls back to the argument that *Reichert* was poorly reasoned and should be overruled and that the principle of *stare decisis*, is not an inexorable principle. The rule in Montana is set forth in *Certain v. Tonn*, 209 MT 330, ¶19, 353 Mont. 21, 220 P.3d 384. Although *stare decisis* is not a rigid doctrine which forecloses the reexamination of cases, when necessary, "weighty considerations underlie the principle and courts should not lightly overrule past decisions," (citing other Montana cases). *Certain*, ¶9.

There is no reason at all to overrule *Reichert*. Its logic was spot on. In fact, *Reichert's* analysis was recently reaffirmed in *McLaughlin I*.

II. *McLaughlin I* Controls

Interestingly, although Jacobsen makes a strenuous attempt to distinguish *Reichert*, she hardly touches the more recent *McLaughlin I* precedent. As this Court said in *McLaughlin I*, citing *Reichert*, "this is not the first-time legislators have moved to disqualify justices in cases where the court will decide the constitutionality of their legislation or actions." *McLaughlin I*, ¶12. Yet, Jacobsen's brief barely touches on *McLaughlin I*.

Citing *Reichert* with approval, *McLaughlin I* held: "…the justices' interest in being reelected by state-wide election did not rise to the level of a constitutional due process violation…" *Id.* ¶12. *McLaughlin I* further cites *Reichert* noting the true upshot of the motion to disqualify supreme court justices in *Reichert* applies equally to district court judges because, like supreme court justices, judges also have the "potential" for a seat on the supreme court sometime in the future. As *McLaughlin I* noted, "we applied the Rule of Necessity to conclude none of the justices would be disqualified." *McLaughlin I*, ¶12. *McLaughlin I* stated:

> Thus, implicit in the Rule is the concept of the absolute duty of judges to decide cases within their jurisdiction and that "actual disqualification of a member of a court of last resort will not excuse such member from performing his

> official duty if failure to do so would result in denial of a litigant's constitutional right to have a question properly presented to such court, adjudicated." *United States v. Wills*, 449 US 200, 214…1980.

Jacobsen also argues the Code of Judicial Conduct supports her motion. But, as this Court held in *McLaughlin I*, the opposite is true. Although the Code comments note that there are times when disqualification is necessary, "Unwarranted disqualification may bring public disfavor to the court and to the judge personally." *McLaughlin I*, ¶15. M.C.Jud.Cond. 2.7 cmt [1].

This Court in *McLaughlin 1* summarized its reasons for denying disqualification as follows:

> Were the Court to succumb to the Legislature's request and evade our responsibilities and obligations as a Court, we are convinced that public confidence in our integrity, honesty, leadership, and ability to function as the highest court of this State would be compromised.

McLaughlin I, ¶16

III. Conclusion

Curiously, Jacobsen argues "in normal times, this would be a paradigmatic case for recusal. These, however, are not normal times. [citing *McLaughlin I*]." *Jacobsen's Brief*, p.4. She urges return to "normalcy". That's a laugh.[2] The only

[2] In basic phycology the concept is known as "projection"—the phenomenon in

reason things are not "normal" is because of the iniquitous conduct of the Montana Attorney General and his cohorts.

Jacobsen tries to excuse herself, arguing that she merely wishes "to bolster confidence in the Montana judiciary and the Rule of Law." *Jacobsen's Brief*, p.4. The opposite is true. This Court has been repeatedly under pernicious political attack since the 2021 Montana Legislative Session. The present motion is just another stratagem to undermine confidence in Montana's courts.

The motion, obviously lacking merit, should be denied.

DATED this 19th day of May, 2022.

By: ***/s/ James Goetz***
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which people identify their negative emotions, beliefs, or traits in someone else.

CERTIFICATE OF COMPLIANCE

Rule 16 M.R.App. provides that a brief filed under that Rule is limited to 1,250 words. This certifies that the present opposition brief complies with that Rule. I certify that this document is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnote and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 1,249 words, excluding the Certificate of Service and Certificate of Compliance.

DATED this 19th day of May, 2022.

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I, James H. Goetz, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 05-19-2022:

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