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

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 and Appellees,

v.

CHRISTI JACOBSEN, Montana Secretary of State,

Defendant and Appellant.

PLAINTIFFS/APPELLEES' ANSWER BRIEF

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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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Did the District Court correctly determine that HB 325 is unconstitutional?

2) Did the District Court correctly determine that this case is ripe for "review"?

STATEMENT OF THE CASE

The Plaintiffs/Appellees (hereinafter "Plaintiffs") filed the present challenge to the Constitutionality of HB 325 in the Second Judicial District. They moved for summary judgment and Defendant Jacobsen cross-moved. By order of March 21, 2022, District Judge Peter Ohman granted summary judgment in favor of Plaintiffs, and denied Defendant's summary judgment motion. Dkt. 53.

STATEMENT OF FACTS

HB 325 (Appendix A) was enacted by the 2021 Montana Legislature. It is a legislative referendum which proposes to submit HB 325 to the Montana electorate on the November 2022 general election ballot. HB 325 proposes to establish seven Supreme Court districts in Montana, assign each Supreme Court seat to one of the seven districts, and require candidates for each seat to run for election within the district assigned to that seat. The measure would also require the chief justice to be chosen by the majority vote of the seven justices, effective after the 2024 general election.

A similar measure, passed by the Montana legislature in 2011, was declared unconstitutional in *Reichert v. State, ex. Rel McCulloch*, 2012 MT 11, 365 Mont.

92, 278 P.3d 455.

District Judge Peter Ohman found this case justiciable, determined that at-large voting for justices of the Montana Supreme Court is constitutionally mandated, and granted Plaintiffs' Motion for Summary Judgment. Dkt. 53. Judge Ohman closely followed this Court's previous analysis in *Reichert*.

The operative deadline for Jacobsen to place HB 325 on the 2022 general election ballot is **August 25, 2022**. Dkt. 49. This Court has ordered expedited briefing.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo* using the same Rule 56 criteria used by the district court. Summary judgment is appropriate when the moving party demonstrates the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. *Styren Farms, Inc. v. Roos*, 2011 MT 299, ¶ 10, 363 Mont. 41, 265 P.3d 1230.

SUMMARY OF ARGUMENT

At large voting for justices of the Montana Supreme Court, which has been the practice in Montana throughout its history, is constitutionally required. This Court so held in *Reichert*, which held unconstitutional a similar measure passed in 2011. *Reichert* found the 2011 measure unconstitutional on two separate and independent bases: (1) the Act attempted to add additional qualifications for

Supreme Court Justices; and (2) the Act attempted to change the structure of the Supreme Court. HB 325, which redressed one of the constitutional defects found by this Court in *Reichert*, but not the other, is unconstitutional.

Under venerable principle of *stare decisis*, *Reichert* is controlling. There is no reason to overturn *Reichert*, much less a compelling one.

Apart from *Reichert*, HB 325 is unconstitutional on its face because Art. VII, § 6 of the Montana Constitution explicitly provides for "districting" but confines that to district court judges. There is a repeated careful distinction between "judges" and "justices" throughout Article VII.

Further, the district court correctly followed *Reichert* in finding that HB 325 is an unconstitutional attempt to amend the Montana Constitution through a statutory referendum. Article XIV, § 8 governs legislative attempts to amend the Constitution through the referendum process. It requires a supermajority vote and its procedures were not followed with respect to HB 325.

Jacobsen's attempt to rely on certain language in Article VII, § 8(1), ("as provided by law") to argue the Constitution delegates to the Legislature, the right to eliminate at-large voting, was squarely rejected by *Reichert*. Section 8(1) was adopted by constitutional amendment in 1992 solely for the purpose of closing a perceived loophole in the manner of filling judicial vacancies. Moreover, there is nothing in the Voter Information Pamphlet on the 1992 Amendment or in any

public debates which would support the drastic step of eliminating at-large voting for Supreme Court justices. The district court correctly followed this Court's holding in *Reichert* in rejecting Jacobsen's identical argument based on § 8(1).

The district court also properly rejected Jacobsen's ripeness argument. Although courts are generally reluctant to consider pre-election challenges, there are two well-established exceptions to that policy: judicial consideration is mandated where (1) there is a procedural defect in presentation of the measure and/or (2) where the measure is unconstitutional on its face. *Reichert* correctly applied the two exceptions, as reaffirmed in *MEA-MFT v. McCulloch*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075. Because the present challenge to HB 325 meets both exceptions, the district court correctly undertook judicial review.

ARGUMENT

If adopted, HB 325 would eliminate this State's long-established practice of voting at-large for each candidate seeking election to the Montana Supreme Court. The measure would balkanize the state into seven judicial districts, with one justice elected by each district and the chief justice selected not by the people of Montana, as it has been for 132 years, but rather a majority vote of the seven justices.

The ultimate adoption of this measure would 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.

That constitutional right to vote for each justice of the Montana Supreme Court was reaffirmed in *Reichert*. *Reichert* rejected as unconstitutional a legislative attempt to provide for voting for justices by district, just as HB 325 again attempts. *Reichert* is clear, sound *stare decisis* governing HB 325's unconstitutionality.

This ruling should have been no surprise to the legislative sponsors of HB 325. They were advised by the Legislative Services Division of its unconstitutionality, given the *Reichert* case:

> The Supreme Court explicitly held that Article VII, section 8(1), did not confer authority to convert the Supreme Court into a "district-based representative body." *Id.* 75. The Supreme Court traced the adoption, history, and discussions concerning Article VII, and it held that such a change was facially unconstitutional and impermissible absent constitutional amendment. *Id*. 75-82.

See App. 2.[1] Yet, they mulishly moved ahead with this defective legislation.

I. The district court correctly enjoined the placement of HB 325 on the ballot because it is facially unconstitutional and because it is an attempt to amend the Constitution by improper means.

A. This Court resolved these issues in the *Reichert* case.

[1] This document is a "legal review note" of the Legislative Services Division prepared pursuant to law. As such, it is subject to judicial notice by this Court, pursuant to Rule 202(4), M.R.Ev.

Reichert considered SB 268, a 2011 Act that similarly proposed to divide Montana into seven judicial districts, with each district to elect one Supreme Court justice. This Court held SB 268 to be facially unconstitutional on two separate aspects. "First, LR-119 (SB 268) would create new qualifications for the office of Supreme Court justice…" *Reichert*, ¶ 66. "Second, LR-119 would alter the structure of the Supreme Court." *Id.* ¶69. This Court found LR-119 facially unconstitutional on both bases[2]. *Id.* ¶ 83.

With respect to the second change—the "structure" change—this Court held 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.[3]

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[2] There was a third change described in *Reichert* as follows: "third, it would change the method of selecting the chief justice from a statewide election to a selection by the seven justices among their number." ¶ 84. *Reichert*, after noting that the first and second of the changes "are facially unconstitutional," stated that plaintiffs did not challenge the third change. Therefore, this Court assumed "without deciding" that the third change is "not unconstitutional." *Id.* However, the Court held that the third change could not be severed from the two unconstitutional features of the act. *Id.* ¶ 88.

[3] In the legislative session immediately following the adoption of the 1972 Montana Constitution, the Legislature took action to implement Montana's new judiciary article, adopting amendments to § 3-2-102(1), MCA. The new legislation continued the practice of at-large election of Supreme Court justices. *Reichert*

This 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. This 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.

The 2021 Montana Legislature, in enacting HB 325, attempted to redress the first constitutional defect found in *Reichert* by eliminating any new qualifications for the office of Supreme Court justice. However, the second constitutional defect *Reichert* found in LR-119 , the attempt to alter the "structure of the Supreme Court," is not addressed at all in HB 325. Thus, HB 325 contains the same

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found this implementing statute to be "consistent with Article VII." *Id.* ¶ 66.

constitutional defect that the 2011 bill did. Accordingly, *Reichert*'s holding on that point is *stare decisis* and dispositive.

Jacobsen seeks to distinguish *Reichert*, arguing that although *Reichert* found both the "qualification" requirements in the 2011 measure and the "structural" aspect of that measure unconstitutional, it is "impossible to disentangle" one from the other. Jacobsen Br., p. 39.

This argument is not persuasive. *Reichert's* finding on the unconstitutionality of SB 268's structure was clearly disjunctive—that is, the "structure" issue was separate from, and not dependent on, the "qualification" issue. After finding the "qualifications" in SB 268 unconstitutional, *Reichert* found that the attempt to change the structure was "likewise" unconstitutional:

> 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 (emphasis added).

The district court correctly rejected Jacobsen's argument, noting that *Reichert* separated the issues into discrete questions and "addressed each change separately." Dkt. 53, p.7 (citing *Reichert*, ¶ 7). Judge Ohman concluded:

> 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 ¶ 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.

Id. at 8 (citing *Reichert*, ¶¶ 64, 71).

This is correct. The "structure" determination is not entangled with the "qualifications" provision. Neither is dependent on the other. Thus, the fact that the Legislature may have cured the constitutional problem on the qualifications issue says nothing about the remaining constitutional problem. In sum, under *Reichert* and the constitutional principles enunciated therein, HB 325 is unconstitutional.

B. HB 325 is facially unconstitutional.

Jacobsen alternatively argues that *Reichert* was wrongly decided and should be overturned. In making that argument, Jacobsen demonstrates a rather flippant attitude towards the venerable principle of *stare decisis*. In fact, the logic of *Reichert* is compellingly correct. 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).

The Montana 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) (emphasis

added). 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." *Id.* (emphasis added). But this districting power is confined to district court **judges**. It does not apply to the Supreme Court or its **justices**. *Id.* § 6(2).

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….").

Article VII, § 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." (Emphasis added).

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

This distinction is particularly important with respect to the selection of justices and judges. Article VII, § 8(3) requires incumbents, under specified 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 makes an explicit distinction between voters "of the state" and voters of the "district." This distinction makes it clear 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.

Notably, if HB 325 were to pass, this constitutional language, "voters of the state," would become surplusage. It is well established that "[w]e must avoid a statutory construction that renders any section of the statute superfluous and fails to give effect to all the words used." *Gannett Satellite Info. Network Inc. v. State, Dep't of Revenue*, 2009 MT 5, ¶ 19, 348 Mont. 333, 201 P.3d 132. This fundamental rule should have even greater weight when interpreting constitutional language. *See Marbury v. Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect....")

In *Cobb v. State*, 278 Mont. 3107, 311, 924 P.2d 268 (1996), this Court assumed jurisdiction over a pre-election challenge to a proposal to submit a referendum to the electorate because of a palpable defect in the proposal. In that

case, the bill purported to abolish the office of secretary of state, but it left "one duty assigned to that office, with no provision for who must assume that duty." *Id.* at 311, 924 P.2d at 270. Striking that measure from the ballot, this Court stated:

> The failure of the bill to address Article IV, Section 7(3), of the Montana Constitution or to dispose of the duty contained therein would leave an obvious defect in the constitution.

Id. Likewise, here the passage of HB 325 would leave the language "voters of the state" unaddressed and meaningless-an obvious constitutional defect.

In sum, all voters in Montana, including the plaintiffs, have the right to vote for each of the Supreme Court justices. *Reichert*, ¶ 82. HB 325 would "eliminate the right presently held by all Montanan voters to select all seven justices of the Supreme Court…." *Id.* ¶ 70. HB 325's effort to establish districts for the election of Supreme Court justices and to deprive the "voters of the state" of the right to vote for each Supreme Court justice is facially unconstitutional.

The right to vote is a fundamental constitutional right under Art. I, § 13 of the Montana Constitution 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…."). *Reynolds* further declared:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of the citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id. at 555.

In *Gray v. Sanders*, 372 U.S. 368 (1963), the Court held that the Georgia county unit system, applicable in statewide primary elections, was unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where they resided.

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.

Finally, Jacobsen's argument that *Reichert* should be overruled gives insufficient weight to the well-established principle of *stare decisis*. *See State v. Dobrowski*, 2016 MT 261, ¶ 13, 385 Mont. 179, 382 P.3d 490 ("*Stare decisis* 'is of fundamental and central importance to the rule of law,' which 'reflects our concerns for stability, predictability, and equal treatment.'" (citing *State v. Gatts*,

279 Mont. 42, 51, 928 P.2d 114, 119 (1966))).

C. HB 325 is an unconstitutional attempt to amend the Montana Constitution through a statutory referendum.

The attempt to implement this radical change in how Supreme Court justices are elected, by means of a simple majority vote for a statutory referendum, 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 was not passed in compliance with this Constitutional provision—it does not comply with the supermajority requirement.

Reichert determined:

> 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.

Jacobsen, cherry picking one word from the *Reichert* opinion, argues that *Reichert* simply held that SB 268 would only "effectively" amend the Constitution. Jacobsen Br., p.22. To the contrary, this Court in *Reichert* could hardly have been more clear:

> 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 (emphasis added).

Jacobsen asserts that "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." Jacobsen Br., p. 9. This is a red herring. Article III, § 5, a **statutory referendum power**, has nothing to do with the issues in this case, which involve a back-door attempt to amend the Constitution. This procedural defect and *Reichert's* decision concerning it, were made clear to the Legislature by the "legal review note of the Legislative Services Division." Appendix B, p. 3.

In sum, the statutory referendum method is defective because it attempts to accomplish a constitutional amendment without complying with the Montana Constitution.

D. The 1992 constitutional amendment was not intended to, and did not, alter the long-standing constitutional requirement of at-large voting.

Jacobsen points to certain language in Article VII, § 8(1), "as provided by law," to argue that the Constitution delegates to the Legislature the manner in which the Supreme Court justices are to be elected. All this language means is that the Legislature may implement procedures regarding the manner in which judges

are elected, such as the non-partisan requirement and provisions for the advancement of the top two primary winners to the general election ballot.

The language of §8(1) was added in 1992 when the voters adopted a constitutional referendum which revised the wording of the Judiciary Article. *See* Mont. Const. Art. VII, § 8, *amended by* Mont. Const. amend. No. 22 (approved 1992).

Jacobsen's argument that §8(1) delegates to the Legislature the power to eliminate at-large voting was identical to an argument made by the Secretary of State in *Reichert* and roundly rejected by this Court. Before examining *Reichert*, it should be noted that there is **nothing** in the voter information pamphlet of 1992 (Appendix C) which remotely suggests to the voters that they are 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. **Nothing**. A proposed structural alteration of this magnitude must not be made without fully informing Montana voters. But there was nothing in the 1992 proposal for constitutional amendment that did that.

There is nothing because, of course, that was not the intent of the 1992 constitutional amendment. Instead, the entire purpose of the 1992 amendment was to address a glitch in the language of Article VII regarding the filling of judicial vacancies. *Reichert* made it clear that the purpose of the proposed amendment in

1992 was to "close the perceived 'loophole' in Article VII, Section 8." *Reichert*, ¶ 76. The "loophole," which concerned the filling of judicial vacancies, was exposed in *State ex rel. Racicot v. First Jud. Dis. Ct.*, 243 Mont. 379, 391, 794 P.2d 1180, 1187 (1990). In *Reichert*, this Court concluded:

> Thus, HB 353 was a *timing* measure. 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. The State is mistaken in its claim that Section 8(1) grants such authority. If anything, the proponents' views indicate that HB 353 was intended to *strengthen* the right of "all Montanans" to vote for Supreme Court justices, not take that right away.

Id. ¶ 78 (emphasis in original).

Jacobsen criticizes this Court's decision in *Reichert* regarding § 8(1) for not doing a "textual" analysis "and only considering legislative history". Jacobsen Br., pp. 28-29. She further criticizes the district court for failing to address what she claims is a "textual" analysis in *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548. Jacobsen Br., p. 29. Oddly, she cites *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1050, for her "plain meaning" argument that resort to extrinsic aids of interpretation is allowed only when the express language is vague. In fact, *Brown* relied on *Nelson* for exactly the **opposite**

proposition. *Brown* quoted language from *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 (emphasis added) (citing *Nelson*, ¶ 14). See also *Board of Regents of Higher Education v. State of Montana*, 2022 MT 128, ¶11, ___ Mont. ___, ___ P.3d ___.

Jacobsen further argues that Article VII contains the language "provided by law" in various other places. Their first cite is to Article 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."). This citation to Article VII, §1 itself carries the refutation of Jacobsen's plain meaning argument. The language "and such other courts as may be provided by law" may mean that the "other" courts may be established if the legislature deems it appropriate. Or does it mean that the legislature has power to specify exactly what judicial power these "other courts" may exercise, or both? This search for a "plain meaning" is often a chimera.

The other citations to the language of Article VII are equally unpersuasive because the cookie-cutter approach is too simplistic. Each of these clauses is dependent on the context. *See Mashek v. Dep't of Public Health and Human*

Services, 2016 MT 86, ¶ 10, 383 Mont. 168, 369 P.3d 348 ("We construe a statute by 'reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the legislature'"…"statutory construction is a holistic endeavor and must account for the statute's text, language, structure and object.").

A good example of the importance of context is found in *Reichert* where this Court emphasized the language in Article VII, § 9, which provides for the qualifications and methods of selection of judges and "other" courts. *Reichert*, ¶ 62. *Reichert* emphasized the word "other":

> 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. (italics in original; bold added).

The importance of context is evident in *Brown v. Gianforte*. Jacobsen faults the district court for not relying on *Brown*, describing it as a "game-changing decision." Jacobsen Br., p. 33. She argues that the "as provided by law" language, at issue in *Brown*, albeit on a different issue, should be rotely applied in this case. In fact, this particular language was not applied by the *Brown* majority in a

formulaic fashion. Instead, the majority opinion spends considerable space discussing both the context and the constitutional debates concerning the issue of how to fill judicial vacancies under Article VII, § 8(2). After this protracted analysis, the majority concluded that a nominating commission to fill judicial vacancies was not constitutionally-required. *Brown*, ¶ 51.

A very different question emerges, however, with respect to state-wide election of justices. On that question, *Reichert* already addressed the constitutional debates, particularly the rejection of Delegate Holland's amendment, on which the State continues to rely:

> There is no indication in the delegates' discussion that they objected to the "state at large" portion of Delegate Holland's proposal. To the contrary, **the assumption of all who spoke on the question was that**, under whatever system the delegates finally adopted, **the Supreme Court justices would be selected on a statewide basis** and District Court judges would be selected on a district-specific basis.

Reichert, ¶ 81 (emphasis added). This Court continued:

> It would be extraordinary to conclude that the delegates intended by their vote on Delegate Holland's amendment to "reject Montana's decades-old system of electing Supreme Court justices by the electors of the state at-large, without even a single word by any of the delegates directed to this issue and without any language to this effect in Constitution itself.

Id.

Moreover, in *Brown*, in arguing Plaintiffs, *qua* voters, lack standing, the State took pains to argue that *Brown*, unlike the present case, has nothing to do with judicial elections. This Court agreed: "respondents are correct that SB 140 has nothing to do with judicial elections." *Id.* ¶13.

In short, the *Brown* case offers little guidance to the issues presented in this case.

Finally, Jacobsen makes a strange argument that "the 1972 Constitutional Convention Debates support the plain reading of Article VII, §8(1)." Jacobsen Br., p. 37. Prescient as the 1972 Framers may have been, they were not clairvoyant. Article VII, §8(1) was adopted by the Montana voters in 1992, **twenty years after** the 1972 Constitutional Convention. Jacobsen's reliance on debates which took place in **1972** to interpret the meaning of a **1992** constitutional amendment is nonsense.

II. This case is justiciable.

Jacobsen argues this case is not ripe for review. This argument boils down to the proposition that courts are generally reluctant to involve themselves in pre-election challenges. *Reichert* rejected all of the arguments now made by Jacobsen on ripeness. *Reichert* is controlling.

A. Pre-election review is required in two circumstances—where the proposed referendum is facially unconstitutional and where the proposed measure is procedurally defective.

It is useful to address Montana justiciability law pre-*Reichert* to dispel any notion that *Reichert's* rejection of the ripeness argument was, somehow, novel. The law in Montana has long been clear. Although reluctant, courts **will adjudicate** pre-election challenges in two circumstances:

1) Where the proposed referendum is **procedurally defective**; and/or

2) Where the proposed referendum is **unconstitutional on its face**.

Perhaps the most cogent articulation of the standard by which the Court will or will not exercise jurisdiction is found in two cases which actually **declined** to consider such challenges. *See State ex. Rel Montana School Bd. Assoc. v. Waltermire*, 224 Mont. 296, 729 P.2d 1297 (1986) and *State ex. Rel Montana Citizens for Preservation of Citizens' Rights v. Waltermire*, 224 Mont. 273, 276, 729 P.2d 1283 (1986).

In *School Bd. Assoc.* this Court stated:

> …this Court has exercised pre-election jurisdiction to remove an initiative from the ballot **only** when there was a **procedural defect** or when the initiative was **clearly unconstitutional on its face**.

Id. at 300, 729 P.2d at 1299 (emphasis added).

Likewise in *Montana Citizens*, this Court addressed the question of "what

initiative matters are proper for pre-election jurisdiction?" This Court answered:

> The reasons which have been recognized for this Court's intervention in the initiative process prior to an election are quite limited. This Court has assumed original jurisdiction over pre-election challenges when the **initiative was not properly submitted under the election laws**, e.g., *State ex. Rel Livingstone v. Murray*, (1960), 137 Mont. 557, 354 P.2d 552, and **where the initiative was unconstitutional on its face**. E.g., *State ex. Rel Steen v. Murray* (1964), 144 Mont. 61, 394 P.2d 761.

Id. at 276, 729 P.2d at 1285 (emphasis added).

In both cases, pre-election challenges were not allowed because the measures were not facially unconstitutional. *See, e.g., School Bd. Assoc.*, ("the impairment of contract challenge does not suggest that the Initiative is unconstitutional on its face, as was the Initiative in *Steen*."); *Montana Citizens*, 224 Mont. at 278, 729 P.2d at 1286 ("this challenge is not addressed to the facial unconstitutionality of Initiative 30, but to its constitutionality as applied.").[4]

In *Steen*, this Court enjoined the Secretary of State from placing on the ballot an initiative that was "unquestionably and palpably unconstitutional on its face," 144 Mont. at 69, 394 P.2d at 765. In *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 428, 691 P.2d 826, 828 (1984) the Court entertained a pre-election

[4] In a follow-up post-election challenge, the measure was found unconstitutional, *see State ex. Rel Montana Citizens for Citizens' Rights v. Waltermire*, 227 Mont. 106, 738 P.2d 1255 (1987).

challenge to an initiative that, on its face, was "beyond the power of initiative granted the people by the Montana Constitution." In *Cobb*, 278 Mont. at 310-11, 24 P.2d at 270, this Court affirmed an injunction that prohibited the Secretary of State from placing on the ballot a referendum, which, if enacted would leave "an obvious defect in the Constitution." In *Livingstone*, this Court affirmed a pre-election injunction because of procedural defects—although the bill at issue passed with the requisite two-thirds vote of both houses, it was not presented to the Governor. *Id.* at 565, 354 P.2d at 556.

Jacobsen presumes to lecture this Court on "decades" of its precedents, arguing that a ruling against her in this case "would effectively overturn decades of this Court's precedents making clear that Montana courts have jurisdiction over pre-election challenges to a legislative referendum *only* to review whether the initiative is procedurally defective." Jacobsen Br., p. 24. This rather pompous pronouncement is plainly wrong. There are **two** exceptions, both extant for "decades."

B. *Reichert* correctly rejected the ripeness argument.

Reichert, following these established precedents, properly rejected the ripeness challenge on both grounds—the measure was procedurally defective, and it was facially unconstitutional. *Id.* ¶¶ 59, 60, n. 7.

In making that determination, *Reichert* relied on several of the cases cited

above, *Steen*, *Harper*, and *Cobb*.

Addressing one of these grounds, facial unconstitutionality, *Reichert* said:

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

Reichert, ¶ 59 (emphasis added). The Court continued:

> 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."

Id. (emphasis added).

With respect to the second exception to the deference rule, *Reichert* held that SB 268 was an attempt to amend Montana's Constitution through improper means—through statutory amendment. "Besides facial invalidity, courts will

entertain pre-election challenges when a measure 'was not properly submitted under the election laws.'" *Reichert*, ¶ 59, n. 7, (citing *State ex. Rel. Sch. Bd. Ass'n v. Waltermire*, *supra*, which, in turn, cited *Livingstone*, *supra*).

The Constitution itself, in Article XIV, § 8, sets forth the exclusive procedure by which the Constitution may be amended through legislative referendum. The failure of the Legislature to follow this constitutional procedure was directly addressed in *Reichert*:

> [T]he constitutional infirmity is clear on the face of the measure in that LR-119 attempts to amend the Constitution by means of a statutory referendum.

Id. ¶ 60.

In making the determination that the case was ripe and justiciable, *Reichert* was merely following the rule established long ago in *Livingstone* and the many other cases cited above. Where a proposed initiative or referendum is procedurally defective, pre-election review is required.

The logic of *Reichert* in rejecting the ripeness argument is unassailable. When there is a procedural defect, it infects the entire process. This defect cannot be repaired by a subsequent vote by the electorate. Put simply, if the electors vote to change the Constitution by simply amending a statute, it will be constitutionally invalid. It makes no sense to postpone the court review until after an election.

With respect to the present challenge to HB 325, Judge Ohman correctly

applied the reasoning of *Reichert* in rejecting the ripeness challenge. As instructed by *Reichert*, courts have a **duty** to act when an unconstitutional attempt to amend our Constitution is clearly presented. That is precisely what we have here. HB 325 is procedurally flawed as a statutory attempt to amend Montana's Constitution.

Jacobsen makes an egregious misstatement when she claims that Plaintiffs do not challenge the submission of HB 325 on the grounds of defective procedure. Jacobsen Br., p. 23. Clearly, Plaintiffs do. *See* Arg. 1(C), *supra*, and clearly the district court understood that there was such a procedural challenge. Tr. pp. 11-12 (Goetz for Plaintiffs):

> Here's what *Reichert* said (about) that the statutory referendum in that case which is very similar to the one in this case, constitutes an illegal attempt to amend Montana's Constitution without compliance with Article 14 (Sic. XIV), Section 8 of the Montana Constitution. So, one of the clear procedural difficulties the State has is this identical issue. Now, its not that we made this issue secret, it was the main issue in our opening argument. It's our leadoff issue in the reply brief.

Id. at 12. Thus, it is inexcusable that Jacobsen continues to claim that Plaintiffs do not challenge the submission of HB 325 on grounds of defective procedure.

Jacobsen argues that *Reichert* is distinguishable on ripeness because the time issues were more pressing in *Reichert*. The bill in *Reichert*, HB 268, called for it to be voted on in the June 2012 primary election and several judicial positions would be at issue in the ensuing general election. This *dicta* is a distinction without a

difference. Although the period between the primary election and the general election in *Reichert* was constricted, it was clear the appeal could have been expedited and decided prior to the general election. *Reichert*, ¶ 97 (Baker, J., concurring in part and dissenting in part). Thus, although the timing issue discussed by the *Reichert* majority was important, it was not essential to the holding.

In contrast, the **holding** in *Reichert* rejecting the ripeness argument was based on the fact that the bill in question was both facially unconstitutional and procedurally defective.

This holding in *Reichert* was followed in *MEA-MFT v. McCulluch*. There, this Court stated:

> In the present case the *MEA-MFT* challenged the facial validity of LR-123 and requested injunctive and declaratory relief. This Court recently discussed the law of justiciability in this same context in *Reichert*, ¶¶ 53-60, concluding that the pre-election challenge to a referendum was ripe and justiciable.

Id. ¶ 15. *MEA-MFT* summarized this Court's precedent regarding pre-election challenges, including both those cases rejecting such challenges, and those requiring exercise of jurisdiction. *Id.* ¶ 14. After this summary, the Court applied the facial unconstitutionality exception, holding the pre-election challenge ripe and justiciable because it was facially unconstitutional.

Jacobsen also makes a cute argument that Judge Ohman erroneously "smuggled a merits analysis into the constitutional ripeness inquiry." Jacobsen Br., p. 17. Plaintiffs are unsure what this means, but it carries the implication that this Court itself is an inveterate smuggler because it has for years required pre-election review where an initiative is "facially unconstitutional." Obviously, to make a determination of facial unconstitutionality, there must be some threshold examination of the merits. This Court said in *MEA-MFT*: "and, when faced with a measure properly challenged as not properly submitted under the election laws, or as facially defective, this Court has often considered the substance of the challenge." *Id*. ¶ 14 (citations omitted).

In sum, *Reichert* could not be more clear that this case is justiciable. HB 325 is facially unconstitutional, and it makes no sense to go through the needless expense of an election, as so eloquently stated in *Reichert*. *Id.* ¶ 59. And, Judge Ohman was correct in carefully following *Reichert*.

C. Jacobsen's arguments to distinguish *Reichert* on ripeness are unpersuasive.

Jacobsen seeks to distinguish *Reichert* on the basis that her ripeness objection is based on "constitutional" justiciability as opposed to "prudential."

Constitutional justiciability is not as metaphysical or confusing as Jacobsen seeks to make it. As *Reichert* made clear, this limitation on court jurisdiction,

"derives primarily from the Montana Constitution…." *Id.* ¶ 53. All that is required is that it meet the "case and controversy" requirement of the Constitution. *Missoula Air Pollution Control Bd. v. Board of Env'l Rev.*, 282 Mont. 255, 260, 937 P.2d 463, 466 (1997). *Reichert* explained:

> In general terms, a justiciable controversy is one that is "definite and concrete, touching legal relations of parties having adverse legal interests", "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 fact, or upon an abstract proposition." *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948).

Id. ¶ 53. In sum, constitutional justiciability simply requires that the issues be presented in an adversary context and the controversy must be one which a Court's judgment will effectively and conclusively operate, as distinguished from the dispute involving a purely political, administrative, philosophical, or academic conclusion.

Significantly, in a discussion of the constitutional basis for the ripeness doctrine, *Reichert* relied on *Gryczan v. State*, 283 Mont. 433, 443-444, 942 P.2d 112, 118-119 (1997). This Court held that case justiciable even though the challenged deviate-sexual-conduct statute had never been enforced against consenting adults. *Reichert*, ¶ 58.

MEA-MFT closely followed *Reichert* in finding its case ripe for judicial

review, stating:

> In the present case, as in *Reichert*, the issues **are definite and concrete, not hypothetical and abstract….As in *Reichert***, allowing the defective referendum to proceed to election does nothing to protect voter rights. Placing a facially invalid measure on the ballot would be a waste of time and money for all involved, including State and local voting officials, the proponents and opponents of the measure, the voters, and the taxpayers who bear the expenses of the election.

MEA-MFT, ¶ 18 (emphasis added).

Eschewing a bright-line approach to ripeness, this Court said in *Reichert*: "the more the question presented is purely one of law, and the less that the additional facts aid the court's inquiry, the more likely the issue is to be ripe, and vice-versa." *Id*. ¶ 56 (citations omitted).

In *Air Pollution Control Board*, this Court stated constitutional limits of standing are drawn from the "cases and controversies" requirement. That requirement stems from the "cases at law and in equity" definition at Article VII, § 4 Montana Constitution. *Id.*, 282 Mont. at 260, 937 P.2d at 466. Regarding the prudential aspect of justiciability, the Court further stated:

> With respect to the prudential basis for standing, this Court has stated that the trial courts' discretion **cannot be defined by hard and fast rules**, and that the **importance of the question to the public "surely is an important factor"**. *Committee for an Effective Judiciary v. State* (1984), 209 Mont. 105, 110, 679 P.2d 1223, 1226.

Id. (emphasis added). Academics have gone even farther. Professor Gene A. Nichol, Jr., put it this way in his article, "Ripeness & the Constitution":

> It is my view, therefore, that the Court's effort to bring the ripeness doctrine under the umbrella of the case or controversy requirement is unfortunate. Not only is constitutionalization inconsistent with the doctrine's premises, but it implies a rigidity and formalism that is at odds with the doctrine's operation. It threatens further to complicate and confuse the case or controversy requirement as well. Ripeness analysis is intertwined with the posture, factual record, and substantive standards of the claim being litigated. It cannot easily be encompassed by an independent, uniform constitutional limitation on judicial authority.

55 U. Chi. L.R. 153, 156 (1987). But there is no need here to explore the outer boundaries of the concept of constitutional ripeness. *Reichert* is squarely on point in rejecting both constitutional and prudential arguments.

D. **Plaintiffs have standing.**

It **appears** that Jacobsen does not contest Plaintiffs' standing to bring the present action. However, Jacobsen seems to hedge her bets with this cagey statement: "the Secretary does not make any **prudential** standing arguments in this appeal." Jacobsen Br., p.7, n.2 (emphasis added). Does this mean she thinks she is keeping her powder dry for a potential constitutional standing argument?

Whatever her latent position is, Jacobsen makes no effort to brief the standing issue, therefore it need not be considered. *See Marriage of McMahon*,

2002 MT 198, ¶ 6, 311 Mont. 175, 53 P.3d 1266 ("this Court has repeatedly held that we will not support unsupported issues or arguments…this Court is under no obligation to locate authorities or formulate arguments for a party in support of positions taken on appeal.").

Many cases have found standing on the part of voters in cases involving the judiciary article. See *Comm. for an Eff. Jud'y v. State*, 209 Mont. 105, 110, 679 P.2d 1223, 1226 (1984) ("We hold that a registered voter has the standing to make this assertion." p. 110); *Brown*, ¶¶ 8-24; *Keller v. Smith*, 170 Mont. 399, 401, 553 P.2d 1002, 1004 (1976); *Yunker v. Murray*, 170 Mont. 427, 554 P.2d 285 (1976).

E. There is no separation of powers problem.

Jacobsen throws in an argument that if the present challenge is accepted, the result will be a violation of the separation of powers principle. That argument is meritless. First, as made clear above, this Court has always exercised judicial self-restraint in considering whether to assume jurisdiction over pre-election challenges. It only intervenes under the two carefully-developed limited circumstances addressed above.

Recently, in *McLaughlin v. Montana State Legislature*, 2021 MT 178, ¶ 17, 405 Mont. 1, 493, P.3d 980, this Court rejected a similar separation of powers argument, holding: "the judiciary has an unflagging responsibility to decide cases and controversies, even those that involve the authority of a coordinate branch of

government or the court's own functions." Citing the earlier *McLaughlin* decision:

> [W]e touched also in that opinion on the justiciability issue, noting the "exclusive 'constitutional duty' and authority of this Court to 'adjudicate the nature, meaning and extent of applicable constitutional statutory, and common law and to render appropriate judgments thereon[.]"

Id. ¶ 15 (citing *McLaughlin v. Montana State Legislature*, 2021 MT 120, 404 Mont 166, 489 P.3d 482).

Reichert explicitly held that "[s]uch deference and restraint do not apply…where a challenged measure is facially defective. In that event, the courts **have a duty** to exercise jurisdiction and declare the measure invalid." *Id.* ¶ 59 (emphasis added).

In sum, there is no merit to the separation of powers argument.

CONCLUSION

For the foregoing reasons, the District Court's order granting summary judgment to the Plaintiffs should be affirmed.

Respectfully submitted, this 29th day of June, 2022.

By:

/s/ James H. Goetz

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 11, M.R.App.P., that the foregoing brief is proportionally spaced, printed in a 14-point Times New Roman (a Roman-style, non-script) type-face, is double spaced, and is not more than 10,000 words (7,851 words), excluding the Caption, Table of Contents, Table of Authorities, the Index to Appendix, and this Certificate of Compliance.

DATED this 29th day of June, 2022.

By: ***/s/ James H. Goetz***
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INDEX TO APPENDIX

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