IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 21-0382

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.

APPELLEES' ANSWER BRIEF

On Appeal from the Montana Second Judicial District Court, Silver Bow County,
The Honorable Kurt Krueger, Presiding

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the District Court correctly denied Defendant's motion to substitute as untimely.

STATEMENT OF THE CASE

The 2021 Montana Legislature passed HB 325, a proposed referendum that will be placed on the 2022 general election ballot. This is a bill which proposes to eliminate voting at large for each candidate for the position of Justice of the Montana Supreme Court, and instead, divide the State into seven judicial districts, with one Justice elected from each district.

On May 6, 2021, the Plaintiffs, a group of leading Montana citizens and organizations, filed their complaint in the Second Judicial District challenging the constitutionality of HB 325. The case was immediately assigned to Judge Krueger.

The sole defendant is Christi Jacobsen, Montana's Secretary of State. The Complaint seeks declaratory relief and an order enjoining Defendant Christi Jacobsen from certifying the legislative referendum and from presenting it on the 2022 ballot.

Defendant Jacobsen failed to file a responsive pleading within the forty-two (42) days from the day she was served (May 13, 2021). Plaintiffs moved for summary judgment, noting Jacobsen's failure to respond and informing Jacobsen that she had twenty-one (21) days to respond to the Motion for Summary

Judgment. Doc. 3–4.

Thereafter, the Office of the Attorney General contacted Plaintiffs' Counsel, taking the position that, although he had been served with the Rule 5.1 Notice of Constitutional Challenge, he had not been formally served with the summons and complaint. Although Plaintiffs' Counsel disagreed that such formal service is required, they agreed to send an acknowledgment of service to avoid arguing about it. The Attorney General promptly acknowledged service. Doc. 11.

Shortly after acknowledging service, the Attorney General filed a Motion for Substitution of Judge. Doc. 12. Plaintiffs objected because Defendant Jacobsen's time period for filing a substitution had lapsed. Doc. 13. On July 30, 2021, Judge Krueger entered an order denying the motion to substitute as untimely. Doc. 18.

STATEMENT OF FACTS

Christi Jacobsen, the sole defendant in this case, was served on May 13, 2021. Doc. 3, Exhibit 1 (Return of Service). On May 11, 2021, plaintiffs served the Montana Attorney General with a notice of constitutional challenge with a copy of the complaint. Doc. 2. This was accomplished by certified mail. Rule 5.1(a), M.R.Civ.P., provides that such notice may be served on the Attorney General "by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose."

Under Rule 12(a)(2), M.R.Civ.P., Defendant Jacobsen had forty-two (42)

days, until June 25, 2021, to file her responsive pleading. None was filed.

Plaintiffs filed their motion and supporting brief for summary judgment on July 1, 2021. Doc. 3–4. Defendant Jacobsen then had twenty-one (21) days to file a response.[1] Plaintiffs noted in their summary judgment motion that, though overdue, no responsive pleading had yet been filed.

Plaintiffs' counsel was then contacted by the office of Attorney General, which claimed that they had not been properly served in accordance with Rule 4 M.R.Civ.P. Although plaintiffs disagreed with this position, rather than argue about it and waste the Court's time, plaintiffs agreed to mail a copy of the summons and complaint so that the Attorney General could go through the process of "acknowledgment" of service. That was quickly accomplished.[2]

Defendant Jacobsen, although served with the summons and complaint on May 13, 2021, did not file a Motion to Substitute within the thirty (30) days

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[1] Rule 56(c)(1)(A) allows the filing of a motion for summary judgment "at any time." Although a summary judgment motion may be filed at any time, under Rule 56(c)(1)(B) the response of the non-moving party is due "within twenty-one (21) days after the motion is served or a responsive pleading is due, whichever is later."

[2] Judge Krueger had previously set a hearing date on plaintiffs' motion for summary judgment for August 3, 2021. Because of the wrangle over whether the Attorney General was properly served, plaintiffs agreed to a joint motion to vacate the August 3 hearing date. That hearing was rescheduled by Judge Krueger for September 1, 2021. That hearing did not take place because of the present appeal by the Attorney General.

allowed by § 3-1-804(4), MCA.

Even though Defendant Jacobsen lost her right to substitute by failing to file a timely motion, the Attorney General sought to use his argument that *he* was not properly served, to resurrect Jacobsen's right of substitution. See Doc. 12 (Jul. 16, 2021 Motion to Substitute). Appellees objected because Defendant's motion was untimely. Judge Krueger agreed:

> While the Court acknowledges the importance of ensuring the Attorney General is properly notified of, and able to defend as needed, all suits against the State and state officers in whatever capacity, the Attorney General is *not* presently a party in this matter. Further, since the Defendant allowed sixty-four (64) days to pass since being served with the Complaint of Summons, the Court shall not grant her *Motion for Substitution of Judge*.

Doc. 18 (Aug. 12, 2021 Order Denying Motion to Substitute Judge), p. 2.

STANDARD OF REVIEW

"A district court's determination of whether to substitute a judge is a question of law that we review for correctness." *Holmes v. Bretz*, 2021 MT 200 ¶ 4, ___ Mont. ____, 492 P.3d 1210 (quoting *City of Missoula v. Mt. Water Co.*, 2021 MT 122, ¶ 8, 404 Mont. 186, 487 P.3d 15; *Labair v. Carey*, 2017 MT 286, ¶ 11, 389 Mont. 366, 405 P.3d 1284).

SUMMARY OF ARGUMENT

The Montana Substitution Statute declares that an untimely motion for substitution is void. Defendant Christi Jacobsen failed to file a motion to substitute

Judge Krueger within the thirty (30) days allowed by the Substitution Statute.

The Attorney General, arguing that **he** had not been properly served with the Summons and Complaint filed a motion for substitution over sixty (60) days after service on Jacobsen of the Summons and Complaint. Judge Krueger properly denied that motion. In the first place, the right of substitution is accorded only to a "party" under the substitution statute. The Attorney General is not a party to this suit. Even if the Attorney General were to become a party at a later time, the right of substitution inheres only to the original party named in the complaint, Jacobsen. Thus, the Attorney would have no right to substitute even if he became a party.

The Attorney General's argument that he must be served under Rule 4(l), M.R.Civ.P., is incorrect because Jacobsen is sued in her official capacity and Rule 4(l) does not require service on the Attorney General. In any event, the Attorney General was served, contemporaneously with the filing of the Complaint, via a Rule 5.1 Notice of Constitutional Challenge which included a copy of the Complaint. Accordingly, the Attorney General has long been on notice and fully aware of this lawsuit and that the case was immediately assigned to Judge Krueger.

Although generally service under Rule 4 is strictly interpreted, there is a strong countervailing policy against elevating form over substance. Because the Defendant (and the Attorney General) have long been on notice of this lawsuit, there is no prejudice and the Attorney General should not be allowed a late

substitution right under an unduly crabbed interpretation of the Montana Rules.

ARGUMENT

I. THE MOTION FOR SUBSTITUTION WAS CORRECTLY DENIED AS UNTIMELY.

The Montana Substitution statute is clear: "Any motion for substitution that is not timely filed is void." § 3-1-804(4), MCA. The substitution statute, § 3-1-804(1)(a), provides: "a motion for substitution by the party served must be filed within 30 calendar days after service has been completed in compliance with M.R.Civ.P. 4." The Defendant, Christi Jacobsen, was served with the summons and complaint on May 13, 2021. Defendant Jacobsen's motion to substitute, filed on July 16, 2021, was not filed within 30 days of when she was served. Therefore, it was not timely filed and is "void." § 3-1-804(4), MCA.

The substitution statute provides: "The District Judge for whom substitution is sought has the jurisdiction to determine time limits, and if the motion for substitution is untimely, **shall** enter an order denying the motion." § 3-1-804(4), MCA (emphasis added). Thus, Judge Krueger had jurisdiction to decide the substitution motion and he correctly denied it.

II. THE ATTORNEY GENERAL, A NON-PARTY, MAY NOT INVOKE THE SUBSTITUTION STATUTE ON THE PRETENSE THAT HE WAS NOT PROPERLY SERVED.

The Attorney General is not a party to this suit. He has no separate right of substitution. Section 3-1-804(1) confers the right of substitution only on "each

adverse party." *See Pallister v. BCBS*, 2013 MT 149, ¶ 11, 370 Mont. 335, 302 P.3d 106. (Pallister, though a member of the represented class, was not a "party to the litigation" with rights under the substitution statute). The sole "adverse party," Jacobsen was served on May 13, 2021 and, beyond argument, did not exercise her right of substitution within 30 days. So, the question of whether the Attorney General was properly served makes no difference here—he is not a "party."

Even if the Attorney General should intervene as a party,[3] he would have no separate right to substitute a judge. In *Mattson v. Montana Power Co.*, 2002 MT 113, 309 Mont. 506, 48 P.3d 34, this Court summarized the statute as follows:

> When considered in its entirety, § 3-1-804(1)(c), MCA, clearly provides that **parties originally named in a summons** have thirty days, following service within which to file a motion for substitution, but after the time has expired for the original parties to do so, no parties who were not originally named in a summons may move to substitute.

Id. ¶ 13 (emphasis added). The sole party "originally named in [the] summons" is Christi Jacobsen.

Mattson added:

> Accordingly, § 3-1-804(1)(c), M.C.A., effectively affords an **original** party thirty days from the service of summons, to move for a substitution of the District Judge. Once the time expires for the original parties to move for a substitution, subsequently joined parties may not do so.

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[3] Rule 5.1(b), M.R.Civ.P., explicitly accords the Attorney General 60 days in which to intervene in a case challenging the constitutionality of a Montana law.

Id. ¶ 14 (emphasis added).

This Rule was followed in *Eisenhart v. Puffer*, 2008 MT 58, 341 Mont. 508, 178 P.3d 139. In that case, "the Puffers maintained that F&D had an independent right to file a motion free from the Puffers' time constraints[,]" because F&D was not originally a named party. *Id.* ¶ 16. This Court rejected that argument stating:

> We held…that § 3-1-804(1) states on its face that "[o]nce the time expires for the original parties to move for substitution, subsequently joined parties may not do so."

Id. ¶ 16 (citing *Mattson*, ¶¶ 13–14).[4]

In sum, the Attorney General is not a "party" and therefore has no right of substitution. Even if he were later to become a party he would not be adverse to Jacobsen so there would be no separate substitution right.

III. THE ATTORNEY GENERAL IS INCORRECT IN HIS INTERPRETATION OF THE SERVICE RULE.

The Attorney General argues that there was no effective service of process on Jacobsen because he was not formally served at the same time. In making that

[4] There is one limited exception to the Rule that a subsequently added party has no right of substitution. In some cases, if the added party is *adverse* to the others previously named, it may have the additional right of substitution. *See Goldman Sachs v. Mont. Second Jud. Dist. Ct.*, 2002 MT 83, 309 Mont. 289, 46 P.3d 606; *Eisenhart, supra.* That is not the situation here, nor could it ever be. The Attorney General lists himself as representing the defendant. Clearly there is no "adversity" between defendant Jacobsen and the Montana Attorney General.

argument, he takes significant license with the language Rule 4(l), M.R.Civ.P. He argues that "the Montana Rules of Civil Procedure require a plaintiff suing a state **officer** to serve the State by providing service of process on the Attorney General." AG Brief, p. 4 (emphasis added). Rule 4(l), however, makes an important distinction between, on the one hand, the "State" or a "state board", and on the other hand, "an officer or employee." Thus, the Attorney General's shorthand argument glosses over the actual language of the Rule, which is:

> **Serving the State.** The **State**, as well as any **state board or agency**, must be served by delivering a copy of the summons and complaint to the attorney general and any other party prescribed by statute…

(emphasis added).

Notably this part of the Rule applies only to "the State" or "state board or agency". In contrast, the balance of the Rule, which applies only to "individual capacity" suits does explicitly refer to "an officer or employee of the state." The balance of Rule 4(l):

> Whenever an **officer or employee** of the State is sued in an **individual capacity** for an act or omission occurring in connection with duties performed on the State's behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the state and also serve the officer or employee. Under Rules 4(e), 4(f), 4(g), 4(h), or 4(n) (emphasis added).

Id. (emphasis added.) Thus, the Attorney General's attempt to conflate the distinction between a state "officer" and the state itself, is inconsistent with the

actual language of the Rule.

The Attorney General, citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989), argues that a suit against state "officials" **is** against the State. This resort to case law amounts to a tacit acknowledgment that the literal language of the rule does not say what the Attorney General claims it says. More important, this resort to case law ignores the critical distinction found in the language of the rule itself which differentiates between "the State" and "state board or agency" and "officer or employee of the state." [5]

This Court has consistently required that a statute be interpreted first by looking at its plain language. *Holmes*, ¶ 9. This Court will "endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all the words used." *Mont. Trout Unlimited v. Mont. DNRC*, 2006

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[5] *Will* has no application here. It was not a suit contesting the adequacy of service of process on a state official. Rather, it involved specialized questions about sovereign immunity and immunity of government officials. In this connection, although courts have ruled that the Eleventh Amendment generally immunizes a state from damages, a government officer is not immune from suits for prospective injunctive relief. *Hafer v. Melo*, 502 U.S. 21, 25–26 (1991). *Hafer* is summarized cogently in *Gillpatrick v. Sabatka-Rine*, 902 N.W.2d 115, 129 (Neb. 2017): "[T]he [U.S. Supreme] Court has consistently explained that state officials sued *in their official capacities* for injunctive relief are persons under § 1983, because official capacity actions for prospective relief **are not treated as actions against the state**." (italics in original, bold emphasis added). The present suit seeks a prospective injunction against Defendant Jacobsen to restrain the placing of HB 325 on the 2022 Montana Ballot. Thus, the Attorney General's cherry-picked snippet from *Will* has no application here.

MT 72, ¶ 23, 331 Mon. 483, 133, P 3d. 224.

Among the applicable rules of statutory construction is the canon known as *expressio unius est exclusio alterius* (the expression of one thing [in a statute] implies the exclusion of another). *Ominex Canada, Ltd v. State, Dep't of Revenue*, 2008 MT 403, ¶ 21, 347 Mont. 176, 2001 P.3d 3. The express reference, in the first part of the Rule 4(l) to "the State" and its "state board or agency," must be taken to mean that other terms, not mentioned, such as "officer or employee," are excluded. This is particularly true in this case, given that these very words ("officer or employee") **are** used in the second part of Rule 4(l), which applies only to individual capacity suits.

In fact, the plain meaning of Rule 4(l) is that duplicate service on the state "officer" and the Attorney General is required only in cases in which the officer is sued in his/her **individual capacity**.

Appellant concedes that Defendant Jacobsen is being sued in her official capacity. "Here, McDonald is suing the Secretary of State in her official capacity." AG Brief, p. 4.[6] Accordingly, as sued in this case, Rule 4(l) provision for service of

[6] Despite this admission, the Attorney General's brief hedges its bets, arguing elsewhere:

> Even if Rule 4(l) were limited to individual capacity defendants, McDonald did not specify in the Complaint whether Christi Jacobsen was sued in her official or

the attorney general does not apply.

The Attorney General's citation to several other cases from out of state, in addition to *Will*, is equally unavailing. The Attorney General cites an obscure federal case from Vermont, *Kozaczek v. New York Higher Educ. Corps.*, 2011 US Dist. LEXIS 1276 (D. Vt.). That case is not helpful here because it involved application of the **federal** service rule: Rule 4(e)) of the Federal Rules of Civil Procedure. That Rule, in turn, required the plaintiff to comply with the rules of either Vermont or New York with respect to service on the state agency. *Id.* at *1. Neither Vermont's nor New York's Rule 4 is identical to Montana's. Moreover, plaintiff there sued an entity of the state, as opposed to a state official. At best, the Attorney General's citation to this case is only helpful to explain the "purpose" of the service rule, which is to notify the Attorney General's office of the pendency of the action. This function has been served here because the Attorney General received a prompt notice pursuant to Rule 5.1(a), M.R.Civ.P.

The Attorney General's argument is even more attenuated with his citation of an Alabama case, *Boyd v. State*, 960 So.2d 722 (Ala. 2006). There is not even a majority opinion in that case, it simply states: "WRIT QUASHED. NO OPINION." *Id.* There is a specially concurring opinion in *Boyd* but that opinion is

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individual capacity or in both capacities. See Doc. 1, ¶ 10.

AG Brief, p. 7, n. 1.

not helpful to the Montana Attorney General. It noted that the Alabama statute in question, § 6-6-227 of the Alabama Code, "requires notice to the attorney general only in challenges to a **civil** statute." *Id.* at 726 (emphasis added.) Because *Boyd* was a criminal case, the Alabama statute had no application in *Boyd* and *Boyd* has no application here.

Several Montana cases are also cited by the Attorney General, but each is cited for general propositions and none have specific application to the issue presented here.

In sum, the Rule's language simply does not support the Attorney General's argument. If the attorney General is dissatisfied with the language of the Rule, he can always petition this Court for revision. Short of that, the present language controls and requires that this Court affirm.

IV. THE ATTORNEY GENERAL'S ARGUMENT IMPROPERLY ELEVATES FORM OVER SUBSTANCE.

The Attorney General (accurately) cites several Montana cases for the proposition that the service rule should be strictly construed. Appellees acknowledge that policy. On the other hand, there is an equally important countervailing policy against exalting form over substance. § 1-3-219, MCA. Rule 1 provides that the Rules of Civil Procedure should be construed to secure the just, speedy, and inexpensive determination of every action. The policy of the law is to favor trial on the merits. *Schmitz v. Vasquez*, 1998 MT 314, ¶ 27, 292 Mont.

164, 970 P.2d 1039 *(quoting Hoit v. Eklund*, 249 Mont. 307, 311, 815 P.2d 1140, 1142 (1991)).

A trilogy of cases decided by this Court reject hypertechnical interpretations which would exalt form over substance. *See Yarborough v. Glacier County*, 285 Mont. 494, 948 P.2d 1181 (1997); *Quamme v. Jodsaas*, 1998 MT 341, 292 Mont. 342, 970 P.2d 1049; *Schmitz, supra*.

In *Yarborough*, the defendant sought to dismiss because the original summons was not served within a year and was lost by the plaintiff's attorney, who then issued a duplicate copy and served it on the defendant. This Court rejected defendant's argument that "Yarborough did not literally comply with Rule 41(c)…." *Id.* at 498, 948 P.2d at 1183. In rejecting defendant's arguments, this Court held:

> Yarborough complied with the substance and literal purpose of Rule 41(e), M.R. Civ. P. We conclude that to require more would **exalt form over substance** and do nothing to further the resolution of controversies on their merits which, after all, as we explained in *Larango* [*v. Lovely*, 196 Mont. 43, 637 P.2d 517 (1981)], is the ultimate purpose of our Rules of Civil Procedure.

Id. (emphasis added).

The Court in *Quamme* followed suit, holding that,

> Just as in *Yarborough*, this Court declined to elevate form over substance and we concluded that the plaintiff had complied with the substance and purpose of Rule 41(e). We held that the Defendant Vasquez was not prejudiced,

> because the amended summons adequately notified him that he was the defendant in a civil action….

Id. ¶ 22.

Likewise, in *Schmitz*, this Court rejected a stinting interpretation of the Montana Rules, stating "the purpose of the summons is to provide a defendant with notice that he has been made a party to an action and that he has twenty (20) days to appear before the court." *Id*. ¶ 19. The Court concluded:

> We conclude that Schmitz complied with the substance of Rule 41(e) and, as in *Yarborough*, we decline to elevate form over substance.

Id. ¶ 27.[7]

Here, the actual defendant in the case, Jacobsen, was formally served with the Complaint and Summons. Further, the Attorney General was on notice of this suit because of the contemporaneous service on him of the Rule 5.1(a) Notice. Thus, the policy underlying the Rule, placing the Defendant on notice of the lawsuit, is served in this case.

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[7] Montana's Rule 4(q) supports this flexible approach providing for a liberal amendment procedure:

> **Amendment.** Upon such notice and terms as it deems just, the Court in its discretion may allow any process or proof of service thereof to be amended at any time, unless it appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Although the Federal Rule 4 differs somewhat from Montana's rule, it also establishes that courts have discretion to interpret the rules to achieve a just result. In *Sanderford v. Prudential Insurance Co. of America,* 902 F.2d 897 (11th Cir. 1990), the Court eschewed an over-literal application of the rules stating the defendant "has not demonstrated he was prejudiced by the defect in the process. He had complete and total knowledge of Prudential's claim against him." *Id.* at 901. The court found "the summons served on him was in substantial compliance with the requirements of Rule 4(b), F.R.Civ.P…." Likewise, in *United Food & Commercial Workers Union, Locals 197,* 736 F.2d 1371 (9th Cir. 1984), the Court rejected defendants' argument that it had not been properly served because the summons mistakenly stated the number of days to respond. In affirming the District Court's refusal to dismiss, the Court observed "Rule 4 is a flexible rule that should be liberally construed **so long as the party received sufficient notice of the complaint**." *Id.* at 1382 (emphasis added).

In sum, the actual Defendant, Jacobsen, was served with the summons and complaint and was clearly on notice. The Attorney General was also clearly on notice. There is no prejudice. Acceptance of the Attorney General's argument would improperly exalt form over substance.

CONCLUSION

For the foregoing reasons Judge Krueger's denial of the motion to substitute must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes 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 4647 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

DATED this 21st day of September, 2021.

By: */s/* **James Goetz**
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