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

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.

APPELLANT'S REPLY BRIEF

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

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INTRODUCTION

The plain language of Rule 4(l) requires that for lawsuits against the State, the Attorney General must be served. Plaintiffs-Appellees 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 (collectively, "McDonald") attempt to evade this requirement by asserting for the first time in her answer brief that this is an official capacity suit against Montana Secretary of State Christi Jacobsen ("Jacobsen" or "the State"). They argue that, because Rule 4(l) doesn't explicitly refer to official capacity suits, they were not obligated to serve the Attorney General in this case.

But McDonald cannot overcome the elementary principle of law that suits against state officers such as Jacobsen in her official capacity are suits against the State. Thus, the first sentence of Rule 4(l) applies, and McDonald was required to serve the Attorney General. McDonald fails to forward any principled, rational, or textual basis for why the Attorney General should not have been served in this case and instead resorts to invoking inapplicable case law, canons of construction, and policy arguments. Indeed, the only salient rationale for adopting

McDonald's reading of Rule 4(l) is an impermissible one: to bail out McDonald for her failure to follow the basic rules of procedure.

McDonald fails, furthermore, to address the import of the acknowledgement of service signed on July 7, 2021. This provides an independent basis from Rule 4(l) for finding that service was effectuated on that date and that the State's motion to substitute was therefore timely. Without addressing the State's argument on this point, this Court should find these arguments are well-taken and any counterarguments are waived.

Service in this case was effectuated only when both Secretary Jacobsen and the State (via the Attorney General) were properly served. The State's substitution motion was accordingly timely, and the State respectfully requests this Court reverse and remand the district court's order denying it.

ARGUMENT

I. An official capacity lawsuit is a lawsuit against the State requiring service under Rule 4(l).

McDonald's Rule 4 arguments go far in attempting to excuse her failure to properly serve the State. But her textual contortions cannot overcome the plain meaning and basic logic of Rule 4(l). As explained in the State's opening brief, lawsuits against state officials in their official capacities are suits against the State. This Court has affirmed this principle. *State ex rel. Division of Workers' Compensation v. District Court*, 246 Mont. 225, 235, 805 P.2d 1272, 1279 (1990) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.") (citations omitted); *accord Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

Because McDonald's lawsuit is directed at a State official in her official capacity, her claims are against the State—which requires service on the Attorney General. *See* Rule 4(l) ("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). This is especially true here,

where the crux of Plaintiffs' complaint is on the constitutionality of a duly enacted law, not on any particular action Jacobsen has taken or will take. Plaintiffs do not, for instance, complain that even if HB 325 was constitutional, Jacobsen would err in putting it on the ballot consistent with her constitutional and statutory duties. This case is a straightforward constitutional challenge to a duly enacted law, and therefore it is plain that the State—not Secretary Jacobsen—is the real party in interest.

In *Reichert v. State*—another case concerning a legislative referendum on judicial districts—this Court viewed the case as a suit against the State. 2012 MT 111, ¶ 8, 365 Mont. 92, 278 P.3d 455. The Court specifically noted that "[p]laintiffs commenced this action on November 23, 2011, naming the State, *by and through Secretary of State Linda McCulloch*, as defendant." *Id.* (emphasis added); *see also id.* ("Plaintiffs asked the District Court to order the State to decertify LR-119 and to enjoin the State from placing LR-119 on the ballot."). Despite there being only one defendant, Secretary of State Linda McCulloch, the State was considered a party and the Attorney General defended the legislative referendum. *See, e.g., id.* (the Attorney General filing an answer and

motion for summary judgment). Plaintiffs' decision of who to name in the lawsuit is of no moment. In any suit against a state officer—in either her official or individual capacities—they must be served because there is a presumption that the state may be the preeminent entity in interest.

The plain language of Rule 4 serves a clear purpose for suits against the State. It effectuates the Attorney General's unique and critical role in Montana's constitutional republic. *See Mont. Power Co. v. Mont. Dep't of Pub. Serv. Regulation*, 218 Mont. 471, 482, 709 P.2d 995, 1001 (1985) ("He is constitutionally empowered to be the legal officer of the state and to have the duties and powers provided by law"). McDonald does not dispute that this includes the right of the Attorney General to represent the state and its officers in all litigation of a public character. *State ex rel. Olsen v. Mont. Public Serv. Comm'n*, 129 Mont. 106, 115, 283 P.2d 594, 599 (1955). Rule 4(l) squarely applies here.

To argue otherwise, McDonald seeks refuge in the *expressio unius est exclusio alterius* (*i.e.*, the expression of one is the denial of another) canon. McDonald Opening Br. at 11. Her argument is as simple as it is incorrect: Rule 4(l) explicitly addresses individual capacity suits but does

not explicitly contemplate official capacity suits, so the Rule must not apply to official capacity suits.

Official capacity suits are, however, mentioned in the second sentence of Rule 4(l), which states that for individual capacity suits "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). This language confirms that service of official capacity suits is governed by the first sentence of Rule 4(l) concerning suits against the State. This is also supported by Rule 12(a)(2) and (3) concerning answer deadlines, which includes official capacity suits in the same subsection with suits against the State but lists the deadline for individual capacity suits in a separate subsection. Thus, the structure of the Montana Rules of Civil Procedure supports the position that official capacity suits are suits against the State. *Cf. Christensen*, 2020 MT 237, ¶ 95 (courts may look to "the larger statutory scheme in which the term appears" in ascertaining a meaning of a statutory term).

McDonald's novel interpretation also makes no sense. The reason that Rule 4(l) distinguishes an "officer or employee of the State" in individual capacity suits is obvious: officers or employees of the State—*i.e.*, human beings—are capable of being sued in either their official or individual capacities. It is, however, impossible to sue the State or any state board or agency—*i.e.*, non-humans—in an individual capacity. Thus, when a state employee or officer is sued in an individual capacity, the State—via the Attorney General—must still be served because the State's interests may be implicated. For example, individual capacity suits for "acts or omission occurring in connection with duties performed on the state's behalf" may actually be official capacity suits that the State needs to defend. *See* Rule 4(l).

Or, as in this case, a plaintiff may fail to specify which capacity is at issue. Until her Answer Brief, McDonald had not asserted whether she was suing Jacobsen in an official or individual capacity. *See* State Opening Br. at 7, n.1. Now, in an effort to contort the language of Rule 4(l), she for the first time asserts she has sued Jacobsen in her official capacity. McDonald Answer Br. at 5.

McDonald's apparent purpose for presenting this newly discovered (and self-serving) fact is so that they may pretend that Rule 4(l) does not cover official capacity suits, resulting in an ambiguity that benefits McDonald's attempt to deprive the State of its right to file a motion to substitute. *Id.* ("Jacobsen is sued in her official capacity and Rule 4(l) does not require service on the Attorney General.") But this is not true—Rule 4(l) covers both individual and official capacity suits.

This Court should also approach McDonald's proposed *expressio unis* interpretive canon with skepticism. *See Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 57, 384 Mont. 503, 380 P.3d 771 ("Canons of construction can be contradictory, and the particular canon that governs the interpretation of a given statute depends on the context."). Rather than viewing this language through this particular canon, the better approach is an understanding that this Court "may consider prior case law … to aid in our interpretation of a statute." *Grenz v. Mont. Dep't of Natural Res. & Conservation*, 2011 MT 17, ¶ 28, 359 Mont. 154, 248 P.3d 785; *accord Christensen*, ¶ 95. Because Montana case law demonstrates that official capacity suits are suits against the State, *see Reichert*, ¶ 8;

State ex rel. Division of Workers' Compensation, 246 Mont. at 235, 805 P.2d at 1279, this Court should enforce the plain meaning of Rule 4(l).

And contrary to McDonald's assertion, the State's citation of case law is not a "tacit" concession that Rule 4(l) does not apply here. *See* McDonald Answer Br. at 10. McDonald cannot ignore basic legal principles regarding suits against the State, then use the black-letter law cited by the State to refute those arguments as evidence of ambiguity.[1] Instead, the axioms found in case law only punctuate what is already apparent in McDonald's papers: this is a lawsuit against the State. Indeed, McDonald fails to identify *any authority* that establishes that official capacity suits are not suits against the State. McDonald, rather, is grasping for textual straws as she searches for a way around the clear requirements of the rules.

[1] The State's citation of caselaw does not constitute an acquiescence to an extra-textual interpretation of Rule 4(l). That Rule 4(l) incorporates basic maxim of American law does not, as McDonald claims, render the provision ambiguous. Rule 4(l) also does not specify that the "state" that must be served is the State of Montana and not the State of Missouri. But reference to the text and basic logic allow the reader to discern the answer without declaring the statute ambiguous.

What's more, McDonald extensively cites to caselaw on what constitutes a party in cases in which the State is not a defendant. *See id.* at 6–8. This distracting and inapplicable caselaw cannot mask the principle that official capacity suits are suits against the State and that Rule 4(l) requires service of the Attorney General and the named State officer. Instead, the specific rule concerning service in lawsuits against the State should prevail over general provisions concerning who is a party in other lawsuits. *Ditton v. DOJ Motor Vehicle Div.*, 2014 MT 54, ¶ 22, 374 Mont. 122, 319 P.3d 1268 ("It is a well-settled rule of statutory construction that the specific prevails over the general.").

At bottom, "[r]ules for service of process are mandatory and must be strictly followed," *Cascade Dev., Inc. v. City of Bozeman*, 2012 MT 79, ¶ 14, 364 Mont. 442, 276 P.3d 862, official capacity suits are suits against the State, and Rule 4(l) applies to this case. McDonald cannot evade her service obligations by misinterpreting the plain intent of Rule 4(l), which is to ensure the Attorney General is adequately served when the State is a party. *Cf.* MCA § 1-2-102 ("In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the

former, so a particular intent will control a general one that is inconsistent with it.").

Accordingly, this Court should find: (1) that McDonald was required to satisfy Rule 4(l) and serve the Attorney General in this case; (2) service was effectuated on July 7, 2021; and (3) that the State's motion to substitute filed on July 12, 2021, was timely.

II. Policy arguments favor interpreting Rule 4(l) to include official capacity suits.

McDonald argues that policy considerations should favor finding that service was effectuated on May 13, 2021. Citing to three cases, she repeatedly argues that the State's argument elevates form over substance. *See* McDonald Answer Br. at 14 (citing *Schmitz v. Vasquez*, 1998 MT 314, 292 Mont. 164, 970 P.2d 1039; *Yarborough v. Glacier County*, 285 Mont. 494, 948 P.2d 1181 (1997); *Quamme*, 1998 MT 341).

McDonald misses the point of these cases, which concerned appeals of orders dismissing lawsuits for the plaintiffs' alleged failure to properly serve the defendants. These cases stand for the proposition that procedure should not be used as a cudgel to deprive a party the opportunity to have their case heard on the merits. *See Schmitz*, ¶ 27 ("To bar Schmitz from the courthouse because of procedural irregularities

from which Vasquez could show no prejudice would do nothing to further the goals and policies of the rules of civil procedure."); *Yarborough*, 285 Mont. at 499, 948 P.2d at 1184 ("A system, hundreds of years old, which exists solely to resolve controversies on their merits, cannot be paralyzed by the loss of one piece of paper which does no more than tell the other party to file an answer in twenty days.").

Here, the State is not trying to dismiss McDonald's lawsuit or win by default. Instead, the State is simply attempting to require McDonald to effectuate service as required by Rule 4(l) so that the State may make use of a statutory provision to which it is entitled. *See* MCA § 3-1-804(1) ("Each adverse party is *entitled* to one substitution of a district judge.") (emphasis added); *accord Holms v. Bretz*, 2021 MT 200, ¶ 11, 405 Mont. 186, 492 P.3d 1210. By comparison, McDonald identifies no prejudice that they would suffer by being required to adhere to the requirements of Rule 4(l).

Furthermore, requiring service of the Attorney General for official capacity suits furthers common sense policy goals. *See Quamme*, ¶¶ 20, 28 (stating that service requirements should be motivated by "common sense"); *Yarborough*, 285 Mont. at 499, 948 P.2d at 1184 (stating the

same). For example, if McDonald's interpretation of Rule 4(l) is accepted, a plaintiff could serve a state official with a complaint and summons in their official capacity and never inform the Attorney General. And as a result, despite it being a well-established principle that official capacity suits are suits against the State, the legal officer of the State (*i.e.*, the Attorney General), *see* MONT. CONST. art. VI, § 4(4), would have no knowledge of this suit. This is especially worrisome in instances in which an official at a large, busy State agency is served with an official capacity lawsuit and fails to inform the Attorney General in a timely fashion of the suit. McDonald's proposed interpretation of Rule 4(l) would hamstring the State's ability—via the Attorney General—to adequately defend its laws and protect its interests. This Court should decline to issue an order that would create such a disastrous precedent.

III. McDonald provides no explanation for the effect of the acknowledgement of service signed on July 7, 2021.

The State pointed out in its opening brief that the parties had signed an acknowledgement of service on July 7, 2021. *See* State Opening Br. at 11–12. The State also pointed out that independent of what Rule 4(l) requires, this agreement provides a basis for finding that the motion

to substitute was timely. *Id.* at 11, 14. Importantly, the State noted that parties should not be permitted to renege on their prior representations to gain an undue litigation advantage. *Id.* at 13–14.

McDonald provides no response to this argument. She simply acknowledges that the event happened, *see* McDonald Opening Br. at 2–3, but provides no analysis or argument on its import. Without a response from McDonald that the acknowledgement of service provides an independent basis for finding that the motion to substitute was timely, this Court should consider the argument waived and accept the uncontested factual record on its face.

Accordingly, this Court should find that service was effectuated on July 7, 2021, either pursuant to Rule 4(l) or through the parties' signed acknowledgment of service.

CONCLUSION

For the reasons provided above, this Court should reverse and remand the district court's order that the State's motion to substitute was not timely.

DATED this 19th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,814 words, excluding certificate of service and certificate of compliance.

/s/ Jeremiah Langston
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CERTIFICATE OF SERVICE

I, Jeremiah Radford Langston, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-19-2021:

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