IN THE SUPREME COURT OF THE STATE OF MONTANA
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.

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

APPELLANT'S OPENING BRIEF

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QUESTIONS PRESENTED

1. Whether a court has jurisdiction to entertain a substantive constitutional challenge to a pre-election legislative referendum that will have no effect on any voter or candidate during the current election cycle.

2. Whether the Legislature may, pursuant to Article VII, Section 8(1) of the Montana Constitution, submit a legislative referendum asking the qualified electors of Montana whether they wish to change the method of selection of supreme court justices to a district-based body.

3. Whether this Court should overrule *Reichert v. State* in light of *Brown v. Gianforte*.

STATEMENT OF THE CASE

On April 26, 2021, the Legislature passed HB 325. HB 325 is a legislative referendum that changes the method of selection for justices of the Montana Supreme Court from being elected statewide to being elected by districts. On May 6, Plaintiffs sued Secretary of State Christi Jacobsen ("Secretary") in her official capacity and sought to enjoin her from placing HB 325 on the November 2022 ballot. Plaintiffs alleged that HB 325 violated Article VII, Section 8(1) of the Montana Constitution as interpreted by this Court in *Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455. The district court heard arguments on Cross Motions for Summary Judgment on January 26, 2022. On March 23, 2022, the district court granted summary judgment in favor of Plaintiffs. Relying

extensively on *Reichert*, the district court determined that Plaintiffs' pre-election challenge to HB 325 was ripe and that HB 325 was unconstitutional under *Reichert*. The Secretary timely appealed.

STATEMENT OF THE FACTS

Plaintiffs challenge HB 325. App.A at 2. The Legislature passed HB 325 by a substantial margin during the 67th Legislature on April 26, 2021. Doc. 38 at 3. HB 325 is a legislative referendum that will be submitted to the qualified electors of Montana at the 2022 November general election. App.A at 2. HB 325—if approved—will establish seven supreme court districts of approximately equal populations that follow county lines, 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. *Id.* After the 2024 general election, HB 325 would also require the chief justice to be chosen by the majority vote of the seven justices. *Id.* Unlike LR-119—the 2012 referendum at issue in *Reichert*—HB 325 contains no residency requirement. Doc. 38 at 3. Qualified candidates for supreme court may run in any district they please. *Id.*

STANDARD OF REVIEW

This Court reviews summary judgment orders de novo. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704.

Summary judgment is only proper where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). Because, in this posture, the district court "is not called to resolve factual disputes," this Court reviews the district court's "conclusions of law to determine whether they are correct." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664.

Plaintiffs decidedly bear the burden of persuasion. When a party claims a duly enacted law violates a constitutional provision, courts apply the presumption of constitutionality. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. Though courts sometimes forget it, this presumption has teeth: "The constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* ¶¶ 73–74. This means that Plaintiffs have to overcome the presumption of constitutionality afforded to HB 325 and show that Article VII, Section 8(1) prevents district-based supreme court elections without a residency requirement *beyond a reasonable doubt*. *Id.* ¶ 74. Even if HB 325 was ripe for constitutional challenge, Plaintiffs

cannot overcome this presumption. *Id.* ¶¶ 73–74 ("[I]f any doubt exists, it must be resolved in favor of the statute.").

SUMMARY OF ARGUMENT

The district court erred by concluding that (1) this case presents a justiciable case or controversy and that (2) HB 325 violates the Montana Constitution.

Plaintiffs' challenge to HB 325 is not yet constitutionally ripe for review. Absent extraordinary circumstances, a court cannot prospectively rule on the hypothetical constitutionality of a referendum voters may not even approve. Under this Court's standard in *Reichert v. State*, a pre-election challenge to a legislative referendum satisfies constitutional ripeness when it will *affect* voters *in the same election cycle*. *Reichert,* ¶ 59. HB 325 will be submitted to Montana voters in November 2022, but will not affect any voter or candidate until the 2024 election cycle. Otherwise, this Court's precedents allow pre-election review only of procedurally defective legislative referenda. HB 325 has no procedural defect; Plaintiffs allege none.

The district court also surmised that courts intervene, pre-election, when a referendum is facially unconstitutional. But that analysis goes

to prudential standing, not constitutional standing. It is the latter, and more important standing threshold Plaintiffs cannot establish. For this Court to adjudicate HB 325's constitutionality under these circumstances would amount to an advisory opinion in violation of Article VII, § 4(1). *See Meyer v. Jacobsen*, 2022 MT 93, ¶ 48 (McKinnon, J., dissenting) ("Advisory opinions are not only at odds with these fundamental principles ordering our government, but they likewise are at odds with the development of a consistent and stable source of rules of law.").

If this Court reaches HB 325's merits, it's constitutional. Article VII, Section 8(1) of the Montana Constitution provides that Supreme Court justices "shall be elected by the qualified electors as provided by law." The phrase "provided by law" appears ubiquitously throughout the Constitution—specifically in Article VII. This Court's recent decision in *Brown v. Gianforte* interpreted the phrase "provided by law" in Section 8(2) as giving the Legislature the power to change the method of selection for district court judges. That language gives the Legislature the same power in § 8(1). *See Kottel v. State*, 2002 MT 278, ¶ 43, 312 Mont. 387, 60 P.3d 403. HB 325 is also distinguishable from the law at issue in *Reichert* because it contains no residency requirement for justices. Thus,

it doesn't create an additional "qualification" for justices and merely provides which qualified electors may select them.

To the extent *Reichert* contradicts *Brown* or suggests that HB 325 is unconstitutional, however, it must be overruled. *Reichert* relied on a flawed structural analysis of Article VII and an improper use of legislative history to conclude that election of supreme court justices by district added a "qualification" for justices in violation of Article VII, § 9(1). The plain meaning of Sections 8(1) and 9(1) demonstrate that HB 325 is constitutional.

This Court should reverse the district court.

ARGUMENT

I. This case is not justiciable.

A. The constitutional ripeness doctrine.

Plaintiffs' challenge to HB 325 is not ripe for review.

"'The judicial power of Montana's courts, like the federal courts, is limited to justiciable controversies.'" *Bullock v. Fox*, 2019 MT 50, ¶ 27, 395 Mont. 35, 47, 435 P.3d 1187, 1193 (quoting *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567). "'[C]ourts have an independent obligation to determine whether jurisdiction exists and, thus, whether constitutional justiciability

requirements … have been met.'" *Bullock*, ¶ 27 (quoting *Plan Helena, Inc.*, ¶ 11).

Article VII, Section 4(1) of the Montana Constitution confers original jurisdiction on district courts in "all civil matters and cases at law and in equity." Article VII, Section 4(1) "embodies the same limitations … imposed on federal courts by the 'case or controversy' language of Article III" in the federal constitution. *Plan Helena*, ¶ 6.[1]

"Standing is a threshold jurisdictional requirement that limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing)." *Bullock*, ¶ 28. Standing embodies "two complimentary but somewhat different limitations." *Plan Helena, Inc.*, ¶ 7. "Case-or-controversy standing limits the courts to deciding actual, redressable controversy, while prudential standing confines the courts to a role consistent with the separation of powers." *Bullock*, ¶ 28.[2] Case-or-

[1] "The central concepts of justiciability have been elaborated into more specific doctrines—advisory opinions … standing, ripeness, mootness, political questions … —each of which is governed by its own set of substantive rules." *Reichert*, ¶ 54.

[2] The Secretary does not make any prudential standing arguments in this appeal.

controversy standing is also known as constitutional standing. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 41, 360 Mont. 207, 225, 255 P.3d 80, 94. The case-or-controversy requirement "contemplates real controversies and not abstract differences of opinion." *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881.

Ripeness "concern[s] … whether the case presents an actual, present controversy." *Reichert*, ¶ 55 (quotations omitted). "[C]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id.* Ripeness can be seen as a "time dimension[] of standing." *Id.*; *see also id.* ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (citing *Tex. v. United States*, 523 U.S. 296, 300 (1998)).

Ripeness, thus, also has "both a constitutional and a prudential component." *Reichert*, ¶ 56. "The constitutional component focuses on whether there is sufficient injury, and thus is closely tied to standing." *Id.* ¶ 56. "'Whether framed as an issue of standing or ripeness, the [constitutional] inquiry is largely the same: whether the issues presented

are definite and concrete, not hypothetical or abstract.'" *Id.* (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010)). Ripeness doctrine overlaps with the idea that courts lack power to issue advisory opinions explaining "what the law would be upon a hypothetical state of facts or upon an abstract proposition." *Plan Helena*, ¶ 12.

Plaintiffs ask this court to issue an advisory opinion by intervening in the referendum process. *See Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650, 656 (1988) ("A referendum is not a single act, it is a process. That process is not complete until the electorate has spoken."). They want a prospective ruling on the hypothetical constitutionality of a referendum that could, potentially, become law *if* the voters approve it.

It's important to be clear about the nature of the challenged legislative action in this case. When it passed HB 325, the Legislature submitted a referendum to the people. This is clearly within its Article III, § 5 power. *See* MONT. CONST. art. III, § 5(1). Plaintiffs don't claim that the Legislature stepped outside the scope of its Article III, Section 5 referendum power when it decided to submit HB 325 to the people. *Cf. State ex rel. Livingstone v. Murray*, 137 Mont. 557, 568, 354 P.2d 552, 558 (1960) (exercising jurisdiction over a pre-election initiative improperly

submitted under the election laws). Instead, they want the court to say that if HB 325 were to become law, it would be unconstitutional.

But there's no room for "if" in this Court's jurisdiction. Courts lack power to issue rulings that depend upon contingent future events—especially when the law, *if approved*, will have no effect on any voter or candidate until the 2024 election cycle. *Havre Daily News*, ¶ 19; *cf. Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not … give opinion[s] advising what the law would be upon a hypothetical state of facts.") (cleaned up). Challenging HB 325's constitutionality before November 2022 amounts to an abstract debate about a hypothetical state of facts. And there's no exigency (hypothetical or otherwise) justifying departure from these bedrock justiciability principles. *See Meyer*, ¶ 44 (McKinnon, J., dissenting) ("Montana precedent has always protected the principle underlying the requirement that there be a justiciable controversy—that is, an appreciation for the separation of powers doctrine and for the concomitant authority and jurisdiction of a court to act."). No one's right to vote would—even hypothetically—be affected until 2024

The Constitution requires this Court to stake its judicial power in much firmer ground.

B. HB 325's referendum is not constitutionally ripe for review under the *Reichert* standard

Both the district court and Plaintiffs agreed with the Secretary that *Reichert* controls regarding justiciability. App.A at 4–11; Doc. 39 at 8. And *Reichert* makes clear that HB 325 is not yet ripe for review. Any cursory reading of *Reichert* reveals that it expressly relied upon exceptional circumstances that justified the extraordinary measure of enjoining a pre-election legislative referendum.

Reichert involved a pre-election challenge to a similar 2012 legislative referendum known as LR-119. *Reichert*, ¶¶ 4–7. This Court concluded that a pre-election challenge to LR-119 was ripe for review both prudentially and constitutionally. *Id.* ¶ 58 (discussing constitutional ripeness); *Id.* ¶¶ 59–60 (discussing prudential ripeness). In its explanation of constitutional ripeness (contained exclusively in paragraph 58), the *Reichert* Court relied solely on unique concerns about LR-119's effect in the then-impending 2012 election:

> Starting with the constitutional component of ripeness, the Legislature has placed a referendum on the June 5 ballot concerning the election of Supreme Court justices. If passed,

> the statutory changes outlined in the referendum are effective immediately. They will change the manner in which justices are elected to Seats 5 and 6 … which are up for election this year …. While all registered voters in the state may vote in the June primary election for the candidates running for Seats 5 and 6, only registered voters in the Fifth and Sixth Supreme Court districts, respectively, will be permitted to vote for those seats in the November election (if LR-119) is adopted…. For those Plaintiffs who do not reside in the Fifth and Sixth Supreme Court districts, the disenfranchisement will occur this election cycle …. The issues presented are definite and concrete, not hypothetical or abstract, and this case thus presents a controversy in the constitutional sense.

Id. ¶ 58. If the voters approved LR-119, in other words, it would have forced a *statewide* primary election in June 2012 to select candidates for seats 5 and 6 but then *district-only* elections in November to select justices for those seats. The Court's jurisdiction rested on these immediate exigencies.

Amplifying this rationale were timing concerns about whether the Court would have sufficient time to issue an opinion on LR-119 before the November 2012 general election if the Court waited to hear a challenge until after the June 2012 election. *Id.*; *see also id.* ¶ 97 (Baker, J., concurring in part and dissenting in part) ("The Court determines that LR-119 presents unique grounds for pre-election review because of its effect in the current election cycle ...."). *Reichert* made clear that the *only*

reason the Court had jurisdiction to hear a pre-election challenge to LR-119 was because of the unique temporal exigencies at play: had LR-119 passed, the Court may have been hard-pressed or unable to prevent the alleged disenfranchisement of portions of the statewide electorate *later that year*. *See Reichert*, ¶ 58 (majority opinion). The exceedingly unique timing concerns this Court relied on to support its constitutional ripeness holding in *Reichert* don't exist here. HB 325 doesn't meet the *Reichert* justiciability standard because it will not affect any voter or candidate until the 2024 election cycle. If the voters approve it in November 2022, the first election HB 325 will impact will be the 2024 primary election. There will be ample time to consider the constitutional merits of HB 325 between November 2022 and 2024. In contrast, the *Reichert* Court in April 2012 intervened months before the June 5, 2012, referendum on LR-119 because the result could directly affect the voters in the November 2012 election. *Reichert*, ¶ 58. It's clear that no such exigency exists now.

But somehow, the district court concluded "there is no material difference between *Reichert* and the present case." App.A at 11. Its analysis, indeed, fundamentally misapprehended *Reichert*:

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

App.A at 5. That conclusion overlooked the distinctive circumstances that made *Reichert* meaningfully different than this case. The district court admitted the facts in *Reichert* were "somewhat different" but agreed verbatim with Plaintiffs that this was a "distinction without a difference." *See* App.A at 10; Doc. 38 at 8.

Its sole rationale—lifted directly from Plaintiffs' briefing—involved an odd mis-extrapolation from Justice Baker's *Reichert* dissent: "Although the time constraints [in *Reichert*] were more narrow than they are here, it was made very clear in … Justice Baker['s separate opinion] that there would have been time to consider the case after the primary election." App.A at 10–11; *see also* Doc. 38 at 8 ("As the dissent in *Reichert* made clear, there would have been time for the Court to consider and strike down HB 268 after the primary election and before the general").

Relying on Justice Baker's opinion for that proposition was illogical and self-contradictory. In fact, adopting the logic of Justice Baker's *Reichert* dissent should have led the district court to the entirely *opposite* conclusion than the one it reached. Here's how.

First, it's important to note that Justice Baker dissented as to whether a pre-election challenge to a legislative referendum was justiciable. *See id.* ¶¶ 91–100 (Baker, J., concurring in part and dissenting in part).[3] She would not have reached the merits until after the referendum passed. *Id.*

But, second, her view that this Court would have had plenty of time to consider the case after the June 5 primary election and prior to the November general election *didn't win the day*. *Id.* ¶ 97. She disagreed with the majority's "temporal exigency" exception and believed the case nonjusticiable. *Id.* ¶ 100 ("Because a decision on the constitutional issues could have been rendered quickly following the primary election had the referendum passed, the Court's interference now is not, in my view, 'absolutely essential.' I dissent."). The *Reichert* majority, however,

[3] The Secretary believes Justice Baker's dissent in *Reichert* was entirely correct in determining that the LR-119 was not prudentially or constitutionally ripe.

disagreed. It didn't believe there would be sufficient time. Yet the district court here strangely adopted Justice Baker's explanation of why, in her nonprecedential view, *Reichert* was *not justiciable* to support its conclusion that this case is. The district court can't have it both ways.

The district court effectively ignored the State's argument that *Reichert*'s temporal circumstances don't exist here. But courts can't opt for a dissenting opinion's preferred outcome to evade the compulsions of majority—precedential—opinions.

And, in any event, Justice Baker's characterization of the *Reichert* majority's holding on ripeness is, in fact, *identical* to the State's position in this case. If the district court had followed Justice Baker's logic, it should have led the district Court to *agree* with the State that this case is distinguishable from *Reichert* and, therefore, not justiciable. *Reichert*, ¶ 97 (Baker, J., concurring in part and dissenting in part) ("The Court determines that LR-119 presents *unique* grounds for pre-election review because of its effect in the current election cycle, observing that the measure threatened to disenfranchise voters outside the Fifth and Sixth Supreme Court Districts."). The exigencies the Court identified in

Reichert—the very exigencies Justice Baker understood the Court to be identifying—do not exist in this case.

The district court never grappled with the Secretary's arguments that Plaintiffs in this case cannot meet the *Reichert* ripeness standard.

This Court should reverse. Unless and until voters approve HB 325, it remains constitutionally unripe.

C. The district court erroneously smuggled a merits analysis into the constitutional ripeness inquiry

As discussed above, the district court's analysis of constitutional standing appears limited to several paragraphs on one page of its opinion. *See* App.A at 5. The rest of its ripeness analysis appears directed mostly to prudential ripeness**.** *See* App.A at 5-11. In the latter part of that analysis, however, the district court's opinion discusses arguments the Secretary made in the constitutional ripeness context. *See, e.g.*, App.A at 10 (discussing time issue in *Reichert*). The Secretary, therefore, discusses several of the district court's other ripeness points as applied to constitutional ripeness.[4]

[4] As a side matter, the district court said that the Secretary "attempts to distinguish the ripeness inquiry conducted by the Supreme Court in *Reichert* by arguing that the residency requirement and the establishment of districts in LR-119 are 'impossible to disentangle' and

According to the district court, if a legislative referendum is clearly unconstitutional, ripeness doesn't matter:

> Considering the question presented regarding the constitutionality of a legislative enactment relating to election of the Montana Supreme Court justices by district has already been squarely addressed by the Montana Supreme Court in *Reichert*, this Court does not find itself to be issuing an advisory opinion—it is simply acting in conformance with an opinion that has already been issued by the Montana Supreme Court.

App.A at 6. Such ends-dictate-the-means reasoning flouts basic jurisdictional principles and this Court's precedents, which—absent exigent circumstances—only allow pre-election judicial review of *procedurally* defective legislative referenda.[5]

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thus the Court cannot rely on *Reichert* and the same issues do not exist in HB 325." App.A at 6. That's blatantly incorrect. The Secretary never made those merits arguments in the ripeness context (constitutional or prudential). *See* Doc. 38 at 5–14. Nothing in *Reichert*'s constitutional ripeness analysis permits or requires an inquiry into the merits. *See Reichert*, ¶ 58. The merits of HB 325 are relevant only to prudential ripeness. *See id.* ¶¶ 59–60.

[5] As explained below, the district court's "ends"—its conclusion that HB 325 is unconstitutional under *Reichert*—is wrong.

1. Courts don't gain constitutional jurisdiction over a pre-election referendum simply because it summarily concludes the measure is unconstitutional

The Montana Constitution gives the people the right to make statutory changes by initiative as well as the ability to alter or abolish the Constitution by initiative. *State ex rel. Mont. Sch. Bd. v. Waltermire*, 224 Mont. 296, 299, 729 P.2d 1297, 1298–99 (1986). Generally, "it is not the function of this Court to intervene in the initiative process prior to the peoples' vote absent extraordinary cause." *Id.* This Court's older cases often fail to differentiate between prudential and constitutional ripeness, creating confusion over the threshold for the justiciability of pre-election challenges to initiatives. *Reichert*, however, demonstrates that constitutional ripeness involves no merits analysis. *See Reichert*, ¶ 58.

The district court pointed to language from *Waltermire* permitting it to invoke constitutional jurisdiction of a facially unconstitutionally initiative. *See* App.A at 8-9. In *Waltermire*, this Court "accepted jurisdiction over pre-election initiative challenges … where the challenged initiative was unconstitutional on its face." 224 Mont. at 299–300, 729 P.2d at 1297 (citing *State ex rel. Steen v. Murray*, 144 Mont. 61,

394 P.2d 761 (1964)). But that doesn't give courts *carte blanche* to review any proposed initiative on the merits.

Waltermire and *Steen* don't differentiate between constitutional and prudential ripeness. *Waltermire*, like other older cases, also doesn't use the terms "ripeness," "standing," or "justiciability." *See* 224 Mont. at 297–302, 720 P.2d at 1297. Unsurprising, given the relatively recent creation of those terms and/or concepts. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of* Citizen Suits, *"Injuries," and Article III*, 91 Mich. L. Rev. 163, 167–69 (1992) (noting that the injury-in-fact test was a "recent creation"); Marla Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. Rev. 1, 22 (1992) (noting that Abbot Lab., Inc. v. Gardner, 387 U.S. 136 (1967) "is heralded as beginning the modern era of ripeness"). *Waltermire* makes sense, then, only as a prudential ripeness case. *Cf. Waltermire*, 224 Mont. at 301 (declining discretionary jurisdiction).[6]

[6] Even in the prudential standing context, the *Waltermire* Court declined to get involved in a pre-election initiative despite allegations that it conflicted with the U.S. and Montana constitutions because "[n]o constitutional conflict would exist until and unless the Initiative was enacted into law by popular vote in November." 224 Mont. at 301. And, even after the vote, there would be time "to raise objections to the Initiative before it took effect as law." *Id.*

Reichert, however, clearly differentiates between constitutional and prudential ripeness and cites *Waltermire* and *Steen* to support its analysis of the latter. *See Reichert*, ¶ 58 (constitutional ripeness), ¶¶ 59–60, ¶ 59 n.7 (citing *Waltermire* and *Steen* when addressing prudential ripeness). That's dispositive. This Court cannot consider HB 325's merits for purposes of *constitutional* ripeness.

At this point, it's unclear whether HB 325 will ever affect voters or candidates. If voters approve it, there will be ample time to adjudicate its constitutionality before it affects anyone. The case is simply not ripe.

2. HB 325 is not procedurally defective

A referendum's substantive constitutionality is fundamentally different from its procedural constitutionality. The district court erroneously merged the two. App.A at 9. In the district court's view, "*Reichert* was clear that the measure there in question amounted to an attempt to amend the Montana Constitution by statutory means." *Id.* (citing *Reichert*, ¶ 78). So—the "logic" goes—because the substance of HB 325 changed the method of selection for Supreme Court justices in violation of the Montana Constitution, it amounted to a procedural flaw

justifying intervention. *Reichert* didn't do that, and neither has any other case—it would make the justiciability exception swallow the rule.

First, *Reichert* said that LR-119 "would *effectively* amend the Constitution." *Reichert*, ¶ 68 (emphasis added). It was not a literal attempt. The *Reichert* Court's statement about amending the Constitution, moreover, came in its discussion of *prudential* standing in Paragraph 60. *See Reichert*, ¶¶ 59–60 (discussing prudential standing). Its exclusive consideration of constitutional standing came in Paragraph 58. *Reichert*, ¶ 58.

Second, the sole other case cited by the district court for this proposition, *State ex rel. Livingstone v. Murray*, 137 Mont. 557, 354 P.2d 552, (1960), is completely inapplicable to the current scenario and actually favors the Secretary's position. See App.A at 9 ("The [*Livingstone*] Court … held that, where a legislative action is in conflict with the mandatory provisions of the Montana Constitution limiting legislative action, 'our plain duty is to declare the attempted amendment unconstitutional and void.'") (quoting *Livingstone*, 137 Mont. at 568).

In *Livingstone*, this Court enjoined the Secretary of State from putting an initiative on the ballot. 137 Mont. at 568. What the district

court's discussion of *Livingstone* omits entirely is *why* the initiative was unconstitutional. *See* App.A at 9–10. The *Livingstone* initiative was truly procedurally flawed because the Governor hadn't signed it. 137 Mont. at 565. On that basis alone this Court limited the legislative action and prevented the initiative from going on the ballot. *See id.* at 565–568; *accord* 137 Mont. at 569 (Angstman, J., concurring) ("I agree that the restraining order should be made permanent, but not for the reasons given in the foregoing opinion. I do not believe it is necessary for a proposed constitutional amendment to be submitted to the governor."). The substance of the ballot measure was not at issue in *Livingstone*.

Plaintiffs here facially challenge the constitutionality of HB 325. They mounted no procedural attacks. Characterizing the district court's (erroneous) conclusions about HB 325's substantive validity as a "procedural defect" merely smuggles in a merits analysis to cover for a justiciability deficit.

If "procedurally defective" really means "substantively unconstitutional," there are no limits on courts' pre-election review of legislative referenda. This cannot be. Practically, any initiative that violates the constitution could be recast as an illegal attempt to "amend"

it. Such a holding would grant courts license to intervene pre-election in the initiative process whenever they suspected a substantive constitutional violation. And it 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 referendum is procedurally defective.

HB 325's substance speaks to constitutional ripeness in only one relevant regard: whether and when it will affect plaintiffs, candidates, and voters. *See Reichert*, ¶ 58. No voter will be affected by this hypothetical law until the 2024 election cycle. This Court should reverse.

C. A ruling at this stage of the referendum process would violate the separation of powers.

As noted, Courts are reticent to review pre-election challenges to legislative referenda and limit their review to whether the measure is procedurally defective. This rule matters: it embodies respect for the Peoples' constitutional prerogative to enact law or amend the Constitution by initiative and the Legislature's constitutional power to submit legislative referenda to the People.

The Constitution thus gives the Legislature power to submit an act to the People for approval or rejection by referendum—or reserves it to

the people. MONT. CONST. art. III, § 5(1); *see also Montana Consumer Fin. Ass'n v. State*, 2010 MT 185, P 27 (Morris, J., concurring) ("Initiative and referendum provisions of the Constitution should be broadly construed to maintain the maximum power in the people."). "A referendum is not a single act, it is a process. That process is not complete until the electorate has spoken." *Harper*, 234 Mont. at 269, 763 at 656. And it is a process in which the judiciary has no part. *See generally* MONT. CONST. art. III, § 5(1).

Unsurprisingly, courts are deeply reticent to intervene "in referenda or initiatives prior to an election." *Cobb v. State*, 278 Mont. 307, 310, 924 P.2d 268, 269 (1996); *cf. Waltermire*, 224 Mont. at 300–01. And with good reason. The implications of judicial interference with the referendum process are deeply troubling.

Suppose the State had asked this Court to "pre-approve" HB 325 as constitutional before the people voted on the measure. Any court would summarily reject it as unripe. And it would be improper for the Court to place its thumb on the scales of the referendum process by giving its imprimatur to a measure on the ballot. *See Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 621, 338 Mont. 259, 165 P.3d 1079 ("[A

court] should avoid constitutional issues whenever possible."). Why should the outcome be any different where the roles are reversed? *Cf. Reichert*, ¶ 99 (Baker, J., concurring in part and dissenting in part) (criticizing *Reichert*'s "patronizing" decision to "protect the voters from a measure referred by the legislature"). If a court can opine about the prospective constitutionality of a prospective law in the referendum context, there's no principled reason it couldn't do the same with a prospective statute before its enactment.

As discussed above, the exigency that justified its unusual pre-election intervention in *Reichert* doesn't exist here. No voter will be affected by HB 325 until the 2024 election cycle. For that reason, this Court has far less justification to enjoin a pre-election referendum than it did in *Reichert*. It would, therefore, be an even greater encroachment on the Legislature's power and impossible to justify.

II. HB 325 is Constitutional

The district court decided *Reichert* squarely and fully resolved the question of HB 325's constitutionality. App.A at 11. But it failed to address the Secretary's argument about the effect of this Court's landmark decision in *Brown v. Gianforte* on the interpretation of Article

VII, Section 8(1). *See Brown*, ¶ 41. Perhaps this was because the district court believed that eliminating at-large voting for justices was a "draconian change." App.A at 14. Or perhaps because *Reichert* and *Brown* send mixed signals about the way this Court approaches the constitutional text. Whatever the reason, it's time for this Court to reaffirm for lower courts the clear rules enunciated in *Brown*.

On its face, Article VII, Section 8(1) gives the Legislature power to provide, "by law," the method of election for Supreme court justices. *See* MONT. CONST. art. VII, § 8(1). Throughout Article VII, "provided by law" means the Constitution has delegated a matter to the Legislature. It means the same thing in Section 8(1). *See Brown,* ¶ 41. This sound interpretation is confirmed by the history of the 1972 Constitutional Convention. To the extent this Court believes *Reichert* informs its analysis of Section 8(1) at all, *Brown* requires it to start over and engage in a new textual analysis.

It's important to note, however, that this Court need not overrule *Reichert* to uphold HB 325. HB 325 is distinguishable from LR-119 and the *Reichert* court's analysis of § 8(1) is best seen as anachronistic dicta in light of *Brown*.

Reichert decided that LR-119 was unconstitutional because "the language and structure" of other sections in Article VII, namely Sections 6(1), 6(2), 5(1), 9(1), and 9(4), "demonstrate that the Constitution intends Supreme Court justices to be elected and serve on a statewide basis." *Reichert*, ¶ 64. The Court determined that Section 9(1), in particular, forbids the Legislature from adding any additional "qualifications" to Supreme Court justices. *Id.* ¶ 62. The *Reichert* Court believed that LR-119 added a new qualification because it required a justice to be a resident of a specific district in the state. *Id.* ¶ 68. It also believed LR-119 would alter structure of the Supreme Court by "transform[ing] the Supreme Court into a representative body identical to the Legislature in the method of selection." *Id.* ¶ 70.

HB 325, unlike LR-119, does not contain a residency requirement. The *Reichert* Court was most concerned with the residency requirement and unconstitutionally adding a "qualification" for Supreme Court justices. HB 325 changes nothing for justices. It only affects which electors can vote for them.

Reichert also rejected the State's Section 8(1) argument without doing a textual or structural analysis and only considering legislative

history. *See id.* ¶¶ 73–78. And the *Reichert* Court didn't have the benefit of *Brown*. The consequence of *Brown* is that the Court must engage in a new analysis of Section 8(1)—from a textualist perspective. This interpretation leads to only one conclusion: the Legislature may determine the manner and method of Supreme Court justice elections.

But if this Court still reads *Reichert*'s discussion of Section 8(1) and LR-119 as applicable to its analysis of HB 325, then *Reichert* was wrongly decided and the Court should overrule it. *Reichert*'s holding was based on an atextual and structurally flawed analysis of Article VII.

A. Article VII, § 8(1) of the Montana Constitution gives the Legislature power to provide, "by law," how Supreme Court justices are elected.

When construing a provision of the constitution, Montana courts first look to the plain meaning of the provision's words, and resort to extrinsic aids of interpretation only when the express language is vague or ambiguous. *See, e.g.,* N*elson v. City of Billings,* 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. Article VII, § 8(1) says, in relevant part, "Supreme court justices … shall be elected by the qualified electors as

provided by law." On its face, that gives the Legislature power to adopt and alter the method of election for supreme court justices in Montana. One way the Legislature may do this is through its power to submit referenda to the people. *See* MONT. CONST. art. III, § 5(1).

The next question is: what does "provided by law" mean in Article VII?

The plain meaning of the phrase "provided by law" in § 8(1) means that the Legislature retains the power to set the method of election for supreme court justices. *Provided by Law*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining "provided by law" to mean "prescribed or provided by some statute"). In other words, the Legislature may decide which "qualified electors" elect justices.

A fundamental principle of statutory interpretation presumes that the same word carries the same meaning throughout the Constitution. *See Kottel*, ¶ 43 (applying to the Constitution the "rule that language is presumed to have the same meaning throughout a document"); *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170–173 (2012) (a word or phrasing is presumed to bear the same meaning throughout a text); *Env't Def. v. Duke Energy Corp.*,

549 U.S. 561, 574 (2007) ("We presume that the same term has the same meaning when it occurs here and there in a single statute.").

The 1972 Constitution used the phrase "provided by law" throughout Article VII. A look at how the Legislature has interpreted other "provided by law" provisions in Article VII removes any doubt about the meaning of that phrase. By the State's count, Article VII alone contains the phrase "provided by law" in thirteen other places. *See* MONT. CONST. art. 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."); 2(1) ("[The supreme court] has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law."); 4(2) ("The district court shall hear appeals from inferior courts as trials anew unless otherwise provided by law."); 5(1) ("There shall be elected in each county at least one justice of the peace with … monthly compensation provided by law."); 5(2) ("Justice courts shall have such original jurisdiction as may be provided by law."); 7(1) ("All justices and judges shall be paid as provided by law …."); 7(2) ("Terms of office shall be eight years for supreme court justices, six years for district court judges, four years for justices of the

peace, and as provided by law for other judges."); 8(2) ("For any vacancy … the governor shall appoint a replacement from nominees selected in the manner provided by law"); 8(2) ("Appointments made under this subsection shall be subject to confirmation by the senate, as provided by law."), 8(2) ("The appointee shall serve until the election for the office as provided by law"), 9(1) ("Qualifications and methods of selection of judges of other courts shall be provided by law."), 9(4) ("The residency requirement for every other judge must be provided by law.").

The Legislature has passed numerous laws pursuant to the Article VII "provided by law" provisions. *See generally* MCA §§ 3-1-101–3-20-105. For example:

• Pursuant to its Article VII, Section 1 power to provide "by law" courts other than the Supreme Court and district courts, the legislature has authorized small claims courts, *see* MCA § 3-12-102, established city courts, *see* MCA § 3-11-10(1), established municipal courts, *see* MCA § 3-6-101; and established water courts, *see generally* MCA §§ 3-7-101–502.

• Pursuant to its Article VII, Section 2(1) power to establish jurisdiction for the supreme court to "issue, hear, and determine…such other writs as may be provided by law," the legislature has given justices

of the supreme court jurisdiction to "issue and hear and determine writs of certiorari in proceedings for contempt in the district court." MCA § 3-2-212(2).

• Pursuant to its Article VII, Section 5(1) power to set compensation for justices of the peace, the legislature sets the salaries for justices of the peace. MCA § 3-10-207.

• Pursuant to its Article VII, Section 5(2) power to determine the jurisdiction of justice courts, the legislature has done just that. See MCA §§ 3-10-301—304.

• Pursuant to its Article VII, § 7(1) power to set compensation for supreme court justices and district court judges, the legislature has done so. *See* MCA §§ 2-16-403 (supreme court justice salaries), MCA § 3-5-211(1) (district court judge salaries).

In a game-changing decision, *Brown v. Gianforte*, 2021 MT 149, this Court considered the meaning of "provided by law" in Article VII, Section 8(2). In *Brown*, the Court considered whether SB 140—which abolished the Judicial Nomination Commission for district court judges—violated Article VII, Section 8(2). *Id.* ¶¶ 23–24. Section 8(2) says, in relevant part, "[f]or any vacancy in the office of … district court judge, the governor

shall appoint a replacement from nominees selected in the manner provided by law."

This Court determined that the phrase "in the manner provided by law" in Section 8(2) "delegates the process for selecting judicial nominees to the Legislature …" *Brown*, ¶ 41. In reaching that common-sense conclusion, this Court also examined transcripts from the Constitutional Convention and observed that the Constitution "delegated the process for selecting nominees to the Legislature in broad language that the selection of nominees be 'in the manner provided by law.'" *Id.* (quoting MONT. CONST. art. VII, § 8(2)).

Throughout Article VII, then, the phrase "as provided by law" or "in the manner provided by law" means the Constitution has delegated a matter to the Legislature. To conclude otherwise would be to create a one-time only exception that "provided by law" means something different in Section 8(1) than it means in the rest of Section 8 and throughout Article VII. This argument defies the principle that a term carries the same meaning throughout the same provision of the Constitution. *Kottel*, ¶ 43.

As the Supreme Court recognized in *Brown*, throughout Article VII, the phrase "provided by law" means the Constitution delegates a matter to the Legislature to implement as it will—consistent with other constitutional limits, of course. It means the same thing in § 8(1). So when Article VII, Section 8(1) provides that "Supreme court justices … shall be elected by the qualified electors as provided by law," it means that that the Constitution directs the Legislature to provide the method of election for supreme court justices.

Some of the "provided by law" provisions remove certain matters from the power of the Legislature, while leaving other matters to be "as provided by law." For example, Article VII, Section 9(4) sets constitutional residency requirements for supreme court justices and district court judges but leaves it to the Legislature to set residency requirements for "every other judge." MONT. CONST. art. VII, § 9(4). But not Article VII, Section 8(1)—that provision leaves it entirely up to the Legislature to determine the method of elections for Supreme Court justices. *Cf. Meyer v. Knudsen*, Op 22-0219, ¶¶ 12–15 (June 2, 2022) (determining that the phrase "enact laws" does not include constitutional amendments).

This interpretation isn't unique. Other state supreme courts have found the same broad grant of authority for "provided by law." *See, e.g.*, *Ill. State Toll Highway Auth. v. Am. Nat'l Bank & Tr. Co.*, 642 N.E.2d 1249 (Ill. 1994) (stating that "as provided by law" means as prescribed or provided by the General Assembly); *Hayden v. La. Pub. Serv. Com.*, 553 So. 2d 435, 439 (La. 1989) ("By using the phrase 'as provided by law,' the drafters of the constitution intended to allow the legislature to frame its grant of 'other regulatory authority' as it sees fit."); *State ex rel. Agnew v. Schneider*, 253 N.W.2d 184, 187 (N.D. 1977) ("We are satisfied that [as provided by law] fundamentally means that the subject matter which this phrase modifies is not 'locked' into the Constitution but may be dealt with by the Legislature as it deems appropriate."): *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 443, 258 N.W.2d 414, 425 (1977) ("The phrase 'as provided by law' clearly vests the Legislature with the authority to exert substantial control over the mechanics of how administrative decisions are to be appealed."); *Wann v. Reorganized Sch. Dist. No. 6*, 293 S.W.2d 408, 411 (Mo. 1956) (holding that "provided by law" "directs the legislature to provide the rules by which the general right which it [constitutional provision] grants may be enjoyed and protected.").

In sum, the plain means of the phrase "as provided by law" in Article VII means that the constitution leaves a matter to the discretion of the Legislature. *See Brown*, ¶ 41.

B. The 1972 Constitutional Convention debates support the plain reading of Article VII, § 8(1).

The transcripts of the Constitutional Convention don't reflect intent by the framers to require statewide election. The initial majority proposal for what was to become Article VII would have required, as a constitutional matter, statewide elections for supreme court justices: "The justices of the supreme court shall be elected by the electors of the state at large, and the term of the office of the justices of the supreme court, except as in this Constitution otherwise provided, shall be six years." Mont. Const. Conv., Vol. 1 at 487 (1986).

The convention rejected this proposal and adopted the language of the minority proposal, which today largely comprises Article VII, Sections 8(2) & 8(3). They rejected the one proposal that would have required statewide elections as a constitutional matter and, instead, drafted a constitution that remained intentionally silent about the method of election for justices of the Supreme Court. *Cf. Brown*, ¶ 41 (delegates rejected competing proposals for Section 8(2) resulting in

compromise that left matter to the Legislature to provide by law). The record of the Constitutional Convention also demonstrates that the delegates preferred, as a matter of principle, to leave matters to the legislature rather than to button down every detail in the Constitution. *See generally*, Vol. IV at 1020-1120. If any ambiguity remained after the 1972 Convention, the people settled the question in 1992. That year, the people approved amendments to the Constitution, including Article VII, Section 8(1). As the State has argued, Section 8(1) expressly directs the Legislature to prescribe and alter the method of election for supreme court justices.

C. *Reichert* is distinguishable

1. HB 325 contains no residency requirement

Reichert concluded that LR-119 was unconstitutional because it would have required candidates to reside in the supreme court district in which they were running, at the time of election. *Id.* ¶ 68. *Reichert* explained that this provision added a qualification for Supreme Court justices. *Id.* But—*Reichert* pointed out—Article VII, Section 9 already set qualifications for Supreme Court justices and didn't allow other qualifications to be provided by law. *Reichert*, ¶¶ 66–68. HB 325 contains

no residency requirement and adds no new qualifications for the office of Supreme Court justice. So *Reichert*'s constitutional analysis plainly doesn't apply to HB 325.

Reichert did also discuss the district-based elections aspect. But *Reichert*'s analysis of district-based elections is dicta that is impossible to disentangle from the residency requirement. The Court observed that "LR-119 … requires a candidate for the Supreme Court to be a qualified elector … of the district *from which the candidate is elected*." *Id.* ¶ 70 (emphasis added). And the Court found it notable that "the State characterize[d] the intent of [LR-119] as being to tie Justices to the districts from which they are elected." *Id.* (internal quotation marks omitted). These passages suggest that the *Reichert* Court thought that LR-119's residency requirement unconstitutionally changed the structure of the Court from a neutral, statewide body, to a truly representative one.

HB 325 eliminated LR-119's residency requirement. HB 325 therefore breaks the link that caused *Reichert* Court relied on in concluding that LR-119 unconstitutionally altered the structure of the supreme court. *See id.* ¶¶ 69–70. Because HB 325 doesn't have a

residency requirement, it would not convert the Supreme Court into a representative body. *Reichert* does not foreclose the ability of the Legislature to follow its Article VII, Section 8(1) directive to "provide by law" a district-based election for Supreme Court justices.

Finally, regardless of whether it's possible to disentangle *Reichert*'s entire analysis of LR-119 from the residency requirement, the district court wholly failed to discuss the effect of *Brown* on the interpretation of Article VII, § 8(1).[7]

2. Reichert's Article VII, § 8(1) analysis was based primarily on LR-119 adding "qualifications"

Reichert's analysis of Section 8(1) is both anachronistic and distinguishable. It rejected the State's pre-*Brown* Article VII, § 8(1) argument. *See Reichert*, ¶¶ 73–78. *Reichert* found significant that Section 8(1) is titled "Selection" and "does not purport to address the qualifications of Supreme Court justices." *Id.* ¶ 74. It said qualifications "are covered exclusively in Article VII, Section 9, which is titled

[7] Despite briefing by the Secretary on the issue, *see* Doc. 38 at 18–21, the district court's only discussion of *Brown* for purposes of constitutional interpretation came by way of noting that this Court in *Brown* followed *Nelson*'s instructions on the rule of reasonable construction. *See* App.A at 13. The district court, thus, never addressed the Secretary's argument about *Brown*'s effect on *Reichert* and Article VII, Section 8(1).

'Qualifications.'" *Id.* Thus, "[§ 8(1)] is not authority for LR-119's addition of qualifications (i.e., voter-registration and residency requirements) to the office of Supreme Court justice." *Id.*

HB 325 does not contain a residency requirement for justices. It only modifies who can vote for each justice. It does not, therefore, add a "qualification." By creating districts, it simply addresses the manner of "selection" in line with the title of Section 8(1) and this Court's concerns in *Reichert*. *See id.* ¶ 74.

To be sure, *Reichert* proceeded to say that Section 8(1) was not authority to convert the supreme court into a district-based representative body. *See Reichert*, ¶ 75. But that language and analysis of § 8(1) must now be squared with this Court's "provided by law" analysis in *Brown*—particularly when there is no longer a residency requirement that can be said to add any "qualification." It must also be squared with the clear meaning of "provide by law" throughout Article VII. At the very least, this Court must begin its textual analysis anew and square these holdings. There's no canon of construction that would allow this Court to reaffirm *Reichert*'s analysis. This Court should, therefore, conclude that

"provided by law" gives the Legislature the same power in Section 8(1) as it does throughout the rest of Article VII.

D. If *Reichert* controls the meaning of "provided by law", then it is wrong and should be overruled.

If *Reichert* cannot be reconciled with the clear import of Article VII, Section 8(1), the meaning of "provided by law" throughout Article VII—and with *Brown*—then this Court must overrule it. This Court has made clear that "[t]he rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon the constitutional provision in the former decision is manifestly wrong." *State ex rel. Sparling v. Hitsman*, 99 Mont. 521, 555, 44 P.2d 747, 749 *R*; *see also Pearson v. Callahan*, 555 U.S. 223, 233 (2009) ("[S]tare decisis is not an inexorable command.") (cleaned up); *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) ("By applying demonstrably erroneous precedent instead of the relevant law's text … the Court exercises 'force' and 'will,' two attributes the People did not give it.") (citing THE FEDERALIST NO. 78, p. 465 (C. Rossiter ed., 1961)).

1. Reichert was based on a flawed structural analysis of Article VII

As discussed, Article VII, Section 8 covers "selection" of Supreme Court justices and provides that "Supreme court justices … shall be elected by the qualified electors as provided by law." *Reichert*, however, incorrectly concluded that Article VII, Section 9 of the Montana Constitution precludes the Legislature from converting the Supreme Court from a state-wide body to a district-based representative body because it would add a qualification. *See Reichert*, ¶¶ 62–64. The holding was based on a flawed interpretation of the original public meaning of Article VII, Section 9. This Court should fix that error.

Article VII, Section 9(1) addresses "qualifications" for Supreme Court justices. It is not, however, an affirmative constitutional requirement that Justices be elected at-large. Section 9(1) requires that potential judges: (1) must be a U.S. citizen; (2) who has resided in the state two years immediately before taking office; and (3) who has been admitted to the practice of law in Montana for at least five years prior to the date of appointment or election. MONT. CONST. art. VII, § 9(1).

Reichert relied on Sections 6(1), 6(2), 5(1), and 9(4) of Article VII to inform its interpretation of Section 9(1). *Reichert*, ¶¶ 63–64. Sections

6(1), 6(2), and 5(1) address the creation of judicial districts for district court judges and justices of the peace. Section 9(4) requires Supreme Court justices to reside "within the state." MONT. CONST. art. VII, § 9(4). Given that Section 9(1) already requires potential justices to have resided reside in the state two years immediately before taking office, Section 9(4) is clearly intended to ensure that Supreme Court justices reside in the state during their term. This is confirmed by the remainder of Section 9(4), which provides that, during his or her term of office, a district court judge shall reside "in the district" in which the judge was elected or appointed, and a justice of the peace shall reside "in the county" in which the justice of the peace was elected or appointed. *Id.*

Reichert nevertheless, found that:

> The language and structure of these sections demonstrate that the Constitution intends Supreme Court justices to be elected and serve on a statewide basis, district court judges to be elected and serve on a district-wide basis, and justices of the peace to be elected and serve on a countywide basis. When a justice or judge is to be selected from a discrete geographic area, the Constitution states that requirement expressly—as it does with district court judges and justices of the peace. The election of representatives and senators from "districts" is likewise explicit in the Constitution. See MONT. CONST. art. V, §§ 4, 14. With respect to Supreme Court justices, however, the Constitution could, but does not, specify district elections. To the contrary, the residency requirements in Section 9(4) plainly contemplate that Supreme Court justice, district court

> judge, and justice of the peace are "state," "district," and "county" offices, respectively.

Reichert, ¶ 64.

Reichert's interpretation of the text and structure of Article VII was wrong. The requirement in Section 9(4) that "Supreme Court justices shall reside within the state" ensures that justices reside in Montana. This serves the same purpose as the rest of Section 9(4), which ensures district court judges reside "in the district" in which they are elected or appointed, and justices of the peace reside "in the county" in which they are elected or appointed. It's obvious, after all, that judges should (and must) live in the political subdivision in which they serve. The same applies to Supreme Court justices. But since they serve the entire State, it simply follows that under Section 9(4) they must actually live within the corresponding boundaries of that political body (i.e., the entire state) while they serve. Section 9(4) prevents a justice from moving out of state once they are elected. There's no negative implication from Section 9(4) that justices must be elected statewide.

2. Reichert incorrectly invoked and applied legislative history.

As discussed above, *Reichert*'s rejection of the State's Article VII, Section 8(1) argument was incorrect at the time, but even more so after last year's *Brown* decision. The *Reichert* Court determined that Section 8(1)—added via amendment in 1992—was just a "timing measure." *Reichert*, ¶ 78. It relied on the legislative history of Section 8(1) to contravene its plain text. *See Nelson*, ¶ 14; Scalia & Garner, *supra*, at 56 ("[T]he purpose of the text must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires."). As discussed, *infra*, the meaning of Section 8(1) is unambiguous and therefore the Court cannot resort to extrinsic sources. *See* Scalia & Garner, *supra*, at 29 ("[C]ases approving the use of legislative history … disapprove of it when the enacted text is unambiguous).

Reichert's use of legislative history was clearly results-based. *Compare Reichert*, ¶ 80 (during the 1772 Constitutional Convention, the delegates rejected an amendment to Article VII that would have provided "[t]he justices of the Supreme Court shall be elected by the electors of the state at large") (citing Montana Constitutional Convention, Verbatim

Transcript, Feb. 29, 1972, p. 1086; Montana Constitutional Convention, Judiciary Committee Proposal, Feb. 17, 1972, vol. I, p. 48); *with id.* ("There is no indication in the delegates' discussion that they objected to the 'state at large' portion …. To the contrary, the assumption of all who spoke on the question was that, under whatever system the delegates finally adopted, Supreme Court justices would be selected on a statewide basis and district court judges would be selected on a district-specific basis.").

Reichert was wrong. If this Court cannot distinguish *Reichert*, it must overrule it. HB 325 is constitutional.

CONCLUSION

The Secretary assumes this Court means what it says when it comes to jurisdictional principles and constitutional interpretation. HB 325 is clearly not yet ripe for adjudication under the standard set in *Reichert* because it will not affect any voter until the 2024 election cycle. If this Court decides to overlook the clear constitutional ripeness principles from *Reichert* and reach the merits of HB 325, it must begin its textual analysis of Article VII, Section 8(1) anew. This Court's decision in *Brown* interpreted the phrase "provided by law" in Section

8(2) as giving the legislature the power to change the method of selection for district court judges. That phrase carries the same meaning in Section 8(1) and gives the Legislature the power to make supreme court justices elected by districts.

DATED this 8th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16 of the Montana Rules of Appellate Procedure, I certify that this Motion 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 9,567 words, excluding certificate of service and certificate of compliance.

/s/ Christian B. Corrigan
CHRISTIAN B. CORRIGAN

IN THE SUPREME COURT OF THE STATE OF MONTANA
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.

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

APPENDIX

CERTIFICATE OF SERVICE

I, Christian Brian Corrigan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-09-2022:

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