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 REPLY BRIEF

[ORAL ARGUMENT REQUESTED]

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INTRODUCTION

I. HB 325 isn't ripe for review.

Reichert made clear that the unique timing concerns about LR-119 and the November 2012 election justified the Court's involvement. *Reichert*, ¶ 58. It's *undisputed* that HB 325 will not affect any Montana voter until the 2024 election cycle. Without that exigency, the Court has no jurisdiction.

Plaintiffs believe otherwise. But let's be clear about their position. They want this Court to declare that *all* legislative referenda are ripe for review pre-election if the law is facially unconstitutional. Appellees' Br. at 22. They also want this Court to abandon common sense and declare that a facially unconstitutional referendum is tantamount to a procedurally flawed attempt to amend the constitution.

A. There's no "facially unconstitutional" exception to constitutional ripeness.

Plaintiffs are fundamentally confused about the distinction between constitutional and prudential ripeness.[1] The "facially unconstitutional" exception to ripeness is a *prudential* consideration. *See Reichert v. State*, 2012 MT 111, ¶ 59, 365 Mont. 92, 118, 278 P.3d 455, 474 ("[T]he prudential concerns of the ripeness doctrine [are] not implicated' where 'the possible constitutional infirmity [is] clear on the face' of the measure.") (quoting *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 903 (9th Cir. 1993)). Plaintiffs implicitly confirm this when they cite *Reichert* paragraphs 59 and 60 (which discussed prudential standing) in support of their pronouncement that "*Reichert* … properly rejected the ripeness challenge on both grounds—the measure was procedurally defective, and it was facially unconstitutional." Appellees' Br. at 24 (citing *Reichert*, ¶¶ 59, 60 n.7).

Constitutional ripeness, on the other hand, involves no merits analysis. *See Reichert*, ¶ 58 (discussing constitutional ripeness);

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[1] Plaintiffs' ignorance of the difference between constitutional and prudential ripeness explains their odd discussion where they accuse Defendant of "hedg[ing] her bets" and making a "cagey statement" that she doesn't contest prudential standing. Appellees' Br. at 32. Defendant's jurisdictional argument was dedicated to the difference between the two types of ripeness. Appellant's Br. at 6–24. Defendant didn't contest prudential standing/ripeness because *Reichert* settled it.

Portman, 995 F.2d at 903 ("The constitutional component focuses on whether there is sufficient injury, and thus is closely tied to the standing requirement …."). That's precisely why "a general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered, by the plaintiff." *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 200, 434 P.3d 241, 262. Plaintiffs' standing doesn't come from some type of general interest in the constitutionality of HB 325, it comes from the temporal proximity of the threatened injury to their right to vote. *See Reichert*, ¶ 58. There's no ripeness without the exigency.

Plaintiffs purport to explain the state of justiciability law pre-*Reichert* to justify their jejune view of ripeness. Appellees' Br. at 22–24. Their discussion is anachronistic, legally deficient, and missing key context.[2]

[2] Meanwhile, Plaintiffs charge Defendant with making a "pompous pronouncement" and "lectur[ing] this Court on 'decades' of its precedents" on ripeness. Appellees' Br. at 24. Defendant invited a nuanced discussion of a complicated concept. It speaks volumes that Plaintiffs would rather lob *ad hominem* attacks.

First, the principles of justiciability—including standing and ripeness—have evolved and hardened much in the last four decades. *See* Appellant's Br. at 20. Prior courts never considered distinguishing prudential and constitutional ripeness. *See id.* at 19–20.

Nowhere is Plaintiffs' naivete on the issue more apparent than their characterization of two cases, *State v. Waltermire*, 224 Mont. 296, 729 P.2d 1297 (1986), and *State ex rel. Mont. Citizens for Pres. of Citizens' Rights v. Waltermire*, 224 Mont. 273, 729 P.2d 1283 (1986), as "the most cogent articulation of the standard by which the Court will or will not exercise jurisdiction." Appellees' Br. at 22. Plaintiffs, similarly, discuss *State ex rel. Steen v. Murray*, 144 Mont. 61, 394 P.2d 761 (1964), as authoritative. Yet none of these cases differentiate between constitutional and prudential ripeness, or even use the term ripeness. *See* Appellant's Br. at 19–21. Plaintiffs, likewise, fail to refute the fact that *Reichert* cited *Steen* and *Mont. Sch. Bd. v. Waltermire* when addressing *prudential* ripeness—not constitutional ripeness. *See Reichert*, ¶ 59 n.7.

Plaintiffs' "history" also discusses *Cobb v. State*, 278 Mont. 307, 309, 924 P.2d 268, 269 (1996). As Justice Baker has noted, however, *Cobb*

was rendered in accordance with a statute at the time that allowed a pre-election challenge to an initiative if it challenged a "constitutional defect in the substance of a proposed ballot issue." *Reichert*, ¶ 95 (Baker, J., dissenting) (quoting MCA § 3-5-302(6)(a)(ii) (1995)). *Cobb* did not discuss standing or ripeness at all. So, any decisions from that era have nearly no relevance to a present analysis of constitutional ripeness.

1. Reichert's constitutional ripeness analysis controls.

Reichert spoke clearly: the case was *constitutionally* ripe because if voters approved LR-119 it would have affected the plaintiffs' right to vote in that election cycle. *Reichert*, ¶ 58 ("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."). Case closed.

Plaintiffs never attempt to refute the fact that *Reichert* clearly differentiated between constitutional and prudential ripeness. *See Reichert*, ¶ 58 (constitutional ripeness), ¶¶ 59–60 (prudential ripeness). That's likely why their brief consistently—perhaps deliberately—conflates the two.

Plaintiffs claim *Reichert* "eschew[ed] a bright line approach to ripeness" because it said "'the more the question presented is purely one of law, and the less that the additional facts aid the court's inquiry, the more likely the issue is to be ripe, and vice versa.'" Appellees' Br. at 31 (quoting *Reichert*, ¶ 56.). Unfortunately for Plaintiffs, they've taken this quote out of context. This statement was about *prudential* standing:

> *The prudential component*, on the other hand, involves a weighing of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. The principal consideration under the fitness inquiry is whether there is a factually adequate record upon which to base effective review. *The more the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa.*

Reichert, ¶ 56 (internal citations omitted) (emphasis added). This argument also highlights the internal confusion of Plaintiffs' brief, given that their main theory of ripeness is that pre-election review is "required" "where the proposed referendum is unconstitutional on its face." Appellees' Br. at 22.

Further, Plaintiffs attempt to satisfy *Reichert* actually confirms Defendant's position. Plaintiffs claim *Reichert* relied on "*Steen*, *Harper*, and *Cobb*" to conclude LR-119 was ripe. Appellees' Br. at 24–25.

Plaintiffs then cite passages from paragraph 59 of *Reichert*. *Id.* at 25 (citing *Reichert*, ¶ 59). Paragraph 59 of *Reichert* addressed *prudential* standing. *Reichert*, ¶ 59.

Plaintiffs' actual discussion of *Reichert*'s constitutional ripeness analysis is limited to one paragraph. *See* Appellees' Br. at 27–28. They repeat their nonsensical argument that "it was clear the appeal could have been expedited and decided prior to the general election." *Id.* at 28 (citing *Reichert*, ¶ 97) (Baker, J., dissenting)). As Defendant has explained, *see* Appellant's Br. at 14–17, because the referendum would have affected the right to vote in the current election cycle, the *Reichert* majority held the case was ripe, even if Justice Baker was correct that there was time to intervene before the election. *Reichert*, ¶ 58 (majority opinion). Although Defendant wishes Justice Baker's view had prevailed, it didn't.

Knowing *Reichert* forecloses their argument, Plaintiffs pivot to a non-right-to-vote case, *MEA-MFT v. McCulloch*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075, where this Court decided a pre-election challenge to a referendum was ripe. *Id.* ¶ 19. Although *MEA-MFT* was an outgrowth of *Reichert*, it doesn't change the fact that *Reichert* limited pre-election

challenges to referenda that could affect the right to vote in limited circumstances. And it's undisputed that those circumstances are not present in this case.

The relevant inquiry for constitutional ripeness focuses on the nature of the injury. In *Reichert*, as with HB 325, the plaintiffs were registered voters and the alleged constitutional injury was disenfranchisement. *Reichert*, ¶ 58. *Reichert* relied on unique concerns about LR-119's effect in the then-impending 2012 election. *Reichert*, ¶ 58 ("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.").

MEA-MFT employed the same logic but in a very different context. The *MEA-MFT* plaintiffs challenged LR-123, which would have provided a tax credit and potential tax refund, or outright State payment, to individuals in years in which there was a certain level of projected surplus revenue. *MEA-MFT*, ¶ 6. Plaintiffs challenged LR-123 as both an unconstitutional appropriation and an unconstitutional delegation of legislative power to the Legislative Fiscal Analyst ("LFA"). *MEA-MFT*,

¶ 8. The nature of those constitutional injuries is different than the right to vote.

The temporal aspect of the injury in *MEA-MFT* was highly relevant to the Court's reasoning and bonds its applicability to *Reichert*. LR-123 was to appear on the November 2012 ballot. *Id.* ¶ 6. First, as in *Reichert*, the *MEA-MFT* Court issued a summary order on the merits in August 2012 and released its opinion the following month. *Id.* ¶ 1. The Court's discussion of ripeness was rather cursory, but it made clear that "[i]n the present case, as in *Reichert*, the issues are definite and concrete, not hypothetical and abstract. LR-123 would have a definite impact upon the State treasury and would require the LFA's predictions of surpluses and calculations of refunds and payments in August 2013." *Id.* ¶ 18.

Second, the dispute arose from the calculations required to determine whether the credit-refund threshold was reached. *Id.* ¶ 6. This required the LFA to calculate a projected general fund balance by August 1, 2013. *Id.* ¶ 7. The process had "numerous separate steps, some involving other sub-steps, required to make this calculation" and "require[d] the LFA to project and anticipate fund balances, revenues,

transfers, appropriations and reversions to arrive at a conclusion." *Id.* ¶ 9.

So, if LR-123 passed, it would have immediately required the LFA to begin a process of determining whether money comes into the State treasury in taxes or is paid out in cash payments or refunds. *See MEA-MFT*, ¶ 22. The LFA's execution of this process—which would need to begin immediately after the election to comply with the August 1, 2013, deadline—would violate the separation of powers. *Id.* ¶ 29. The same exigency existed as in *Reichert*: the time between the passage of the referendum and the beginning of the constitutional injury was short.[3]

Finally, the impact on the state treasury—and thus the injuries to taxpayers—would also have occurred immediately after LR-123 passed. This Court has recognized that taxpayer standing is simply different from other constitutional injuries, particularly where plaintiffs challenge

[3] Justices Baker, Rice, and Cotter disagreed—believing the case wasn't ripe under *Reichert*. *MEA-MFT*, ¶ 35 (Baker, J., dissenting). Even if they were correct that *MEA-MFT* constituted an improper extension of *Reichert*, the timing exigency here is still nowhere near *MEA-MFT*. That being said, this Court has the opportunity to confirm that it meant what it said in *Reichert*.

an unconstitutional tax or appropriation. *See, e.g., Grossman v. Dep't of Nat. Res.*, 209 Mont. 427, 438, 682 P.2d 1319, 1325 (1984).

2. HB 325 is not "procedurally flawed".

Defendant has made her argument quite clear: a referendum's substantive constitutionality is fundamentally different from its procedural constitutionality. Appellant's Br. at 21–24. Plaintiffs feign outrage that Defendants' have continually pointed out that Plaintiffs don't make a true procedural challenge. *See* Appellees' Br. at 27. It's Plaintiffs' prerogative to pretend they're making a procedural challenge to HB 325, but Defendant isn't obliged to indulge their fantasy.

As Plaintiffs point out, older caselaw distinguishes between two types of illegalities in a referendum: (1) where the proposed referendum is unconstitutional on its face and (2) where the proposed referenda is procedurally defective. Appellees' Br. at 22; *Mont. Sch. Bd. Assoc.*, 224 Mont. at 300, 729 P.2d at 1299. The first is a facially unconstitutional referendum. The second is a procedural flaw, such as in *Livingstone*, 137 Mont. 557, 354 P.2d 552, where the initiative was procedurally defective because the Governor hadn't signed it. *Id.* at 565.

The district court erroneously said that "HB 325 is procedurally flawed—and that procedural flaw has a constitutional dimension." Appellant's App.A. at 9. That exception would swallow the entire rule. Any putative referendum that violates the Constitution would also be, as Plaintiffs claim, a "back-door" attempt to amend the Constitution. For example, a legislative referendum banning possession of all firearms would also constitute an attempt to amend Article II, Section 12 of the Montana Constitution. Plaintiffs' theory would render the "facially unconstitutional" exception superfluous.

Reichert didn't conclude that LR-119 was procedurally flawed. In its *merits* analysis, *Reichert* said LR-119 would "effectively" amend the Constitution, *Reichert*, ¶ 68, and classified it as a substantive—not procedural—flaw several times. For example, immediately after Plaintiffs accuse Defendant of "cherry picking" one word from *Reichert*, Plaintiffs quote paragraph 82 of *Reichert*. Appellees' Br. at 14–15. Once again Plaintiffs don't provide the full quote to the court—presumably because it confirms Defendant's point. *See Reichert*, ¶ 82 ("[T]hese changes constitute amendments to the Constitution, which cannot be achieved by means of a statutory referendum. Accordingly, we hold that

LR-119 is *facially unconstitutional*.") (emphasis added); *see also id.* ¶ 71 ("[T]his attempt to alter the structure of the Supreme Court by making it into a representative body composed of members elected from districts is likewise *facially unconstitutional*.") (emphasis added).

Reichert's ripeness analysis only discussed LR-119's *facial* validity (and of course only did so in the prudential standing context). *See Reichert*, ¶ 60 ("[T]he *constitutional infirmity is clear on the face* of the measure in that LR-119 attempts to amend the Constitution by means of a statutory referendum.") (emphasis added).

Adopting Plaintiffs' view would—in fact—smuggle a merits analysis into a purely procedural question.

II. HB 325 is Constitutional.

The Court need not overrule *Reichert* to uphold HB 325. This Court's ruling in *Brown*, 2021 MT 149, and HB 325's lack of a residency requirement give the Court ample jurisprudential justification. The Court should employ a fresh textual analysis of Article VII, Section 8(1)—consistent with its most recent precedents. There's no real tension between *Reichert* and HB 325.

A. Article VII, Section 8(1) Controls.

1. The plain text of Article VII supports Defendant's interpretation.

The term "provided by law" in Article VII, Section 8(1) means the Legislature retains the power to set the method of election for supreme court justices. *See* Appellant's Br. at 29–37. *Brown* similarly interpreted the phrase "provided by law" in Article VII, Section 8(2) as giving the Legislature the power to change the method of selection for district court judges. It's axiomatic that the same word carries the same meaning throughout the Constitution, and, therefore, "provided by law" must have the same meaning throughout Article VII, Section 8. *See* Appellant's Br. at 29–32.

What's abundantly clear from Plaintiffs' briefing is that they would prefer anything but a textual analysis of Article VII, Section 8. Their discussion of Section 8(1) retreats almost immediately to the "intent" of the 1992 amendments. *See* Appellees' Br. at 15–16.

When discussing *Brown*, likewise, they urge this Court to ignore the decision's textual analysis and only rely on *Brown*'s discussion of legislative history. *See id.* at 19–20. In *Brown*, some these same plaintiffs argued that "the transcripts leave no doubt that the framers envisioned a separate 'commission' to evaluate and nominate the

'nominees,'" *Brown*, ¶ 40, but this Court rejected that on textual grounds as well. *See id.* ¶ 40 ("And yet neither the words 'commission' nor 'committee' appear anywhere in Article VII, Section 8(2)").

Here, nothing in the text of Article VII mandates that justices be *elected* on a statewide basis—even if there's a negative implication in Article VII, Section 9 that the Legislature cannot add "qualifications." It also cannot be said that the purpose of Article VII was to ensure statewide elections when the delegates of the 1972 Convention rejected a proposal that would have specified: "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." *Reichert*, ¶ 80; *see also* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) ("[T]he purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires."). And then the 1992 Amendments specified that justices shall be elected by the *qualified electors as provided by law*.

Plaintiffs profess that the Court must consider "context" above all else. *See* Appellees' Br. at 18, 19. But what's obvious from Plaintiffs'

brief is that "context" is merely a euphemism for "heads we win, tails you lose." Were Plaintiffs serious about context, they wouldn't avoid the fact that the canon of consistent usage is itself a *contextual* canon. Scalia & Garner, *supra*, at 170–173; Appellant's Br. at 29–37.

Finally, the Court should give no weight to the "legal review note" from the Legislative Services Division cited by Plaintiffs. *See* Appellees' Br. at 5, 15; App.B. It's dated January 21, 2021. *Id.* App.B at 1. This Court didn't issue its decision in *Brown* until June 2021. Just like *Reichert*, it lacked the benefit of *Brown*.

2. Plaintiffs offer no viable alternative for interpreting Article VII, Section 8(1).

Plaintiffs do offer a competing interpretation of Section 8(1), claiming that it only gives the Legislature power to "implement procedures regarding the manner in which judges are elected, such as the non-partisan requirement and provisions for the advancement of the top two primary winners to the general election ballot." Appellees' Br. at 15–16.

It's worth scrutinizing where exactly Plaintiffs find the basis for that interpretation. According to them, "the entire purpose of the 1992 amendment was to address a glitch in the language of Article VII

regarding the filling of judicial vacancies." Appellees' Br. at 16. They also characterize the 1992 amendments as simply a "timing measure." *Id.* at 17 (quoting *Reichert*, ¶ 78).

So which is it? The "non-partisan requirement and provisions for the advancement of the top two primary winners to the general election ballot" are neither timing measures nor tied to the filling of judicial vacancies. Plaintiffs' interpretation of Section 8(1) wouldn't even survive their own legislative intent analysis.

What's more is that as much as Plaintiffs stake their entire case against Defendant's interpretation of Section 8(1) on its legislative history, they offer nothing from that same legislative history to support their competing interpretation. This again demonstrates the folly of relying on legislative history.

3. Reichert's analysis of Section 8(1) was incomplete.

Plaintiffs say *Reichert* rejected Defendant's Section 8(1) argument. That's half true. *Reichert* didn't conduct a textual analysis of Section 8(1) at all. *Reichert* also didn't have the benefit of *Brown*. The *Reichert* Court wasn't asked to, and didn't attempt to, grapple with incompatible interpretations of "provided by law" in Sections 8(1) and 8(2). *See*

Reichert, ¶ 78 ("Nothing in the plain language of Article VII, Section 8 ...."). Nor did *Reichert* consider the Section 8(1) argument disentangled from the residency requirement.

The 1992 amendments made multiple changes to the way judges were "selected" in Article VII, Section 8. *See Reichert*, ¶ 78 ("HB 353 added what is now Section 8(1) and amended other parts of Section 8 ...."). *Reichert* conducted zero textual analysis of Section 8(1) and then over-generalized the 1992 amendments without considering the specific text. *Brown* then held that the phrase "provided by law" is "broad language" that delegates the process for selecting nominees to the Legislature. *Brown*, ¶ 41 (citing MONT. CONST. art. VII, § 8(2)). *Reichert* never got there.

4. The legislative history of Section 8(1) is inconclusive.

Plaintiffs gesticulate emphatically to the Voter Information Pamphlet ("VIP") as evidence that the addition of Section 8(1) was not intended to allow district elections for justices. As noted above, nothing in the VIP suggests Plaintiffs' interpretation is correct, either. The legislative history isn't a silver bullet.

First, the 1992 amendments were called: "An Amendment to … Generally Revise the Law Relating to the Selection of Supreme Court Justices and Judges." Appellees' Br. App.C at 1. The VIP also discusses revising Article VII, Section 8 more generally. *See, e.g., id.* at 2 ("It would amend the Montana Constitution to clarify procedures for election of supreme court justices and district court judges and for the filling of vacancies."). The characterization of Section 8(1) as simply a "timing measure" is belied by the broad delegation of power to the Legislature in the text. *See Brown*, ¶ 41.

Second, the 1992 amendments weren't proposing a seismic shift in judicial selection. It's likely Section 8(1) simply removed any doubt about the breadth of the Legislature's authority over the selection of justices and judges. Although statewide election of justices had been the norm, nothing in Plaintiffs' briefing purports to conclusively limit the Legislature's power under the 1972 Constitution to set the method of *selection* of supreme court justices (as opposed to qualifications). If anything, 1992 Amendments clarified a latent ambiguity in the Constitution.

To demonstrate the immense folly of relying on legislative history, this Court should consider a hypothetical. What if in drafting the 1992 amendments the Legislature specifically considered a proposal for Section 8(1) to elect justices from districts (without a residency requirement), but then rejected that language in favor of the current "as provided by law" language. Plaintiffs would almost certainly scream from the mountaintop that there's no possible way the Court could read the 1992 amendments to support Defendant's interpretation of Section 8(1) because the Legislature expressly rejected it. Yet that's precisely what happened during the 1972 Convention when the Delegates rejected a proposal that would have specified that supreme court justices be elected statewide. *See* Appellant's Br. at 37–38. *Reichert* almost summarily dismissed this inconvenient history, but it's still there. And this time there's no Article VII, Section 9 "qualifications" problem.

B. HB 325 doesn't alter the structure of the Constitution.

Reichert contains a discussion about altering the structure of the Supreme Court. *Reichert*, ¶ 69. But *Reichert* said LR-119 would "transform the Supreme Court into a representative body identical to the Legislature in the method of selection." *Id.* ¶ 70. That analogy is

powerful because—without the residency requirement—the Supreme Court is not *identical* to the Legislature. Justices are not required to live in their districts and thus not "tied" to their districts like the Legislature. It's a hybrid. And that hybrid survives in light of Section 8(1)'s plain text and *Brown*.

Plaintiffs also surmise that the Constitution's purported distinctions between "judges" and "justices" supports their reading of Section 8(1). Appellees' Br. at 10. Their reliance on Article VII, Section 9(4) is particularly misplaced. Section 9(4) just ensures that Supreme Court justices reside in the state during their term. Section 9(1) already requires them to have resided in the state two years immediately before taking office, MONT. CONST. art. VII, § 9(1), so Section 9(4) merely explains that they must continue to reside in the state while serving. Section 9(4), likewise, requires district court judges to reside in the district in which they serve. *Id.* That's all to say that Section 9(4) forces justices and judges to live in their respective jurisdictions. Since the Supreme Court has jurisdiction over the entire state, justices can live anywhere in Montana. District court judges, likewise, have to live in the judicial district where they work.

C. HB 325 doesn't affect Article VII, Section 8(3).

Plaintiffs expend considerable effort hypothesizing that Article VII, Section 8(3) distinguishes between "voters of the state" and "voters of the district." MONT. CONST. art. VII, § 8(3) ("If an incumbent files for election and there is no election contest for the office, the name of the incumbent shall nevertheless be placed on the general election ballot to allow the voters of the state or district to approve or reject him. If an incumbent is rejected, the vacancy in the office for which the election was held shall be filled as provided in subsection (2)."). This is irrelevant to HB 325.

First, Section 8(3) doesn't affect HB 325 at all. Section 8(3) simply recognizes that some judges may be elected statewide while other are elected by districts—it doesn't specify which ones. The language provides guidance for either contingency. And, moreover, Supreme Court justices aren't the only judges that may be elected statewide. Article VII, Section 9 gives the Legislature the power to set the qualifications, method of selection, and residency requirements for judges of other courts. MONT. CONST. art VII, §§ 9(1), 9(4). So yes, Section 8(3) distinguishes between voters of the state and voters of the district—but that doesn't curtail the Legislature's power to provide by law which group is applicable to a

particular incumbent. Section 8(3) just says that in the event an incumbent files for reelection unopposed, the voters (qualified electors) must still accept or reject the candidate.

Plaintiffs then turn to an odd argument, claiming that adopting Defendant's interpretation of Section 8(1) would "leave the language 'voters of the state' unaddressed and meaningless." Appellees' Br. at 11–13. They claim HB 325 would violate the rule of avoiding a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used (the "surplusage canon"). Appellees' Br. at 11–13.

First, as explained above, the surplusage canon is entirely inapplicable. Defendant's interpretation of Section 8(1) doesn't render Section 8(3) superfluous or fail to give effect to every word of the Constitution. Even if Section 8(1) permits HB 325 to create district-wide elections for Supreme Court justices, "voters of the state" is not superfluous. Section 8(3) is a contingency provision regarding what happens when a judge or justices runs for reelection unopposed. *Cf. Holms v. Bretz*, 2021 MT 200, ¶ 11, 405 Mont. 186, 190, 492 P.3d 1210, 1212 ("The 'or' in the subsection … implicates the two conditions that

trigger the deadline for the plaintiff to file the motion to substitute."). In the event the Legislature provides by law a statewide judicial election for any judge, "voters of the state" in Section 8(3) applies. *See, e.g.*, MONT. CONST. art. VII, §§ 9(1), 9(4). The Legislature could also repeal HB 325 and return justices to statewide election. HB 325 doesn't eliminate that contingency.

Second, Plaintiffs misapply, misunderstand, and misconstrue the surplusage canon. That's probably why they don't discuss a single case applying it. What promotes their theory from implausible to preposterous is their discussion of *Cobb*, wherein this Court entertained a pre-election challenge to a referendum (pursuant to a now-repealed statute). *Cobb* didn't invoke, apply, or imply the surplusage canon. *Cobb* struck the measure from the ballot because "its passage would leave a defect in the constitution which could not be remedied except by another election." 278 Mont. at 309, 924 P.2d at 269. That defect? It would have eliminated the Secretary of State, but left duties in the Constitution that had to be carried out by the Secretary of State. *Cobb* is wholly inapplicable. The Court shouldn't waste its time dredging this half-baked theory for coherence.

D. *Stare Decisis* doesn't foreclose proper constitutional interpretation.

This Court doesn't need to overrule *Reichert* to hold HB 325 constitutional. *Reichert* is distinguishable for a variety of reasons. But if this Court finds irreconcilable tension between *Reichert* and HB 325/*Brown*, *Reichert* must be overruled.

It's true that *stare decisis* is "of fundamental and central importance to the rule of law." *State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996). But this Court has also said in the same breath that "[c]ourt decisions are not sacrosanct." *Id.* "[S]tare decisis does not require us to follow a manifestly wrong decision." *Id.* It's not "an inexorable command." *Kimble v. Marvel Ent.*, 576 U.S. 446, 455 (2015). Stare decisis "is at its weakest when [] interpret[ing] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

As the U.S. Supreme Court just explained in *Dobbs v. Jackson Women's Health Organization*, "when it comes to the interpretation of the Constitution" the Court "place[s] a high value on having the matter settled right." *Dobbs*, 2022 U.S. LEXIS 3057, at *61 (cleaned up). When a constitutional decision goes astray, the people are usually stuck with that decision until the Court corrects its mistake. *See id.* (citing *e.g.,*

Brown v. Board of Educ., 347 U.S. 483 (1954); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943)). This Court should uphold *Brown*'s interpretation of "provided by law." Any interest in *stare decisis* should give way to the Court's new and correct reading of a phrase that appears 63 times in the Constitution.

CONCLUSION

This Court doesn't have jurisdiction because HB 325 is not ripe for review. If the Court entertains the challenge, the plain text of HB 325 demonstrates that it's constitutional.

DATED this 6th day of July, 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 4,962 words, excluding certificate of service and certificate of compliance.

/s/ Christian B. Corrigan
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CERTIFICATE OF SERVICE

I, Christian Brian Corrigan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 07-06-2022:

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