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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY O'NEIL, GENE KIRSCHBAUM, RUSSELL SIAS, BARBARA LEVITT (Assembled Voter), DARELL LEVIT (Assembled Voter), and OTHER ASSEMBLED VOTERS,

Plaintiffs,

v.

THE MONTANA SUPREME COURT, THE STATE BAR OF MONTANA, and THE MONTANA SUPREME COURT AND THE STATE BAR OF MONTANA, JOINED TOGETHER AS THE INTEGRATED BAR OF MONTANA, and MONTANA SECRETARY OF STATE CHRISTI JACOBSEN,

Defendants.

Cause No. CV 23-161-M-DLC-KLD

DEFENDANT SECRETARY OF STATE CHRISTI JACOBSEN'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant, Montana Secretary of State Christi Jacobsen (hereinafter referred to as the "Secretary," "Secretary of State," or "Defendant"), by and through her counsel of record, files this brief in support of her Motion to Dismiss Plaintiffs' Amended Complaint (Doc. 14), pursuant to Fed. R. Civ. P. 12(b)(1) and/or Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

On December 29, 2023, Plaintiffs Jerry O'Neil, Eugene Kirschbaum, and several Assembled Voters (hereinafter referred to as "Plaintiffs," "O'Neil," "Kirschbaum," or "assembled voters") filed a "Petition for Declaratory and Injunctive Relief." (Doc. 1.) On February 2, 2024, Plaintiffs then filed an Amended Complaint. (Doc. 14.) [1] In the Amended Complaint, Plaintiffs do not mention the Secretary of State, nor do Plaintiffs provide any arguments or rationale in the Amended Complaint itself as to why the Secretary is a party in this suit. Nevertheless, the Secretary moves this Court to dismiss this case because Plaintiffs' claims fail on multiple grounds, and the Secretary does not belong as a party. The Secretary has fully and properly executed her obligations set forth in the Montana Constitution. The Secretary's Motion to Dismiss should be granted.

[1] The Secretary was not properly served nor provided a copy of Plaintiffs' Amended Complaint.

SUMMARY OF ARGUMENT

Plaintiffs O'Neil and Kirschbaum seek to be allowed to run for judicial office in Montana, even though neither O'Neil nor Kirschbaum are admitted to the practice of law in Montana, a qualification that is specifically set forth in the Montana Constitution. (Doc. 14 at 4-5; Mont. Const. art. VII, § 9.) In Plaintiffs' Amended Complaint, which makes no mention of the Secretary of State, Plaintiffs specifically seek to abolish a provision in the Montana Constitution, and in doing so, Plaintiffs allege a grab bag of constitutional claims.

Two provisions in the Montana Constitution are at issue. First, Article VII ("The Judiciary"), Section 9 of the Montana Constitution, lays out the "Qualifications" required for a candidate to serve as a Montana Supreme Court Justice or District Judge. Article VII, Section 9, Paragraph 1 states as follows:

> (1) A citizen of the United States who has resided in the state two years immediately before taking office is eligible to the office of supreme court justice or district court judge **if admitted to the practice of law in Montana for at least five years prior to the date of appointment or election.** Qualifications and methods of selection of judges of other courts shall be provided by law.

Mont. Const. art. VII, § 9. (Emphasis added.)

Second, Article VII ("The Judiciary"), Section 2 ("Supreme Court Jurisdiction"), Paragraph 3 of the Montana Constitution states as follows:

> (3) **[The Supreme Court] may make rules governing** appellate procedure, practice and procedure for all other courts, **admission to the bar** and the conduct of its members...

Mont. Const. art. VII, § 2. (Emphasis added.)

Unsatisfied with the Montana Constitution, Plaintiffs seek to abolish constitutional provisions and seek to avoid, in their own words, having to do the following: "(1) Having to be admitted to the practice of law in Montana for at least five years, as required by the Montana Constitution, Article VII, Section 9; and (2) Having to be a member of the Integrated Bar of Montana as required by Montana Supreme Court rules." (Doc. 14 at 2.)

Throughout their Amended Complaint, Plaintiffs concede not only that neither O'Neil nor Kirschbaum are admitted to the practice of law in Montana, but also that neither has ever been authorized to practice law in Montana. (Doc. 14 at 4-5.). Plaintiffs argue that because they are "well versed in the practice of law," the specific requirements of the Montana Constitution laid out above (*See* Article VII, Section 9) should be declared unconstitutional and that this Court should "declare that Plaintiffs [O'Neil and Kirschbaum] do not have to be members of the Integrated Bar of Montana in order to run for the office of Justice, or Chief Justice, of the Montana Supreme Court." (Doc. 14 at 5.)

Here, Plaintiffs' claims have no basis in law and fail for the many reasons laid out in this brief as well as for the reasons laid out in the *"Defendant The Montana*

Supreme Court's Brief in Support of Motion to Dismiss.[2]" In particular, Plaintiffs' claims fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Also, the Court lacks jurisdiction to consider them. Fed. R. Civ. P. 12(b)(1).

As it pertains to the Secretary, the Secretary serves all Montanans in carrying out the Constitutional and Statutory duties prescribed of her. The Secretary should be dismissed from this action because the Secretary has carried out and fulfilled her constitutional and statutory duties set forth in the Montana Constitution and in Montana law, and there is no justiciable controversy or claim upon which relief can be granted. The Secretary must support and defend the Constitution of the State of Montana, including the provisions at issue above.

Since Plaintiffs present no issues that pertain to the Secretary and because there is no meaningful relief that this Court could grant as to any allegation in Plaintiffs' Amended Complaint pertaining to the Secretary, this Court should dismiss Plaintiffs' Amended Complaint.

LEGAL STANDARD

Fed. R. Civ. P. Rule 12(b)(1) requires dismissal where the court lacks subject matter jurisdiction, such as when the claims alleged are not justiciable. Fed. R. Civ. P. 12(b)(1); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

[2] Defendant "The Montana Supreme Court" has also submitted a Brief in Support of its Motion to Dismiss. In addition to the arguments made herein, the Secretary agrees that the additional arguments made in that brief filed by "The Montana Supreme Court" further support the swift dismissal of this action.

Fed. R. Civ. P. Rule 12(b)(6) allows for the dismissal of a cause of action that "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A dismissal for failure to state a claim under Rule 12(b)(6) is proper and may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.3d 1035, 1041 (9th Cir. 1990).

To survive a motion to dismiss, a plaintiff's complaint must allege sufficient facts to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the court accepts as true a plaintiff's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper 12(b)(6) motion to dismiss. *Vazquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2017). The court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, unreasonable inferences," or conclusory legal allegations cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

The court then determines whether the well-pled factual allegations are sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 554). "[O]nly a complaint that states a plausible claim for relief survives a

motion to dismiss." *Iqbal*, 556 U.S. at 679. If a court decides in light of its judicial experience and common sense that the claim is not plausible, it may dismiss the case at the pleading stage. *Id.*

ARGUMENT

The Secretary of State has faithfully executed all statutory and constitutional duties prescribed by law. Plaintiffs' lack subject matter jurisdiction and fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(b)(6).

I. PLAINTIFFS LACK SUBJECT MATTER JURISDICTION.

Article III of the United States Constitution "limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). This requirement imposes a limitation known as "justiciability" on federal courts. *See Taxpayers of United States v. Bush*, 2004 WL 3030076, *2 (N.D. Cal. Dec. 30, 2004). "The justiciability doctrines—standing, ripeness, mootness, and the political question doctrine—present a threshold question in every federal case because they determine the power of the court to entertain a suit." *Id.*

"As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise

of the court's remedial powers on 499 his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197 (1975); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). For a federal court to have jurisdiction, a plaintiff must have suffered 'some threatened or actual injury resulting from the putatively illegal action . . ..' *See Warth*, 422 U.S. at 499.

Here, Plaintiffs' Amended Complaint implicates several doctrines going to this Court's subject-matter jurisdiction, including the political-question doctrine and standing. Notably, Plaintiffs' Amended Complaint, which does not mention the Secretary, does not present a justiciable controversy against her regarding an existing right, and to the extent that it could, the controversy is merely speculative and hypothetical.

1. Plaintiffs' Claims Present a Non-Justiciable Political Question.

This Court may not hear Plaintiffs' claims because they raise a nonjusticiable political question. The political question doctrine arises out of Article III's "case or controversy" requirement and has its roots in separation of powers concerns. *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 706 (1962). The doctrine "is essentially a function of the separation of powers, and it excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the Legislature] or the confines of the Executive Branch." *Rangel*

v. Boehner, 20 F. Supp. 3d 148, 166 (D.D.C. 2013) (cleaned up).

The political question doctrine rests on the tenet that "certain political questions are by their nature committed to the political branches to the exclusion of the judiciary." *See Taxpayers of United States v. Bush*, 2004 WL 3030076 (N.D. Cal. Dec. 30, 2004); *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir.1990). An issue is not properly before the judiciary when "'there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving' the issue." *Nixon v. United States*, 506 U.S. 224, 228 (1993).

Here, Plaintiffs' claims present a political question that cannot be resolved by this Court. The Montana Constitution explicitly provides in part that for a citizen to be eligible for the office of supreme court justice or district court judge, the citizen must be 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. In that it is undisputed that Plaintiffs are not licensed to practice law in Montana (Doc 14 at 4-5, 23.), Plaintiffs seek to abolish the above provision in the Montana Constitution. However, amending the Montana Constitution presents a political question that is constitutionally left to both Montana's electorate and legislature. Mont. Const. art. XIV, §§ 1,28, 9.

Additionally, in seeking to abolish a provision in the Constitution and in seeking a declaration from this Court that Plaintiffs qualify to be candidates for judicial office in Montana, Plaintiffs are essentially asking the Court to unilaterally alter the Montana Constitution. *See, e.g. Citizens for Fair Representation v. Padilla*, 2018 WL 6249911, *9 (In *Citizens for Fair Representation*, the plaintiffs claims that were brought there pertaining to the state's constitutional cap on the number of legislators were determined to be nonjusticiable because they turned on the resolution of political questions better suited to legislative resolution. The court there stated that "[i]ncreasing the numbers of legislators would appear to be susceptible to constitutional amendment ... yet plaintiffs bring this grievance to federal court, effectively asking the court to usurp the electorate and unilaterally alter the state constitution ...; a task committed to the legislative branch.")

Here, Plaintiffs seeking to alter the Constitution is an example of a claim that is nonjusticiable because such would require this Court to overstep its bounds by nullifying the constitutional authority granted to Montana's electorate and legislative branch. Montana Const. art. XIV, §§ 1,2,8,9. Additionally, nothing would allow for, nor are Plaintiffs even asking for, the Secretary to amend the State Constitution.

The Secretary is honored Montana entrusted her with the faithful

execution of the duties set forth in the Constitution prescribed by law. The Secretary has faithfully executed those duties and obligations. Accordingly, this Court should respect the separation of powers and dismiss Plaintiffs' Amended Complaint.

2. Plaintiffs Lack Standing.

As a threshold requirement of justiciability, a plaintiff must have a "personal stake in the outcome of the controversy . . . to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 442 U.S. 490, 490-99 (1975). "[T]he party invoking federal jurisdiction[] bears the burden of establishing" standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Standing protects "the idea of separation of powers." *United States v. Texas*, 143 S.Ct. 1964, 1969 (2023), and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To establish standing, the plaintiff must show "(1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely [as opposed to merely speculative] to be redressed by the requested relief." *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1646 (2022). The claimed in injury must be "concrete and particularized" and " actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992).

United States Supreme Court precedent rejects standing theories that rely on the speculative future actions of third parties. *Lujan*, 504 U.S. at 562; *Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990). Additionally, "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require." *Lujan*, 504 U.S. at 564. Then, as to traceability, the Court has found that it represents the simple notion that a plaintiff must sue the party who caused its injury, not an unrelated third party. *See Lujan*, 504 U.S. at 560-61.

Here, Plaintiffs lack case-or-controversy standing because among other things, their alleged injuries are not redressable nor traceable to the Secretary of State. The alleged injury at the core of Plaintiffs' claims is seemingly that they are unable to seek judicial office because of a provision in the Montana Constitution.

Plaintiffs allege nothing more than a theory that relies on the speculative allegations insufficient to show an injury that is concrete, particularized, and actual or imminent. While Plaintiffs seek to be declared eligible to run for judicial office, neither has filed for office, and in the case of Kirschbaum, he has not even expressed an intent to do so.

In accordance with Section 13-10-201, MCA, "[e]ach candidate in the

primary election, except nonpartisan candidates filing under the provisions of Title 13, chapter 14, shall file a declaration for nomination with the secretary of state or election administrator." §13-10-201, MCA. Plaintiffs make no allegation that they filed for office with the Montana Secretary of State's Office, nor have they filed for office. In Montana, candidate filing opened January 11, 2024 and closes March 11, 2024. Without mentioning the Secretary in the Amended Complaint, Plaintiffs appear to recognize that the present conditions and law require no obligation of the Secretary.

If Plaintiffs do suffer any injure (which they do not), the Secretary is certainly not the cause of it. She is bound to uphold the Constitution. The Secretary does not harm anyone, including these Plaintiffs, when she properly fulfills her statutory and constitutional duties under the law. Plaintiffs have failed to show any concrete injury-in-fact. Thus, Plaintiffs do not present a justiciable controversy against the Secretary regarding an existing right, and to the extent that it could, this is the very type of theoretical or hypothetical problems as applied to the Secretary that this Court lacks jurisdiction to decide.

Additionally, the assembled voter Plaintiffs join in the Amended Complaint as they "desire to vote for Plaintiffs… so they will get elected to" office. (Doc. 14 at 5.) These assembled voter Plaintiffs lack standing to challenge qualifications for public office without there being a particularized injury that would not extend to all

voters. *See Clark v. Weber*, 2023 U.S. Dist. LEXIS 189172, *4-6 (C.D. Cal. Oct. 20, 2023.) Here, there is not a particularized injury as any Montana registered voter could claim the same injury.

Overall, Plaintiffs' fail to establish Article III standing, a threshold requirement of justiciability applicable to all claims for relief as a matter of constitutional law.

II. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST THE SECRETARY UPON WHICH RELIEF CAN BE GRANTED.

Threshold jurisdictional issues aside, Plaintiffs also fail to state a claim upon which relief can be granted. Thus, this Court should dismiss this cause of action that "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

To survive a motion to dismiss, Plaintiffs' well-pled factual allegations must be sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. To do so, a plaintiff must plead "more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 554). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679. If a court decides in light of its judicial experience and common sense that the claim is not plausible, it may dismiss the case at the pleading stage. *Id.*

In additional to the reasons described above, Plaintiffs' desire as to how the Montana Constitution should read does not amount to any responsibility by the Secretary for any wrongdoing or violation of actual legal rights by the Secretary or her office. Plaintiffs never once mention the Secretary in the Amended Complaint, nor do Plaintiffs ask this Court to declare any wrongdoing by the Secretary. Plaintiffs recognize the present conditions require no obligation of the Secretary.

The Secretary has performed all legal duties required of her, including that of Section 13-10-201, MCA. ("Each candidate in the primary election, except nonpartisan candidates filing under the provisions of Title 13, chapter 14, shall file a declaration for nomination with the secretary of state or election administrator." § 13-10-201, MCA). Plaintiffs' Amended Complaint does not allege a single fact that shows the Secretary has done anything whatsoever related to Plaintiffs' claims in this matter. The Secretary has acted pursuant to her Constitutional duties in every instance that she has been required to do so.

What Plaintiffs seek is to ask the Court to abolish a provision of the Montana Constitution. The Secretary has no legal authority to unilaterally alter the Montana Constitution. Even viewed in the light most favorable to Plaintiffs, their claims must be dismissed because they fail to state a claim upon which relief can be granted. Plaintiffs fail to allege sufficient facts, that if true, would entitle them to relief under that claim.

Plaintiffs also fail to establish any Section 1983 claim. Section 1983 provides a cause of action for individuals who have been "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person or entity acting under color of state law. 42 U.S.C. Section 1983. Plaintiffs fail to allege any deprivation of rights secured by the Constitution, nor are there are any federal rights that Plaintiffs were deprived of.

For the reasons stated above, there are no uncertainties or controversies as to the Secretary's rights or duties. Plaintiffs have not been deprived of any right under the Constitution. Plaintiffs have no clear legal right to the relief requested and their claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the aforementioned reasons, the Court should dismiss Plaintiffs' Amended Complaint, with prejudice. The Secretary has faithfully executed all her duties and obligations in accordance with the law and will continue to do so.

DATED this 4th day of March, 2024.

MONTANA SECRETARY OF STATE
CHRISTI JACOBSEN

/s/ CLAY R. LELAND
AUSTIN MARKUS JAMES
CLAY R. LELAND
Attorneys for Secretary of State

CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: March 4, 2024

/s/ *Clay R. Leland*
Clay R. Leland

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this Brief in Support of the Secretary of State Christi Jacobsen's Motion to Dismiss is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word, is 3397 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

Dated: March 4, 2024

/s/ *Clay R. Leland*
Clay R. Leland