No. DA 25-0187

IN THE SUPREME COURT OF THE STATE OF MONTANA

MONTANA CONSERVATION VOTERS; JOSEPH LAFROMBOISE; NANCY HAMILTON; SIMON HARRIS; DONALD SEIFERT; DANIEL HOGAN; GEORGE STARK; LUKAS ILLION; AND BOB BROWN,

Plaintiffs and Appellants,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant and Appellee.

On Appeal from the Montana First Judicial District, Lewis & Clark County, Cause No. DV-25-2023-702-CR, Hon. Christopher Abbott

APPELLANTS' OPENING BRIEF

Molly E. Danahy
Rylee Sommers-Flanagan
Dimitrios Tsolakidis
Upper Seven Law
P.O. Box 31
Helena, MT 59624
(406) 998-6067
molly@uppersevenlaw.com
rylee@uppersevenlaw.com
dimitrios@uppersevenlaw.com
Attorneys for Appellants

Austin Knudsen
Montana Attorney General
Michael D. Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
Montana Department of Justice
PO Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov
Attorneys for Appellee

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2. Whether the District Court erred when it applied an unduly deferential federal presumption of legislative "good faith" in evaluating Plaintiffs' claim that the 2023 Montana Public Service Commission district map violates the Montana Constitution's prohibition against political discrimination.

3. Whether the District Court erred in finding that the 2023 Montana Public Service Commission district map was not drawn intentionally to discriminate against non-Republican voters although it locked in all five Public Service Commission seats for Republicans.

4. Whether the District Court erred in recognizing, for the first time in Montana history, an absolute legislative privilege that barred Plaintiffs from obtaining relevant evidence in discovery.

STATEMENT OF THE CASE

In 2023, the legislature adopted Senate Bill 109 ("SB 109"), which created a new map for the Montana Public Service Commission ("PSC"). Because the SB 109 map only elects Republicans to the PSC, Plaintiffs challenged it for diluting non-Republican votes—violating Montanans' fundamental right of suffrage—and as an unconstitutional partisan gerrymander—violating Montanans' fundamental right to be free from discrimination based on political ideas. Doc. 1.

Plaintiffs moved for a preliminary injunction on both claims on November 21, 2023. Doc. 6. The District Court correctly determined Plaintiffs' claims were justiciable and found Plaintiffs likely to succeed on their equal protection claim. Doc. 29. But the court found the balance of the equities favored leaving SB 109 in place during the litigation. *Id.* The District Court did not reach Plaintiffs' suffrage claim. *Id.*

During discovery, Plaintiffs served document and deposition subpoenas on SB 109's sponsor, Senator Keith Regier, seeking evidence related to legislative intent and Regier's map-drawing approach. Regier asserted legislative privilege. As a matter of first impression, the District Court found that Montana state legislators enjoy absolute immunity

from civil discovery. Doc. 64.

Defendant Secretary of State Christi Jacobsen demanded a jury on all fact issues. Doc. 32. Plaintiffs moved to strike the jury demand. Doc. 35. The court correctly determined the Secretary had no right to a jury because Plaintiffs raised only equitable claims. Doc. 96. Nonetheless, the court empaneled an advisory jury on the question of discriminatory partisan intent. *Id.*

The parties cross-moved for summary judgment in October 2024. Doc. 93; Doc. 101. Plaintiffs moved on their suffrage claim because the unopposed expert testimony conclusively established that SB 109 diluted non-Republican votes. Plaintiffs also moved on their equal protection claim because the undisputed facts showed that the legislature intended for SB 109 to lock in an all-Republican PSC. The court ruled that Plaintiffs established standing. Doc. 129. On the merits, the court determined that both claims required showing discriminatory intent and that whether partisan advantage was the "predominant factor" motivating the legislature's passage of SB 109 was a disputed fact. *Id.* If discriminatory intent was established, the court found that SB 109 could not satisfy strict scrutiny. *Id.*

Beginning on December 10, 2024, the District Court presided over a four-day trial on legislative intent. A divided panel of advisory jurors advised against finding for Plaintiffs. In its independent findings, the court erroneously ruled that Plaintiffs failed to show the legislature intended to favor Republican candidates and voters in enacting SB 109. Doc. 153. Plaintiffs timely appealed.

STATEMENT OF THE FACTS

I. The PSC Redistricting Process

The PSC regulates public utilities and other industries. Doc. 113 at 2 (Final Pretrial Order). It consists of five members elected from single-member districts. *Id.* When the Montana Constitution was enacted, PSC commissioners were elected at-large. Doc. 153 at 3 (Findings of Fact & Conclusions of Law, "FOFCOL"). As a result, the delegates had no reason to contemplate PSC redistricting. *See id.* Regarding redistricting more generally, the delegates recognized the legislature would not be "psychologically fitted to reapportion itself." Mont. Const. Conv., IV Verbatim Tr., at 685 (Feb. 22, 1972) (Del. Blend). Accordingly, they assigned redistricting authority for districted and popularly elected state and federal offices to the bipartisan Montana

Districting and Apportionment Commission ("Districting Commission"). Doc. 113 at 2.

In 1974, the legislature moved the PSC to district-based elections, assigning themselves the task of redistricting. *See* § 69-1-104, MCA. The 1974 districts remained unchanged until 2003, when the legislature redrew the map to reflect population changes. Doc. 113 at 2. The 2003 lines remained in place for two more decennial redistricting cycles. *Id.* In 2021, a group of Montanans successfully challenged the 2003 map as malapportioned in violation of one-person, one-vote. *Id.*; *see Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1286 (D. Mont. 2022). A three-judge federal court ordered the adoption of a new district map proposed by the Secretary. Doc. 113 at 2; *Brown*, 590 F. Supp. 3d at 1276, 1287. The court adopted the Secretary's map ("Secretary's Map") in part because it followed county lines, which the Secretary represented as traditional "state policy" for PSC districts. Doc. 113 at 3; *Brown*, 590 F. Supp. 3d at 1288–89. The Secretary's Map had a maximum population deviation between districts of 6.72%—well within the 10% allowed under federal equal protection principles—and thus satisfied the reapportionment needs resulting from population changes. Doc. 153 at 11; *see also*

Evenwel v. Abbott, 578 U.S. 54, 59 (2016) (presuming state and local districts comply with the one-person, one-vote requirement where "the maximum population deviation between the largest and smallest district is less than 10%").

When the 2023 legislature convened, it appeared poised to adopt the Secretary's Map. Regier introduced SB 109 on January 4, proposing to codify the Secretary's Map. App. 001–02.

On January 6, the bipartisan Districting Commission submitted its proposed state legislative districts to the legislature. Doc. 153 at 5. The full legislature provided feedback on January 30. App. 033–40. The legislature jointly recommended six changes, four of which aimed to keep counties whole. *Id.* The Republican majority then offered separate criticisms of the map based on the partisan makeup of certain districts. *Id.* The majority identified at least 27 districts that its members believed were likely to elect Democrats. *Id.*

While this back-and-forth was ongoing, Regier announced that a new PSC map was forthcoming. App. 054, 15:04:25. He proposed using the Montana Constitution's legislative redistricting criteria—compactness, contiguity, and population balance—to draw the map. *Id.*

at 15:04:03–29. He also suggested drawing districts within a plus-or-minus 1% population deviation. *Id.* at 15:04:29.

On February 28, Regier introduced a new PSC map, drawn using the state house districts Republicans had criticized for partisanship. App. 056, 18:09:04. He said SB 109 followed contiguity and population deviation requirements, omitting compactness. *Id.* Although PSC districts traditionally follow county lines, *see* App. 059, 16:16:19, SB 109 split fourteen counties and six cities, App. 003–05. Regier asserted that he intended to achieve a plus-or-minus 1% population deviation, to use state house districts, and to split cities between two Commissioners. *See, e.g.*, App. 054, 15:04:29; App. 057, 14:58:04–59:55; App. 059, 16:17:34–18:59.

Despite the majority's intense focus on partisanship in the state house districts, Regier asserted that he "didn't check" the partisan makeup of the PSC districts. App. 056, 18:17:34. He presented the map in hearings using Dave's Redistricting App, however, which shows the proposed districts' partisan makeup. *See id.* at 18:07:05 (displaying SB 109 in Dave's Redistricting); *see also* App. 012 (showing SB 109's partisan lean from Dave's Redistricting). Asked if he considered

communities of interest, Regier said no. App. 056, 18:15:25. Asked about "compactness," he said, "[t]he big emphasis was the population." *Id.* at 18:22:07–22:40. Asked why Butte was not split like other major cities, Regier stated that it just happened that way. App. 059, 16:10:17–11:33.

Senators questioned why the bill split so many cities and counties given the many possible ways to group house districts. App. 057, 14:55:24. Regier changed tunes, claiming that only population balance was required, and that contiguity and compactness only applied to legislative districts. *Id.* at 14:57:10. He said he would oppose a map that followed state house lines and had population equality, but was more compact and split fewer cities, because "we don't have to look at compactness." *Id.* at 15:01:54.

Every member of the public who testified on SB 109 opposed the map. App. 059, 15:46:19–57:39. An election judge testified that splitting cities and counties would confuse voters and complicate election administration. *Id.* Missoula's public works director voiced the city's opposition because having two commissioners would reduce citizens' influence. *Id.*

When SB 109 reached the House Floor, carried by Representative Steven Galloway, legislators openly discussed the map's partisan implications. *See, e.g.*, App. 061, 14:29:04–32:16 (Rep. Franz explaining SB 109's partisan effects). Members had access to partisan lean data for SB 109 and several proposed amendments. *See* App. 008–14, 021–32. Galloway derided these as "the minority party singing the blues." *Id.* at 14:28:47–55. The first amendment followed state house district lines, had a smaller population deviation than SB 109, split just three counties and one city, and created two competitive districts. *Id.* at 14:34:10; *see* App. 015, 021. The next also followed state house district lines, had a smaller population deviation than SB 109, and split all seven Montana cities. App. 061, 14:37:23–39:36; *see* App. 18, 27. Both were voted down. App. 061, 14:34:10, 14:37:23. Galloway refused to answer questions about the bill. *Id.* at 14:43:55. In final comments, he described minority members' concerns about gerrymandering as "ironic." *Id.* at 14:47:32. Galloway asked, "How was it fine over here when they did the redistricting for our districts, but now, all of a sudden?" *Id.*

The House passed SB 109 on April 17, 2023, along party lines. That day, Republican Districting Commissioner Dan Stusek testified before

the House Judiciary Committee on redistricting. He openly acknowledged the partisan intent of the PSC map, stating "I don't think it's lost on folks that maybe, because of the actions of the redistricting commission, there might have been some folks that thought—that wanted to use this opportunity and produce what resulted in the PSC map." App. 042, 09:35:11–35.

II. SB 109's Partisan Characteristics

Plaintiffs' expert, Dr. Stephanie Somersille, analyzed SB 109 using the "Ensemble Method." Dr. Somersille holds a PhD in mathematics and specializes in applying mathematical methods to redistricting. App. 126, Tr. 106:13–19, 108:11–15, 109:20–110:2. The District Court found her credible and persuasive and determined that her methodology was sound. Doc. 153 at 23.

Dr. Somersille evaluated whether SB 109 was drawn with partisan considerations in mind. Her analysis revealed that it was. She concluded that SB 109 was drawn to lock in a Republican advantage in all five PSC districts. App. 126, Tr. 114:1–7.

Dr. Somersille compared SB 109 to 500,000 algorithmically created Montana PSC maps. Initially, she generated four ensembles of 100,000

maps each. App. 126, Tr. 115:10–12. Each ensemble provided Dr. Somersille with a range of maps that allowed her to see what types of PSC maps are possible when specific map-drawing criteria are applied. *Id.* 110:9–23. The "Neutral Ensemble" created 100,000 maps with districts that were contiguous, reasonably compact, and had a population balance within 5% of the ideal population. *Id.* 114:13–21. The "Tighter Population Balance Ensemble" had the same constraints, except that districts were balanced within plus or minus 1%, consistent with Regier's stated goal. *Id.* 114:22–25. The third ensemble was identical to the Neutral Ensemble, except it minimized city and county splits. *Id.* 115:1:3. The fourth "Fully Constrained Ensemble" maintained compactness and contiguity, constrained population deviation by plus or minus 1%, and minimized city and county splits. *Id.* 115:4–9. Dr. Somersille used these criteria because they are traditional redistricting criteria in Montana. *Id.* 115:14–15, 117:11–23, 119:21–23; Mont. Const. art. V, § 14; *Brown*, 590 F. Supp. at 1288–89 (Secretary Jacobsen testifying that it is "state policy" for PSC districts to follow county lines).

Had SB 109 been drawn only to comply with traditional redistricting criteria, Dr. Somersille would expect its partisan effects to

fall within the range of maps created in her ensembles. App. 126, Tr. 120:9–18. Instead, her analysis revealed SB 109 as a significant outlier in terms of partisan effects—across all four ensembles. *Id.* 120:19–121:6. SB 109's partisan effects strongly indicated an intent to gerrymander the PSC map to elect only Republican candidates. *Id.* 121:7–136:12.

Dr. Somersille next considered whether relying on state legislative districts could explain SB 109's partisan characteristics. *Id.* 137:24–139:40. She created a fifth 100,000 map ensemble using state house districts as the building blocks for PSC districts. *Id.* 139:11–17. SB 109 remained an outlier with respect to partisanship. *Id.* Ultimately, Dr. Somersille concluded that the criteria Regier claimed to have used to draw SB 109 could not explain the map's extreme partisan bias. *Id.* 142:11–13. Thus, she concluded SB 109 was drawn to lock in Republican representation across all five PSC districts. *Id.* 136:9–12.

The Secretary offered no expert testimony and did not dispute Dr. Somersille's analysis or conclusions. Instead, she merely asserted that Dr. Somersille's testimony was insufficient to overcome the presumption of legislative good faith. *Id.* 73:16–18, 79:5–25.

STANDARD OF REVIEW

"The constitutionality of a statute is a question of law," over which this Court has "plenary review." *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 11, 416 Mont. 44, 545 P.3d 1074, *cert. denied* 145 S. Ct. 1125 (2025). "If the challenger shows an infringement on a fundamental right, a presumption of constitutionality is no longer available." *Id.*

The Court reviews findings of fact for "clear error." *Id.* ¶ 12. "Clear error can be found by one of three ways." *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 17, 383 Mont. 205, 369 P.3d 1034. First, "[a] finding of fact is clearly erroneous if it is not supported by substantial evidence." *Mont. Democratic Party*, ¶ 12. Second, "[e]ven if supported by substantial evidence, the finding may be clearly erroneous if the trier of fact misapprehended the effect of the evidence." *In re Eldorado Coop Canal*, ¶ 17. And third, "a finding may be clearly erroneous if, in light of the evidence as a whole, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

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SUMMARY OF THE ARGUMENT

The Montana Constitution confers a clear and unequivocal right to vote. This right is essential to preserving all other civil and political rights. The Constitution also expressly prohibits discrimination based on political ideas.

The Montana legislature eschewed its constitutional duty to secure a free and unimpeded right to vote by creating PSC districts that deny non-Republican voters the opportunity to elect their candidates of choice. The legislature also violated its obligation to treat all voters equally regardless of their political leanings by intentionally prioritizing an all-Republican PSC over traditional districting criteria. The District Court erred in finding otherwise.

First, the District Court erred in concluding that Plaintiffs could not establish their right of suffrage claim without showing that the legislature had a discriminatory motive in enacting SB 109. Intent is not an element of a suffrage claim under the Montana Constitution. And courts, including federal courts, regularly consider effects-based vote dilution without requiring a showing of discriminatory intent. The unrebutted and undisputed testimony of Plaintiff's expert demonstrates

that SB 109 interferes with the right of suffrage by diluting the votes of non-Republican electors and denying them an equal opportunity to elect a candidate to the PSC. This is all that is necessary for Plaintiffs to prevail on their right of suffrage claim.

Second, the District Court erred in finding that advantaging Republican candidates and voters was not SB 109's predominant purpose. The District Court unduly deferred to the legislature using a federal common law presumption of "good faith" in applying the predominant purpose test. The Montana Constitution offers no such safe haven to legislators regulating elections. And such deference is even less appropriate in the redistricting context, where the delegates specifically sought to preclude legislators from exercising any authority.

Third, the District Court committed several legal and factual errors in determining that the legislature did not subordinate traditional redistricting principles in enacting SB 109. The court erred as a matter of law by accepting that the legislature's primary purpose was achieving population balance, instead of considering how the legislature assigned equal populations to different PSC districts. The court also erred in discounting the alternative maps Plaintiffs proffered, which established

that a rational legislature could have achieved its stated objectives without the same partisan effects. And the court erroneously rejected unrebutted expert testimony that SB 109 was drawn to lock in an all-Republican PSC and could not be explained by the legislature's purported map-drawing criteria. The court did so based on a legally and factually erroneous assumption that accepting the expert's conclusions would require it to find that Regier lied about how he drew the map. But Regier's statements were not actually inconsistent with the unrebutted expert testimony, making a choice between Regier and the expert unnecessary. The District Court further erred in affording Regier's legislative statements the same presumption of truth afforded witnesses who testify in court and under oath, and in failing to presume that the legislature intended the adverse consequences of its actions. Considering the foregoing errors, the advice of the divided jury panel—just one factor among many in the District Court's independent findings—does not preclude a finding for Plaintiffs.

Finally, the District Court erred in finding that legislators enjoy an absolute legislative privilege against civil discovery and precluding Plaintiffs from obtaining documentary and testimonial evidence from

Regier regarding how he drew SB 109. The court's ruling predated this Court's decision in *O'Neill* and thus errs in two critical ways: it relies on post-1972 precedent to create an exception to the fundamental right to know, and it creates that exception based solely on federal common law and federal separation of powers conceptions. *O'Neill* rejects both of these bases as a means for establishing a governmental privilege in Montana. At the time of the 1972 convention, it was settled law that legislators enjoy protections against civil and criminal liability for legislative acts. Applying a modern federal common law disclosure privilege that directly conflicts with the right to know and this Court's ruling in *O'Neill* was error.

This Court should reverse and remand to the District Court to enter judgment for Plaintiffs.

ARGUMENT

I. SB 109 violates Plaintiffs' right of suffrage.

The Montana Constitution expressly confers a "clear and unequivocal" right to vote. *Mont. Democratic Party*, ¶ 13. "All elections shall be free and open, and no power civil or military shall, at any time interfere to prevent the free exercise of the right of suffrage." Mont.

Const. art. II, § 13. The suffrage right is fundamental—and stands distinct from the right to equal protection. *Id.* §§ 4, 13; *see also, e.g.*, *Mont. Democratic Party*, ¶ 20 (distinguishing between suffrage and equal protection rights under the Montana Constitution). The right of suffrage is infringed by "debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219; *see also McDonald v. Jacobsen*, 2022 MT 160, ¶ 57, 409 Mont. 405, 515 P.3d 777.

The District Court erroneously concluded that Plaintiffs could not establish their suffrage claim without showing the legislature enacted SB 109 with "pernicious intent." Doc. 129 at 31. The court thus applied the test for intentional partisan gerrymandering to both of Plaintiffs' claims, instead of applying the usual test for suffrage claims. *Id.*; *see also* Doc. 153 at 39–40.

This was error. Intent is not an element of a suffrage claim in Montana. *See Mont. Democratic Party*, ¶ 33 ("[I]f the Legislature passes a measure that impacts the free exercise of the right of suffrage it must be held to demonstrate that it did not choose the way of greater

interference. This standard should govern equally when a facially neutral restriction disproportionately impacts identifiable groups of voters.") (emphasis added); *id.* ¶¶ 96–99 (holding that prohibition on absentee ballot collection impermissibly interfered with the right to vote based on effect, without considering legislative intent).

To evaluate a suffrage claim, courts consider whether a law "impermissibly interferes" with that right. Impermissible interference with the right to vote means interfering "with all electors' right to vote generally, or interfer[ing] with certain subgroups' right to vote specifically." *Mont. Democratic Party*, ¶ 35.

Dr. Somersille's unrebutted expert testimony establishes that SB 109 denies Montana electors the opportunity to elect even one non-Republican candidate to the PSC under normal voting conditions. App. 126, Tr. 130:1–134:20. Only if Republican vote share drops below 50% statewide will Montanans be able to elect a non-Republican candidate to the PSC. *Id.* SB 109 therefore interferes with Montanans' right to vote generally, by diluting their votes for non-Republican candidates, and with the rights of Democratic voters specifically, by denying them an equal opportunity to elect Democrats to the PSC.

The District Court wrote that without considering intent, courts would be unable to determine "how much partisan dominance is too much." Doc. 129 at 30 (quoting *Rucho v. Common Cause*, 588 U.S. 684, 701 (2019)). But courts, including federal courts, regularly consider effects-based vote dilution without requiring a showing of intent. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 17–18 (2023) (describing the Supreme Court's forty-year history of adjudicating vote dilution under the effects prong of the Voting Rights Act). In so doing, courts typically consider whether drawing a majority-minority district is possible and whether the enacted map usually prevents minority voters' candidates of choice from being elected. *See id.* (applying *Gingles* test for racially discriminatory effects); *see also League of Women Voters of Utah v. Utah State Leg.*, 2022 WL 21745734, slip op. at 36, 41–42, 54–55 (Utah Dist. Ct. Nov, 22, 2002) (applying effects test under Utah Constitution's free and fair elections and right of suffrage clauses) ("*LWV Utah*").[1]

In *LWV Utah*, the court examined an effects-based partisan vote dilution claim for congressional redistricting. First, it considered whether the plan established an "extreme and durable partisan advantage by

[1] The *LWV Utah* slip opinion is included as an addendum at App. 064.

cracking . . . large and concentrated populations of non-Republican voters . . . and dividing them" across districts "to diminish their electoral strength." Second, the court considered whether the plan made it "systematically harder for non-Republican voters to elect" a single candidate. Finally, it asked whether the challenged plan "entrenches a single party in power" and "reliably ensures that Republicans . . . are elected in all of the State's" congressional seats, despite "a sizeable population of non-Republican voters that, in a partisan-neutral map, would comprise the majority of" at least a single district. *Id.* at 36.

Here, each factor is met. The legislative record establishes that drawing PSC districts that could elect Democratic candidates is straightforward. App. 024; App. 030 (showing alternative maps with majority Democratic districts). Dr. Somersille's unrebutted analysis shows that SB 109 entrenches an all-Republican PSC and denies a sizeable population of non-Republican voters the opportunity to elect a single candidate to the PSC. App. 126, Tr. 132:21–133:19 (non-Republican voters cannot elect a single candidate to the PSC unless their statewide vote share exceeds 50%). By contrast, Democrats start winning

PSC seats with partisan-neutral maps once Democratic statewide vote share reaches 38.9%. *Id.* 133:20–134:10.

Although determining "how much partisanship is too much" may be a difficult task under some circumstances, *see* Doc. 129 at 30, it is easy here. By denying non-Republicans any opportunity to elect a candidate to the PSC unless their statewide vote share exceeds 50%, SB 109 impermissibly interferes with the right to vote.

Moreover, SB 109 is not narrowly tailored. The legislative record establishes that SB 109's asserted goals—achieving a plus or minus 1% population deviation using state legislative house districts and splitting cities[2]—can be achieved without the same partisan effect. *See, e.g.*, Doc. 153 at 15 (Amendment 5 to SB 109 "has lower population deviation than SB 109," uses state legislative districts to build the PSC districts, [and] splits all seven cities as compared to just six in SB 109"); App. 014; App. 32 (Amendment 5 had the same compactness score as SB 109); *see also* Doc. 129 at 32–33 (finding that violating the right of suffrage does not

[2] Plaintiffs do not concede that these interests are compelling. But because the record evidence establishes that they can be achieved through narrower means, the Court need not decide whether they are actually compelling.

serve the state's interests in separation of powers and preserving constitutional districting guidelines).

In light of the undisputed dilutive effect of SB 109, the District Court erred in denying summary judgment on Plaintiffs' suffrage claim. At that time, the only disputed issue of fact was legislative intent, which is not at issue under the right of suffrage.

II. The District Court erred in finding that advantaging Republican candidates and voters was not SB 109's predominant purpose.

To prevail on an intentional partisan gerrymandering claim, plaintiffs must show—by direct or circumstantial evidence—that the predominant purpose of the challenged map was to favor or disfavor particular voters based on their political beliefs or affiliations. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (providing test for intentional racial gerrymandering); *see also* Doc. 129, at 22 (adopting *Miller* test for intentional partisan gerrymandering claims); Doc. 137 (same). Predominance is established "by showing the legislature subordinated traditional neutral districting principles to political considerations." Doc. 153 at 40; Doc. 29 at 40 (citing *Miller*, 515 U.S. at 916).

Because the legislative record and Plaintiffs' unrebutted expert testimony conclusively established both that the legislature intentionally

subordinated traditional districting principles to partisan advantage and that SB 109 can only be explained as a partisan gerrymander, the District Court erred in ruling for the Secretary. The court's conclusions were based on undue deference to the legislature, a misapplication of law to the evidence, and several clearly erroneous findings of fact that lack support in the record.

A. The District Court afforded the legislature undue deference in evaluating discriminatory intent.

The District Court erred when it deferred to the legislature in evaluating discriminatory intent. The Montana Constitution limits the legislature's power over elections. *Mont. Democratic Party*, ¶¶ 24–30. The right of suffrage expressly cabins legislative authority; the legislature "must regulate elections in conformance with that right." *Id.* ¶ 28; *see also id.* ¶ 19. As a result, the Montana Constitution precludes undue deference to the legislature in election regulation. *Mont. Democratic Party*, ¶ 40 ("Given the importance of the right to vote in our Constitution, we think it improper for us to imagine possible reasons the Legislature has enacted a law that burdens the right to vote.") (citing *Kramer v. Unified Free Sch. Dist. No. 15*, 395 U.S. 621, 627–28 (1969)).

The legislature's assertion of authority over PSC redistricting is due even less deference than ordinary election regulations. While the delegates granted the legislature "responsibility . . . for administration of elections," *Mont. Democratic Party*, ¶ 25, they withheld power over redistricting, instead placing that task in the hands of a carefully balanced, bipartisan commission. *See* Mont. Const. art. V, § 14. Thus, not only is legislative authority over redistricting constrained by express, fundamental rights to suffrage and equal protection, *see Mont. Democratic Party*, ¶ 28, it is also subject to the delegates' clear skepticism of legislators' role in redistricting—expressed by their complete exclusion. Mont. Const. art. V, § 14; Mont. Const. Conv., IV Verbatim Tr., at 685 (Feb. 22, 1972) (Del. Blend).

The District Court ignored Montana law, conferring on the legislature a heretofore unrecognized presumption of good faith. *See* Doc. 129 at 25. That presumption is a federal standard rooted in federalism. *See Alexander v. S. Carolina State Conf. of the NAACP*, 601 U.S. 1, 10–11 (2024) ("[T]his presumption reflects the Federal Judiciary's due respect for the judgment of state legislatures."); *id.* at 7 ("Redistricting constitutes a traditional domain of state legislative

activity."). But this Court has regularly cautioned against importing federal standards in cases arising under the Montana Constitution. *See, e.g.*, *O'Neill v. Gianforte*, 2025 MT 2, ¶ 15, 420 Mont. 125, 561 P.3d 1018 (the delegates' intent "controls the Court's interpretation of a constitutional provision, not federal precedent") (cleaned up); *Mont. Democratic Party*, ¶ 33 ("Montana best serves the independence of its explicit constitutional guarantee of the right to vote by retaining a state-constitution-driven analytical framework for evaluating challenges to voting regulations."); *Dorwart v. Caraway*, 2002 MT 240, ¶ 94, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring) (Montana's "Declaration of Rights was framed . . . to stand on its own footing and to provide individuals with fundamental rights and protections far broader than those available through the federal system."). And it has expressly distinguished Montana's conception of separation of powers from that under federal law. *See O'Neill*, ¶¶ 16–17.

The unduly deferential federal presumption of good faith is particularly ill-fitting here because redistricting is not traditionally in the Montana legislature's domain. Mont. Const. art. V, § 14. While it may be appropriate for federal courts to draw inferences in favor of

legislatures in the redistricting context, *Alexander*, 602 U.S. at 10, it is improper for Montana courts do so, *Mont. Democratic Party*, ¶ 40. And it is particularly harmful to simultaneously presume legislators' good faith and excuse them from explaining their motives to the public or the court. *See* Part III, *infra*; *see also Mont. Env't Info. Ctr. v. Governor*, 2025 MT 112, ¶ 39, __ Mont. __, __ P.3d __ (Shea, J. concurring) (questioning why a state actor would provide information to a district court "if it will benefit from the presumption that the absence of such information will lead to the conclusion that it did not act" improperly); *see also id.* (noting that the opposite presumption is just as rational).

B. The evidence presented at trial shows that SB 109 intentionally advantages Republicans.

Even assuming legislative deference were appropriate here, the District Court misapplied the law and "misapprehended the effect of the evidence." *Mont. Democratic Party*, ¶ 12. The court erred by concluding that SB 109 was not intended to advantage Republicans. Doc. 153, at 44.

1. The District Court erred in accepting population balance as the predominant purpose behind SB 109.

To prevail on their equal protection claim, Plaintiffs needed to establish that in drawing SB 109, the legislature subordinated

traditional redistricting criteria in favor of partisan advantage. *See* Doc. 153 at 40. At trial, the Secretary advanced a single predominant purpose for SB 109: compliance with population parity as set forth in the *Brown* decision. App. 327, Tr. 69:3–7 ("The predominant purpose was the *Brown* decision . . . This was the impetus for this, for Senate Bill 109."); *id.* 69:17–23 ("[A]t each juncture when Senator Regier was asked, he said the purpose is the *Brown* decision . . . We wanted to get back to population parity. We wanted to address what the federal court told us we needed to address."). The court erred as a matter of law in concluding that compliance with population objectives could serve as a relevant consideration in evaluating predominance. Because this was the Secretary's sole basis for justifying the map, this Court should reverse.[3]

"[E]qual population objectives play a different role in a State's redistricting process" than other traditional criteria. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015). Because the federal Constitution "demands" population parity among districts, that parity "may often 'predominate' in the ordinary sense of that word." *Id.* at 272–

[3] The Secretary identified other considerations, such as administrative ease and giving cities two commissioners, but conceded that those criteria did not predominate. App. 327, Tr. 72:5–7, 16–18.

73. But "predominance" in the case of an intentional gerrymandering claim is "special." *Id.* at 273. "It is not about whether a legislature believes that the need for equal population takes ultimate priority"; rather, the question is "whether the legislature placed" an improper motive "above traditional districting considerations in determining which persons were placed in appropriately apportioned districts." *Id.* (cleaned up). That is, if the legislature's goal is to achieve a certain population balance, "the 'predominance' question concerns which voters the legislature decides to choose" to meet those goals "and specifically whether the legislature uses" an improper motive "when doing so." *Id.* Consequently, equal population is unlike other factors when determining whether partisanship predominated. *Id.*

The District Court improperly viewed population parity as a factor that could predominate, rather than considering how the legislature assigned equal populations to different districts. As Dr. Somersille's uncontroverted testimony conclusively established, there were hundreds of thousands of ways to achieve population balance—including while using state house districts as building blocks—without causing SB 109's extreme partisan effects. App. 126, Tr. 120:3–121:24, 126:18–25, 128:21–

25, 131:9–22–134:20, 135:20–136–12 (explaining the results of her randomly generated ensembles of 500,000 maps). Based on SB 109's partisan characteristics, Dr. Somersille concluded that SB 109 intentionally divided voters into specific population-equal PSC districts to ensure all five would elect Republicans. *Id.* 135:23–136:12 ("I concluded that it was drawn to lock in Republican representation in all five of the PSC districts under normal voting patterns in Montana."); *see id.* 138:22–139:17; 141:11–17. This conclusion was unrebutted.

The legislature's professed desire to comply with *Brown* similarly offers no explanation for how it distributed voters across districts. Indeed, nothing in *Brown* required the legislature to draw new districts in the first place. The *Brown* court merely affirmed that PSC districts must fall within a maximum population deviation of 10% and, in the absence of legislative action, adopted a map proposed by the Secretary that met those criteria. *See Brown*, 590 F. Supp. 3d at 1292.

The District Court erred in relying on the legislature's professed desire to achieve population balance to find that traditional criteria were not subordinated to partisan discrimination.

2. The District Court erred in finding that Plaintiffs failed to overcome the presumption that the legislature acted in good faith.

The District Court erred in finding that Plaintiffs' evidence was insufficient to overcome the presumption that Regier drew SB 109 based on neutral principles. As a matter of law, the unrebutted expert testimony and alternative maps overcome the presumption of legislative good faith by demonstrating that the legislature could have achieved its objectives without the same partisan effects. In fact, Plaintiffs' evidence shows that the legislature's stated motives cannot explain SB 109. Even Regier's own statements are consistent with partisan predominance and confirm that the legislature disregarded traditional redistricting criteria.

The presumption of good faith only holds when a court is "confronted with evidence that could plausibly support multiple conclusions." *Alexander*, 602 U.S. at 10. If a plaintiff can demonstrate that improper motive "drove the mapping of district lines, then the burden shifts to the State." *Id.* at 11; *cf. Mont. Democratic Party*, ¶ 11 ("If the challenger shows an infringement on a fundamental right, a presumption of constitutionality is no longer available . . . and the burden necessarily shifts to the State to demonstrate that the statute is

constitutional."). This bar can be met by producing, "among other things, an alternative map showing that a rational legislature driven by its professed . . . goals would have drawn a different map." *Alexander*, 602 U.S. at 10; *see id.* at 34 ("an alternative map can perform the critical task of distinguishing between" proper and improper motives).

Here, Plaintiffs produced two alternative maps that improved upon goals professed by the legislature. *Compare* App. 008, *with* App. 015–32. These maps provide "key evidence" that "a rational legislature, driven only by its professed goals, could have produced a different map," without diluting non-Republican votes. *Alexander*, 602 U.S. at 34. This is precisely the type of evidence the U.S. Supreme Court countenances as proof that legislators acted with discriminatory racial intent absent direct evidence of racial motive. *Id.* By attributing little significance to the alternative maps on the grounds that they did not constitute "direct" evidence of improper partisan motivation, the District Court erred. Doc. 153 at 30; *see Alexander*, 602 U.S. at 34 (emphasizing importance of alternative maps absent direct evidence). The court's dismissal of the maps was confounding given its acknowledgement that the legislature likely rejected these maps for partisan reasons. Doc. 153 at 30 ("[T]he

Court therefore does not ultimately give much weight to the fact that the legislature rejected Democratic amendments to the bill.").

Beyond proving that a rational legislature could have achieved its stated goals without SB 109's extreme partisan bias, Plaintiffs also established that SB 109 can only be explained by an intent to disfavor non-Republican voters. Dr. Somersille concluded that the extreme partisan bias SB 109 displays when compared to her neutral ensembles is clear evidence that the legislature intended to "lock in a Republican advantage in all five PSC districts." App. 126, Tr. 114:4–7, 121:2–6; *see also id.* 114:1–7, 120:19–121:6 (testifying that the chances that SB 109's partisan characteristics occurred at random "are astronomically small"). At no point did the Secretary attempt to rebut this conclusion.

The District Court found Dr. Somersille credible and persuasive. Doc. 153 at 23. But the court ultimately rejected her uncontroverted conclusions on the grounds that to accept them would be to find that Regier lied when he denied looking at partisan data. Not so. Although Regier asserted during legislative proceedings that he did not look at partisan lean data, he never denied drawing the PSC districts to advantage Republicans. *See, e.g.*, App. 059, 16:24:10–24:39. Nor did any

other member. And no matter what data Regier reviewed, it is undisputed that the entire legislature had access to partisan data about the PSC districts. *See* App. 056, 18:07:05 (Regier displaying SB 109 in Dave's Redistricting); *see also* App. 013 (legislative exhibit showing that District 1 is 63% Republican, District 2 is 53.31% Republican, District 3 is 53.74% Republican, District 4 is 53.61% Republican, and District 5 is 52.8% Republican). Indeed, the legislature openly discussed SB 109's partisan implications. *See, e.g.*, App. 061, 14:28:59–32:16 (Rep. Franz describing SB 109's partisan effect). And the majority clearly viewed the state house districts as partisan.[4] Doc. 153 at 5 (majority's official comments "evinced knowledge of the partisan lean of the legislative districts"). Ultimately, Regier's statements are not inconsistent with Dr. Somersille's uncontroverted conclusions.[5] As such, the District Court

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[4] In light of these facts, the District Court committed clear error insofar as it imputed Senator Regier's statements to the legislature as a whole. *Cf.* Doc. 153 at 26; *contra* Doc. 153 at 5, 10, 24–25.

[5] This Court generally defers to district courts "in cases involving conflicting testimony because we recognize that the court had the benefit of observing the demeanor of witnesses and rendering a determination of the credibility of those witnesses." *State v. Bieber*, 2007 MT 262, ¶ 23, 339 Mont. 309, 170 P.3d 444. But no deference is due when only one party presents competent expert testimony. *See Assoc. Mgmt. Servs., Inc. v. Ruff*, 2018 MT 182, ¶ 62, 392 Mont. 139, 424 P.3d 571; *Lindquist v.*

erred in choosing between the two. *See Thompson v. City of Bozeman*, 284 Mont. 440, 445, 945 P.2d 48 (1997) (evidence insufficient to deny plaintiff's claim where competing expert testimony could be resolved without choosing "whether to believe one party over the other").

Regier's other statements during the legislative session confirm that he subordinated traditional redistricting criteria to other concerns. This is consistent with Dr. Somersille's findings. It is undisputed that compactness, maintaining communities of interest, and drawing districts along county lines are all traditional redistricting criteria in Montana, including for PSC districts. App. 126, Tr. 115:14–15, 117:11–23, 119:21–23; Mont. Const. art. V, § 14; *Brown*, 590 F. Supp. at 1288–89. It is also undisputed that once Regier introduced the enacted version of SB 109, he affirmatively denied considering those criteria. *See, e.g.*, App. 056, Tr. 18:15:01–16:27; App. 057, Tr. 15:00:35–02:24, 14:58:04–59:55; App. 059, 16:17:34–18:59.[6] Instead, Regier insisted that the only requirement

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Moran, 203 Mont. 268, 275, 662 P.2d 281, 285 (1983). Nor should it here, where the District Court could not observe Regier presenting live testimony or his demeanor on cross.

[6] The District Court found Regier was "occasionally inconsistent" about relying on compactness and described such inconsistency as "a feature of human nature." Doc. 153 at 26 n.6. But Regier only referenced relying on

for the PSC districts was population parity. *See* App. 057, 15:02:24–02:41 ("We just have to have equal population because of the 15th [sic] Amendment."); *contra* Mont. Const. art. II, § 4 (prohibiting political discrimination).

Finally, Dr. Somersille's unrebutted testimony conclusively established that the goals Regier proffered during the legislative session cannot explain SB 109. While there is no doubt that Regier relied on state legislative districts to achieve his population goals and intentionally split cities, Dr. Somersille's testimony, together with the alternative maps, show that he had an overriding predominant purpose. Regier asserted that he could not balance district populations while following county lines, so instead he used state legislative districts, splitting fourteen counties and six cities. *See, e.g.*, App. 057, 14:58:04–59:55; App. 059, 16:17:34–18:59. But Dr. Somersille refuted this claim by generating 200,000 maps that met Regier's population goals without using state

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compactness before introducing the enacted map. After introducing the enacted version, Regier consistently claimed compactness was not required for PSC districts. *Compare* App. 054, 15:04:25 (encouraging committee to adopt compact districts in compliance with constitutional criteria), *with* App. 056, 18:15:01–16:27 (omitting compactness from criteria considered), *and* App. 057, 15:00:35–02:24 (affirmatively arguing compactness is not required for PSC districts).

legislative districts, including 100,000 maps that did so while minimizing city and county splits. App. 126, Tr. 114:13–115:12, 126:11–25, 140:1–11, 141:21–142:13. She generated an additional 100,000 maps that met Regier's population goals and used state house districts. *Id.* at 139:7–17, 140:18–141:13. SB 109 remained an extreme partisan outlier in every ensemble. *Id.* at 141:13. Thus, Dr. Somersille concluded that relying on state house districts and population constraints did not and could not explain SB 109's partisanship.[7] *Id.*

Regier later claimed that he split cities to give them the advantage of having two commissioners. *See, e.g.*, App. 059, 16:21:28–23:32 (Mar. 20, 2023) (Regier testifying that splitting cities could be an advantage or disadvantage, but that he sees it as an advantage). In response to the concern that giving cities two commissioners could disadvantage rural voters, however, Regier reversed course, stating it

[7] The District Court did not address Dr. Somersille's state legislative ensemble in its findings. This was error. *See Martinez-Gonzalez v. Elkhorn Packing Co. LLC*, 25 F.4th 613, 625 (9th Cir. 2022) ("the district court overlooked key facts, it is our duty to reverse"); *Jones v. Couch*, 669 F. App'x 475, 475 (9th Cir. 2016) (same where district court "overlooked . . . uncontroverted testimony"); *Myers v. United States*, 652 F.3d 1021, 1036 (9th Cir. 2011) (same where district court "simply ignored" evidence).

"doesn't give an advantage to anyone." *See id.* 16:14:28–15:38.[8] Despite repeated questions, Regier appeared unable to explain why Butte had only one commissioner, unlike other cities—including the less populous Kalispell. *See id.* at 16:10:17–11:33 (Regier: "It could been done a lot of different ways . . . but as far as Butte, it just happened out that way.").

But an alternative proposed map would have split all seven of Montana's largest cities, achieved even tighter population parity, and used state legislative districts as district building blocks. *Compare* App. 008 (SB 109 map presented during the April 7 committee hearing with linked partisan lean data), *with* App. 027 (Amendment 5 Map with linked partisan lean data); *see also* App. 058, 10:48:53–11:02:11; App. 062, 14:41:01–43:50; App. 021. A rational legislature seeking to split cities and minimize population deviation would adopt the alternative map. *Cf. Alexander*, 602 U.S. at 10. Asked whether he would support such amendments, Regier answered, "I would say no, otherwise would have done it that way." App. 057, 15:01:49–02:24. He offered no explanation for why he did it that way. *See* App. 126, Tr. 87:15–92:2 (Plaintiff Daniel

[8] For this reason, the District Court erred in finding that Regier "never wavered" in his rationale for splitting cities. Doc. 153 at 27–28.

Hogan testifying that he could identify no explanation for why Butte was not split or why the proposed amendments to SB 109 that split Butte failed).

Plaintiffs must merely show, through direct or circumstantial evidence, that the legislature subordinated traditional districting criteria to achieve a partisan advantage to prevail on their equal protection claim. *Miller*, 515 U.S. at 916; *Alexander*, 144 S. Ct. at 1234. Plaintiffs need not establish that Senator Regier lied, acted in bad faith, or personally enacted SB 109 with a discriminatory motive. *Compare Miller*, 515 U.S. at 916; *Alexander*, 144 S. Ct. at 1234, *with* Doc. 153 at 25, 31, 38. The District Court erred to the extent it required Plaintiffs to establish improper motive through direct evidence that Regier personally acted in bad faith. *Cf.*, *e.g.*, Doc. 153 at 25–26, 30, 31, 36. And it erred in discounting Plaintiffs' undisputed expert testimony due to a perceived but nonexistent conflict with Regier's legislative statements.

3. The District Court wrongly applied ordinary statutory presumptions to out-of-court legislative statements.

The District Court erred in affording Regier's statements the same presumption of truth afforded in-court witnesses. *See* Doc. 153 at 36. Regier's statements were made on the legislative floor, not in sworn

testimony before the court, and were not subject to cross examination. Unlike with an ordinary witness, Plaintiffs were affirmatively (and erroneously, *see* Part III, *infra*) denied the opportunity to cross-examine Regier under oath regarding the veracity of his statements.[9] As the District Court rightly recognized, legislative statements and actions often contain hidden motives or may be tendered for reasons other than those appearing on the face of the matter, including purely partisan reasons. *See, e.g.*, Doc. 153 at 30–31. It was inherently contradictory for the court to assume the truth of Regier's asserted motives and assume that legislators who voted for SB 109 agreed with those motives, while simultaneously dismissing as mere politics the same legislators' decision to reject amendments that better accomplished those motives. *Cf. id.*

Finally, the District Court erred in failing to presume that the legislature intended the adverse consequences of its actions. *See* § 26-1-

[9] The District Court discounts the possibility that live testimony from Regier would have helped Plaintiffs. *See* Doc. 153 at 37; *cf. Johnson v. Finn*, 665 F.3d 1063, 1066 (9th Cir. 2011) ("The district judge erred by declining the opportunity to observe the trial prosecutor's demeanor before rejecting the magistrate judge's adverse credibility finding."). In so doing, the court failed to recognize that its erroneous ruling on Regier's motion to quash also denied Plaintiffs access to documentary evidence that could have undermined his unsworn legislative testimony, including the actual data Regier relied on in drawing SB 109.

602(3), MCA ("[a] person intends the ordinary consequence of the person's voluntary act"); *see also Personnel Admn'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979) (courts may draw "a strong inference" that the legislature intends the adverse consequences of its actions); *cf.* § 26-1-602(2), MCA (statutory presumption that "[a]n unlawful act was done with an unlawful intent"). SB 109's dilutive effect is undisputed. *See* Part I, *supra*. Under the ordinary rules, the court ought to have presumed the legislature intended this effect.

As this Court recently recognized, parties alleging that state actors have violated fundamental rights are entitled to presumptions that favor vindicating those rights. *Cf., e.g.*, *Mont. Env't Info. Ctr.*, ¶ 9 (holding that plaintiffs who succeed on right to know claims are entitled to a presumption towards attorney's fees). Here, the District Court erroneously concluded that Regier was immune from discovery and cross-examination, accepted his unsworn statements at face value, and construed all presumptions in his favor. Such an approach only serves to reward legislators for keeping motivations secret, even where fundamental rights are at stake, by allowing them to benefit in court from their lack of transparency. *Cf. id*, ¶ 9 (Shea, J., concurring) (warning

against such incentives). Courts should be wary of setting up incentives for state actors to withhold information from the public. The District Court erred in doing so here.

4. The advisory jury's determination does not control.

Although the District Court also gave "substantial weight" to the advisory jury, Doc. 153 at 71, that advice was just one factor among many. The advisory jury's view cannot absolve the court of the other errors catalogued herein. Even where an advisory jury is employed, the district court must make independent conclusions of fact and law. *See* Mont. R. Civ. P. 52(a)(1); *see Storms v. Bergsieker*, 254 Mont. 130, 133, 835 P.2d 738, 740 (1992) (holding district court erred by failing to make separate findings of fact after advisory jury trial). While the weight it affords the jury verdict is discretionary, the court's independent findings remain subject to clear error review. *Mont. Democratic Party*, ¶ 12. And even jury verdicts may be set aside where unsupported by substantial evidence, particularly where a verdict conflicts with uncontradicted credible evidence. *Thompson*, 284 Mont. at 442, 443 (remanding for new trial based on insufficiency of evidence supporting jury verdict that conflicted with uncontroverted expert testimony).

The court's undue deference to the legislature, the insufficiency of the evidence supporting the Secretary's position, and the court's improper presumptions all run counter to the jury's advisement, minimizing its import in the District Court's ultimate determination of facts and law.[10]

III. The District Court erred in concluding that legislators enjoy an absolute legislative privilege.

Plaintiffs also appeal the District Court's July 12, 2024 order granting Regier's motion to quash two discovery subpoenas based on legislative privilege. *See* Doc. 64. Plaintiffs sought documents and a deposition from Regier related to the legislative intent behind SB 109. *Id.* at 4. Such information is undeniably relevant to Plaintiffs' intentional partisan gerrymandering claim.

Drawing almost exclusively on federal law, the District Court found, as a matter of first impression in Montana, that legislators enjoy an absolute privilege that protects them from civil discovery related to legislative intent. Doc. 64 at 15, 20–22. Further, the court held that

[10] The court also erred in empaneling an advisory jury over Plaintiffs' objections, in overruling Plaintiffs' objections related to jury instructions, and in denying Plaintiffs' proposed instructions.

Montana's fundamental right to know does not extend to legislative motive. This ruling was wrong as a matter of law, conflicts with more recent decisions by this Court, and turns Montana's fundamental right to know on its head.[11]

The District Court issued its ruling on legislative privilege without the benefit of the *O'Neill* decision. In *O'Neill*, this Court held that a government entity that seeks to assert a privilege against disclosure of government records bears the burden of establishing that the privilege (1) "preexist[ed]" the adoption of the Montana Constitution in 1972 and is (2) "necessary for the integrity of government." *O'Neill*, ¶ 13. If the court finds that a preexisting privilege exists, the government entity nonetheless "has the burden of proving the application and the scope of the asserted privilege to the court upon in camera inspection." *Id.* ¶ 26 (quoting *Nelson v. City of Billings,* 2018 MT 36, ¶ 36, 390 Mont. 290, 412 P.3d 1058).

This is so because the Montana Constitution's right to know is robust: "No person shall be deprived of the right to examine documents

[11] The decision has already proved consequential, even outside the context of civil litigation, and warrants swift review. *See Saslav v. Howe*, No. DA 25-0054 (Mont. 2025).

or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II, § 9. When the delegates adopted Article II, Section 9, they "creat[ed] 'a constitutional presumption that every document within the possession of public officials is subject to inspection.'" *See Nelson*, ¶ 17 (quoting *Bryan v. Yellowstone Cty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 39, 312 Mont. 257, 60 P.3d 381). Applying *O'Neill* here, it is clear the District Court erred in precluding discovery.

Before the 1972 convention, no court had held that speech and debate provisions—whether federal or state—granted legislators immunity from civil discovery or public records laws. Instead, courts recognized that legislative immunity provisions were intended to protect legislators from criminal and civil liability for their legislative acts. *See Coffin v. Coffin*, 4 Mass. 1, 27 (Mass. 1808)[12] ("I would define the article as securing to every member exemption from prosecution, for every thing

[12] Even these early conceptions of legislative immunity had limits. In *Coffin*, the court upheld a defamation verdict against a legislator for statements made during legislative debate because the statements were not about a subject under legislative consideration. 4 Mass. at 29.

said or done by him, as a representative, in the functions of that office.") (emphasis added); *Kilbourne v. Thompson*, 103 U.S. 168, 200–04 (1880) (exempting House members from liability for false imprisonment after they voted for a contempt resolution leading to a citizen's arrest and imprisonment).

This conception of speech and debate protections as precluding liability remained unchanged in the lead up to Montana's constitutional convention. In 1951, the U.S. Supreme Court confirmed that the federal common law legislative privilege shields state legislators from liability for civil money damages in federal court related to acts done within the sphere of legislative activity. *Tenney v. Brandhove*, 341 U.S. 368, 372 (1951). And in 1955, a New York trial court expressly found that speech and debate immunity does not shield a non-party legislator from compulsory testimony related to legislative acts in a judicial proceeding where he faced no risk of criminal or civil liability. *Lincoln Bldg. Assocs. v. Barr*, 147 N.Y.S.2d 178, 182 (Mun. Ct. City of N.Y. 1955). The court determined that the words "shall not be questioned in any other place" do not "encompass all places and circumstances" but rather are "delimited by the intent for which the provision was made," *e.g.*, as a

shield against intimidation through civil or criminal prosecution. *Id.*; *cf. Nelson*, ¶ 34 ("Because they obstruct 'the truth-finding process' and—as applied to government agencies and public bodies—collide with the public's fundamental right to know under Article II, Section 9, . . . privileges must be narrowly construed to effect their limited purposes."). Thus, the delegates had no reason to suspect there would be any conflict between constitutionally guaranteed transparency and normal forms of immunity for legislative acts.

The only post-1972 case to interpret Montana's legislative immunity provision is fully consistent with the pre-1972 conception of legislative immunity. In *Cooper v. Glaser*, this Court found that Article V, Section 8 of the Montana Constitution shields legislators from liability for defamation for statements made on the house floor. 2010 MT 55, ¶ 14, 355 Mont. 342, 228 P.3d 443. The Court reasoned that "[b]ecause, historically, the British Crown used criminal and civil law to suppress and intimidate legislators, the Framers of the [U.S.] Constitution believed that giving immunity to legislators was essential to protect them from intimidation from outside pressures." *Id.* ¶ 11 (emphasis added).

In contrast, the District Court relied on a distinctly modern—and federal—understanding of legislative privilege. *See* Doc. 64 at 5–7, 9–10, 13–14, 16–18, 21. In the decade after the 1972 convention, federal courts began allowing legislators to withhold evidence and testimony as a form of legislative privilege, but only where they faced criminal or civil liability related to legislative acts. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 626 (1972)[13] (federal speech and debate clause protected U.S. Senator's staffer from testifying before a federal grand jury investigating criminal charges against the senator for disclosing classified materials in a subcommittee meeting); *United States v. Brewster*, 408 U.S. 501 (1972) (finding speech and debate clause did not bar prosecution of U.S. Representative for bribery because prosecution did not inquire into legislative acts); *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491 (1975) (precluding investigation into legislative motive as means to overcome legislators' immunity from civil suit); *United States v. Helstoski*, 442 U.S. 477 (1979) (barring prosecutors from introducing evidence of congressman's past legislative acts at his criminal bribery trial); *contra*

[13] *Gravel* was decided on June 29, 1972, after the Constitutional Convention concluded. *See* 408 U.S. 606.

United States v. Gillock, 445 U.S. 360, 366 (1980) (declining to recognize a state legislative privilege against introducing legislative acts as evidence in federal criminal trial). Federal courts only began to shield legislators from discovery in judicial proceedings not involving legislator liability in the past ten to fifteen years. *See, e.g., Lee v. City of L.A.*, 908 F.3d 1175, 1186–1187 (9th Cir. 2018). The District Court erred in relying on this modern federal common law to create an exception to Montana's fundamental right to know that did not exist in 1972. *O'Neill*, ¶ 13.

This is especially so given that the federal common law legislative privilege is expressly rooted in federalism and the federal conception of separation of powers. Doc. 64 at 5 (finding federal legislative privilege rooted in "the separation of powers implied from the federal Constitution" as well as the speech and debate clause). This Court has expressly rejected federal separation of powers as a basis for Montana governmental privileges. *O'Neill*, ¶ 17 ("Because Montana's conception of separation of powers does not bar the courts or the public from inquiring into the Governor's exercise of his constitutional duties, or the actions of any coordinate branch, it is clear that any privilege under the Montana Constitution cannot rest on the separation of powers or any federal

conception of privilege."). Indeed, *O'Neill* is entirely incompatible with the District Court's finding that the legislative privilege is intended to preclude judicial review of nonpublic legislative documents. *Id.* ¶ 26 (requiring a governmental agency that has established a preexisting governmental privilege to nonetheless provide the privileged documents to the court *in camera* so the court can determine application and scope of privilege).

When "a party succeeds in litigation based on a right to know request, it has performed a public service in ensuring that Montana's government is appropriately transparent and accountable to the people." *Mont. Env't Info. Ctr.*, ¶ 9. So too when Plaintiffs seek to hold the state accountable for violating other fundamental public rights. *See id.* ("Every branch of government and every member of the public has a vested interest in seeing constitutional rights defined and developed and litigation can be a tool for doing so."). Allowing individual legislators to shield their motives from discovery in cases alleging invidious discrimination dulls this tool and thwarts plaintiffs' ability to perform this important public service.

The Court should find that while legislators enjoy a constitutional protection against civil and criminal liability for legislative acts, there is no legislative disclosure privilege, and it should vacate the ruling below.

CONCLUSION

The Court should reverse and remand to the District Court to enter judgment for Plaintiffs.

Respectfully submitted this 6th day of June 2025.

/s/ Molly E. Danahy
Molly E. Danahy
/s/ Rylee Sommers-Flanagan
Rylee Sommers-Flanagan
Dimitrios Tsolakidis
UPPER SEVEN LAW

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this Brief is printed with a double-spaced, proportionately spaced Century typeface of 14 points and that the word count, as calculated by Microsoft Word, is 9,964 words, including footnotes.

/s/ Rylee Sommers-Flanagan

CERTIFICATE OF SERVICE

I, Rylee Sommers-Flanagan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-06-2025:

Dimitrios Tsolakidis (Attorney)
PO box 31
Helena MT 59601
Representing: Bob Brown, Nancy Hamilton, Simon Harris, Daniel Hogan, Lukas Illion, Joseph LaFromboise, Montana Conservation Voters, Donald Seifert, George Stark
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Secretary of State, Office of the
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Secretary of State, Office of the
Service Method: eService

Thane P. Johnson (Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Secretary of State, Office of the
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: Secretary of State, Office of the
Service Method: eService

Molly Elizabeth Danahy (Attorney)
814 E. Broadway St
Helena MT 59601

Representing: Bob Brown, Nancy Hamilton, Simon Harris, Daniel Hogan, Lukas Illion, Joseph LaFromboise, Montana Conservation Voters, Donald Seifert, George Stark
Service Method: eService

Christian Brian Corrigan (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: Keith Regier
Service Method: eService

Electronically Signed By: Rylee Sommers-Flanagan
Dated: 06-06-2025