IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0187

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

Plaintiffs and Appellant,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,

Defendant and Appellee,

and

STATE SENATOR KEITH REGIER,

Intervenor-Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. DDV-2023-702, The Honorable Christopher Abbott, Presiding

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3. Whether the district court correctly found that SB 109 was not intentionally drawn to discriminate against non-Republicans?

4. Whether the district court correctly exercised its discretion to give significant weight to the jury's verdict to inform its own findings of fact?

STATEMENT OF THE CASE

In the 2023 legislative session, Senator Keith Regier sponsored Senate Bill 109 (2023) ("SB 109") to resolve the constitutional shortcomings of the Public Service Commission districts a federal trial court identified in *Brown v. Jacobsen*, 590 F. Supp. 3d 1273 (D. Mont. 2022). That court found the Commission districts violated the U.S. Constitution because they lacked population parity. (Doc. 153, Findings of Fact (FOF) ¶ 6.) SB 109 modified the Commission districts to meet the federal Constitution's requirements of population parity and contiguity. (Doc. 153, FOF ¶ 15.)

Appellants Montana Conservation Voters, Joseph LaFromboise, Nancy Hamilton, Simon Harris, Donald Seifert, Daniel Hogan, George Stark, Lukas Illion,

and Bob Brown ("Appellants") sued to enjoin SB 109, alleging the bill is politically discriminatory and violated the right to suffrage. (Doc. 1.) Appellants alleged that under SB 109, non-Republicans could not "fairly influence election results." (Doc. 1, ¶¶97–98.) About one month after bringing this suit, Appellants moved for a preliminary injunction. (Doc. 153, FOF ¶ 39.) Soon after, the Secretary moved to dismiss the case, arguing that Appellants presented a nonjusticiable political question and lacked standing to sue. (Doc. 153, FOF ¶ 40.) The district court denied both. (Doc. 153, FOF ¶ 42.)

Discovery ensued, and a dispute arose between Senator Regier and Appellants regarding his deposition. (Doc. 153, FOF ¶ 43.) Another issue, whether to empanel an advisory jury, similarly came to a head with Appellants' motion to strike. (Doc. 153, FOF ¶ 45.) The district court ultimately empaneled an advisory jury to address the question of legislative motive. (Doc. 153, FOF ¶ 45.) Before trial, the district court resolved cross motions for summary judgment, disposing of the Secretary's challenges to justiciability and standing, and granting Appellants partial summary judgment on standing. (Doc. 153, FOF ¶ 46.) The case then went to trial, where a Lewis and Clark County jury found that the Montana Legislature, through SB 109, did not intend to discriminate based on political beliefs or partisan affiliations. (Doc. 137.) Soon after, the district court held SB 109 constitutional. (Doc. 153, FOF ¶¶ 1–4.) Appellants timely appealed.

STATEMENT OF THE FACTS

The Montana Legislature created the Public Service Commission to regulate the state's railroad and utility companies. Mont. Code Ann. § 69-1-102. Originally, the statute provided for three Commissioners who were elected at-large by all Montana voters. (Doc. 153, FOF ¶61.) Since 1974, the Legislature has chosen to designate five districts which each elect one Commissioner. (*Id.*)

These five districts are supposed to be redrawn after every federal census. Mont. Code Ann. § 69-1-104(2). After 2003, however, the Legislature did not redistrict the Commission for nearly 20 years. (Doc. 153, FOF ¶ 5.) In 2021, three Plaintiffs (two of whom also joined this lawsuit) sued in federal court to enjoin the 2003 maps. (*Id.* at 3–4). They argued that the outdated districts violated the population parity requirement of the Fourteenth Amendment. *Brown v. Jacobsen*, 590 F. Supp. 3d 1273 (D. Mont. 2022).

Under *Evenwel v. Abbott*, 578 U.S. 54, 60 (2016), districts with maximum population deviations below 10% are presumptively constitutional. Maps that exceed this threshold presumptively violate the rule of one-person, one-vote. Based on 2020 Census data, the 2003 Commission districts failed this test. So the court in *Brown* imposed a new map. The three-judge panel essentially adopted a map proposed by Secretary Jacobsen. *Brown*, 590 F. Supp. 3d at 1291. This map, known as the Judges' Plan, resulted in a maximum population deviation of 6.72%. *Id.* Still,

the court voiced hesitancy to interfere with the legislature's authority over Commission redistricting: "Reluctantly, the answer here is to narrowly impose a federal court order to reapportion state electoral districts until the Montana legislature acts … This remedy is not permanent, however, and remains subject to the Montana legislature's power to draw and implement its own constitutional map." *Id.* at 1280.

The Legislature soon answered this call to action. In early 2023, lawmakers drew a new Commission map that followed the boundaries of state legislative districts. The legislative districts served as an ideal template. By law, these lines were tailored for population parity, in accordance with the latest Census. *See* Mont. Const. art. V, § 14, cl. 1-2. And they had just been revised by the bipartisan Districting and Apportionment commission. (Doc. 153, FOF ¶ 8.) Twenty of these legislative districts were apportioned to each of the five Commission districts. (*Id.* ¶ 15.) These revisions were codified under SB 109, which was sponsored by Senator Keith Regier. (*Id.*) Following extensive debate in the Legislature, during which several alternative maps were proposed and rejected, SB 109 became law. (*Id.* ¶¶ 15–22.)

SB 109 scrupulously followed constitutional requirements. The official legislative record shows that Senator Regier apportioned the Commission using legislative districts instead of county lines because it achieved population parity

within a maximum deviation of 1.95%. (*Id.* ¶¶ 18, 58–59.) This represents a marked improvement over the Judges' Plan. Senator Regier did not focus on auxiliary factors, like maintaining county lines or communities of interest. (*Id.* ¶¶ 6, 15.) And he stated he did not rely on partisan leanings. (*Id.* ¶ 17.) Instead, he focused on population parity—the key requirement for legislative districts that is enumerated by the Montana Constitution and required by the U.S. Constitution. (*Id.*); Mont. Const. art. V, § 14, cl. 1; *Evenwel*, 578 U.S. at 59–60.

These priorities split several of Montana's major cities between two districts. (Doc. 153, FOF ¶¶ 16, 34–36). Still, Senator Regier accounted for democratic advantages to such a scheme. For example, two Commissioners would represent those communities and be held accountable to their voters. (*Id.* ¶ 62.) Even adverse experts recognized that this methodology was constitutionally sound. (*See* (Doc. 103, ¶¶ 10–15, 18, 24) (recounting testimony from Dr. Stephanie Somersille, a mathematical data scientist retained by the Appellants).)

Even so, the Appellants sued to enjoin SB 109 shortly after it took effect. They argued that the new Commission districts violate their constitutional right to suffrage and equal protection of the law. (Doc. 1, ¶¶ 27–34.) This, they allege, because the map was intentionally redrawn to minimize the political influence of "non-Republican voters." (*Id.* at 5.) An empaneled Lewis and Clark County jury determined the question of legislative intent. (Doc. 153, FOF ¶ 76.) The jury returned

a verdict for the Secretary of State, finding no improper motive behind SB 109. (Doc. 137.) The district court adopted this finding and affirmed the constitutionality of SB 109. (Doc. 153, Or. ¶¶ 1–4.) Appellants timely appealed. (Doc. 164.)

STANDARD OF REVIEW

Questions of law, including the constitutionality of a statute, are reviewed de novo. *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶ 11, 416 Mont. 44, 545 P.3d 1074. A statute is presumed constitutional until the challenger proves otherwise "beyond a reasonable doubt" or shows that the statute infringes on a fundamental right. *Id.* This is a "heavy burden." *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548.

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous[.]" *In re Estate of Tipp*, 281 Mont. 120, 123, 933 P.2d 182 (1997) (citation omitted). "Findings are clearly erroneous if they are not supported by substantial evidence, if the district court misapprehends the effect of the evidence, or if our review of the record convinces us a mistake has been committed." *In re Marriage of Olson*, 2005 MT 57, ¶ 9, 326 Mont. 224, 108 P.3d 493 (citation omitted).

SUMMARY OF THE ARGUMENT

The district court's judgment was correct: SB 109 does not violate Montana's Constitution. First, SB 109 is subject to deferential review because it does not violate

the fundamental right to suffrage. Montana's guarantee of the right to vote does not include the right to proportional elections. Appellants each exercised their right to vote for the Commission candidate of their choice; those candidates simply lost. And SB 109 is an even-handed law that follows the constitutional lead of the Districting and Apportionment Commission. Individuals holding minority viewpoints reside in uncompetitive districts under any map, and the Constitution tolerates this result. Finally, because SB 109 obeys traditional redistricting criteria, it was absolved of any improper motive before a jury. The district court was wise to defer to the People's finding, which was based on sober analysis of extensive evidence. These observations are far from clearly erroneous; they are common sense. On the merits, this Court should affirm.

In any event, the district court should not have adjudicated this matter. Claims of partisan gerrymandering constitute a nonjusticiable political question. By attempting to thread this political needle, the judiciary will subject every map in this State to a partisan siege for which there is no workable judicial standard. This is why the U.S. Supreme Court continually rejects appellants' invitation to expand the judicial power into legislative redistricting. *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019). Before today, neither has this Court. And today is not the day. Instead, this Court should dismiss this case with prejudice.

ARGUMENT

I. The political question doctrine bars judicial review of legislative redistricting as a non-justiciable issue.

Both the Montana and federal Constitutions uphold as sacrosanct the separation of powers between the three co-equal branches of government. Just as the executive and legislative branches may not extend themselves in the judiciary, when not presented with a justiciable matter, the judiciary may not extend itself into the sister branches. Such nonjusticiable issues are those subject to the political question doctrine. And no matter is more inherently tied to a political question than the lines drawn on electoral maps. Because this Court cannot develop workable legal principles and standards applicable to this and future controversies, this Court should dismiss this case as a nonjusticiable controversy. This comes down to the fundamental requirement of subject-matter jurisdiction.

As a specimen of the separation of powers, the political question doctrine "excludes from judicial review [only] those controversies … which revolve around policy choices and value determinations constitutionally committed" to "other branches of government or to the people." *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)) (alteration in original); *see also Rangel v. Boehner*, 20 F. Supp. 3d 148, 166 (D.D.C. 2013). Under the federal Constitution, "[a] controversy is nonjusticiable—*i.e.*, involves a political question—where there is 'a textually

demonstrable constitutional commitment of the issue to a coordinate political department.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962). Likewise, issues that lack "judicially discoverable and manageable standards" for resolution are non-justiciable. *Nixon*, 506 U.S. at 228.

Because "Article VII, Section 4(1) [of the Montana Constitution] embodies the same limitations imposed by Article III [of the Federal Constitution]," "federal precedents interpreting the Article III requirements for justiciability are persuasive authority" for Montana courts. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.,* 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567. Relying on federal precedent, Montana courts have established that a political question involve issues: (1) "in the legal domain" of a sister branch of government or the people; or (2) where "the governing constitution … [lacks] a standard for adjudication of the issue." *Larson*, ¶ 39 (citing *Nixon*, 506 U.S. at 228).

The Appellants' challenge to SB 109 falls under both categories.

Rucho v. Common Cause holds that, at its core, partisan redistricting claims are non-justiciable because it is impossible to develop consistent judicial standards for identifying and apportioning political classifications within the electorate. *Rucho*, 588 U.S. at 704. Appellants' challenge here boils down to asking this Court "to make [its] own political judgment about how much representation particular

political parties *deserve*—based on the votes of their supporters." *Id.* "But [courts] are not equipped to apportion political power as a matter of fairness." *Id.* More and more state courts agree. *E.g.*, *Brown v. Sec'y of State*, 313 A.3d 760 (N.H. 2023); *Graham v. Sec'y of State Michael Adams,* 684 S.W.3d 663 (Ky. 2023); *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022); *State ex rel. Cooper v. Tennant,* 730 S.E.2d 368 (W. Va. 2012); *Harper v. Hall*, 886 S.E.2d 393 (N.C. Apr. 28, 2023). Consistent with its own non-justiciability doctrine, this Court should follow suit.

A. The Legislature's legal domain includes Commission redistricting.

The Commission is a creature of statute. Mont. Code Ann. §§ 69-1-102, -104. And being a creature of statute, the Commission is subject to the Legislature's wide discretion in its design and promulgation. This includes everything from the extent of the Commission's authority to its membership and mode of selection of members. The Legislature may redistrict, and indeed, modify, the Commission as it sees fit. Beyond constitutional limitations, there are no constraints on legislative redistricting of the Commission. (Doc. 153, FOF ¶ 61.) The Legislature could even eliminate the districts, as was the case pre-1974, when the Legislature authorized the at-large election of commissioners rather than districts. (Doc. 153, FOF ¶ 61.) Or the Legislature may amend these statutes to provide gubernatorial nominations instead of elections—again eliminating districts, but elections too. This is all within the Legislature's legal domain.

Although being within the Legislature's legal domain does not immunize the Legislature of any liability for constitutional deficiencies in elections, the Legislature has sole discretion on the "policy choices and value determinations" self-assigned through the Commission statutes. *Larson*, ¶ 39 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230). That includes the election of commissioners and the drawing of the district boundaries. "[T]he Legislature has the exclusive authority to enact laws to that end." *Id.* This Court cannot double-guess the Legislature's policy choice and value determinations for redistricting the Commission. Yet that is exactly what Appellants seek here.

As the U.S. Supreme Court cautioned in *Rucho*, Appellants' request for "expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life." *Rucho*, 588 U.S. at 718–19. Such endless intervention would be "unlimited in scope and duration," occurring every election when one side could lose. *Id.* at 719. When it comes to a political question, this Court's province is to "construe and adjudicate provisions of constitutional, statutory, and the common law as applied to facts at issue in particular cases." *Larson*, ¶ 39 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230). But that is not at issue here. On the contrary, Appellants demand this Court second-guess the legislative intent behind SB 109 and adopt a different map. That demand upends the entrenched understanding in American law that political

redistricting belongs with the branch most directly accountable to the people—here, the Legislature. *See Ely v. Klahr*, 403 U.S. 108, 114 (1971) ("districting and apportionment are legislative tasks in the first instance"); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, ¶ 19, 208 P.3d 676 (2009) ("Not only do enactments that carry the force of law traditionally originate in the legislature, but the process of redistricting is itself traditionally viewed as a legislative task"); *Rucho*, 588 U.S. at 701 (recognizing "the Framers' decision to entrust districting to political entities").

A judicial incursion into a matter squarely in the legislative domain, like redistricting, violates the separation of powers preserved in the Montana Constitution. *See* Mont. Const. art. III, § 1 ("[No] branch shall exercise any power properly belonging to either of the others"); *Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers."). "It has been said that the principle of the separation of powers is fundamental to the existence of constitutional government." *State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410, 417, 859 P.2d 992, 996 (1993) (internal citations omitted). This epitomizes why courts avoid adjudicating political questions in the first place. Yet Appellants insist this Court "intru[de] into a process that is the very foundation of democratic decisionmaking." *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) (plurality opinion).

No one disputes this Court has a "solemn duty to review the Legislature's work to ensure that the right of suffrage guaranteed to the people by our Constitution is preserved." *Mont. Democratic Party*, ¶ 30.[1] But that duty is not in play here. Under SB 109, the right to suffrage is not "denied by a debasement or dilution of the weight of a citizen's vote [or] by wholly prohibiting the free exercise of the franchise." *Burns v. Cty. of Musselshell*, 2019 MT 291, ¶ 19, 398 Mont. 140, 454 P.3d 685 (quoting *Bush v. Gore*, 531 U.S. 98, 105 (2000)). Appellants had their day in court,

[1] The district court erroneously found a latent agreement from the 1972 Convention that partisan redistricting cases present justiciable questions. (Doc. 29 at 25–26.) Purportedly, the "delegates themselves recounted [how] the interval from *Baker v. Carr* to the Convention had been marked by frequent court challenges to districts drawn by the legislature" meaning that state courts were expected carry on this tradition under the new constitution. *Id.* Thus, the district court reasoned, the delegates omitted from the Montana Constitution a "superfluous and unnecessary" provision for this Court's original jurisdiction over redistricting issues. *Id.* at 26 (quoting Mont. Const. Convention proceedings, Verbatim Tr. 686 (Feb. 22, 1972) (Del. Thomas Joyce)). This view misapplies the legislative history in at least three ways. First, the district court inverts the inference: by excluding such a guarantee in the final document, the signers did *not* intend for redistricting cases to obtain special status before this Court. This Court only has original jurisdiction over special writs—not redistricting challenges. Mont. Const. art. VII, § 2, cl. 1. "A *casus omissus* does not justify judicial legislation." Antonin Scalia and Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 94 (2012) (quoting *Ebert v. Poston*, 266 U.S. 548, 554 (1925) (Brandeis, J.)). Second, the delegates were experienced at expressing special rules of justiciability. *See, e.g.*, Mont. Const. art. II, § 16 (open courts provision); art. IX, § 1 (environmental standing). Yet the framers here unquestionably follow the unmodified federal lead, which to that point had never countenanced a constitutional limit on partisan redistricting. *See Plan Helena*, ¶ 6; s*ee also* READING LAW 107–11 (discussing the *expresio unius* canon). Finally, those pre-1972 suits involved claims of racial gerrymandering—not political gerrymandering. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964). As explained below, racial standards cannot be grafted onto other areas of districting.

yet they "did not produce and appear not to have discovered any direct evidence" of legislative impropriety. (Doc. 153, FOF ¶ 60.) Because Appellants' challenge is just a demand that this Court supplant the Legislature's policy decision and value determinations with the Court's own, the political question doctrine renders Appellants' suit non-justiciable.

B. Legislative redistricting lacks judicially discoverable and manageable standards.

Political questions are "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho*, 588 U.S. at 696. That is because courts struggle to produce "judicially discoverable and manageable standards" applicable beyond the current controversy. *Baker*, 369 U.S. at 217. The judicial power "to 'say what the law is,' rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, *according to legal principles*, a plaintiff's particular claim of legal right." *Gill v. Whitford*, 585 U.S. 48, 64–65 (2018) (emphasis added) (quoting *Marbury v. Madison,* 5 U.S. 137, 177 (1803)). Because they cannot tackle issues piece-meal every time an election rolls around (something contrary to the judicial power), courts instead admit the impossibility of workable standards.

Courts often cannot resolve partisan feuds through a "limited and precise rationale" with "clear, manageable, and politically neutral" criteria. *Vieth*, 541 U.S. at 306–08 (Kennedy, J., concurring). In this vacuum, courts would "assum[e]

political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 307 (Kennedy, J., concurring). That political responsibility rests not in the judiciary however but in "the legislative process of apportionment" *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring), which is far better situated to resolve these "most heated partisan issues" that remain "fundamentally a political issue." *Id.*

Maybe this Court can pin down what has evaded the U.S. Supreme Court—but given its extensive precedent, the U.S. Supreme Court proves this task more Sisyphean than Herculean. *Gill,* 585 U.S. at 65 ("our considerable efforts in *Gaffney* [*v. Cummings,* 412 U.S. 735 (1973)], [*Davis v.*] *Bandemer*[, 478 U.S. 109 (1986)], *Vieth*, and [*League of United Latin American Citizens v. Perry,* 548 U.S. 399 (2006)] leave unresolved whether ... claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering."); *accord Brown*, 313 A.3d at 775–76 (explaining how the North Carolina Supreme Court struggled to identify standards for quantifying partisan vote dilution). And not without reason. As the U.S. Supreme Court most recently summarized:

> Even assuming the court knew which version of [partisan] fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are 'unguided and ill suited to the development of judicial standards' and 'results from one gerrymandering case to the next would likely be disparate and inconsistent.' … [T]he one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution

> supplies no objective measure for assessing whether a districting map treats a political party fairly.

Rucho, 588 U.S. at 708 (internal citations omitted).

Even Justice Kagan's proposed holding in *Rucho,* that "[t]his much is too much," embodies the fool's errand of having courts police partisan debates. *Id.* at 744 (Kagan, J., dissenting). And as the *Rucho* Court identified, "[t]hat is not even trying to articulate a standard or rule." *Id.* at 716 (quoting *Rucho*, 588 U.S. at 744 (Kagan, J., dissenting)).

"[T]he original unanswerable question" is how much is too much? *Vieth*, 541 U.S. at 296–97 (plurality). "[J]udicial action must be governed by *standard*, by *rule* … law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* at 278. Courts cannot create such standards or rules when dealing with inconsistent electorates, let alone electorates like the people of Montana, who pride themselves on their political independence and long tradition of ticket-splitting. *Compare Rucho*, 588 U.S. at 712 (describing how "partisan" gerrymandering backfired in Indiana and Pennsylvania, illustrating that "accurately predicting electoral outcomes is not so simple"). As a basic political and legal reality: Montana voters do not register by political party. Montanans elect candidates who have ideas they agree with. In Montana, there is no such thing as "classes" of "Republican voters" and "non-Republican voters."

Even if the Court could create discernible classes based on *party affiliation* or *non-affiliation*, the remedy would simply trade one constitutional injury for another. This Court has expressly rejected such an outcome. *Willems v. State*, 2014 MT 82, ¶ 34, 374 Mont. 343, 325 P.3d 1204 (declining to enjoin a map because "the purported violation of the right of suffrage would not be cured at all; it would simply be shifted to another set of voters."). Increasing the number of purported non-Republican voters to a majority within a particular district also purposefully reduces purported Republican voters to a minority. In the same way Appellants now claim harm, such a judicial solution would prevent purported Republican voters from "fairly influenc[ing] election results." (Doc. 1, ¶ 96.) That is precisely the sort of partisan horse trading that an apolitical judiciary must avoid.

Entering this partisan arena only invites an onslaught of litigation over every legislative map. "It would be idle … to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U.S. at 752. Look no further than Kendra Miller, a Democratic member of Montana's Districting and Apportionment Commission, who argues that "[t]here are no neutral redistricting criteria … They're not partisan-neutral. None of them

are. These are political districts … they have political impacts. The idea that there'd be a non-partisan way to draw political districts is silly."[2]

If the Court adjudicates this case, judicial "intervention [into partisan redistricting] would be unlimited in scope and duration—it would recur over and over again around the [state] with each new round of districting." *Rucho*, 588 U.S. at 719. Worst of all, it is likely that these cases would have wildly inconsistent outcomes that inflame partisan animosity. *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring). This is not the way forward. Instead, this Court "must be wary of plaintiffs who seek to transform [the] courts into 'weapons of political warfare' that will deliver victories that eluded them 'in the political arena.'" *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 11 (2024) (citation omitted). Having no judicially discoverable or manageable standards, Appellants' cause here is non-justiciable.

C. The predominant-purpose framework from racial gerrymandering claims cannot graft onto partisan claims.

Because there was no adequate federal partisan gerrymandering framework, the district court turned to racial gerrymandering because "there is already a well-defined method for judicially adjudicating racial gerrymandering claims that can be

[2] Arren Kimbel-Sannit, *Explaining the why and the where of Montana's new legislative districts*, MONT. FREE PRESS (Feb. 13, 2023) https://montanafreepress.org/2023/02/13/montana-redistricting-commission-finalizes-new-house-senate-maps/.

extended to gerrymandering predicated on other protected classes." ((Doc. 29 at 31) (citing *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 260–61 (2015).) It thus analogized race to the "political . . . ideas" protected in Montana's Equal Protection Clause, Mont. Const. art. II, § 4. Appellants advocate for this Court to do the same. Appellants' Opening Br. at 20, 23. That reasoning does not hold water. Race and political ideas are not analogous.

Race "is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). "[T]he imposition of special disabilities upon the members of a particular [race] because of their [race] would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Id.* (citation omitted). Courts necessarily must apply strict scrutiny and other burden-shifting regimes because our Constitution is colorblind. Political opinions are, however, elective and almost always morph over time. Rather than an accident of birth, they are an accident of circumstance. A rationale derived from immutable qualities simply does not apply to ideological differences between voters. Racial gerrymandering cannot provide the Court a workable standard for alleged partisan gerrymandering.

II. The district court correctly found SB 109 is constitutional.

None of Appellants' constitutional claims are meritorious even if they were justiciable. SB 109 does not infringe on the right to suffrage: nobody has lost the

ability to cast their vote, have it counted, or carry less weight than anyone else's vote. Nor does SB 109 fail to supply equal protection. In fact, it comports with constitutional redistricting criteria that are not even required of Commission districting. The advisory jury's findings buttress these conclusions: the Legislature lacked a discriminatory intent. The district court did not clearly err in adopting that finding, and its other findings that flow from the jury stand firm against Appellants' criticisms. This Court should affirm the judgment below.

A. SB 109 does not violate the right to suffrage.

Article II, § 13 of the Montana Constitution guarantees that "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; *see also Willems*, ¶ 32. To prevail on a right to suffrage challenge, "[p]laintiffs have the burden of demonstrating the law interferes with *all* electors' right to vote generally, or interferes with certain *subgroups*' right to vote specifically." *Mont. Democratic Party*, ¶ 34 (emphasis added); *see also Burns*, ¶ 19.

"Interference" usually requires a direct intervention that prevents somebody from casting their ballot. In *Montana Democratic Party*, for example, this Court invalidated a voter I.D. law because it barred certain subgroups of voters from accessing the polls. There, the Court emphasized that Montana has "long carefully scrutinized laws which interfered on the right [to suffrage.]" *Mont. Democratic*

Party, ¶ 23 (citing *Harrington v. Crichton*, 53 Mont. 388, 394–96, 164 P. 537 (1917)). The Court also remarked how, at the 1972 Convention, the suffrage clause prevailed as a response to obstruction tactics like unfair voter registration deadlines. *Mont. Democratic Party*, ¶ 27. The Court thus looked at burden placed on "the act of voting" itself. *Id.* (quoting Montana Constitutional Convention, Verbatim Transcript, February 17, 1972, Vol. III, p. 401). No Appellant alleges however that they were prohibited from voting in a Commission election. At trial, the district court erred in even allowing this testimony, because Appellants failed to list themselves on their pre-trial witness list. (Doc. 113 at 16.) Even so, every Appellant who testified at trial admitted that they could vote for their favored candidate in Commission elections. (Trial Tr. at 55:6–23 (Donald Seifert); 79:1–14 (Bob Brown); 94:21–95:8 (Daniel Hogan).) SB 109 does not interfere with Appellants' right to suffrage.

Alternatively, constructive interference occurs when the weight given to a citizen's vote is "debase[d] or dilut[ed]." *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219 (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (citation omitted)). Vote dilution "refers to the idea that each vote must carry equal weight." *Rucho*, 588 U.S. at 709. "In other words, each representative must be accountable to (approximately) the same number of constituents." *Id.* SB 109 cannot dilute the vote as a matter of simple math: SB 109 divides one hundred legislative

districts between five Commission districts. Each Commission district thus contains twenty legislative districts, and each legislative district is around equal size according to the Redistricting Commission. So again, SB 109 does not violate Appellants' right to suffrage.

The U.S. Supreme Court, for example, presumes no vote dilution when a map has population deviance below 10%. *Evenwel*, 578 U.S. at 60. Everyone agrees SB 109 has a population deviance of less than 2%, which is well below the *Evenwel* presumption threshold. Contrary to Appellants' red herring argument on this point, other maps having similar or smaller population deviation than SB 109 is irrelevant to whether SB 109 dilutes the vote. *Contra* Appellants' Opening Br. at 22 (discussing proposed Amendment 5 to SB 109). SB 109 preserves population parity by grouping together twenty preexisting legislative districts five times. That simple math defeats a vote dilution claim.

Apellants' argument reduces to a conflation of dissimilar concepts through similar language. *See* Appellants' Opening Br. at 20 ("federal courts[] regularly consider effects-based vote dilution"). Under the federal Voting Rights Act, a plaintiff may allege racial vote dilution more broadly for voting schemes that "cause an inequality in the opportunities enjoyed by black and white voters." *Allen v. Milligan*, 599 U.S. 1, 17 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)); *cf. Alexander*, 602 U.S. at 8 (explaining that racial dilution can be shown

by contrasting a racially gerrymandered map with an alternative map that does not depart from "traditional redistricting criteria"). But that is dissimilar to non-racial vote dilution. In the non-racial setting, vote dilution "does not mean that each party must be influential in proportion to its number of supporters." *Rucho*, 588 U.S. at 709. Courts accordingly vindicate "the individual rights of the people appearing before [them]," not "generalized partisan preferences." *Id.* Indeed, in the earlier *Brown* case, the federal court specifically found that "the vote dilution and vote deprivation concerns typically implicated by the Voting Rights Act are not implicated in this case." *Brown*, 590 F. Supp. 3d at 1287. Because racial discrimination is distinguishable from partisan classifications, the standards are not interchangeable. *See supra* at 22–23. And even if they were, there is no workable solution to Appellants' ephemeral "dilution" without also diluting other voters too. Appellants' real ask—to "shift" constitutional injuries between "set[s] of voters"—is an equal protection violation disguised as a remedy. *Willems*, ¶ 34. That is wrong.

Ultimately, Appellants shoehorn proportional representation into the Montana Constitution's right to vote. Appellants' Opening Br. at 19; *contra Davids v. Akers*, 549 F.2d 120, 124 (9th Cir. 1977) ("to deny to Democratic members of the House proportional membership" is not "to deny … the equal protection of the laws … these propositions are non sequiturs). This approach is alien to our nation's winner-take-all system of elections. "It hardly follows from the principle that each person

must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Rucho*, 588 U.S. at 708. Indeed, "[t]he mere fact that one interest group or another … has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." *Whitcomb v. Chavis*, 403 U.S. 124, 154–55 (1971). Just because Appellants' preferred candidates do not prevail in Commission elections does not mean there is a constitutional violation. On the contrary, winning and losing shows the health of Montana's electoral system. But winning and losing cannot prove SB 109 violates the right to suffrage.

B. Courts must presume the Legislature enacted SB 109 in good faith.

Because SB 109 does not infringe on any fundamental rights, it is presumed to be constitutional and, as the district court correctly instructed the jury, promulgated in good faith. (Doc. 136 at 17 (Instruction No. 14).) This presumption survives unless a plaintiff proffers evidence of a discriminatory legislative intent.[3]

[3] Predicate facts in constitutional litigation must be proven "beyond a reasonable doubt." *Gianforte*, ¶ 32. Thus, the Secretary of maintains that the district court erred in applying the preponderance of the evidence standard to the question of legislative intent. *See* Instruction No. 14. The preponderance standard is anomalous in this context: "Courts exercising judicial review in every state require the conflict between a statute and the state constitution to be 'clear,' rather than simply shown

The district court was correct that Appellants did not produce this evidence and the Legislature enacted SB 109 in good faith. (*See* Doc. 153, FOF ¶¶ 60–61.)

Appellants presented no direct evidence of a discriminatory intent, either from Senator Regier or any legislator or the Legislature as a whole, and they presented limited circumstantial evidence in their attempt to show the Legislature acted with bad faith related to SB 109. *Id.* Instead, as Senator Regier said, he "didn't check" the "partisanship of the new districts." (Doc. 1, ¶ 57); *see also* Mont. Code Ann. § 5-1-115(3)(b)–(d) (prohibiting the use of partisan data in legislative and congressional districting). This is a far cry from the bona fide cases of partisan gerrymandering that often occur in this country. *E.g.*, *Rucho*, 588 U.S. at 691 (noting how lead sponsor for redistricting bill said "'I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country'"

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by the preponderance of the evidence." Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. Tex. L. Rev. 169, 170 (2015). Admittedly, this issue has not been appealed and is not before this Court at this time. But it bears reiterating the law: This Court holds that legislation is "presumed to be constitutional, and the party challenging a statute's constitutionality bears the burden of proving it unconstitutional beyond a reasonable doubt." *Barrett v. State*, 2024 MT 86, ¶ 13, 416 Mont. 226, 547 P.3d 630. This standard has stood strong for nearly 130 years. *State v. Camp Sing*, 18 Mont. 128, 138, 44 P. 516, 517 (1896). In fact, Montana has relied on it more often than any other state judiciary. Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond A Reasonable Doubt,"* 74 Rutgers U. L. Rev. 1429, 1440 (2022) (identifying at least 74 instances in Montana caselaw). While the district court erred in instructing the jury on a lower standard, that error is harmless because even under this lower standard, the jury still correctly found that the Legislature did not have a discriminatory intent in enacting SB 109.

and that he only drew a map with 10 Republican seats because he did "'not believe it would be possible to draw a map with 11 Republicans'") (citations omitted). Nothing in the record contradicts Senator Regier's statements on the record. (Doc. 153, FOF ¶ 60.) That forecloses the matter, because official proceedings sufficiently establish legislative intent or motive. *City of Missoula v. Pope*, 2021 MT 4, ¶ 17 n.1, 402 Mont. 416, 478 P.3d 815.

Because they could muster no evidence of direct discriminatory intent, Appellants instead rely on limited circumstantial evidence inferred from their expert, Dr. Somersille. But these conclusions from Dr. Somersille's testimony are mistaken in two ways. First, Dr. Somersille's analysis offers only circumstantial evidence against the official record, including no alternative maps. (Doc. 8, Ex. 4.) But that circumstantial evidence does not overcome the presumption that Senator Regier's stated intent is true. *Alexander*, 602 U.S. at 10–11; *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995). "Without an alternative map, it is difficult to defeat out starting presumption that the legislature acted in good faith." *Id.* at 10. And whatever apparent contradiction exists, the Court should side with the Legislature, as, like the Court, they are "similarly bound by an oath to follow the Constitution." *Id.* at 11. Second, Dr. Somersille's analysis incorrectly assessed the map as a whole rather than analyzing specific districts. The U.S. Supreme Court specifically rejected that kind of analysis because, in these kinds of cases, it is the specific claims of the

plaintiffs that courts deal with, not generalized grievances disposed of in the aggregate. *Id.* at 33; *Ala. Legis. Black Caucus*, 575 U.S. at 262–63.

These conclusions are not affected by the fact that Senator Regier did not testify at trial. (*Accord* Doc. 153, FOF ¶ 78.) Appellants devote exhaustive briefing (along with improperly presented affidavits designed to impeach the jury's verdict, which the trial court properly rejected) to argue that his absence prejudiced the judgment below. Appellants' Opening Br. at 33-35, 43-51; *see also* (Doc. 153, FOF ¶ 20) ("what Plaintiffs seek to do here is indistinguishable in form and substance from an attempt to impeach a trial jury verdict with juror affidavits" even though that conduct is prohibited). But these arguments go nowhere.

First, the district court correctly concluded that Senator Regier, after remaining so consistent over multiple legislative debates, would likely not change his tune on the stand. (*See* Doc. 153, FOF ¶ 81) ("There is no reason to believe he would have testified at trial any differently than what he said at the various hearings in the matter."). Appellants' response is merely that, had that court allowed discovery into privileged legislative materials, they could have cross-examined his testimony. But that contradicts the legislative privilege and the Montana Constitution's art. V, § 8. "[Appellants] were required to prove their case by a preponderance of the evidence using admissible, non-privileged evidence."

(Doc. 153, FOF ¶ 84.) The fact they could not does not mean the lower court erred; it means they had a weak case.

Second, as his own briefing accurately explains, Senator Regier properly exercised his constitutional immunity as a legislator.[4] It is not for the Court to draw adverse inferences from that protected silence: "Questioning the veracity of a senior elected member of a coordinate branch of government is a serious matter that should not be determined cavalierly." (Doc. 153, FOF ¶ 70.) Besides, the district court properly instructed the jury that it could rely on circumstantial evidence and its own common sense to fill in the gaps left by the Senator's absence. (Doc. 153, FOF ¶¶ 78–81.) This was a correct statement of the law, applied with equal fidelity by the jurors and the district court to conclude that SB 109 was not designed to harm "non-Republicans."

Well beyond Senator Regier's statements, the record provides good reasons to conclude that partisan discrimination did not guide SB 109. Even though "the legislature is not required to follow traditional redistricting criteria" when revising the Commission districts, (Doc. 153, FOF ¶ 61), the legislature *did* follow these criteria.

[4] Appellee joins in Intervenor-Appellee State Senator Regier's Response Brief and adopts his arguments surrounding legislative privilege.

The Montana Constitution provides that legislative districts "shall consist of compact and contiguous territory" and "be as nearly equal in population as is practicable." Mont. Const. art. V § 14 (1). As with the legislative districts on which it is based, the SB 109 maintains these constitutional mandates—even though they are not legislative districts. There is no dispute: SB 109 meets population parity because the Commission districts falls well within the 10% deviation threshold and even improves on parity from the Judges' Plan. Contiguity is apparent on the face of the map: none of the new districts contain any exclaves. So too then SB 109 follows the rules of compactness.

To defeat a map on compactness, Plaintiffs must prove a district's shape is "so bizarre on its face," *Alexander*, 602 U.S. at 8, that neutral criteria were obviously subordinated to an improper "dominant and controlling rationale." *Miller*, 515 U.S. at 913. Appellants' expert's testimony to the contrary does not hold water either. Although Dr. Somersille found the *Brown* map to have scored .26—"well within the ranges of compactness"—she could not state whether SB 109's score of .19 was also. (Doc. 8, Ex. 4 at 4). That is because Appellants never established a range of reasonable criterion for compactness (Doc. 153, FOF ¶¶ 30–31) (reiterating expert testimony that SB 109 was within a reasonable range of compactness). As the district court recognized: "there is no way to draw five PSC districts that will not also create odd pairings or divide adjacent areas with common interests. The districts are too

large and the state is too geographically, socially, and economically diverse for it to be otherwise." (Doc. 153, FOF ¶ 64.) SB 109 faithfully navigated these cartographical shoals.

C. The district court correctly agreed with the jury to inform its conclusions.

The district court did not clearly err agreeing with the jury's findings on these issues. *Cf. In re Marriage of Olson*, 2005 MT 57, ¶ 9, 326 Mont. 224, 108 P.3d 493 (enumerating the three ways of showing clear error). First, substantial evidence exists for upholding the Legislature's presumptive good faith. The jury watched recordings of the entire legislative proceedings of SB 109, (Doc. 153 at 2), which included Senator Regier's consistent assertions of non-partisanship. (*See, e.g.*, Doc. 153, FOF ¶¶ 15, 17.) They also consulted the maps and population data, which show SB 109's compatibility with constitutional redistricting criteria. (Doc. 153, FOF ¶ 22.)

Second, there is no reason to believe that the jury misapprehended the relevant evidence. Despite Appellants' protestations, Appellants' Opening Br. at 39–42, raised also in their improper affidavits, (Doc. 152), the jury need not have misconstrued Senator Regier's statements or silence to reach its conclusions about his motives. Nor did Appellants take any steps to cure this purported issue before the verdict was issued, an oversight which bolsters the propriety of the jury's approach. (Doc. 153, FOF ¶¶ 78–79) (noting Plaintiffs' failure to seek a Rule 505

curative instruction). The jury also carefully listened to and drew reasonable conclusions from Dr. Somersille's expert testimony. Far from a smoking gun that must be construed in Appellants' favor, her novel expert testimony subject to cross-examination presented competing considerations for the jury. But just because the jury does not find Dr. Somersille's opinions as compelling as Appellants do does not mean the jury was wrong or erred.

Finally, no clear mistake of law prejudices this result. The district court delivered fair jury instructions, (Doc. 136), and properly handled evidentiary issues, including by respecting the Senator's legislative privilege. (Doc. 83.) In reality, whatever mistakes there were, they always served Appellants. The district court applied the wrong standard of proof (Doc. 136 at 17); the district court incorrectly asserted this case was justiciable (Doc. 29); and the district court wrongly permitted Appellants' unlisted witnesses to testify. (Doc. 113 at 16.) Yet while Appellants received a minor win at these critical junctures, they still lost the war.

* * *

It is rare for a jury to settle a redistricting case. But that gives all the more reason to support the People's decision, consistent with Montana's unique respect for popular sovereignty. (*See generally* (Doc. 144).) Montana's Constitution recognizes that the People are the bedrock of our democracy. *E.g.*, Mont. Const. art. II, § 1 ("All political power is vested in and derived from the people."). Through

jury service, these People are key to policing the contours of their own democratic elections.

Of course, a judge need not acquiesce in advisory jury findings for a case brought in equity. *Vesel v. Polich Trading Co.*, 96 Mont. 118, 128, 28 P.2d 858, 861 (1934). And a court still must produce independent findings of fact, Mont. R. Civ. P. 52(a)(1); *Storms v. Bergsieker*, 254 Mont. 130, 133, 835 P.2d 738, 740 (1992), just as the district court did here. (*See generally* (Doc. 153).) Even still, the district court was correct to resolve its doubts regarding intent for these citizen-jurors' judgment.

Ultimately, juries are wiser than Appellants give them credit. As this Court has noted, and as the court below reiterated:

> We should never underestimate … the collective wisdom of the American jury to sort out complex problems such as this. Claims or defenses which are good "on paper" often evaporate when subjected to the time-honored test of cross examination by skilled trial counsel. Juries have an uncanny ability to evaluate the credibility of a witness, especially an expert. Problems presented in a case such as this, namely conflicting expert testimony and missing evidence, are best solved by juries.

(Doc 153, FOF ¶ 72) (quoting *Wood v. Old Trapper Taxi*, 286 Mont. 18, 27, 952 P.2d 1375, 1381 (1997)). This is why juries are empowered to rule on criminal sentences, often in cases of life or death. So too, for multimillion-dollar commercial lawsuits. Juries embody the popular sovereignty and collective wisdom that gives

effect to our Constitution, itself the source of judicial power. This Court should not readily discard a judgment that relied on this popular authority.

CONCLUSION

The district court should have never heard this case in the first place. Redistricting is simply too intertwined with the political process for courts to develop workable standards applicable beyond the current controversy. As a nonjusticiable dispute, the Court should dismiss this case with prejudice and close the door on these nakedly partisan lawsuits. But even if this Court believes it can hear this case, under the clear error standard, this Court should let stand the district court's findings of fact, including its adoption of the advisory jury's verdict. Appellants had their day in court. They presented their best evidence, made their best arguments, and requested their favored outcome. Yet before a panel of twelve everyday Montanans from Lewis and Clark County, Appellants failed to prove by a preponderance of the evidence that the Legislature's intent with SB 109 was driven by partisanship. The district court correctly agreed. But because this case deals with a political question, dismissal with prejudice is most proper. Short of dismissal, the Court should affirm the judgment below.

DATED this 5th day of August 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman 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 8,072 words, excluding certificate of service and certificate of compliance.

/s/ *Thane Johnson*
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