

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

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

Plaintiffs,

v.

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

Defendant.

Cause No.: DDV-2023-702

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
MERITS ORDER**

This matter came before the Court for trial on December 10 through
13, 2024, with the Court presiding with an advisory jury. Plaintiffs Montana
Conservation Voters, Joseph Lafromboise, Nancy Hamilton, Simon Harris, Donald
Seifert, Daniel Hogan, George Stark, Lukas Illion, and Bob Brown were

1 represented by Rylee Sommers-Flanagan, Molly Danahy, and Dimitrios
2 Tsolakidis. Defendant Secretary of State Christi Jacobsen (the Secretary) is sued
3 in her official capacity. She was represented by Thane Johnson and Alwyn
4 Lansing. Some individual Plaintiffs were personally present for portions of the
5 trial, and counsel for the Secretary, Clay Leland, appeared in person as the
6 Secretary's representative.

7 The Court heard testimony from Donald Seifert, Bob Brown,
8 Daniel Hogan, Ann Bukacek, and Stephanie Somersille. The Court received
9 Plaintiffs' Exhibits 1–7, 9–16, 19, 21–22, 25–28, and Defendant's Exhibits A–C,
10 E, and F. The Court also received, and the jury was shown, the entire video
11 recordings of legislative proceedings related to Senate Bill 109 from January 24,
12 2023 (Senate Energy and Telecommunications Committee); January 31, 2023
13 (same) February 8, 2023 (same); March 2, 2023 (Senate floor debate); March 20,
14 2023 (House Energy, Technology, and Federal Relations Committee); April 7,
15 2023 (same); and April 14, 2023 (House floor debate), all of which the Court has
16 judicially noticed. At the conclusion of the trial, the advisory jury returned a
17 verdict that Plaintiffs failed to prove that the legislature intended to discriminate
18 on the basis of political ideas or partisan affiliation.

19 The Court solicited post-trial briefing, which it has now reviewed.
20 The Court has also considered all stipulated facts and the facts the Court found to
21 be undisputed in its December 4, 2024, Order on Pending Motions (Dkt. 129.)
22 The Court has considered all of the arguments of counsel. For reasons developed
23 below, the Court has not considered the post-trial affidavits of Sommers-
24 Flanagan or juror Steven Blom.

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1 Based on the foregoing, the Court enters the following findings of
2 fact, conclusions of law, and order finding the Secretary is entitled to entry of
3 judgment in her favor on Plaintiff's claims.

4 **FINDINGS OF FACT**

5 **The Public Service Commission**

6 1. The Public Service Commission (PSC) is the public body
7 created to supervise and regulate the operations of public utilities, common
8 carriers, railroad, and other regulated industries.

9 2. The PSC consists of five members who are elected on a
10 staggered basis, from a single-member district, to serve a four-year term of
11 office.

12 3. The Montana Legislature draws PSC district boundaries.
13 The bipartisan, constitutionally mandated Montana Districting and
14 Apportionment Commission ("Districting Commission") draws district lines for
15 all other districted and popularly elected state government offices.

16 4. The PSC districts have only been redrawn on a few
17 occasions over its history. Prior to 1974, commissioners were elected at large
18 rather than by single-member district. Likely as a result, while the 1972 Montana
19 Constitution created the Montana Districting and Apportionment Commission to
20 establish legislative and congressional districts, it made no similar provision for
21 the PSC.

22 5. The PSC has seldom been redistricted. The districts first
23 drawn in 1974 remained in effect until the 2003 legislature drew new boundaries
24 to reflect population changes in the intervening years. Another nearly two
25 decades passed without further amendment to the districts. Then, in 2021, three

1 Montana residents (two of whom are plaintiffs in this case) brought an action
2 against the Secretary in federal court, alleging population growth in the
3 intervening decades had rendered the 2003 map unconstitutional. A three-judge
4 panel ultimately held the 2003 map violated the Equal Protection Clause of the
5 Fourteenth Amendment under the “one person, one vote” doctrine, and
6 compelled the use of a modified map (adapted from the alternative map proposed
7 by the Secretary) to mitigate the population disparities among districts. *Brown v.*
8 *Jacobsen*, 590 F. Supp. 3d 1273 (D. Mont. 2022). The parties have referred to the
9 districting scheme ordered by the *Brown* court as the “Judges’ Plan.”

10 **Senate Bill 109**

11 6. The 2023 legislature convened ten months after *Brown* was
12 decided. On January 4, 2023, Senator Keith Regier, a Republican, introduced
13 Senate Bill 109 (SB 109). As introduced, SB 109 proposed the same district
14 boundaries that were used in the Judges’ Plan. Senate Bill 109 was originally
15 heard in committee on January 24 in the Senate Energy and Telecommunications
16 Hearing. At the hearing, Senator Regier expressly indicated that he did not agree
17 with the Judges’ Plan, and that the introduced draft language simply reflected the
18 *Brown* ruling without modification. He encouraged the committee to adopt a map
19 that focused on the “constitutional”¹ criteria of compactness contiguity, and
20 population parity. Senator Regier stated that he intended to propose an
21 amendment, that his goal was to propose a map with a maximum population
22 deviation of less than one percent, and that such a map would necessarily divide
23 county lines. He made clear the bill text was a “starting point.”

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¹ This presumably refers to the constitutional requirements for legislative districting. See Mont. Const. art. V, § 14(1).

1 7. No immediate action was taken on Senate Bill 109. indeed,
2 in early January, Republican Senator Jason Small (the majority vice-chair of the
3 committee) texted PSC Commissioner Jennifer Fielder to inform her that there
4 was a PSC redistricting bill pending, but they were “going to hold it for awhile.”²

5 8. At the same time that SB 109 was pending in committee, the
6 Districting and Apportionment Commission was wrapping up its work on the
7 districts for the 2024–2032 election cycles. The Districting Commission
8 submitted its proposed legislative district map to the legislature on January 6,
9 2023. On January 30, the legislature adopted Senate Joint Resolution 8, which
10 responded to the proposed legislative districting scheme and made
11 recommendations to the Redistricting Commission. Among other things, the
12 majority caucus criticized the proposed map for unnecessarily splitting
13 communities of interest:

14 The Commission aimed to keep towns and cities intact where
15 possible but divided communities unnecessarily in the name of
16 proportionality. Additionally, the Commission's criteria prioritized
17 keeping rural, suburban, and urban interests in the same district, but
18 frequently drew urban areas into rural ones to create more
19 competitive districts by splitting voting blocs. The mixing and
20 dividing of Montana's communities of interest created districts where
the representative will likely have little knowledge of the areas
beyond his or her own front door.

21 The joint resolution evinced knowledge of the partisan lean of the legislative
22 districts, citing partisan lean data to contend the proposed map would “unduly
23 favor a political party,” and reviewing several examples of proposed House
24

25 ² This evidence was not presented at trial. Nevertheless, the Court found in its order on the parties’ cross-motions for summary judgment that these facts were not genuinely disputed. Facts specified as not genuinely disputed “must be treated as established in the action.” Mont. R. Civ. P. 56(d)(1).
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1 districts the legislative majority believed reflected an intention to favor the
2 Democratic party by dividing communities of interest.³

3 9. During this time, PSC commissioners (understandably) were
4 interested in what proposals would emerge for districting. Commissioner Fielder,
5 a Republican, had several conversations with Senator Regier about districting,
6 including an appeal from her not to reduce the number of districts and to keep the
7 districts reasonably compact, and about the viability of using county lines,
8 geographic features, or house districts to define district boundaries. No evidence
9 was presented of communications between Commissioner Fielder and Senator
10 Regier about the political implications of the map. Commissioner Fielder also
11 communicated with Dan Stusek, a Republican-appointed member of the
12 Redistricting Commission, about their progress on legislative districting.

13 10. Brad Tschida, then the Executive Director of the PSC, met
14 with Senator Regier around January 19, 2023, to discuss SB 109. He was
15 interested in knowing whether the new districts “would wind up dividing
16 communities of significant population, thereby requiring that residents of part of
17 the community would be served by one commissioner and residents of another
18 portion of that community might be served by another commissioner.”

19 11. Commissioner Ann Bukacek, a Republican, exchanged text
20 messages with Senator Regier about SB 109. The text messages suggest she
21 likely spoke with Senator Regier during this time, but Commissioner Bukacek
22 did not recall the substance of any conversations during that time.

23
24
25 ³ By statute, the Districting Commission is prohibited from drawing districts “for the purposes of favoring a political party,” and the commissioners may not consider “political affiliations of registered voters,” “partisan political voter lists” or “previous election results” in drawing district boundaries. Mont. Code Ann. § 5-1-115(3). This mandate has apparently enjoyed the same success one might expect from instructing a crowd to think about anything but rhinoceroses: Districting Commissioner Dan Stusek testified in his deposition that at least four of the five commissioners, including him, consulted partisan lean data.

1 12. At trial, Commissioner Bukacek credibly testified that she
2 had discussions with her fellow PSC Commissioners about SB 109, and that her
3 impression was that the SB 109 map was intended to favor Republican candidates
4 for PSC. Bukacek’s testimony was relatively short and provided few details about
5 the basis for her testimony. She had only limited recall about the discussions she
6 had about Senate Bill 109. This limited the weight the Court accorded her
7 testimony.

8 13. No admissible evidence has been presented that any PSC
9 Commissioners, including Commissioner Bukacek, had direct contact with any
10 legislators, including Senator Regier, about the partisan political implications of
11 Senate Bill 109 or any political motivations underlying the map that ultimately
12 became law. Neither PSC President James Brown nor PSC Commissioner
13 Jennifer Fielder were called to testify at trial. Likewise, the deposition testimony
14 considered at the summary judgment stage consisted of only limited excerpts, and
15 it included no direct knowledge of legislators’ deliberations.

16 14. The Districting Commission submitted its final report
17 establishing legislative districts on February 22, 2023. Six days later, on February
18 28, Senator Regier introduced an amendment to SB 109 during a committee
19 executive session. While all previous PSC districting schemes had defined
20 districts by county lines, SB 109 pioneered the use of defining districts by house
21 districts, with each PSC district consisting of twenty house districts apiece. The
22 amendment to SB 109 divided multiple counties and most of Montana’s largest
23 cities into multiple PSC districts. This amendment ultimately became law; the
24 parties refer to it as the “Enacted Plan.”
25

1 15. Senator Regier spoke to his reasoning behind SB 109 at
2 several junctures through the legislative process. In response to a question asked
3 during committee, Senator Regier said his objective with the Enacted Plan was to
4 “try to follow what the Constitution said as far as contiguous and equal in
5 population as practicable,” apparently referring to the constitutional criteria for
6 legislative districting in Article V, Section 14(1). When asked in committee about
7 how he factored compactness into the Enacted Plan, Senator Regier responded,
8 “Again, the big emphasis was the population and sticking with what the
9 Redistricting Committee (*sic*) did” on the house districts. On the Senate floor,
10 Senator Regier argued the legislature did not need to draw compact districts,
11 noting that the only criterion the legislature had to follow was population equity,
12 noting that compactness and other constitutional criteria did not apply to the PSC.

13 16. Much of the criticism of the Enacted Plan proposal
14 throughout the legislative process focused on the splitting of fourteen counties
15 and six major cities, including the tripartite division of Cascade County. Senator
16 Regier freely acknowledged in the Senate Energy and Telecommunications
17 Committee that he did not strive to keep communities of interest together, noting
18 that the Constitution does not require the legislature to do so. Senator Regier
19 consistently responded to this criticism by maintaining that splitting cities may
20 inure to their benefit by giving them two commissioners answerable to that
21 community.

22 17. Senator Regier consistently denied relying on political
23 considerations. When the amendment was first proposed in committee, a senator
24 questioned him if he knew the “population of Democrats and Republicans in
25 these various districts.” Senator Regier responded, “I didn’t check that.” He

1 elaborated that he followed the Constitution, and “the Constitution doesn’t say
2 anything about the political part.” In the House committee, Senator Regier stated
3 that the “only system” he used to draw the map was using legislative districts and
4 maximizing population equality. In response to a question whether he consulted
5 partisan data, Senator Regier responded, “I’ve heard opponents talk about
6 partisanship, and I have not checked where—I don’t know how to check the
7 partisan leaning in these districts. I was focused on getting the population as
8 equal as possible.”

9 18. In the Senate, the only additional proposed amendment
10 (SB109.001.002) was a defeated proposal to reduce the PSC to three members
11 and continue the practice of drawing districts along county lines. In the House,
12 however, there were multiple unsuccessful attempts to amend SB 109.
13 Democratic representatives moved several amendments in committee. The first,
14 Amendment Two (SB109.002.002), used county lines and had a maximum
15 population deviation of 1.72 percent. The second, Amendment Three
16 (SB109.002.003), used legislative district lines but only split three counties and
17 one city, with a maximum population deviation of 1.55 percent. The third,
18 Amendment Five (SB109.002.005), used legislative district lines but split all
19 seven largest Montana cities with a maximum population deviation of 1.39
20 percent. The Enacted Plan had a maximum population deviation of 1.95 percent.
21 The amendments were defeated in committee largely without discussion,
22 although one representative inquired whether the maps had been vetted through
23 Senator Regier, and the Chair (who voted for Amendment Five) praised
24 Amendment Five as most consistent with the sponsor’s intent.

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1 19. Republican Representative Steve Galloway carried SB 109
2 on the House floor. Representative Galloway told the body that amendments had
3 been proposed and were likely to be moved on the floor, but he characterized
4 them as “the minority singing the blues.” On the floor, Minority Leader Kim
5 Abbott⁴ and Representative Jonathan Karlen, both Democrats, moved
6 Amendments 3 and 5, respectively. Representative Galloway argued the
7 amendment was “unfriendly.” Both amendments failed.

8 20. In response to the failure of the floor amendments,
9 Representative Derek Harvey, a Democrat, stated that he had not been given a
10 persuasive explanation why the map was drawn the way it was given the many
11 ways a map could be drawn that equalized population, gave cities multiple PSC
12 representation, and used legislative lines. He complained that the Democratic
13 minority had proposed multiple maps that better achieved these stated aims, and
14 each had been rejected. Multiple representatives, including Representative
15 Galloway, expressly tied the debate over political considerations to complaints
16 about partisanship in the Districting Commission’s work, saying “I find it ironic
17 because if you ask me they’re making my case for me, and I appreciate that,
18 because this isn’t political unless of course it was drawn political previously,
19 because we’re just using those previous districts that were just redone.” Viewed
20 in context, the implication of this statement was unmistakable.

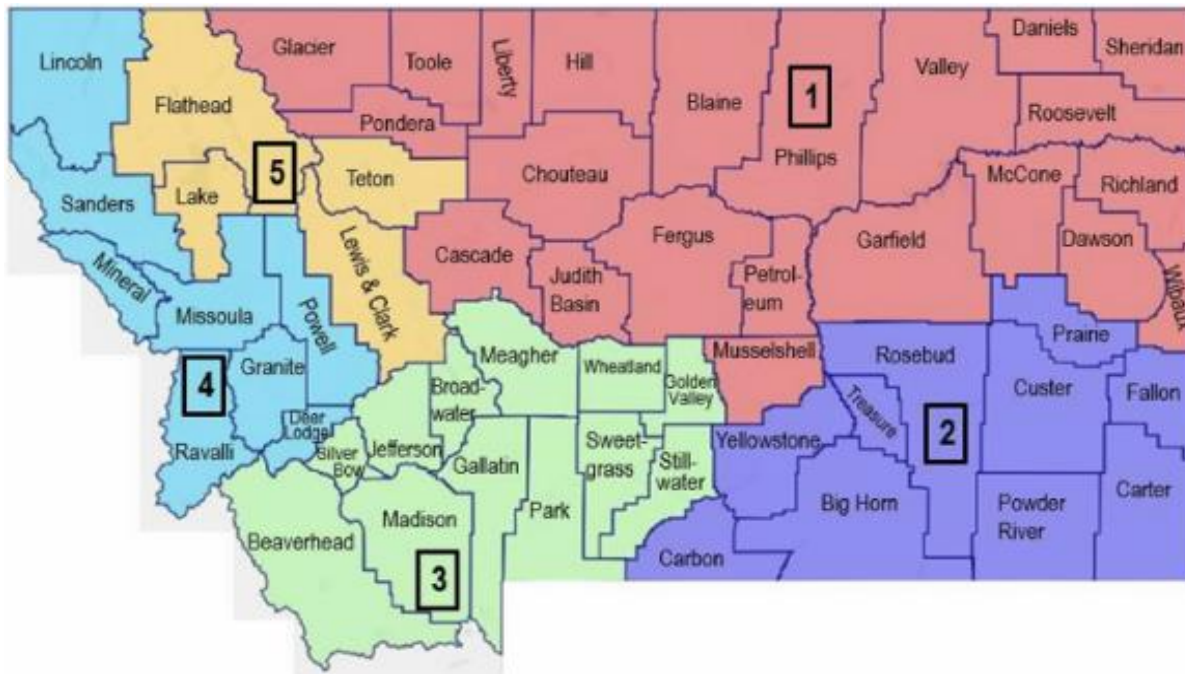
21 21. Notably, Representative Galloway’s observation echoes a
22 comment made by Districting Commissioner Dan Stusek during a hearing on a
23 different bill. He said: “I don't think it's lost on folks that maybe, because of the
24 actions of the redistricting commission, there might have been some folks that
25 thought—that wanted to use this opportunity and produce what resulted in the

⁴ The undersigned is not related.

1 PSC map. I think had it been resolved first, you might not have seen that result.”
2 (Stusek was not called to testify at trial.)

3 22. During the 2023 session, the legislature considered five
4 alternative maps for dividing up a five-member PSC:

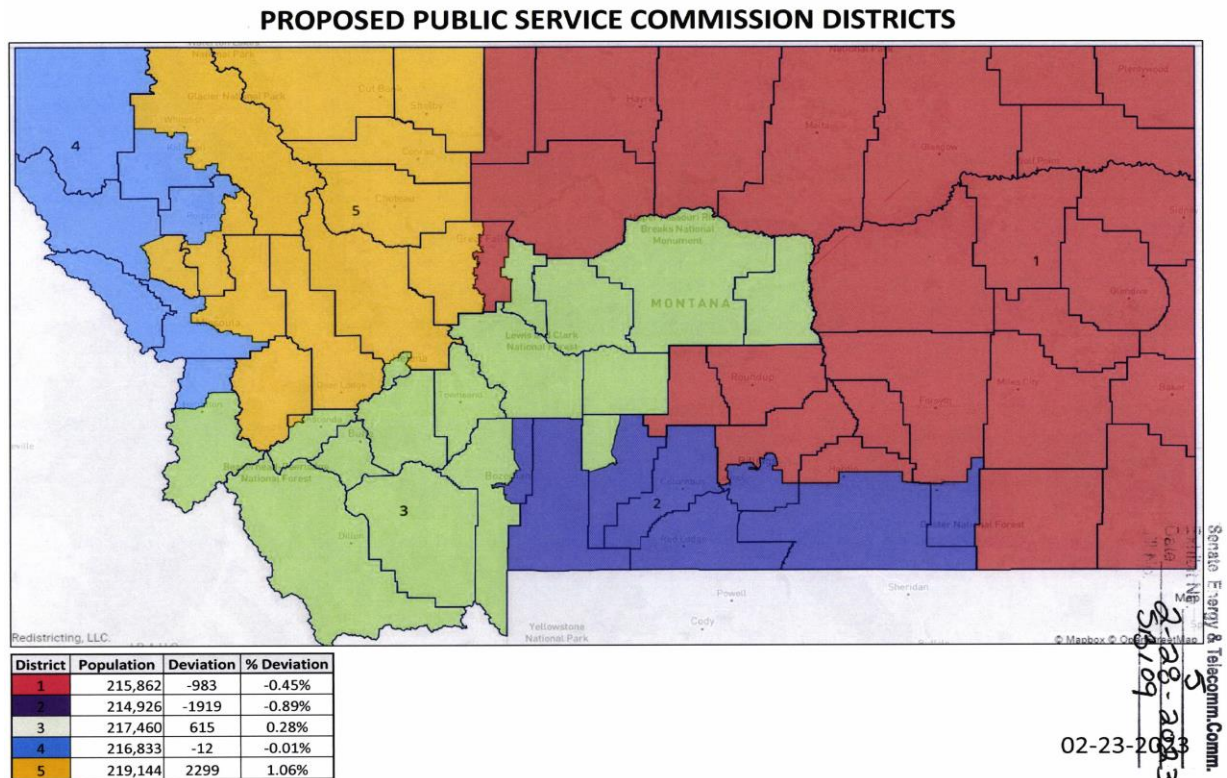
5 a. The Judges’ Plan. The Judges’ Plan is the map used in
6 2022 as ordered by the court in *Brown v. Jacobsen*, 590 F. Supp. 3d 1273 (D.
7 Mont. 2022) (three-judge panel).



19 *Id.* at 1292. Relevant features:

- 20 • Maximum population deviation: 6.72%.
- 21 • Defines districts by county lines.
- 22 • No counties or cities are split.
- 23 • All reservations except Flathead Reservation are kept whole. The
24 Blackfeet, Rocky Boy, Fort Belknap, and Fort Peck reservations
25 are entirely in District 1. The Crow and Northern Cheyenne
reservations are in District 2. The Flathead Reservation is split
between Districts 4 and 5.

b. The Enacted Plan. The Enacted Plan is the amendment, sponsored by Senator Regier and moved by Senator Jason Small, that was adopted in committee February 28, 2023, and ultimately became law.



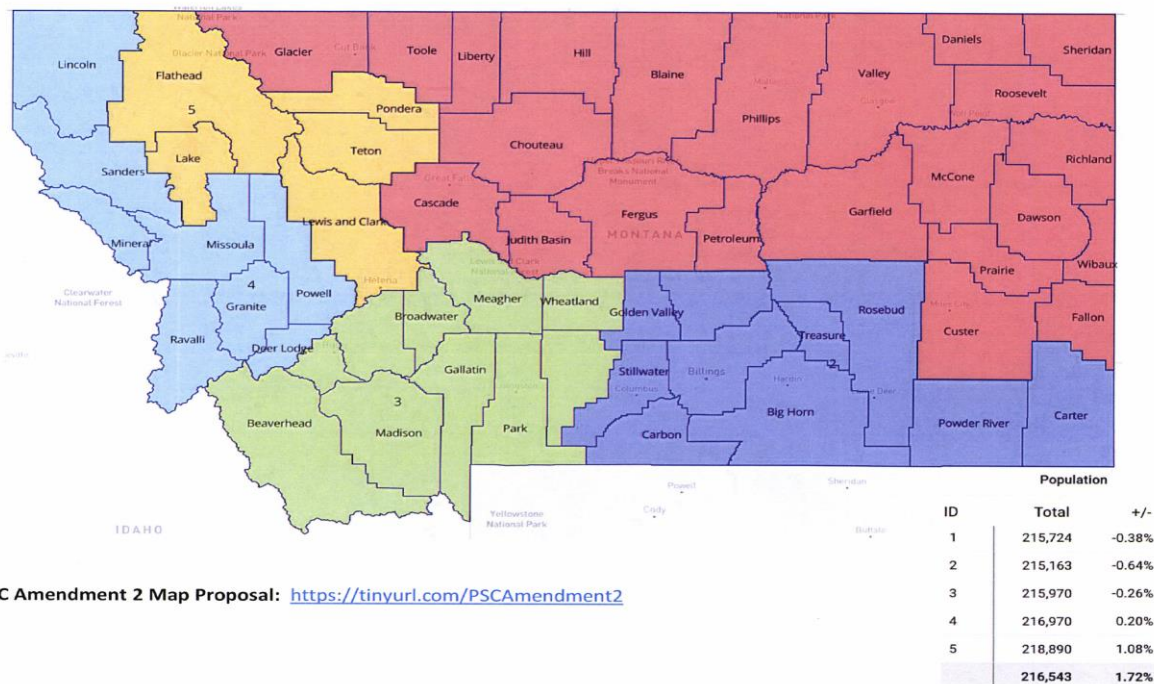
Relevant features:

- Maximum population deviation: 1.95%
- Defines districts by legislative districts.
- Splits 14 counties. Cascade County is split among three districts.
- Splits 6 of Montana's 7 largest cities between two districts: Kalispell, Missoula, Great Falls, Helena, Bozeman, and Billings.
- All reservations except the Flathead Reservation are kept whole. The Blackfeet reservation is entirely in District 5. The Rocky Boy, Fort Belknap, and Fort Peck reservations are in District 1. The Crow and Northern Cheyenne reservations are in District 2. The Flathead Reservation is split between Districts 4 and 5.

c. Amendment Two. This amendment was proposed by Democratic Representative Laurie Bishop in committee and defeated April 7.

PSC Amendment 2 – Population Equal, County Lines

Amendment 2 has lower population deviation than SB 109 while splitting no cities and no counties (compared to SB 109 that groups 20 house districts to make up each PSC district while splitting counties 14 times and dividing 6 cities).



PSC Amendment 2 Map Proposal: <https://tinyurl.com/PSCAmendment2>

Relevant features:

- Maximum population deviation: 1.72%
- Defines districts by county lines.
- Splits no counties or cities.
- Splits two reservations. Splits Flathead Reservation between Districts 4 and 5. Splits Blackfoot Reservation between Districts 1 and 5. The Rocky Boy, Fort Belknap, and Fort Peck Reservations are entirely in District 1. The Crow and Northern Cheyenne Reservations are entirely in District 2.

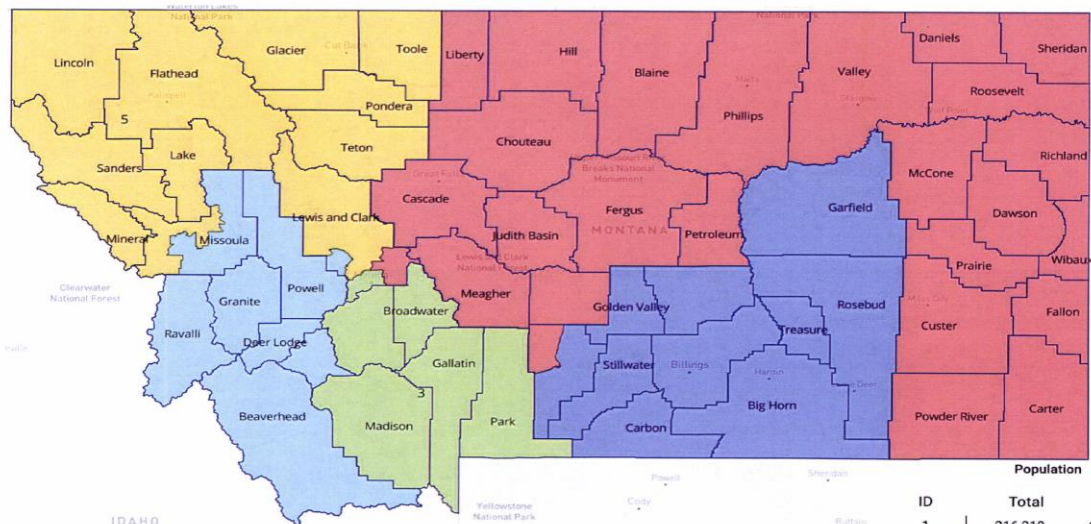
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d. Amendment Three. This amendment was moved by Democratic Representative Katie Sullivan in committee and defeated April 7. It was moved again on the House Floor by Minority Leader Kim Abbott and defeated April 14.

PSC Amendment 3 – Follows Legislative District Lines while Minimizing City/County Splits

Amendment 3 has lower population deviation than SB 109. It groups 20 legislative house districts for each PSC district and splits only 3 counties and 1 city (compared to SB 109 that also groups 20 house districts to make up each PSC district while splitting counties 14 times and dividing 6 cities).



PSC Amendment 3 Map Proposal: <https://tinyurl.com/PSCAmend3>

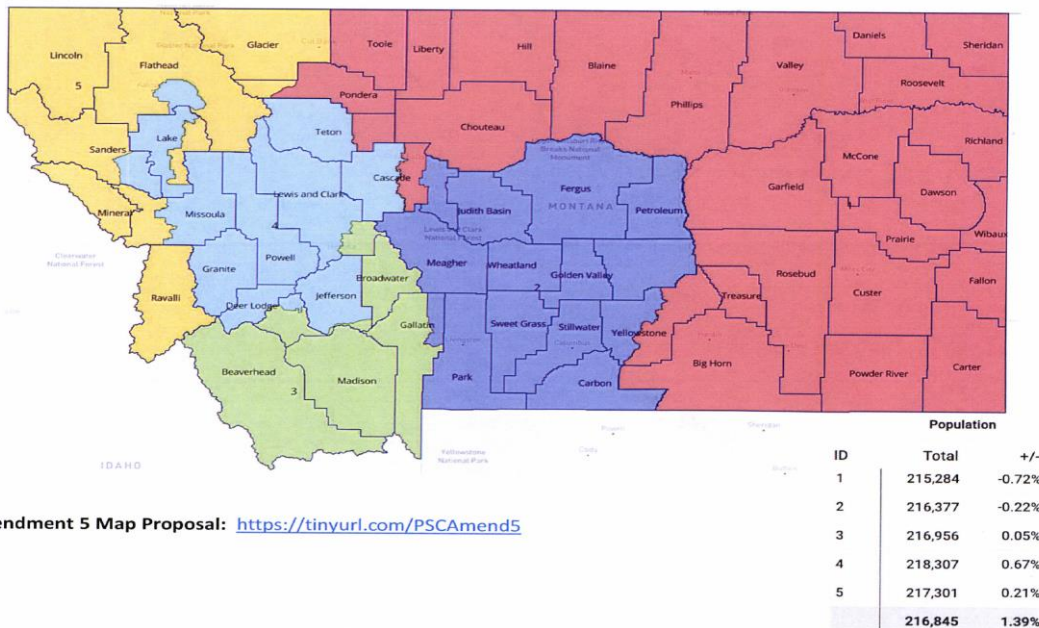
Relevant features:

- Maximum population deviation: 1.55%.
- Defines districts by legislative districts.
- Splits 3 counties (Sweetgrass, Lewis & Clark, and Missoula), and 1 city (Missoula). Lewis and Clark is split among three districts; Missoula among two; and Sweetgrass among two.
- All reservations appear to be kept whole. Flathead and Blackfeet Indian Reservations are entirely in District 5; Rocky Boy, Fort Belknap, and Fort Peck Reservations are in District 1; and Crow and Northern Cheyenne Reservations are in District 2.

e. Amendment Five. This amendment was moved by Representative Harvey in committee and defeated April 7. It was moved again on the House floor by Representative Jonathan Karlen and defeated April 14.

PSC Amendment 5 – Follows Legislative District Lines while Splitting the 7 Major Cities

Amendment 5 has lower population deviation than SB 109. It groups 20 legislative house districts for each PSC district and splits all 7 major cities to ensure they all receive the same advantage of two representatives on the PSC as described by the sponsor (compared to SB 109 that also groups 20 house districts to make up each PSC district but only splits 6 of the 7 major cities while treating Butte differently than other cities).



PSC Amendment 5 Map Proposal: <https://tinyurl.com/PSCAmend5>

Relevant features:

- Maximum Population Deviation: 1.39%
- Defines districts by legislative districts.
- Splits at least 12 counties (Flathead, Lake, Sanders, Missoula, Silver Bow, Jefferson, Madison, Gallatin, Lewis & Clark, Pondera, Cascade, and Yellowstone) and all 7 largest cities.
- Splits two reservations. Splits Flathead Reservation between Districts 4 and 5. Splits Blackfoot Reservation between Districts 1 and 5. Rocky Boy, Fort Belknap, Fort Peck, Northern Cheyenne, and Crow Reservations are entirely in District 1.

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1 **Expert Testimony**

2 23. Stephanie Somersille, Ph.D., testified as an expert witness
3 for Plaintiffs. She holds a doctorate in mathematics and has specialized in the
4 mathematical analysis of redistricting schemes. Although this was her first time
5 testifying as an expert witness, Somersille has consulted on gerrymandering
6 questions in multiple other cases. She has opined before that maps she has
7 reviewed unduly favored both Democrats and Republicans.

8 24. The State did not produce any rebuttal expert testimony.

9 25. Somersille reviewed two maps, the Judges' Plan and the
10 Enacted Plan. Somersille generated four different sets of "ensemble maps" to
11 compare to the two questioned maps. "Ensemble maps" are a set of more than
12 100,000 random maps generated algorithmically using certain constraints. They
13 are a widely accepted methodology in the field of redistricting mathematics.
14 The first ensemble, termed the "neutral ensemble" in her report, consisted of
15 maps that were contiguous, reasonably compact, and with population disparities
16 of no greater than five percent. These maps were generated without any use of
17 partisan election data. Somersille then reviewed selected partisan statewide
18 elections conducted between 2016 and 2020, and compared the range of partisan
19 outcomes (specifically, the share of the vote going to the Democratic general
20 election candidate) from the ensemble map sets (from the 1st to 99th percentile of
21 Democratic vote share) to the Democratic voter share that would have obtained
22 in each district within the districts defined in the Judges' Plan and Enacted Plan.
23 A Democratic vote share greater than the 99th percentile or less than the 1st
24 percentile for the two questioned maps suggests that they were drawn based on
25 factors other than those used to generate the ensemble.

1 26. Somersille made several findings about both plans based on
2 her comparison to the neutral ensemble set. First, while the Democratic voter
3 share for each district in the Judges’ Plan fell within the range established by the
4 neutral ensemble, two adjoining districts in the Enacted Plan—Districts 3
5 and 5—fell above the 99th percentile and below the 1st percentile for Democratic
6 voter share, respectively. In other words, the Democratic vote share in these two
7 Districts was a statistical outlier that likely cannot be explained by a random or
8 neutral application of a maximum 5 percent population deviation, contiguity, and
9 compactness. Somersille further noted that that the relatively flat rate of
10 Democratic voter share across four of the five districts reflected in her data
11 suggested two common gerrymandering practices: “cracking” and “packing.”⁵

12 27. Finally, when reviewing multiple elections over the 2016-
13 2020 period with varying Democratic voter shares, she noted that the Democratic
14 voter share in each district was relatively unresponsive to increases in the
15 statewide Democratic voter share. As Democratic voter share increases statewide,
16 one would expect Democrats to pick up progressively more PSC seats; with the
17 Enacted Plan, however, Democratic pickups lagged substantially behind what
18 would be predicted as statewide voter share increased. It was only in those
19 elections where Democrats won a 51.8 percent or greater statewide voter share
20 that there was a substantial increase in Democratic representation on the PSC.
21 Somersille concluded that these findings are all characteristic of partisan
22 gerrymandering efforts.

23 28. Somersille then adjusted the constraints on the neutral
24 ensemble, generating one ensemble with a maximum one-percent population
25

⁵ “Packing” refers to districting as many voters expected to favor a particular party in one location to confine their influence to a single district; while “cracking” refers to the practice of dividing up voters expected to favor a particular party into multiple districts where they are likely to be outvoted.

1 deviation as the only constraint, one that used a five-percent maximum
2 population deviation but minimized splits of cities and counties, and one that
3 minimized political subdivision splits and used a one-percent maximum
4 population deviation. None of these constraints significantly altered her analysis.

5 29. Somersille also compared the number of city splits in her
6 ensemble sets to the Judges' Plan and Enacted Plan. While the Judges' Plan
7 (which defined districts along county lines) had no city splits, the Enacted Plan
8 was a statistical outlier compared to the ensembles, making it "extremely unlikely
9 that the designers of this plan were merely indifferent to splitting city
10 boundaries." An intentional splitting of city boundaries can be suggestive of an
11 intent to crack presumed Democratic-leaning voters by spreading them out
12 among multiple districts. Under the Enacted Plan, Billings, Bozeman, Helena,
13 Missoula, Kalispell, and Great Falls are divided among multiple districts.

14 30. Finally, Somersille also noted that the Enacted Plan's
15 districts were less compact than the Judges' Plan and the median compactness of
16 the neutral ensemble set. Somersille described two commonly applied methods
17 for assessing compactness: the Polsby-Popper score, which is a scaled ratio of the
18 area of the district to its perimeter-squared; and the Cut Edges score, which
19 measures how many pairs of adjacent census blocks are assigned to different
20 districts.

21 31. At trial, Somersille conceded that although the Enacted Plan
22 was less compact than the Judges' Plan and the neutral ensemble value, it was
23 only modestly less compact. The Polsby-Popper score for the Enacted Plan was
24 0.19, compared to 0.26 for the Judges' Plan and a median score of 0.21 generated
25 by the neutral ensemble. There was a bigger difference, however, for the Cut

Edges method, where the Enacted Plan separated 283 adjacent census blocks, compared to 138 adjacent census blocks separated by the Judges' Plan and the median of 152 for the neutral ensemble. The disparity in the Cut Edges score was a statistical outlier. How much of this difference was due to the underlying legislative house districts cutting census blocks, however, was not explored in the testimony.

32. Somersille's opinion, expressed to a reasonable degree of scientific certainty, is that the Enacted Plan was designed to provide an advantage for Republican candidates and voters in all five PSC districts.

Plaintiffs

33. This lawsuit is brought by Montana Conservation Voters and eight individual Montana residents. Montana Conservation Voters is an organization focused on environmental protection that is interested in the work of the PSC and having diverse candidates elected to the PSC. Each individual plaintiff is a qualified elector who sometimes, often, or always vote in PSC elections for non-Republican candidates, and who assert injury in being unable to effectuate their desired representation on the PSC.

34. Plaintiff Donald Seifert testified at trial. He is a former Republican Gallatin County Commissioner. He demonstrated for the jury how the Enacted Plan divides up neighborhoods in the Bozeman area, including his own, in a seemingly arbitrary fashion, and he testified to the negative impact this had on his ability to select the PSC Commissioner of his choice and how it negatively impacts Gallatin County and the City of Bozeman's representation on the PSC.

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1 35. Plaintiff Bob Brown testified at trial. He is a former
2 Republican Secretary of State and long-time legislator. He resides in Flathead
3 County near Whitefish. Like Seifert, Brown demonstrated for the jury arbitrary
4 divisions in his community, and he pointed out the lack of commonality of
5 communities included in the districts as drawn.

6 36. Plaintiff Daniel Hogan testified at trial. He is a resident of
7 Walkerville, a small community slightly north of Uptown Butte in Silver Bow
8 County. Butte is the only major Montana city that is contained within a whole
9 district under the Enacted Plan. This District (District 3), however, covers not
10 only all of southwestern Montana, but extends as far as Lewistown. Testimony
11 focused on the wide geographic range of the district and lack of commonality
12 between Butte and the communities in central Montana.

13 37. All three testifying Plaintiffs established a concrete,
14 particularized injury resulting from the Enacted Plan.

15 38. All three Plaintiffs testified credibly and sincerely.

16 **Procedural History**

17 39. Plaintiffs initially brought this case, seeking declaratory and
18 injunctive relief, on October 30, 2023. (Dkt. 1.) Plaintiffs moved for a
19 preliminary injunction one month later, on November 29. (Dkts. 6–8.)

20 40. The State moved to dismiss the case on political question
21 and standing grounds and their contention that Plaintiffs failed to state a claim for
22 which relief can be granted. (Dkts. 15, 16.)

23 41. The Court held an evidentiary hearing on the motion for a
24 preliminary injunction on February 2, 2024, and received testimony from
25 Somersille and Stusek. (Dkt. 26.)

1 42. On February 29, 2024, the Court denied the State’s motion
2 to dismiss, found Plaintiffs were likely to succeed on the merits of their claim
3 based on the record then before the Court, but declined to issue a preliminary
4 injunction based on the absence of a workable alternative map. (Dkt. 29.)

5 43. Over the summer of 2024, Plaintiffs issued a deposition
6 subpoena and subpoena *duces tecum* to Senator Regier. He moved to quash the
7 subpoena. The Court granted the motion to quash on July 12, 2024, based on
8 Senator Regier’s privilege against being questioned for his legislative acts in a
9 judicial forum. (Dkt. 64.) Specifically, the Court held Senator Regier was
10 absolutely privileged from being compelled to testify about his work on Senate
11 Bill 109. (*Id.* at 16.)

12 44. On September 13, 2024, the Court declined to quash
13 subpoenas directed to sitting PSC Commissioners Bukacek and Fielder, although
14 the Court did impose some limitations on the length and subject matter of the
15 depositions to avoid undue burden on them. (Dkt. 83.)

16 45. Early on in the case, the Secretary demanded a jury trial, and
17 Plaintiffs subsequently moved to strike the jury trial demand. The issue of
18 whether the Secretary was entitled to a jury trial and whether the Court should
19 alternatively empanel an advisory jury was fully briefed and orally argued by the
20 parties. (Dkts. 32, 35, 36, 39, 41, 57.) On October 16, 2024, the Court held that
21 the Secretary was not entitled to a jury trial on Plaintiffs’ declaratory judgment
22 claims, but that the Court was persuaded an advisory jury should be empaneled to
23 address the question of legislative motive. (Dkt. 95.)

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1 46. On December 4, 2024, the Court resolved cross motions for
2 summary judgment. The Court granted partial summary judgment for Plaintiffs
3 on standing and whether the State had a compelling state interest that would
4 justify political belief discrimination, assuming the Court found a motive to
5 discriminate. The Court held that justiciability, standing, and the legislative
6 history of SB 109 were not genuinely disputed. (Dkt. 129.)

7 47. The advisory jury was asked to answer the following special
8 verdict question:

9
10 Did the Plaintiffs prove that the Montana State Legislature intended
11 to use the PSC district boundaries they drew in Senate Bill 109 to
12 favor or disfavor certain candidates or groups of voters based on
their political beliefs or partisan affiliations?

13 Nine jurors (out of twelve) answered this special verdict question in the negative.

14 48. Following trial, Plaintiffs produced an affidavit from juror
15 Steven Blom, who averred that his verdict of “no” was “based in part on what
16 [he] viewed as the Plaintiffs’ failure to call Senator Keith Regier as a witness to
17 testify directly regarding the legislature’s intent.” (Blom Decl. ¶ 5, Pls.’ Post-
18 Trial Br. & Objs. Ex. 1, Dkt. 145 at 24.) Blom also contended that he understood
19 Instruction No. 14, which instructed the jury on a presumption to legislative good
20 faith, “to be similar to the presumption of innocence in criminal cases, and [he]
21 felt compelled to accept as true Senator Regier’s statements in the legislative
22 videos.” (Blom Decl. ¶ 7, *Id.* at 24–25.)

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24 49. Counsel for Plaintiffs, Rylee Sommers-Flanagan, also filed a
25 declaration that she had conversations with five advisory jurors, an unspecified
number of which answered “no” to the special verdict question. According to her,

1 the “advisory jurors [she] spoke with independently noted—each in their own
2 words—that the advisory jury drew an adverse inference against Plaintiffs
3 because of Senator Regier’s absence from the trial.” (Sommers-Flanagan Decl.
4 ¶ 4, Pls.’ Post-Trial Br. & Objs. Ex. 2, Dkt. 145 at 28.) No further detail was
5 provided.

6 50. The State has objected to consideration of these post-trial
7 declarations and moved to strike them from the record.

8 **Analysis of the Disputed Factual Issues**

9 51. The core disputed factual issue in this case is the question
10 posed to the advisory jury: whether Plaintiffs can prove the legislature intended
11 the Enacted Plan to favor Republican candidates and voters and disfavor other
12 candidates and voters. Although the Court can consider the advisory verdict in
13 rendering its findings, the factual issue is ultimately for this Court to determine.
14 The Court starts with the factors favoring Plaintiffs’ case, in descending order of
15 significance.

16 52. First, the most significant evidence favoring Plaintiffs is the
17 testimony of Dr. Somersille. The Court found Dr. Somersille credible and her
18 method sound. Her opinion that the district lines cannot be explained simply by
19 population parity, compactness, contiguity, and keeping communities of interest
20 together is persuasive to the Court.

21 53. Second, the Court gives weight to Dr. Somersille’s analysis
22 that the Enacted Plan bears other hallmarks of gerrymandering, including a lack
23 of responsiveness to increasing vote share. Superimposing the districts onto
24 Democratic voter share for statewide elections in 2016, 2018, and 2020,
25 Somersille found that Democratic voter share from any of those elections would

1 not translate into a Democratic victory in any of the Enacted Plan districts except
2 where Democratic voter share equaled or exceeded 47.6%, whereas the Judges’
3 Plan and most ensemble maps would award two seats to Democrats. When
4 Democratic vote share from those elections exceeded 51.8%, then Democrats
5 would prevail in four of the five PSC districts. According to Somersille, this flat
6 curve followed by “overreaction” once a tipping point is reached is indicative of
7 a partisan gerrymander.

8 54. Third, the Court regards as significant the splitting of cities,
9 counties, and communities. Plaintiffs Seifert and Brown pointed out how
10 neighborhoods near them were seemingly arbitrarily separated by district
11 boundaries. Likewise, Plaintiffs have pointed out that six of Montana’s seven
12 largest cities are divided, and fourteen counties are divided. One county, Cascade
13 County, is divided among three different districts. Elsewhere, the legislature has
14 indicated a preference for avoiding such splits. For instance, the legislature has
15 directed the Districting Commission to apportion legislative districts to minimize
16 splits: “District boundaries must coincide with the boundaries of political
17 subdivisions of the state to the greatest extent possible. The number of counties
18 and cities divided among more than one district must be as small as possible.”
19 Mont. Code Ann. § 5-1-115(2)(b). In the list of ranked priorities in that statute,
20 this ranks above contiguity and compactness and, indeed, is second only to
21 population equality. *See id.* Likewise, the same majority that approved SB 109
22 also criticized the Districting Commission’s legislative districting scheme for
23 unnecessarily splitting communities and mixing urban and rural voters together.

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25 /////

1 55. Fourth, the Court credits some limited direct evidence of an
2 impermissible discriminatory motive. It was clear to the Court that
3 Representative Galloway's remarks on the House Floor suggested that he, at the
4 very least, regarded Democratic complaints about the Enacted Plan as
5 hypocritical because they contended the legislative districting was accomplished
6 apolitically. Indeed, several representatives at various stages in the proceedings
7 made an argument to the following effect: "If the legislative districts were not
8 gerrymandered, and the PSC map uses those legislative districts to define the
9 district boundaries, how can the PSC map be gerrymandered?" Of course,
10 because the PSC districts are so much larger than the legislative districts, it
11 matters *which* house districts are allocated to each PSC district. This argument,
12 nevertheless seems to reflect frustration with the legislative map and is
13 suggestive of a possible motive to respond to use the PSC map to respond.

14 56. Finally, the Court considers that Democrats proposed three
15 alternative maps to the legislature which were rejected. The main value of these
16 rejected amendments is that they demonstrate one can draw maps that achieve
17 closer population parity while using either county lines, avoiding city splits, or
18 maximizing city splits.

19 57. The foregoing, however, are not the only considerations:
20 there are also several factors that either blunt the effect of Plaintiffs' evidence or
21 affirmatively suggest the absence of a discriminatory motive.

22 58. First, the most significant factor for the Secretary by far is
23 Senator Keith Regier's own contemporaneous statements. As this Court has
24 previously noted, Senator Regier's views are not the be-all-end-all of legislative
25 motive, as he is only one of 150 legislators. Nevertheless, he was the bill sponsor,

1 making his views particularly significant. Moreover, the record contains little
2 evidence of other legislators' views, including whether the majority of legislators
3 voting for SB 109 disagreed with or had different views than did Senator Regier.
4 Accordingly, Senator Regier's statements are entitled to substantial weight.

5 59. Senator Regier consistently maintained that he did not look
6 at partisan data, that he did consider partisan advantage, and that he focused
7 primarily on population parity.⁶ Although the amendments proposed by
8 Democrats demonstrate that it is *possible* to achieve population balance using
9 county lines, it certainly makes intuitive sense that using legislative districts
10 required by law to be relatively equal in population will all but guarantee a close
11 parity of PSC districts as well. Thus, Senator Regier's use of legislative districts
12 is consistent with his stated motivations.

13 60. Notably, Plaintiffs did not produce and appear not to have
14 discovered any direct evidence, including from the PSC commissioners or their
15 staff that they deposed, that Senator Regier ever looked at partisan data,
16 considered partisan data, or made statements to anyone about the political
17 implications of the Enacted Plan. Commissioner Bukacek testified that she
18 formed the impression from her conversation *with other* PSC commissioners that
19 the Enacted Plan was intended to make it easier to elect Republicans, but
20 Plaintiffs did not offer any testimony or evidence from those other
21 commissioners about the basis of their knowledge or whether it was connected to
22 any communication with any legislator, let alone Senator Regier. Because of its
23
24

25 ⁶ The Court recognizes that Senator Regier was occasionally inconsistent in his statements about the extent to which he considered contiguity or compactness. It is not uncommon for anyone—and legislators are no exception—to articulate the same thing somewhat differently in multiple tellings of the same event. Given this feature of human nature, the Court does not weigh this heavily against the credibility of Senator Regier's stated motivations.

1 secondhand nature and lack of accompanying detail, Commissioner Bukacek’s
2 testimony, although credible, is entitled to little weight.

3 61. Second, the legislature is entitled to deference in what
4 criteria it chooses to use for districting the PSC, provided it does not draw
5 boundaries that violate the Constitution. The *Brown* decision affirmed that the
6 legislature has a duty and power to draw districts of comparable population.
7 There is a federal prohibition on drawing districts that discriminate on the basis
8 of race. This Court has further recognized that there is a constitutional prohibition
9 on drawing districts that discriminate on the basis of political ideas (and
10 presumably the other protected categories in Article II, Section 4). But beyond
11 these, there are no constitutional or statutory constraints on PSC districting, as
12 various legislators stated during debate over SB 109. Indeed, the legislature could
13 go further than they did here: they could resume the pre-1974 practice of
14 selecting Commissioners at large instead of by district or eliminate elections
15 entirely and use gubernatorial appointment instead, either of which would just as
16 surely inhibit Democratic representation on the Commission. Similarly, the
17 legislature is not required to follow traditional redistricting criteria such as
18 compactness, contiguity, or keeping communities of interest together if the
19 legislature makes a good faith policy determination that those criteria do not
20 make sense for PSC districting. As it should be with any matter falling within its
21 domain, the legislature should be accorded deference in its policy determinations.

22 62. Third,, the legislature has never professed that it was trying
23 to keep communities of interest together in the PSC districts. From the very first
24 discussion of the Enacted Plan, Senator Regier maintained that splitting
25 communities of interest was a “plus” because it gave those split communities

1 multiple representatives on the PSC with a stake in the issues of those
2 communities. This rationale never wavered, and indeed it was repeated at every
3 stage of the legislative process. Indeed, the Chair of the House Energy,
4 Telecommunications, and Federal Relations Committee, Republican
5 Representative Katie Zolnikov, voted for Amendment Five, stating it was
6 consistent with the sponsor's intent to provide multiple representatives for each
7 major city.

8 63. There are certainly downsides to dividing communities
9 between PSC districts. While each city might have multiple representatives, it
10 also dilutes the influence of that city within each district. For example, while the
11 commissioners for Districts 2 and 3 are both answerable in part to constituents in
12 the City of Bozeman under the Enacted Plan, neither commissioner is as
13 dependent on the support of those constituents as they would be if the entirety of
14 Bozeman were within their district. Nevertheless, it is generally for the
15 legislature to weigh the advantages and disadvantages of a policy decision.

16 64. The individual Plaintiffs' testimony focused on the
17 geographic and cultural dissonance of the communities grouped into each district
18 (for example, including Butte and Lewistown in the same district) and the
19 divisions cleaving common communities, such as neighborhoods in Bozeman and
20 Whitefish. The significance of this, however, is somewhat overstated. Unlike
21 legislative districts, which are small and more easily tailored to particular
22 communities of interest, this becomes much more difficult to do as the number of
23 districts decreases and the area they necessarily cover increases. For example,
24 there is no way to divide the State into its two Congressional districts in a way
25 that will not produce strange bedfellows: hardly anyone in Helena would

1 consider themselves as part of eastern Montana or having much in common with
2 the prairie communities of eastern Montana, and yet it is difficult to avoid such
3 pairings when accounting for the uneven population distribution across the state.
4 Likewise, there is no way to draw five PSC districts that will not also create odd
5 pairings or divide adjacent areas with common interests. The districts are too
6 large and the state is too geographically, socially, and economically diverse for it
7 to be otherwise.

8 65. Similarly, the task of how best to balance urban and rural
9 interests without creating unfair political unbalance is not straightforward. It is no
10 secret that urban areas tend to be comparatively more Democratic leaning than
11 rural areas in the current political climate. Thus, even neutral schemes that try to
12 balance the interests of urban and rural voters without regard for politics have
13 implications for political advantage because of where voters of different political
14 preferences tend to live.

15 66. Moreover, urban voters and rural voters have different
16 interests relative to the industries regulated by the PSC. People living in urban
17 areas have entirely different systems for sewage and septic disposal, garbage
18 pickup, and transit (i.e., taxi services) than those living in more far-flung rural
19 areas. The legislature could thus rationally choose to aggregate several cities into
20 a single PSC district to ensure urban interests have at least one commissioner
21 intensively focused on them, but such a scheme could result in accusations of
22 either gerrymandering that district to favor Democrats or, alternatively,
23 “packing” Democrats into a single district to make them less competitive in the
24 remaining four.

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1 67. Additionally, different regions of the State have different
2 interests. For example, residents of the northern part of the state—commonly
3 called the “Hi-Line” have particular interests in the railroad industry, which is
4 regulated by the PSC. Many voters in southeastern Montana very much care
5 about the economic health of the power generation facilities at Colstrip, which
6 stands to be affected by PSC regulation. Some residential customers receive their
7 power from Montana-Dakota Industries, while customers in other areas receive
8 power from NorthWestern Energy. The legislature may choose to draw districts
9 to account for these interests in ways that an ensemble map comparison analysis
10 does not fully capture.

11 68. Plaintiffs have pointed to the unanimity of opposition in
12 public hearings in the legislature, particularly the opposition from representatives
13 of the cities that SB 109 is claimed to benefit. The Court gives this little weight.
14 First, it is not unusual for the legislature to advance bills that face substantial—
15 even unanimous—opposition at the bill hearing or to kill bills that have
16 unanimous support in public testimony. Legislators are entitled to disagree with
17 city governments about whether multiple or single representation best benefits
18 them.

19 69. The Court has also noted above the legislature’s rejection of
20 several proposed amendments to SB 109. Although these amendments
21 demonstrate that it is possible to achieve better population parity with fewer city
22 splits or using county lines, they do not necessarily evince a discriminatory
23 motive. Just as bills can fail for a multitude of reasons, so can amendments.
24 Proposed amendments in legislative bodies may be strategic and brought as
25 poison pills, as delaying tactics, or to aid the losing side with messaging.

1 Amendments may be rejected because legislators did not have enough time to
2 study them, because they will complicate passage of the overall legislation, or
3 because they distrust the motivations of the legislators who introduced them,
4 among other reasons. The Court therefore does not ultimately give much weight
5 to the fact that the legislature rejected Democratic amendments to the bill.

6 70. Given all of the foregoing considerations, this Court rejected
7 Plaintiffs' motion for summary judgment on motive, noting that reasonable
8 minds could draw different conclusions from the record about the legislature's
9 motives. Moreover, the Court notes that a holding for Plaintiffs here effectively
10 requires the Court to conclude that when Senator Regier said—publicly and
11 multiple times—that he did not consult partisan data or consider political
12 advantage in formulating SB 109, he was not being truthful. Questioning the
13 veracity of a senior elected member of a coordinate branch of government is a
14 serious matter that should not be determined cavalierly.

15 71. The Court gives substantial weight to the determination of
16 the advisory jury. As the Court noted in its order on the motion to strike the jury
17 trial demand:

18 Juries are well-suited to determine such matters of intent. They are
19 commonly asked to decide questions of discriminatory intent arising
20 in discrimination claims under Title VII of the Civil Rights Act and
21 the Americans with Disabilities Act. Juries decide questions of fraud,
22 which requires the jury to determine whether the defendant was
23 either aware or in reckless disregard of the falsity of a representation
24 and whether the defendant intended the representation be acted upon
25 by the recipient. Juries adjudicate whether actual malice, a
prerequisite for awarding punitive damages, has been shown. And in
criminal jury trials, juries routinely determine whether the State has
proven beyond a reasonable doubt that a person accused of a crime
possesses the requisite degree of criminal intent.

1 To be sure, this Court, too, frequently adjudicates factual questions
2 of intent in a variety of contexts. But juries have certain advantages.
3 First, unlike the federal system, Montana has no mechanism for
4 three-judge panels to hear redistricting claims. Thus, the question of
5 intent comes to a single judge's opinion. By contrast, a jury will
6 consist of twelve citizens from a variety of backgrounds and

7 possessing an array of political beliefs, who will be required to
8 deliberate and achieve some degree of consensus. The framers of the
9 Montana Constitution infused that document with the notions of
10 popular sovereignty (“[a]ll political power is vested in and derived
11 from the people”), and self-government (“the people have the
12 exclusive right of governing themselves as a free, sovereign, and
13 independent state”). Allowing a measure of public participation and
14 voice here is consistent with those sentiments.

15 (Or. on Mot. to Strike Jury Trial Demand, Dkt. 95 at 6–7 (internal citations
16 omitted).)

17 72. The courts of this State—the undersigned included—
18 properly place great confidence in the ability of a jury comprised of citizens from
19 all walks of life to decide even complex matters accurately. In a case reversing a
20 grant of summary judgment in a products liability case, the Montana Supreme
21 Court said as follows:

22 It is apparent that the District Court was genuinely concerned that
23 the absence of the failed piece, combined with conflicting expert
24 testimony, rendered this case virtually impossible for a jury to
25 decipher. We should never underestimate, however, 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.

1 *Wood v. Old Trapper Taxi*, 286 Mont. 18, 27, 952 P.2d 1375, 1381 (1997).

2 73. This Court does not assess its ability to judge the credibility
3 of witnesses and weigh conflicting evidence as superior to that of a twelve-person
4 jury. Trial judges certainly have more *experience* and *training* making factual
5 findings in legal matters because that is what trial judges do every day, all year
6 long. Judges are better practiced in applying and understanding evidentiary
7 limitations and the principles of law that are given to the jury in the form of jury
8 instructions. Also, trial judges constantly strive to be aware of how their own
9 experiences and beliefs shape how they perceive and interpret facts and guard
10 against falling prey to unfounded assumptions. But for questions like witness
11 credibility and intent, there is always an inherent vulnerability associated with
12 relying on a single finder of fact who has a single background and perspective.
13 Though they are unpracticed laypersons, a diverse group of citizens ensures that
14 multiple backgrounds and perspectives are considered and incorporated into the
15 verdict and that assumptions that might be held by a single trier of fact do not go
16 unquestioned in the jury room.

17 74. Here, Plaintiffs had a full and fair opportunity to question
18 the jury panel and seek to challenge those jurors who they felt could not fairly
19 judge the issues here. While there is a great deal of legal complexity in this case,
20 neither the jury instructions nor the factual question posed to the advisory jury
21 were any more complex than similar instructions and verdict forms the Court has
22 given juries in civil and criminal cases. Plaintiffs had a full and fair opportunity
23 to present their case and to press every relevant point in their favor.

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1 75. Plaintiffs argue that the Court should reject the advisory
2 verdict. Many of Plaintiffs’ arguments rehash issues that were previously argued,
3 considered, and rejected by the Court. For example, Plaintiffs contend their
4 evidence is “unrebutted and incontrovertible.” (Pls.’ Post-Trial Br. & Objs., Dkt.
5 145 at 3.) This Court already held, contrary to this claim, that there was a genuine
6 dispute of fact regarding the presence or absence of a discriminatory motive.
7 While the Court agrees with Plaintiffs that it may freely disregard the advisory
8 verdict if it finds it unsound, *see Vesel v. Polich Trading Co.*, 96 Mont. 118, 128,
9 28 P.2d 858, 861 (1934), that does not imply the advisory verdict is entitled to no
10 weight at all. Where the evidence supports either conclusion and reasonable
11 minds could disagree about the effect of the evidence, the Court has determined it
12 should cast its lot with the clear majority of the twelve reasonable minds on the
13 jury.

14 76. Plaintiffs also seek to relitigate the wisdom of using an
15 advisory jury. (Dkt. 145 at 14–15.) The Court, however, remains unpersuaded.
16 Plaintiffs repeatedly suggest error by emphasizing how “unprecedented” the use
17 of an advisory jury is in redistricting litigation, but this Court is seldom
18 persuaded by appeals to “this is how it has always been done.” Plaintiffs argue
19 that advisory juries should not be empaneled in discrimination cases because of
20 the fear that “local majorities would prevent effective enforcement of [anti-
21 discrimination laws].” (Dkt. 145 at 14 (citing Note, *Practice and Potential of the*
22 *Advisory Jury*, 100 Harv. L. Rev. 1363, 1375 (1987⁷)).) Perhaps this sentiment
23 has merit when a minority seeks justice from a jury which shares no common
24 membership with that minority, but that is almost certainly not the scenario here.

⁷ Notably, this 1987 student note, which discusses the reluctance of federal courts to use advisory juries in Title VII cases, precedes the 1991 Civil Rights Act Amendments which expressly adopted a right to a jury trial. Congress thus took a different view of the value of juries in these cases.

1 This is not a racial discrimination lawsuit tried to an all-white jury. Rather, the
2 “minority” at issue is Democrats, and the relevant jury pool comes from Lewis
3 and Clark County, which historically has not reliably favored either political
4 party in elections. It is unlikely a jury pool drawn from a fair cross-section of this
5 community would systematically exclude or underrepresent jurors inclined to
6 favor Democrats in elections.

7 77. Plaintiffs also take issue with the Court’s determination to
8 instruct the jury that legislators are presumed to act in good faith, and citing the
9 Blom and Sommers-Flanagan declarations, they assert this improperly pushed
10 jurors into making the “wrong” decision. For the reasons stated in the Court’s
11 conclusions of law, the Court is giving these declarations no weight. Even so,
12 Plaintiffs greatly overstate the effect of instructing the jury on a presumption of
13 good faith. This is what the instructions actually said:

14 There is a presumption that the Montana legislature acted in good
15 faith. This presumption may be overcome if Plaintiffs establish the
16 contrary by a preponderance of the evidence.

17 (Instr. No. 14 (emphasis added).) The instructions told the jury how to determine
18 whether Plaintiffs had met this burden of proof and overcome the presumption of
19 good faith:

20 The Plaintiffs have the burden of proving that the Montana State
21 Legislature intended to use the PSC district boundaries they drew in
22 Senate Bill 109 to favor or disfavor certain candidates or groups of
23 voters based on their political beliefs or partisan affiliation. To meet
24 their burden of proof, the Plaintiffs must prove that political beliefs or
25 partisan leanings or affiliation were the “predominant factor”
motivating the Legislature’s passage of SB 109. Political or partisan
advantage need not have been the Legislature’s “sole” purpose—only
the predominant motivating factor.

1 (Instr. No. 10.) And the Court explained what a “preponderance of the evidence”
2 is:

3
4 A party who has the burden of proof must persuade you by the
5 evidence that her claim is more probably true than not true. In other
6 words, the evidence supporting the propositions, which a party has
the burden of proving, must outweigh the evidence opposed to it.

7 (Instr. No. 15.) In short, this Court told the jury that it starts with a presumption
8 the legislature acted in good faith and without discriminatory motive, that
9 Plaintiffs have the burden of showing the legislature in fact had an improper
10 discriminatory motive, and that Plaintiffs satisfy that burden if they show this
11 was more likely than not true. This is neither novel nor controversial: rather, it is
12 a fairly humdrum explanation of the indisputable requirement that the jury should
13 not start with the assumption of impropriety, but rather that Plaintiffs must prove
14 their case. Senator Regier’s statements also are appropriately judged by the very
15 similar presumption in civil cases that witnesses are presumed to speak the
16 truth—also the subject of a jury instruction here (Instr. No. 4). The Court’s
17 instructions were not confusing and did not undermine the weight to be accorded
18 the advisory verdict.

19 78. Plaintiffs also contend that jurors unfairly drew an adverse
20 inference against them for failing to call Senator Regier when the jury did not
21 know that Plaintiffs *could not* call Senator Regier. Plaintiffs, notably, did not
22 seek any remedy pre-verdict to address that issue. Rule 505 does not prohibit
23 curative instructions encouraging the jury not to draw adverse inferences against
24 absent testimony: to the contrary, there is a pattern criminal jury instruction,
25 commonly used, that informs juries they may not hold a criminal defendant’s

1 silence against them. *See* Mont. Crim. J.I. 1-122. Plaintiffs could have, but did
2 not, propose something similar here. The Court is loath to reject the advisory jury
3 verdict based on the absence of instructions that were never proffered.

4 79. Additionally, the jury instructions that *were* given made
5 clear that direct evidence was not necessary. No less than five separate
6 instructions informed the jury that they were not limited to direct evidence and
7 could consider circumstantial evidence of discriminatory motive. (*See* Jury Instrs.
8 6, 12, 16, 17, 18.)

9 80. During closing arguments, the parties both presented reasons
10 why the jury should or should not believe Senator Regier's assertions about his
11 motivations as presented through the recordings of the legislative hearings.
12 Indeed, the strongest attempt to persuade the jury to draw an adverse inference
13 about Senator Regier's absence came not from the Secretary, but from Plaintiffs.
14 In closing arguments, Plaintiffs spoke directly to Senator Regier's absence as a
15 witness for the Secretary and how the jury should treat that absence. Although the
16 Secretary had no more ability to compel Senator Regier's testimony than
17 Plaintiffs did, the Secretary notably did not object.

18 81. Finally, even if Senator Regier had testified at either party's
19 behest, it is unclear how this would have changed anything. There is no reason to
20 believe he would have testified at trial any differently than what he said at the
21 various hearings in the matter. To be sure, Senator Regier would be subject to
22 cross-examination had he appeared, but Senator Regier was questioned by
23 legislators at various hearings; indeed, his responses to those questions have
24 frequently been cited by the parties as evidence for or against a finding of
25 discriminatory motive.

1 82. In short, the Court is not persuaded that Senator Regier’s
2 absence meaningfully altered the advisory verdict. Even if the Court were to
3 consider the post-trial declarations, whether Senator Regier’s testimony or a more
4 robust jury instruction would have altered the result is entirely speculative.

5 83. The Court further rejects Plaintiffs’ characterization of the
6 trial as “unprecedented and highly irregular” because, as Plaintiffs put it, the
7 Court recognized an “absolute testimonial privilege and a presumption of good
8 faith.” (Dkt. 145 at 21 (emphasis in original).) For the reasons given above, the
9 presumption of legislative good faith on which the jury was instructed is neither
10 “unprecedented” nor the blockbuster ruling Plaintiffs think it is. Likewise, it is
11 not “irregular” to apply a privilege even though it constrains the search for truth.
12 Indeed, the scenario Plaintiffs paint as “unprecedented and highly irregular” is no
13 different than the struggle prosecutors routinely face in criminal trials. Actually,
14 prosecutors have it even worse: they face a presumption of innocence, a burden
15 to overcome that presumption beyond a reasonable doubt, and the inability to
16 compel or discover testimony from the accused or even comment on the
17 accused’s assertion of their privilege against self-incrimination. Nevertheless, the
18 interests of due process for those facing the loss of their life, liberty, or property
19 compel this result.

20 84. Ultimately, Plaintiffs ask the Court to find a coordinate
21 branch of government acted in bad faith and with intent to discriminate, to reject
22 as not credible the statements of members of that branch to the contrary, and to
23 interfere with the traditionally legislative task of redistricting. This Court has
24 already held that it can, must, and would so interfere should it find discriminatory
25 intent, but that does not mean the accusation is the proof. Plaintiffs were

1 required to prove their case by a preponderance of the evidence using admissible,
2 non-privileged evidence, and the Court disagrees with the suggestion that this
3 was an unreasonable burden to impose.

4 85. For the foregoing reasons, the Court agrees with the
5 advisory jury: Plaintiffs failed to prove by a preponderance of the evidence that
6 the legislature's motive in enacting SB 109 was to favor Republicans or disfavor
7 Democrats or other non-Republican candidates or voters.

8 **CONCLUSIONS OF LAW**

9 1. This Court has jurisdiction, and venue is proper in Lewis
10 and Clark County.

11 2. This case is justiciable for reasons given in previous orders.

12 3. Plaintiffs have standing for reasons given in previous orders.

13 4. The Montana Constitution protects the people of Montana
14 against discrimination in the exercise of their civil or political rights on account
15 of, among other things, political or religious ideas. Mont. Const. art. II, § 4. This
16 provides broader and greater protection against discrimination than is found in
17 the United States Constitution.

18 5. The Montana Constitution guarantees that the State may not
19 at any time interfere to prevent the free exercise of the right of suffrage. Mont.
20 Const. art. II, § 13. The Montana Constitution thus affords an express,
21 fundamental right to vote that provides greater protections of voting rights than
22 are found in the United States Constitution.

23 6. Plaintiffs allege that Senate Bill 109 violates both Article II,
24 Section 4 and Article II, Section 13 of the Montana Constitution, and seek
25 declaratory and injunctive relief. To prevail under either theory, Plaintiffs must

1 prove circumstantially or through direct evidence that voters’ political ideas or
2 partisan affiliation were the predominant factor motivating the legislature’s
3 decision to place a significant number of voters within or without a particular
4 district. Plaintiffs can establish this by showing the legislature subordinated
5 traditional neutral redistricting principles to political considerations.

6 7. The Court correctly instructed the jury that Plaintiffs’
7 burden is to establish the legislature’s motive by a preponderance of the
8 evidence, not beyond a reasonable doubt.

9 8. The question of the proper standard of proof to apply to
10 predicate disputed factual issues in a constitutional challenge is an issue of first
11 impression. The Montana Supreme Court has frequently said that statutes “are
12 presumed to be constitutional, and the party challenging a statute’s
13 constitutionality bears the burden of proving it unconstitutional beyond a
14 reasonable doubt.” *Barrett v. State*, 2024 MT 86, ¶ 13, 416 Mont. 226,
15 547 P.3d 630. The issue is whether this statement is merely a judicial canon
16 calling on courts to look for every way possible to uphold a statute, or whether it
17 also means that where a constitutional challenge depends on disputed factual
18 questions, whether those factual matters must be proved beyond a reasonable
19 doubt. Plaintiffs argue the former; the Secretary argues the latter.

20 9. The “beyond a reasonable doubt” formulation became
21 popular in judicial circles after the 1893 publication of an article by James
22 Bradley Thayer, who posited the doctrine as a principle of judicial restraint that
23 would counterbalance the perceived conservative activism of the federal courts of
24 the late nineteenth century. Hugh D. Spitzer, *Reasoning v. Rhetoric: The Strange*
25 *Case of ‘Unconstitutional Beyond a Reasonable Doubt’*, 74 Rutgers Univ. L.

Rev. 1429, 1434–1435 (2022). Nevertheless, this conception of deference dates back even further to the early days of the Marshall Court:

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810). *Fletcher* treats this not as a factual standard, but rather as an admonition to courts not to invalidate legislative acts unless the court “feels a clear and strong conviction” that it is incompatible with the Constitution.

10. Of the various states that continue to invoke the “beyond a reasonable doubt” formulation, Montana is the most prolific. Spitzer, *supra*, at 1440. Professor Spitzer notes that although many jurisdictions invoke the phrase, they ascribe different meanings to it and may employ it inconsistently over time. Montana is no exception to this practice. *See id.* at 1448. Despite its frequent invocation, however, the Montana Supreme Court appears never to have considered whether and how this standard applies to proof of disputed facts.

11. Some of the modern opinions expanding on the phrase suggest it indeed operates primarily as a canon governing how courts engage in legal reasoning to analyze constitutional challenges. For example:

The constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be presumed, unless

1 its unconstitutionality appears beyond a reasonable doubt. *The*
2 *question of constitutionality is not whether it is possible to condemn,*
3 *but whether it is possible to uphold the legislative action which will*
4 *not be declared invalid unless it conflicts with the constitution, in the*
5 *judgment of the court, beyond a reasonable doubt.* Every possible
6 presumption must be indulged in favor of the constitutionality of a
7 legislative act. The party challenging a statute bears the burden of
8 proving that it is unconstitutional beyond a reasonable doubt and, if
9 any doubt exists, it must be resolved in favor of the statute.

10 *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518,
11 15 P.3d 877 (emphasis added). The key takeaway from *Powell* is that this
12 principle means that courts should look for ways to uphold the statute, not look
13 for ways to strike it down.

14 12. Likewise, the earliest Montana case to adopt the “beyond a
15 reasonable doubt formulation,” *State v. Camp Sing*, 18 Mont. 128, 44 P. 516
16 (1896), casts it as a rule for legal analysis, not proof of facts:

17 It has been said by an eminent jurist that when courts are called upon
18 to pronounce the invalidity of an act of legislation, passed with all
19 the forms and ceremonies requisite to give it the force of law, *they*
20 *will approach the question with great caution, examine it in every*
21 *possible aspect, and ponder upon it as long as deliberation and*
22 *patient attention can throw any new light upon the subject; and*
23 *never declare a statute void unless the nullity and invalidity of the act*
24 *are placed, in their judgment, beyond reasonable doubt. A*
25 *reasonable doubt must be solved in favor of the legislative action,*
and the act be sustained.

Camp Sing, 44 P. at 517 (emphasis added).

1 13. *Camp Sing* cites *Fletcher* and other early federal cases,
2 suggesting the “beyond a reasonable doubt” formulation was never intended to
3 operate differently in Montana than it did at the federal level. Notably, most
4 federal cases to address the burden in constitutional challenges to redistricting
5 have applied a preponderance of the evidence standard. See *Cooper v. Harris*,
6 581 U.S. 285, 300 & n.15 (2017); *Harris v. Ariz. Indep. Redistricting Comm’n*,
7 578 U.S. 253, 259 (2016).

8 14. Ultimately, the Court finds persuasive the following from a
9 Washington Supreme Court case (notably, Washington is also a frequent user of
10 the phrase “beyond a reasonable doubt” in constitutional challenges):

11 Our traditional articulation of the standard of review in a case where
12 the constitutionality of a statute is challenged is that a statute is
13 presumed to be constitutional and the burden is on the party
14 challenging the statute to prove its unconstitutionality beyond a
15 reasonable doubt. While we adhere to this standard, we take this
16 opportunity to explain the rationale of such a standard. The
17 “reasonable doubt” standard, when used in the context of a criminal
proceeding as the standard necessary to convict an accused of a crime,
is an evidentiary standard and refers to the necessity of reaching a
subjective state of certitude of the facts in issue.

18 In contrast, the “beyond a reasonable doubt” standard used when a
19 statute is challenged as unconstitutional refers to the fact that one
20 challenging a statute must, by argument and research, convince the
21 court that there is no reasonable doubt that the statute violates the
22 constitution. The reason for this high standard is based on our respect
23 for the legislative branch of government as a co-equal branch of
24 government, which, like the court, is sworn to uphold the constitution.
25 We assume the Legislature considered the constitutionality of its
enactments and afford some deference to that judgment. Additionally,
the Legislature speaks for the people and we are hesitant to strike a
duly enacted statute unless fully convinced, after a searching legal

1 analysis, that the statute violates the constitution. Ultimately,
2 however, the judiciary must make the decision, as a matter of law,
3 whether a given statute is within the legislature's power to enact or
4 whether it violates a constitutional mandate.

5 *Island County v. State*, 955 P.2d 377, 380 (Wash. 1998) (en banc) (cleaned up).
6 The foregoing best captures what the Montana Supreme Court has likely had in
7 mind when it applied the “beyond a reasonable doubt” standard in past and
8 present cases.

9 15. The Secretary also cited various state redistricting
10 challenges that have suggested the “beyond a reasonable doubt” standard should
11 be applied to disputed issues of fact. Upon closer review, however, nearly all of
12 these have undertaken little or no analysis as to why that standard should apply to
13 proof of facts, not just to legal analysis. *See League of Women Voters of Ohio v.*
14 *Ohio Redistricting Comm’n*, 192 N.E. 3d 379 (Ohio 2022); *Harkenrider v.*
15 *Hochul*, 197 N.E.3d 437 (N.Y. 2022); *Parella v. Montalbano*, 899 A.2d 1226
16 (R.I. 2006); *McClure v. Sec’y of the Commonwealth*, 766 N.E.2d 847, 854 (Mass.
17 2002); *Logan v. O’Neill*, 448 A.2d 1306, 1310 (Conn. 1982); *but see In re Senate*
18 *Joint Resolution of Legislative Apportionment*, 83 So. 3d 597, 607 (Fla. 2012)
19 (rejecting “beyond a reasonable doubt” as the standard of proof). The Court did
20 not find these authorities to be persuasive.

21 16. Nevertheless, for the reasons stated in the foregoing findings
22 of fact, Plaintiffs failed to prove by a preponderance of the evidence that voters’
23 political ideas were the predominant factor motivating the legislature’s enactment
24 of Senate Bill 109 and the district boundaries it embodies.

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1 17. The Court further concludes the post-trial Blom and
2 Sommers-Flanagan declarations are inadmissible. First, the evidentiary record in
3 this case is closed. The time for calling witnesses and for raising objections to the
4 jury instructions or proposing alternative instructions has passed. Plaintiffs have
5 made no Rule 59 or Rule 60 motions at this time and have cited no authority
6 suggesting this Court can or should consider evidence arising after the trial has
7 taken place. Generally, a court's findings of fact are based on the matters
8 presented at trial, not post-trial evidence.

9 18. Even so, the declarations are hearsay. Neither Blom nor any
10 of the other jurors have testified in open court such that the Court can assess their
11 demeanor, and none have been subjected to cross-examination. The Sommers-
12 Flanagan declaration is double-hearsay: it offers up the extrajudicial statements
13 of unnamed jurors for the truth of the matter asserted, and there is no apparent
14 hearsay exception that would allow that.

15 19. Additionally, even if the Court sets aside these other
16 problems, Rule 606(b) of the Rules of Evidence bars consideration of both
17 declarations. That rule provides:

18 Upon an inquiry into the validity of a verdict or indictment, a juror
19 may not testify as to any matter or statement occurring during the
20 course of the jury's deliberations or to the effect of anything upon
21 that or any other juror's mind or emotions as influencing the juror to
22 assent or dissent from the verdict or indictment or concerning the
23 juror's mental processes in connection therewith. Nor may a juror's
24 affidavit or evidence of any statement by the juror concerning a
25 matter about which the juror would be precluded from testifying be
received for these purposes.

1 Mont. R. Evid. 606(b). The rule notably refers only to a “juror,” with no
2 distinction made about the type of juror, whether the juror is serving on a grand
3 jury, a standard petit jury, or an advisory jury. Plaintiffs argue that the policy
4 considerations underlying Rule 606(b) do not apply to advisory verdicts. Rule
5 606(b) is designed to promote both finality and “*the insulation from judicial*
6 *scrutiny of jury value judgments underlying a verdict or indictment.*” Wright &
7 Miller, Federal Practice & Procedure § 6074 (2d ed.) (emphasis added). The Rule
8 protects the secrecy of deliberations and protects jurors from continued
9 entanglement in litigation once their service has concluded. *See State v. Maxwell*,
10 198 Mont. 498, 505, 647 P.2d 348, 353 (1982). Plaintiffs’ attempt to use juror
11 statements to persuade the Court to reject their verdict strikes directly at these
12 policies: (1) jurors who have concluded their service and been released have now
13 been pressed into further service as witnesses; and (2) Plaintiffs want this Court
14 to reject the jury’s verdict by arguing that their precise reasoning was faulty.
15 These are exactly the sort of outcomes Rule 606(b) is designed to prevent, and
16 they demonstrate why Rule 606(b) applies to advisory jurors just as it does with
17 any other type of juror.

18 20. Plaintiffs also argue that Rule 606(b) does not apply because
19 they are not engaged in an inquiry into the validity of a “verdict.” Plaintiffs cite
20 various cases holding that an advisory jury’s findings are not final (true) or that
21 findings and recommendations that are not themselves final—e.g., referee
22 reports, advisory jury verdicts, and magistrate findings and recommendations—
23 are not “verdicts” for other purposes, such as defining when post-verdict interest
24 begins to run. *See, e.g., Wachs v. Winter*, 569 F. Supp. 1438, 1451 n.9 (E.D.N.Y.
25 1983). That an advisory jury’s conclusions are not final for other purposes,

however, does not mean they are not a “verdict” for the purposes of Rule 606(b), particularly given the policy of that rule, discussed above, that discourages using jury deliberations and mental processes to second-guess their findings. Indeed, various Montana Supreme Court cases have described the advisory jury’s findings as a “verdict.” *See, e.g., Kiely Constr., LLC v. City of Red Lodge*, 2002 MT 241, ¶ 70, 312 Mont. 52, 57 P.3d 836; *Pankratz Farms, Inc. v. Pankratz*, 2004 MT 180, ¶ 39, 322 Mont. 133, 95 P.3d 671. Because what Plaintiffs seek to do here is indistinguishable in form and substance from an attempt to impeach a trial jury verdict with juror affidavits, the Court concludes Rule 606(b) is not distinguishable merely because the jury’s verdict was not binding on the Court.

21. Plaintiffs are not entitled to declaratory relief or an injunction.

Based on the foregoing findings of fact and conclusions of law, the Court enters the following:

ORDER

1. Plaintiffs' request for a declaratory judgment that SB 109 is unconstitutional is **DENIED**.

2. Plaintiffs’ request for an order permanently enjoining the State and all its agencies, agents, and employees from enforcing SB 109 is **DENIED.**

3. The Secretary is entitled to entry of judgment in her favor and against Plaintiffs on all claims in their complaint.

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4. Plaintiffs' claims alleging violation of Article II, Sections 4 and 13 of the Montana Constitution are **DISMISSED** with prejudice.

Judgment may be entered accordingly.

DATED this 7th day of February 2025.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

cc: Rylee Sommers-Flanagan, via email
Molly E. Danahy, via email
Dimitrios Tsolakidis, via email

Austin Knudsen, via email
Michael Russell, via email
Thane Johnson, via email
Alwyn Lansing, via email
Michael Noonan, via email
Emily Jones, via email
Austin James, via email

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