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official capacity as Montana Secretary of State*

**IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY**

Montana Democratic Party and Mitch Bohn,

Plaintiffs,

Western Native Voice, *et al.*,

Plaintiffs,

Montana Youth Action, *et al.*,

Plaintiffs,

vs.

Christi Jacobsen, in her official capacity as
Montana Secretary of State,

Defendant.

Consolidated Case No. DV 21–0451

Hon. Michael Moses

**DEFENDANT’S BRIEF IN SUPPORT OF
MOTION FOR ADVISORY JURY**

INTRODUCTION

As Secretary Jacobsen has consistently represented, this case should be resolved as a matter of law on motions for summary judgment, not by trial. That is how Montana courts

typically resolve cases challenging the constitutionality of statutes, and for good reason. Conducting a trial to determine the constitutionality of statutes would waste resources and significantly clog courts' dockets to answer quintessential legal questions, i.e., statutory and constitutional interpretation. Courts in this state regularly interpret statutes and determine their constitutionality as a matter of law on the briefs and argument of counsel. *See, e.g., Robinson v. State Comp. Mut. Ins. Fund*, 2018 MT 259, ¶ 13, 393 Mont. 178, 430 P.3d 69 (“A statute’s constitutionality is a question of law, which [the Montana Supreme Court reviews] for correctness,” and affirming summary judgment order rejecting constitutional challenge to statute).

This Court is fully competent to do so here. A trial on these issues not only would require the Court and parties to unnecessarily expend extraordinary resources, but it would also substantially delay efficient resolution of the case, which is particularly important given the upcoming elections. Although Plaintiffs have given lip service to the need for expeditious resolution of these cases, they have done precious little to advance that goal. Secretary Jacobsen encourages the Court to promote that path.

But if this case is not going to be resolved as a matter of law, the Court should exercise its wide discretion and try any factual issues before an advisory jury, as permitted by Montana Rule of Civil Procedure 39. Doing so would assist and “inform the conscience of the court” on important issues, such as the burdens the challenged statutes allegedly place on voters. Anne E. Melley, 9 *Cyc. of Federal Proc.* § 31:54 (3d ed.), *Advisory jury and jury trial by consent* (citing cases). An advisory jury would serve the interests of justice for all the reasons that jury trials serve the interests of justice. The issues in this case are of critical importance to all Montanans, and

the citizens of Montana are perfectly situated to advise the Court on disputed facts, especially Plaintiffs' claims that the Legislature's modest changes impose a substantial burden on voters like them. The issues in this case necessarily affect, and are easily understood by, the average Montanan, and having a jury of citizens would aid the Court in resolving these issues of public importance, to the extent any genuine and material factual issues exist.

BACKGROUND

Plaintiffs in this consolidated case assert constitutional challenges to laws passed by the Montana Legislature during the 2021 session. The challenged laws—HB 176, SB 169, HB 506, and HB 530—all concern the Legislature's regulation of elections, and all Plaintiffs seek declaratory judgments against those statutes. Defendant Jacobsen has filed a motion for summary judgment on all issues, which has not yet been fully briefed. A non-jury trial is presently scheduled to start on August 15, 2022.

ARGUMENT

I. This Court should exercise its discretion to call an advisory jury to help resolve any factual issues in this case because of the broad importance to Montana's electorate.

Because this is an equitable case, there is no absolute right to a jury trial. *City of Great Falls v. Forbes*, 2011 MT 12, ¶¶ 17-19, 359 Mont. 140, 247 P.3d 1086. But the Court has wide discretion to try factual issues with an advisory jury, even where no right to a jury trial exists.

Mont. R. Civ. P. 39 provides:

(c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right.

The Montana Supreme Court has held, “[i]n equity cases, the judge may call a jury to his assistance if he chooses, but is not bound to do so.” *Supola v. Montana Dep’t of Just., Drivers License Bureau*, 278 Mont. 421, 425, 925 P.2d 480, 482 (1996) (citations omitted). The Court is not bound by the advisory jury’s findings, but a jury’s findings can be of significant help to the Court, especially in a case involving laws that have wide public impact, like those at issue here. “If the issues tendered are purely equitable, the court has the indisputable right under the civil rules of procedure to call a jury in an advisory capacity of its own initiative and to submit to them such issues of fact as he sees fit, and to accept or disregard its verdict thereon in his discretion.” *Hargrove v. Am. Cent. Ins. Co.*, 125 F.2d 225, 228 (10th Cir. 1942) (citing 3 Moore Federal Practice, 3030, Sec. 39.03).

As the name “advisory” jury in Mont. R. Civ. P. 39(c) suggests, the “function of an advisory jury is simply to assist the judge.” 35B C.J.S. Federal Civil Procedure § 1040. “An advisory jury does no more than advise a court.” 75B Am. Jur. 2d *Trial* § 1577. Courts routinely have recognized they “benefit from the parties’ arguments to the jury on these issues.” *Static Control Components, Inc. v. Lexmark Int’l, Inc.*, 749 F. Supp. 2d 542, 554 (E.D. Ky. 2010) (citations omitted), *aff’d*, 697 F.3d 387 (6th Cir. 2012), *aff’d*, 572 U.S. 118 (2014).

Advisory juries are useful because they consist of a “panel of average citizens—representing a broad range of economic, educational, social and political experience,” who collectively advise the Court on disputed facts. *Birnbaum v. U.S.*, 436 F. Supp. 967, 988 (E.D.N.Y. 1977), *aff’d in part, rev’d in part*, 588 F.2d 319 (2d Cir. 1978). In practice, “[f]ew formal constraints limit the modern trial judge’s use of the advisory jury. This nearly unbounded discretion exists because an advisory jury trial is not formally tried before the jury at all, but rather before the

judge.” Note, *Practice and Potential of the Advisory Jury*, 100 Harv. L. Rev. 1363, 1364 (1987). Indeed, the Court may order an advisory jury even without the parties’ consent. See *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 249 (3d Cir. 2013); see also Mont. R. Civ. P. 39(c) (courts may order trial by advisory jury “on motion or on its own”).

Here, to the extent there are factual issues that need to be resolved, an advisory jury would be helpful to the Court in determining them. For example, Plaintiff Montana Democratic Party generally alleges two categories of disputed fact that they claim should be resolved at trial: (i) whether and to what degree the challenged statutes “burden constitutional rights”; and (ii) whether the challenged statutes are supported by sufficient state interests, such as easing burdens on election administrators and staff, reducing long lines for voting, preventing fraud, and promoting public confidence in elections. MDP’s Response to Defendant’s Motion for Summary Judgment, p. 37 (Apr. 5, 2022).

As noted, Secretary Jacobsen disagrees with MDP that these issues are questions of fact—not law—that Courts routinely answer when resolving constitutional challenges to statutes. See, e.g., *Wadsworth v. State*, 275 Mont. 287, 297, 911 P.2d 1165, 1171 (1996) (“Wadsworth presented a question of law—i.e. whether he had a fundamental constitutional right and whether the State showed a compelling interest for infringing upon that right. **Thus, the question before the District Court was a legal issue containing no implicit questions of fact.**”) (emphasis added); see also *Robinson*, ¶ 13.

But if the Court agrees with MDP and concludes these are factual issues that must be resolved at trial, then the Court should impanel an advisory jury. These are issues of wide public importance that impact voters and voter confidence in elections. It would be immensely valuable

to the Court in determining these issues to have the perspective of everyday Montanans. These issues do not involve highly technical or complex issues that would be beyond a jury's knowledge that have been found outside the normal purview of an advisory jury. Christine M.G. Davis, *Factors affecting utilization of advisory juries*, 33 Fed. Proc., L. Ed. § 77:154 (2022) (noting technical issues involving federal tort cases or employment cases are sometimes not amenable to advisory jury). Rather, election regulation is an issue that impacts most Montanans, so it would be helpful for the Court to have the perspective of those Montanans in resolving any factual issues in the case.

CONCLUSION

For these reasons, and to the limited extent the Court believes there are factual issues to resolve in this case, the Court should impanel an advisory jury of 12 jurors to assist it in deciding them.

Dated this 26th day of May, 2022.

/s/ David F. Knobel

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