

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

Montana Democratic Party, Mitch Bohn,

Plaintiffs,

Western Native Voice, Montana Native Vote,  
Blackfeet Nation, Confederated Salish and  
Kootenai Tribes, Fort Belknap Indian Community,  
and Northern Cheyenne Tribe,

Plaintiffs,

Montana Youth Action; Forward Montana  
Foundation; and Montana Public Interest Research  
Group

Plaintiffs,

v.

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

Defendant.

Consolidated Case No. DV 21-0451

**PLAINTIFFS' CONSOLIDATED  
OPPOSITION TO DEFENDANT'S  
MOTION FOR ADVISORY JURY**

**INTRODUCTION**

After publicly impugning the Court's integrity and impartiality, the Secretary now seeks to diminish the Court's role in this case by requesting that it appoint an advisory jury.<sup>1</sup> The Secretary's argument for this extraordinary request rests on a series of contradictions—she (1) argues that there are no factual issues to resolve, but then asserts that the case involves factual issues of such importance that they require input from “everyday Montanans,” and (2) claims that “[c]onducting a trial . . . would waste resources and significantly clog the Court's dockets,” and yet urges the Court

<sup>1</sup> See Peter Christian, *Montana Secretary of State Plans To Fight Court's Election Decision*, Newstalk KGVO (Apr. 11, 2022), <https://newstalkkgvo.com/montana-secretary-of-state-plans-to-fight-courts-election-decision/> (“Montana's judicial system should not be able to be bought.”); *Secretary Christi Jacobsen releases statement on Wednesday's court decision*, Montana Secretary of State (Apr. 6, 2022), <https://media.sosmt.gov/secretary-christi-jacobsen-releases-statement-on-wednesdays-court-decision/> (claiming that Court's decision “defies Montana's common-sense approach to running our elections” and expressing “disappoint[ment]” that the Court “sided with the beliefs of out-of-state attorneys funded with millions of dollars from the liberal machine” in granting Plaintiffs' motions for preliminary injunctions).

to appoint an advisory jury, which would add significant cost, complexity, and time to the trial. Br. at 1-2, 5-6. Substantively, the Secretary merely asserts that “having a jury of citizens would aid the Court” in resolving issues of public importance. Br. at 3. But the Court is fully competent to decide every issue before it. Empaneling an advisory jury would only waste the time and resources of the Court, the parties, and the jurors and cause unnecessary delay. The Secretary’s motion should be denied.

### LEGAL STANDARD

Under Montana Rule of Civil Procedure 39(c), in actions for which parties have no right to a jury trial, the Court may choose to appoint an advisory jury. The decision is entirely within the trial court’s discretion. *Golden Rod Mining Co. v. Bukvich*, 108 Mont. 569, 92 P.2d 316, 321 (1939). If an advisory jury is appointed, the Court is not bound by its findings and remains ultimately responsible for deciding both the legal and factual issues in the case. *See Yellowstone Nat’l Bank v. McCullough*, 51 Mont. 590, 604, 154 P. 919 (1916). Nevertheless, an advisory jury necessarily substantially increases the resources—in both time and money—the judiciary and the parties must spend on the case. Even though the jury’s opinion is non-binding, “[j]urors [still] have to be selected and paid; the parties and the Court [have to] spend time and resources on voir dire and jury instructions; and the Court might have to make mid-trial evidentiary rulings that would be unnecessary in a bench trial.” *Smith v. Reinke*, No. 1:12–cv–00030–BLW, 2014 WL 2203896, at \*1 (D. Idaho May 27, 2014).<sup>2</sup> As a result, the appointment of advisory juries is rare in civil cases, generally, and especially in a case involving constitutional challenges to voting restrictions—indeed, Plaintiffs have been unable to identify any similar case involving voting rights where an advisory jury was appointed.

---

<sup>2</sup> Montana Rule of Civil Procedure 39(c) is, in all relevant respects, identical to Federal Rule of Civil Procedure 39(c). *See* Mont. R. Civ. P. 39, Commission & Advisory Committee’s Notes (stating Montana’s Rule 39(c) “is identical with the Federal Rule, except for the omission of [a] clause” involving suits against the United States). Authority interpreting the federal rule is, therefore, instructive. *See, e.g., Bates v. Anderson*, 2014 MT 7, ¶ 19, 373 Mont. 252, 316 P.3d 857 (relying on the Federal Rules for guidance in interpreting a Montana rule modeled on its federal counterpart).

## ARGUMENT

After assuring the Court that it is “fully competent” to resolve questions of law by itself, the Secretary urges the Court to obtain an advisory jury’s advice on questions of fact. Br. at 2, 5. But the Secretary’s brief is rife with contradictions. While arguing at length that there are no issues of fact to resolve, she simultaneously claims that any factual issues are of such “public importance” that they require the perspective of advisory jurors.<sup>3</sup> *Id.* at 1-2, 5-6. The Secretary also complains that trial will “require the Court and parties to unnecessarily expend extraordinary resources” and “substantially delay efficient resolution of the case,” while in the next breath arguing that the Court should do something extraordinary—appoint an advisory jury—that would significantly increase the time and resources expended by the parties and the Court. *Id.* at 2.

And to what end? The Secretary has identified no basis for concluding that the Court needs assistance in resolving factual issues presented in this case, and she cannot, because the Court needs no such help. Indeed, this Court has already demonstrated that it is more than capable of performing this task by rendering extensive and thoughtful Findings of Fact in response to multiple preliminary injunction motions. And the Secretary similarly offers no basis for wasting the Court’s, the parties’, and the prospective advisory jurors’ time and resources.

The Secretary contends that an advisory jury should be empaneled because the issues are “of wide public importance that impact voters and voter confidence in elections,” and that it would be valuable for the Court to “have the perspectives of everyday Montanans.” Br. at 5-6. But, of course, many cases involve matters of wide public importance that impact people far beyond the litigants in the courtroom, yet they are resolved in bench trials without incurring the time and expense necessary to empanel an advisory jury. Moreover, the Secretary’s explanation sorely mischaracterizes the role

---

<sup>3</sup> Because the Secretary’s arguments about whether the issues are factual or legal are out of place in a motion seeking an advisory jury, Plaintiffs do not engage with them here. Instead, Plaintiffs will address those arguments in their forthcoming response to the Secretary’s motion for summary judgment.

of a jury—even an advisory one. The job of a jury is not to offer their “perspectives” on issues that are important to them; rather, it is to find the facts based on the evidence presented to them at trial—something that this Court is well equipped to do, particularly in a case with substantial expert evidence. Not surprisingly, this argument has been rejected as reason to empanel an advisory jury. *See Ollier v. Sweetwater Union High Sch. Dist.*, 267 F.R.D. 338, 339 (S.D. Cal. 2010) (rejecting argument that “community involvement with the determination of facts would assist the Court” in Title IX case and disapproving of “defendants’ subtle suggestion that the legal issues presented in this case should be influenced by community beliefs about the funding of sports programs in the local schools or gender equality”). The Secretary’s reference to “voter confidence,” Br. at 5, raises the same concern: in light of the sustained and widespread misinformation campaign propagated by certain politicians and media organizations attempting to convince Americans that recent elections are rife with fraud, there is a very real danger that the “perspectives” of lay jurors would reflect the influence of such falsehoods.<sup>4</sup> To state the obvious, the determination of whether the challenged laws violate Plaintiffs’ constitutional rights should not be influenced by, let alone turn on, the effectiveness of these cynical attempts to undermine democracy.

This case presents the types of issues routinely determined in bench trials without advisory juries. The Secretary presents no reason to conclude that this case should be treated any differently. Indeed, undersigned counsel found no cases empaneling an advisory jury where plaintiffs challenged voting-related statutes on the ground that they violated constitutional voting rights. Conversely, courts have held numerous bench trials on similar issues, including in Montana. *See, e.g., W. Native Voice*

---

<sup>4</sup> *See, e.g.,* Sam Wilson, *Montana election officials report threats ahead of primary*, Independent Record (May 26, 2022), [https://helenair.com/news/state-and-regional/govt-and-politics/montana-election-officials-report-physical-threats-ahead-of-primary/article\\_8304ba9f-817c-564c-916f-011ec607a604.html](https://helenair.com/news/state-and-regional/govt-and-politics/montana-election-officials-report-physical-threats-ahead-of-primary/article_8304ba9f-817c-564c-916f-011ec607a604.html) (describing threats to Montana election officials as a result of “[e]lection misinformation” and “disinformation”); Matt Vasilogambros, *Disinformation may be the new normal, election officials fear*, Pew Charitable Trusts: Stateline (Sept. 21, 2021), [pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/21/disinformation-may-be-the-new-normal-election-officials-fear](https://pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/21/disinformation-may-be-the-new-normal-election-officials-fear) (describing Republican “lies about election fraud,” “election conspiracy theories,” and “disinformation campaigns”).

v. *Stapleton*, No. DV 20-0377, 2020 WL 8970685, at \*1 (Mont. Dist. Sept. 25, 2020); Findings of Fact, Conclusions of Law, and Order, *Driscoll v. Stapleton*, Sept. 25, 2020, No. DV 20-0408; *Fish v. Schwab*, 957 F.3d 1105, 1111 (10th Cir. 2020); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 618, 621 (6th Cir. 2016); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1131-32 (N.D. Ala. 2020); *Common Cause/N.Y. v. Brehm*, 432 F. Supp. 3d 285, 287 (S.D.N.Y. 2020); *Priorities USA v. State*, 591 S.W.3d 448, 451 (Mo. 2020); *N.H. Democratic Party v. Sec’y of State*, 262 A.3d 366, 372 (N.H. 2021). As in all of these other cases, this Court is fully equipped to make any necessary findings of fact without the assistance of an advisory jury.

Empaneling an advisory jury would also waste the Court’s, the parties’, and the advisory jurors’ time and resources. Because none of the claims in this case are triable of right to a jury, empaneling an advisory jury “does not promote judicial economy.” *Freeman v. U.S. Bank, N.A.*, No. 2:10–CV–01544 RSM, 2014 WL 969642, at \*4 (W.D. Wash. Mar. 12, 2014). This is not a case in which a jury is already empaneled because a party has a right to a jury trial on some, but not all, claims and an advisory jury could thus promote judicial economy. *See In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2012 WL 4361443, at \*1 (S.D.N.Y. Sept. 11, 2012) (noting one circumstance in which courts tend to empanel advisory juries is when doing so will “promote judicial economy . . . [because] at least one of the claims to be tried has facts in common with another claim that will be tried to a jury as a matter of right”); *see also Kiely Const., L.L.C. v. City of Red Lodge*, 312 Mont. 52 ¶ 15, 2002 MT 241, 57 P.3d 836. The result here would be just the opposite: granting the Secretary’s motion would result in a “slower and more expensive” trial. *Smith*, 2014 WL 2203896, at \*1 (explaining multiple costs and delays associated with empaneling an advisory jury where there is not already a jury sitting in the matter, including that the parties would have to go through jury selection, the jurors would have to be paid, “and the Court might have to make mid-trial evidentiary

rulings that would be unnecessary in a bench trial”). Notably, this is not what the parties contemplated when they participated in a scheduling conference and agreed upon a two-week trial.

Because the Court is fully capable of resolving all issues in this case on its own and an advisory jury would not be helpful to the Court, it would be nonsensical for the Court and the parties to expend the significant resources an advisory jury would demand. *See, e.g., Fort Henry Mall Owner, LLC v. U.S. Bank N.A.*, No. 2:11–CV–287, 2012 WL 523657, at \*5 (E.D. Tenn. Feb. 15, 2012) (“The *raison d’etre* of an advisory jury is to assist the district judge. Empaneling an advisory jury in this case not only will be of no assistance to the judge, [but] it will [also] complicate his job considerably.”); *Freeman*, 2014 WL 969642, at \*4 (declining to empanel advisory jury where doing so would require expenditure of significant resources and where “the Court is fully capable of making impartial factual determinations on the evidence adduced at trial”); *Skoldberg v. Villani*, 601 F. Supp. 981, 982 (S.D.N.Y. 1985) (“The role the subjective judgment of the [advisory jury] would play . . . simply does not justify the additional time and expense involved in presenting this case to a jury . . . .”).

Empaneling an advisory jury would also unnecessarily burden the jurors themselves, requiring them to take time away from their jobs or families, all to provide non-binding findings the Court is perfectly capable of making on its own. *See, e.g., Grondal v. United States*, No. 2:09-CV-18-RMP, 2020 WL 6720930, at \*4 (E.D. Wash. Nov. 16, 2020) (finding it unnecessary “to impose on citizens during a pandemic to serve on an advisory jury in a case that can be resolved by the Court alone”); *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, Civil Action No. 11-1623 (RC), 2015 WL 13691542, at \*4 (D.D.C. Feb. 3, 2015) (declining to empanel advisory jury because, among other reasons, “the unnecessary time, expense, and inconvenience that would be suffered by the advisory jurors”); *Freeman*, 2014 WL 969642, at \*4 (declining to empanel advisory jury where doing so would “burden potential jurors by requiring them to commit time and resources

to sit on a jury” that makes only non-binding findings). The Secretary has not provided—and cannot provide—any convincing reason why the Court should impose such a burden on potential jurors in this case.

### **CONCLUSION**

For the reasons discussed above, the Court should deny the Secretary’s motion for an advisory jury.

Dated: June 9, 2021

Respectfully submitted,

By: /s/ Matthew Gordon

Rylee Sommers-Flanagan  
**UPPER SEVEN LAW**  
P.O. Box 31  
Helena, MT 59624  
Phone: (406) 396-3373  
rylee@uppersevenlaw.com

Matthew Gordon  
**PERKINS COIE LLP**  
1201 Third Avenue  
Suite 4900  
Seattle, Washington 981013099  
Telephone: 2063599000  
Email: mgordon@perkinscoie.com

Ryan Aikin  
**AIKIN LAW OFFICE, PLLC**  
P.O. Box 7277  
Missoula, MT 59807  
Phone: (406) 840-4080  
ryan@aikinlawoffice.com

Peter Michael Meloy  
**MELOY LAW FIRM**  
P.O. Box 1241  
Helena, Montana 59624  
Telephone: 4064428670  
Email: mike@meloylawfirm.com

*Attorneys for Youth Plaintiffs*

Alex Rate  
Akilah Lane  
**ACLU OF MONTANA**  
P.O. Box 1968  
Missoula, MT 59806  
406-224-1447  
ratea@aclumontana.org

John Heenan  
**HEENAN & COOK PLLC**  
1631 Zimmerman Trail  
Billings, MT 59102  
Telephone: 4068399091  
Email: john@lawmontana.com

Alora Thomas-Lundborg\*  
Jonathan Topaz\*  
Dale Ho\*  
**ACLU**  
125 Broad Street  
New York, NY 10004  
(212) 519-7866

Henry J. Brewster  
**ELIAS LAW GROUP LLP**  
10 G Street NE Suite 600  
Washington, DC 20002  
(202)-968-4596  
hbrewster@elias.law

Samantha Kelty\*  
**NATIVE AMERICAN RIGHTS FUND**  
1514 P Street N.W. (Rear) Suite D  
Washington, D.C. 20005  
(202) 785-4166

Jonathan P. Hawley  
**ELIAS LAW GROUP LLP**  
1700 Seventh Avenue  
Suite 2100  
Seattle, Washington 98101  
206-656-0179  
jhawley@elias.law

Jacqueline De León\*  
Matthew Campbell\*  
**NATIVE AMERICAN RIGHTS FUND**  
1506 Broadway  
Boulder, CO 80302-6296

*Attorneys for  
Montana Democratic Party and  
Mitch Bohn*



(303) 447-8760

Theresa J. Lee\*

**ELECTION LAW CLINIC**

**HARVARD LAW SCHOOL**

6 Everett Street, Suite 5112

Cambridge, MA 02138

(617) 998-1010

*Attorneys for Native Plaintiffs*

*\*Admitted pro hac vice*

## **CERTIFICATE OF SERVICE**

I, Matthew Prairie Gordon, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 06-09-2022:

Ryan Ward Aikin (Attorney)  
1018 Hawthorne St.  
Missoula MT 59802  
Representing: Forward Montana Foundation, Montana Youth Action  
Service Method: eService

Rylee Sommers-Flanagan (Attorney)  
40 W. Lawrence Street  
Helena MT 59601  
Representing: Montana Public Interest Research Grp., Forward Montana Foundation, Montana Youth Action  
Service Method: eService

Jonathan Patrick Hawley (Attorney)  
1700 Seventh Avenue  
Suite 2100  
Seattle WA 98101  
Representing: Montana Democratic Party, Mitch Bohn  
Service Method: eService

John C. Heenan (Attorney)  
1631 Zimmerman Trail, Suite 1  
Billings MT 59102  
Representing: Montana Democratic Party, Mitch Bohn  
Service Method: eService

Peter M. Meloy (Attorney)  
2601 E. Broadway  
2601 E. Broadway, P.O. Box 1241  
Helena MT 59624  
Representing: Montana Democratic Party, Mitch Bohn  
Service Method: eService

Alexander H. Rate (Attorney)  
713 Loch Leven Drive  
Livingston MT 59047

Representing: Western Native Voice  
Service Method: eService

William McIntosh Morris (Attorney)  
1915 S. 19th Ave.  
P.O. Box 10969  
Bozeman MT 59719  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

John Mark Semmens (Attorney)  
900 N. Last Chance Gulch  
Suite 200  
Helena MT 59601  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

Dale Schowengerdt (Attorney)  
900 N. Last Chance Gulch  
Suite 200  
Helena MT 59624  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

Leonard Hudson Smith (Attorney)  
P.O. Box 2529  
Billings MT 59103  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

Clayton H. Gregersen (Attorney)  
P.O. Box 2529  
Billings MT 59101  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

David M.S. Dewhirst (Govt Attorney)  
215 N Sanders  
Helena MT 59601  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

David Francis Knobel (Attorney)  
490 N. 31st St., Ste 500  
Billings MT 59101  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

E. Lars Phillips (Attorney)

1915 S. 19th Ave  
Bozeman MT 59718  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

Ian McIntosh (Attorney)  
1915 S. 19th Ave  
P.O. Box 10969  
Bozeman MT 59719  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

Kathleen Lynn Smithgall (Govt Attorney)  
215 N. Sanders St.  
Helena MT 59601  
Representing: Jacobsen, Christi As Secretary Of State Of Mt  
Service Method: eService

Henry James Brewster (Attorney)  
10 G Street NE, Ste 600  
Washington 20002  
Representing: Montana Democratic Party, Mitch Bohn  
Service Method: Email

Jonathan Topa (Attorney)  
125 Broad Street 18th Floor  
New York 10004  
Representing: Western Native Voice  
Service Method: Email

Electronically Signed By: Matthew Prairie Gordon  
Dated: 06-09-2022