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**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 REPLY BRIEF IN  
 SUPPORT OF MOTION FOR  
 ADVISORY JURY**

**INTRODUCTION**

“Jury trials are this society’s most magnificent expression of direct democracy.” *Ciulla v.*

*Rigny*, 89 F.Supp.2d 97, 105 (D. Mass. 2000). “Through the jury we place the decisions of justice

where they rightly belong in a democratic society: in the hands of the governed.” *Id.* at 101 (internal punctuation omitted); *see also* Culley, *In Defense of Civil Juries*, 35 ME. L. REV. 17, 29 (1983).

Plaintiffs relegate the role of juries to that of an inconvenience and a wasteful inefficiency. Plaintiffs sling mud at the Secretary, attempt to flatter the Court, and argue that the Secretary’s position rests on contradictions. But Plaintiffs are projecting, and Plaintiffs’ efforts to prove themselves the Court’s darling should be rejected. The Secretary has not “publicly impugn[ed] the Court’s integrity or impartiality.” The Secretary has repeatedly insisted that the Court should decide this case in its entirety as a matter of law. Deciding the constitutionality of the challenged laws as a matter of law is squarely within this Court’s wheelhouse.

If, however, the Court agrees with Plaintiffs that disputed *factual* questions must be resolved before deciding this case, then this Court should utilize the assistance of an “American jury, that ‘most vital day-to-day expression of direct democracy’” to advise it, because “as an instrument of justice, the civil jury is quite simply the best we have.” *See id.* at 101. “Jurors bring their good sense and practical knowledge into our courts.” *Id.* “Without juries, the pursuit of justice becomes increasingly archaic, with elite professionals talking to others, equally elite, in jargon the elegance of which is in direct proportion to its unreality.” *Id.* at n.7. Therefore, if Plaintiffs are correct that disputed *factual* questions must be resolved, then a jury is uniquely suited and equipped to resolve such factual disputes.

Factually, Plaintiffs take the position that Montana’s election workers are not really burdened by election day registration, that large numbers of Montana citizens use student ID’s to vote and lack other forms of acceptable ID, that paid ballot collection is a risk-free and problem-free practice that must go unregulated, and that providing absentee ballots to individuals before

they turn 18 is a risk-free and problem-free practice. Plaintiffs have presented virtually no evidence to support such assertions. The deposition testimony of their lay witnesses has repeatedly undermined Plaintiffs' factual assertions. As a result, Plaintiffs have attempted to proceed in almost exclusive reliance on so-called "experts" whose credibility and connection with reality a jury can and should judge because "jury fact-finding is 'the best criterion for investigating the truth of facts that was ever established in any country.'" *U.S. v. Kandirakis*, 441 F.Supp.2d 282, 324 (D. Mass. 2006) (quoting 3 Blackstone, Commentaries on the Laws of England, 343 (1769)).

Plaintiffs' purported concern for efficiency and a "waste of resources" rings exceptionally hollow. Plaintiffs' tactics in this case have forced the parties to expend enormous resources, and Plaintiffs continue to clamor for more extraordinary, wasteful, and unnecessary discovery. *See e.g.* Dkt. 159. Moreover, Plaintiffs greatly exaggerate any additional expense of having an advisory jury serve in a trial of this case, while ignoring all its benefits. Plaintiffs suggest use of an advisory jury would be an "extraordinary" event for the Court to accommodate, but this Court routinely holds jury trials and is perfectly equipped to utilize an advisory jury. It is also well-established that "[f]ew formal constraints limit the modern trial judge's use of the advisory jury" because the rules "allow[] the trial judge to be informal, experimental, or even sloppy with the advisory jury without risk of reversible error." Note, *Practice and Potential of the Advisory Jury*, 100 Harv. L. Rev. 1363, 1364 (1987).

It is Plaintiffs' position, not the Secretary's, that is plagued by contradictions. Plaintiffs contend there are disputed factual questions. But they want to eliminate from the process "the best criterion for investigating the truth of facts that was ever established in any country." Plaintiffs have argued throughout this litigation that there is no concern with voter confidence in Montana

elections. But Plaintiffs now argue a jury should not consider the evidence because Montana citizens may be *so* overly concerned with the integrity of elections that they cannot fairly evaluate the facts. And Plaintiffs contend the challenged laws are an attack on democracy. But Plaintiffs want to eliminate from this process entirely “society’s most magnificent expression of direct democracy.”

Plaintiffs do not want an advisory jury in this case for the simple reason that they are afraid that the crucible of a jury trial will lay bare how detached their theories are from facts and reality. As their tactics throughout this litigation have made clear, they care nothing for efficiency or the conservation of State, party, or Court resources. They insist on a trial. They should then present their case to a jury—that “instrument of justice” whose “greatest value...is its ability to decide cases correctly.” *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F.Supp. 994 (D. Mass 1989).

If the Court determines that genuine, material factual disputes must be resolved, the Court should grant the Secretary’s Motion for Advisory Jury and empanel an advisory jury.

#### **ARGUMENT**

In a footnote, Plaintiffs sidestep the issue of what disputed facts they mean to prove if this case proceeds to trial. This is because there are no genuine and material disputed facts required to be resolved in Plaintiffs’ facial challenge to the constitutionality of the election laws at issue. *See City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685, *as corrected* (June 8, 2018) (“Facial challenges do not depend on the facts of a particular case.”).

To the extent the facts are in dispute, the disputes are either non-genuine or immaterial. In depositions, Plaintiffs’ lay witnesses have repeatedly torpedoed the supposed burden imposed by

the modest changes the challenged laws make to Montana's elections. And Plaintiffs' experts, many of whom offered doomsday prognostications about the effects of the challenged laws, have been proven wrong, again, by the most recent statewide election which saw near record-high turnout in several counties in the state. Again, this Court should decide this case in its entirety as a matter of law on summary judgment.

Assuming, however, that the Court disagrees, the Court has wide discretion to empanel an advisory jury to decide factual disputes, and it should do so. *See* Mont. R. Civ. P. 39(c); *Supola v. Montana Dep't of Just., Drivers License Bureau*, 278 Mont. 421, 425, 925 P.2d 480, 482 (1996). Plaintiffs' only real argument is that having a jury consider the evidence and advise the Court would be a waste, an inconvenience, and a burden on Court resources. Plaintiffs' arguments are disingenuous and fail on their merits.

Plaintiffs' disdain for the fact-finding power of a jury as well as a jury's "unmistakable contribution to the scheme of liberty and the rule of law" should be rejected. *See In re Acushnet River*, 712 F.Supp. at 1005. In addition to a jury's important inherent benefits to this country's system of justice—the direct participation of the citizenry so that "each can rightly claim that the law belongs partly to her"—the presence of a jury provides practical benefits toward efficiency and the presentation of evidence at trial. *Id.* at 1005-06.

As courts recognize, having a jury "makes for a much better trial." *Id.* at 1007. "[T]he presence of a lay jury requires litigants to present their evidence in succinct, understandable fashion." *Id.* "Use of an advisory jury throughout minimizes the tendency among attorneys to resort to the arcane and recondite...[and] to encourage the simple, straightforward approach, thus inevitably improving the very quality of justice to be expected." *Id.*

A trial of this case, with the number of lawyers present, the lack of any identifiable harmed individuals, and the siloed academics who Plaintiffs mean to present as experts, is ripe for devolving into an abstract and hypothetical discussion. The presence of a jury will temper that tendency and force the parties to focus on presenting evidence of *facts*—which would be the sole purpose of holding a trial in the first place.

Juries are also notoriously superb truth-telling devices, and the mere presence of a jury will minimize the temptation of witnesses (including experts) to present testimony that defies common sense. *See Ciulla*, 89 F.Supp.2d at 98, n.1 (discussing “the American jury’s knack for detecting even the most talented liars.”). Outlandish theories, exaggerations, and unfair treatment of witnesses by lawyers will be minimized in a jury trial.

Moreover, contrary to Plaintiffs’ primary argument, an advisory jury will likely increase efficiency. As courts recognize, rather than decreasing efficiency, “studies on the problem indicate clearly that a case tried before the judge does not proceed with as much dispatch as one before a jury.” *See In re Acushnet River*, 712 F.Supp. at 1007, n. 25 (quoting Clark, *The American Jury: A Justification*, reprinted in *Selected Readings: The Jury* 5 (American Judicature Society, G. Winters ed. 1971). This is especially true with advisory juries because the factors which may make jury trials longer in certain cases are not present in a case tried before an advisory jury. *See Practice and Potential of the Advisory Jury*, 100 Harv. L. Rev. at 1369 (“delaying factors [in a jury trial] are largely absent from a trial with an advisory jury”).

In short, Plaintiffs exaggerate the logistical concerns of an advisory jury and ignore its benefits. Plaintiffs do so because they are unable to present witnesses who will support their theories. Plaintiffs’ supporting “witnesses” are largely limited to their so-called experts. But there

is a reason that challenges to laws similar to those at issue have failed time and time again in courts all around the country—because the laws impose only the slightest of burdens on the merest sliver of the population, while they clearly advance a host of legitimate and compelling state interests, from practical, administrative benefits, to election integrity and voter confidence in elections. *See, e.g., Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (ballot collection); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (voter ID); *Marston v. Lewis*, 410 U.S. 679, 680 (1973). (registration deadline); *see also e.g. Common Cause v. Thomsen*, 2021 WL 5833971, at \*6 (W.D. Wis. Dec. 9, 2021) (student ID); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) (absentee voting regulation); *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*, 480 Mass. 27, (2018) (20-day registration deadline); *DCCC v. Ziriaux*, 487 F.Supp.3d 1207 (ballot collection). As Plaintiffs must know, a jury of Montana citizens will not have the slightest difficulty recognizing from the very outset of a trial that the laws are reasonable, justified, and constitutional.

### CONCLUSION

If the Court determines that it must resolve genuine and material disputed facts to rule in this case, the Secretary respectfully requests the Court grant its Motion for Advisory Jury.

Dated this 27th day of June, 2022.

/s/ Leonard H. Smith

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official capacity as Montana Secretary of State*

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of June, 2022, I mailed a true and correct copy of the foregoing document, by the means designated below, to the following:

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By /s/ Leonard H. Smith



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I, Leonard Hudson Smith, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 06-27-2022:

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