

**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
YELLOWSTONE COUNTY**

<p>Montana Democratic Party, Mitch Bohn,  Plaintiffs,</p> <p>WESTERN NATIVE VOICE, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe,  Plaintiffs,</p> <p>Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group,  Plaintiffs,</p> <p>v.</p> <p>Christi Jacobsen, in her official capacity as Montana Secretary of State,  Defendant.</p>	<p>Consolidated Case No.: DV 21-0451</p> <p> Judge Michael G. Moses</p> <p><b>ORDER DENYING DEFENDANT'S MOTION FOR ADVISORY JURY</b></p>
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Defendant Christi Jacobsen (“the Secretary”), submitted her Motion for an Advisory Jury on May 26, 2022 (Dkt. 150; Dkt. 151). Consolidated Plaintiffs Montana Democratic Party and Mitch Bohn (“MDP”); Western Native Voice, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe (“WNV”); and Montana Youth Action, Forward Montana Foundation, and Montana Public Interest Research Group (“MYA”) (collectively, “Plaintiffs”) submitted their response on June 9, 2022. (Dkt. 158). The Secretary submitted her reply on June 27, 2022. (Dkt. 174). Neither party requested a hearing or oral argument concerning the motion. This motion is ripe for decision.

### *Memorandum*

The Secretary requests the Court to empanel an advisory jury in this matter pursuant to Rule 39(c) of the Montana Rules of Civil Procedure. Rule 39(c) provides:

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.

Mont. R. Civ. P. 39(c)(1-2). The Secretary essentially claims that an advisory jury would assist the Court in determining factual disputes.

The determination of whether to empanel an advisory jury is discretionary in equity cases. *See Supola v. Mont. DOJ, Drivers License Bureau* (1996), 278 Mont. 421, 425, 925 P.2d 480, 482. If a Court calls an advisory jury in an equity case, “he is not bound by the findings, but may reject them in whole or in part and make findings of his

own...Whether he adopts the one course or the other, the ultimate result is to be regarded as emanating from the judge, and its correctness is to be determined by a review of his action, and not that of the jury by the standard of counsel's judgment as to what the jury ought to have been required to find." *Yellowstone Nat'l Bank v.*

*McCullough* (1916), 51 Mont. 590, 604, 154 P. 919, 924.

In making the determination on whether to empanel an advisory jury in this case, the Court considered several issues. First, Courts regularly determine factual disputes and make factual findings in cases and thus this Court is well-versed in making these determinations. Second, while Courts do regularly call juries, typically that is in cases in which their findings are binding. The Court has the utmost respect for jurors and the significant duty that they are called to service for in the interests of justice. However, the Court does not believe that it would be in the interests of justice to call on jurors to serve in an advisory capacity in this matter. Specifically, requesting that twelve jurors (and two alternate jurors) put their work lives and/or personal lives on hold and take—at minimum—two weeks to assist the Court in making a decision that the Court is entirely responsible for making itself is simply an unacceptable allocation of the Court's responsibilities.

Also, in considering the logistics of attempting to add jurors to the courtroom during this trial, the Court has considered that the Covid-19 pandemic is still of large concern and the Court will not needlessly subject not only jurors but also all the parties

in the courtroom to unnecessary potential exposure. While the Secretary points to the fact that a jury being present could assist the parties in staying on track with presenting facts rather than “devolving into an abstract and hypothetical discussion,” the Court has full faith in the ability of the parties to stay on track and maintain a good pace with their presentation of evidence with or without a jury present. (*See* Dkt. 174 at 6).

In sum, the Court will not empanel an advisory jury given the considerations illustrated above.

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

**IT IS HEREBY ORDERED** the Secretary’s Motion for Advisory Jury is **DENIED**.

DATED July 28, 2022

/s/ Michael G. Moses  
District Court Judge

cc: E. Lars Phillips  
David M.S. Dewhirst  
Kathleen Smithgall  
Dale Schowengerdt  
Ian McIntosh  
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John M. Semmens  
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Matthew Gordon  
Jonathan Hawley  
Henry Brewster  
John Heenan  
Peter Meloy  
Alex Rate  
Akilah Lane  
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