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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA  
HELENA DIVISION**

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BOB BROWN; HAILEY SINOFF;  
and DONALD SEIFERT,

*Plaintiffs,*

vs.

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

*Defendant.*

Cause No.  
6:21-cv-92-PJW-DWM-BMM

**Plaintiffs' Brief in  
Opposition to  
Defendant's Motion for  
Summary Judgment**

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## INTRODUCTION

Rather than address the merits of Plaintiffs’ claim and defend the constitutionality of the Montana Public Service Commission (“Commission”) map, Defendant Secretary of State Christi Jacobsen attacks the Court’s power to resolve this redistricting challenge. Whether it comprises a single judge or three, the Court has clear authority to adjudicate Plaintiffs’ claim for relief.

Plaintiffs “assert[] ‘a plain, direct and adequate interest in maintaining the effectiveness of their votes.’” *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). If the Court orders Secretary Jacobsen to implement a constitutionally permissible map, the effectiveness of Plaintiffs’ votes will be maintained. Standing is not a difficult issue here. And of course the Secretary is a proper party: she administers Montana’s elections, in which the harms at issue arise. And, as the Court has already decided, Plaintiffs’ claim is ripe. (See Docs. 16 at 3-5, 19.) The Court should deny Defendant’s motion for summary judgment.

## ARGUMENT

Defendant raises three issues, contending: (1) a three-judge court was convened improperly; (2) Plaintiffs lack standing; and (3) Plaintiffs' claim is not ripe. Not one entitles Defendant to summary judgment. First, whether this case is decided by one judge or three, summary judgment cannot be granted to Defendant on this basis. In any event, Plaintiffs have consented to adjudication by a single district court judge. (Doc. 30.) Second, Plaintiffs have standing because the relief sought would prevent the imminent harm. Third and finally, as the Court has ruled, Plaintiffs' claim is ripe.

**I. Although a three-judge court appropriately may resolve Plaintiffs' claim, Plaintiffs do not object to Defendant's request to dissolve the three-judge district court.**

Plaintiffs requested a three-judge district court because they challenge the apportionment of the Public Service Commission, a popularly elected, statewide body that performs legislative functions. 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened . . . when an action is filed challenging the . . . apportionment of any statewide legislative body."). Although the meaning of the phrase

“statewide legislative body” is unclear, it likely encompasses the Commission, a statewide body that exercises legislative powers.

Nonetheless, while a three-judge court appropriately may resolve their claim, Plaintiffs do not object to Defendant’s motion to the degree it may be read as a motion to dissolve the three-judge district court.<sup>1</sup> Plaintiffs’ interest is in seeing their claim resolved on the merits, and so Plaintiffs affirmatively consent to adjudication by a single district court judge. Section 2284 does not divest a single judge of jurisdiction where, as here, the parties express consent. *See* Wright & Miller, 17A Fed. Practice & Proc. Juris. § 4235 (3d ed.) (explaining that ambiguity in statute counsels in favor of finding it nonjurisdictional).

**II. Plaintiffs have standing to pursue their claim, and the Secretary properly is named as the sole defendant to this lawsuit.**

Plaintiffs ask the Court to declare the current Commission map unconstitutional and award injunctive relief to prevent constitutional harm during the 2022 election. Defendant argues that Plaintiffs lack standing, breaking the issue into two separate sections: (1) Plaintiffs’

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<sup>1</sup> Defendant “move[s] for summary judgment pursuant to Rule 56 . . . [to] dissolve the three-judge panel as improper.” While Rule 56 is not the proper procedural basis for pursuing such relief, Plaintiffs do not object to the relief sought.

standing to seek declaratory relief; and (2) Plaintiffs’ standing to seek injunctive relief. Ultimately, the arguments are identical—Defendant contends that Plaintiffs lack standing because they have sued only Secretary Jacobsen.

Respectfully, Defendant appears to misunderstand the proper party analysis in the context of Article III standing. The appropriate defendant is the defendant who can redress the Plaintiffs’ injury if so ordered. The question is not, as Defendant suggests, which state actor may have the most interest in or curiosity about the legal questions at issue.

Here, Plaintiffs have standing because the relief requested would prevent imminent constitutional harm. Secretary Jacobsen, Montana’s independently elected “chief election officer,” Mont. Code Ann. § 13-1-201, has the power to implement a new Commission map in time for the 2022 election. The Secretary—and only the Secretary—administers the Montana election in which Plaintiffs’ constitutional harms inure. Secretary Jacobsen is the proper defendant.

**A. Plaintiffs have standing to seek declaratory and injunctive relief against Secretary Jacobsen because a favorable decision will redress their constitutional injury.**

If the Secretary conducts the 2022 Montana Public Service Election with a court-ordered, constitutionally apportioned map, Plaintiffs' injuries will be redressed. She is the proper defendant.

"The three elements of standing...are (1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). Plaintiffs face a concrete and particularized injury—the dilution of their votes in upcoming elections—and this injury is "imminent, not conjectural or hypothetical" because it will occur absent judicial relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). Indeed, Defendant does not argue otherwise. This imminent prospective injury is traceable to the challenged conduct: implementation of the unconstitutional Commission map in upcoming elections by Montana's "chief election officer."<sup>2</sup> Mont. Code Ann. § 13-1-201. The injury is

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<sup>2</sup> Plaintiffs do not seek to impose *financial liability* on the Secretary or any other state actor based on the current Commission map. Accordingly, it is irrelevant that the Secretary is not personally

*Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment*

redressable because there will be no injury if the Court grants the requested relief. Plaintiffs have standing. *See Baker*, 369 U.S. at 704 (“Our decisions plainly support” plaintiffs’ standing to bring Fourteenth Amendment reapportionment claim.).

**B. Secretary Jacobsen is the proper defendant because an order compelling her to implement a constitutional map will remedy the alleged wrong.**

Without saying whom, exactly, Plaintiffs should have sued, Defendant argues that Plaintiffs wrongly named Secretary Jacobsen. But “in a suit for an injunction against enforcement of an allegedly unconstitutional state law, it makes no practical difference whether the formal party before the court is the state itself or a state officer in his official capacity.” *Perry v. Brown*, 671 F.3d 1052, 1071 (9th Cir. 2012), *vacated and remanded sub nom. on other grounds by Hollingsworth v. Perry*, 570 U.S. 693, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013); *see Ex Parte Young*, 209 U.S. 123 (1908). Because the Court can compel Secretary Jacobsen to prevent harm to Plaintiffs, she is the

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responsible for failing to redistrict the Commission. (*See* Doc. 25 at 10.) *See, e.g., San Lázaro Ass’n v. Connell*, 286 F.3d 1088, 1095 n.5 (9th Cir. 2002) (explaining the difference between properly seeking prospective injunctive relief against state officials in federal court and improperly seeking to impose monetary damages directly against a state).

appropriate defendant. *See, e.g., Harris v. Ariz. Indep. Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1065 (D. Ariz. 2014), *aff’d* 578 U.S. 253 (2016) (in redistricting case, Arizona “Secretary of State undoubtedly was an appropriate defendant” because he “enforces the map”).

An independent executive branch officer, Mont. Const. art. VI, § 1, the Secretary of State is the “chief election officer” for Montana, and it is her “responsibility to maintain uniformity in the application, operation, and interpretation of the election laws [except for those enforced by the judiciary and/or the Commissioner of Political Practices].” Mont. Code Ann. § 13-1-201. The Secretary regularly implements districting plans without interference from the governor, attorney general, or legislature. By state constitutional design, districting plans for the U.S. House of Representatives and state legislative offices are submitted directly by the Districting and Apportionment Committee to the Secretary. Mont. Const. art. V, § 14 (“[T]he commission shall file its final plan for legislative districts with the secretary of state and it shall become law.”). The Secretary unequivocally has the ability to implement a new map if the Court so orders.

Defendant nonetheless argues that Plaintiffs should have sued the State or various other state actors. But the Eleventh Amendment prohibits claims against the State directly, and it is black-letter law that a party may bring a suit for injunctive relief against a state officer whose “office sufficiently connect[s] him with the duty of enforcement to make him a proper party.” *Ex Parte Young*, 209 U.S. at 161. The Montana Legislature is not in session, and the Court could not order it to pass a law even if it were—a claim against the legislature likely would fail the redressability test.<sup>3</sup> The Governor does not oversee the Secretary, as each is an independently elected constitutional officer, and the Secretary—not the Governor—oversees elections.

Finally, Defendant—through her lawyer the Montana Attorney General—makes an odd claim that the Attorney General should have a greater role in this litigation. (Doc. 25 at 14.) But the Montana Attorney

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<sup>3</sup> In a joint letter, the President of the Senate and Speaker of the House recently explained that legislative leadership “has no legal authority” to intervene in this case and that the legislature may act only through the Legislative Council when out of session. The legislators continued, “The Attorney General has the legal responsibility to defend the state in lawsuits, which includes the Legislature’s interests, and he has been doing just that.” Ex. A-1, Letter from Sen. Mark Blasdel & Rep. Wylie Galt to all Republican legislators at 2 (Feb. 17, 2022).

General manifestly has had the opportunity to defend the validity of the current districting plan. Federal Rule of Civil Procedure 5.1 expressly provides that a litigant need not file a notice of constitutional question with the Montana Attorney General when a state officer is sued in her official capacity. In other words, the expectation is that the Attorney General will defend the constitutionality of a challenged law when adequate notice is given (as it was here) and the Attorney General decides that the State has an interest in defending the law. Indeed, there's an elephant in the room: the Montana Attorney General *is* defending against Plaintiffs' claim.

Finally, Defendant argues that she would lack standing to appeal if the Court grants the requested relief. The case cited, *Bethune-Hill*, stands for no such proposition. 139 S. Ct. 1945. Like Plaintiffs, the plaintiffs in *Bethune-Hill* sued state actors tasked with overseeing elections on the grounds that legislative districts were unconstitutional. *Bethune-Hill v. Va. State Bd. of Elec.*, No. 3:14-cv-000852-REP-GBL-BMK, Am. Compl. (Doc. 71) (June 16, 2015). There, unlike here, one house of the state's bicameral legislature intervened in the litigation. *Bethune-Hill*, 139 S. Ct. at 1950. On appeal, after noting that the state

attorney general (who was not a named party) had declined to appeal the district court's redistricting plan, the Supreme Court held that the legislative chamber lacked standing to appeal on behalf of the state or in its own right. *Id.* at 1950, 1951, 1953. In contrast, if the Court orders Secretary Jacobsen to implement a new map, she may appeal because the Court's order would require her to take action.

**III. As the Court already has determined, Plaintiffs' claim is ripe.**

Finally, Defendant rehashes its ripeness argument, previously presented in opposition to Plaintiffs' Motion for Injunction and in support of its Motion to Dismiss. As the Court already has decided, Plaintiffs' claim is ripe. (Docs. 16 at 4–5, 19.) Defendant has presented no new argument, and Defendant has not moved for reconsideration of the Court's ruling on justiciability. Thus, there is no need for Plaintiffs to again respond to Defendant's argument or for the Court to again resolve this issue.

## CONCLUSION

Plaintiffs respectfully ask the Court to deny Defendant's Motion for Summary Judgment.

Respectfully submitted this 22nd day of February, 2022.

*/s/ Constance Van Kley*  
Constance Van Kley  
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Upper Seven Law

*/s/ Joel G. Krautter*  
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Netzer Law Office P.C.

## CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(2)(E), I hereby certify that this brief includes 1,970 words, excluding caption, certificates, tables, and exhibit index. The word count was calculated using Microsoft Word.

/s/ Constance Van Kley  
Attorney for Plaintiffs

## CERTIFICATE OF SERVICE

I hereby certify that this document was filed in CM/ECF on February 22, 2022, and served upon all registered users.

/s/ Constance Van Kley  
Attorney for Plaintiffs

# Exhibit A

Affidavit of Constance Van Kley

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BOB BROWN; HAILEY SINOFF;  
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CHRISTI JACOBSEN, in her  
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Cause No.

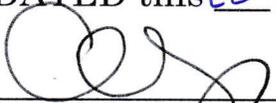
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**Affidavit of  
Constance Van Kley**

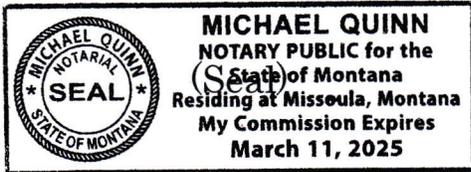


Further Affiant Sayeth Naught.

DATED this 22<sup>nd</sup> day of February, 2022.

  
\_\_\_\_\_  
Constance Van Kley

Subscribed and sworn to before me this 22<sup>nd</sup> day of February, 2022 by Constance Van Kley.



  
\_\_\_\_\_

Notary Public for the State of Montana

Printed Name: Michael Quinn

Residing at: Missoula

My commission expires: 3/11/25

# Exhibit A-1

Letter from Sen. Mark Blasdel & Rep. Wylie Galt to all  
Republican legislators (Feb. 17, 2022)



# MONTANA STATE LEGISLATURE

MONTANA STATE CAPITOL  
PO BOX 200500  
HELENA MT 59620-0500  
PHONE: (406) 444-4800

SENATOR MARK BLASDEL  
PRESIDENT OF THE SENATE  
REPRESENTATIVE E. WYLIE GALT  
SPEAKER OF THE HOUSE

To: All Republican Legislators  
From: President Blasdel and Speaker Galt

February 17, 2022

This letter is following up on our earlier letter from this week. Attached to the email sending you this letter you will also find a document from Rep. Skees providing answers to the questions we had asked in our earlier letter.

Rep. Skees also sent us five questions he wanted us to answer. Those questions from Rep. Skees (in black) and our answers (in red) are below.

Regarding the answers to the questions we had asked, we have concerns about the lack of specificity. The proposed funding includes \$150,000 for legal staff, travel expenses, and expert witnesses. What action will require \$50,000 in legal expenses? Who is going to be traveling, to where, for what purpose? The Legislature doesn't normally pay people to testify before us, so why would we need to spend \$50,000 on that? The answers provided to our questions also don't explain **how** the committee would "ensure the purity of elections and guard against abuses of the electoral process," and the response doesn't answer our question about if there are any policy proposals.

Again, we are seeking these details about the election integrity proposal because special sessions are too short to make a plan on the fly, and we also don't think legislators should be expected to sign a letter without understanding the plan they are signing onto. We want caucus members to be able to make a fully informed decision.

Here are our goals as leadership in this ongoing discussion:

1. Maintain the Legislature's authority to draw PSC maps. If we can get the necessary support to have a special session on this topic, we'll do that. At this stage, the governor would have to call a special session, and he's said he will only do that if PSC maps are the only topic. If the necessary agreement can't be reached to have a special session, then we'll draw maps next session and put a procedure in place to make sure the courts can't intrude on the Legislature's authority again in the future.
2. Protect the integrity of our elections. We passed numerous election security bills last session, most of which are currently being litigated. We must protect those gains. Also, any special committee to work on this topic needs to have defined goals and a defined plan to be successful. A special committee that doesn't accomplish anything will do more harm than good to election integrity.
3. Preserve the caucus unity and cooperativeness that we experienced last session. We had by far the most successful legislative session ever for conservative policy that we can recall. We want that success to continue going forward.

Sincerely,

Handwritten signature of Mark Blasdel in black ink.

Mark Blasdel, Senate President

Handwritten signature of E. Wylie Galt in black ink.

Wylie Galt, House Speaker



# MONTANA STATE LEGISLATURE

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**SENATOR MARK BLASDEL**  
PRESIDENT OF THE SENATE  
**REPRESENTATIVE E. WYLIE GALT**  
SPEAKER OF THE HOUSE

Below are Rep. Skees's questions (in black) and leadership responses (in red).

1. What have you done to whip votes for a PSC map to date (not including what you have initiated in the last 24 hours, due to our letter)? You have said that you have seen perhaps up to 14 different maps, well if this issue is so vital to the Legislature, which map did you like and circulate to see if we could get enough support for a special session?

The first step is to get agreement on the scope and topic(s) for which a special session would be called. We (the entire Republican caucus) haven't gotten past that first step yet. A majority of each caucus would support a special session for the sole purpose of PSC redistricting according to informal leadership vote counts, but we haven't been able to get agreement to limit the special session to only that subject. Without that agreement, there aren't enough votes as of our last count.

2. At least in the House the whips were not activated, so have any of you individually or combined, reached out to every member of the caucus to determine what they wanted in order to get a special session?

Majority Leader Sue Vinton talked to and counted the votes in the House. President Pro Tempore Jason Ellsworth did the same in the Senate. These issues were discussed in depth and at length at a January meeting which you participated in. As you know, we had nearly reached agreement on having a single issue PSC maps special session, but a senator walked out of the room over the issue of an election special committee and no agreement was reached. At that same meeting, there was also no consensus on a PSC map.

3. The lawsuit was filed in mid-December, thus giving us 7 weeks to deal with this critical issue. That window would have been enough for us to utilize the Sec State polling method (30 day requirement to reply) so we could call the session ourselves. Why didn't you do poll the single issue session on PSC maps then?

We still, to this date, have not been able to get agreement from the caucuses to do a single issue PSC maps special session. When Rep. Vinton and Sen. Ellsworth talked to caucus members, the votes weren't there to have a special session unless it was agreed that the sole topic would be PSC redistricting. A call via legislative poll would have failed due to that lack of agreement.

4. Why didn't you join the Sec State and the AG as defendants in this case as soon as we saw it, so we had standing to appeal the decision, should it go the wrong way, vis a vie Constitutional Legislative authority?

Leadership has no legal authority to do that on our own, it is outside of our powers. When the Legislature joined the SB 140 lawsuit during session, we passed concurrent resolutions in both chambers to join that lawsuit. Outside of session, it would take at least a vote of Legislative Council, which is a deadlocked committee due to its equal partisan makeup. The Attorney General has the legal responsibility to defend the state in lawsuits, which includes the Legislature's interests, and he has been doing just that.



# MONTANA STATE LEGISLATURE

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**SENATOR MARK BLASDEL**  
PRESIDENT OF THE SENATE  
**REPRESENTATIVE E. WYLIE GALT**  
SPEAKER OF THE HOUSE

5. We all know that the call will be for a single issue, the PSC maps. It is implied in your response, as the committee we are asking for will be set up by a procedural vote during our normal business. It is not an issue per say, according to the legal definitions of the call by the governor. If we have a majority of both chambers for this call by Friday at 3pm, will you then answer the request of your peers and ask for a special session?

The letter you are circulating is not asking the governor to call a single issue special session on PSC maps. The letter very clearly and explicitly asks the governor to call a special session for more than that topic. The governor has been quite clear, publicly and repeatedly, that he will only call a special session on the single topic of PSC maps, and if the Legislature has agreement that that will be the only topic.

Also, regardless of an election special committee being a subject of the call or a motion during the session, the need for a specific plan still remains. Legislators shouldn't be expected to vote on a \$250,000 appropriation without understanding how that money will be used and what projects or policy proposals such a committee would be undertaking.