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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, HELENA DIVISION
BOB BROWN; HAILEY SINOFF;
AND DONALD SIEFERT,

Plaintiffs,

v.

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

Defendant.

Case No. 6:21-cv-00092

**DEFENDANT'S RESPONSE
IN OPPOSITION
TO PLAINTIFFS' MOTION
FOR SUMMARY
JUDGMENT**

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INTRODUCTION

Plaintiffs' briefing makes clear that they failed to name the appropriate party in this litigation. Secretary Jacobsen did not cause their alleged injuries and the Secretary cannot cure their alleged injuries. Plaintiffs admit as much. *See* Pls.' Resp. to Def's First. Disc. Req. at 19 (Feb. 7, 2022) (relevant excerpts attached as Exhibit A). But they nonetheless request relief to draw new Public Service Commission ("Commission") districts. Secretary Jacobsen possesses no such authority and the entity with such authority—the Montana Legislature—isn't a party to this litigation. Nor is the Secretary the State of Montana.

By naming only Secretary Jacobsen, the Secretary is asked to take positions on issues in which her office has no role. She is, in essence, asked to stand in for the Legislature and the State and defend their interests and actions in this case. But the Secretary cannot do that. Secretary Jacobsen can only speak for her office and her duties and cannot exercise authority belonging to the legislative branch or defend the interests of other branches and other constitutional offices.

This Court should refrain from any further relief in this case because of the ripeness issues previously argued and the jurisdictional

hurdles created by Plaintiffs' choice to name only Secretary Jacobsen. If the Court proceeds to reapportioning Commission districts, then Secretary Jacobsen, per Court Order, submits a proposed map that complies with all relevant federal and state laws.¹ Secretary Jacobsen's proposal minimizes changes to current districts to leave as much of the expressed legislative policy intact as constitutionally permissible. The Secretary's proposal minimizes voter changes, all voters currently eligible to cast a ballot in 2022 for commissioner remain eligible, and her proposal adheres to county lines and other legislative policy criteria.

STANDARD OF REVIEW

Secretary Jacobsen set forth the appropriate rules for summary judgment in her motion. *See* (Doc. 25 at 3–4). In addition to those rules, Plaintiffs must prove each element of standing at each stage of the litigation, including at summary judgment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). “[A] plaintiff must demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000); *accord*

¹ Secretary Jacobsen submits this map to comply with the Court's order but preserves for appeal her position that she has no authority to participate in Public Service Commission redistricting by redrawing districts.

Mayfield v. United States, 599 F.3d 964, 969 (9th Cir. 2010) (“[A] plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment.”). “[A] federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State....” *Upham v. Seamon*, 456 U.S. 37, 41 (1982). Courts “should not pre-empt the legislative task nor ‘intrude upon state policy any more than necessary.’” *Id.* (quoting *White v. Weiser*, 412 U.S. 783, 794–95 (1973)).

ARGUMENT

I. Plaintiffs fail to link their requested redistricting relief to any injury caused or redressable by the Secretary.

Remedies must be tailored to address the specific injurious conduct of specific defendants. *See California v. Texas*, 141 S. Ct. 2104, 2115 (2021); *see also* (Doc. 25 at 8–10). As the Secretary previously argued, Plaintiffs requested reapportionment relief inappropriately assigns the actions of non-parties, the State of Montana and the Montana Legislature, to Secretary Jacobsen to create their alleged injuries. (Doc. 25 at 10). In so doing, they violate the central precept of traceability. Their

alleged injuries, if they exist, result from the independent actions of non-parties and can only be redressed by those non-parties.

A. Secretary of State Jacobsen is not the State of Montana or the Montana Legislature.

Secretary Jacobsen’s role as chief election officer of the State of Montana does not extend to redistricting or reapportioning Commission maps. Ex. A (Plaintiffs admit that Defendant Christi Jacobsen has no authority to draw or approve PSC districts and cannot amend Mont. Code Ann. § 69-1-104). This undisputed fact forecloses Plaintiffs’ requested relief against the Secretary. *See* (Doc. 25 at 8–16).

The State of Montana and the Montana Legislature are not parties to this case. *See* (Doc. 1, ¶¶ 12–16). But Plaintiffs’ allegations center on inaction by the State of Montana and the Montana Legislature. *See* (Doc. 22 at 11) (“The legislature rejected multiple proposals...”); (Doc 22. at 14) (“the legislature’s failure to act”); (Doc. 22 at 16) (“The legislature has neither provided for regular redistricting nor set standards for redistricting...”); (Doc. 22 at 17) (“The legislature does not regularly redistrict...”); (Doc. 22 at 25) (“...no justification excuses the State’s failure to redistrict.”); (Doc. 22 at 25) (“The State cannot, as a matter of law, rebut the presumption of unconstitutionality.”). Plaintiffs’ briefing attempts to

define Secretary Jacobsen as the “State,” but that does not make it so. *See* (Doc. 22 at 9–10) (“Secretary of State Christi Jacobsen (the ‘State’)”); *but see Black’s Law Dictionary* 1698 (11th ed. 2019) (Defining State as “[a]n institution of self-government within a larger political entity; esp., one of the constituent parts of a country having a federal government, <the 50 states>.”). Secretary Jacobsen, as a state officer, possesses only limited authority and duties. *See e.g.* MCA Title 13, Chapter 1, Part 2 (defining Secretary Jacobsen’s role in election laws). The Secretary’s role does not extend to the legislative power or the authority to represent the State of Montana for redistricting purposes. *See* MONT. CONST. ART. V, § 1; ART. VI, § 4. Plaintiffs’ case suffers from the fatal defect that they allege acts or failures to act by the Montana Legislature or the State of Montana, but name only Secretary Jacobsen. By failing to name the proper parties, Plaintiffs’ fail to state claims for which relief can be granted by this Court, and summary judgment should be granted against them.

Plaintiffs, furthermore, cannot prove any injury caused by Secretary Jacobsen related to their declaratory and redistricting relief. *See* (Doc. 25 at 8–16). Plaintiffs’ discovery admissions and briefing make clear their issue lies with the State of Montana or the Montana

Legislature, in this regard, not Secretary Jacobsen. *See* Ex. A; (Doc. 22 at 11–25). Public records also indicate the debate over redistricting properly belongs in the halls of the legislature not the office of Secretary Jacobsen. *See* SOS 0042–0044 (attached as Exhibit B) and SOS 0045–0046 (attached as Exhibit C). The ultimate resolution of this issue, amending MCA § 69-1-104, depends entirely upon a legislative act, not any administrative decision of the Secretary. *See* Ex. A. In short, Plaintiffs failed to plead any facts, enter any evidence, or otherwise prove Secretary Jacobsen caused any of their alleged injuries. Their allegations relate entirely to the actions, or inactions, of the Montana Legislature and/or the State of Montana. This Court should deny any further relief in this case because of this standing issue. *See* (Doc. 25 at 8–16).

B. The Court lacks authority to amend Montana statute to reapportion the Commission.

Plaintiffs’ legal argument rests on another fundamental flaw in that their requested relief asks the Court to go beyond pronouncing a constitutional judgment and extends into amending Montana law. Courts do not rewrite or amend the statutes to bring statutes into constitutional conformity. *See United States v. Stevens*, 559 U.S. 460, 481 (2018) (“We will not rewrite a ... law to conform it to constitutional

requirements, for doing so would constitute a serious invasion of the legislative domain.”) (internal citations and quotations omitted). The “obligation to avoid judicial legislation” properly leaves crafting constitutional legislation to the legislative branch. *United States v. Nat’l Treasury Emples. Union*, 513 U.S. 454, 479 (1995) (declining to adopt a requirement not found in the language of the statute to salvage the statute’s constitutionality).

This principle applies even in the election law context. *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013). In *Shelby County*, the Supreme Court invalidated the Voting Rights Act coverage formula for jurisdictions subject to the Act’s preclearance requirement. *Id.* The Supreme Court didn’t draft a constitutional formula under § 4(b) but instead left it so “Congress may draft another formula based on current conditions.” *Id.* In other words, the Court’s authority to say what the law is does not extend to crafting legislation.

Court-drawn Commission maps would operate as an amendment to current statute. State legislative districts operate as part of a plan submitted to Secretary Jacobsen. *See* Mont. Const. art. V, § 14(4) (“... the commission shall file its final plan for legislative districts with the

secretary of state and it shall become law.”). By contrast, the Commission districts are defined in statute. *See* MCA § 69-1-104. The Commission districts, therefore, are not a map or plan in the same sense as the legislative districts. Instead, the Montana Legislature defined Commission districts through legislation.

What Plaintiffs really ask this Court to do, then, is amend MCA § 69-1-104. (Doc. 22 at 28). First, Plaintiffs ask the Court to “declare the current Commission map and the statute creating the current districts, Mont. Code Ann. § 69-1-104, unconstitutional.” (Doc. 22 at 21–22). Then, Plaintiffs “ask the Court to redistrict the Commission.” (Doc. 22 at 28). That request runs afoul of the “obligation to avoid judicial legislation.” *Nat’l Treasury Emples. Union*, 513 U.S. at 479. Any relief at that juncture necessarily requires the Court to rewrite MCA § 69-1-104 because the Commission “map” consists only of statutory text.

The request for amendment is demonstrated in the Plaintiffs’ proposed remedial maps. For example, Plaintiffs’ Proposed Map 1, (Doc. 22 at 37), essentially asks the Court to rewrite MCA § 69-1-104 as follows:

Public service commission districts. In this state there are five public service commission districts, with one commissioner elected from each district, distributed as follows:

(1) first district: Blaine, Broadwater, Cascade, Chouteau, Daniels, Dawson, Fallon, Fergus, Garfield, Glacier, Hill, Judith Basin, Liberty, McCone, Meagher, Petroleum, Phillips, Pondera, Prairie, Richland, Roosevelt, Sheridan, Toole, Valley, and Wibaux Counties;

(2) second district: Big Horn, Carbon, Carter, Custer, ~~Fallon~~, Golden Valley, Musselshell, Powder River, ~~Prairie~~, Rosebud, Treasure, and Yellowstone Counties;

(3) third district: Beaverhead, ~~Broadwater~~, ~~Deer Lodge~~, Gallatin, ~~Golden Valley~~, Jefferson, Madison, ~~Meagher~~, ~~Musselshell~~, Park, Silver Bow, Stillwater, Sweet Grass, and Wheatland Counties;

(4) fourth district: Deer Lodge, Granite, Lincoln, Mineral, ~~Missoula~~, Powell, and Ravalli Counties; and those parts of Missoula and Sanders Counties not within the boundaries of the Confederated Salish and Kootenai Tribal Reservation;

(5) fifth district: Flathead, ~~Glacier~~, Lake, Lewis and Clark, ~~Pondera~~, and Teton Counties; and those parts of Missoula and Sanders Counties within the boundaries of the Confederated Salish and Kootenai Tribal Reservation.

These proposed changes cross the line of interpreting a statute for constitutionality, to rewriting a statute to comply with the constitution.

That power; however, rests with the Montana Legislature not with Secretary Jacobsen, the Plaintiffs, nor the Court. The inherent amendatory nature of the requested relief further underscores why this Court should deny such relief.

C. Plaintiffs' requested relief against Secretary Jacobsen isn't ripe.

“[Ripeness] is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). “A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal citation and quotation omitted). “[T]he Constitution leaves with the States primary responsibility for apportionment” of their representative districts. *Grove v. Emison*, 507 U.S. 25, 34 (1993). Courts recognize “that ‘reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.’” *White*, 412 U.S. at 794–95 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). Federalism and principles of judicial restraint further require that plaintiffs demonstrate they brought their challenge in a timely fashion. *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018); *Merrill v. Milligan*. 2022 WL 354467 at *6–7 (U.S. 2022) (Kavanaugh, J. concurring) (interpreting *Purcell v. Gonzalez*, 548

U.S. 1 (2006) to require a showing that plaintiffs did not unduly delay their case).

The Montana Legislature has not had an adequate opportunity to redistrict PSC districts based on 2020 Census data. The Montana Legislature adjourned prior to the release of the 2020 Census. *See* House Journal, 67th Leg. Reg. Sess., April 29, 2021, 35 (Mont. 2021); Senate Journal, 67th Leg. Reg. Sess., April 29, 2021, 24–25 (Mont. 2021). Plaintiffs therefore can't point to any failure to act by the Montana Legislature between August 12, 2021, and now. Under *Reynolds*, the Montana Legislature needs to timely act on the 2020 Census data in advance of the 2024 elections. *See* (Doc. 8 at 9) (explaining Montana's redistricting cycle). Only if the Legislature fails to act in advance of those elections would judicial relief be appropriate. *See Reynolds*, 377 U.S. at 586.

Plaintiffs faced a choice in filing this challenge. They could challenge the current districts in advance of the 2022 elections, but that would need to be based on the 2010 Census. Or they could challenge the current districts in advance of the 2024 elections based on the 2020 Census. By challenging the current districts based on the 2020 Census, for the 2022 elections, they jumped the gun. *See* (Doc. 8 at 14–17). *Reynolds*

requires the Montana Legislature be given some adequate opportunity to reapportion based on the August 12, 2021, data prior to judicial intervention. That opportunity has not occurred and thus this challenge isn't ripe.

Previous redistricting cases demonstrate that the Montana Legislature must be afforded some opportunity to reapportion. In *Reynolds*, Alabama failed to reapportion its legislative seats following the 1900 Census up until the 1960 Census. 377 U.S. at 540–41. The federal district court did not enjoin the legislative map prior to the spring primary elections. Instead, the district court gave “reasonable but prompt” opportunity for the legislature to redistrict, which it did a few months later. *Id.* at 542–44. The district court invalidated the map from the July 1962 legislative session, not the prior map, because courts must give that adequate opportunity to reapportion. *Id.* at 573. In *Wise*, the district court entered declaratory judgment then “afforded the city an opportunity as a legislative body for the City of Dallas to prepare a plan which would be constitutional.” *Wise v. Lipscomb*, 437 U.S. 535, 538 (1978). A court must afford some opportunity to the appropriate legislative body prior to undertaking its own redistricting.

Here, the timing aspects of Plaintiffs' challenge demand such opportunity. Montana 2022 elections will be run under the 2010 redistricting cycle because 2020 Census data was not available when the 2021 legislative session concluded. Plaintiffs challenge current Commission districts based only on the 2020 Census. (Doc. 22 at 14–16, 25). Plaintiffs do not allege, and Secretary Jacobsen is unaware of, any prior challenge to the constitutionality of the current districts vis-à-vis the 2010 Census. Plaintiffs don't assert that challenge either, and thus their claim of stale maps is unsupported.² Without that piece, Plaintiffs don't prove that the State of Montana or the Montana Legislature were legally required to redistrict following the 2010 Census, nor does their challenge require redistricting based on the 2010 Census. Commission districts must be presumed constitutional for the 2022 elections because they have not been previously adjudicated to be unconstitutional, nor are they challenged

² Plaintiffs' cited legislative history fails to illuminate any clear principle regarding legislative views towards redistricting. The legislation between 2017 and 2019 cited by Plaintiffs contained substantive policy changes towards Commission composition going beyond mere reapportionment. *See* S.B. 210, 65th Leg., Reg. Sess. (Mont. 2017) (seeking to change method of selecting commissioners to appointment); S.B. 246, 66th Leg., Reg. Sess. (Mont. 2019) (seeking to reduce Commission from five to three and elect on non-partisan basis); S.B. 309, 66th Leg., Reg. Sess. (Mont. 2019) (seeking to reduce commission from five to three); S.B. 160, 67th Leg., Reg. Sess. (Mont. 2021) (seeking to change method of selecting commissioners from election to appointment). As Plaintiffs acknowledge, these policy considerations, apart from reapportionment concerns, resulted in opposition. *See* (Doc. 22 at 14).

here based on the 2010 Census. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 421 (2006) (“States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade.”). Instead, because this challenge relies solely on the 2020 Census data, not the 2010 Census data, the Montana Legislature must be afforded an opportunity to act prior to the 2024 elections. Until the legislature fails to do so, Plaintiffs’ claim isn’t ripe.³

II. Equitable factors counsel denying further relief in this case.

The Montana Legislature still has not had adequate opportunity to reapportion Commission districts considering the 2020 Census data. (Doc. 8 at 14–17). To timely act, the Montana Legislature must cure any one-person, one-vote issues prior to the 2024 elections. *See* (Doc. 8 at 9). The Montana Legislature will reconvene for its next regular session next January. All relevant entities continue to clearly communicate an intent to take this issue up during the next legislative session. *See* Exs. B and

³ Plaintiffs Seifert and Sinoff admit they are not eligible to vote for a Public Service Commissioner in either the 2022 primary or general election. Ex. A. Vote dilution claims are “district specific.” *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). Because these plaintiffs reside in a district not up until 2024, those claims don’t ripen until 2024.

C.⁴ The Court should give that legislative process time to work to re-balance Commission districts ahead of the 2024 elections.

Procedural issues counsel staying any further Court action. Thus far, the Court has not set any schedule for the State or the Montana Legislature to complete redistricting. *See* (Docs. 16, 17); *see Reynolds*, 377 U.S. at 542 (delaying district court action until the legislature had “reasonable but prompt opportunity”). Secretary Jacobsen lacks authority or power to unilaterally engage in redistricting the Commission. Ex. A. Notwithstanding the Court’s Order, (Doc. 29), Secretary Jacobsen opposes submitting a map on constitutional grounds. The Montana Constitution prohibits one branch of government from exercising the powers of another branch. *See* MONT. CONST. art. III, § 1. The Commission districts found at MCA § 69-1-104 can only be amended through a legislative act, not by the Secretary. *See* MONT. CONST. art. V, § 1. Even if the Court accepts Secretary Jacobsen’s map, the Secretary simply has no authority or power to proffer it. Ex. A. The only authority for her proposed map

⁴ Secretary Jacobsen does not purport to speak for these entities. Rather, these statements evince, in the Secretary’s eyes, an unequivocal desire by legislative leaders in both major parties and the Governor’s office.

comes from this Court's order, but that fact should counsel limiting any further judicial intervention.

III. If the Court does redistrict the Commission, then Secretary Jacobsen's proposal should be implemented.

While the Secretary maintains that she has no constitutional or statutory role in PSC redistricting, her proposed map more closely embodies legislative policy and judgment than Plaintiffs'. Consistent with the principle that "reapportionment is primarily a matter for legislative consideration and determination," courts defer to the "policies and preferences of the State." *Upham*, 456 U.S. at 41. If part of a state plan violates federal or state law, the court must still defer to the "unobjectionable aspects" of the plan. *Perry v. Perez*, 565 U.S. 388, 396 (2012). A court errs by substituting "its own concept of the collective public good" for the legislature's "determination of which policies serve the interests of [its] citizens" *Id.* The court's duty is to reconcile "the requirements of the Constitution with the goals of state political policy." *Upham*, 456 U.S. at 43 (quoting *Conner v. Finch*, 431 U.S. 407, 414 (1977)).

Contrary to Plaintiffs' assertions, (Doc. 22 at 20), current law embodies clear "legislative judgments" as to Commission districting criteria.

See MCA § 69-1-104. First, each district is reasonably compact and contiguous. *See* Def.'s Rebuttal Expert Discl. at 1 (Feb. 22, 2022), attached as Exhibit D. Second, each district represents a community of interest. *See* Ex. D at 1. Finally, current law defines district boundaries based on county lines. *See* MCA § 69-1-104. Each subsequent redistricting attempt likewise adhered to the existing policy of following county lines. *See* Senate Bill 153 § 2(b), 63rd Leg., Reg. Sess. (Mont. 2013); S.B. 246 § 2(b), 66th Leg., Reg. Sess. (Mont. 2019); S.B. 309 § 2(b), 66th Leg., Reg. Sess. (Mont. 2019). In any remedial map, this Court must follow these legislative judgments. *See Upham*, 431 U.S. at 41.

Further, the Secretary's proposed map is owed considerable deference. *See Upham*, 431 U.S. at 41; *White*, 412 U.S. at 795; *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971) (collectively, courts should follow state policy, even when in the judgment of the court such policy is unwise, unless the state policy violates federal law). In other words, a (1) lawful state plan that (2) fully remedies the constitutional and statutory issues

should be adopted by the court. *See Montes v. City of Yakima*, 2015 WL 11120964 at 13 (E.D. Wash. 2015).⁵

A. Any map must comply with federal law.

Secretary Jacobsen agrees with the Plaintiffs that any Court-drawn map must comply with the Fourteenth Amendment and Voting Rights Act. *See* (Doc. 22 at 29–32). Secretary Jacobsen also agrees that because of the size of Commission districts relative to the size of the largest minority group voting blocs, the Voting Rights Act does not complicate reapportionment. *See* (Doc. 22 at 31–32). Finally, Secretary Jacobsen agrees any map must aim for maximum population deviations less than 10%. *See Evenwel v. Abbott*, 578 U.S. 54, 60 (2016) (“Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map

⁵ In *Montes*, the district court notes the *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), decision. In *Garza*, the court did not afford any special deference to a reapportionment plan submitted by some local government officials, but less than a required majority to enact the submitted plan. 918 F.2d at 776. *Garza* doesn’t apply in this case. *Garza* presupposes that the submitted plan comes from the reapportioning body. 918 F.2d at 779 (Kozinski, J. concurring and dissenting in part). In this case, Secretary Jacobsen and the Plaintiffs acknowledge that she is not the proper reapportioning body. *See* Ex. A. It is impossible for Secretary Jacobsen to meet *Garza*’s legislative act requirement because she cannot reapportion Commission districts. Applying *Garza*, therefore, in this case would grant Plaintiffs the benefit of denying any deference to the Secretary’s submitted map because they named an improper party for this relief. *See* (Doc. 25 at 14–16).

presumptively complies with the one-person, one-vote rule.”); *see also* (Doc. 22 at 29–30).

B. Any map must incorporate state criteria.

Montana, through historical practice and as codified in MCA § 69-1-104, adopts three distinct criteria for reapportioning Commission districts. First, Commission districts adhere to county lines. Second, as with legislative districts, Commission districts are compact and contiguous. Finally, Commission districts keep communities of interest intact.

Current Commission districts are designed to be as compact and contiguous as possible. *See* (Minutes of House Committee on Federal Relations, Energy, and Telecommunications at SOS 0006 (Mar. 17, 2003), relevant excerpts attached as Exhibit E) (the current map was the “most compact by eyesight” of four options presented). As Plaintiffs note, this requirement derives from Article V, § 14(1) of the Montana Constitution and is well recognized in federal law. *See* (Doc. 22 at 33). Any Court redistricting should strive to be as compact and contiguous as feasible given other interests.

Montana law sets binding standards and policies for redistricting the Commission. *See* MCA § 69-1-104; *see also* Ex. D at 1. Prior to 2003,

Commission districts followed county lines. *See* MCA § 69-1-104 (2001). Senate Bill 220 (Mont. 2003) redrew the Commission districts to their current form while continuing to follow county lines. *See* MCA § 69-1-104 (2021). Each redistricting attempt cited by Plaintiffs likewise required Commission districts to follow county lines. *See supra* at 17 (citing relevant proposed legislative text). Until such time as the Montana Legislature changes course, that policy choice must be respected by this Court. *See Upham*, 431 U.S. at 41.

Plaintiffs ask the Court to prioritize federal reservation boundaries above state political subdivisions such as county lines. (Doc. 22 at 33–34). Even acknowledging that the 2020 Districting and Apportionment Commission adopted a definition of political unit that includes cities, towns, counties, and federal reservations for legislative seats, that does not alter existing criteria for Commission seats. *See* (Doc. 22 at 33); *Cf. Durst v. Idaho Comm’n for Reapportionment*, 2022 WL 247798, at *16 (Idaho 2022) (state law choices prevail in questions over prioritizing tribal interests and state political subdivision interests). Until the Montana Legislature enacts a contrary policy, this Court must follow the

consistent policy choice to adhere to county boundaries. *See Upham*, 431 U.S. at 41.

Finally, Secretary Jacobsen agrees with Plaintiffs that respecting communities of interest is a common redistricting criterion. *See* (Doc. 22 at 24) (citing *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795 (2017)). In general, a community of interest means a community with shared geography, socioeconomic status, and economic activity. *See* Ex. D at 1. Secretary Jacobsen also agrees with the facts the Court may notice as evidence of communities of interest. *See* (Doc. 22 at 34–35). As Secretary Jacobsen’s expert states, the current districts represent communities of interest and any court-led redistricting efforts should seek to retain them. *See* Ex. D at 1.

C. Any map must balance equities.

Any court-led redistricting must follow general equitable principles. *See Reynolds*, 377 U.S. at 585. Courts must consider the severity and nature of the constitutional harm against the disruption of the state’s elections process and mindful of the state’s sovereignty and primacy in redistricting. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017); *cf. Merrill*, 2022 WL 354467 at *6–7 (Kavanaugh, J. concurring)

(in the broader election law context, courts must consider whether pre-election changes are “feasible before the election without significant cost, confusion, or hardship”). These principles echo the command that courts must give effect to as much of the state’s policy as constitutionally permissible. *See Perry*, 565 U.S. at 396.

Here, these principles generally mean that (1) existing district boundaries should serve as the starting point; (2) each voter currently entitled to cast a ballot for a commissioner in the 2022 elections should remain eligible to cast a ballot after any Court-led reapportionment; and (3) the Court should only make those changes necessary to cure the alleged constitutional violation and not substitute its will for that of the Montana Legislature.⁶ Courts commonly use existing district lines as the starting point, and this respects the existing expressed will of the Legislature. *See League of United Latin Am. Citizens*, 548 U.S. at 411–12 (discussing history of Texas’s court-led redistricting following the 2000 census). A form of disenfranchisement will occur if voters eligible to cast a

⁶ The Court should reject any attempt at redistricting based on “competitiveness.” (Doc. 22 at 12). Other courts properly rejected attempts at drawing maps based on such measures of perceived fairness to political parties. *See Henderson v. Perry*, 399 F. Supp. 2d 756, 768 (E.D.Tex. 2005). Drawing a district based on ‘competitiveness’ necessarily forces the Court to consider partisanship. Such decisions implicate “charges of partisan decision-making” better left to the political branches. *Id.*

ballot for a Commissioner in 2022 are denied that opportunity through Court-led redistricting. *See Willems v. State*, 325 P.3d 1204, 1210 (2014). In *Willems*, the Montana Supreme Court acknowledged that statewide legislative redistricting requires shuffling holdover elected officials and this changes when voters can cast a ballot for that office. *Id.* Unlike in *Willems*, and as demonstrated by proposed maps from both parties, this issue can be avoided and as an equitable principle should be avoided to give the fullest meaning to the right to vote. Finally, it is bedrock law that courts should not “intrude upon state policy any more than necessary.” *White*, 412 U.S. at 795. The Court, here, should limit itself only to those changes necessary to bring current districts into constitutional conformity and not engage in a broad redistricting effort.

D. Secretary Jacobsen’s map comports with the required criteria.

Pursuant to this Court’s Order, (Doc. 28), Secretary Jacobsen submits the map attached as Exhibit F. As should be clear on its face, the Secretary’s proposed map offers only limited changes compared to current districts. Ex. D at 2. District 1 expands to add Glacier County from District 5 and Musselshell County from District 3. These changes address District 1’s under-population. District 2 remains unchanged as it

is close to the ideal population size. District 3 sheds Musselshell County to District 1 and Deer Lodge County to District 4 to reduce District 3's excess population and bring up the population in two underpopulated districts. In sum, by shifting these three counties, the districts come into presumptive compliance with the one-person, one-vote rule.

The Secretary's proposed map contains a maximum deviation of 9.44%. Ex. D at 2. This falls within presumptively constitutional guidelines. See *Evenwel*, 578 U.S. at 60. The Secretary's proposed map minimizes shifting voters to ensure that current districts are left intact to a large extent. Ex. D at 2. Everybody currently in District 1, 2, and 4 remains in Districts 1, 2, and 4. Ex. D at 2. 94.10% of current people in District 3 and 94.08% of people in District 5 remain in Districts 3 and 5 respectively. Ex. D at 2. Keeping voters in their current districts to the largest extent possible serves the equitable principles of minimizing voter confusion and disruptions to current elections processes. See *Merrill*, 2022 WL 354467 at *6–7.

Additionally, every voter shifted out of District 5 moves into District 1, which means that every voter currently eligible to cast a ballot in 2022 will remain eligible. Ex. D at 2–3. This addresses any *Willem's*-like

concerns about potential temporary disenfranchisement. Finally, the Secretary's proposed map adheres to county lines in conformity with existing state law and is more compact than Plaintiffs' Proposed Maps 1 and 3. Ex. D at 3–4. Secretary Jacobsen's proposed map does no more than necessary to bring Commission districts into presumptive compliance with state and federal law. *See Upham*, 456 U.S. at 43.

IV. The Court should reject Plaintiffs' proposed maps.

Each of Plaintiffs proposed maps suffers from defects which should result in this Court rejecting them. All three maps split counties in violation of well-established Montana law. Further, while each of Plaintiffs' proposed maps comply with the Fourteenth Amendment, they override existing state policy more than necessary to reach presumptive constitutionality. *See Upham*, 456 U.S. at 43 (district court modifications should be "limited to those necessary to cure any constitutional or statutory defect."). Proposed maps 2 and 3 would also deny voters currently scheduled to vote for a commissioner in 2022 that opportunity. By contrast, the Secretary's map limits such disenfranchisement for the 2022 election, doesn't split any county, and minimizes changes prior to the 2023

Montana Legislature having a fair opportunity to reapportion based on the 2020 Census.

A. Proposed Map 1 violates existing state policy by splitting counties and is less compact than the Secretary's map.

Plaintiffs' Proposed Map 1 violates existing state policy and does more than necessary to attain presumptive constitutionality. Splitting Lake and Sanders Counties violates existing state policy and must be rejected. *See Perry*, 565 U.S. at 396. Proposed Map 1 shifts all of 9 counties and parts of two others, compared to Secretary Jacobsen moving three counties. Ex. D at 3. These changes render Proposed Map 1 less compact than the Secretary's Proposed Map. Ex. D at 3. For these reasons, the Court should reject proposed Map 1.

B. Proposed Map 2 also violates state policy by making more changes than necessary and splits counties.

Plaintiffs' Proposed Map 2 again violates existing state policy requiring adherence to county boundaries and effects significantly more changes than necessary to address any constitutional issues. Ex. D at 3–4. Proposed Map 2 splits Pondera and Flathead County. Ex. D at 3. The proposal also shifts large portions of Districts 3, 4, and 5. Ex. D at 3–4.

Only 82.66% of people currently in District 5 remain in District 5. Ex. D at 4. Further, 32,533 people shifted out of District 5 will no longer be eligible to cast a ballot in 2022 for a Public Service Commissioner. Ex. D at 4. The changes to District 3 and 4 involve retaining only 90.74% and 87.26% of persons in those districts respectively. Ex. D at 3–4. All told, Proposed Map 2 substantially changes the geography and makeup of all five districts. It does this by moving all of 13 counties and parts of two others. Ex. D at 3–4. These types of large-scale changes are best left to the reapportioning body and should not be entertained by the Court. *See Upham*, 456 U.S. at 43.

C. Proposed Map 3 likewise does not adhere to state policies governing Commission redistricting.

Plaintiffs' Proposed Map 3 suffers from similar defects as Proposed Map 2. Ex. D at 4. Statewide, the proposal shifts 11 counties and parts of one more. Ex. D at 4. District 5 in particular retains only 74.84% of its current makeup, the lowest of any district under any proposal. Ex. D at 4. To effectuate a population change of 12,973 people between the current district and Proposed Map 3, Plaintiffs move 103,937 people. Ex. D at 4. Districts 3 and 4 each retain less than 90% of the people currently residing in the district. Ex. D at 4. *Upham's* restraining principle again

applies here. Further, Proposed Map 3 splits Flathead County and districts 32,533 people from potentially being able to cast a ballot this year. Ex. D at 4. Finally, the resulting districts under Proposed Map 3 are less compact than under the Secretary's Proposed Map. By any measure, the Court should reject Proposed Map 3.

CONCLUSION

The Court should deny any further relief in this case due to the procedural improprieties threaded throughout Plaintiffs' arguments. At a minimum, before this case proceeds to redistricting, this Court must give an adequate opportunity to the Montana Legislature—the actual entity with redistricting authority—to reapportion prior to judicial intervention. If, however, the Court proceeds apace, then it should adopt Secretary Jacobsen's proposed map as her proposal complies with all federal and state law and minimizes disruptions to the state elections process.

DATED this 22nd day of February 2021.

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Montana Attorney General

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Lieutenant General

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,858 words, excluding tables of content and authority, certificate of service, certificate of compliance, and exhibit index.

/s/ Brent Mead

NAME OF ATTORNEY

CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: February 22, 2022

/s/ Brent Mead

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Exhibit A

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

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' Responses
to Defendant's First
Discovery Requests**

The contract between Plaintiffs' counsel and Plaintiffs' expert has not yet been executed. When it is, Plaintiffs will supplement their production.

REQUEST FOR PRODUCTION NO. 10: Please produce all data, photographs, videos, and other information upon which the opinions of each expert identified in your Answer to Interrogatory No. 16 are based.

RESPONSE: Please see the expert report of the Honorable Jim Regnier, disclosed on February 7, 2022.

REQUEST FOR ADMISSION NO. 1: Please admit that Defendant Christi Jacobsen has no authority to draw or approve PSC districts.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 2: Please admit that Defendant Christi Jacobsen does not represent the State of Montana.

RESPONSE: Object that this request is too vague for Plaintiffs to admit or deny. Defendant is sued strictly in her official capacity as the Montana Secretary of State. The Secretary of State is elected statewide and performs exclusive functions on behalf of the State of Montana, so she clearly does represent the State under some meaning of the relevant

terms. Further object that Defendant’s “relative access to relevant information” regarding her own role in State government is greater than Plaintiffs. Fed. R. Civ. P. 26(b)(1).

Plaintiffs do not object to answering this request to the degree that Defendant is asking whether the State of Montana is not a named party defendant in this litigation represented by Defendant Christi Jacobsen. Pursuant to this clarification, Plaintiffs respond as follows: Admit.

REQUEST FOR ADMISSION NO. 3: Please admit that amending Mont. Code Ann. § 69-1-104 requires an act of the Montana Legislature.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 4: Please admit that Defendant Christi Jacobsen cannot amend Mont. Code Ann. § 69-1-104.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 5: Please admit that Plaintiffs Sinoff and Seifert are not eligible to vote for a Public Service Commissioner in either the 2022 primary or general election.

RESPONSE: Admit.

correspondence or other tangible evidence in your possession, custody, or control which support your Answers to the above Interrogatories or the allegations of your Complaint.

RESPONSE: There are none.

REQUEST FOR PRODUCTION NO. 14: If you assert a claim of privilege to the production of any document requested, please provide a written privilege log that identifies each document individually and for each such document, provides the following information: (i) the nature or type of privilege claimed; (ii) a statement of the facts upon which the claim of privilege is based; (iii) the nature of the document, e.g., letter, memo, minutes, etc.; (iv) the date it bears, if any; (v) the identity of the person preparing or sending it; (vi) the identity of each person receiving it or any copy; and (vii) the subject matter of the document.

RESPONSE: Not applicable.

DATED this 7th day of February, 2022.

/s/ Constance Van Kley
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that this document was served upon the following via email on February 7, 2022:

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Exhibit B

<https://montanafreepress.org/2022/01/21/legislators-mull-limited-options-in-psc-redistricting-bind/>

Legislators mull limited options in PSC redistricting bind

Calling a special session would let lawmakers preempt federal judges who are poised to redraw outdated utility board districts for the 2022 election. But it's not necessarily a popular option.

by [Eric Dietrich](#)

01.21.2022

HELENA — With a federal court [likely to bar the state from using its aging Public Service Commission district map in this year's election](#), lawmakers in Montana's Republican-controlled Legislature face a tricky choice: Let the election proceed with a court-ordered map, or call a special session in an attempt to preempt the courts by drawing new districts to account for nearly 20 years of population shifts themselves.

While many GOP lawmakers bristle at the idea of letting the federal judiciary dictate a map for a Montana election, interviews with legislators from both parties this week indicate the special session option may not be in the cards.

That's especially true since the maps for this year's election in theory need to be pinned down by March 14, the filing deadline state law specifies in order to give candidates enough time to campaign before the June 7 primary election.

"I hate to rule anything out right now, but my thought process is this needs to be dealt with in a regular session, not a special session," said Sen. Greg Hertz, R-Polson. "It's a complex issue, and we need public involvement too."

"I don't think there's much appetite from our caucus for a special session," said House Minority Leader Kim Abbott, D-Helena. "We don't see a way that we can productively get into session, draw districts that will be constitutional, and get those approved in the time frame we have."

The Montana Legislature meets in regular session in the winters of odd-numbered years. That means it isn't scheduled to convene again until 2023, after this year's election. However, the Montana Constitution also provides for special sessions, which focus on urgent topics that can't wait until the next regular session. They can be called either by the governor or by a majority vote of the 150 state representatives and senators.

Given the challenge of gathering support from lawmakers scattered across the state, [every special session in state history](#) has been initially called by the governor. It is, however, somewhat common for lawmakers to vote to expand the scope of a special session once they're gathered in Helena — precedent that raises the

possibility that a special session called to deal with PSC districting in the coming months could open the door to politically charged proposals on topics such as federal COVID relief funding or [election integrity](#).

The office of Gov. Greg Gianforte didn't provide a direct answer Thursday to questions about whether he is considering calling a special session to address the PSC election issue.

"Montana law rests public service commission districts with the legislature, and the governor remains willing to work with the legislature to get the job done," Gianforte press secretary Brooke Stroyke said in an emailed statement.

One advocate for a special session is Rep. Derek Skees, a hardline Republican from Kalispell who is running for a PSC seat this year. He told Montana Free Press in an interview Thursday that it would be a "travesty" to have a map drawn by federal judges instead of the Legislature.

He's said he's optimistic he'll be able to persuade his peers that a special session is necessary. "I can't say that it will. I know that I'm advocating for it," he said.

Plaintiffs in a new lawsuit argue that Public Service Commission districts, which haven't been updated by the Legislature since 2003, now have unbalanced populations. They want the districts redrawn by federal courts.

Skees also said he is worried about federal judges selecting a map that stymies his campaign by placing him in the same district as incumbent commissioner Randy Pinocci of Sun River, a fellow hardline Republican who is up for re-election this year.

The five-member PSC regulates utility companies that provide Montana consumers services such as electricity, natural gas and trash hauling. The commissioners, who are paid a \$112,443 salary, are elected to four-year terms. The seats are staggered so that either two or three commission seats are up for election in each even-year election cycle.

Two PSC seats are up for election this year: Pinocci's, which represents Great Falls and northeast Montana, and one held by termed-out commissioner Brad Johnson that includes Helena and Kalispell.

While Democratic candidates have received 43% of the votes cast in PSC elections the last two cycles, all five commission seats are held by Republicans.

Environmentalists, climate activists and Democratic candidates [have consistently criticized the PSC](#) in recent years for not being more aggressive about pushing NorthWestern Energy and other power utilities to more rapidly adopt renewable energy sources.

[The federal lawsuit about the districts](#) was filed Dec. 6 by plaintiffs Bob Brown, a former Republican who served as secretary of state in the early 2000s; former Gallatin County Commissioner Don Seifert, also a Republican; and Gallatin County resident Hailey Sinoff. They are represented by attorneys with Helena-based Upper Seven Law and Sidney-based Netzer Law Office. Both firms are also involved in separate cases challenging legislation passed by the 2021 Legislature.

The plaintiffs argue that the current [PSC districts](#), which the Legislature hasn't revised [since 2003](#), have become so wildly out of balance as a result of population shifts that they now violate the "one person one vote" principle guaranteed by the U.S. Constitution. State attorneys have acknowledged that the districts are unbalanced, but have tried to argue that the Legislature should be given a chance to redraw the maps in the 2023 session, the first regularly scheduled session where lawmakers will have access to population data from the 2020 census.

A three-judge panel appointed to hear the case has in initial rulings appeared sympathetic to the plaintiffs. In a Dec. 22 order, Judge Donald Molloy [called the current map "presumptively unconstitutional"](#) and the three judges have barred state election officials from certifying PSC candidates while the litigation remains active. In a separate order earlier this month, Molloy laid out a schedule that could see the case resolved by the state's March 14 filing deadline — an ambitious time line considering that high-profile federal court cases often take years to litigate.

In any case, lawmakers of both parties said this week that they expect the Legislature to redraw the PSC districts next year whether or not a court-ordered map is used for this fall's election. The redistricting job, they said, is properly the Legislature's responsibility.

"It's better if we take the time as a Legislature to work through what works for us," said Senate Majority Leader Jill Cohenour, D-East Helena. "I think we need to take that time."

Hertz, who has another session left in his four-year Senate term, pledged to bring legislation himself in 2023.

"I will have a bill and I will push forward on redrawing PSC districts," he said. "We definitely need to redraw the lines. There's no question about that."

Exhibit C

https://helenair.com/opinion/columnists/opposing-special-session-to-draw-psc-districts/article_9ccc0b9f-61c7-583e-b52d-052d48686d3e.html

GUEST VIEW

Opposing special session to draw PSC districts

DUANE ANKNEY

Jan 28, 2022

For the past eight years I served on the Senate Energy and Telecommunications Committee, six as chair. When combined with my eight years in the House, I have spent more time evaluating the Public Service Commission's (PSC) regulatory duties and commissioners than anyone in the Legislature.

For the unfamiliar, the PSC consists of five members, each elected from a distinct geographic Montana district. Their primary charge is keeping your lights on and power costs low. Over the last two decades I have watched the Montana PSC descend into a state of dysfunctionality. Rather than focus on its regulatory role, it has become a political body whose commissioners routinely degrade each other.

Today's commissioners often let politics distract them from their role of regulating energy costs and energy reliability.

Previous efforts made by the Legislature to redraw the PSC district boundaries to correct for population imbalances as required by the Constitution (one man, one vote) died in committee, as both parties sought to gerrymander seat boundaries to their benefit. Further, prospective PSC candidates, while still serving in the Legislature, worked to ensure they had a favorable seat for their upcoming political race. Despite the growing population imbalance between PSC districts, the chair of House Energy did not redraw PSC district boundaries this session, perhaps because he planned to run.

A federal court has now intervened. The court, recognizing the unconstitutionality of the current PSC District population imbalance, has indicated that a three-judge panel (two from Montana, one from California) will engage in redrawing PSC districts. Now there are legislators clamoring for a special session to draw districts — including the previously uncooperative chair of House Energy. I do not support a special session. Hastily drawn district lines from an expensive short special session will just kick the can down the road. The right temporary solution is to let the court rapidly engage, then the Legislature can do a thoughtful permanent fix in the 2023 session, a short 10 months away.

In most states, PSC commissioners are appointed. This is done to ensure that commissioners have a background in energy analysis. Going forward, I would

propose that two commissioners be elected, one from an eastern congressional district and one from the western congressional district. The other three would be appointed, two by the majority party and one from the minority. To ensure that Montanans can be confident in the commission's expertise, I would establish minimum requirements for background experience.

A hastily called special session will do more harm than good, especially as there are legislators who will work to extend the session to include their pet topic. This will waste tax dollars and stick the public with 10 more years of questionable PSC policy decisions. The current call for a special session is the final act of individuals who repeatedly chose to ignore their statutory obligations. As such, I adamantly oppose the call.

Sen. Duane Ankney, R-Colstrip, is chair of the Montana State Senate Energy and Telecommunications Committee.

Exhibit D

Montana State Senate



The Treasure State

**SENATOR FRED THOMAS
MAJORITY LEADER**

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I submit this rebuttal to the Plaintiff's expert to issue my opinion on Plaintiffs three proposed maps and Secretary Jacobsen's proposed map.

All maps were created with free online redistricting software available at davesredistricting.org. Both parties have used davesredistricting.org in this litigation. (Doc. 8 at 52–53); (Doc. 23-4).

In order to presumptively comply with the one-person, one-vote rule, the maximum deviation between districts must be less than 10%. *Evenwel v. Abbott*, 578 U.S. 54, 60 (2016).

As stated in my original expert report, communities of interest guide redistricting. That means keeping communities with shared geography, socioeconomic status, and economic activity together. The principle is that the people should be able to choose a representative who fairly represents their interests and their concerns. In 2003, my assessment was to update districts to be as equal in population as possible, making sure we kept communities and counties together and that districts were contiguous and visually compact.

I. Complete statement of all opinions and the basis and reasons for them.

Montana's population is 1,084,225 according to the 2020 Census. Therefore, the ideal population for each of the five Public Service Commission ("Commission") districts based on the 2020 Census is 216,845. Document 23-1 contains a map listing the population of each Montana county following the 2020 Census.

A. Current Commission Districts

Document 23-1 contains a map of current Commission district boundaries. These boundaries, defined in MCA § 69-1-104, follow county lines. The population

and population deviation from ideal district size are accurately represented according to the 2020 Census by the map at Doc. 23-1 on page 14. Redistricting Commission districts is entirely a legislative task. Because the Commission itself is created by the Montana Legislature, the legislature alone sets the qualifications, composition, and districts for commissioners.

I sponsored Senate Bill 220 in 2003 which created the present district lines. (SOS0006). The criteria used included rough population equity, keeping county boundaries intact, and meeting an eye test for compactness. (SOS0006 and SOS0010). These criteria overlap, in part, with the criteria for legislative seats. For example, legislative seats also need roughly equal population and since 1980 have required a level of compactness. (History of State Legislative Districting Criteria in Montana, 1974–2010). But outside of federal law and constitutional limitations, the criteria for legislative seats does not control what the legislature may use for commission districts. This is most apparent in that the Commission has always followed county lines and it was my intention in 2003 to continue that historically practice. (SOS0010).

B. Review of Proposed Maps

1. Secretary Jacobsen

The map submitted by Secretary Jacobsen for my review makes three changes relative to the current districts. First, Glacier County moves from District 5 to District 1. Second, Musselshell County moves from District 3 to District 1. Third, Deer Lodge County moves from District 3 to District 4. These changes are necessary to raise District 1's population and reduce District 3's population to create overall maximum deviation less than 10%.

This results in the following district population totals and deviations from the ideal district size:

District 1: 205,124 (-11,721) (-5.41%)
District 2: 216,532 (-313) (-0.14%)
District 3: 225,597 (8,752) (4.04%)
District 4: 218,384 (1,539) (0.71%)
District 5: 218,588 (1,743) (0.80%)

The maximum population deviation is 9.44%. This complies with the one-person, one-vote rule. By continuing to draw along county lines, the proposed map also complies with the requirement that those boundaries be respected.

Because Secretary Jacobsen's map largely follows existing district lines it follows the same communities of interest as the current districts. This minimal redistricting also has the benefit of keeping most voters in their current districts. One way to look at this is the percentage of current population of a district that is kept in that district. 100% of persons currently in Districts 1, 2, and 4 remain in Districts 1, 2, and 4. This means that no persons in those districts currently were moved out of the district. Even though the proposed map moves 9,421 people from Deer Lodge County and 4,730 people in Musselshell County out of District 3, District 3 retains 94.10% of its original population. In District 5, by moving Glacier County out, the district retains 94.08% of its original population.

Regarding Glacier County, by moving that county from District 5 to District 1, eligible voters will still be able to cast a ballot in 2022 as Districts 1 and 5 are the two commission seats up for election this year. In other words, no one loses their ability to vote in 2022 under the Secretary's proposed map.

Finally, the Secretary's proposed map has a compactness score of 35 according to davesredistricting.org. (higher is better).

2. Plaintiffs' Proposed Map 1

Document 23-4 at page 6 contains Plaintiffs' Proposed Map 1 and its accompanying district populations and population deviations. The proposed map separates the Evaro precinct in Missoula County from the rest of Missoula County. This precinct contains 1,183 people. It also separates the Dixon and Hot Springs precincts in Sanders County from the rest of that county. These precincts contain 514 and 1,461 people respectively. Splitting these counties violates the state criteria for commission districts that county boundaries remain intact.

Proposed Map 1 also shifts Glacier and Pondera Counties from District 5 to District 1; Broadwater and Meagher Counties from District 3 to District 1; Deer Lodge County from District 3 to District 4; Golden Valley and Musselshell Counties from District 3 to District 2; and Prairie and Fallon Counties from District 2 to District 1. In total, Proposed Map 1 moves all of 9 counties and parts of two others. The effects of this, using the population retention described above, mean that 100% of District 1 is retained, 98.09% of District 2, 94.06% of District 3, 98.49% of District 4, and 91.53% of District 5. These changes exceed what is present in Secretary Jacobsen's proposed map.

Proposed Map 1 has a compactness score of 29.

3. Plaintiffs Proposed Map 2

Document 23-4 at page 7 contains Plaintiffs' Proposed Map 2 and its accompanying district populations and population deviations. The proposed map separates Precinct 24 in Flathead County from the rest of the county, and the Heart Butte and Valier precincts from the remainder of Pondera County. Precinct 24 in Flathead County contains 1,419 people, Heart Butte in Pondera County contains 775 people, and Valier in Pondera County contains a combined 1,279 people. These county splits violate existing state policy.

Proposed Map 2 also shifts Lincoln and Powell County from District 4 to District 5; Lake County from District 5 to District 4; Teton County from District 5 to District 1; Meagher and Wheatland Counties from District 3 to District 1; Custer, Fallon, and Prairie Counties from District 2 to District 1; and Golden Valley, Musselshell, Stillwater, and Sweetgrass Counties from District 3 to District 2. In total Proposed Map 2 moves all of 13 counties and parts of 2 others. The effects of this, using the population retention described above, mean that 100% of District 1 is retained, 92.61% of District 2, 90.74% of District 3, 87.26% of District 4, and 82.66% of District 5.

Further, by moving Precinct 24 in Flathead County and all of Lake County from District 5 to District 4, this districts 32,533 people out of potentially being able to cast a ballot for commissioner in 2022.

Proposed Map 2 as a compactness score of 41.

4. Plaintiffs Proposed Map 3

Document 23-4 at page 7 contains Plaintiffs' Proposed Map 3 and its accompanying district populations and population deviations. The proposed map, like Proposed Map 2, separates Precinct 24 in Flathead County from the rest of the County. This county split violates existing state policy.

Proposed Map 3 shifts Lincoln and Powell Counties from District 4 to District 5; Lake County from District 5 to District 4; Glacier, Pondera, and Teton Counties from District 5 to District 1; Jefferson and Broadwater Counties from District 3 to District 5; Meagher County from District 3 to District 1; Musselshell County from District 3 to District 2; and Prairie County from District 2 to District 1. All told Proposed Map 3 shifts all of 11 counties and part of Flathead County. The effects of this, using the population retention described above, mean that 100% of District 1 is retained, 99.50% of District 2, 89.36% of District 3, 87.26% of District 4, and 74.84% of District 5.

Further, by moving Precinct 24 in Flathead County and all of Lake County from District 5 to District 4, this districts 32,533 people out of potentially being able to cast a ballot for commissioner in 2022.

Proposed Map 3 has a compactness score of 32.

II. Facts or data considered in forming opinions

1. Decennial 2020 data
2. Documents filed in this case:
 - a. Doc. 1
 - b. Doc. 6
 - c. Doc. 8
 - d. Doc. 9
 - e. Doc. 22
 - f. Doc. 23 (including exhibits)
 - g. Doc. 25
3. Legislative history concerning:
 - a. Senate Bill 220 (2003)
 - b. Senate Bill 153 (2013)
 - c. Senate Bill 210 (2017)
 - d. Senate Bill 246 (2019)
 - e. Senate Bill 309 (2019)
4. Montana Districting and Apportionment Commission rules, procedures, legal memorandum, and history.
5. Knowledge, training, and experience as a Montana Legislator, House of Representatives from 1984–1992 and Montana Senate from 1996–2004 and 2012–2020 including serving as Senate Majority Leader from 2000–2004 and 2016–2020.
6. Knowledge and experience sponsoring the successful 2003 Public Service Commission reapportionment legislations and sponsoring the attempt at reapportionment in 2013.

III. Exhibits to summarize and support opinions

1. Secretary Jacobsen's Proposed Map
2. Plaintiffs' Exhibits filed as Doc. 23 are incorporated by reference
3. Montana Districting and Apportionment Commission documents
 - a. 2010 Criteria for State Legislative Districts
 - b. 2020 Criteria for State Legislative Districts
 - c. History of State Legislative Districting Criteria in Montana, 1974–2010
 - d. Lisa Mecklenberg Jackson, *Where to Draw the Line: Criteria for Redistricting in Montana*, Montana Districting and Apportionment Commission (April 2010).

- e. K. Virginia Aldrich, Litigation Background and Districting and Apportionment Criteria, Districting and Apportionment Commission (May 31, 2020) (Revised June 12, 2020).

4. Curriculum Vitae of Fred Thomas

IV. Witness qualifications and publications authored in previous 10 years.

Curriculum Vitae is attached as an exhibit. I sponsored the successful 2003 Public Service Commission reapportionment legislation and the attempt at reapportionment in 2013. I have not published any works beyond the legislation I sponsored in 2003 and 2013.

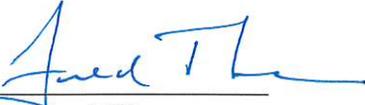
V. Other cases in which witness has testified as an expert in past 4 years.

None.

VI. Statement of compensation for study and testimony

I am not receiving compensation for my study and testimony.

Respectfully this 22nd day of February, 2022.



Mr. Fred Thomas

Exhibit E

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
58th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON FEDERAL RELATIONS, ENERGY, AND TELECOMMUNICATIONS

Call to Order: By **CHAIRMAN ROD BITNEY**, on March 17, 2003 at 3:00 P.M., in Room 455 Capitol.

ROLL CALL

Members Present:

Rep. Rod Bitney, Chairman (R)
Rep. Gary Matthews, Vice Chairman (D)
Rep. Dee Brown (R)
Rep. Eileen J. Carney (D)
Rep. Tim Dowell (D)
Rep. Daniel Fuchs (R)
Rep. Hal Jacobson (D)
Rep. Diane Rice (R)
Rep. Jim Shockley (R)

Members Excused: Rep. Brennan Ryan (D)
Rep. John Parker (D)
Rep. Alan Olson, Vice Chairman (R)
Rep. Jeff Laszloffy (R)
Rep. Scott Mendenhall (R)

Staff Present: Glenna McClure, Committee Secretary
Mary Vandebosch, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SJ 13, 3/13/2003; SB 220,
3/13/2003; SB 316, 3/13/2003
Executive Action: SB 220

Opening Statement by Sponsor:

{Tape: 1; Side: A; Approx. Time Counter: 17.8 - 24.8}

SEN. THOMAS said that the districts for the Public Service Commission (PSC) have not changed since the 1970's. There were several different options of which he picked Option C which he moved through the Senate. It has the smallest deviation by population and most compact by eyesight. He distributed a copy of the current PSC districts, a copy of the Option C changes, and a table that showed the population deviation.

EXHIBIT (feh56a02)

EXHIBIT (feh56a03)

EXHIBIT (feh56a04)

Proponents' Testimony:

{Tape: 1; Side: A; Approx. Time Counter: 24.8 - 28}

Greg Jergeson, Public Service Commission, provided a copy of his testimony.

EXHIBIT (feh56a05)

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

{Tape: 1; Side: A; Approx. Time Counter: 28 - 30}

REP. MATTHEWS asked how this change would affect commissioners from other districts.

Mr. Jergeson said that one commissioner is term-limited. Two of the commissioners are up for election in 2006, two are up for election in 2004, there isn't a commissioner in the new district which would be an open seat for the next election.

Closing by Sponsor:

{Tape: 1; Side: B; Approx. Time Counter: 1 - 1.7}

SEN. THOMAS said that **REP. FUCHS** has agreed to carry this bill in the House.

ADJOURNMENT

Adjournment: 3:45 P.M.

REP. ROD BITNEY, Chairman

GLENN MCCLURE, Secretary

RB/GM

EXHIBIT (feh56aad)

Exhibit F

