MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA CONSERVATION VOTERS; JOSEPH LAFROMBOISE; NANCY HAMILTON; SIMON HARRIS; DONALD SEIFERT; DANIEL HOGAN; GEORGE STARK; LUKAS ILLION; and BOB BROWN, Plaintiffs, v. CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State, Defendant.	Cause No.: DDV-2023-702 **OPINION AND ORDER ON MOTIONS**

Before the Court are the following motions:

1. Plaintiffs' Motion for Preliminary Injunction (Dkt. 6), filed November 29, 2023; and

2. Defendant's Motion to Dismiss (Dkt. 15), filed December 20, 2023.

Plaintiffs are represented by Constance Van Kley, Christopher Patalano, and Rylee Sommers-Flanagan. Defendant Secretary of State Christi Jacobsen is represented by Thane Johnson, Alwyn Lansing, Michael Russell, and Emily Jones.

The foregoing motions are fully briefed, and a hearing was held January 31, 2024. At the hearing, the Court heard testimony from Stephanie Somersille and Dan Stusek, received Secretary's Exhibits A through G, and heard oral argument from counsel. Based on the evidence presented, the pleadings, and the arguments of counsel, and for the reasons that follow, the motion to dismiss and the motion for a preliminary injunction will be denied.

BACKGROUND[1]

1. Redistricting in Montana

Accurately or not, Montana politics has long held a reputation for independence and ticket-splitting.[2] In several respects, Montana law has sought to de-emphasize the role of partisan affiliation in government. Unlike many states, Montana has "open" primary elections and does not require voters to register by party to participate. *See* Mont. Code Ann. §§ 13-10-209, 13-10-301. Counties have the option of electing their officers on an entirely nonpartisan basis, and many (like both counties comprising this judicial district) have done just that. Mont. Code Ann. § 7-3-103(4). Judges are elected on a nonpartisan basis. Mont. Code Ann. § 13-14-111. The membership of some legislative committees—

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[1] The following constitutes the Court's findings of fact. Mont. R. Civ. P. 52(a)(2).

[2] *See, e.g.,* Eric Dietrich & Mara Silvers, *Politicos explain Montana's red wave,* Montana Free Press, Nov. 11, 2020, https://montanafreepress.org/2020/11/11/politicos-explain-montanas-red-wave/ ("Montana voters have historically been ticket splitters—reliably supporting Republican presidential candidates over the past two decades, but often choosing Democrats for other offices.").

including the legislative finance and legislative audit committees—are equally divided between the two major parties. Both parties play a role in selecting the commissioner of political practices, who must be an individual who has not engaged in certain political activities within two years of their appointment. *See* Mont. Code Ann. §§ 13-37-102(2), 13-37-107.

Then there is the Montana Constitution, which embodies a similar nonpartisan spirit. As Plaintiffs note, the delegates to the 1972 Montana Constitutional Convention were famously seated alphabetically and without regard to partisan affiliation. Mae Nan Ellingson, *My Glory Days: How I Came to be in the Right Place at the Right Time*, 43 Pub. Land & Res. L. Rev. 71, 86 (2020). The Montana Constitution contains a unique protection against political discrimination, providing that "[n]either the State nor any person. . . shall discriminate against any person in the exercise of his civil or political rights on account of. . . political. . . ideas." Mont. Const. art. II, § 4. Even more pertinently, the framers of the Constitution endeavored to limit the influence of partisan gamesmanship on legislative district apportionment.

Rather than leave it to the legislature to establish district lines for legislative and Congressional seats, the Montana Constitution assigns the task to a bipartisan Districting and Apportionment Commission (the Redistricting Commission). Mont. Const. art. V, § 14. The Redistricting Commission consists of five members, four of whom are selected by the majority and minority leaders of both houses of the legislature, ensuring partisan balance. *Id.* § 14(2). The fifth member, the chair, is supposed to be jointly elected by the four appointed members. In practice, however, this task has generally fallen to the Supreme Court, which is empowered to appoint the fifth member in cases of deadlock. *Id.*

The Constitution established several non-exclusive, mandatory criteria for redistricting, including that legislative and Congressional districts consist of "compact and contiguous territory" and be "as nearly equal in population as practicable." *Id.* § 14(1). The legislature may review the Redistricting Commission's work and make suggestions, but it cannot veto or modify the Redistricting Commission's final plan. *Id.* § 14(4).

By statute, the legislature has further defined the criteria the Redistricting Commission must use to apportion legislative and Congressional districts. With respect to state legislative districts, the legislature requires the following:

> In the development of legislative districts, a plan is subject to the Voting Rights Act and must comply with the following criteria, in order of importance:
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> (a) The districts must be as equal as practicable, meaning to the greatest extent possible, within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census. The relative deviation may be exceeded only when necessary to keep political subdivisions intact or to comply with the Voting Rights Act.
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> (b) District boundaries must coincide with the boundaries of political subdivisions of the state to the greatest extent possible. The number of counties and cities divided among more than one district must be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions must be divided before the less populous, unless the boundary is drawn along a county line that passes through a city.
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> (c) The districts must be contiguous, meaning that the district must be in one piece. Areas that meet only at points of adjoining corners or areas separated by geographical boundaries or artificial barriers that

> prevent transportation within a district may not be considered contiguous.
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> (d) The districts must be compact, meaning that the compactness of a district is greatest when the length of the district and the width of a district are equal. A district may not have an average length greater than three times the average width unless necessary to comply with the Voting Rights Act.

Mont. Code Ann. § 5-1-115(2). In short, Montana's mandatory districting criteria require population parity, cohesion of political subdivisions, contiguity, and compactness. Additionally, partisan gerrymandering is outlawed by statute: districts "may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress." *Id.* § 5-1-115(3). To ensure this, the Redistricting Commission may not consider the addresses of incumbents, the political affiliations of voters, partisan voter rolls, or prior election results (except when judicially required) when drawing district boundaries. *Id.*

Finally, the Redistricting Commission has adopted its own set of mandatory criteria and goals that generally follow the statutory redistricting criteria but add some additional considerations. (Secretary's Exs. C, D.) For instance, the Redistricting Commission has provided that in additional to formal compactness, it will consider "functional compactness in terms of travel and transportation, and geography." Likewise, contiguity militates against districts consisting of "areas separated by natural geographical or artificial barriers that prevent transportation by vehicle on a maintained road." Both are nods to the State's geography: for example, that some communities (like Seeley Lake or Cooke City) are physically isolated by wilderness or mountain ranges from significant portions of the county in which they are situated. Additionally, the

Redistricting Commission seeks to keep "communities of interest intact,", minimize the displacement of constituents for "holdover" state senators, and "consider competitiveness of districts when drawing plans." (Ex. D.)

2. Districting of the Public Service Commission

The Public Service Commission (PSC) is the public body created by statute to "supervise and regulate the operations of public utilities, common carriers, railroad, and other regulated industries" set forth in statute. Mont. Code Ann. § 69-1-102. At the time of the Constitutional Convention, the legislature and members of Congress were the only state and federal officials elected by district. At that time, the Public Service Commission (PSC) consisted of three commissioners elected at large. In 1974, however, the legislature changed the composition of the PSC to increase the number of commissioners from three to five, and to provide for their election by single-member district.

Since the adoption of the districted PSC, the district boundaries have only been changed three times. In 2003, the legislature redistricted to account for changes in population since 1974. Senate Bill 200, 2003 Mont. Laws 294. The districts were apportioned along county lines.

Those districts remained unchanged for nineteen years. Then, in 2022, litigation alleging a geographic voter dilution claim resulted in a federal three-judge panel declaring the 2003 apportionment to violate the Fourteenth Amendment to the United States Constitution. *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1286 (D. Mont. 2022). The panel permanently enjoined enforcement of the 2003 PSC districts and ordered use of a modified map, also apportioned along county lines, for certifying candidates for the 2022 PSC elections. *Id.* at 1292. In that election, Commissioners were elected to Districts 1

(a large district covering central and northeastern Montana including, among other places, Hill, Cascade, and Roosevelt Counties) and 5 (a central-to-northern district covering Flathead, Lake, Teton, and Lewis and Clark Counties). The judicially imposed 2022 map deferred to Montana's redistricting criteria for legislative and Congressional districts as expressed by the Redistricting Commission, including compactness, contiguity, preserving communities of interest, and following political subdivision boundaries. *See id.* at 1288, 1291.

3. Senate Bill 109

Following the 2022 elections, the legislature sought to reapportion the PSC districts following the *Brown* decision. Their vehicle for doing so was Senate Bill 109. 2023 Mont. Laws 272 [SB 109]. The introduced draft of SB 109 reused the county-line based method of defining district boundaries that had been employed in 1974, 2003, and 2022.

The form of SB 109 to which Plaintiffs now object emerged with a committee amendment introduced in the Senate Energy and Telecommunications Committee on February 28, 2023.[3] The amendment proposed dividing the PSC districts evenly among house districts, with each of the five PSC districts consisting of twenty house districts apiece. The sponsor of both the bill and the amendment, Senator Keith Regier, explained that executive action on the bill had been delayed while the Redistricting Commission finalized its proposed 2024-2032 house district map.

[3] Executive action on SB 109 took place on February 28, 2023, from 18:07:53–18:24:02. The video is available at https://sg001-harmony.sliq net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230228/-1/47041.

At the hearing, Senator Regier provided his rationale for the proposed map. Senator Regier stated that he opted to use house districts as a basis for apportioning the PSC districts rather than county lines because it facilitated achieving population parity within a 1% maximum deviation. Notably, Senator Regier did not follow either the Redistricting Commission's adopted criteria for apportionment or the criteria established in Mont. Code Ann. § 5-1-115. He expressly disavowed focusing on compactness or maintaining communities of interest within a district, stating instead that he focused on population parity and contiguity because in his view those were the criteria the Constitution required.[4] He also denied knowledge of the partisan lean of the voters in these districts. Senator Regier openly acknowledged that his proposed map did not attempt to keep communities of interest together. He argued that doing so made it more difficult to achieve population parity using the house-district method and that there may be advantages to splitting districts within communities because that community would be represented by two commissioners accountable to that community's voters.

Senator Regier's amendment was adopted by the committee, and the bill was passed to the floor, while both houses rejected floor amendments to reduce the number of elected commissioners or adopt any of several alternative maps supported primarily by the Democratic caucus. SB 109 passed both houses on generally party-line votes in the form adopted February 28, 2023, and it was signed into law by the Governor on April 26, 2023.

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[4] For legislative districting, the Constitution also expressly requires compactness. Mont. Const. art. V, § 14(1).

4. Evidence at the Preliminary Injunction Hearing

Plaintiffs allege that the legislators who amended and approved SB 109 were motivated by a desire to gain partisan advantage for Republican candidates for PSC. Observing that prior maps generally did not split up political subdivisions—which follows from the county-based method of apportionment—Plaintiffs point out that the SB 109 map splits fourteen counties and six of Montana's seven largest cities. Only the smallest, Butte, remains undivided. (Comp., ¶¶ 48–49, Dkt. 1 at 15–16.)

Plaintiffs retained Stephanie Somersille, PhD, a mathematics consultant with research interests in redistricting mathematics, game theory, probability, and partial differential equations to review the SB 109 PSC districting map. (Somersille CV, Ex. 4[5], Dkt. 8 at 55.) Somersille has consulted in various partisan gerrymandering cases, and she has previously found maps to have unfairly advantaged Republicans and Democrats alike.

In this case, Somersille reviewed two maps, the 2022 map adopted in *Brown* (in her terminology, the "Judges' Plan") and the 2023 map approved by the legislature in SB 109 (to her, the "Enacted Plan"). Somersille generated four different sets of "ensemble maps" to compare to the two questioned maps.

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[5] The Secretary objects to Plaintiffs' Exhibit 4 (Dkt. 8 at 37–57) as hearsay. The Montana Supreme Court has not squarely addressed whether the rules of evidence apply in preliminary injunction hearings. Federal courts, applying the same substantive preliminary injunction standard as Montana, have generally found that the rules of evidence are relaxed in preliminary injunction hearings. *See, e.g., Americans for Prosperity Found. v. Harris*, 809 F.3d 536, 540 n.3 (9th Cir. 2015) (allowing consideration of hearsay at a preliminary injunction hearing). This is because preliminary injunction hearings are conducted early in proceedings, are time-sensitive in nature, and often allow little opportunity to obtain live-testimony witnesses or fully develop the record. *Id.*

Additionally, the Montana Rules of Evidence likewise provide that they do not apply in "proceedings. . . where the court is authorized by law to act summarily." Mont. R. Evid. 101(c)(4). To proceed "summarily" is to proceed "without the usual formalities; esp., without a jury" or "immediate[ly]; done without delay." Black's Law Dictionary 1736 (11th ed. 2019). Preliminary injunction hearings are necessarily summary in nature and this Court therefore agrees with the federal authorities that the rules of evidence need not be strictly observed. Accordingly, the Secretary's objection to the admission of Exhibit 4 is overruled.

"Ensemble maps" are a set of more than 100,000 random maps generated algorithmically using certain constraints. She testified that they are the "gold standard" for testing partisan gerrymandering and are a widely accepted methodology in the field of redistricting mathematics.

The first ensemble, termed the "neutral ensemble" in her report, consisted of maps that were contiguous, reasonably compact, and with population disparities of no greater than 5%. These maps were generated without any use of partisan election data. Somersille then reviewed selected partisan statewide elections conducted between 2016 and 2020, and compared the range of partisan outcomes (specifically, the share of the vote going to the Democratic general election candidate) from the ensemble map sets (from the 1st to 99th percentile of Democratic vote share) to the Democratic voter share that would have obtained in each district within the districts defined in the Judges' Plan and Enacted Plan. A Democratic vote share greater than the 99th percentile or less than the 1st percentile for the two questioned maps suggests that they were drawn based on factors other than those used to generate the ensemble.

Somersille made several findings about both plans based on her comparison to the neutral ensemble set. First, while the Democratic voter share for each district in the Judges' Plan fell within the range established by the neutral ensemble, two adjoining districts in the Enacted Plan—Districts 3 and 5—fell above the 99th percentile and below the 1st percentile for Democratic voter share, respectively. In other words, the Democratic vote share in these two Districts was a statistical outlier that likely cannot be explained by a random or neutral application of a maximum 5% population deviation, contiguity, and compactness. Somersille further noted that that the relatively flat rate of

Democratic voter share across four of the five districts reflected in her data suggested two common gerrymandering practices: "cracking" and "packing."[6] Finally, when reviewing multiple elections over the 2016-2020 period with varying Democratic voter shares, she noted that the Democratic voter share in each district was relatively unresponsive to increases in the statewide Democratic voter share. As Democratic voter share increases statewide, one would expect Democrats to pick up progressively more PSC seats; with the Enacted Plan, however, Democratic pickups lagged substantially behind what would be predicted as statewide voter share increased. It was only in those elections where Democrats won a 51.8% or greater statewide voter share that there was a substantial increase in Democratic representation on the PSC. Somersille concluded that these findings are all characteristic of partisan gerrymandering efforts.

Somersille then adjusted the constraints on the neutral ensemble, generating an ensemble with only a maximum 1% population deviation, one that used a 5% maximum population deviation but minimized splits of cities and counties, and one that minimized political subdivision splits and used a 1% maximum population deviation. None of these constraints significantly altered her analysis.

Somersille also compared the number of city splits in her ensemble sets to the Judges' Plan and Enacted Plan. While the Judges' Plan (which defined districts along county lines) had no city splits, the Enacted Plan was a statistical

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[6] "Packing" refers to districting as many voters expected to favor a particular party in one location to confine their influence to a single district; while "cracking" refers to the practice of dividing up voters expected to a favor a particular party into multiple districts where they are likely to be outvoted.

outlier compared to the ensembles, making it "extremely unlikely that the designers of this plan were merely indifferent to splitting city boundaries." As acknowledged in Dan Stusek's recounting of his experiences with legislative redistricting, urban areas are often thought to contain a higher concentration of Democratic-leaning voters, and rural areas are thought to contain a comparatively higher concentration of Republican-leaning voters. An intentional splitting of city boundaries is suggestive of an intent to crack presumed Democratic-leaning voters by spreading them out among multiple districts. Under the Enacted Plan, Billings, Bozeman, Helena, Missoula, Kalispell are divided between two districts, and Great Falls is divided among three districts.

Finally, Somersille also noted that the Enacted Plan's districts were less compact than the Judges' Plan and the median compactness of the neutral ensemble set.

Based on these considerations, Somersille's opined that it was "extremely unlikely" that the Enacted Plan was constructed without partisan considerations in mind. (Ex. 4, Dkt. 8 at 49.) She continued that the evidence "strongly suggest[s]" that the Enacted Plan "was made to lock in Republican advantage in all five of its districts under the most currently typical patterns of voting in Montana."

At the hearing, the Secretary did not challenge Somersille's mathematics, her methodology, or her application of that methodology. Rather, the Secretary vigorously cross-examined Somersille about her knowledge of Montana politics, Montana political geography, and population trends in the state. Somersille, who has never been to Montana, admitted to little knowledge of these subjects.

To the Court, however, these criticisms largely miss the point. The Court's understanding is that like most statistical analysis, the ensemble analysis is testing a hypothesis: when reviewed using election results from multiple statewide elections over a four-year period, can the partisan allocation of votes that would have obtained in each Enacted Plan district be explained by chance, assuming the legislature indeed drew the maps using only contiguity, compactness, and population parity? In Somersille's opinion, the answer is, "likely not." This is a problem of math and probability that does not materially turn on the nuances of Montana politics or geography. The chance that Democratic voter share primarily reflects something other than the partisan lean of an area is mitigated by her use of multiple elections for multiple offices in different years.

The Court also heard testimony from Dan Stusek, a Republican-appointed commissioner on the recently concluded Districting and Apportionment Commission. Stusek was a credible witness whose opinions struck the Court as earnest and sincerely held. Nevertheless, much of his testimony primarily concerned issues with legislative district apportionment. The validity of the legislative district apportionment is not before this Court.

Based on the foregoing—including in particular the absence of any substantial rebuttal to Somersille's expert opinion—the Court concludes that Plaintiffs are likely to establish that SB 109 was intended to secure a partisan advantage for Republican candidates for PSC, and to limit the influence of voters

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not inclined to vote for Republican PSC candidates.[7] The question that necessarily follows, however, is what, if anything, Plaintiffs should get out of this preliminary finding. That is discussed below.

STANDARDS

Justiciability "is a mandatory prerequisite to the initial and continued exercise" of a court's subject matter jurisdiction. *Larson v. State*, 2019 MT 28, ¶ 18, 394 Mont. 167, 434 P.3d 241. For motions asserting a lack of jurisdiction under Rule 12(b)(1), the Court "must generally take all well-pled factual assertions as true in the light most favorable to the claimant. *Gottlob v. DesRosier*, 2020 MT 210, ¶ 7, 401 Mont. 50, 470 P.3d 188. Subsequently, dismissalis only permissible if the claim, as pled, is not of a type or within a class of claims the court has threshold authority to consider and adjudicate." *Gottlob*, ¶ 7.

For a motion asserting a failure to state a claim for which relief can be granted under Rule 12(b)(6), the Court must similarly take all well-pleaded factual allegations as true, and the Court may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6 (quoting *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997)).

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[7] The Court cautions that its charge at this stage is only to assess a likelihood of success on the necessarily limited record now before it. The Court cannot say whether further factual development will alter this conclusion following trial.

A preliminary injunction is governed by the following standard:

> (1) A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that:
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> (a) the applicant is likely to succeed on the merits;
> (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;
> (c) the balance of equities tips in the applicant's favor; and
> (d) the order is in the public interest.

Mont. Code Ann. § 27-19-201(1). The statute is intended to mirror the standard for preliminary injunctions found in federal law as established by *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008), and its progeny. *See* Mont. Code Ann. § 27-19-201(4). The applicant for a preliminary injunction bears the burden of establishing the foregoing factors. *Id.* § 27-19-201(3).

DISCUSSION[8]

The Secretary moves to dismiss this case on two grounds: (1) that the case is not justiciable; and (2) that Plaintiffs' constitutional claims fail to state a claim for which relief can be granted. The former is a threshold inquiry that must be addressed before any other. The latter, however, overlaps substantially with the question of whether Plaintiffs are likely to succeed on the merits of their constitutional claims, one of the elements of a preliminary injunction. Accordingly, to resolve the pending motions, the Court addresses the following questions:

1. Are Plaintiffs' claims justiciable?
2. Should Plaintiffs be granted a preliminary injunction?

[8] The following constitutes the Court's conclusions of law. Mont. R. Civ. P. 52(a)(2).

Each question is addressed in turn.

1. Are Plaintiffs' claims justiciable?

The Secretary contends Plaintiffs' claims are nonjusticiable because they are not redressable and because they present a political question not amenable to judicial resolution.

The first question—redressability—is easily resolved. Redressability is one of the three elements of constitutional standing, and it asks whether a judicial determination in Plaintiffs' favor would indeed remedy the harm they claim to have suffered. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 32–33, 360 Mont. 207, 255 P.3d 80. The Secretary contends that Plaintiffs' claims are not redressable because she has no power to draw maps. While that may be so, the Secretary is the official who certifies candidates according to the districts established by the legislature. If Plaintiffs are successful in enjoining enforcement of SB 109, then it would be as if SB 109 had never been enacted, and the 2022 permanent injunction issued in *Brown*—which compels the Secretary to certify candidates for the PSC in accordance with the Judges' Plan—would be the operative authority. *See Brown*, 590 F. Supp. 3d at 1292. Indeed, the panel in *Brown* rejected a nearly identical redressability argument in that case for these very reasons. *See id.* at 1285–1286.

Additionally, Plaintiffs have sued the Secretary in her official capacity. This is the equivalent of suing the State itself. *McDonald v. Jacobsen*, 2021 MT 287, ¶ 16, 406 Mont. 197, 512 P.3d 251. Plaintiffs' claims are redressable.

The second justiciability issue—the "political question" doctrine—is more complicated. The political question doctrine is an outgrowth of the

doctrine of separation of powers and the comity each coordinate branch of government owes to the others. *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Under the Montana Constitution, "no person. . . charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art. III, § 1. Thus, courts may not resolve a question where "'there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving' the issue." *Brown v. Gianforte [Gianforte]*, 2021 MT 149, ¶ 21, 404 Mont. 269, 488 P.3d 548 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

There are two important limitations to this doctrine. First, despite its name, the "political question doctrine" does not preclude judicial determination merely because the question at issue involves political considerations or the process of politics. As *Baker* observed, "[t]he doctrine of which we treat is one of "political questions," not one of "political cases." *Baker*, 369 U.S. at 217. Likewise, that a lawsuit "seeks protection of a political right does not mean it presents a political question," as such "an objection 'is little more than a play upon words.'" *Id.* at 209 (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)); *see also Gianforte*, ¶ 21 ("not every matter touching on politics is a political question" (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229 (1986))). Courts nationwide have repeatedly reached the merits of questions that directly implicate the fortunes of political parties. *See, e.g., Larson*, ¶ 43 (challenge to certification of Green Party for ballot was

justiciable); *Conrad v. Uinta County Republican Party*, 529 P.3d 482, 489–490 (Wyo. 2023) (challenge to political party's bylaws governing voting for convention officers violated state law was justiciable); *Mecinas v. Hobbs*, 30 F.4th 890, 902–903 (9th Cir. 2022) (challenge to Arizona's method of ordering political parties on the ballot was justiciable), *but see Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020) (similar challenge held nonjusticiable).

The second important limitation is that the doctrine does not abrogate the judiciary's prerogative and obligation to decide cases and controversies before it and, when necessary to do so, "to say what the law is." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 11 n.3, 401 Mont. 405, 473 P.3d 386 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *Larson*, ¶ 39 ("[I]t is particularly within the province of the judiciary to construe and adjudicate provisions of constitutional, statutory, and the common law as applied to facts at issue in particular cases."). Indeed, the "judiciary has an unflagging responsibility to decide cases and controversies, even those that involve the authority of a coordinate branch of government or the courts' own functions." *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 17, 405 Mont. 1, 493 P.3d 980. Even when a constitutional guarantee of individual rights relies on legislative implementation, once the legislature has acted to secure that guarantee, the "courts can determine whether that enactment fulfills the Legislature's constitutional responsibility." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 326 Mont. 304, 109 P.3d 257. Not only "can" courts decide such matters, but they must. *See Columbia Falls*, ¶ 19 ("it is incumbent upon the court to assure that the system enacted by the Legislature

enforces, protects, and fulfills the right."); *McLaughlin*, ¶ 17. Thus, the "political question" doctrine is but a "narrow exception" to the judiciary's general obligation to decide cases and controversies properly before it. *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

The justiciability of partisan gerrymandering claims is a novel question in Montana. It is not elsewhere. Indeed, courts throughout the country have considered and split on this issue. Numerous state courts have entertained partisan gerrymandering claims—by Republicans and Democrats alike—as justiciable. *See Grisham v. Van Soelen*, 539 P.3d 272 (N.M. 2023); *In re 2021 Redistricting Cases Matanuska-Susitna Borough*, 528 P.3d 40 (Alaska 2023); *Adams v. DeWine*, 195 N.E.3d 74, 83 (Ohio 2022); *Matter of Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Penn. 2018); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012); *McClure v. Sec'y of the Commonwealth*, 766 N.E.2d 847 (Mass. 2002). Many others, following the United States Supreme Court's lead in *Rucho v. Common Cause*, __ U.S. __, 139 S. Ct. 2484 (2019), have reached the opposite conclusion. *Brown v. Sec'y of State*, 2023 N.H. LEXIS 220, 2023 WL 8245078 (N.H. 2023); *Graham v. Sec'y of State*, 2023 Ky. LEXIS 345 (Ky. Dec. 14, 2023); *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022); *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368 (W.V. 2012). At least two state supreme courts have flip-flopped (or at least signaled their openness to doing so) on the question in less than two years' time. *Harper v. Hall*, 868 S.E.2d 499 (N.C. Feb. 14, 2022) (partisan gerrymandering

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claims held justiciable), *vacated by* 886 S.E.2d 393 (N.C. Apr. 28, 2023) (reversing course); *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469 (Wis. Nov. 30, 2021) (partisan gerrymandering claims are nonjusticiable); *Clarke v. Wis. Elections Comm'n*, 995 N.W.2d 779, 781 (Wis. Oct. 6, 2023) (recognizing partisan gerrymandering claim involved an "important and unresolved question[] of statewide significance," albeit one not yet sufficiently factually developed for review). Other states, while not squarely addressing the question of partisan gerrymandering, provide a role for the courts in reviewing whether the state's districting plans comport with constitutional or statutory redistricting criteria. *See, e.g., Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 97 (Cal. Ct. App. 2006) (whether maps conform to constitutional districting criteria is justiciable); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012) (statute provides for state courts to review maps for consistency with statutory districting criteria). And, finally, the *Rucho* Court was itself deeply divided, with a strong four-Justice dissent. *See Rucho*, 139 S. Ct. at 2509–2525 (Kagan, J., dissenting).

Thus, this Court cannot simply defer to the weight of authority because the authority provides no clear direction. Nor does *Rucho* settle the question: although *Rucho* held that partisan gerrymandering claims are not justiciable under the United States Constitution, it expressly acknowledged that its conclusion does not necessarily hold true under constitutional and statutory schemes adopted by the states. *Rucho*, 139 S.Ct. at 2507. Indeed, many of the foregoing state court decisions turn on the specifics of their own state constitutions and statutes. *See, e.g., League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 375 (Fla. 2015) (relying on express constitutional provision prohibiting apportionment "with the intent to favor or disfavor a political party or

an incumbent" (quoting Fla. Const. art. III, § 20)); *Grisham*, 539 P.3d at 282–289 (relying on unique suffrage and popular sovereignty clauses of the New Mexico Constitution in conjunction with an enhanced equal protection guarantee and diminished "case or controversy" requirement to find partisan gerrymandering claims justiciable). Thus, this Court must determine for itself whether, under the Montana Constitution, courts have a constitutional role in deciding when and whether districting and apportionment for partisan advantage violates the Constitution.

The Montana Constitution confers on the judiciary the "judicial power of the state." Mont. Const. art. VII, § 1. As is true under the federal constitution, the judicial power of the state is limited to the power to decide cases and controversies. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567. Additionally, the Montana Supreme Court has generally followed the United States Supreme Court's cases defining the contours of the political question doctrine. *See Columbia Falls,* ¶ 14. This standard holds: "An issue is not properly before the judiciary when 'there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving' the issue." *Gianforte*, ¶ 21 (quoting *Nixon v. United States*, 506 U.S. 224, 228). Thus, the Court evaluates Plaintiffs' partisan gerrymandering claim using this rubric.

a. Textual Commitment

Where the Constitution expressly commits responsibility for a decision to a coordinate branch of government, that is generally a question outside the province of the courts. For instance, in *Nixon*, the United States

Supreme Court refused to review a challenge to impeachment rules adopted by the United States Senate because the Impeachment Trial Clause, U.S. Const. art. I, § 3 cl. 6, expressly gave the Senate "the sole Power to try all Impeachments," suggesting the "authority is reposed in the Senate and nowhere else." *Nixon*, 506 U.S. at 229. But a textual commitment of decisional responsibility does not follow merely from the fact that the controversy concerns powers exercised by other branches of government. *See, e.g., McLaughlin*, ¶¶ 17–19 (courts could review the validity of legislative subpoenas directed at the judiciary); *Gianforte*, ¶¶ 22–24 (even though the Constitution expressly provides for the legislature to prescribe the manner by which judicial candidates are nominated for gubernatorial appointment, courts could still review whether the method chosen otherwise comports with the Constitution); *Columbia Falls*, ¶¶ 17–19 (although the Constitution directs the legislature to "provide a basic system of free quality public. . . schools," whether the system adopted indeed satisfies the individual right to a quality education is a justiciable controversy).

The Montana Constitution addresses the question of districting and apportionment only once, and it pointedly gives that power *not* to the legislature, but rather to the largely independent Redistricting Commission. Mont. Const. art. V, § 14. The legislature's role is limited to the following: (1) the caucus leaders of the two legislative houses appoint four of the five commissioners; and (2) the legislature is entitled to review and make non-binding recommendations pertaining to the proposed legislative redistricting plan. *Id.* To be sure, Article V, Section 14 only applies to legislative and Congressional apportionment. At the time, however, no other state or federal offices were elected by district, and

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nothing this Court could locate suggests the framers of the 1972 Constitution ever contemplated the existence of other state officers elected by district.

At the 1972 Constitutional Convention, delegates were concerned by the potential conflict of interest attendant to allowing legislators to draw their own districts and the repeated failures of the legislature to adopt an apportionment scheme that survived judicial review. As Delegate Carman Skari, introducing the majority report of the legislative committee, explained:

> [T]here are several reasons why reapportionment is difficult for the Legislature. Each legislator tends to create his own district first. I think this is just a natural human trait. It's not meant as criticism. There is a great difficulty in being objective here, because one man's gerrymander can be another's logical district.

Mont. Const. Convention proceedings, Verbatim Tr. 682 (Feb. 22, 1972).[9] Another delegate commented that a commission was necessary because of "the fundamental principle of democracy that no one should be a judge in their own case." *Id.* Tr. 720 (Feb. 23, 1972) (Del. Harold Arbanas).

Delegate Skari further explained that the aim of the proposal for an independent commission was "to provide for the creation of a commission reasonably free of legislative pressure." *Id.* He recounted the experience of legislative reapportionment in the 1960s in the wake of *Baker*, where the courts had twice stepped in—in 1965 and 1971—when the legislature failed to enact a valid redistricting plan. *Id.* Delegate Skari noted that to remedy this phenomenon

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[9] This concern, of course, is not implicated by the PSC because it is an independent body in the executive branch. There is not even a potential conflict of interest in the legislature drawing districts for another body. But the framers nevertheless included Congressional redistricting in the Redistricting Commission's authority even though there is a similar lack of apparent conflict, suggesting their concerns with legislative-directed reapportionment extended beyond just the conflict-of-interest question.

and to correct the inherent conflict of interest in the legislature drawing its own districts, "we are asking the commission to initiate and to carry it out completely." *Id.* Notably, the Convention adopted an independent commission over the objections of delegates who complained that this should remain an exclusively legislative function. *See Id.* Verbatim Tr. 690 (Del. Miles Romney) ("[T]he tendency in this Convention to delegate authority to commissions. . . is sapping at the roots of representative government. . . . [Legislators] are the closest force in government to the mass of the electorate that exists. I think that they should be the first, the initial force in providing for reapportionment."), 719 (Del. C.B. McNeil) ("[I]t is fundamentally wrong to take away from the elected representatives the right to apportion and district. This is one of the crucial elements in our democracy."), 720 (Del. Grace Bates) ("I feel that legislators have been elected. They understand the districting perhaps better than anyone else and they should have an opportunity.").

Legislators were also concerned with reducing the potential for gerrymandering. During the floor debate of the proposal to have the Redistricting Commission consist mostly of members picked by the majority and minority leaders in the legislature, Delegate Richard Nutting stated:

> I think the only thing—problem with all of us is that we feel that there—in any reapportionment there's real problems with possibly gerrymandering of districts and that if we can keep the membership of the commission as relatively nonpartisan as we can, and we have a lot of problems trying to arrive at how to do that.

Id., Verbatim Tr. 688. Similarly, Delegate Jerome Cates, advocating for some legislative involvement in the process, said, "I think that it's important that we allow the Legislature to have some part in this procedure so that the

gerrymandering, which we all fear and all legislators fear, will not take place." *Id.* Verbatim Tr. 716 (Feb. 23, 1972). Much of the discussion about the composition of the commission was driven by concerns that a political party should not drive the outcome of redistricting. For instance, delegates opposed a proposal that the members appointed by the legislature merely be "balanced geographically and politically" because "we could give an undue advantage here to a majority party every 10 years." *Id.* Verbatim Tr. 738 (Del. Skari). And Delegate Cate commented that equal representation of political parties was needed because:

> [T]he reason that we felt we had to include and make provision for party leadership or recognition of parties was that Mr. Taylor, who is the present geographical redistricter in Montana from the university—the guy that's been doing it—said that he could gerrymander either political party out of office. He said he could change the whole complexure [*sic*] of the Legislature just by gerrymandering unless we provided some method of representation of political parties.

Id. Verbatim Tr. 688.

Finally, the backdrop against which the delegates framed the Constitution should be considered. As the delegates themselves recounted, the interval from *Baker v. Carr* to the Convention had been marked by frequent court challenges to districts drawn by the legislature. *See id.* Verbatim Tr. 682 (Del. Skari) (recounting the history of court challenges in the 1965 and 1971 reapportionment cycles), 686 (Del. Cate) ("Under the present system there is a race to the courthouse."). Delegates widely expected that courts would continue to review redistricting after the Convention. Indeed, one delegate opposed a provision expressly giving the Supreme Court original jurisdiction over

redistricting disputes because it was "superfluous and unnecessary, and as a matter of fact, a waste of time"; the delegate believed that federal and state judicial review of reapportionment was inevitable whatever the language said. *Id.* Verbatim Tr. 686 (Del. Thomas Joyce). And in fact, this language was ultimately stripped as unnecessary to afford judicial review: "I've taken out the provisions relating to a citizens' right of appeal *because a citizen has that right anyway*." *Id.* Verbatim Tr. 717 (Del. Cate) (emphasis added). Even delegates opposed to a commission commented that no matter how districts were drawn, the plans would end up in court. *Id.* Verbatim Tr. 690 (Del. Romney).

To be sure, the delegates only discussed the redistricting of legislative and congressional seats, not the PSC. Nevertheless, the Convention debate sheds substantial light on the delegates' and the ratifying public's understanding of the proper role of the legislature vis-à-vis the judiciary in districting. First, the foregoing establishes that the delegates did not intend to give the legislature primacy over redistricting; indeed, they intended the opposite. Second, although delegates sought to mitigate the frequency and contention of judicial review by delegating the work to a commission, they understood and expected that courts would continue play a significant role in reviewing the work of a redistricting commission to ensure conformity with the state and federal constitutions. And third, the delegates were concerned about the pernicious effects of political gerrymandering, and its redistricting scheme for the only districted offices then in existence was consciously designed to make gerrymandering difficult to achieve. None of this suggests an intention to exclude courts from adjudicating claims of the sort advanced by Plaintiffs here.

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b. Judicially Discoverable and Manageable Standards

The second question under the political question doctrine is whether, notwithstanding the absence of a textual commitment, there are judicially discoverable and manageable standards for resolving the question. If there are not, that suggests the question is one best addressed through the political process.

Importantly, a "judicially discoverable and manageable standard" need not be one that cleaves with mathematical precision. To the contrary, courts have long been accustomed to reviewing and applying standards that lack clear definitions. For example, to determine whether someone has been deprived of life, liberty, or property without due process of law, someone must determine what process is "due." Despite the inherent fuzziness of the term, courts have adopted a framework for determining the degree of process required for various deprivations by balancing the nature of the affected interest, the risk of error, and the government's interest. *See In re Vinberg*, 216 Mont. 29, 32 (1985) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

To take another example, it is not self-evidently clear under the Constitution when a delay in a criminal trial is too much, thus violating the defendant's right to a "speedy trial." Nevertheless, that does not mean only the political branches can define the right; rather, courts have adopted a four-factor framework and applied it in many cases over the decades. *See State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815. Indeed, the justiciability of speedy trial questions falls prey to the same question that troubled the *Rucho* Court: just as *Rucho* tackled how to determine "when political gerrymandering has gone too far," *Rucho*, 139 S.Ct. at 2497, courts adjudicating speedy trial questions must

determine when trial delay has gone too far. That courts have no hard-and-fast answer does not mean there can be no answer at all.

This notion is confirmed by Montana's political question jurisprudence. Consider first *Columbia Falls Elementary School District Number 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257, which involved a claim that the legislature's method for funding public schools violated the Constitution. The relevant provision, Article X, Section 1(3), required the legislature to "provide a basic system of free quality public elementary and secondary schools," a directive aimed at the legislature, not the courts. The court noted that the legislature was owed deference in defining its conception of a "quality" system of education, but the court maintained its jurisdiction to assess whether the system adopted comported with that definition. *Columbia Falls*, ¶ 22. The court found the legislature's failure to establish a threshold of quality rendered its system inadequate. *Columbia Falls*, ¶¶ 26–27. Additionally, while the court urged deference to the legislature's prerogative to define "quality," it also did not find that prerogative to be entirely unfettered: rather, it held that under any "legitimate" definition of "quality," Montana's school funding system fell short. *Columbia Falls*, ¶¶ 28–30.

In *McLaughlin v. Montana State Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980, the court addressed a challenge to legislative subpoenas addressed to the justices of the Montana Supreme Court. Even though the dispute concerned a legislative power—its subpoena authority—the Supreme Court found the controversy justiciable. Although there is no textual definition or limitation on the scope of the legislative subpoena power, the court drew on a four-factor test adopted for Congressional subpoenas by the United States

Supreme Court in *Trump v. Mazars USA, LLP*, __ U.S. __, 140 S.Ct. 2019 (2020). *See McLaughlin*, ¶¶ 9–13. The reliance on a standard rather than a rule and the necessity of balancing multiple factors did not render the issue nonjusticiable.

Finally, in *Foster v. Kovich*, 207 Mont. 139, 673 P.2d 1239 (1983), the Montana Supreme Court held that whether a recall petition was legally sufficient was a question of law for the Court, not a question for the voters. Thus, a district court had to determine whether the allegations in a recall petition sufficiently established one of the enumerated grounds for recall, which includes not only lack of fitness, official misconduct (a term of art in Montana law), or felony conviction, but more amorphous standards such as "incompetence" or whether the official has violated their oath of office. Even though one might see these latter grounds as in the eye of the beholder, courts were nevertheless deemed to be the gatekeepers determining whether the issue goes to the voters. In none of these cases did the existence of some play in the joints defeat justiciability.

Both the Montana Constitution and statute establish criteria a court can use to adjudicate whether the legislature or the Redistricting Commission appropriately apportioned districts. The Constitution requires that districts be "as nearly equal in population as practicable" and consist of "compact and contiguous territory." Mont. Const. art. V, § 14(1). The legislature has articulated what it believes to be the principles of fair districting, enacting a statute requiring that legislative and Congressional districts be: (1) as equal in population as practicable, (2) coincide with the boundaries of political subdivisions as much as possible, (3) be contiguous, (4) be compact, and (5) not drawn to favor a political

party or incumbent. *See* Mont. Code Ann. § 5-1-115. Although these criteria pertain to legislative districts, it is difficult to conceive of a reason why the legislature's policy judgment in this arena would not logically extend to PSC districts.

Moreover, these criteria are all capable of judicial determination. The legislature has defined what it means by contiguity and compactness. The political subdivision and population equality requirements are readily reviewable. And the final criteria—that a district not be drawn "for the *purposes* of favoring a political party or an incumbent legislator or member of congress," *id.* § 5-1-115(3)—has an intent requirement attached, meaning that it is only contravened upon a showing of purpose. Courts are well equipped and frequently decide legal questions turning on whether a person or entity has acted with improper purpose or intent. *E.g.,* Mont. Code Ann. § 45-2-101(65) (defining "purpose" within the context of criminal prosecutions); *Losleben v. Oppedahl*, 2004 MT 5, ¶ 17, 319 Mont. 269, 83 P.3d 1271 (noting that discrimination claims grounded in the Equal Protection Clause traditionally required a showing of intentional discrimination); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (striking a city ordinance adopted with the purpose to undermine a disfavored religious practice of Santeria worshippers). Thus, Montana has adopted standards for redistricting that supply judicially discoverable and manageable standards.

Finally, the Court considers the causes of action on which Plaintiffs rely. Count I of the Complaint asserts a claim under the equal protection guarantee found in Article II, Section 4 of the Montana Constitution. There is a well-defined framework for evaluating claimed equal protection

violations. *See Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 15, 392 Mont. 1, 420 P.3d 528. The Montana Supreme Court has previously applied equal protection principles to election law questions. *See Burns v. County of Musselshell*, 2019 MT 291, ¶ 19, 398 Mont. 140, 454 P.3d 685 (citing *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219).

Moreover, Plaintiffs rely on unique language in Article II, Section 4 that expressly proscribes discrimination on the basis of political ideas in the exercise of civil and political rights, which in this context elevates political discrimination to the same degree of protection reserved for race, sex, and religious discrimination. *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 10 n.2, 392 Mont. 1, 420 P.3d 528 (observing that the anti-discrimination guarantee of Article II, Section 4 "enlarges the protected class to include not only race but also. . . political and religious ideas" (quoting Larry M. Elison & Fritz Snyder, *The Montana Constitution: A Reference Guide* 35 (2001))). Equal protection claims predicated on religious discrimination are judicially cognizable. *See, e.g., Coleman v. Jones*, 2022 U.S. App. LEXIS 16871, at *18, 2022 WL 2188402 (4th Cir. 2022) (unpublished) (holding it clearly established that "intentional or purposeful discrimination based on religion, if not sufficiently justified, violates the Equal Protection Clause"). There is no reason it should be any different with respect to claimed discrimination on the basis of political belief. And, there is already a well-defined method for judicially adjudicating racial gerrymandering claims that can be extended to gerrymandering predicated on other protected classes. *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 260–261 (2015).

Count II alleges a violation of the right to suffrage guaranteed by Article II, Section 13. To be sure, the right to suffrage has not been as extensively

reviewed by Montana courts. Nevertheless, past alleged violations of the right have previously been adjudicated on their merits in the courts, including in challenges to past redistricting. *See Willems v. State*, 2014 MT 82, ¶¶ 32–34, 374 Mont. 343, 325 P.3d 1204 (right-to-suffrage challenge to 2014–2022 legislative redistricting map); *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 19, 410 Mont. 114, 518 P.3d 58 (right-to-suffrage challenge to various election statutes). Indeed, the courts have even articulated a standard for the right to suffrage that is implicated not just when a citizen is denied the right to vote but when the weight given their vote is "debase[d] or dilute[ed]." *Big Spring*, ¶ 18 (quoting *Bush v. Gore*, 531 U.S. 98, 104–105 (2000)). Thus, neither constitutional claim brought by Plaintiffs is inherently a matter beyond the capability of judicial consideration.

The Secretary's response relies heavily on *Rucho* itself. *Rucho* was a consolidated appeal of partisan gerrymandering claims brought in two states, North Carolina (alleged to have gerrymandered districts to favor Republicans) and Maryland (alleged to have gerrymandered districts to favor Democrats). *Rucho*, 139 S. Ct. at 2491. The evidentiary record for intentional partisan gerrymandering could scarcely have been stronger: to take perhaps the starkest example, the co-chair of the North Carolina legislature's redistricting committee told legislators that they were "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats." *Id.* at 2510 (Kagan, J., dissenting) (alterations in original). Nevertheless, the Supreme Court found the matter nonjusticiable.

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The rationale for the *Rucho* majority's holding is worth reviewing. A central underlying component of *Rucho* was that the Framers had been well acquainted with the problems of districting and apportionment when the Constitution was drafted, but rather than directly regulate the matter, they delegated the regulation of districting to state legislatures, checked by Congress's powers under the Elections Clause, U.S. Const. art. I, § 4. *See Rucho*, 139 S. Ct. at 2496. The Supreme Court noted, "At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing." *Id.* This, of course, stands in stark contrast to the circumstances of the Montana Constitution's framing, where Convention delegates were not only very aware of recent litigation over redistricting, but they actively expected courts would continue to be involved. The United States Supreme Court held that a prohibition on drawing districts for partisan advantage "would essentially countermand the Framers' decision to entrust districting to political entities." *Id.* at 2497. In Montana, however, the Framers consciously chose *not* to entrust districting to the political branches, instead opting to insulate districting from politics and legislative control as much as possible.

Next, the Court examined the two instances where federal courts had actively policed redistricting plans: the one-man, one-vote rule established in *Baker v. Carr*, 369 U.S. 186 (1962), and racial gerrymandering claims, first recognized in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The Court distinguished these claims from partisan gerrymandering claims because one-man, one-vote and racial gerrymandering claims were amenable to equal protection analysis because *any* violation of these doctrines implicates equal

protection. *See Rucho*, 139 S. Ct. at 2497. By contrast, "a jurisdiction may engage in constitutional political gerrymandering" under the federal Constitution, which means the Court must draw lines defining "how much partisan dominance is too much." *Rucho*, 139 S.Ct. at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) and *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.)). To the Court, racial gerrymandering analysis cannot be extended to political gerrymandering because "[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent 'predominates.'" *Id.* at 2503.

The Montana Constitution, however, does not have the same tolerance for partisan motivation that the federal Constitution has. As noted above, the Convention delegates in Montana labored to combat partisan advantage in redistricting as much as possible. The Montana Constitution, unlike the United States Constitution, expressly prohibits discrimination in the exercise of one's civil or political rights on the basis of political ideas. Mont. Const. art. II, § 4. And Montana's legislature has already done what the United States Supreme Court deemed impracticable: it has not only prohibited redistricting "for the purposes of favoring a political party," but it has banned the Redistricting Commission from even considering data on the political affiliations of registered voters and prior election results. Mont. Code Ann. § 5-1-115(3). The problem of "how much is too much" does not pervade Montana law to the degree it does federal law because the legislature and the Constitution have together already largely answered that question.

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Finally, *Rucho* allowed that states may adopt measures that supply the standards the Court found lacking in federal law. *Rucho*, 139 S. Ct. at 2507–2508. And as an example, it cited an Iowa statute remarkably similar to the prohibition on partisan gerrymandering in Montana's legislative redistricting statutes: "No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group." *Id.* at 2508 (quoting Iowa Code § 42.4(5) (2016)).

The Montana Supreme Court has articulated the following guidance for assessing whether the Montana Constitution affords greater protections than the United States Constitution:

> The Montana Constitution may provide greater protection, in certain circumstances, than the United States Constitution. . . . The Court also has determined, however, that a defendant must establish sound and articulable reasons that the Montana Constitution affords greater protection for a particular right.
>
> A party may establish sound and articulable reasons when it demonstrates that the Montana Constitution contains unique language, not found in its federal counterpart, that dictates this Court should recognize the enhanced protection. A party also may establish, through convention transcripts and committee reports, that the delegates to the Montana Constitutional Convention intended to provide the alleged, broader protection. A party further may illustrate his claim for broader protection by establishing that the right must not be read in isolation, but rather, in conjunction with rights that are uniquely Montanan. We accordingly will undertake a unique, state constitutional analysis only when the defendant has satisfied his burden of proof that a unique aspect of the Montana Constitution, or the background material related to the provision, provides support for the greater protection that he seeks to invoke.

State v. Covington, 2013 MT 31, ¶¶ 20–21, 364 Mont. 31, 364 Mont. 118 (internal citations omitted). In this case, the unique text, history, and structure of the Montana Constitution, discussed above, indeed supports an analysis of partisan gerrymandering claims that differs from that attendant to the United States Constitution. And for the reasons stated above, the Court concludes that there is neither a textual commitment of this matter to the legislative branch nor an absence of judicially discoverable and manageable standards. Accordingly, this matter is justiciable.

2. Should Plaintiffs be granted a preliminary injunction?

Having found partisan gerrymandering claims to be justiciable, the Court considers the factors set forth in Mont. Code Ann. § 27-19-201 to determine whether a preliminary injunction is appropriate.

a. Likelihood of Success on the Merits

Federal courts typically consider likelihood of success on the merits to be the most important criterion for entering a preliminary injunction. *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F. 4th 760, 771 (7th Cir. 2023). This factor also necessarily requires the Court to consider whether Plaintiffs have stated a claim for which relief can be granted. Plaintiffs contend they are likely to show that the district boundaries adopted in SB 109 violate their right to equal protection of the laws and their right of suffrage. The Court agrees that Plaintiffs are likely to show that Districts 3 and 5 under SB 109 discriminate against voters whose political beliefs lead them to prefer non-Republican candidates for PSC in violation of Article II, Section 4 of the Montana Constitution.

Montana's equal protection guarantee is found in a unique part of the Montana Constitution. The relevant provision states:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Mont. Const. art. II, § 4. This encompasses two equal protection measures: a general guarantee comparable to that found in the United States Constitution, and a specific anti-discrimination guarantee that sweeps more broadly than the federal constitution. *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 8, 392 Mont. 1, 420 P.3d 528.

The Court begins by focusing on the latter guarantee, which prohibits discrimination "in the exercise of [a] civil or political right[]" on the basis of a defined protected class. Exercising the franchise is unquestionably a civil or political right. *See State v. Gafford*, 172 Mont. 380, 563 P.2d 1129 (1977) (defining the "political and civil rights incident to citizenship" as including the right to vote, to hold public office, to serve as a juror, and "the panoply of rights possessed by all citizens under the laws of the land."); Mont. Const. art. II, § 13 (conferring a constitutional right of suffrage). Nevertheless, equal protection claims unfailingly require "an element of intentional or purposeful discrimination." *See Snowden v. Hughes*, 312 U.S. 1, 8 (1944); *Accord*, *Green Genie, Inc. v. City of Detroit*, 63 F.4th 521, 527–528 (6th Cir. 2023). The question thus turns to whether Plaintiffs state a claim for discrimination on the basis of political beliefs if they can show SB 109 was enacted with the purpose of disfavoring voters of particular sets of political beliefs.

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The Secretary contends that the problem with Plaintiffs' argument is that voters cannot be divided neatly into "Republican" and "non-Republican" categories. There is much to commend this position. For one, although political ideology overlaps substantially with partisan affiliation, they are not entirely coextensive. Parties have factions, and many voters might have idiosyncratic views that do not conform to the predominant party ideology. Second, despite concerns of increased polarization, voters do not always cast their ballot based primarily on partisan affiliation or candidate ideology. Voters might reasonably give more weight to a candidate's experience, integrity, connection to the community, competence, dynamism, or charisma, among other factors. Third, voters do not vote consistently partisan from election to election or office to office. Voters split tickets and change their minds.

At the same time, however, it undeniably remains the case that large swaths of voters *do* have partisan preferences that are tied to their personal ideology, that are generally reflected in their voting patterns, and that remain relatively stable from office to office and election to election. This is illustrated in the Secretary's own exhibits and election results data. Exhibit E contains the county-by-county election results for the 2020 presidential election in Montana. In the "reddest" county, Garfield County, the Republican candidate, Donald Trump, received 94% of the vote, while the Democratic candidate, Joseph Biden, received only 5% of the vote. By contrast, in the "bluest" county, Glacier County, Donald Trump received only 33.5% of the vote and Joseph Biden received 64.3% of the vote. Two years earlier, in a United States Senate race with two entirely different candidates, Garfield County remained the "reddest" county, with the Republican candidate, Matt Rosendale, garnering 83% of the vote, while Glacier

County remained the "bluest" county, with the Democratic candidate, Jon Tester, winning with 75% of the vote.[10] Finally, in the presidential election two years before that, Garfield County again topped the list, with Donald Trump winning 90.9% of the vote, and Glacier again led for Democratic votes, with Democratic candidate Hillary Clinton winning 61.5% of the vote. A review of the county-by-county results—no doubt replicated at the precinct level—shows voters in different locales having a greater propensity to support candidates of one party over the other on a fairly consistent basis.

Thus, the idiosyncrasies of individual voters do not mean that intentional partisan gerrymandering is neutral with respect to political ideas. If the State purposely draws district lines to favor candidates of a particular party, it is does so because the State knows that—as a group—voters that live in the area have some propensity to hold a particular ideology and have a general corresponding party preference. Indeed, if that were not the case, there would be little point to drawing districts with an eye towards partisan gain in the first place. When voters with a certain ideology and correlating party preference are intentionally "packed" into a single district rather than spread through several districts, that is done so voters of that political ideology only get one—and not two or three—candidates of their choice successfully elected. When voters of a particular ideology and partisan preference are intentionally "cracked" across several districts, that is done to ensure they are unsuccessful in electing anyone who shares their political views from those districts. In other words, traditional

[10] Because the State's printout in Exhibit F is incomplete, the Court consulted the Secretary's archived election results for the 2018 general election, of which the Court takes judicial notice. They are available at https://electionresults mt.gov/resultsSW.aspx?type=FED&map=CTY&eid=17.

partisan gerrymandering techniques have the purpose of disparately treating voters holding different political ideas. Thus, to strategically draw districts with the purpose of favoring one political party's candidates is to necessarily draw districts with the purpose of disfavoring voters who generally prefer the opposing political party. Partisan gerrymandering claims are thus cognizable under Article II, Section 4's prohibition on discrimination because of political ideas.

Next, the Court must consider *how* Plaintiffs might establish this purpose. The answer is found in Article II, Section 4. That provision renders political ideas a protected class on the same basis as race. There is a well-defined method for evaluating claims of racial gerrymandering. A plaintiff establishes a racial gerrymandering claim if the districting scheme, "though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Shaw v. Reno*, 509 U.S. 630, 649 (1993). A plaintiff must show either circumstantially or through direct evidence of legislative intent that race was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The plaintiff must demonstrate that the legislature "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Upon showing the use of race as a predominant factor, the districting plan can only be saved, if at all, by satisfying the requirements of strict scrutiny, that is, if the State shows the districting plan is narrowly tailored to achieve a compelling state interest. *Id.* at 920. The standard for racial gerrymandering claims is a

conservative test that sets a high (though not impossible) bar for success. *Cano v. Davis*, 211 F. Supp. 2d 1208, 1215 (C.D. Cal. 2002).

Reliance on the standard for racial gerrymandering claims was not workable in *Rucho* because political belief is not a federal protected class, and a purpose to secure a partisan advantage is not improper under federal law. *See Rucho*, 139 S. Ct. at 2502–2503. Under Montana law, however, political ideas are protected to the same extent as race in the context of voting. Thus, the Court can consider in the context of an Article II, Section 4 claim whether the "political belief" of voters was the predominant factor in the legislature's apportionment of PSC districts. The Court therefore applies the *Shaw* methodology to the evidence presented by Plaintiffs here.

In *Rucho*, the parties had express and direct evidence of a purpose to secure a partisan advantage. By contrast, the legislative record here does not supply much that helps Plaintiffs. The Court declines to view the timing of the Regier amendment to SB 109 in the sinister light cast in the Complaint (*see* Comp. ¶¶ 46–48.) Consistent with his explanation, the Redistricting Commission indeed had submitted its final legislative redistricting plan to the Secretary of State only six days earlier, on February 22, 2023.[11] A map using house districts instead of county lines could not have been proposed until the districts themselves were established. Additionally, the Court recognizes that Senator Regier's method of drawing lines by reference to house districts does a much better job of achieving population parity than the Judges' Plan adopted in *Brown*—indeed, use of house districts all but guarantees population parity.

[11] The Court takes judicial notice of the Redistricting Commission's report, available at: https://leg.mt.gov/content/Districting/2020/Reports/State-Legislative/FINAL-report-to-SOS-feb-2023.pdf

Nevertheless, the paucity of direct evidence of discriminatory intent on the face of the legislative record does not necessarily save the plan. Taking Senator Regier's statements as true does not conclusively settle the matter because, though the sponsor, he is but 1 of 150 legislators, and he is only 1 of the 95 legislators who ultimately voted to enact SB 109 as amended. Additionally, the record contains no information about who assisted Senator Regier in drafting the maps and what motivations they may have harbored. And as always, legislative history must be viewed with care. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (discussing some of the risks of reliance on legislative history).

Rather, the Court finds the more salient evidence to be found in the work of Somersille. As discussed at greater length above, Somersille concluded that the map enacted in SB 109 was an extreme outlier with respect to partisan outcomes when compared to over a hundred thousand maps generated to guarantee the criteria the legislature purportedly relied upon: population parity, contiguity, and compactness. Indeed, Districts 3 and 5 fell outside the 1st and 99th percentile of expected Democratic vote share. Using Somersille's model, the boundaries selected for Districts 3 and 5 could not be explained solely by reference to population parity, contiguity, and compactness. A mathematical model is not necessary to see that a map relying on house districts instead of county lines and dividing all but one of Montana's seven largest cities does not comport with the legislative redistricting criteria that favors boundaries that "coincide with the boundaries of political subdivisions of the state to the greatest

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extent possible" and asks that "the number of counties and cities divided among more than one district must be as small as possible." Mont. Code Ann. § 5-1-115(2)(b).

Somersille opined that the foregoing strongly suggests that factors other than the Constitutional factors of contiguity, compactness, and population equality explain how the boundaries were drawn. This, combined with her findings—recounted more fully above—that SB 109 has hallmarks of "packing" and "cracking" along with a lack of sensitivity in outcome to increasing statewide Democratic vote share, led Somersille to conclude that the map was likely drawn to favor Republican PSC candidates and disfavor voters generally preferring non-Republican PSC candidates. This is forbidden by Article II, Section 4 for the reasons already stated.

The Secretary did not present any evidence meaningfully suggesting bias (apart from the unexceptional fact that Somersille was compensated for her work) or casting Somersille's methods or data into question. The Secretary critiqued Somersille's lack of personal knowledge of Montana geography and politics, but that does not implicate the validity of her model or findings. More importantly, because her model expressly controlled for population parity, compactness, and contiguity, her opinion appears to establish that partisan identity was a predominant factor underlying the formation of SB 109 and that the State "subordinated traditional. . . districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests," to political considerations. *See Miller*, 515 U.S. at 916. Because the Secretary did not meaningfully rebut Somersille's testimony and has not attempted to provide a

justification for the map that would satisfy the rigors of strict scrutiny, Plaintiffs are likely to succeed in demonstrating that, at a minimum, Districts 3 and 5 were drawn to disfavor voters on the basis of political ideas.

Because Plaintiffs not only state a claim, but they are likely to succeed on the merits of their claim that SB 109 discriminates against voters on account of their political ideas, it is unnecessary to resolve Plaintiffs' right-of-suffrage claim.[12] The Court thus turns next to the other preliminary injunction factors.

b. Irreparable Harm

The second preliminary injunction factor asks whether the applicant "is likely to suffer irreparable harm in the absence of preliminary relief." As a general matter, constitutional injury is irreparable injury. *de Jesus Ortega Melendras v. Arpaio*, 695 F.3d 990 (9th Cir. 2012); *Planned Parenthood of Mont. v. State*, 2022 MT 57, ¶ 60, 409 Mont. 378, 515 P.3d 301. This is true for restrictions on fundamental voting rights as well. *League of Women Voters of N.C. v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). The injury is irreparable because "once the election occurs, there can be no do-over and no redress." *Id.*

The Secretary does not deny this as a general proposition, but she contends Plaintiffs waited too long to seek a preliminary injunction. The Court, too, wishes Plaintiffs had more timely brought this case, as the timing of the

[12] The Court does not agree that Plaintiffs' right to suffrage claim fails to state a claim for which relief can be granted. The right to suffrage can be violated by "debasement or dilution of the weight of a citizen's vote." *Burns v. County of Musselshell*, 2019 MT 291, ¶ 19, 398 Mont. 140, 454 P.3d 685. This standard is not necessarily the same as that for an Article II, Section 4 claim, but the precise standard need not be established here. It suffices to say at this stage that the State has not shown that "it is beyond doubt that the plaintiff can prove no set of facts" that would entitle Plaintiff to relief. *See Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6 (quoting *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997)).

motion has made fashioning effective relief difficult. But this is not a case where that delay suggests the injury is not irreparable after all. Even one of the Secretary's cited authorities illustrates this upon review. In *Valeo Intellectual Prop., Inc. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D. Wash. 2005), a three-month delay was too long where the injury at issue was an impending termination of a licensing agreement. There, despite being aware of the impending termination for months, the plaintiff waited until *after* the termination to seek a preliminary injunction. It was this fact pattern that caused the court to find that its indolence in seeking the preliminary injunction "belie[d]" its assertion of irreparable harm. *Id.*

By contrast, here the alleged injury—an election that unfairly discriminates against voters preferring non-Republican PSC candidates—has not yet occurred. The candidate filing deadline has not yet run, and the primary and general elections are months away. Moreover, while Plaintiffs could have moved more quickly, they nevertheless filed this action on October 30, 2023, more than four months before the March 11, 2024, candidate filing deadline, and moved for a preliminary injunction only a month later. That this case is coming down to the wire has more to do with substitution of judges and scheduling problems than a lackadaisical posture on the part of Plaintiffs. It is not evidence that Plaintiffs do not truly face irreparable injury.

c. Balance of the Equities and Public Interest

In a constitutional challenge brought against the government, the final preliminary injunction factors—balance of the equities and whether the injunction is in the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). To balance the equities, the Court must "balance the interests of all

parties and weigh the damage to each." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). It is an independent requirement for a preliminary injunction; thus, it does not necessarily follow that because there is irreparable injunction and a likelihood of success on the merits that the balance of the equities tips in Plaintiffs' favor. *See* Mont. Code Ann. § 27-19-201 (providing that the elements for a preliminary injunction are conjunctive); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 23–24 (2008) (reversing preliminary injunction on balance-of-the-equities grounds independent of the likelihood of success on the merits).

To weigh the equities, the Court must consider what would happen if a preliminary injunction were to issue. Two concerns emerge, one more significant than the other. The less significant concern is that candidates for the PSC only have until March 11, 2024, to file. That is not an insurmountable concern because candidates who have already filed can still change their filing status, and this litigation was publicized and presumably known to prospective candidates. Moreover, because the filing deadline has not yet run, the table for the 2024 election is not set, and candidates are not prejudiced in their plans any more than they would be if an opponent decided to file on the last day of filing. And because candidate filing has not yet closed, the Court does not agree with the State that there is potential for confusion or chilled participation, as the judicially remediated districts would be set by the March 11, 2024, deadline. This, in and of itself, would not outweigh the damages of allowing a likely unconstitutional map to take effect.

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The Court's greater concern lies with the remedy. If SB 109's redistricting scheme is enjoined (and for the reasons are stated above, Plaintiffs are likely to show that it ultimately must be enjoined), it must be replaced with something else for the 2024 primary and general elections. In *Brown*, the three-judge panel had the benefit of a full trial on the merits prior to the 2022 candidate filing deadline and had before it multiple alternative maps that had been proposed by the litigants. That record—including the specifics of the alternative maps proposed in that litigation—has not been made part of the record before this Court. The Court lacks any factual record about the relative merits of the (defeated) alternative maps proposed during the debate over SB 109. The only alternative map before the Court is the Judges' Plan from 2022. Indeed, if the Court simply enjoined SB 109, it appears that the law would default back to the Judges' Plan.

It is not feasible (and would not have been possible even had the Court decided this matter on the record on January 31) to develop the record necessary to consider any alternatives to the Judges' Plan. The principles of separation of powers and comity towards coordinate branches of government dictate that this Court give the legislature the first opportunity at curing a violation whenever possible. *Brown*, 590 F. Supp. 3d at 1286–1287 (citing *Wise v. Lipscomb*, 437 U.S. 535, 539–540 (1978)). This Court cannot call the legislature into session; only the Governor or a majority of the legislature itself may do so. Mont. Const. art. V, § 6. This Court lacks the capacity in the available timeframe to draw its own maps to conform to the redistricting principles articulated by the legislature in Mont. Code Ann. § 5-1-115, as it lacks the information in the record necessary to do so. Thus, the Court is left with only two

feasible alternatives: let the SB 109 map remain in effect notwithstanding its issues; or enjoin SB 109, requiring the Secretary to revert to the 2022 Judges' Plan adopted in *Brown*.

The Court's concern with ordering reversion to the Judges' Plan is that it appears to replace one infirmity with another. While the Enacted Plan appears to be a likely improper partisan gerrymander, it does comport with the most important of the State's adopted redistricting principles: the district boundaries are "as equal as practicable, meaning to the greatest extent possible, within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census." Mont. Code Ann. § 5-1-115(2)(a). This necessarily follows from the choice to define PSC districts in terms of house districts rather than county lines. The Judges' Plan, by contrast, has a maximum population deviation of 6.72%, using 2020 Census data. *Brown*, 590 F. Supp. 3d 1273, at 1291. Indeed, because this exceeds even the 5% benchmark used by Somersille in developing her neutral ensemble set, this is not a map that would have been among those generated randomly by her algorithm.

This deviation made sense for the 2022 election. The *Brown* panel was seeking to correct a *24%* maximum population deviation that had resulted from nearly two decades of uneven growth around the state. Though 6.72% greatly exceeds the State's redistricting criteria, it was a sensible attempt to correct a significant violation of the one-man-one-vote principle on a stopgap basis until the legislature could fine-tune the districting in a manner that better comports with the Constitution's requirements. But here, the Court would be endorsing a map that *increases* the population deviation by six-fold, thus diluting

the influence of those voters affected by the disparities in the Judges' Plan. The Court is not persuaded that the equities favor addressing voters disadvantaged on the basis of their political belief by instead disadvantaging those voters who live in the largest districts in the Judges' Plan. The state redistricting policies require that population parity come first. Mont. Code Ann. § 5-1-115(2) (listing the priorities to be given to each criteria). And just as the Court in *Columbia Falls* accorded substantial deference to the legislature's prerogative to define a "quality education," this Court believes it owes substantial deference to the redistricting criteria propounded by the legislature in statute, including its articulation of redistricting priorities.

Additionally, the legislature has chosen to use a house-district based method of districting rather than a county-based method of redistricting. It remains to be seen whether the legislature's chosen method can indeed meet the requirements of the Montana Constitution and the statutory criteria favoring preservation of political subdivision boundaries whenever possible (which has always been understood as meaning not legislative districts, but rather the boundaries of reservations, counties, cities, towns, and other established communities). But the Court does not believe it is within its proper role to cast that effort aside and instead revert to a county-based system without giving the legislature an opportunity to try to achieve compliance on its own terms.

In short, while the Court concludes—for all the reasons previously set forth—that courts have a necessary role in ensuring redistricting plans comport with the law, that role must necessarily occupy a secondary position to the efforts of the legislature or—in the case of legislative and Congressional districts—the Redistricting Commission. Courts may properly say when the

districting authority has gone too far or fallen outside the law, but courts should avoid doing the work of developing the lines themselves except as a last resort. That last resort has not yet been reached here. The outcome the Court endorses here—leaving a likely infirm map in place—is no doubt unsatisfying to Plaintiffs, but the Court believes that it is necessary to keep the Court within the proper scope of its judicial role.

Rather than grant a preliminary injunction, this Court intends to set an expedited schedule in this matter ensuring a merits determination—and hopefully an opportunity for appellate review—before the commencement of the 2025 legislative session. If the Court's prediction of the likely success of Plaintiffs' claims turns into reality following a more fulsome hearing of the merits, the Court would likely retain jurisdiction over the case to review the 2025 legislature's efforts and consider further remedies should the legislature fail to cure any deficiencies found by the Court.

Because the Court finds that the balance of the equities do not currently favor a preliminary injunction, the motion for a preliminary injunction should be denied notwithstanding Plaintiffs' demonstration of irreparable injury and likelihood of success on the merits.

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs' claims are justiciable and state claims for which relief can be granted, but that Plaintiffs are not entitled to a preliminary injunction. Accordingly,

IT IS ORDERED:

1. Defendant's Motion to Dismiss (Dkt. 15), filed December 20, 2023, is **DENIED**.

2. Plaintiffs' Motion for a Preliminary Injunction (Dkt. 6), filed November 29, 2023, is **DENIED**.

3. A status conference will be held before the Court on Friday, **March 14, 2024** at 2:30 pm to develop an expedited schedule for resolution of this matter on the merits. Continuances of the status conference will be disfavored for this reason.

4. Within fourteen days of the date of this Order, the Secretary shall file an answer or other appropriate responsive pleading. *See* Mont. R. Civ. P. 12(a)(4)(A).

DATED this 29th day of February 2024.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

cc: Rylee Sommers-Flanagan, via email
Thane P. Johnson, via email
Christopher Patalano, via email
Constance Van Kley, via email
Alwyn Lansing, via email
Michael Russell, via email
Austin M. James, via email
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