No. DA 25-0187

IN THE SUPREME COURT OF THE STATE OF MONTANA

MONTANA CONSERVATION VOTERS; JOSEPH LAFROMBOISE; NANCY HAMILTON; SIMON HARRIS; DONALD SEIFERT; DANIEL HOGAN; GEORGE STARK; LUKAS ILLION; AND BOB BROWN,

Plaintiffs and Appellants,

v.

CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant and Appellee,

and

STATE SENATOR KIETH REGIER,

Intervenor-Appellee

On Appeal from the Montana First Judicial District,
Lewis & Clark County, Cause No. DV-25-2023-702-CR, Hon. Christopher Abbott

APPELLANTS' REPLY BRIEF

Molly E. Danahy
Rylee Sommers-Flanagan
Upper Seven Law
P.O. Box 31
Helena, MT 59624
(406) 998-6067
molly@uppersevenlaw.com
rylee@uppersevenlaw.com
Attorneys for Appellants

Austin Knudsen
Montana Attorney General
Michael D. Russell
Thane Johnson
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549
michael.russell@mt.gov
thane.johnson@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

Attorneys for Appellee

Austin Knudsen
Montana Attorney General
Christian B. Corrigan
Solicitor General
Brent Mead
Deputy Solicitor General
MONTANA DEPARTMENT OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
christian.corrigan@mt.gov
brent.mead2@mt.gov

Attorneys for Intervenor-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions & Materials

Rules & Statutes

Other Authorities

The Montana Constitution makes three things clear. First, the convention delegates did not trust legislators with redistricting. Second, they affirmatively protected Montanans' rights to vote and be free from political discrimination. Third, they trusted Montana courts to fairly adjudicate violations of those rights.

Under well-established and manageable standards—not to mention the overwhelming weight of the evidence—Montana Conservation Voters and individual Plaintiffs ("Voter Appellants") prevail. The Court should decline to apply an unduly deferential federal presumption of good faith and should presume the legislature intended the ordinary and predictable effect of its actions, which it openly discussed.

Finally, legislators do not enjoy an absolute privilege to violate the Montana Constitution in secret. Allowing legislators to withhold evidence of illegal acts is wholly at odds with open government, the history of legislative immunity, and common sense.

ARGUMENT

I. Voter Appellants' claims are not political questions.

Voter Appellants' claims are justiciable. A case presents a political question only where it involves issues in the "exclusive legal domain" of

a political branch, where adjudication would infringe another branch's power, or where the constitution "does not provide a standard for adjudication." *Larsen v. State ex rel. Stapleton*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241. None of those issues apply here. The Court therefore must determine whether SB 109 infringes Voter Appellants' constitutional rights. *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 18, 326 Mont. 304, 109 P.3d 257 (even where the Constitution commits authority to another branch, Montana courts must determine whether the exercise of that authority implicates fundamental rights); *Brown v. Gianforte*, 2021 MT 149, ¶¶ 20–24, 404 Mont. 269, 488 P.3d 548 (political question doctrine is prudential, not jurisdictional).

A. Redistricting is not in the legislature's domain.

By expressly protecting suffrage and prohibiting political discrimination, the delegates committed to the judiciary adjudication of those rights. Mont. Const. Art. II, §§ 1, 2, 4, 13; Mont. Const. Art. II, § 18; Mont. Const. Art. VII, §§ 1, 4; *see Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 36, 410 Mont. 114, 518 P.3d 58 ("*MDP I*"); *Mont. Democratic Party v. Jacobsen,* 2024 MT 66 ¶ 14, 416 Mont. 44, 545 P.3d 1074, *cert denied* 145 S. Ct 1125 (2025) ("*MDP II*") (courts must "carefully

scrutinize[]" legislation against the "right to vote, which is the pillar of our participatory democracy, and without which all other rights are meaningless") (cleaned up).

By contrast, the delegates expressly excluded redistricting from the legislature's purview. Mont. Const. Art. V, § 14 (assigning redistricting and reapportionment authority to an independent commission). They understood legislators are ill-equipped to draw districts without political and personal bias. *See, e.g.*, Mont. Const. Conv., IV Verbatim Tr., at 682 (Feb. 22, 1972) (hereinafter "[Volume number] Conv. Tr.") (Del. Skari) (expressing intent to "bypass the legislature" with respect to redistricting and reapportionment and create "a commission reasonably free of legislative pressure"); *id.* (citing the "great difficulty in being objective" in redistricting and reapportionment); *id.* at 685 (Del. Blend) (legislature is not "psychologically fitted to reapportion itself"); *id.* at 688 (Del. Nutting) (highlighting importance of nonpartisan commission to prevent "gerrymandering of districts"); *id.* (Del. Cate) (identifying risk that a mapdrawer "could gerrymander either political party out of office"); *id.* at 720 (Del. Shultz) (legislature's interests in reapportionment "are not necessarily in accord with the broad interests of the state").

The Constitution's near-silence on the Public Service Commission ("PSC") neither abrogates this obligation nor textually commits PSC redistricting to the legislature.[1] Whatever discretion the legislature has over the PSC more generally, *cf.* Ans. Br. of Sec'y Jacobsen at 10–11 ("Sec'y's Br."), it remains bound by Article II. Having extended the right to vote in PSC elections, the legislature cannot restrict that right in violation of Montanans' fundamental rights. Mont. Const. Art. II, § 13 ("no power . . . shall at any time interfere to prevent the free exercise of the right to vote"); *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219 ("Having once granted the right to vote on equal terms, the State may not . . . value one person's vote over that of another.").

Because redistricting is outside the legislature's domain, the Secretary's reliance on federal and out-of-state caselaw is unavailing. *Compare Ely v. Klahr*, 403 U.S. 108, 114 (1971) ("districting and apportionment are legislative tasks in the first instance") *with* IV Conv. Tr., at 682 (Del. Skari) ("We question . . . whether [redistricting] is entirely a legislative function."); *see also State v. Bullock*, 272 Mont. 361,

[1] Only Article XII, Section 2 references the PSC, providing that consumer counsel will represent consumer interests before it.

384, 901 P.2d 61, 75 (1995) (refusing to "'march lock-step' with the United States Supreme Court") (citation omitted); *MDP II*, ¶ 16 ("This Court can diverge from the minimal protections offered by the United States Constitution when the Montana Constitution clearly affords greater protection."). This Court "has the unflagging responsibility" to decide Voter Appellants' claims, even if they "involve the authority of a coordinate branch." *McLaughlin v. Mont. State Leg.*, 2021 MT 178, ¶ 17, 405 Mont. 1, 493 P.3d 980, *cert. denied*, 142 S. Ct. 1362 (2022); *Larsen*, ¶¶ 41–43 (courts have the "duty to adjudicate . . . constitutional, statutory, and common law and to render appropriate judgments thereon"); *Columbia Falls*, ¶ 18. This is so even where claims involve political rights. *Id.*; *see Baker v. Carr*, 369 U.S. 186, 209 ("[T]he mere fact that [a] suit seeks protection of a political right does not mean it presents a political question."); *cf. Rucho v. Common Cause*, 588 U.S. 684, 719 (2019) (partisan gerrymandering claims may proceed in state court under state constitutions).

B. Voter Appellants' claims are judicially manageable.

Both Voter Appellants' suffrage and political discrimination claims are judicially manageable. SB 109 violates the right to suffrage because

it effectively denies Voter Appellants an equal opportunity to elect non-Republican candidates to the PSC, *infra*, Part II.[2] Courts regularly consider effects-based vote dilution. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 17–18 (2023) (describing the forty-year history of adjudicating vote dilution under the effects prong of the Voting Rights Act). Effects-based standards can include whether the map "entrenches a single party in power" and "reliably ensures" that only one party is elected "in all of the . . . seats." *League of Women Voters of Utah v. Utah State Leg.*, 2022 WL 21745734, slip op. at 36, 41–42, 54–55 (Utah Dist. Ct. Nov. 22, 2022) (*available at* App. 064).

Similarly, several state courts have struck down partisan gerrymanders using manageable standards like the predominant purpose test adopted below. *See, e.g.*, *In re 2021 Redistricting Cases*, 528 P.3d 40, 92–94 (Alaska 2023); *Szeliga v. Lamone*, No. C-02-CV–21-001816 (Anne Arundel Cnty. Circ. Ct., Md., Mar. 25, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St. 3d

---

[2] Voter Appellants are not seeking proportional representation, Sec'y's Br. at 6–7, 23–24, but rather an equal opportunity to elect candidates to the PSC, App. 255–259, Tr. 131:22–134:20. Equal opportunity to elect is a judicially manageable standard. *Compare Thornburg v. Gingles*, 478 U.S. 30 (1986), *with Whitcomb v. Chavis*, 403 U.S. 124 (1971).

255, 192 N.E. 3d 379 (2022); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1 (2018).[3] Finally, federal courts apply the *Arlington Heights* factors to evaluate intentional discrimination, including "the impact of the official action [and] 'whether it bears more heavily on [one protected class] than another.'" *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (citation omitted).

Montana courts can easily manage these standards. The Secretary asserts that political discrimination in voting is difficult to analyze because Montanans do not register by party and because partisanship may be mutable. But the rates at which Montanans vote for particular parties is readily discernable. *See e.g.*, App. 246–259 Tr. 121:2–134:25 (analyzing vote share by party using past election results). And the legislature had access to and discussed the partisanship of the PSC districts when passing SB 109. *See* Opening Br. at 6, 34.

[3] These examples belie the Secretary's contention that these tests are ill-suited to these claims because "race and political ideas are not analogous." *See* Sec'y's Br. at 19; *contra* Mont. Const. Art. II, § 4 (protecting both classes). Moreover, the predominant purpose test seeks to determine whether a legislature impermissibly stereotypes its citizens based on protected characteristics, not whether its citizens actually embody those stereotypes.

Next, the Secretary asserts that remedying partisan vote dilution requires "trad[ing] one constitutional injury for another." Sec'y's Br. at 17.[4] But everyone benefits from undoing an unfair map. *Cf. Larson*, ¶ 35 ("In our representative form of government the whole people are interested in having the election laws enforced."); *Mont. Env't Info. Ctr. v. Governor*, 2025 MT 112, ¶ 9, 422 Mont. 136, 569 P.3d 555 (vindicating fundamental rights benefits the state and the public). The standards herein merely ensure that no voter is unduly favored or disfavored for their political ideas.

Finally, Voter Appellants do not contend that districting in Montana must be devoid of partisan considerations. *Cf.* Sec'y's Br. at 17–18. But the legislature cannot draw district lines that deny voters who support a certain party an equal opportunity to elect PSC commissioners. Opening Br. at 22.

II. SB 109 violates Voter Appellants' right to suffrage.

SB 109 violates the right to suffrage by diluting Voter Appellants' votes. The Secretary agrees voting is infringed by "debasement or

[4] Partisan vote dilution is not an inescapable consequence of redistricting. *Cf. Willems v. State*, 2014 MT 82, ¶ 34, 374 Mont. 343, 325 P.3d 1204.

dilution of the weight of a citizen's vote." *Big Spring*, ¶ 18; *see* Sec'y's Br. at 21. She does not dispute—and therefore concedes—that intent is not required for suffrage claims. *See* Sec'y's Br. at 24; *see also MDP II*, ¶¶ 33, 96–99. Finally, she does not dispute that SB 109 has a dilutive effect. App. 246–259 Tr. 121:2–134:25 (unrebutted expert testimony showing SB 109's dilutive effects).

The Secretary did not appeal the ruling below that SB 109 cannot survive strict scrutiny. Doc. 129 at 31–32. Nor does she dispute that SB 109 is not narrowly tailored. *See* Opening Br. at 22–23. This ends the analysis. Voter Appellants prevail on their suffrage claim.

Nevertheless, the Secretary asserts that SB 109 is constitutional because only malapportionment causes unconstitutional vote dilution. *See* Secretary's Br. at 21–22. But this is incorrect, and malapportionment cases do not suggest that states can avoid vote dilution claims simply by balancing population. *Cf. Rucho*, 588 U.S. at 709 (explaining vote dilution in the malapportionment context); *Evenwel v. Abbott*, 578 U.S. 54, 60 (2016) (affirming ten percent deviation safe harbor for malapportionment claims); *see also*, *e.g.*, Opening Br. at 27–29 (population equality is presumed when evaluating gerrymandering or vote dilution); *Ala. Legis.*

Black Caucus v. Alabama, 575 U.S. 254, 272–73 (2015) (same); *Singleton v. Merril*, 582 F.Supp.3d 924, 964 (N.D. Ala. 2022) (adjudicating vote dilution claim involving Congressional districts with near-perfect population distribution) *aff'd sub nom. Milligan*.[5]

Vote dilution also occurs when districting choices "minimize or cancel out" a minority population's ability "to elect their preferred candidates." *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986); *Wold v. Anderson*, 335 F. Supp. 952, 954–56 (D. Mont. 1971) (evaluating claim that Montana's multi-member state legislative districts tended to favor one political party).[6] Most relevant here, vote dilution occurs when the legislature "dispers[es]," or cracks, members of a protected class "into districts in which they constitute an ineffective minority." *Cooper v. Harris*, 581 U.S. 285, 292 (2017) (citing *Gingles*, 478 U.S at 46 n.11); *see* App. 249–251, Tr. 124:4–126:5 (SB 109 cracks non-Republican voters

[5] *Brown v. Jacobsen*, 590 F. Supp. 3d 1273 (D. Mont. 2022) presented a malapportionment not a vote dilution claim.

[6] The delegates were particularly concerned about this form of vote dilution. They mandated single-member legislative districts to prevent "block voting" and ensure "minorities are not submerged and their voices drowned out." IV Conv. Tr., at 680 (Del. Skari).

across Districts 3 and 5); *In re 2021 Redistricting Cases*, 528 P.3d at 54 (explaining "cracking").

Federal vote dilution cases focus on race because the federal constitution and statutes prohibit racial discrimination in voting. *See, e.g.*, U.S. Const. amend. XV; 52 U.S.C. § 30101, *et seq*. But the Montana Constitution prohibits discrimination on account of both race and political ideology. Mont. Const. Art. II, § 4. The Secretary's disagreement with this choice cannot render decades-old frameworks for resolving Voter Appellants' claims ineffective or unenforceable.

Because the Secretary concedes Voter Appellants' suffrage claim in every material aspect, the Court should reverse and remand for judgment in Voter Appellants' favor.

III. SB 109 discriminates based on political ideas.

Because Voter Appellants succeed on their suffrage claim, the Court need not reach their partisan gerrymandering claim. If it does, it should find that SB 109 violates the prohibition on political discrimination. The overwhelming weight of the trial evidence and every ordinary presumption applied by Montana courts establishes that intent to lock in all five PSC seats for Republicans predominated over

traditional redistricting criteria. Opening Br. at 27–43. The Secretary does not address, and therefore concedes, that accepting population equalization as SB 109's predominant purpose, rather than determining how the legislature distributed voters among equally populated districts, constitutes legal error. *Id.* at 27–29. Moreover, the legislative record establishes that, whatever data Senator Regier considered, the majority was aware of and intended SB 109's partisan effects. *Id.* at 34–35.

The Secretary bizarrely asserts that Voter Appellants failed to present alternative maps. Sec'y's Br. at 26; *contra* App. 015–32. But the legislative record—which the Secretary asserts is the only evidence of legislative intent[7]—contains two alternative maps. App. 015–32. These maps conclusively establish that "a rational legislature, driven only by its professed" goals, "could have produced a different map." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 34 (2024). Voter Appellants overcome even the presumption of good faith. *See id.*

Moreover, Dr. Somersille analyzed 500,000 alternative maps and conclusively established that the legislature could have achieved its

[7] The Secretary cites *City of Missoula v. Pope*, 2021 MT 4, ¶ 17 n.1, 402 Mont. 416, 478 P.3d 815. There, the Court analyzed statutory construction, not discriminatory intent. *Pope* is inapposite.

asserted goals without SB 109's discriminatory partisan effects, and that those effects are unexplainable when adhering to neutral criteria. This unrefuted evidence is extremely probative of intent. And the Secretary's claim that Dr. Somersille only analyzed the map as a whole is demonstrably false. App. 249–251, Tr. 124:4–126:5 (demonstrating that SB 109 cracked voters across Districts 3 and 5 for partisan advantage).[8] Regardless, redistricting a statewide body affects the whole state. *See, e.g.*, *Larsen*, ¶ 35 (elections affect "every citizen in the state").[9]

The Secretary asks this Court to disregard the trial and legislative records as "circumstantial" in favor of cherry-picked, unsworn, and out-

[8] Voter Appellants include individual voters from Districts 3 and 5. Doc. 129 at 21; Doc. 99. The Secretary contends the District Court should have barred Voter Appellants from testifying at trial. Sec'y's Br. at 21. But their omission from the initial witness disclosures was harmless—the Secretary knew Voter Appellants' identities and their intent to testify. *See* Docs. 1, 8 (Nov. 2023 Declarations).

[9] The Secretary suggests Dr. Somersille found Senator Regier's methodology "constitutionally sound." Sec'y Br. at 5. Not so. Dr. Somersille found that SB 109 disregarded traditional redistricting criteria by splitting cities and counties, App. 242–44, Tr. 117:11–118:13, 119:21–23, is less compact than 99.99% of partisan neutral maps drawn using state house districts, App. 265–66, Tr. 140:18–141:13, and intentionally disadvantaged non-Republican voters, App. 260–61, Tr. 135:23–136:12.

of-court statements that Senator Regier "didn't check" partisanship.[10] The Secretary and Senator Regier assert that the presumption of good faith requires the Court to accept these statements and discount all other evidence. *See, e.g.*, Sec'y's Br. at 24–28. This position is untenable. It would require courts to credit legislators' self-serving statements regardless of the weight of contrary evidence and would preclude Voter Appellants from proving constitutional violations unless legislators openly admit to them.[11] Even the federal presumption does not stretch so far. *See Alexander*, 602 U.S. at 34. Affording the legislature an unrebuttable presumption runs contrary to the delegates' intent, particularly in the redistricting context. Opening Br. at 24–27, 50; *see MDP II*, ¶ 28 (rejecting application of unduly deferential federal standards voting legislation). Instead, Voter Appellants are entitled to presumptions that favor vindicating fundamental rights. *See Mont. Env't*

[10] The Secretary also asks this Court to ignore Senator Regier's express disavowal of traditional redistricting criteria. Opening Br. at 35–36, 38; *see* App. 057 at 14:57:10; *id.* at 15:01:54 ("we don't have to look at compactness").

[11] Circumstantial evidence alone can be sufficient to overcome even the presumption of innocence. *See State v. Morrisey*, 2009 MT 201, ¶ 89, 351 Mont. 144, 214 P.3d 708. Here, the record evidence surpasses any reasonable doubt. *Cf. id.*; Sec'y's Br. at 24 n.3; *see also* Opening Br. at 39.

Info. Ctr., ¶ 9; *id.* ¶ 39 (Shea, J., concurring) (disapproving presumptions that incentivize state actors to shield their actions from the public and the courts); Opening Br. at 39–42.

Finally, the Secretary concedes this Court is not obligated to follow the advisory jury's recommendation. Sec'y's Br. at 31–32. It should not do so here. Opening Br. at 42–43.

IV. Legislators do not enjoy absolute privilege.

The Court should reject Senator Regier's assertion of absolute legislative privilege as abhorrent to the right to know and the limited delegation of authority to the legislature. *See Bd. of Regents v. Judge*, 168 Mont. 433, 444, 543 P.2d 1323, 1330 (1975) ("the Montana Constitution . . . is a prohibition upon legislative power"). Together with the right to participate, the right to know preserves the people's right to sovereignty. *See MDP I*, ¶ 36 ("Protection of our Article II fundamental rights ensures that, among other things, government is indeed founded upon the will of the people only."); III Conv. Tr., at 603 (Del. Bugbee); V Conv. Tr., at 1670 (Del. Eck); IV Conv. Tr., at 611 (Del. Heliker) ("We are saying to the Legislature, 'You shall not conduct the people's business behind closed doors. You shall not keep from the people the secrets that

belong to the people. You shall let the people in and the people shall know.'"). The right to know establishes a "constitutional presumption that every document within the possession of public officials is subject to inspection." *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 39, 312 Mont. 257, 60 P.3d 381.

Nonetheless, Senator Regier asserts an absolute privilege to obstruct Montanans from scrutinizing legislative business and vindicating their fundamental rights. Specifically, he seeks to withhold factual information regarding SB 109's enactment, including draft or proposed maps he created or reviewed, documents showing the data and criteria he used to draw or evaluate maps, and communications disclosing such information to others. *See, e.g.*, Ex. A to Doc. 49 (subpoena duces tecum to Senator Regier). By keeping this information secret, Senator Regier prevented Montanans from understanding how PSC districts were actually drawn. He forced the District Court to evaluate SB 109 on presumptions rather than the actual data and criteria used to create it. Instead of facts, the parties, the court, and the jury could only consider the justifications Senator Regier and others offered in committee and on the floor to advance the bill over objections from every

member of the public who testified regarding the bill and the minority party. Opening Br. at 8–9.

To establish this privilege, Senator Regier must show that it "preexist[ed]" the 1972 Montana Constitution and is "necessary for the integrity of government." *O'Neill v. Gianforte*, 2025 MT 2, ¶ 13, 420 Mont. 125, 561 P.3d 1018. He cannot. Senator Regier relies on Montana's legislative immunity provision, but nothing in that article authorizes withholding facts from public scrutiny. *Cf.* Mont. Const. art. V, § 8 ("Immunity. A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature."). Immunity provisions like Montana's protect legislators from tyrannical executives—not the public. *See* Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption*, 57 N.C. L. Rev. 197, 200 (1979) (tracing speech and debate immunity to the English Crown's prosecution of a parliamentarian for authoring a bill to improve working conditions). After Parliament granted itself immunity from prosecution for speech in

1512, *see id.*, the framers of the U.S. and numerous state constitutions followed suit. But no pre-1972 evidence suggests that legislative immunity extends beyond arrest and prosecution. Opening Br. at 45–47.

Senator Regier cannot alter reality by conflating the terms "immunity" and "privilege." *Cf.* Regier Br. at 7–9. Nor can he justify expanding legislative immunity to encompass an absolute disclosure privilege with modern federal caselaw. *Cf.* Regier Br. at 13–16; Christopher Asta, Note, *Developing a Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U. L. Rev. 238, 244 (2014) ("Part of the confusion . . . is due to the inconsistent use of the terms 'legislative immunity' and 'legislative privilege.'"). That federal courts have adopted a common law disclosure privilege over the past fifteen years, *see* Philip Mayer, Note, *An Uncertain Privilege: Reexamining the Scope & Protections of the Speech or Debate Clause*, 50 COLUM. J.L. & SOC. PROBS. 2 (2017), does not require this Court to do the same, *cf. Planned Parenthood of Mont. V. State*, 2025 MT 120, ¶ 36, 422 Mont. 241, 570 P.3d 51 (rejecting "argument that a change in the federal landscape

mandates a change in this Court's" interpretation of fundamental rights).[12]

Rather, because governmental privileges necessarily "obstruct 'the truth-finding process' and . . . collide with the public's fundamental right to know," the court must construe the immunity provision "narrowly . . . to effect [its] limited purpose." *Nelson v. City of Billings*, 2018 MT 36, ¶ 20, 34, 390 Mont. 290, 412 P.3d 1058. In so doing, "the intent of the Framers controls . . . not federal precedent." *O'Neill*, ¶ 15.

The delegates indisputably placed substantial weight on ensuring public access to government documents and the legislative process. *See supra* (citing delegate testimony regarding public access to the legislature). In so doing, they explicitly sought to preserve existing judicial and attorney client privileges but never mentioned legislative privilege. *See, e.g.*, VII Conv. Tr., at 2500 (Del. Dahood) ("[O]ur comments clearly indicate that we are not trying to upset any traditional rule of procedure with respect to anything within the judiciary."); V Conv. Tr.,

---

[12] Senator Regier concedes there was an open question in 1972 as to whether the federal Speech and Debate Clause protected members of congress from compulsory testimony about their legislative acts in liability proceedings. *See* Regier Br. at 27 n.5.

at 1673–74 (Mar. 7, 1972) (Del. Dahood) ("confidential relationships" between "attorney and client, . . . priest and penitent, doctor and patient" should be protected).

Overall, the delegates afforded little significance to legislative immunity, which they carried forward from 1889 at a single delegate's insistence. III Conv. Tr., at 595 (Del. Robinson) ("The committee felt pretty much that this could be left to statute."). The only substantive comment indicated they felt the provision should be narrowly construed. *See id.* ("We did not feel that members of the Legislature should be exempt from arrest for violation of their oath of office."). Legislative Committee minutes reflect only the narrow purpose of ensuring "that no legislator could be detained from a crucial vote." Mont. Const. Conv., Legislative Comm., "*Minutes of the eighth meeting of the Legislative Committee*" at 2 (1972); *cf.* Mont. Const. Conv. Comm'n, "*Report Number 12: The Legislature*" at 120 (1971) (noting that while Maryland proposed only immunity from liability for speech, Montana also bars arrest). There is no indication the delegates believed legislative immunity shielded legislators from the right to know, and the lack of pre-1972 law establishing a disclosure privilege meant they had no reason to consider

a conflict between the two provisions.[13] Thus, the Court should construe the immunity provision—including the speech and debate clause—narrowly because that accurately reflects its limited purpose of protecting legislators against arrest and liability for legislative acts. *Cf. Nelson*, ¶ 34; *see Cooper v. Glaser*, 2010 MT 55, ¶ 14, 355 Mont. 342, 228 P.3d 443 (immunity provision shields legislators from defamation for floor statements).

Furthermore, the Court should reject Senator Regier's contention—again based solely on federal caselaw—that an absolute disclosure privilege is necessary for government integrity. Montanans have examined legislator communications about legislative business for decades without "imping[ing] upon or threaten[ing] the legislative process." *Gravel v. United States*, 408 U.S. 606, 616 (1972); *United States* v. *Gillock*, 445 U.S. 360, 373 (1980) (evidentiary privilege provides "only a speculative benefit to" state legislators). Legislators serve at the

[13] Senator Regier concedes at least one pre-1972 court expressly declined to expand legislative immunity to preclude discovery into legislative acts unrelated to legislator liability, but contends this case is unpersuasive because it was abrogated in 2024. Regier Br. at 29–30. But this only confirms the law has recently changed, not that the modern conception of legislative privilege existed in 1972—indeed, it did not.

people's pleasure, subject to public scrutiny. They are not entitled to confidentiality to preserve their reputations or to mislead the public they serve. *See Gravel*, 408 U.S. at 640–41 ("By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion.") (Douglas, J., dissenting).[14] Montanans' ability to scrutinize the legislature is not "prosecution by an unfriendly executive and conviction by a hostile judiciary," *United States v. Johnson*, 383 U.S. 169, 179 (1966), but a fundamental right that is itself necessary to the integrity of government, *see Nelson*, ¶ 34.

Making information used in crafting legislation public neither violates the separation of powers nor authorizes any branch of government to control, interfere with, or intimidate the other. *Cf.* Regier Br. at 12 (citing *McLaughlin*, ¶ 58 (McKinnon, J., concurring)). It ensures that the business of the legislature remains the business of the people. Similarly, allowing litigants access to such information to vindicate their

[14] *Gravel* involved publication of the Pentagon Papers. 408 U.S. at 608–09. Instead of clearly establishing a privilege to keep secrets, *Gravel* protected a senator from criminal liability for disclosing state secrets. Justice Douglas's dissent touted the importance of access to the Pentagon Papers and the importance of protecting public servants who disclosed them from liability. *Id.* at 640–41.

fundamental rights is a basic function of adversarial court proceedings. Numerous protections exist to protect legislators from unduly burdensome, overly intrusive, or harassing discovery. *See, e.g.*, Mont. R. Civ. P. 45(d)(1), 45(d)(3)(A); Doc. 83 (applying apex doctrine).[15] Such protections confirm that absolute legislative privilege is not necessary to government integrity. *See O'Neill*, ¶ 13; *cf.* Regier Br. at 10.

Finally, even where a preexisting privilege exists, whoever asserts the "privilege has the burden of proving the application and the scope of the asserted privilege to the court upon *in camera* inspection." *Nelson*, ¶ 36. While a privilege log may do the trick*, see O'Neill*, ¶ 26, courts need some mechanism to ascertain whether materials are actually

[15] Alternatively, a limited testimonial privilege that balances evidentiary needs, the public interest in vindicating fundamental rights, and a legislator's interest in avoiding interference with their public duties may be appropriate. *See, e.g.*, *Times Mirror Co. v. Super. Ct.*, 813 P.2d 240 (Cal. 1991); *In re Kent Cnty. Adequate Pub. Facilities Ordinances Litig.*, 2008 WL 859342 (Del. Ch. Mar. 19, 2008); *League of Women Voters of Fla. v. Fla. H.R.*, 132 So.3d 135 (Fla. 2013); *Hughes v. Speaker of the N.H.H.R.*, 876 A.2d 736 (N.H. 2005); *Dublin v. State*, 742 N.E.2d 232 (Ohio App. 10th Dist. 2000).

privileged,[16] and whether the claimed privilege continues to serve its underlying purpose. *Nelson*, ¶¶ 33, 35.

Senator Regier asserts this process does not apply to legislators. But Montana's separation of powers does not prevent the public or the judiciary from "inquiring into . . . the actions of any coordinate branch," so it cannot completely insulate legislators from the right to know. *See O'Neill*, ¶ 17. And even in its broadest conception, the legislative privilege only applies to actions within the legitimate scope of legislative activity. Evidence that the legislature intentionally violated Montanans' fundamental rights is not within the legitimate scope of legislative activity. *See*, *e.g.*, *Ex parte Young*, 209 U.S. 123, 156, 159–60 (1908) (unconstitutional act is not protected government action); III Conv. Tr., at 595 (Del. Robinson) (legislators not immune for violating their oaths).

The Court should reject Senator Regier's novel expansive privilege and construe Montana's immunity provision narrowly to effectuate its purpose of shielding legislators from arrest and civil or criminal liability.

---

[16] Courts must also ensure privilege was not waived, including by disclosure to third parties with no duty to keep a legislator's confidences. *Cf.* Doc. 64 at 26–27.

CONCLUSION

The Court should reverse and remand to enter judgment for Voter Appellants.

Respectfully submitted this 18th day of September, 2025.

/s/ Molly E. Danahy
Molly E. Danahy
Rylee Sommers-Flanagan
UPPER SEVEN LAW

Attorneys for Voter Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this Brief is printed with a double-spaced, proportionately spaced Century typeface of 14 points and that the word count, as calculated by Microsoft Word, is 4,953 words, including footnotes.

/s/ *Molly E. Danahy*

CERTIFICATE OF SERVICE

I, Molly Elizabeth Danahy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-18-2025:

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
Helena MT 59624
Representing: Bob Brown, Nancy Hamilton, Simon Harris, Daniel Hogan, Lukas Illion, Joseph LaFromboise, Montana Conservation Voters, Donald Seifert, George Stark
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Secretary of State, Office of the
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Secretary of State, Office of the
Service Method: eService

Thane P. Johnson (Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Secretary of State, Office of the
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: Secretary of State, Office of the
Service Method: eService

Christian Brian Corrigan (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: Keith Regier

Service Method: eService

Brent A. Mead (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: Keith Regier
Service Method: eService

Electronically Signed By: Molly Elizabeth Danahy
Dated: 09-18-2025