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MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

ROBERT WILLEMS, PHYLLIS WILLEMS, TOM BENNETT, BILL JONES, PHILIP WILSMAN, LINDA WILSMAN, JASON CARLSON, MICK JIMMERSON, DWAYNE CROOK, MARY JO CROOK, JAMES STUNTZ, RANDY BOLING, ROD BOLING, BOB KELLER, GLORIA KELLER, ROALD TORGESON, RUTH TORGESON, ED TIMPANO, JEANNIE RICKERT, TED HOGELAND, KEITH KLUCK, PAM BUTCHER, TREVIS BUTCHER, BOBBIE LEE COX, WILLIAM COX, AND DAVID ROBERTSON, Plaintiffs, vs. STATE OF MONTANA, LINDA McCULLOCH, in her capacity as Secretary of State for the State of Montana, Defendants.	Case No.: ADV-2013-609 [Prior Case No.: DV13-07 (14th Jud. Dist)] **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs are registered voters residing in Senate District #15 (SD-15). They seek to enjoin enforcement of a surprise, eleventh-hour amendment to the state's redistricting plan. During the two weeks preceding the Districting and Apportionment Commission's (Commission) final hearing on February 12, 2013, commissioners privately deliberated on how to open SD-9 in order to enable Sen. Llew Jones to seek reelection in 2014. Without prior notice to the public, they approved an amendment that opened SD-9 by reassigning a "holdover" senator to SD-15. Hours later, the Commission filed its plan with the Secretary of State, resulting in its dissolution by operation of law. Plaintiffs thus lacked any opportunity to object at a subsequent hearing.

One commissioner described the Commission's amendment policy as requiring "voters throughout Montana" to "stay tuned to the very last meeting if they had any concerns about what the Commission was doing, because the Commission could make changes up to the very last minute." (Ex 36, p.104.) Making matters worse, the Commission imposed a deadline of February 11 for the public to submit written objections, (Ex 33), thereby making it impossible for Plaintiffs to object in writing to the surprise holdover amendment first presented during the Commission's final meeting on February 12. Another commissioner now acknowledges that approval of the holdover amendment was improper. (Ex. 34, pp. 34, 91.) Indeed, it violated Montana law.

The holdover amendment significantly impacts SD-15. For 95% of its voters, 2010 was the most recent opportunity to cast ballots for state senate candidates. The amendment will delay the next senate election for SD-15 until 2016, thereby disenfranchising 19,000 voters in SD-15 for two years in order to advance Sen. Jones' next campaign by two years. Meanwhile, these voters will be saddled until 2016 with a holdover senator who has never appeared on their ballots.

The Commission's last-minute amendment was unlawful for at least six reasons:

1) The Commission's private deliberations on holdover amendments violated the public's Right to Know under Article II, § 9, of the Montana Constitution;

2) The Commission violated Article II, § 8, of the Constitution by approving a holdover amendment that had not been disclosed to the public until the final hearing on February 12, while imposing a deadline of February 11 for public comment on amendments;

3) The Commission also violated Article II, § 8 by failing to provide specific notice in its agenda for February 12 regarding holdover amendments;

4) The Commission also violated Article II, § 8 by failing to provide a reasonable opportunity for Plaintiffs to rebut contentions made during its private deliberations;

5) The Commission failed to submit its holdover amendment to the Legislature for recommendations as required by Article V, §14(4) of the Constitution;

6) Advancing Sen. Jones' campaign two years by disenfranchising 19,000 residents in SD-15 for two years violates Plaintiffs' Right of Suffrage under Article II, § 13.

Plaintiffs therefore seek an order declaring the Commission's last-minute holdover amendment to be void and enjoining the State from enforcing it. Plaintiffs do not challenge any other portion of the redistricting plan.

STATEMENT OF FACTS

I THE COMMISSION'S ASSIGNMENT OF "HOLDOVER SENATORS"

The Commission prepares a plan each decade for redistricting and reapportioning the state's legislative districts, including its 50 senate districts. (State's Ans., ¶¶48-49.) Montana's senators serve four-year terms and are elected on a staggered schedule, resulting in 25 senators elected in 2010 serving terms extending through 2014, and 25 senators elected in 2012 serving terms extending through 2016. Art. V, § 3, Mont. Const. Senators in the latter group are referred to as "holdover" senators because they do not seek reelection in 2014 when the new districts become effective but are instead "held over" to 2016, when their terms expire. (Ex. 35, pp.14-15.) The Commission's assignment of holdover senators to districts results in those districts having their next senate election in 2016. (Ex 34, pp. 34-35.) Therefore, if the Commission assigns a holdover senator to a district that had its most recent senate election in 2010, that district's voters must wait six years between senate elections rather than four years.

The 2010 Commission consisted of five members. The Montana Supreme Court appointed former Associate Justice James "Jim" Regnier as Chairman. (Ex 35, p.13.) Republican caucuses in

the Legislature appointed Jonathan "Jon" Bennion and Linda Vaughey and Democratic caucuses appointed Joseph "Joe" Lamson and Carol Williams. (Ex 34, pp.14-16.)[1]

The Commission assigned all 25 holdover senators during a meeting on November 30, 2012. (Ex 5, pp.14-15; Ex 34, pp. 48-49.) These assignments included Sen. Rick Ripley to SD-9, Sen. Bradley Hamlett to SD-10, and no holdover to SD-15. (Ex 7; Ex 13 [map depicting assignments].)

On January 8, 2013, the Commission presented its plan, including holdover assignments, to the Legislature. (Ex 12, p.21) The Legislature submitted recommendations to the Commission that included a request to reassign Roger Webb, a Billings-area holdover senator. (Ex 19; Ex 20.) It did not request any other holdover reassignments. (Ex. 19; Ex. 20.)

II THE DECISION NOT TO PUBLISH COMMISSIONERS' PROPOSED HOLDOVER AMENDMENTS BEFORE THE FINAL MEETING ON FEBRUARY 12, 2013

The Commission enacted Operating Procedures in 2011 to "serve as a guide to the public about what to expect from the commission and the opportunities they will have to participate in the redistricting process." (Ex 1, p.1.) These included a procedure for public comment on amendments:

> The commission and its staff may recommend public comments be sent before a certain date to ensure the comments can be taken into consideration during the mapping process and then before the commission begins to vote on plans and amendments.

(Ex 1, p.4.) On February 1, 2013, the Commission advised the public of its final meeting on February 12 and that "as possible amendments are proposed by the commissioners, the amendments will be posted on the website under the 'Meeting Materials' section." (Ex 33.) The Commission further advised that written comments "should be submitted by February 11 at noon in order to be distributed to the commissioners at their meeting." (Ex 33.)

An hour after the Commission issued this statement, Commissioner Bennion asked the staff to prepare an amendment reassigning Sens. Ripley and Hamlett from SD-9 to SD-10 and SD-10 to SD-12, respectively. (Ex 16; Ex 34, p.79.) Commissioner Bennion's request resulted from a letter

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[1] Commissioner Williams replaced Commissioner Pat Smith in January 2013. (Ex 34, pp.16-17.)

received the previous day from Rep. Rob Cook, eleven other legislators, and four state educators. (Ex 14; Ex 15; Ex 34, pp.63-64.) The letter's signatories decried the Commission's "significant oversight" in leaving Sen. Jones "without a Senate district." (Ex. 15.) This was a reference to the Commission's original assignment of Sen. Ripley to SD-9, resulting in that district's next senate election occurring in 2016. (Ex 12, p.21.) Because Sen. Jones lives in what is now SD-9 and his term expires in 2014, (Ex 13; Ex 34, p.74), Sen. Ripley's assignment to SD-9 blocked Sen. Jones from seeking reelection in SD-9 in 2014. The letter requested the Commission "provide Senator Jones with a Senate district in which he can run during the upcoming (2014) elections." (Ex 15.)

The staff responded to Commissioner Bennion's request for a holdover amendment by stating that "we can put the House amendments up on the website, but we don't need to do them for the holdover assignments, because it is just moving somebody over." (Ex 34, p.119; see also Ex 16.) Commissioner Bennion believes holdover amendments should have been posted because voters were entitled to know (1) the identity of their potential senator and (2) the possibility that they would have to wait six years for their next senate election. (Ex 34, p.107.)

Between February 2 and February 10, the Commission posted ten amendments proposed by commissioners concerning House district boundaries. (Ex 37 [Stipulated Fact #17].) No proposed amendments to reassign Sen. Ripley out of SD-9 were ever posted on the Commission's website, however, nor was there any other notice of such amendments. (Ex 34, pp. 33-34, 107; Ex 36, p. 105.)

III THE COMMISSION'S PRIVATE DELIBERATIONS REGARDING HOLDOVER AMENDMENTS PRIOR TO THE MEETING ON FEBRURY 12

Between February 1 and February 7, Commissioners Lamson and Williams discussed Sen. Jones' situation during five telephone calls. (Ex 36, pp.70-71.) Commissioner Lamson also spoke with Commissioner Regnier approximately ten times between February 1 and February 7 on aiding Sen. Jones by reassigning holdover senators. (Ex 36, pp.71-72.) Commissioners Bennion and Vaughey also conferred around that time on opening SD-9 for Sen. Jones. (Ex 34, pp.81-82.)

There were eventually two competing proposals by commissioners for opening SD-9. The one proposed by Commissioner Bennion reassigned Sen. Ripley to SD-10 and Sen. Hamlett from SD-10 to SD-12. (Ex 16.) A proposal by Commissioners Lamson and Williams also reassigned Sen. Ripley to SD-10, but reassigned Sen. Hamlett to SD-15, (Ex 30), where Plaintiffs reside.[2]

On February 8, Commissioner Bennion met with Commissioner Lamson and tried to convince him to support the amendment moving Sen. Hamlett to SD-12 rather than to SD-15. (Ex 34, pp. 84-86; Ex 36, pp. 91-92.) Commissioner Lamson rejected this proposal as benefiting Republicans. (Ex 36, p.92.)

The commissioners knew that Chairman Regnier would break any ties and therefore pitched their amendments to him. (Ex 34, p. 89; Ex 36, p. 97.) Chairman Regnier was "always striving to get as much consensus as possible," including with regard to the Jones situation. (Ex 35, pp.41-42.) On February 9, Commissioner Bennion sent an email to Chairman Regnier with "Llew Jones" on the subject line expressing concern with Commissioner Lamson's proposal to "stick [Sen.] Ripley in a district that contains none of his voters." (Ex 17.) Commissioner Bennion promised to "crunch numbers for you so you can see the most reasonable choices" because holdover reassignments need to be "based upon sound reasoning and defensible arguments." (Ex. 17.) He prepared a "fact sheet" the following day entitled "Llew Jones Situation" containing statistics showing the number of "Ripley voters" and "Hamlett voters" in newly drawn senate districts. (Ex. 18; Ex 34, p.98.) He included in the document his conclusion that Sen. Ripley and Sen. Hamlett should be reassigned to SD-10 and SD-12, respectively. (Ex. 18.) Chairman Regnier, Commissioner Lamson, and Commissioner Williams discussed the statistics contained in Commissioner Bennion's fact sheet prior to February 12. (Ex 34, p.98; Ex 36, p.99.) Commissioner Lamson told Chairman Regnier and Commissioner Williams that the statistics were accurate but not conclusive. (Ex 36, p.99.)

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[2] These commissioners also suggested reassigning Sen. Ripley directly to SD-15. (Ex 29, p.2; Ex 36, pp.65-66.) Commissioners Bennion and Vaughey rejected this idea and it was not pursued further. (Ex 18; Ex 36, pp.89-91.)

On February 10, Commissioners Lamson and Williams spoke further regarding Sen. Jones. (Ex 36, pp. 77, 95.) Commissioner Lamson also spoke to Chairman Regnier, who "tr[ied] to find out how we could reach some consensus and move forward." (Ex 36, p.79.) They also discussed the positions of the other commissioners. (Ex 36, p.79.)

Commissioner Lamson explained to Chairman Regnier in an email sent later that day that Commissioner Bennion's proposed amendment was a "blatant GOP move to decrease by one the number of likely Democratic seats up for election in 2014." (Ex. 30.) He argued that "the only option that places no hardship or harm on either party is simply reassigning holdovers Senator Ripley and Hamlett one seat to the east," *i.e.*, to SD-10 and SD-15, respectively. (Ex. 30.) Commissioner Lamson also reasoned that these senators were "term limited" and thus would not be "harmed" by the reassignments. (Ex 30.)

Chairman Regnier also spoke with Commissioner Bennion on February 10 and proposed a "global motion" that included a resolution to Sen. Jones' situation as well as reconfiguring senate seats in Flathead County. (Ex 34, pp.93-95; Ex 35, pp. 46-47.) They discussed Commissioner Lamson's proposed amendment to reassign Sens. Ripley and Hamlett to SD-10 and SD-15, respectively. (Ex 34, pp.93-94.) Commissioner Bennion disagreed with the proposal because SD-15 had few "Hamlett voters" and Sen. Hamlett would be unfamiliar with the district. (Ex 34, p.94.)

On February 11, the day before the final hearing, Chairman Regnier went to Commissioner Bennion's office and "really press[ed] on a global amendment." (Ex 34, p.96.) Commissioner Bennion responded by "trying to plead my case" and "presenting the information that I had developed, as far as the statistics," to persuade Chairman Regnier that Sens. Ripley and Hamlett should be reassigned to SD-10 and SD-12, respectively. (Ex 34, pp.96-97.)

Commissioners Bennion and Lamson conferred again on February 11 regarding Sen. Jones. (Ex 36, p.95.) That same day, Commissioner Lamson spoke briefly with Commissioner Williams as well as Chairman Regnier regarding holdover amendments. (Ex 36, pp.95-97.)

The Commission did not publish the communications among commissioners regarding holdover amendments to open SD-9. (Ex 34, pp. 97-99; Ex 35, pp.61.) It did publish a "Tentative Agenda" for the February 12th hearing. (Ex. 22.) The only "Action item" listed, however, was to

"Discuss and revise Tentative Commission Plan, including justifications for any deviations from ideal population." (Ex 22.) The agenda contained no reference to proposed holdover amendments. (Ex 22.) Though labeled "Tentative," the agenda was never updated. (Ex 34, p.106.)

At 10:28 a.m. during the final meeting on February 12 -- almost literally the eleventh-hour -- Chairman Regnier offered an amendment to reassign Sen. Ripley to SD-10 and Sen. Hamlett to SD-15, (hereinafter, the "Jones Amendment"), which was approved on a 3-2 vote. (Ex 23, pp.7, 9.)[3] No public comment was offered. (Ex. 23, p.9.) Commissioners delivered the plan to the Secretary of State later that day, resulting in the Commission's dissolution by operation of law. (Ex 34, p.112; Art. V, §14(5), Mont. Const.)

IV THE TWO-YEAR DISENFRANCHISEMENT OF SD-15 VOTERS RESULTING FROM THE COMMISSION ADVANCING SEN. JONES'S CAMPAIGN BY TWO YEARS

The Commission's plan submitted to the Legislature in January 2013 did not include a holdover assignment for SD-15, meaning that the next senate election for that district would have occurred in 2014. (Ex 12, p.21.) As a result of the Jones Amendment, Sen. Hamlett is now assigned to SD-15 and Plaintiffs must now wait until 2016 to vote for a senate candidate. (Ex 38 [Plaintiffs' Affidavits, ¶ 6].) Plaintiffs residing in Fergus County were similarly disenfranchised during the last redistricting cycle. (*Id*., ¶ 7.) Had they known in advance of the Jones Amendment, they would have objected, both in writing and in person. (*Id*., ¶ 9.)

ARGUMENT

The purpose of a motion for summary judgment is "to encourage judicial economy and to eliminate the delay and expense of unnecessary trials." *Silverstrone v. Park County,* 2007 MT 261 ¶ 9, 339 Mont. 299, 170 P.3d 950. Summary judgment "should be rendered if the pleadings, the discovery, and any affidavits show that there is no genuine issue as to any material fact, and that the

[3] The holdover configuration resulting from the Jones Amendment is shown in Exhibit 21.

moving party is entitled to a judgment as a matter law." M.R.Civ.P. Rule 56(c)(3). A party may move for summary judgment at any time. M.R.Civ.P. Rule 56(c)(1)(A).

I. THE COMMISSION'S PRIVATE DELIBERATIONS ON REASSIGNING HOLDOVER SENATORS VIOLATED THE PUBLIC'S RIGHT TO KNOW UNDER ARTICLE II, § 9 OF THE CONSTITUTION

Article II, § 9 of the Montana Constitution affords the public a right to know the workings of public bodies and agencies.[4] This right "is to be given a broad and liberal interpretation." *Bryan v. Yellowstone School Dist.*, 2002 MT 264, ¶23, 312 Mont. 257, 60 P.3d 381, quoting *SJL of Mont. Assoc. v. City of Billings*, 263 Mont. 142, 146, 867 P.2d 1084, 1086 (1993). It is "self-executing – that is, legislation is not required to give it effect." *Bozeman Daily Chronicle v. Police Dept.*, 260 Mont. 218, 231, 859 P.2d 435, 443 (1993).

The Right to Know includes a right to "observe the deliberations of all public bodies and agencies of state government…." Art. II, § 9, Mont. Const. A "deliberation" is "[t]he act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means." *SJL*, 867 P.2d at 1088 (Trieweiler, J., dissenting), quoting Black's Law Dictionary 427 (6th ed.1990). This constitutional right is thus "more than a simple requirement that only the final voting be done in public." *Associated Press v. Crofts*, 2004 MT 120, ¶31, 321 Mont. 193, 89 P.3d 971. As other courts have held, laws such as the Right to Know apply not only to deliberations occurring when agency board members physically convene in a meeting room but also when members engage in serial, one-on-one communications among themselves regarding an issue within the agency's jurisdiction. *Stockton Newspapers v. Redevelopment Agency*, 214 Cal.Rptr. 561,

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[4] Article II, 9 of the Montana Constitution states as follows:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

564-65 (Cal.Ct.App.1985). The reasoning in *Stockton Newspapers* is instructive:

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors.

Id., 214 Cal.Rptr. at 564. That the deliberations in *Stockton Newspapers* consisted of one-on-one telephone conversations between agency board members and the agency's attorney made no difference: "no reason appears why the contemporaneous physical presence at a common site of the members of a legislative body is a requisite of such an informal meeting." *Id*., 214 Cal.Rptr. at 564. Courts around the nation have followed *Stockton Newspapers's* reasoning.[5]

Though no Montana opinion addresses the applicability of the Constitution's Right to Know to serial, one-on-one deliberations among an agency's governing members, the reasoning in *Stockton Newspapers* and its progeny is sound and should be followed by this Court. The commissioners' communications among themselves as to the pros and cons of the various proposed amendments constituted "deliberations," *i.e*., "act[s] of weighing and examining the reasons for and against a …

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[5]See, *e.g*., *Right to Know Committee v. City of Honolulu,* 175 P.3d 111, 122 (Hawaii Ct.App. 2008) ("When Council members engaged in a series of one-on-one conversations relating to a particular item of Council business…the spirit of the open meeting requirement was circumvented and the strong policy of having public bodies deliberate and decide its business in view of the public was thwarted and frustrated"); *Harris v. City of Ft. Smith*, 197 S.W.3d 461, 467 (Ark.2004) (city administrator's one-on-one contacts with council members regarding land purchase violated state's open meeting law because the "purpose of the one-on-one meetings was to obtain a decision of the Board as a whole on the purchase….."); *Del Papa v. Bd. of Regents*, 956 P.2d 770, 778 (Nev.1998) ("a quorum of a public body gathered by using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the body has supervision, control, jurisdiction or advisory power violates the open meeting law"); *Cincinnati Post v. City of Cincinnati*, 668 N.E.2d 903, 906 (Ohio 1996) (Ohio's sunshine law "exists to shed light on deliberations of public bodies" and "cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body"); *Booth Newspapers, Inc. v. Wyoming City Council*, 425 N.W.2d 695, 701 (Mich.Ct.App.1988) ("[t]o accept the city council's suggestion that a public body can avoid [Michigan's open meeting law] by deliberately dividing itself into groups of less than a quorum and still deliberate on public policy would circumvent the legislative principles as well as the overall objective of the [act] to promote openness and accountability in government"); *Blackford v. Sch. Bd. of Orange County*, 375 So.2d 578, 580 (Fla.Ct.App.1979) (series of meetings between school superintendent and individual board members violated Florida sunshine law).

choice of … means" for opening SD-9 for Sen. Jones. Black's Law Dictionary 427 (6th ed.1990). These acts included the following:

- At least 15 telephone conversations between Commissioner Lamson and other commissioners between February 1 and February 7 regarding Sen. Jones, (Ex 36, pp.70-72);
- A discussion between Commissioners Bennion and Vaughey around this time on how to open SD-9 for Sen. Jones, (Ex 34, pp.81-82);
- A meeting between Commissioners Lamson and Bennion on February 8 to discuss aiding Sen. Jones by reassigning Sen. Ripley out of SD-9, (Ex 34, pp. 84-87, 99; Ex 36, pp. 91-92.);
- An email from Commissioner Bennion to Chairman Regnier on February 9 complaining about Commissioner Lamson's proposed amendment and pitching his own amendment for opening SD-9, (Ex 17);
- A "fact sheet" prepared by Commissioner Bennion and reviewed by Chairman Regnier as well as Commissioners Lamson and Williams containing statistics on "Ripley voters" and "Hamlett voters" in various districts and why those statistics allegedly supported Commissioner Bennion's proposed amendment, (Ex 18; Ex 34, p.98; Ex 36, p.99);
- An additional discussion between Commissioners Lamson and Williams on February 10 regarding Sen. Jones, (Ex 36, pp. 77, 95);
- A telephone conference and follow-up email on February 10 between Commissioner Lamson and Chairman Regnier in which Chairman Regnier "tr[ied] to find out how we could reach some consensus and move forward," while Commissioner Lamson described the merits of the proposed amendment to move Sen. Hamlett to SD-15 and criticized Commissioner Bennion's proposed amendment, (Ex 30; Ex 36, pp.79);
- A telephone conference on February 10 between Chairman Regnier and Commissioner Bennion in which Chairman Regnier discussed a "global motion" that included a solution to Sen. Jones' problem as well as the benefits and drawbacks of Commissioner Lamson's proposal, (Ex 34, pp.93-95);
- A series of discussions on February 11 involving Chairman Regnier and Commissioners Bennion, Lamson and Williams that included "pressing for a global amendment," and "pleading" their cases with supporting statistics. (Ex 34, pp.96-99; Ex 36, p.95, 97.)

All of these acts of weighing and examining by the commissioners involved proposed amendments for reassigning Sen. Ripley out of SD-9 in order to open it for Sen. Jones in 2014 and

were therefore "deliberations" under Article II, § 9. They should have been observable by the public, but were not. The public never knew the pros and cons for each amendment discussed during these deliberations. Indeed, the public never knew these deliberations were occurring at all. For this reason alone, the Court should void the Jones Amendment reassigning Sen. Ripley to SD-10 and Sen. Hamlett to SD-15.

II. THE COMMISSION'S DEADLINE OF FEBRUARY 11 FOR PUBLIC COMMENTS ON AMENDMENTS, FOLLOWED BY ITS APPROVAL OF A SURPRISE AMENDMENT ON FEBRUARY 12, VIOLATED THE PUBLIC'S RIGHT TO PARTICIPATE UNDER ARTICLE II, § 8 OF THE CONSTITUTION

Article II, § 8 of the Constitution guarantees Montanans a reasonable opportunity to participate in agency operations prior to final decisions being made.[6] Unlike Article II, § 9, the Right to Participate in Article II, § 8 is not self-executing but is instead applicable "as may be provided by law," thereby requiring enabling statutes to effectuate it. 51 Mont. Op. No.12 Atty. Gen. at 4; Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L.REV. 297, 303 (Summer 2005). Accordingly, the Legislature enacted statutes "pursuant to the mandate of Article II, § 8…." § 2-3-101, MCA. These include statutes requiring that agencies "develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public." § 2-3-103(1)(a), MCA. These procedures "must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public." *Id.* They must also "include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public." § 2-3-111(1)(a), MCA.

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[6] Article II, 8 of the Montana Constitution states as follows:

> The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

The Commission enacted Operating Procedures to "serve as a guide to the public about what to expect from the commission and the opportunities they will have to participate in the redistricting process." (Ex 1, p.1.) These included a procedure applicable to public comment on amendments:

> The commission and its staff may recommend public comments be sent before a certain date to ensure the comments can be taken into consideration during the mapping process and then before the commission begins to vote on plans and amendments.

(Ex 1, p.4.) In accordance with this procedure, the Commission issued a press release on February 1 stating that "as possible amendments are proposed by the commissioners, the amendments will be posted on the website under the 'Meeting Materials' section." (Ex. 33.) The Commission further advised that written comments "should be submitted by February 11 at noon in order to be distributed to the commissioners at their meeting" on February 12. (Ex 33.)

Though the Commission posted commissioners' proposed House district amendments prior to the hearing on February 12, (Ex. 37 [Stipulated Fact #17]), it inexplicably refused to post commissioners' proposed holdover amendments. An hour after the Commission issued its press release on February 1, Commissioner Bennion asked the staff to prepare an amendment reassigning Sen. Ripley from SD-9 to SD-10 and Sen. Hamlett from SD-10 to SD-12. (Ex 16; Ex 34, p.79.) The staff explained that "we can put the House amendments up on the website, but we don't need to do them for the holdover assignments, because it is just moving somebody over." (Ex 34, p.119; see also Ex 16.) The public could not have received notice of holdover amendments from any source besides the Commission's website. (Ex 34, p.34.) Commissioner Bennion's proposed amendment was never posted, something he admits should have occurred. (Ex 34, pp. 33-34, 107.) Nor was Commissioner Lamson's proposal to reassign Sen. Ripley to SD-10 and Sen. Hamlett to SD-15 ever posted. (Ex 36, p.105.)

Despite the Commission's public commitment to post to its website amendments proposed by commissioners, Chairman Regnier stated that the Commission could nevertheless approve nonposted amendments presented at the last minute:

> [I]f our Legislative Services staff had received a proposed amendment by a commissioner, I would expect them to post it. But I always maintain, and I told the commissioners this and the Legislative Services staff this, that I would consider any amendment at the time of our February 12th meeting that any commissioners wanted to propose…. If somebody from the public came and said, you know, 'We think you ought to tweak this here or tweak that there,' I would have taken a vote on it, if one of the commissioners had proposed it through an amendment, and that certainly would not have been posted.

(Ex 35, pp.86-87.) Commissioner Lamson accurately described the consequence of this policy:

> The voters in Senate District 15, as well as the voters throughout Montana …should stay tuned to the very last meeting if they had any concerns about what the Commission was doing, because the Commission could make changes up to the very last minute.

(Ex 36, p.104.)

A policy forcing every concerned Montanan to "stay tuned to the very last meeting" of an agency and "up to the very last minute" of that last meeting in case the agency takes unannounced actions is exactly what the Constitution's Right to Participate was intended to prohibit. *Bryan*, ¶ 40, quoting Mont. Const. Conv. Tr., Vol. V at 1655 ("What is intended by [Article II] Section 8 is that any rules and regulations that shall be made and formulated and announced by any governmental agency… shall not be made until some notice is given so that the citizen will have a reasonable opportunity to participate with respect to his opinion, either for or against that particular administrative action").

Moreover, the Commission's policy of entertaining and approving surprise amendments at its very last meeting collided with Plaintiffs' right to "a reasonable opportunity to submit data, views, or arguments, orally or in *written form*, prior to making a final decision that is of significant interest to the public." § 2-3-111(1), MCA (emphasis added). The Commission required the public to submit written comments by noon on February 11 in order for them to be considered at the following day's meeting. (Ex 33.) This was a reasonable requirement. The Commission was unreasonable, however, in permitting surprise amendments to be raised and approved during its final meeting -- a day *after* the written comment period had expired -- especially when Plaintiffs (and, likely, others) would have submitted written comments if they had known of the Jones Amendment. (Ex 38, ¶9.)

The proper way for agencies to take action on items that first arise during a meeting was outlined by then-Attorney General Mike McGrath: simply hold a subsequent meeting and provide notice and a reasonable opportunity for public comment regarding the particular action. 51 Mont. Op. No.12 Atty. Gen. at 10-11. This procedure could have, and should have, been followed by the Commission for matters like the Jones Amendment that were, in the words of Commissioner Lamson, brought up at "the very last minute" of "the very last meeting." (Ex 36, p.104.) Because the Commission received the Legislature's recommendations during the first week of February, it had until March before being legally required to file a plan with the Secretary of State. (Ex 35, pp.82-83; Art. V, § 14(4), Mont. Const.) It could have scheduled a subsequent meeting to allow an opportunity for public comment on the Jones Amendment. Instead the Commission filed its plan with the Secretary of State hours after approving the amendment, then immediately dissolved by operation of law. (Ex 34, p.112; Art. V, §14(5), Mont. Const.)

The Commission was entitled to entertain and approve surprise amendments at the hearing on February 12. It was entitled to hold no additional hearing after February 12. But under § 2-3-111(1), MCA, it was not entitled to do both. The Commission's approval of the Jones Amendment on February 12 violated the Constitution's Right to Participate, the provision's enabling statutes, and its own Operating Procedures. The Jones Amendment must therefore be declared void.

III THE COMMISSION ALSO VIOLATED ARTICLE II, § 8 BY FAILING TO PROVIDE SPECIFIC NOTICE OF HOLDOVER AMENDMENTS IN THE AGENDA FOR THE MEETING ON FEBRUARY 12

The enabling statutes for Article II, § 8 also require agendas that give meaningful notice of meetings, without which "an 'open' meeting is open in theory only, not in practice." *Common Cause v. Statutory Committee*, 263 Mont. 324, 331, 868 P.2d 604, 609 (1994), quoting *Board of Trustees v. Board of County Commissioners*, 186 Mont. 148, 152, 606 P.2d 1069, 1071 (1980). Agencies therefore cannot lawfully "take action on any matter discussed unless *specific notice* of that matter is included on an agenda and public comment has been allowed on that matter." § 2-3-103(1)(a), MCA (emphasis added).

While the Montana Supreme Court has not yet decided what "specific notice" requires, vague generalities in agendas are presumably insufficient, particularly since delegates to the Constitutional Convention envisioned Article II, § 8, the provision which spawned § 2-3-103(1)(a), MCA, as requiring notice whenever an agency contemplates taking a "*particular* administrative action." *Bryan*, ¶ 40, quoting Mont. Const. Conv. Tr., Vol. V at 1655 (emphasis added); see also *Wilson v. City of Tecumseh*, 194 P.3d 140, 144 (Okla.Ct.App.2008) (city agenda's reference to "employment" gave insufficient notice of intent to give city employee $30,000 bonus); *Cox Enterprises, Inc. v. Bd of Trustees*, 706 S.W.2d 956, 959 (Tex.1986) ("personnel" was too vague to notify the public of the hiring of a new school superintendent).

The Commission published on (or about) February 1 its "Tentative Agenda" for the hearing on February 12. (Ex. 22; Ex 37 [Stipulated Fact #7].) The only "Action item" listed was to "Discuss and revise Tentative Commission Plan, including justifications for any deviations from ideal population." (Ex. 22.) Though labeled "Tentative," the agenda was never updated, (Ex 34, p.106), despite the almost two-weeks of deliberations on proposed amendments for opening SD-9 prior to the meeting on February 12. The agenda thus failed to meet the "specific notice" requirement in § 2-3-103(1)(a), MCA, thereby rendering the Jones Amendment void. § 2-3-114, MCA.

IV. THE COMMISSION ALSO VIOLATED ARTICLE II, § 8 BY DEPRIVING PLAINTIFFS OF THE OPPORTUNITY TO REBUT CONTENTIONS MADE DURING ITS PRIVATE DELIBERATIONS

Besides failing to give adequate notice as described in detail in the previous sections of this brief, the Commission violated Article II, § 8 in another manner. Even if Plaintiffs had had the prescience to know before February 12 that the Commission was planning to assign a holdover senator to their district, showing up at the hearing without knowing the substance of the commissioners' earlier, private deliberations would have given Plaintiffs nothing more than an "uninformed opportunity to speak." *Bryan*, ¶ 44. In order "to participate effectively and knowledgeably in the political process of a democracy one must be permitted the fullest imaginable freedom of speech and one must be fully apprised of what government is doing, has done, and is

proposing to do." *Bryan*, ¶ 31 (citations omitted). This requires that "when an agency proposes a new rule," it "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Bryan*, ¶43, quoting *Florida Power & Light Co. v. United States,* 846 F.2d 765, 771 (D.C.Cir.1988). Thus, "at a minimum, the 'reasonable opportunity' standard articulated in Article II, Section § 8, and § 2-3-111, MCA, demands compliance with the right to know contained in Article II, Section § 9." *Bryan*, ¶44. Put another way, an agency that fails to permit observation of its deliberations as required by Article II, § 9 has, *a fortiori*, violated the Right to Participate guaranteed by Article II, § 8.

The rule in *Bryan* required the Commission to allow observation of its deliberations concerning proposed holdover amendments. As a result of the Commission's failure to do so, Plaintiffs were deprived of their right to a reasonable opportunity to participate in the Commission's operations prior to the final decision on the Jones Amendment. They did not know of the various amendments commissioners debated, nor the reasons commissioners offered for and against those amendments. They did not see (or even know about) the statistical "fact sheet" prepared by Commissioner Bennion in support of his proposed amendment that was distributed to other commissioners. *Cf. Bryan*, ¶¶ 45-46 (school district's failure to disclose internal document containing school ratings deprived plaintiff of reasonable opportunity to argue against proposed school closure).

Chairman Regnier contends that providing the public in advance with this information would not have mattered "because the approach that Jon Bennion was proposing was to keep Senate District 15 open, which I think is what [Plaintiffs] are proposing in their lawsuit. And so I think their interests were served by Jon…." (Ex 35, p.62.) There are three problems with that contention.

First, Plaintiffs' right to relief under Article II, § 8, is not contingent on proving their arguments would have carried the day. Rather, the public has a right to a "genuine interchange" with agencies. *Bryan*, ¶ 46. A denial of this interchange, standing alone, is a violation of a fundamental constitutional right that voids an agency's action.

Second, the interests of Plaintiffs were not "served by Jon" because his interests were not aligned with theirs. As Chairman Regnier acknowledged later in his deposition, Commissioner

Bennion was "trying to be a good advocate and give his Republican constituents an advantage." (Ex 35, p.77.) Maximizing Republican seats in the next Legislature by saving Sen. Jones might have been in Commissioner Bennion's interest, but Plaintiffs' interest was (and is) simply to keep SD-15 open, thereby preserving their right to vote for a senate candidate next year. The Bennion amendment was not the only way of protecting Plaintiffs' interests. While that amendment would have kept SD-15 open by moving Sen. Hamlett to SD-12, leaving all holdover assignments undisturbed would have done so, too. Surprisingly, the option of simply rejecting both proposed holdover amendments was not discussed by Commissioners at the meeting on February 12. (Ex 23.)

Third, like the plaintiff in *Bryan*, Plaintiffs had evidence and arguments to bring to the table that was not brought by others, such as the fact that (1) nearly all SD-15 voters would suffer a 2-year disenfranchisement if Sen. Hamlett was assigned to their district and (2) voters in Fergus County, Judith Basin and Petroleum Counties suffered a similar disenfranchisement during the last redistricting cycle -- information that commissioners never discussed during the hearing on February 12 and apparently did not know. (Ex 23; Ex 38.)

Plaintiffs would have objected to the Jones Amendment had they known of it beforehand. (Ex 38, ¶ 9.) Given that Chairman Regnier was undecided until the final moments of the hearing, (Ex 35, p.63), and given the importance he places on public input, (Ex 35, p.61), Plaintiffs' lack of opportunity to win over his tie-breaking vote was particularly unfortunate.

The Commission's failure to permit public observation of its deliberations as required by Article II, § 9 of the Constitution[7] deprived Plaintiffs of a reasonable opportunity to participate in the operations of the Commission prior to it making a final decision on the Jones Amendment, thereby violating their Right to Participate under Article II, § 8 of the Constitution. This additional violation constitutes another basis for enjoining the enforcement of the Jones Amendment.

[7] See pp. 8-11, *supra.*

V THE COMMISSION FAILED TO SUBMIT THE JONES AMENDMENT TO THE LEGISLATURE FOR ITS RECOMMENDATIONS AS REQUIRED BY ARTICLE V, §14(4) OF THE CONSTITUTION

The Montana Constitution requires the Commission to submit its plan to the Legislature for recommendations.[8] The Commission did this on January 8, 2013. (Ex. 12.) Its holdover assignments at that time, which included Sen. Ripley to SD-9 and Sen. Hamlett to SD-10, (Ex. 12, p.21), were an integral part of that plan. (Ex 35, p.24; see also *Wheat v. Brown*, 2004 MT 33, ¶17, 320 Mont. 15, 85 P.3d 765.) The Legislature offered no recommendations regarding the assignment of Sen. Ripley and Sen. Hamlett. (Ex 19; Ex 20.)

After receiving the Legislature's recommendations, the Commission approved the Jones Amendment reassigning Sens. Ripley and Hamlett to SD-10 and SD-15, respectively. (Ex 21.) The Commission never submitted the Jones Amendment to the Legislature. (Ex 35, pp. 67-68.) As a result, a portion of the plan filed with the Secretary of State was never presented to the Legislature for its recommendations as required by Article V, §14(4) of the Montana Constitution. This violation renders void those portions of the plan that were not submitted to the Legislature, *i.e.*, the Jones Amendment reassigning Sens. Ripley and Hamlett to SD-10 and SD-15, respectively.

VI ADVANCING SEN. JONES' CAMPAIGN TWO YEARS BY DISENFRANCHISING RESIDENTS IN SD-15 FOR TWO YEARS VIOLATES PLAINTIFFS' RIGHT OF SUFFRAGE UNDER ARTICLE II, § 13

Article II, § 13 of the Montana Constitution provides that "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The Constitution's Right of Suffrage is part of the Declaration of Rights and is

[8] This requirement is found in Article V, § 14(4) of the Constitution, which states as follows:

> The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law.

therefore a fundamental constitutional right. *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 113 P.3d 281, quoting *Butte Community Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986). It provides greater protection for voting rights than does the United States Constitution, which contains no express right to vote. *Cf. Weinschenk v. State*, 203 S.W.3d 201, 211-12 (Mo.2006) (Missouri Constitution, which contains a right of suffrage identical to that of the Montana Constitution, gives "more expansive and concrete protections of the right to vote" and therefore "provides greater protection than its federal counterpart"). "The most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right," meaning that the action must be narrowly tailored to achieve a compelling state interest. *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996).

If a district's residents last voted for a senate candidate in 2010, and they are then saddled with a holdover senator in 2013, they will be forced to wait six years between senate elections rather than four. (Ex 34, pp.34-35.) These voters are "temporarily disenfranchised"[9] and therefore deprived of their right of suffrage. The State is obliged to minimize such disenfranchisement when assigning holdover senators. See, *e.g.*, *Vandermost v. Bowen*, 269 P.3d 446, 482 (Cal.2012) (court rejected voter's challenge to redistricting plan in part because voter's alternative plan resulted in senate elections being delayed for greater number of voters).

SD-15 consists of approximately 19,000 residents (95% of the district's population) living in areas in which the last senate election occurred in 2010. (Ex 37 [Stipulated Fact #11].) By assigning Sen. Hamlett to SD-15, the Commission delayed the next senate election in SD-15 from 2014 to 2016, thereby disenfranchising 19,000 residents of SD-15 for two years.

In fairness to the Commission, the overall number of voters disenfranchised by the Jones Amendment is less than 19,000. Besides assigning a holdover to SD-15, the amendment removed a holdover (Sen. Ripley) from SD-9, thereby advancing the next senate election in SD-9 from 2016 to

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[9] Comment, *One Person, No Vote: Staggered Elections, Redistricting, and Disenfranchisement*, 121 YALE L.J. 2013, 2013 (2012); *Wilson v. Eu*, 823 P.2d 545, 559 (Cal.1992) (describing a similar process in California as "partially disenfranchising" voters).

2014. Because SD-9 consists of 12,767 residents (64.5% of the district's population) living in areas in which the last state senate election occurred in 2010, (Ex 37 [Stipulated Fact #12]), the Commission's amendment decreased the number of disenfranchised residents in SD-9 by 12,767.

Nevertheless, the net increase in disenfranchisement resulting from the Jones Amendment is staggering. The combined population of SD-9 and SD-15 is 39,790. (Stipulated Facts #11 and 12.)[10] Prior to the Jones Amendment, 32.1% of that group (12,767 out of 39,790) would have been disenfranchised during the senate elections in 2014. The amendment will disenfranchise 47.8% (19,000 out of 39,790) of that population during the 2014 election – a net increase of 6,233 residents.

Because the Jones Amendment substantially increases the number of voters suffering a violation of their right of suffrage under the Montana Constitution, it can only be justified if it is narrowly tailored to achieve a compelling state interest. The purpose of the amendment was to enable Sen. Jones to stand for reelection in 2014 rather than wait until 2016. Even accepting at face value the qualities attributed to Sen. Jones by the signatories of the Cook Letter, (Ex. 15), facilitating the political career of any single person should *never* be a compelling state interest justifying the disenfranchisement of thousands of voters. The Jones Amendment therefore violates Plaintiffs' right of suffrage provided by the Montana Constitution, a violation that provides yet another basis for invalidating the amendment.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request this Court grant its motion for summary judgment and enjoin the State from enforcing the Jones Amendment.

DATED: August 1, 2013

Respectfully submitted,

_____
Matthew G. Monforton,
Attorney for Plaintiffs

[10] SD-10 is not relevant to this analysis because the Commission assigned a holdover senator to that district both before and after approving the Jones Amendment in February.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 1st day of August, 2013, that I mailed a true and correct copy of the foregoing document, via U.S. Mail, postage prepaid, to the following address(es):

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