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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-2013-509 [Prior Case No.: DV13-07 (14th Jud. Dist)] **PLAINTIFFS' (1) REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND (2) RESPONSE TO STATE'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

As explained in Plaintiffs' opening brief, the Districting Commission violated several provisions of the Montana Constitution by privately deliberating on an amendment to open SD-9 in order to accommodate Sen. Llew Jones' political ambitions. The Commission waited until the final moments of its final meeting before presenting this surprise amendment to the public. Plaintiffs therefore could not respond to a change that, if permitted to stand, will deprive them of a senate election in 2014.

The State offers no valid justification for these violations. For example, it makes no mention whatsoever of § 2-3-111(1), MCA, which requires agencies to "afford[ ] 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." Consequently, the State does not explain how the Commission could have complied with the statute by waiting until February 12, 2013, to propose the Jones Amendment after imposing a February 11 deadline for the public to comment upon proposed amendments. The Commission's actions were particularly puzzling in light of its careful posting of other proposed amendments well before February 12.

The State's brief extols the efforts of Commissioners and their staff. Plaintiffs do not question the dedication of these persons. Good faith, however, is not a defense to a claim of defective notice. *Bryan v. Yellowstone School Dist.*, 2002 MT 264, ¶ 53, 312 Mont. 257, 60 P.3d 381 (holding that school district's "extraordinary measures to reach a thoughtful, albeit difficult, determination" and lack of "devious intent" did not excuse Right-to-Know violation).

Montana's constitutional and statutory open meetings provisions do not impose "unworkable standards." (State's Brf., p.3.) These provisions are the law, and can be followed, and must be followed, by the Commission as well as every other state agency. And despite the Commission's hard work and many properly noticed hearings prior to February 2013, the decision that mattered most to Plaintiffs, the last-minute reassignment of a holdover senator to their district, was not one they were told of until the Commission had dissolved. This was a violation of the law requiring that the reassignment be voided. As explained below, the State's explanations for its other constitutional violations do not pass muster, either.

ARGUMENT

A. THE PUBLIC'S RIGHT OF PARTICIPATION UNDER ARTICLE II, § 8, OF THE CONSTITUTION APPLIES TO THE COMMISSION

1. The Commission is an "Agency" Subject to Article II, § 8

The State correctly notes that the Constitution's Right of Participation in Article II, § 8, and its enabling statutes, (§ 2-3-101, MCA, *et seq*.), apply only to "agencies" as defined by § 2-3-102, MCA.[1] (State's Brf, p. 13). It then argues that the Commission is not an "agency." (State's Brf, p.14.) Courts must "interpret a statute by looking to the statute's plain language, and if the language is clear and unambiguous, no further interpretation is required." *State v. Letasky,* 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288. The State's analysis of § 2-3-102, MCA, fails this test.

One requirement for an "agency" is that it must be a "board, bureau, commission, department, authority, or officer of the state or local government." § 2-3-102(1), MCA. The Districting Commission is obviously a "commission" and therefore satisfies this requirement.

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[1] The full text of § 2-3-102, MCA is as follows:

> As used in this part, the following definitions apply:
> (1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:
> (a) the legislature and any branch, committee, or officer thereof;
> (b) the judicial branches and any committee or officer thereof;
> (c) the governor, except that an agency is not exempt because the governor has been designated as a member thereof; or
> (d) the state military establishment and agencies concerned with civil defense and recovery from hostile attack.
> (2) "Agency action" means the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof.
> (3) "Rule" means any agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule but does not include:
> (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; or
> (b) declaratory rulings as to the applicability of any statutory provision or of any rule.

The other requirement for an "agency" is that it be "authorized by law to make rules, determine contested cases, or enter into contracts…." § 2-3-102(1), MCA. A "rule" includes any "statement of general applicability" that "prescribes law …." § 2-3-102(3), MCA.

The Commission prepares a plan that redraws legislative districts and assigns holdover senators. Mont. Const., art. V, § 14(1); *Wheat v. Brown*, 2004 MT 33, ¶ 35, 320 Mont. 15, 85 P.3d 765. The plan governs the actions of the Secretary of State and other election officials in preparing subsequent elections. (Ex. 35, p.74; Mont. Const. art. V, § 14(4) ("…the commission shall file its final plan for legislative districts with the secretary of state and it shall become law"). The Commission thus makes "rules" under § 2-3-102(3), MCA, *i.e*., "statements of general applicability" that "prescribe law," because its plan is a statement regarding district boundaries and holdover assignments that is applicable throughout the state and that has the force of law.[2]

The State strays from the plain language of § 2-3-102, MCA, by inserting phrases into the statute while ignoring others that are expressly included. For example, the State argues that:

> The Commission is not a 'board, bureau, commission, department, authority or officer' <u>*that carries out the directives of a principle*</u> [*sic*] by making 'rules, determin[ing] contested cases, or enter[ing] into contracts.

(State's Brf., p.13 (emphasis added).) Section 2-3-102, MCA, does not include the phrase "carries out the directives of a principal," nor any other language suggesting that an "agency" must be subordinated to a higher body. The State also argues that the Commission is not an agency because it "does not merely adopt 'rules' which are defined as a 'regulation …that implements…law' ." (*Id*., p.14.) Agencies, however, do not merely adopt regulations that implement law. Lurking behind the State's ellipses is a much broader definition of "rule"; a rule can also be a "statement of general applicability" that "prescribes law." § 2-3-102(1), MCA. As shown previously, making a "statement of general applicability" that "prescribes law" is exactly what the Commission does.

The Districting Commission is a "commission" authorized to make "rules." It is therefore an "agency" subject to Article II, § 8 and its enabling statutes.

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[2] See also *Cargo v. Paulus,* 635 P.2d 367, 371, n.1 (Or. 1981) (Linde, J., concurring) (Oregon redistricting plan constituted "rule" under Oregon statute identical to § 2-3-102(3), MCA).

2. The Constitution's Drafting History Shows That Article II, § 8, was Intended to Increase the Accountability of Entities, Such as the Commission, That Are Run by Non-Elected Officials

Not only does the plain language of § 2-3-102, MCA, demonstrate that the Commission should be subject to the Constitution's Right of Participation, the Constitution's drafting history does, too. The delegates to the Constitutional Convention drafted Article II, § 8, because they believed agencies run by appointed officials were less responsive than legislative bodies comprised of elected officials. One of the delegates declared the following:

> We have drawn clearer lines of election for legislative officials. We have devised a more responsive system of selection and election for judicial officials. We have retained an extensive elective process for our executive officials. But what of the bureaus, the long arm of government with which the average citizen most often comes in contact; the long arm of government which is not responsive to elective officials; the long arms of government with which many, if not most, of our Montana citizens have met frustrating resistance and/or indifference? Elections do not materially affect the bureaus. Political pressures are not sufficient to juvenate [*sic*] response to public need.

Bryan, ¶40, quoting Montana Constitutional Convention, Vol. V at 1655, 1657. When another delegate was asked if Article II, § 8, should apply only to appointive agencies, he stated:

> Basically, that's true, because a city council, for example, just like a Legislature, is not going to act without regard to…citizen participation. They are not going to do it; but the governmental agencies that are not elected, that are appointed, that function to carry out the laws that are passed, are the ones, of course, that will enact rules and regulations and make the decisions that affect people with the effect of law without, sometimes, having any regard for citizen participation.

Montana Constitutional Convention, Vol. V at 1667.

These colloquies show delegates were more concerned about the responsiveness of appointed officials than of elected representatives accountable to voters. *Bryan*, ¶44 ("It is evident from the comment to Article II, Section 8, that the delegates sought to expose the activities of those bureaucratic authorities which were once isolated from public scrutiny"). The Commission, consisting entirely of appointed members, is exactly the kind of government entity to which

delegates intended the Right of Participation to apply.

Application of Article II, § 8, to the Commission is all the more important given the nature of its work. Redistricting is "one of the most conflictual forms of regular politics in the United States short of violence." Gelman & King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 545 (1994). Public participation in the Commission's decisions increases their legitimacy and reduces political tensions resulting from redistricting.

The State's brief fails to note the distinction Convention delegates made between legislators and appointed officials. For example, the State contends that last-minute decisions by the Commission are acceptable because "[j]ust like the Legislature, which often passes the budget on the last day of the session, the Commission has to be able to take meaningful steps at its last meeting if it is to be anything other than a sham meeting." (State's Brf., p.16.) The Commission, however, is not "just like the Legislature" because the latter is accountable to voters if, to use the State's example, it passes a last-day budget displeasing to the electorate. Commissioners and other appointed officials are not accountable to voters, which is why the Constitution requires them to allow public participation in ways not required of legislators. The Constitution's drafting history thus supports applying Article II, § 8 to the Commission.

3. The Legislature's Branches Are the House and the Senate, Not the House, the Senate, and the Districting Commission

The Legislature's "branches" are exempt from the requirements of the Constitution's Right of Participation. § 2-3-102(1)(a), MCA. The State argues that the Commission is such a branch. (State's Brf., pp. 13-14.) This argument is not persuasive.

A "branch" is "an offshoot, lateral extension, or division of an institution." BLACK'S LAW DICTIONARY (8th ed. 2005), p. 156. The Constitutional Convention created the Commission as a "separate body" from the Legislature because of the Legislature's inability to redistrict itself. *Wheat*, ¶¶19-20. The Commission cannot be an *offshoot, lateral extension, or division of* the Legislature if it is *separate from* the Legislature.

Other provisions of the Constitution further undermine the State's argument. Montana's

"legislative power is vested in a legislature consisting of a senate and a house of representatives," not a senate, house and districting commission. Mont. Const. art. V, §1. Moreover, members of the Commission cannot be members of the Legislature. Mont. Const., art. V, § 14(2). Describing as a "branch" of the Legislature an entity having no legislative power, and no legislators, makes no sense.

The Constitution's drafting history undermines the State's argument even further. The voters who ratified the Constitution approved a provision on the ratification ballot for "a ***bicameral*** (2 houses) legislature." *State ex rel. Cashmore v. Anderson*, 160 Mont. 175, 179, 500 P.2d 921, 924 (1972) (emphasis added). In voting for a bicameral legislature, the electorate understood it would have two branches – a house and a senate. NEW OXFORD AMERICAN DICTIONARY (2001 ed.), p.161 ("bicameral" means "having two branches or chambers"); AMERICAN HERITAGE DICTIONARY (1982 ed.), p. 177 (defining "bicameral" as "composed of two legislative chambers or branches").[3]

The State, purportedly citing *Wheat,* contends otherwise. (State's Brf, p. 13, (describing the Commission as "an 'independent and autonomous' branch of the Legislature")). The Montana Supreme Court, however, described the Commission as a "separate body," and "an independent, autonomous entity." *Wheat*, ¶¶ 20, 23. The Court never referred to the Commission as a "branch" of the Legislature.

Creation of the Districting Commission in 1972 did not usher in an era of tricameralism in Montana. Section 2-3-102(1)(a), MCA, the legislative-branch exception to the Right of Participation, therefore applies only to the House and the Senate, not the Commission.

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[3] Phraseology used by courts around the nation also leads to the unremarkable conclusion that bicameral legislatures have two branches. See, *e.g.*, *Gordon v. New York Stock Exchange*, 422 U.S. 659, 681 (1975) (discussing SEC's duty to file reports "with both branches of Congress"); *Peterson v. Commissioner of Revenu*e, 825 N.E.2d 1029, 1039 (Mass. 2005) ("both branches of the Legislature" voted for a particular bill); *Forum For Equality v. City of New Orleans*, 881 So.2d 777, 786 (La.App.2004) (amendments to joint resolutions can be made prior to "both branches of the legislature" adopting them); *Collier v. Poe*, 732 S.W.2d 332, 335 (Tex.Cr.App.1987) (noting the large number of attorneys in "both branches of the Legislature"); *Matter of Benoit,* 487 A.2d 1158, 1171 (Me. 1985) (removal of Maine judges requires approval of "both branches of the Legislature.")

B. ARTICLE II, § 8, PRECLUDED APPROVAL OF AMENDMENTS THE COMMISSION FIRST PROPOSED ON FEBRUARY 12 BECAUSE THE COMMISSION IMPOSED A FEBRUARY 11 DEADLINE FOR RESPONES TO PROPOSED AMENDMENTS

1. The Commission's "General Notice" to the Public That It Might Change the Redistricting Plan Did Not Satisfy § 2-3-111, MCA

All agencies are required to "afford[ ] 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), MCA[4]. A "reasonable opportunity" requires "sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Bryan*, ¶43, quoting *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C.Cir.1988). The Commission violated this statute because it did not give notice of the proposal to reassign Sen. Ripley and Sen. Hamlett to SD-10 and SD-15, respectively. (Ex 36, p.105.)

The State offers no analysis of § 2-3-111, MCA, and does not even cite the statute in its brief. Nor does it explain how Plaintiffs could have submitted data, views, or arguments regarding the holdover amendments the Commission first presented to the public on February 12 in light of the Commission imposing a deadline of February 11 for such submissions. (Ex. 33.)

The State claims that the agenda for February 12 gave "general notice" of the Commission's intent to "discuss and revise the Tentative Commission Plan." (State's Brf., p.14). A redistricting commission's agenda stating that a redistricting plan will be discussed at the next meeting does not "provide sufficient factual detail and rationale" that would have "permit[ted] interested parties to comment meaningfully" on the proposal to reassign Sen. Ripley to SD-10 and Sen. Hamlett to SD-15. *Bryan*, ¶43; *id.*, ¶ 40 (Article II, § 8, was intended to require notice whenever an agency contemplates taking a "*particular* administrative action") (emphasis added).[5]

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[4] The State does not dispute that holdover assignments are of significant interest to the public.

[5] Nor did the "general notice" provided by the Commission's agenda, (State's Brf., p.14), satisfy the requirement that "*specific* notice" of matters be included in agendas. § 2-3-103(1)(a), MCA (emphasis added).

2. Publishing a Letter From Private Individuals Did Not Satisfy the Commission's Obligations to the Public Under § 2-3-111, MCA

The State argues that the public had "specific notice" of the Commission's intent to reassign Sen. Ripley to SD-10 and Sen. Hamlett to SD-15 because it published the Cook Letter as well as letters written by local officials back in October 2012 requesting that district boundaries be redrawn to accommodate Sen. Jones. (State's Brf, pp. 14-15.) There are three reasons why these letters did not provide Plaintiffs with the "reasonable opportunity" required by § 2-3-111, MCA.

First, comments from the public did not indicate what the Commission would actually consider. On the contrary, the Commission as a whole did not consider a comment from the public unless at least one Commissioner fashioned it into an amendment, as Chairman Regnier noted:

> 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, p.87 (emphasis added); see also Ex 1, p.2 ("if the commission wishes to use a publicly submitted plan as one of the several upon which it will seek public comment in a series of hearings, the plan must be offered for consideration by at least one member of the commission").) This explains the State's equivocation. (State's Brf., p.15 ("Those letters specifically informed the public of the Llew Jones concerns, and that the Commission *might* act to address those concerns") (emphasis added).) Because no Commissioner publicly proposed a holdover amendment before February 12, the public was entitled to assume none would be considered during the hearing, particularly since the Commission promised that it would post amendments online, (Ex 33), and did in fact post several proposed House boundary amendments between February 2 and February 10 that were considered on February 12. (Ex. 37 [Stipulated Fact # 17].)

The October 2012 letters the State cites illustrate the weakness of its argument. Although a number of local officials pleaded for redrawn boundaries better suited to Sen. Jones' political needs, no individual Commissioner fashioned their request into an amendment and, consequently, the full

Commission never discussed the request at a meeting.[6]

Second, even if Plaintiffs could have guessed that these letters would lead to consideration by the full Commission of the "Llew Jones situation," they could not have known which reassignments the Commission would consider. The October 2012 letters were written before the Commission initially assigned holdover senators in November 2012, (Ex 5, p.15), and therefore were not a guide as to how the Commission might reassign them. The Cook Letter was not any more helpful. It suggested opening SD-9 for Sen. Jones by reassigning Sen. Ripley to Sen. Lewis' seat. (Ex 15.) This request was confusing to Commissioners because Sen. Lewis' district had been "fractured into five or six pieces." (Ex 34, pp. 69-70.) Likewise, Plaintiffs could not have predicted from reviewing the Cook Letter how the Commission would reshuffle holdover senators – something that could have been done in a "myriad – perhaps unlimited" number of ways. (State's Brf., p.15.)

Third, the State does not know when the Commission actually posted the Cook Letter online and acknowledges that it could have been as late as February 11, (Ex. 37 [Stipulated Fact # 6]), the deadline for submission of public comments for the Commission's final hearing on February 12. Thus, even if the Cook Letter had shown the public how the Commission would open SD-9, or that the Commission would consider opening SD-9 at all, it might not have been posted in time to give the public any meaningful notice.

The Cook Letter gave no indication whether any reassignment of holdover senators would involve Plaintiffs' district, SD-15, or whether the Commission would consider any holdover reassignment at all. Contrary to the State's argument, publishing the Cook Letter did not provide "specific notice" -- or any notice -- that the Commission would consider the Jones Amendment on February 12.

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[6] See minutes for Commission meeting on October 25, 2012, available on the Commission's website at http://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Minutes/October%202012/DACOCT25.pdf

3. Salvaging Sen. Jones' Political Career Was Not An Emergency Entitling the Commission to Disregard Its Notice Obligations to the Public

None of the excuses the State offers for the Commission's failure to publish its proposed holdover amendments are adequate. Agencies are excused from complying with § 2-3-111, MCA, if they are "deal[ing] with an emergency situation affecting the public health, welfare, or safety." § 2-3-112, MCA. Plaintiffs take it as read that Sen. Jones is a fount of collegiality and bipartisanship. (State's Brf., p.9; Ex. 15.) The possible termination of his political career in 2014, however, did not amount to an "emergency situation affecting the public health, welfare, or safety." § 2-3-112, MCA.

The State offers several other excuses for failing to give the public notice of its proposed holdover amendments. These excuses are neither within the exceptions contained in § 2-3-112, MCA,[7] nor supported by the record.

For example, the State describes as "unrealistic" the posting of holdover amendments in advance because "there are myriad -- perhaps unlimited – ways the Commission could have addressed the Llew Jones situation." (State's Brf., p.15.) While there were myriad ways Commissioners *could have* addressed the Llew Jones situation, they *actually* proposed only two: (1) Commissioner Bennion's proposal on February 1 to reassign Sen. Ripley and Sen. Hamlett to SD-10 and SD-12, respectively (Exs. 16, 18), and (2) Commissioner Lamson's proposal on February 10 to reassign them to SD-10 and SD-15. (Ex. 30.)[8] Posting those two proposed holdover reassignments was not unrealistic.

The force of the State's argument is further weakened by examining the Commissioners' proposed House boundary amendments. While there were "myriad ways" in which Commissioners could have proposed to redraw the boundaries for any of the 100 House districts, they actually

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[7] Notice is also unnecessary for meetings involving ministerial acts as well as discussions involving litigation in which the agency is a party. § 2-3-112(2) &(3), MCA. The State has not argued that either of these exceptions apply to this case.

[8] Though Commissioner Lamson suggested this proposal to Chairman Regnier on February 10, (Ex. 30), Chairman Regnier was the commissioner who actually moved for that reassignment during the hearing on February 12. (Ex 23, pp. 7, 9.)

proposed only ten boundary amendments and posted them several days in advance along with precise maps detailing the proposed changes. (Ex. 37 [Stipulated Fact #17].)[9] They could have done so with the two proposed holdover amendments as well.

The State also complains that, because "ripple effects" arise from reassigning holdovers, "[r]equiring the Commission to give specific and detailed notice of all of those potential 'ripple effects' would be impracticable." (State's Brf., p.15.) The sole ripple effect of Commissioner Bennion's proposal to reassign Sen. Ripley from SD-9 to SD-10 was a reassignment of Sen. Hamlett from SD-10 to SD-12. (Exs. 16, 18.) The sole ripple effect of Commissioner Lamson's proposal to reassign Sen. Ripley from SD-9 to SD-10 was a reassignment of Sen. Hamlett from SD-10 to SD-15. (Ex. 30.) Giving notice of these two ripple effects would not have been impracticable.

The State also argues that "[t]o demand more specificity than a general statement of what could be discussed or modified would result in a never-ending cycle of 'final' meetings until nothing more is accomplished - surely an absurd and unworkable scenario…" (State's Brf., p. 15.) This conclusory statement is not supported by the record. For example, Commissioners proposed specific, detailed amendments to redraw various House districts and posted them online between February 2 and February 10. (Ex. 37 [Stipulated Fact # 17].) They discussed these amendments on February 12, then voted on them during the same meeting. (Ex. 23.) Posting these specific, detailed boundary proposals did not generate a "never-ending cycle of 'final' meetings" or other "absurd and unworkable scenarios." Posting two holdover proposals would not have done so, either.

The State also complains about the "tight deadline the Commission was working under" when deciding how to reassign Sen. Ripley out of SD-9. (State's Brf, p.15.) The Commission, however, posted Sen. Ripley's initial assignment to SD-9 online back on December 12, 2012. (Ex.7; Ex. 37 [Stipulated Fact #4].) Sen. Jones' enthusiasts waited seven weeks before submitting the Cook Letter to the Commission. (Ex 15.) Commissioners had no obligation to move heaven and earth in order to accommodate this late request, and were certainly not authorized to do so by violating

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[9] See also http://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Meeting-Documents/2013-Meeting/Amendments/a54/a54_JB_dec27-map1.pdf

Plaintiffs' constitutional and statutory rights to reasonable notice.

Finally, the State derides the notion of a "perfunctory last meeting" in which "the Commission could not act on a suggestions [*sic*] proposed by the public at that meeting." (State's Brf., p.16.) It echoes Chairman Regnier, who asserted that the Commission had authority to alter the plan based upon new ideas presented at the final meeting, (Ex 35, p.87), and Commissioner Lamson, who declared that "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.)

With all due respect, the State, Chairman Regnier and Commissioner Lamson are simply wrong. A meeting subject to the Constitution's Right of Participation is not a freewheeling brainstorming session in which new proposals of significant interest to the public can spring up and then be enacted moments later. Instead, when a new rule is proposed, an agency must "afford[ ] 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), MCA. The preparation and submission of data, views, and arguments on almost any significant issue, such as the effects of a holdover reassignment, cannot be done on the fly. Commissioner Bennion needed at least a day to prepare the "fact sheet" he used to counter Commissioner Lamson's proposal to reassign Sen. Hamlett to SD-15. (Ex. 18; Ex 34, p.98.) Plaintiffs deserved the same opportunity to marshal their evidence and had several arguments, supported by historical data, that they would have presented had proper notice been given. (Pltfs' Opening Brf., p.17.)

If, during an agency meeting, someone has an epiphany on an issue of significant interest to the public that merits further consideration, the agency can place it on the agenda for a subsequent meeting. 51 Mont. Op. No.12 Atty. Gen. at 10-11 (2005). This opinion was sound and sensible when Chief Justice Mike McGrath articulated it as Attorney General in 2005. It still is. Had the Commission followed it, no Right of Participation violation would have arisen.

The Commission's failure to post proposed holdover amendments was not the result of notice being "unrealistic" or "impractical." Rather, the Commission believed that notice of holdover assignments was simply not important. As one staff member told Commissioner Bennion, "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.) Moving somebody over to SD-15, however, was very important to Plaintiffs, who were entitled to notice that the Commission was proposing changes that would dramatically affect their senate representation. They didn't get notice. The Commission's approval of the Jones Amendment is therefore void.

C. PLAINTIFFS' RIGHT-TO-KNOW CLAIM UNDER ARTICLE II, § 9, IS TIMELY BECAUSE IT RELATES BACK TO THE ORIGINAL COMPLAINT

The State incorrectly argues that Plaintiffs' claim under the Right to Know provision in Article II, § 9, of the Montana Constitution is untimely. (State's Brf., pp.16-17.) An amended complaint relates back to the date of filing of the original complaint if the amendment "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading." Mt.R. Civ. P. 15(c). The relation-back rule is rooted "in the equitable notion that dispositive decisions should be based on the merits rather than technicalities." *Citizens Awareness Network v. Mont. Bd. of Environmental Rev.*, 2010 MT 10, ¶ 21, 355 Mont. 60, 227 P.3d 583 (amended affidavit supporting challenge to air quality permit related back to original affidavit even though filed over 30 days after challenge because both affidavits concerned same permit). Thus, "the policy of Rule 15(c), M.R. Civ. P., is generous toward allowing amendments" and amendments that change "only the legal theory of the action will relate back." *Id.*, ¶ 22.

Plaintiffs timely filed their original complaint containing seven causes of action on March 14, 2013, thirty days after the Commission approved the Jones Amendment and filed its plan with the Secretary of State on February 12, 2013. Their original complaint is identical to their amended one except that the latter includes an eighth cause of action under Article II, § 9. This new claim arises out of the same conduct, transaction or occurrence set out in Plaintiffs' original complaint: the Commission's approval of the Jones Amendment. In fact, the factual allegations for the new claim are identical to those Plaintiffs included in the original complaint. (Compare Orig. Comp. ¶¶ 78-79 with Amd. Comp., ¶¶ 163-64.) Adding Plaintiffs' Eighth Cause of Action did nothing more than change their legal theory. This change therefore relates back to the filing of their original complaint.

D THE STATE OFFERS NO VALID JUSTIFICATION FOR COMMISSIONERS' PRIVATE DELIBERATIONS MADE IN VIOLATION OF ARTICLE II, § 9.

1. The Statutory Definition of "Meeting" the State Relies Upon is Trumped by the Constitution's Prohibition Against Private Deliberations by Agencies

As shown in Plaintiffs' opening brief, all five commissioners engaged in extensive private deliberations for over ten days as to how to open SD-9 for Sen. Jones. (Pltfs' Opening Brf., p.10.) The State does not dispute the existence of these communications or that they constituted "deliberations" under Article II, § 9. Instead, it attempts to sidestep the issue by contending that no "meeting" occurred under § 2-3-202, MCA, because commissioners never discussed the Jones Amendment in groups of three or more. (State's Brf., p.17.)

Constitutions, however, trump statutes. Unlike the Right of Participation in Article II, § 8, the Right to Know in Article II, § 9 is " 'self-executing' – that is, legislation is not required to give it effect." *Bozeman Daily Chronicle v. Bozeman Police Dept.*, 260 Mont. 218, 231, 859 P.2d 435, 443 (1993); *In re Lacy*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989) ("[t]he clear language contained within Article II, Section 9, indicates that there was no intent on the part of the drafters to require any legislative action in order to effectuate its terms"). Thus, "[w]hile the legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the protections found within the Constitution." *In re Lacy*, 239 Mont. at 325, 780 P.2d at 188.

Article II, § 9, repudiates Otto von Bismark's view of government transparency. Whether or not laws are like sausages, delegates to the Constitutional Convention emphatically believed Montanans should have a constitutional right to see them being made:

> The committee intends by this provision that this deliberation and resolution of all public matters must be subject to public scrutiny. It is urged that this is especially the case in a democratic society wherein the resolution of increasingly complex questions leads to the establishment of a complex and bureaucratic system of administrative agencies. The test of a democratic society is to establish full citizen access in the face of this challenge.

Montana Constitutional Convention, Vol. II at 631. Accordingly, the Montana Supreme Court often looks directly to the broad wording of Article II, § 9, rather than more narrowly drafted statutes

when granting relief to Montanans seeking government transparency. For example, the Court has interpreted the term "documents" in Article II, § 9, "much more broadly" than the Legislature defined "public writings" in § 2-6-101(2), MCA. *Bryan* ¶ 35, citing *Becky v. Butte-Silver Bow Sch. Dist*., 274 Mont. 131, 137-38, 906 P.2d 193, 196-97 (1995). Thus, the Constitution's Right to Know provision is not limited to examining "public writings" as defined by statute but rather includes the broader right of examining "documents." Mont. Const., art. II, § 9.

Likewise, the Constitution's Right to Know provision is not limited to observing "meetings" as defined by statute but rather includes the broader right of observing "deliberations." Mont. Const., art. II, § 9. All five commissioners deliberated extensively for ten days over how best to open SD-9 for Sen. Jones. (Pltfs' Opening Brf., p 10.) The Montana Constitution required Commissioners to deliberate on this issue in public, but they did not. The public never knew the pros and cons for the amendments discussed during these deliberations. Indeed, the public never knew these deliberations were occurring at all. The Commission's resulting approval of the Jones Amendment should therefore be declared void.

2. The Excuses For Not Permitting the Public to Observe Deliberations Regarding Sen. Jones Lack Merit

The State complains about opening deliberations to the public because it would be "unworkable and unnecessarily burdensome to prohibit two members from discussing redistricting matters outside of public meetings." (State's Brf. p. 17). Its concerns are not well founded. The rule against serial one-on-one meetings, referred to by some courts as the "constructive-quorum rule,"[10] or the "walking-quorum rule,"[11] does not prohibit most one-on-one communications between agency members. Rather, as suggested by its various names, the rule applies only to serial, one-to-one communications involving a quorum of agency members deliberating upon a subject within the

[10] See, *e.g.*, *Booth Newspapers, Inc. v. Wyoming City Council*, 425 N.W.2d 695, 471 (Mich.App.1988).

[11] See, *e.g.*, *Esperanza Peace & Justice Cntr. v. City of San Antonio*, 316 F.Supp.2d 433, 474 (W.D.Tex 2001), citing *Brown v. East Baton Rouge Sch. Bd*., 405 So.2d 1148, 1156 (La.App.1981).

agency's jurisdiction. See, *e.g.*, *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 "cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body").

While most states have sunshine statutes, only two state constitutions have right-to-know provisions similar to Montana's. Snyder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L.REV. 297, 299 (2005). Delegates to the Constitutional Convention presumably enshrined a Right to Know in the Montana Constitution because they intended Montana's government to be among the most transparent in the nation. See, *e.g.*, *Associated Press v. Bd. of Public Educ.*, 246 Mont. 386, 391, 804 P.2d 376, 379 (1991) (rejecting use of out-of-state authority to restrict Montana's Right to Know provision because Article II, § 9, is "unique, clear and unequivocal"). If Montana courts reject the constructive-quorum rule that most other courts follow, Montana's ***constitutional*** right to observe government deliberations will have less force than analogous ***statutory*** rights in most states. This is certainly not what the delegates intended.

The State claims *Stockton Newspapers v. Members of Redevelopment Agency*, 214 Cal.Rptr. 561 (Cal.App.1985), is distinguishable because agency communications were undertaken in that case "for the commonly agreed purpose of obtaining a collective commitment or promise by a majority of [the governing] body concerning public business." (State's Brf., pp.18-19, quoting *Stockton Newspapers,* 214 Cal.Rptr. at 562). *Stockton Newspapers* is on point, however, because seeking a collective commitment regarding Sen. Jones was exactly what Commissioners did in this case. For example, Chairman Regnier was "always striving to get as much consensus as possible," including with regard to the Jones situation. (Ex 35, pp. 41-42; see also Ex 36, p.79 (Chairman Regnier "tr[ied] to find out how we could reach some consensus and move forward").) On February 11, 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 Sen. Hamlett should be reassigned to SD-12. (Ex 34, pp.96-97.) These were deliberations in which a majority of Commissioners sought to reach a collective agreement.

The State also argues that *Stockton Newspapers* involved "government bodies intentionally manipulating the system to avoid public participation and accountability." (State's Brf., p.19). The *Stockton Newspapers* court never discussed the good faith of agency members in that case and, in any event, an agency's good faith is not relevant to an inquiry concerning Article II, § 9. *Bryan*, ¶ 53 (holding that school district's "extraordinary measures to reach a thoughtful, albeit difficult, determination" and lack of "devious intent" did not excuse Right to Know violation); see also *Blackford v. Sch. Bd. of Orange County*, 375 So.2d 578, 580 (Fla.App.1979) (agencies "are not supposed to conduct their business in secret even though it may all be for the best at the end of the day and notwithstanding that the motives are as pure as driven snow"). Put more simply, the Montana Constitution's Right to Know does not include a *mens rea* element.

Finally, the State argues that there was no harm and no foul because Commissioners did not make any "collective <u>*decisions*</u> prior to their formal meetings and specifically did not decide in advance what if any steps to take concerning holdover senators and Llew Jones" and "the Commission's ultimate <u>*decision*</u> is something that occur[ed] during the open public meeting." (State's Brf., p.19) (emphasis added). The Right to Know entitles Montanans to observe <u>*deliberations*</u>, however, not just <u>*decisions*</u>. *Associated Press v. Crofts*, 2004 MT 120, ¶31, 321 Mont. 193, 89 P.3d 971 ("our constitution mandates that the deliberations of public bodies be open, which is more than a simple requirement that only the final voting be done in public"). To paraphrase Bismark, Montanans have a constitutional right to see both their laws and their sausages as they are being made and are not limited to only observing the end product.

E SALVAGING SEN. JONES' POLITICAL CAREER IS NOT A COMPELLING INTEREST UNDER ARTICLE II, § 13, THAT JUSTIFIES DISENFRANCHISING 6,000 VOTERS

The State does not dispute that an infringement of a fundamental right guaranteed by the Montana Constitution, such as the Right of Suffrage under Article II, § 13, must be narrowly tailored to achieve a compelling state interest. *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165,

1174 (1996). Nor does it dispute that the Commission's enactment of the Jones Amendment will result in a net increase of 6,000 voters being disenfranchised during the 2014 election for state senate candidates. It simply argues that "attempting to minimize the population affected by holdover senators is one of the many goals the Commission may legitimately pursue - but it must balance that goal with all of its other laudable goals, many of which often conflict." (State's Brf., p.22.)

The Commission, however, was not balancing ***many*** laudable goals such as compactness or population deviation when it moved Sen. Ripley to SD-10 and Sen. Hamlett to SD-15. Those goals had already been met by the plan that existed on the morning of February 12. The Commission enacted the Jones Amendment later that morning to advance ***one*** goal: the salvaging of Sen. Jones' political career. The State does not even attempt to argue that saving one person's political career is a compelling state interest justifying the disenfranchisement of 6,000 voters.

How future commissions should balance the obligation in Article II, § 13, to minimize disenfranchisement with other constitutional obligations, such as the requirement in Article V, § 14(1) for district compactness, is an issue for future commissions and, potentially, future courts. The State's abstract balancing concern, however, is not an issue arising in ***this*** case.

F ARTICLE V, §14(4) PREVENTS THE COMMISSION FROM MAKING REVISIONS TO THE PLAN OUTSIDE THE SCOPE OF THE LEGISLATURE'S RECOMMENDATIONS

The State argues that the Constitution allows the Commission to submit a "tentative" plan to the Legislature and, after receiving the Legislature's recommendations, make wholesale changes to the Plan upon which the Legislature does not get to comment. (State's Brf., pp.24-25, see also Ex. 35, pp. 69-70 (assertion by Chairman Regnier that Commission could reassign all 25 holdover senators after presenting plan to Legislature)). The Constitution, however, requires the Commission to submit "its" plan to the Legislature, not a "tentative" plan. Mont. Const., art. V, § 14(4). After the plan is returned by the Legislature, any subsequent changes by the Commission must be within the scope of the Legislature's recommendations. Any other rule would allow the Commission to do what it did in this case: file a plan with the Secretary of State containing elements that had never been submitted to the Legislature for its recommendations.

The State complains that implementing changes to the plan in response to recommendations by the Legislature may result in "ripple effects." The issue of whether a particular ripple effect necessarily arises from a particular recommendation by the Legislature is not relevant to this case. The Jones Amendment was not a ripple effect arising from the Commission attempting to implement a recommendation from the Legislature. Rather, it was an entirely new rule suggested by dissident members of the Legislature who had not obtained the support of a majority of their colleagues.

The State's argument that the Commission would be restrained from considering new suggestions by dissident legislators or members of the public lacks merit. The public had had over a year to submit its own redistricting ideas to the Commission at the time the Legislature made its recommendations in early February 2013. While the Commission is certainly entitled to consider public comments supporting or opposing the Legislature's recommendations, the Constitution does not permit implementation of new changes that exceed the scope of the Legislature's recommendations after those recommendations have been submitted.

G PLAINTIFFS WERE NOT REQUIRED TO NAME SEN. JONES AND 13,000 VOTERS IN SD-9 AS PARTIES TO THIS ACTION

The State claims Plaintiffs are not entitled to declaratory relief because they have not named as defendants Sen. Jones and 13,000 other voters in SD-9. (State's Brf., p.29.) The State offers no suggestion as to how this could be accomplished or how the case could subsequently be litigated. *Cf. City of Philadelphia v. Commonwealth*, 838 A.2d 566, 582 (Pa. 2003) (if Pennsylvania Declaratory Judgment Act was "applied in an overly literal manner in the context of constitutional challenges to legislative enactments containing a wide range of topics that potentially affect many classes of citizens, institutions, organizations, and corporations, such lawsuits could sweep in hundreds of parties and render the litigation unmanageable").

In any event, whatever cognizable interest 13,000 residents of SD-9 might have in this litigation is limited to their capacity as voters. Sen. Jones' interest in this matter is no greater than that of any other SD-9 resident because he has no greater claim to a senate seat after 2014 than any

other Montana citizen. And because Secretary of State Linda McCulloch, the state's chief election official, is a named party and is vigorously opposing Plaintiffs, the interests of SD-9 voters are adequately represented. *Cf. Martinez v. Clark County*, 846 F.Supp.2d 1131, 1149 (D.Nev. 2012) (atheist seeking declaration that law requiring church membership for license to perform marriages was unconstitutional did not have to join all license holders because government adequately represented their interests); *Town of Ruston v. City of Tacoma*, 951 P.2d 805, 809 (Wash.App.1998) (residents of town and city were not necessary parties in town's declaratory judgment action against city to resolve boundary dispute because each municipality represented interests of its citizens).

H PLAINTIFFS STIPULATE TO DISMISSAL OF THEIR OTHER CLAIMS

The State seeks summary judgment as to the Fourth, Fifth, Sixth, and Seventh Causes of Action in Plaintiff's First Amended Complaint. These involve claims arising under the Montana Constitution's guarantee of equal protection, § 5-1-115(3)(a), MCA, and § 5-1-115(3)(d), MCA. Plaintiffs hereby stipulate to the dismissal of those causes of action.

CONCLUSION

As to Plaintiffs' other causes of action, there is no dispute as to any material fact and Plaintiffs are entitled to summary judgment on each of them. For all of the foregoing reasons, Plaintiffs therefore respectfully request this Court grant their motion for summary judgment and deny the State's cross-motion for summary judgment.

DATED: September 27, 2013

Respectfully submitted,

By: _____

Matthew G. Monforton,
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 27th day of September, 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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I also transmitted an electronic copy of this brief to the following email addresses on this day:

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