AUSTIN KNUDSEN
Montana Attorney General
DEREK J. OESTREICHER
Deputy Attorney General
AISLINN W. BROWN
Assistant Attorney General
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
derek.oestreicher@mt.gov
aislinn.brown@mt.gov

Attorneys for Defendant

ORIGINAL

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

THE ASSOCIATED PRESS, THE BILLINGS GAZETTE, THE BOZEMAN DAILY CHRONICLE, THE HELENA INDEPENDENT RECORD, THE MISSOULIAN, THE MONTANA STANDARD, MONTANA FREE PRESS, THE RAVALLI REPUBLIC, LEE ENTERPRISES, HAGADONE MEDIA MONTANA, THE MONTANA BROADCASTERS ASSOCIATION, and THE MONTANA NEWSPAPER ASSOCIATION, Petitioners, vs. BARRY USHER in his capacity as Chair of the Montana House of Representatives, Judiciary Committee, Respondent.	Cause No. ADV-2021-124 Hon. Mike Menahan **RESPONDENT'S BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO MONT. R. CIV. P. 12(b)(6)**

The Petition in this case should be dismissed pursuant to Montana Rule of Civil Procedure 12(b)(6) because, by Petitioners' own admission, no quorum was present at the alleged January 21, 2021 discussion and, thus, there was no meeting or deliberation in violation of Montana's open meeting laws. Assuming *arguendo* that this Court determines a "meeting" occurred, which Respondent Representative Barry Usher does not concede, any alleged decisions are protected by legislative immunity. Petitioners' requested relief of reversal of legislative decisions and an award of attorney fees fails to state a claim.

BACKGROUND

Petitioners claim Representative Usher, in his capacity as Chair of the Montana House of Representatives Judiciary Committee (Committee), violated their constitutional right to know when he had a private discussion with eight other members of the nineteen-member Committee.[1] (Petition, ¶¶ 10, 12; Declaration of Mara Silvers (Silvers Decl., ¶ 4.) Attached to the petition is a declaration of Mara Silvers, a news reporter for Montana Free Press. According to Ms. Silvers, Representative Usher told her there would be no quorum present and, therefore, the discussion would not be open to the public. (Silvers Decl., ¶ 3.) Petitioners claim this violated Article II, Section 9 and Article V, Section 10 of the Montana Constitution.

[1] The Petition states these alleged events took place on January 12, 2021, but the Silvers Declaration states they occurred on January 21, 2021. To Respondent's best knowledge, Petitioners' allegations refer to alleged events on January 21, 2021.

STANDARD OF REVIEW

A court should dismiss a case under Rule 12(b)(6) when "it appears beyond doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 391 Mont. 156, 415 P.3d 486 (citation and internal quotation marks omitted). For purposes of review, the complaint is construed in the light most favorable to the plaintiff, and the court presumes the fact allegations are true. *Cooper v. Glaser*, 2010 MT 55, ¶ 6, 355 Mont. 342, 228 P.3d 443. However, a court has no obligation to take as true legal conclusions that have no factual basis. *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6.

ARGUMENT

Petitioners' acknowledgement that no quorum was present at the alleged January 21, 2021 discussion is fatal to their case because it means the alleged discussion was not a deliberation or meeting of a public body subject to Article II, Section 9 or Article X, Section 10 of the Montana Constitution. If Petitioners are claiming a constructive quorum existed, that argument contradicts plain statutory language. Finally, even if Petitioners were able to state a claim upon which relief may be granted, their requested relief would violate legislative immunity.

I. Petitioners fail to state a claim for a violation of their constitutional right to know because they admit no quorum was present.

A. Petitioners fail to state a claim under Article II, Section 9 of the Montana Constitution.

Article II, Section 9 of the Montana Constitution provides: "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." Courts analyzing a claimed violation of this provision apply a three-pronged test, reviewing whether: (1) "the subject entity is a public body or agency of state government or a state government subdivision;" (2) "the proceeding or decision at issue was a deliberation of that body or agency;" and (3) "the disputed deliberation was nonetheless privileged from disclosure on the grounds of individual privacy or other recognized exception to the right to know." *Raap v. Bd. of Trs.*, 2018 MT 58, ¶ 9, 391 Mont. 12, 414 P.3d 788 (citations omitted). Petitioners fail the first two prongs of this test because they cannot show that the alleged January 21, 2021 discussion was a "deliberation" of a "public body or agency" subject to Montana's open meeting laws.

"As referenced in Article II, Section 9, the term 'deliberations of . . . public bodies or agencies' includes a 'meeting'" as defined in Montana's open meeting statutes. *Id.* ¶ 8 (citing Mont. Code Ann. § 2-3-202); *Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, ¶ 13, 373 Mont. 212, 316 P.3d 848 (citation omitted); *see also Raap*, ¶ 9 (equating "meeting" under Mont. Code Ann. § 2-3-202 with "deliberation" under Mont. Const. art. II, § 9). Montana Code Annotated § 2-3-202 defines "meeting" as "the convening of a *quorum* of the constituent membership of" a public body, "whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the [public body] has supervision, control, jurisdiction, or advisory power." (Emphasis added.) Pursuant to Rule H30-30 of the Rules of the Montana House of

Representatives (2021), "[a] quorum of a committee is a majority of the members of the committee."[2]

Petitioners acknowledge there was "no quorum" of the House Judiciary Committee present at the alleged January 21, 2021 discussion. (Petition, ¶ 10.) Additionally, Ms. Silvers' declaration states that the Judiciary Committee is composed of 19 members; 10 members would constitute a quorum; and only nine members were present on January 21, 2021. (Silvers Decl., ¶ 4.) Therefore, by Petitioners' own admission, the alleged January 21, 2021 events did not constitute a "meeting" as defined by Mont. Code Ann. § 2-3-202, and there was no deliberation of a public body under Article II, Section 9. *Accord Allen v. Lakeside Neighborhood Planning Comm.*, 2013 MT 237, ¶ 35, 371 Mont. 310, 308 P.3d 956 (holding no public meeting occurred via Yahoo Group website used by neighborhood planning committee where record contained undisputed evidence that a quorum did not and could not convene).

Petitioners attempt to avoid this fatal flaw by claiming that "any decisions made in the room" controlled the Committee votes on the bills because "a majority of that committee was involved in the closed session." (Petition, ¶ 10.) Not only is this statement mathematically and legally inaccurate, but it also directly contradicts Petitioners' acknowledgement that "no quorum" was present at the discussion. (Petition, ¶ 10; Silvers Decl., ¶ 3.)

---

[2] Available at https://leg.mt.gov/bills/2021/billpdf/HR0002.pdf (last accessed Mar. 8, 2021).

To the extent Petitioners are implying that the presence of a majority of the *Republican members* of the Committee constitutes a quorum, this is contrary to plain statutory and constitutional language and is unsupported by caselaw. Simply put, the Republican Party is not "a public body or agency of state government." Mont. Const. art. II, § 9. The statutory quorum requirement, as discussed above, requires a majority of the decision-making body itself (here the Committee) to be present for there to be a meeting, not a majority of a particular faction of the body. Mont. Code Ann. § 2-3-202; House Rule H30-30. Petitioners' argument would lead to the absurd result of a minority of Committee members constituting a quorum, contrary to the statutory language.

Because no quorum of a public body was present at the January 21, 2021 discussion, Petitioners fail to state a claim for a violation of Article II, Section 9.

B. Petitioners fail to state a claim under Article V, Section 10 of the Montana Constitution.

Petitioners fail to state a claim for a violation of their right to know under Article V, Section 10(3) of the Montana Constitution for the same reason their Article II, Section 9 claim fails: they admit there was no quorum present at the alleged January 21, 2021 discussion. Article V, Section 10(3) provides: "The sessions of the legislature and of the committee of the whole, *all committee meetings*, and all hearings shall be open to the public." (Emphasis added.) To constitute a "meeting," a quorum—or majority—of the committee must be present. Mont. Code Ann. § 2-3-202; House Rule H30-30. Because Petitioners acknowledge there was no quorum of the Committee present at the alleged

January 21, 2021 discussion, they do not allege facts demonstrating there was a "meeting," and therefore fail to state a claim for a violation of Article V, Section 10(3).

II. Petitioners cannot make an argument for a constructive quorum.

Because they cannot demonstrate a violation of the plain language of Montana's open meeting laws, Petitioners may be arguing that the alleged January 21, 2021 discussion comprised a constructive quorum of members of the House Judiciary Committee. However, as discussed in Section I, the Legislature was clear that a meeting or deliberation does not occur for the purposes of Montana's open meeting laws unless "a *quorum* of the constituent membership" of the public body convenes. Mont. Code Ann. § 2-3-202 (emphasis added). While Montana's open meeting statutes are liberally construed, the Montana Supreme Court has "decline[d] to formulate" restrictions where the statutory language does not provide them, cautioning that penalizing public officials "and the public bodies they serve by an unwarranted application of the statute[s] creates a difficult labyrinth for public servants and threatens to turn any Saturday night at the county rodeo into a board meeting that must be noticed." *Boulder Monitor*, ¶ 20 (holding presence of school board member in audience at public hearing of budget subcommittee did not create a quorum of full board).

To read Montana's open meeting laws as applying to discussions attended by less than a majority of the members of a legislative committee would directly contradict clear statutory language, and the Montana Supreme Court has explicitly rejected such a "constructive-quorum" theory. *See Willems v. State*, 2014 MT 82, 374 Mont. 343,

325 P.3d 1204. In *Willems*, the Montana Districting and Apportionment Commission (Commission) held a public meeting to submit its final redistricting plan, which included assigning two "holdover senators," who were elected under the old districting system, to a redrawn district to serve the remainder of their terms. *Id.* ¶ 6. A quorum of the Commission constituted three of the five members. *Id.* ¶ 23. Before the meeting, the commissioners talked one-on-one about how to address public requests related to the holdover senators. *Id.* ¶ 10. The plaintiffs claimed these discussions cumulatively violated their constitutional right to know. *Id.* ¶ 11. The court rejected this argument, declining to adopt a constructive-quorum theory, and holding that "the language of § 2-3-202, MCA, is plain and unambiguous, and that the definition of 'meeting' does not include 'serial one-on-one discussions.'" *Id.* ¶ 25. The court further noted that a constructive-quorum rule would prohibit legislators from meeting in the halls of the Capitol and discussing pending legislation. *Id.* The court ultimately concluded: "the Commissioners' one-on-one discussions prior to the February 12 meeting were not subject to [open meeting laws] because a majority of Commission members never 'convened' or 'deliberated' as a 'public body' outside of a public meeting." *Id.*

Willems controls here. A majority of the House Judiciary Committee never convened or deliberated outside of a public meeting. Thus, there was no violation of Montana's open meeting laws. This result is in line with decisions from other jurisdictions that, like Montana, "recognize that their open meeting laws do not apply when a quorum is not present." *Willems*, ¶ 23 (citing *Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 64 P.3d 1070, 1077–78 (2003) (declining to find that "back-to-

back briefings" of members of the City of Reno's Redevelopment Agency "created a constructive quorum or serial communication in violation of" Nevada's open meeting laws); *Dillman v. Trs. of Ind. Univ.*, 848 N.E.2d 348, 351 (Ind. Ct. App. 2006) (concluding that, although Indiana's Open Door Law must be liberally construed, the legislature specifically defined meeting as a gathering of a majority of the governing body, and without a majority present, no meeting occurs)).

Petitioners' argument, if adopted, would effectively change the definition of quorum from "a majority of the members of the committee," House Rule H30-30, to "a majority of the members of the majority party on the committee." Not only would this contradict plain statutory language, *see* Mont. Code Ann. § 2-3-202, -203, it also would lead to absurd results. For example, under Petitioners' theory, if ten members of a nineteen-member committee were from the same party, just six of those members discussing committee issues would constitute a constructive quorum, even though that is less than a third of the committee membership. Additionally, Petitioners' argument raises line-drawing questions, such as whether the existence of a constructive quorum is defeated by the presence of a member of the other party, or whether the members of the minority party on a committee can constitute a constructive quorum. This is precisely the "difficult labyrinth" the Montana Supreme Court has cautioned against. *Boulder Monitor*, ¶ 20.

Petitioners' constructive-quorum theory flies in the face of plain statutory language and has been squarely rejected by the Montana Supreme Court. Because Petitioners cannot state a claim upon which relief may be granted, their Petition must be dismissed. *See* Mont. R. Civ. P. 12(b)(6).

III. Petitioners' requested relief to set aside any decisions made during the January 21, 2021 discussion would violate legislative immunity.

Even if this Court does not dismiss the Petition for the above reasons, Petitioners' requested relief—"[t]hat the Court issue an order setting aside any decisions made in the illegally closed meeting"—cannot be granted against Representative Usher. As a threshold matter, Petitioners failed to allege that any decision was made during the alleged January 21, 2021 discussion. To the contrary, because a quorum of the House Judiciary Committee was not present at the discussion, it is not possible for those present to have acted upon pending legislation. *See* House Rule H30-30. Thus, Petitioners' requested relief is unavailable. Additionally, legislative actions are taken by the committee as a whole, and Petitioners' suit against one legislator cannot reverse actions taken by 8, 50, or 100 other elected officials. And finally, Petitioners' requested relief cannot be granted against Representative Usher without violating legislative immunity, regardless of whether a quorum was present.

Article III, Section 1 of the Montana Constitution provides: "The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others," except

as expressly directed or permitted by the constitution. While Article II, Section 9 and Article V, Section 10(3) require committee meetings to be open to the public, they do not permit the courts to roll back legislation. This is particularly true given that members of the Legislature are immune from suit for legislative acts under Montana Code Annotated § 2-9-111; Article V, Section 8, of the Montana Constitution; and common-law legislative immunity. Legislative immunity is a fundamental precept of government and protects the autonomy and integrity of the legislative process. It prevents Petitioners' requested relief against Representative Usher.

A. Representative Usher has statutory immunity from suit for legislative acts.

Article II, Section 18, of the Montana Constitution explicitly provides that immunity may be established when approved by two-thirds of each house of the Legislature. Pursuant to this provision, the Legislature enacted Montana Code Annotated § 2-9-111, providing immunity from suit for legislative acts or omissions. Specifically, § 2-9-111(2) provides: "A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff of the legislative body, engaged in legislative acts;" and § 2-9-111(3) provides: "Any member or staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with legislative acts of the legislative body." Legislative acts include "actions by a legislative body that result in creation of law or declaration of public policy." Mont. Code Ann. § 2-9-111(1).

A decision on pending legislation is, by definition, an action "by a legislative body that result[s] in creation of law or declaration of public policy." *Id.* § 2-9-111. Thus, to the extent Petitioners allege such decisions were made during the January 21, 2021 discussion (which, as discussed above, is impossible because there was no quorum present), those decisions would be legislative acts for which the Legislature and its members—including Representative Usher—have statutory immunity. *See Mont. Bd. of Pub. Educ. v. Admin. Code Comm.*, No. BDV-91-1072, 1992 Mont. Dist. LEXIS 204 (Mont. First Jud. Dist. Mar. 1, 1992) (dismissing Administrative Code Committee from action because State of Montana was more appropriate party).

While Petitioners may challenge the process by which decisions are reached, they cannot obtain their requested relief against Representative Usher, who is immune from suit for any legislative acts. The Legislature was constitutionally provided the power to grant immunity, and it would be a violation of the separation of powers for this Court to find otherwise. As a result, Petitioners' requested relief to void any decisions made during the alleged January 21, 2021 discussion cannot be granted against Representative Usher and must be dismissed.

B.. Representative Usher has constitutional immunity from suit for legislative actions.

In addition to the immunity granted by statute, immunity provided by the Montana Constitution prevents Petitioners' requested relief of reversing alleged legislative decisions in a suit naming an individual legislator. The speech and debate clause in Article V, Section 8 provides:

> A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.

The language "shall not be questioned in any other place" is identical to that of the United States Constitution. *Compare* art. V, § 8, Mont. Const., *with* U.S. Const. art. I, § 6, cl. 1; *see also Cooper*, ¶ 11 ("Article I, Section 6 of the United States Constitution is similar to Montana's legislative immunity provision."). Thus, federal cases are instructive when interpreting Montana's speech and debate clause. *See Cooper*, ¶¶ 11, 13 (relying on interpretations of federal law to hold Montana representative was entitled to constitutional immunity in defamation action for remarks he made on House floor).

The United States Supreme Court has held that the speech and debate clause applies to acts other than words spoken in debate:

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, *to things generally done in a session of the House by one of its members in relation to the business before it.*

Kilbourn v. Thompson, 103 U.S. 168, 204 (1881) (emphasis added); *see also Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 503 (1975) (holding legislators acting within "sphere of legitimate legislative activity" are protected); *United States v. Brewster*, 408 U.S. 501, 512 (1972) (holding clause "prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts"); *Powell v. McCormack*, 395 U.S. 486, 503 (1969) (holding

clause "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation"). Other states likewise have interpreted their similar speech and debate clauses broadly. *See Lincoln Party v. Gen. Assembly*, 682 A.2d 1326, 1333 (Pa. Commw. Ct. 1996) ("[T]he members, and their staff, of the General Assembly are protected from inquiries into those activities generally said or done in the performance of their official duties.") (citing Pa. Const. art. II, § 15); *Romer v. Colo. Gen. Assembly*, 810 P.2d 215, 225 (Colo. 1991) ("[T]he speech or debate clause protects individual legislators and the legislature as a whole from being named defendants in an action challenging the constitutionality of legislation.") (citing Colo. Const. art. V, § 16).

Petitioners claim that whatever decisions were made during the alleged January 21, 2021 discussion "controlled the Judiciary Committee votes on the bills." (Petition, ¶ 10.) Applying the reasoning expressed by the United States Supreme Court, "speech or debate" extends to "things generally done in a session" and includes voting. *Kilbourn*, 103 U.S. at 204. Thus, to the extent any vote was decided during the January 21, 2021 meeting—and again, Petitioners have failed to state a claim on that point—it would be protected as speech and debate. Revoking legislation would not be a proper redress for a violation of Petitioners' right to know in this case because it would violate Representative Usher's constitutional legislative immunity.

C. *Common law also prevents the Court from granting Petitioners' requested relief.*

A third type of immunity—common-law immunity—also prevents the relief Petitioners seek. *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980) ("We have . . . recognized that state legislators enjoy common-law immunity from liability for their legislative acts."). Common-law immunity from liability for legislative acts is similar in origin and rationale to that accorded congressmen under the speech and debate clause. *Id.* (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)). In fact, the Ninth Circuit has explicitly stated that "Montana legislators 'have an absolute common-law immunity against civil suit for their legislative acts.'" *Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 750 (9th Cir. 2003) (quoting *Chappell v. Robbins*, 73 F.3d 918, 920 (9th Cir. 1996)). "[T]his legislative immunity extends to suits for injunctive and declaratory relief, as well as to suits for damages." *Eugster v. Wash. State Bar Ass'n*, 2010 U.S. Dist. LEXIS 75514, at *33 (E.D. Wash. July 23, 2010) (citing *Supreme Court of Va.*, 446 U.S. at 731).

Here, Petitioners appear to contend that the January 21, 2021 discussion resulted in a decision on whether to pass legislation out of the committee. As such, Representative Usher is immune from liability for actions in his legislative capacity. This immunity bars Petitioners' claim for relief in the form of "setting aside any decisions made" during the alleged January 21, 2021 discussion.

IV. Petitioners cannot obtain attorney fees from the Legislature.

Article 8, Section 14 of the Montana Constitution provides, in pertinent part: "no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof." There is no statute providing for attorney fees against the Legislature. To the contrary, the Montana Supreme Court has made clear that the legislative immunity set forth in Montana Code Annotated § 2-9-111 means the Legislature and its members cannot be held liable for fees resulting from an action challenging legislative acts. *Finke v. State*, 2003 MT 48, ¶ 34, 314 Mont. 314, 65 P.3d 576 (citing Mont. Code Ann. § 2-9-111).

In *Finke*, several individuals and municipalities sued the State and named the Attorney General, the acting director of the Department of Labor and Industry, and several counties. They argued that Senate Bill No. 242, enacted in 2001, violated the Montana Constitution. *Finke*, ¶ 5. While the court concluded that the election provisions in the bill were unconstitutional, it denied the plaintiffs' requested attorney fees because the Legislature is immune from suit under Mont. Code Ann. § 2-9-111. *Id.* ¶ 34 (holding that Mont. Code Ann. § 2-9-111 "provides that the Legislature, as a governmental entity, is immune from suit for any legislative act or omission by its legislative body. There is, therefore, no avenue whereby attorneys' fees could be imposed against the State in this matter.").

Similarly, here, Petitioners cannot obtain attorney fees from Representative Usher because of alleged legislative acts. Petitioners' claim for attorney fees thus must be dismissed.

CONCLUSION

Petitioners admit on the face of their Petition that no quorum was present during the January 21, 2021 discussion. Therefore, they have failed to state a claim upon which relief may be based, and their Petition must be dismissed pursuant to Rule 12(b)(6). Even if they had otherwise stated a claim, Petitioners' requested relief of reversal of any legislative decision and for attorney fees against Representative Usher cannot be granted because he is entitled to legislative immunity.

DATED the 1st day of April, 2021.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
AISLINN W. BROWN
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document by email to the following address(es):

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
mike@meloylawfirm.com

Date: April 1, 2021

Rochell Standish
ROCHELL STANDISH