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IN THE 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.

ADV-2021-124

BRIEF IN OPPOSITION TO RESPONDENT'S RULE 12(B)(6) MOTION TO DISMISS

The Press Petitioners submit the following brief in opposition to the Rule 12(b)(6) Motion to Dismiss filed by Respondent Usher.

INTRODUCTION

Pursuant to Rule 12(b)(6), M.R.Civ.P., Respondent Usher seeks to have the Press Petitioners' action to enforce the public's right to observe government deliberations dismissed on the basis the Petition fails to state a claim upon which relief can be granted because no quorum of the entire House Judiciary Committee was present at the time he closed the meeting. In the alternative, Respondent argues that even if he unlawfully closed the meeting to the public, any decisions of the Committee would be entitled to legislative immunity. He also argues Petitioners are not entitled to the relief they request, including setting aside the decision and an award of attorney fees. As argued below, Respondent Usher's arguments are without merit and his motion should be denied.

STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6), M.R.Civ.P., all pleaded facts are admitted, the complaint's allegations are taken as true and the complaint is construed broadly and favorably towards the plaintiff. *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316; *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9,

306 Mont. 307, 32 P.3d 1250; *HKM Associates v. Northwest Pipe Fittings, Inc.*, 272 Mont. 187, 191, 900 P.2d 302, 304-05 (1995).

A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt the plaintiff can prove no set of facts in support of its claim entitling it to relief. *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 15, 337 Mont. 1, 155 P.3d 1247; *Plouffe*, ¶ 8. Additionally, a petition filed to enforce the public's right to know and to observe the deliberations of its government should be liberally construed in favor of the public's rights. *Raap v. Bd. of Trs.*, 2018 MT 58, ¶ 8, 391 Mont. 12, 414 P.3d 788.

ARGUMENT

I. Respondent Usher Violated the Public's Right to Observe Public Deliberations Under Article II, Section 9, Mont. Const.

The "sole purpose" of public bodies in this state is "to aid in the conduct of the peoples' business." *Raap*, ¶ 8 (quoting § 2-3-201, MCA). Indeed, the Legislature—the very public body on which Respondent was elected to serve on behalf of the people—has declared:

> that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

All "deliberations of public bodies" must "remain open to the public" unless an individual privacy right is implicated and it "clearly exceeds the merits of public disclosure." *Raap*, ¶ 8; Art. II, § 9, Mont. Const. It is worth noting that there is no "quorum" requirement contained in the plain text of Art. II, § 9, and the public's right "to observe the deliberations of all public bodies or agencies of state government and its subdivisions," is only limited by an overriding right of individual privacy, which undisputedly is not at issue in this case.

Respondent Usher argues that Petitioners' "fatal flaw" is that the term "deliberations" applies exclusively to "meetings" which is statutorily defined as a quorum of the constituent members. He argues that because he ensured sufficient members did not attend the meeting, admittedly in an effort to negate a quorum of the entire Committee, he is inoculated from any violation of Art. II, § 9. It is Respondent's reasoning that suffers from the fatal flaw. There is no such "quorum" limitation in the plain and unambiguous language of Art. II, § 9. The Montana Supreme Court has declared only that the term "deliberations" as referenced in Art., § 9 "***includes***" a "meeting as defined by § 2-3-202, MCA. *Raap*, ¶ 8 (emphasis added). Indeed, by its very definition, the term "includes" does not exclude unlisted items. *Lloyd v. Robinson*, 110 F. Supp. 540, 541 (D. Mont. 1952).

"[A] group of individuals organized for a governmental or public purpose" is included in the "common understanding of the phrase 'public or governmental body.'" *Common Cause v. Statutory Comm.*, 263 Mont. 324, 330, 868 P.2d 604, 608 (1994). There is no authority that the term "deliberations" of such public bodies is *limited* exclusively to meetings as that term is defined statutorily. Indeed, Respondent provides none. The "clear" and "unambiguous mandate" of Art. II, § 9, is controlling on the issue. *Raap*, ¶ 8. Unambiguous constitutional language must be given its plain, natural, and ordinary meaning. *Nelson v. City of Billings*, 2018 MT 36, ¶ 16, 390 Mont. 290, 412 P.3d 1058; *Judicial Standards Commn. v. Not Afraid*, 2010 MT 285, ¶ 16, 358 Mont. 532, 245 P.3d 1116.

As acknowledged by Respondent, "a claimed right to observe deliberations under Article II, Section 9" is reviewed to determine: "(1) whether the subject entity is a public body or agency of state government or a state government subdivision; (2) whether the proceeding or decision at issue was a deliberation of that body or agency; and (3) whether the disputed deliberation was nonetheless privileged from disclosure on the grounds of individual privacy or other recognized exception to the right to know." *Raap*, ¶ 9 (citations omitted). There is no "quorum" requirement when considering the broader question of whether the public's right to observe government deliberations was violated. The concept of

"meetings" and "quorums" is generally more relevant to board and agency action to ensure public participation in adopting new rules and regulations.

The second fatal flaw in Respondent's argument is that a "meeting" did occur here, and an effective quorum present, because the majority party, the Republicans, who remained in the room, controlled the Committee's ultimate vote. Respondent Usher effectively convened a subgroup of the Committee, composed of a majority of the Republicans on the Committee. Under such circumstances, a deliberative meeting as contemplated by Art. II, § 9, occurred, from which the public was unlawfully excluded. Indeed, the rationale for requiring a "quorum" in the first instance is that the same is usually required for a decision. But here, a decision was made in the absence of a quorum of the entire Committee, because the Republican party possessed extraordinary majority control.

Any contrary conclusion would usurp the clear mandate of Art. II, § 9, that all "deliberations of public bodies" must be open to the public. It is an elemental precept of law that a constitutional mandate does not yield to a purported statutory limitation. *State ex rel. Strandberg v. State Bd. of Land Comm'rs*, 131 Mont. 65, 74, 307 P.2d 234, 237 (1957) (J. Bottomly, dissenting) ("[a]ny statute must yield to the fundamental law of the land. The Constitution does not yield to the statute"). While it is true that non-deliberative discussions of public officers in the absence

of a quorum have been declared outside the contemplation of Art. II, § 9, there are no cases where a closure of the *deliberations* regarding the *decision of a public body* has been upheld. The purpose of the meeting here was precisely to discuss, deliberate, and decide issues of public importance. It occurred during the legislative session in a room in the Capitol building. This was no "Saturday night at the county rodeo." *Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, ¶ 20, 373 Mont. 212, 316 P.3d 848.

The case relied on by Respondent, *Willems v. State*, actually assists Petitioners' cause. Not only did the Court acknowledge that subcommittee meetings are open to the public, but it left open the idea of a "constructive quorum." *Willems*, ¶¶ 24-25. In several past cases, the Supreme Court has been asked to resolve whether certain "non-formal," *ad hoc* groups created by governmental agencies were subject to the requirements of Art. II, § 9. In each of those cases, the Court concluded that if the committee was formed to perform some type of governmental function, they were required to open their meetings to the public. *See Common Cause*, 263 Mont. at 330, 868 P.2d at 608 (a committee created by statute to assist in the governor's selection of a Commissioner was subject to the open meeting laws); *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 26, 312 Mont. 257, 60 P.3d 381 (a committee created by a

school district to research a proposition and submit a recommendation to the school board was subject to the "Right to Know" provision of the Montana Constitution); and *Great Falls Tribune Co., Inc. v. Day*, 1998 MT 133, ¶ 18, 289 Mont. 155, 959 P.2d 508 (a committee created by the Department of Corrections to screen proposals for the construction of a private prison was a public body subject to the right-to-know provision).

As Petitioners argued in support of their Motion for Judgment on the Pleadings, the *Crofts* decision is particularly instructive. In *Crofts*, an open meeting issue arose when Richard Crofts, Montana's Commissioner of Higher Education met over an 18 month period with a group of upper-level employees of the University System, such as presidents and chancellors. The meetings were called to discuss issues related directly to the operation of the University System. The various members who attended the meetings acted in their official capacity and were compensated with public funds. Crofts contended that the employees with whom he met changed from meeting to meeting, and that it was not a public body because the Committee's membership was not fixed, no number of members were required to attend to constitute a quorum, and neither direct action nor votes were taken at the meetings. The Court disagreed, concluding that under Montana's

Constitution and statutes, which must be liberally interpreted in favor of openness, the meetings were subject to Montana's open meetings laws. *Crofts*, ¶ 28.

The Court articulated several factors to consider when determining if a particular committee's meetings are required to be open to the public. Although not exhaustive, the Court listed factors to include:

> (1) whether the committee's members are public employees acting in their official capacity; (2) whether the meetings are paid for with public funds; (3) the frequency of the meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions; (6) whether the committee's members have executive authority and experience; and (7) the result of the meetings.

Crofts, ¶ 22.

The Court specifically addressed Crofts' contention that § 2-3-202, MCA, defines the term" meeting" as the convening of a quorum his meetings did not qualify because no "quorums" existed among the various University officials with whom he had met. The Court concluded that nothing in the plain language of § 2-3-202, MCA, required that a meeting produce some particular result or action, or that a vote on something be taken. All that is required is that a quorum of the membership convene to conduct its public business. *Crofts*, ¶ 30. The parties agreed there were no established rules of procedure and no quorum requirements.

Accordingly, the Court looked to the common law and held that a quorum consisted of the members who attended any particular meeting:

> The common law rule is that a quorum of any body of an indefinite number consists of those who assemble at any meeting thereof. *Application of Havender* (1943), 181 Misc. 989, 992, 44 N.Y.S.2d 213. There being no statute, rule, or precedent to the contrary, this rule of common law applies in this instance to our interpretation of § 2-3-202, MCA (2001). Section 1-1-108, MCA (2001). Moreover, 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. *Devices such as not fixing a specific membership of a body, not adopting formal rules, not keeping minutes in violation of § 2-3-212, MCA, and not requiring formal votes, must not be allowed to defeat the constitutional and statutory provisions which require that the public's business be openly conducted.*

Crofts, ¶ 31 (emphasis supplied).

Moreover, the Montana Supreme Court's rejection of a "constructive quorum" theory in *Willems* was based on the occurrence of "one-on-one discussions," not a scheduled meeting where members were ordered not to attend in an evasive attempt to avoid a quorum. *Willems*, ¶ 25. This is not the contemplated aggregate, or "accumulated discussion of legislators" case feared by the Court in *Willems*, where Republican members of the Committee having "one-on-one" conversations with each other in the hallways of the Capitol would be subject to Art. II, § 9. *Willems*, ¶ 25.

Rather, in contrast to the situation in *Willems*, Respondent specifically called

a meeting of the Republicans of the Committee in order to discuss their upcoming votes on controversial bills and make "decisions . . . outside of [a] public meeting." *Willems*, ¶ 25. When Ms. Silvers requested to attend and observe their deliberations, Respondent made clear that he purposely defeated a quorum and that since insufficient members were present, the meeting was closed to the public and she could not attend. Contrary to the Respondent's position, the Montana Supreme Court has not "squarely rejected" Petitioner's theory. (Respondent's Brief at 9). Rather, the Court specifically limited its decision to "the facts presented here." *Willems*, ¶ 25. If presented with the facts of this case, it is most likely a different decision would issue.

Application of the *Croft* factors clearly mandated Respondent's compliance with Art. II, § 9. The convening members of this group were public employees acting in their official capacity, paid by public funds, and they met in the public's State Capitol building. They meet whenever important votes are to be taken in the Committee, they deliberate concerning matters of public policy, the members of this group clearly have authority as members of the Judiciary Committee, and because they constitute a majority of the Republicans on the Committee, they have the power to decide the fate of legislation considered by the Committee.

Respondent's actions in closing the meeting, and in advancing his arguments

here, seek to subvert the public's right to know and observe its government. "A closed government is an evil government: it abuses trust, it perverts truth, it misappropriates faith, and, in the end, it reviles the petitions of its citizens to know how they are governed and by what manner of people." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 85, 333 Mont. 331, 142 P.3d 864 (Nelson, J., concurring and dissenting). Article II, § 9, exists to ensure trust, truth, and faith in our state government and does not condone any "secrecy that divides the government from the governed." *Id.*

Petitioners, on behalf of Montana's citizens, seek to enforce the plain language and intent of the right-to-know provided for in Art. II, § 9, Mont. Const., which guarantees them the right to observe the deliberations of their government. Respondent's arguments are without merit, and his motion to dismiss should therefore be denied.

II. Respondent Enjoys no Immunity and Petitioners are Entitled to Their Requested Relief.

The Respondent argues that regardless of the substantive merits of the arguments raised above, Petitioners are not entitled to the relief requested. Respondent faults Petitioners for not citing to a decision to be voided and additionally relies on the affirmative defense of immunity, both legislative and common law. First, since the meeting was closed, the precise decision cannot be

known and Petitioners should not be faulted for failing to identify a particular decision.

Second, this is a declaratory judgment action, so any declaration by the Court as to a constitutional violation is sufficient relief and justifies denial of the motion without necessitating a determination as to whether Petitioner is entitled to have the decision set aside. The same rationale applies to the availability of attorney fees as a remedy. Regardless, Respondent's argument is that legislative immunity precludes an award of fees. As argued below, Respondent enjoys no such immunity.

Third, a complaint is not subject to dismissal under Rule 12(b)(6) unless its allegations indicate the existence of an affirmative defense which "clearly appear[s] on the face of the pleading." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 at 604-06 (1969). The immunity defenses raised by Respondent do not rest on any allegations made by Petitioners. Indeed, the facts as alleged by Petitioners indicate that Respondent's actions were administrative in nature, which do not enjoy legislative immunity.

Unlawfully closing a public deliberation is an act "undertaken in the execution of a law or policy" which is excluded from any legislative immunity under § 2-9-111(1)(c)(ii), MCA. Additionally, Respondent himself is not entitled

to legislative immunity as the doctrine applies to an act of the entire body itself, not an individual member. *See* 2-9-111(1)(b), MCA.

Nor do the Petition's allegations implicate Art. V, § 8, of the Montana Constitution, as Petitioners are faulting Respondent's conduct, not his spoken words. The speech and debate clause protects a legislator from words spoken in debate and does not protect political acts. *See United States v. Brewster*, 408 U.S. 501, 528-29 (1972); *Gravel v. United States*, 408 U.S. 606, 625 (1972). "This action is not about questioning legislators regarding any 'speech or debate' in the legislature" and any declaration as to whether "[party] meetings must be open to the public" does not implicate the clause. *AP v. Mont. Senate Repub. Caucus*, 1998 Mont. Dist. LEXIS 516, *4-5.

Moreover, some courts have recognized an immunity exception for actions seeking to "vindicate the public interest," such as this one. *State v. Beno*, 341 N.W.2d 668, 678 (Wis. 1984). Indeed, common law immunity for public officials has been chipped away by the courts over the years. Noteworthy scholars have observed a "federal retreat from absolute immunity." Prosser & Keeton on Torts, § 132, at 1062 (5th ed. 1984).

Last, Petitioners are not seeking money damages or a declaration of Respondent's tort liability. They are seeking to enforce a fundamental

constitutional right by asking the Court to declare that Respondent's actions in closing the meeting violated Montana citizens' right to observe the deliberations of their Legislature for which Respondent is not immune.

CONCLUSION

Respondent, just like all elected officials, must be subject to public scrutiny for his actions, such as the one challenged here—circumventing Montana's open meetings law in derogation of Montana citizens' fundamental constitutional right to observe the deliberations of all public bodies. The January 21, 2021, meeting of the Republican members of the Judiciary Committee was unlawfully closed to the public by the Respondent. His arguments to the contrary are without merit, and his motion to dismiss should accordingly be denied.

DATED this 14th day of April, 2021.

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CERTIFICATE OF SERVICE

This is to certify that on the 14th day of April, 2021, a true and exact copy of the foregoing document was served via email and by U.S. Mail on the following:

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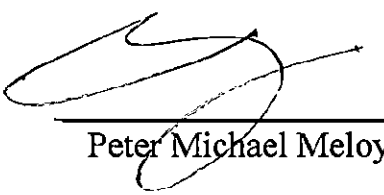

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