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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 **RESPONSE TO PETITIONERS' MOTION FOR JUDGMENT ON THE PLEADINGS**

This Court should deny Petitioners' motion for judgment on the pleadings because no responsive pleading has been filed in this case and, thus, the motion is premature. Even if this Court converts Petitioners' motion into a motion for summary judgment, it should still deny the motion because there was no "meeting" in violation of Montana's open meeting laws.

I. Petitioners' motion for judgment on the pleadings is premature.

Montana Rule of Civil Procedure 12(c) provides: "*After the pleadings are closed* — but early enough not to delay trial — a party may move for judgment on the pleadings." (Emphasis added.) Montana Rule of Civil Procedure 7(a) "closes the pleadings upon the filing of an answer if no counterclaim or crossclaim is included in the answer and if a reply to an answer is not specifically ordered by the court." *Mathews v. Glacier Gen. Assurance Co.*, 184 Mont. 368, 376, 603 P.2d 232, 236 (1979).

The Montana rule for judgment on the pleadings is identical to its federal counterpart. *Compare* Mont. R. Civ. P. 12(c), *with* Fed. R. Civ. P. 12(c). Thus, the Montana Supreme Court has relied on federal law in interpreting Montana's rule. *E.g.*, *Firelight Meadows, Ltd. Liab. Co. v. 3 Rivers Tel. Coop., Inc.*, 2008 MT 202, ¶¶ 10–11, 344 Mont. 117, 186 P.3d 869 (citing Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* vol. 5C, § 1367 at 206–07 (3d ed., Thomson-West 2004)); *Clayton v. Atl. Richfield Co.*, 221 Mont. 166, 169–70, 717 P.2d 558, 560 (1986) ("The Ninth Circuit Court of Appeals recently announced the judicial standard of review applied to a Rule 12(c) motion.") (citing *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984)). Though the Montana Supreme Court has not addressed what

happens when a Rule 12(c) motion is premature, the Ninth Circuit and the U.S. District Court for the District for Montana have decided such motions should be denied. *Doe v. United States*, 419 F.3d 1058, 1061–62 (9th Cir. 2005) ("Doe's motion for judgment on the pleadings was filed before the government filed an answer. Accordingly, Doe's motion was premature and should have been denied."); *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360, 367 (D. Mont. 1977) (denying Fed. R. Civ. P. 12(c) motion where defendant had not filed answer because "[j]udgment on the pleadings under Rule 12(c) is available only when the pleadings are closed") (citations omitted).

Instead of an Answer, on April 1, 2021, Respondent Representative Barry Usher filed a motion to dismiss the Petition pursuant to Mont. R. Civ. P. 12(b)(6). A motion is not a pleading. *See* Mont. R. Civ. P. 7(a). Petitioners recognize as much by stating "[i]t is anticipated" that Representative Usher may make certain arguments in response to their Petition. (Doc. 8 at 6.) Thus, the pleadings in this case are not "closed" because no responsive pleading has been filed. Petitioners' motion is premature and should be denied.

II. Even if converted into a motion for summary judgment, Petitioners' motion should be denied.

Montana Rule of Civil Procedure 12(d) provides: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Rule 12(d) does not apply here because Petitioners' motion should be denied on the basis that it is premature—not because it introduces matters outside the pleadings. Moreover,

though Petitioners mention Rule 12(d) in passing (Doc. 8 at 4), they do not once mention the summary judgment standard, nor even the words "summary judgment," despite allocating several paragraphs to the standard of review for a 12(c) motion. *See generally* Doc. 8.

However, even if this Court converts Petitioners' motion for judgment on the pleadings into a motion for summary judgment, it should be denied. Summary judgment is only proper where "no genuine issue as to any material fact" exists and the "movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The moving party bears the initial burden of showing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *McDaniel v. State*, 2009 MT 159, ¶ 13, 350 Mont. 422, 208 P.3d 817. Petitioners have not met this burden.

While Representative Usher disagrees with the "facts" presented by Petitioners, who cited no evidence in support of their motion,[1] this case nonetheless is ripe for decision on the pure legal issue of whether there was a meeting on January 21, 2021. For

[1] Petitioners' "undisputed facts" are replete with speculation and unsupported by any citations to record evidence. By Petitioners' own admission, they do not know what exactly was discussed on January 21, 2021, because they were not privy to the discussion, yet they speculate as to the substance of the discussion and Respondent's purpose in attending it. "Unsupported, conclusory or speculative statements . . . as to what might have happened, do not constitute issues of fact . . . ." *Wombold v. Assocs. Fin. Servs. Co. of Mont., Inc.*, 2004 MT 397, ¶ 28, 325 Mont. 290, 104 P.3d 1080. Additionally, Petitioners' "fact" that "any decisions made in the room, whether a vote was taken or not, controlled the Judiciary Committee votes on the bills" (Doc. 8 at 3) is inaccurate because less than a quorum of the Committee was present at the discussion (Doc. 6 at 2–5). Finally, Petitioners again refer to January 12 as the date of the alleged discussion. As Representative Usher noted, the correct date is believed to be January 21, 2021. *Id.* at 1 n.1.

the reasons set forth in Representative Usher's motion to dismiss and supporting brief, the Petition should be dismissed. *See* Docs. 5–6. For these same reasons, summary judgment for the Petitioners should be denied.

The House Judiciary Committee has established rules governing its numbers, meetings, and quorum requirements. *See* Montana House of Representatives Rules H30-05 through H30-60 (2021).[2] Petitioners cannot avoid the legal requirement that Montana's open meeting laws only apply where a quorum of the Committee meets—Petitioners acknowledge that less than a quorum was present at the January 21, 2021 discussion. *See* Mont. Code Ann. § 2-3-202 (defining "meeting" as "the convening of a *quorum* of the constituent membership of a public agency or association") (emphasis added); Doc. 8 at 3 (acknowledging "[a] quorum of the entire Committee is ten," and "only nine members" convened).

Petitioners' unsupported claim that "the Montana Supreme Court has applied the right-to-know to similar subgroups which do not have quorums" is both incorrect and inapposite. The Republican members of the Committee are not a "committee" or "subcommittee" under Mont. Code Ann. § 2-3-203(6). Nor are they an "*ad hoc*" group created by a government agency subject to Montana's open meeting laws.[3] None of the

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[2] Available at https://leg.mt.gov/bills/2021/billpdf/HR0002.pdf (last accessed Apr. 9, 2021).

[3] Notably, neither was the statutorily created committee in *Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices*, 263 Mont. 324, 331, 868 P.2d 604, 608 (1994), which Petitioners cite to support their statement that "'non-formal,' ad hoc groups created by governmental agencies were subject to the requirements of Article II, Section 9." (Doc. 8 at 8.)

cases Petitioners cite applied Montana's open meeting requirement to a minority of the members of an established committee. *See Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 6, 312 Mont. 257, 260, 60 P.3d 381, 384 (applying open meeting requirements to meeting of "Reconfiguration Committee" as a whole); *Great Falls Tribune Co. v. Day*, 1998 MT 133, ¶¶ 1, 6, 20, 289 Mont. 155, 959 P.2d 508, 509 (applying open meeting requirement to Montana Department of Corrections' twenty-one member "Private Prison Screening and Evaluation Committee"); *Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices*, 263 Mont. 324, 331, 868 P.2d 604, 608 (1994) (applying open meeting requirement to quorum of statutorily established committee). In fact, the Montana Supreme Court has *never* decided that a minority of members of a committee with established quorum rules can constitute a quorum. Rather, even in the cases Petitioners cite, it has emphasized the quorum requirement. *E.g.*, *Common Cause*, 263 Mont. at 331, 868 P.2d at 608 ("On November 20, 1992, three of the four members met to discuss the candidates and the transmission of the list of names to the governor. Thus, by definition, a 'meeting' was held.") (citation omitted).

Petitioners' reliance on *Associated Press v. Crofts*, 2004 MT 120, ¶ 22, 321 Mont. 193, 89 P.3d 971 is misplaced. In contrast to *Crofts*, here, there is no question that the House Judiciary Committee is a "public or governmental bod[y]" subject to Mont. Code Ann. § 2-3-203(1). Whereas, in *Crofts*, there "were no established rules of procedure and no quorum requirements," *id.* ¶ 31, well-established procedural rules set by the Legislature govern this case, *see* House Rules H30-05 through H30-60. Unlike in *Crofts*,

there is a clear quorum requirement, House Rule H30-30, and the Committee does not have an indefinite number of members.

The inherent flaws in Petitioners' position are further evidenced by the juxtaposition between their requested relief—reversal of any decisions during the January 21, 2021 discussion—and the focus of their argument: the Committee vote. (*Compare* Doc. 1 at 5, *with* Doc. 8 at 3.) Petitioners make the unsupported leap that "any decisions" made during a discussion between nine members of the nineteen-member Committee "controlled the Judiciary Committee votes." (Doc. 8 at 4.) Setting aside the legal fact that Representative Usher's legislative decisions are subject to legislative immunity, *see* Doc. 6 at 9–15, Petitioners' premise is not possible because "[a]ll motions may be adopted only on the affirmative vote of a majority of the members voting," House Rule H30-50(9) (2021), and Petitioners admit that less than a majority was present at the discussion (Doc. 1, ¶ 10).[4] The simple, undisputed fact remains that only nine of the nineteen members on the Committee were present at the alleged discussion, and a fraction of the Republican members of the Committee does not constitute a quorum. (Doc. 8 at 3 ("A quorum of the entire Committee is ten."), 5 (acknowledging nine members "does not constitute a full quorum of the entire Committee").)

If this Court were to adopt Petitioners' argument, it would lead to the absurd result that legislators running into each other in the bathroom and discussing legislation would constitute a meeting required to be noticed and open to the public. As discussed in

[4] This Court should reject Petitioners' attempt to confuse the issue through use of the term "controlling majority." (Doc. 8 at 2.)

Representative Usher's brief in support of his motion to dismiss, the Montana Supreme Court has rejected this constructive quorum theory. (Doc. 6 at 6–7 (citing *Willems v. State*, 2014 MT 82, 374 Mont. 343, 325 P.3d 1204).) In *Willems*, the Court stated:

> Plaintiffs disregard as "unfounded" any concern that the "constructive-quorum" rule would prohibit legislators from meeting in the halls of the Capitol and discussing pending legislation. However, if we accept Plaintiffs' premise that accumulated one-on-one conversations among Commission members violate the open meeting statutes, then so too could the accumulated discussions of legislators.

Willems, ¶ 25. Similarly, here, under Plaintiffs' theory, any hallway or bathroom discussions of pending legislation would be subject to public meeting requirements. That is neither required nor intended by Montana's open meeting laws. *See Id.*

In this case, as in *Willems*, "a majority of [Committee] members never 'convened' or 'deliberated' as a 'public body' outside of a public meeting." *Id.* Thus, there was no violation of the public's right to know. *Id.* To find otherwise would be to ignore clear statutory language, *e.g.*, Mont. Code Ann. § 2-3-202, in violation of the cardinal rule of statutory interpretation: "not to insert what has been omitted or to omit what has been inserted," Mont Code Ann. § 1-2-101. It would also "create[] a difficult labyrinth for public servants and threaten[] to turn any Saturday night at the county rodeo into a board meeting that must be noticed." *Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, ¶ 20, 373 Mont. 212, 316 P.3d 848.

Petitioners cannot win on the pure legal issue of whether a discussion of less than a quorum of Committee members constitutes a meeting under Montana's open meeting laws; therefore, their motion should be denied and the Petition should be dismissed.

CONCLUSION

Petitioners' motion for judgment on the pleadings under Mont. R. Civ. P. 12(c) is premature because no responsive pleading has been filed in this case and, therefore, it should be denied. Even if this Court converts Petitioners' motion into a motion for summary judgment, it should still be denied because Petitioners admit a quorum of the House Judiciary Committee was not present at the January 21, 2021 discussion, Petitioners have not met their burden to demonstrate entitlement to judgment as a matter of law.

DATED the 19th day of April, 2021.

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By: _____
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CERTIFICATE OF SERVICE

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

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Date: April 19, 2021

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