

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

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

FILED

MAY 05 2021

ANGIE SPARKS, Clerk of District Court
By: *Anastasia* Deputy Clerk

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 REPLY IN
SUPPORT OF MOTION TO
DISMISS PURSUANT TO MONT.
R. CIV P. 12(B)(6)**

No meeting or deliberation of a public body occurred during a January 21, 2021 discussion among some of the members of the Montana House of Representatives Judiciary Committee (Committee) because a quorum of the Committee was not present. Petitioners admit this uncontroverted fact, and the Petition against Representative Barry Usher in his official capacity as Chair of the Committee must be dismissed. Petitioners have failed to state a claim for a violation of Article II, Section 9 or Article V, Section 10 of the Montana Constitution. Even if Petitioners had stated a claim for a violation of their constitutional rights, this Court cannot grant their requested relief to reverse legislative decisions or award attorney fees because Representative Usher is entitled to legislative immunity.

I. Petitioners' Article V, Section 10 must be dismissed.

As Representative Usher argued in support of his motion to dismiss, Petitioners failed to state a claim under Article V, Section 10 of the Montana Constitution. (Doc. 6 at 5–6.) Petitioners did not respond to this argument, nor even mention Article V, Section 10 in their response brief. *See generally* Doc. 13. Petitioners have conceded dismissal of this claim is appropriate.

For the undisputed reasons set forth in Representative Usher's brief in support of his motion to dismiss, this Court should dismiss Petitioners' claims brought under Article V, Section 10.

II. The quorum prerequisite applies to deliberations of public bodies under Article II, Section 9.

Petitioners recognize that “discussions of public officers in the absence of a quorum have been declared outside the contemplation of Art. II, § 9,” while in the same breath arguing that there is no quorum requirement for deliberations under Article II, Section 9. (Doc. 13 at 6-7.) Petitioners’ argument has no basis in the law.

Montana law requires a quorum of an established committee to be present as a prerequisite to claiming Montana’s open meeting laws have been violated. *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).¹ And the Montana Supreme Court has consistently applied Montana’s open meeting statutes—including the quorum requirement—when considering challenges under Article II, Section 9. *See Citizens for Open Gov’t, Inc. v. City of Polson*, 2015 MT 55, ¶¶ 15–17, 378 Mont. 293, 343 P.3d 584 (applying open meeting statutes to deliberation of city commission executive committee); *Willems v. State*, 2014 MT 82, ¶¶ 21-25, 374 Mont. 343, 325 P.3d 1204 (holding no “deliberation” occurred under Article II, Section 9 because no quorum of city commission was present); *Common Cause v. Statutory Comm. to Nominate Candidates for Comm’r of Political Practices*, 263 Mont. 324, 331, 868 P.2d 604, 608 (1994) (“On November 20, 1992, three of the four members met to discuss the

¹ To the extent Petitioners attempt to challenge the constitutionality of Montana’s open meeting statutes for the first time in their response brief, this Court should reject any such argument because Petitioners are limited to the claims made in their Petition. *See* Mont. R. Civ. P. 15 (establishing requirements for amending a complaint).

candidates and the transmission of the list of names to the governor. Thus, by definition, a 'meeting' was held.") (citation omitted).

By contrast, the Court has never held that a discussion of less than a quorum of members of a public body is subject to Montana's open meeting laws, and none of the 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' 21-member "Private Prison Screening and Evaluation Committee"); *Common Cause*, 263 Mont. at 331, 868 P.2d at 608 (finding violation of Art. II, § 9 due to presence of quorum of statutorily established committee). Petitioners cite no law dictating that a quorum is not required for a deliberation of a public body precisely because this claim is legally unsupportable.

Moreover, Petitioners' contention that the quorum requirement does not apply because this was a "deliberation" and not a "meeting" directly contradicts their argument. In his Motion to Dismiss, Representative Usher properly relied on the Petition's repeated claims that he allegedly conducted a private *meeting* in violation of the Montana Constitution. *E.g.*, Doc. 1, ¶ 9 (the House Judiciary Committee is "subject to the open *meetings* requirements of Article II, Section 9 and Article V, Section 10 of the Montana Constitution") (emphasis added); ¶ 10 ("He informed her that he made three

members stay out of the *meeting* . . . so the *meeting* could be conducted in private.”) (emphasis added); ¶ 11 (“After this *meeting*, the Respondent reconvened the Judiciary Committee . . .”) (emphasis added); 5 (requesting “[t]hat the Court find . . . that the manner in which Respondent conducted the secret *meeting* of members of the Republican Party violated Petitioners’ constitutional right to know” and “issue an order setting aside any decisions made in the illegally closed *meeting* and order the Respondent to refrain from conducting another *meeting* in a closed session”) (emphasis added).

This Court should reject Petitioners’ argument that the quorum requirement does not apply to the facts alleged in the Petition.

II. The quorum requirement applies to deliberations of the House Judiciary Committee.

The House Judiciary Committee has established rules governing its meetings, including membership, minutes, and voting. *See* Montana House of Representatives Rules H30-05 through H30-60 (2021) (House Rules). House Rule H30-30 provides, in pertinent part, “A quorum of a committee is a majority of the members of the committee. A quorum of a committee must be present at a meeting to act officially.” Thus, a quorum is a prerequisite to Committee deliberations.

Petitioners’ reliance on *Associated Press v. Crofts*, 2004 MT 120, ¶ 22, 321 Mont. 193, 89 P.3d 971, and the resulting argument that any number of Committee members can constitute a quorum, is misplaced. In stark contrast to the group at issue in *Crofts*, 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). Unlike in *Crofts*, the Committee does

not have an indefinite number of members, and there is a clear quorum requirement. No Committee decision could have been reached during a discussion among a minority of its members. *See* House Rule H30-50(9) (2021) (“All motions may be adopted only on the affirmative vote of a majority of the members voting.”).

The Committee is not a “nonformal, ad hoc group[]” (Doc. 13 at 7), but rather a defined entity with formal rules governing its meetings. Under those rules, Committee action cannot occur unless a majority of the members—a quorum—are present. House Rule H30-30. Thus, the quorum requirement applies to Committee deliberations.

III. The Petition must be dismissed because no quorum of the House Judiciary Committee convened outside of a public meeting.

Petitioners admit there was “no quorum of the Committee in attendance” during the alleged January 21, 2021 discussion. (Doc. 1 at 4.) For this reason, Petitioners cannot state a claim for a violation of their open meeting rights under the Montana constitution.

Petitioners’ verbal gymnastics attempt to get around this requirement, but only further demonstrate they cannot meet it. For example, Petitioners claim the individuals involved in the alleged January 21, 2021 discussion “have authority as members of the Judiciary Committee, and because they constitute a majority of the Republicans on the Committee, . . . have the power to decide the fate of legislation considered by the Committee.” (Doc. 13 at 11.) Not only do Petitioners provide no legal support for this claim, it also is not possible under House rules. As Petitioners admit, only 9 members of the 19-member committee were involved in the alleged discussion (Doc. 2, ¶ 4), and

the Committee cannot act unless a majority of its members are present. *See* House Rule H30-30.

Additionally, this Court should reject any “constructive-quorum” theories for the reasons set forth in *Willems*. Petitioners attempt to distinguish *Willems* by claiming the decision is limited to one-on-one discussions. (Doc. 13 at 10.) However, in *Willems*, three commissioners comprised a quorum. *Willems*, ¶ 23. Thus, anything more than a one-on-one discussion would have been a meeting subject to Montana’s open meeting laws. Moreover, Petitioners’ argument ignores Court’s holding: “[T]he Commissioners’ one-on-one discussions prior to the February 12 meeting were not subject to Section 9 because *a majority of Commission members never ‘convened’ or ‘deliberated’ as a ‘public body’ outside of a public meeting.*” *Id.* ¶ 25 (emphasis added). *Willems* is directly on point and controls the question here. There was no open meeting violation because a majority of the Committee never convened or deliberated outside of a public meeting.

Petitioners’ argument also ignores the serious line-drawing questions concerning how many individuals would have to meet before a constructive quorum would be reached. Were this Court to adopt Petitioners’ theory that discussions of less than a quorum of a public body must be subject to Montana’s open meeting laws, any hallway or bathroom discussions of pending legislation could potentially be subject to public meeting requirements. That is not what the law requires.

Petitioners’ allegations that a minority of the committee members were involved in a discussion on January 21, 2021, does not state a claim for a violation of Article II,

Section 9 of the Montana Constitution. *See Common Cause*, 263 Mont. at 331, 868 P.2d at 608. The Petition must be dismissed.

IV. Representative Usher is entitled to legislative immunity with respect to Petitioners' request that a decision be voided and for attorney fees.

Because Petitioners fail to state a claim for a violation of their constitutional rights, this Court need not reach Representative Usher's immunity argument. However, if considered, Petitioners' request that this Court "set[] aside any decisions made" during the January 21, 2021 discussion and reimburse Petitioners "for their costs and attorney fees incurred in bringing this matter" (Doc. 1 at 5) cannot be granted because Representative Usher is entitled to legislative immunity. For this reason, in addition to those set forth in the preceding sections, these claims for relief must be dismissed. *See Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 103, 454 P.3d 655 ("[T]he focus of a Rule 12(b)(6) motion to dismiss is whether the complaint is facially sufficient to state a cognizable legal claim entitling the claimant to relief on the facts pled.").

Petitioners incorrectly assert that Representative Usher is not entitled to legislative immunity because such immunity is limited to the legislative body as a whole. (Doc. 13 at 13–14.) Montana Code Annotated § 2-9-111(3) plainly states: "*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.*" (Emphasis added.) The basis of Petitioners' complaint is their allegation that a decision of the House Judiciary Committee was improperly made during a closed session. (Doc. 1, ¶ 12 ("[A]ny

decisions made in the room, whether a vote was taken or not, controlled the Judiciary Committee votes.”.) Even if Petitioners’ premise were possible—which it is not because, as discussed above, no quorum was present during the alleged January 21, 2021 discussion—any decisions by the Committee are undeniably “legislative acts.” *See* Mont. Code Ann. § 2-9-111(1) (providing legislative acts include “actions by a legislative body that result in creation of law or declaration of public policy”). Thus, Petitioners cannot state a claim for relief that any decisions made during the alleged January 21, 2021 discussion must be overturned, and this claim for relief must be dismissed.

For the same reasons, constitutional and common-law immunity also apply: Petitioners seek to void an alleged legislative act. *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980) (“[S]tate legislators enjoy common-law immunity for their legislative acts.”); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (applying constitutional immunity “to things generally done in a session of the House by one of its members in relation to the business before it”). As Representative Usher has argued, Petitioners may challenge the process by which decisions are reached but cannot reverse any decisions on pending legislation by suing Representative Usher because he is immune from liability for such legislative acts. Thus, Petitioners’ requested relief in the form of reversal of any legislative decisions must be dismissed.

Similarly, Petitioners have failed to rebut that this Court cannot award fees against Representative Usher, a member of the legislature. *See Finke v. State*, 2003 MT 48, ¶ 34, 314 Mont. 314, 65 P.3d 576 (holding, in declaratory action, that “§ 2-9-111, MCA, 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.”). Petitioners' claim for attorney fees must also be dismissed.

CONCLUSION

Petitioners cannot state a constitutional violation under the facts of their Petition because they admit there was no quorum of the House Judiciary Committee, a necessary prerequisite for an open meeting violation claim. Even if they had otherwise stated a claim, this Court cannot grant Petitioners' requested relief of reversal of any legislative decision, or for attorney fees, because Representative Usher is entitled to legislative immunity. This Court should grant Representative Usher's motion to dismiss.

DATED the 3rd day of May, 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 and first class mail to the following address(es):

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

Date: May 3, 2021


Beverly J. Hornbeck