Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
(406) 442-8670
mike@meloylawfirm.com

Attorney for Petitioner

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.	Cause No. ADV-2021-124 **REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

The Press Petitioners submit the following reply brief in support of their Motion for Judgment on the Pleadings.

INTRODUCTION

Respondent Usher argues that the Press Petitioners' Motion for Judgment on the Pleadings, brought pursuant to Rule 12(c), M.R.Civ.P, is premature because he has not yet filed an Answer, or other "responsive pleading" and because the pleadings are not yet closed. Respondent has, however, filed a Motion to Dismiss, pursuant to Rule 12(6), M.R.Civ.P., in which he does not contest any issues of fact and concedes that only a question of law exists for the Court to resolve. This is the precise situation contemplated as ripe for resolution by Rule 12(c), M.R.Civ.P. Indeed, Respondent's only substantive response to Petitioners' Motion is that no "meeting" took place as contemplated by Montana's right-to-know and open meeting law jurisprudence. Accordingly, any argument by the Respondent that the Court cannot grant Petitioners' motion should be rejected. So too should his substantive legal argument.

As argued below, the Press Petitioners' legal position is supported by Montana law and they are entitled to the relief requested in their Petition, especially given that it must 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. Petitioners' Motion for Judgment on the Pleadings is not Premature as Respondent Concedes There Exists Only a Question of Law for the Court to Decide.

Respondent devotes two pages to arguing that Petitioners' motion should be denied as premature. Even if Respondent is technically correct that the pleadings are not yet closed, he has conceded that the only issue to be decided by this Court is one of law, which is the precise situation contemplated by Rule 12(c), M.R.Civ.P. *Firelight Meadows, Ltd. Liab. Co. v. 3 Rivers Tel. Coop., Inc.*, 2008 MT 202, ¶¶ 10-11, 344 Mont. 117, 186 P.3d 869 (noting that a Rule 12(c) motion "has utility when all material allegations of fact are admitted or not controverted" and "only questions of law remain to be decided by the district court") (citing Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil vol. 5C, § 1367 at 207-10 (3d ed., Thomson-West 2004). Indeed, Respondent does not controvert the facts as alleged in Ms. Silvers' Affidavit.

Moreover, "the legal effect of any court-filed paper--be it a motion, a pleading or some other instrument--is to be measured by its content rather than by the author-provided title." *City of Billings v. Smith*, 281 Mont. 133, 138, 932 P.2d 1058, 1061 (1997) (citing *State v. Finley*, 276 Mont. 126, 142, 915 P.2d 208, 218 (1996)). A district court is permitted to consider judicial economy and the parties'

resources when assessing pleadings in order to obviate the need for further unnecessary litigation. *See e.g. State v. Gorder*, 243 Mont. 333, 334, 792 P.2d 370, 371 (1990).

It matters not, however, as Rule 12(d), M.R.Civ.P, permits the Court to treat a Rule 12(c) motion as one for summary judgment so long as "[a]ll parties [are] given a reasonable opportunity to present all the material that is pertinent to the motion." While Respondent purports to disagree with the facts as presented by Petitioners, he offers no specifics and admits the case can be resolved on the issue of law discussed below. Indeed, it is disingenuous for Respondent to argue that any genuine issue of material fact exists. As both parties acknowledge that there is only an issue of law to be resolved by the Court, any argument of semantics by the Respondent that Petitioners are not entitled to judgment in their favor at this stage of the litigation must be rejected.

II. Petitioners are Entitled to a Declaration that Respondent's Actions Violated Article II, § 9, Mont. Const.

The Respondent cites to the House Rules and the open meeting statutory provision, § 2-3-202, MCA, in support of his argument that since no "quorum" was present, no "meeting" took place and therefore Petitioners had no constitutional right to "observe the deliberations" of the House Judiciary Committee, despite the

fact it is undisputedly a public body. Respondent claims that the Montana Supreme Court has never applied the open meeting requirement to a minority of an established committee and has never decided that a minority of members of a committee with established quorum rules can constitute a quorum. In so arguing, the Respondent attempts to distinguish *Associated Press v. Crofts*, 2004 MT 120, 321 Mont. 193, 89 P.3d 971, on the basis that no quorum rules had been adopted by the Policy Committee at issue in that case.

The Montana Supreme Court in *Crofts* made clear that "[d]evices 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. Respondent's actions in intentionally defeating a quorum are the very avoidance devices criticized by the *Crofts'* Court. So too is his argument that no decision during the January 21, 2021, meeting can be voided, as sought by Petitioners, because the rules require a "majority" vote. The Montana Supreme Court has rejected such constitutional circumvention tactics.

It is clear that Respondent's impetus in holding a meeting of one less than a technical quorum was precisely to evade Montana's openness mandate. As such,

the Respondent's rationale that such tactic was lawful must be rejected. "[O]ur 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." *Crofts*, ¶ 31.

Moreover, while Petitioners have sought relief under Montana's open meeting statutory provisions, and believe a constructive quorum existed at the January 21, 2021, meeting of the House Judiciary Committee, the actual constitutional violation asserted, and the thrust of Petitioners' complaint, seeks a declaration that Respondent violated Article II, Section 9, Mont. Const. This Court need not find a "quorum" was present to declare a violation of the same.

Indeed, the entirety of Respondent's argument conflates the "public participation" requirement in Article II, Section 8, Mont. Const., with the public's "right to know" and "right to observe" in Article II, Section 9, Mont. Const. While they are related, the plain language of Section 9 contains no "meeting" or "quorum" language. Much of the jurisprudence imposing such requirements arises out of Section 8's "right of participation," which provides "[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."

The public participation component is the impetus behind the requirement for a "quorum" because no final decision can be made in the absence of one. *Bd. of Trs. v. Bd. of Cnty. Comm'rs*, 186 Mont. 148, 155-56, 606 P.2d 1069, 1073 (1980). "Absent a quorum, no decision made at [a] meeting is binding." *Edgewater Townhouse Homeowner's Ass'n v. Holtman*, 256 Mont. 182, 186, 845 P.2d 1224, 1226 (1993). However, the same is not true for the right to observe the deliberations of public bodies as guaranteed by Article II, Section 9, Mont. Const. The right to observe is not limited to only meetings of a quorum, nor is the right contingent on a public body rendering a final decision.

By illustration, it is undisputed that the public has a right to observe all court proceedings, unless there exists a compelling overriding privacy interest. *Great Falls Tribune v. Dist. Court of Eighth Judicial Dist.*, 186 Mont. 433, 438, 608 P.2d 116, 119 (1980). No "quorum" of the court is required. "Closure of judicial proceedings breeds suspicion and mistrust in the minds of the public and representatives of the media. Such closure is simply censorship at the source -- a denial of the right to know." *Id.* The same holds true here. The "right to observe" can still be violated by a public officer in the absence of a quorum. In his capacity as the Committee Chair, Respondent Usher violated Petitioners' right to observe the Committee's deliberations on public matters by "conduct[ing] the peoples'

business" in secret. *Raap v. Board of Trs.*, 2018 MT 58, ¶ 8, 391 Mont. 12, 414 P.3d 788 (quoting § 2-3-201, MCA). It is worth noting that it is the Legislature's intent "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." Section 2-3-201, MCA.

Respondent's last argument regarding "bathroom open meetings" harkens Chicken Little's cry that "the sky is falling." This is not a case involving non-deliberative discussions of legislators in the hallways or chance community encounters outside of Capitol. Rather it involves a committee meeting designed to circumvent public attendance during deliberations on how members would vote on upcoming controversial bills. The purpose of the meeting 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. First, 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. Second, 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. Its rejection of a "constructive quorum" theory on the facts of the case 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.

Respondent does not dispute the fact that he specifically convened a meeting of 9 Republican members of the Judiciary Committee to discuss bills pending before his committee. In doing so, he believed he could exclude the press and the public from the meeting. At the same time, he could be assured that any decision made during the meeting could materialize into legislative action because the minority party only had 7 members on the Committee. It is undisputed here that the convening Republican members were public employees acting in their official capacity, paid by public funds, meeting in the public's State Capitol building, to discuss votes on upcoming bills, i.e., the public's business. Regardless of whether a technical "quorum" of the Committee was present, these members of the majority party had the power to decide the fate of legislation considered by the Committee, and in fact, did. After this closed meeting, the Committee reconvened and took executive action with no further discussion. The votes on the three abortion bills, HB 136, 140 and 167 was straight party line (12-7) and the vote on the transgender

bill, HB 112 was 11-8, with one Republican voting no. House Judiciary Committee Report, Jan 21, 2021.

Respondent's actions in preventing Ms. Silvers from attending and observing the members' deliberations violated Article II, Section 9, Mont. Const., and thereby "abuse[d] [the] public's trust" and "misappropriate[d] [the] faith" entrusted to him as a public officer. *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, for the benefit of Montana citizens, therefore request the Court to grant their motion for judgment on the pleadings, or in the alternative a motion for summary judgment, and declare Respondent's actions as violative of the public's rights under Article II, Section 9, Mont. Const..

CONCLUSION

As established by the arguments and authorities above, Respondent Usher's undisputed actions in closing the January 21, 2021, meeting of the Republican members of the Judiciary Committee was unlawful and deprived the public of their

right to know and observe governmental deliberations as guaranteed by Article II, Section 9, Mont. Const.

DATED this 7th day of May, 2021.

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
Attorney for Petitioners

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of May, 2021, a true and exact copy of the foregoing document was served via email and by U.S. Mail on the following:

Montana Attorney General
Austin Knudson
Assistant Attorneys General
Derek Ostreicher
Aislinn Brown
P.O. Box 201401
Helena, MT 59620-1401

Peter Michael Meloy