TIMOTHY C. FOX
Montana Attorney General
LAWRENCE VANDYKE
Montana Solicitor General
J. STUART SEGREST
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

COUNSEL FOR DEFENDANTS

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

ROBERT WILLEMS, PHYLLIS WILLEMS, TOM BENNETT, BILL JONES, PHILIP WILSMAN, LINDA WILSMAN, JASON CARLSON, MICK JIMMERSON, DWAYNE CROOK, MARY JO CROOK, JAMES STUNTZ, RANDY BOLING, ROD BOLING, BOB KELLER, GLORIA KELLER, ROLAND TORGESON, RUTH TORGESON, ED TIMPANO, JENNIE RICKERT, TED HOGLAND, KEITH KLUCK, PAM BUTCHER, TREVIS BUTCHER, BOBBIE LEE COX, WILLIAM COX, and DAVID ROBERTSON, Plaintiffs, v. STATE OF MONTANA, LINDA McCULLOCH, in her capacity as Secretary of State for the State of Montana, Defendants.	Cause No. ADV-2013-509 **DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTION AND REQUEST FOR LEAVE TO FILE SUR-REPLY**

Plaintiffs' Objection to supposed "new arguments" in the State's Reply is meritless—on multiple levels.

First, Plaintiffs fundamentally misunderstand the nature and purpose of a reply brief. As its name suggests, the purpose of a reply brief is not simply to regurgitate the exact same arguments made in the opening brief; if that was the case, a reply brief would simply be a redundant waste of the Court's time. The purpose of a reply brief is to *reply*—to the issues presented and arguments made in the opposing party's brief. *See In re Estate of Harmon*, 2011 MT 84, ¶ 63, 360 Mont. 150, 253 P.3d 821 (assuming it is proper for an appellant to "respond to [appellee's] arguments in [a] reply brief"); *State v. Grindheim*, 2004 MT 311, ¶ 24, 323 Mont. 519, 101 P.3d 267 ("In his Reply Brief, [appellant] responds to [appellee's] argument ...."); *Disler v. Ford Motor Credit Co.*, 2000 MT 304, ¶ 24, 302 Mont. 391, 15 P.3d 864 (noting, with disapproval, that the appellant did "not respond to [appellee's] arguments because it failed to file a reply brief").

Thus, when courts have refused to consider arguments or issues "raised for the first time in a reply brief," those were issues or arguments that were never previously raised or implicated in *either* party's earlier briefing—including the opposing party's brief. While it is understandable that Plaintiffs here would like to strictly limit the State to whatever it said in its first brief, and therefore prevent the State from fairly replying to the arguments made and issues raised in Plaintiffs' briefing, that is not how the "no-new-issues-on-reply" rule works. The rule is meant to prevent sandbagging by raising a brand new issue on reply that has never been raised before by *either* party; it is not meant to prevent one party from debunking an argument made in the other party's briefing, even if that requires arguments and authorities that were not presented in an earlier brief. The

key question is whether the arguments in a reply brief are responsive to the arguments and issues made in the brief they are replying to, not whether those arguments were necessarily made in that party's earlier briefing.

Here, Plaintiffs' response brief clearly argued that "The Commission is an 'Agency' subject to Article II, § 8"—indeed, that is one of their response brief's headings. *See* Pls' Resp. at 2. Both of the State's supposed "new arguments" that Plaintiffs decry respond directly to that argument. The definition of "agency" in Black's Law Dictionary is simply one of the many authorities the State uses in replying that Plaintiffs' overbroad application of "agency" cannot be right. Likewise, the Reply's reference to *Brown v. Montana Districting and Apportionment Commission* (Reply at 8) is also provided to show that, contrary to Plaintiffs' argument in their response, Section 2-3-101 should not be misread as reaching the Commission because that would create constitutional difficulties. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."). Because the State's supposed "new arguments" directly respond to issues addressed in Plaintiffs' Response, Plaintiffs have no basis for invoking the "no-new-issues-on-reply" rule.

Second, Plaintiffs err by taking an unwarranted miserly view of what constitutes a "legal issue" or "argument." The State argued in its opening brief that the Commission is not an "agency" covered by Article II, Section 8, or its implementing statutes. *See* Defs' Resp. and S.J. Br., at 12-14. Plaintiffs argued in response that the Commission *is* an "agency." *See* Pls' Resp. at 2-6. Both of the State's supposed "new arguments" clearly

fall within the scope of that broader "argument" or "legal issue." Only by narrowly construing "argument" can Plaintiffs complain. Their unnaturally constrained reading of "argument" is easily demonstrated by the fact that the second "new argument" they complain of—i.e., a definition from Black's Law Dictionary, *see* Obj. at 2—is really just an *authority*, not an argument. If a new reference to Black's Law Dictionary in a reply is an impermissible "new argument," then can a litigant cite new cases in its reply? Precisely to avoid this absurdity, courts generally construe "arguments" and "legal issues" more broadly that Plaintiffs have here. *See, e.g., Dugan v. Sullivan*, 957 F.2d 1384, 1387 (7th Cir. 1992) (rejecting the claim that further "aspects" of a res judicata argument made on reply constituted "a new argument for purposes of waiver"; they were in reply to the appellee's response and "simply offered to buttress the same basic argument made in [appellant's] initial brief"); *Bartlett Grain Co., L.P. v. Am. Int'l Group*, 2011 U.S. Dist. LEXIS 91294, at *6 (W.D. Mo. Aug. 16, 2011) (rejecting claim of new argument in reply simply because new authority was cited); *Lemmons v. Evcon Indus.*, 2011 U.S. Dist. LEXIS 75897, at *24 (D. Kan. July 13, 2011) ("the argument raised by defendant in its Reply was not a new argument; it was a direct response to arguments plaintiff made in his Response"); *EEOC v. Creative Networks, LLC*, 2009 U.S. Dist. LEXIS 121820, at *203 (D. Ariz. Dec. 8, 2009) (rejecting claim that "an attempt to clarify" issues already briefed in the case constituted a "new argument"); *Baird v. Village of Cleves*, 2009 U.S. Dist. LEXIS 17896, at *11-12 (S.D. Ohio Mar. 9, 2009) (rejecting motion to strike "new argument" because "Defendants merely point out additional support for arguments raised in their motion for summary judgment"); *Villa De Jardines*

Ass'n v. Flagstar Bank, 253 P.3d 288, 294 (Ariz. Ct. App. 2011) (rejecting claim that new reference to statutory history in a reply was "new argument" because "it rebutted [appellee's] erroneous interpretations of the statute"); *Sepulveda v. Ariz. Behavioral Health Sys.*, 2007 Ariz. App. Unpub. LEXIS 156, at *14 (Ariz. Ct. App. 2007) ("the State's argument was simply a refutation of Sepulveda's theory, not a new argument raised for the first time in the State's reply").

Third, and perhaps most devastating, is that even accepting *arguendo* Plaintiffs' stingy idea of a "new argument," neither of the two "arguments" attacked by their Objection are actually new. On page 28 of its opening brief, the State clearly argued that "legislation attempting to limit the broad constitutional discretion of the redistricting commission, *like* Mont. Code Ann. §§ 5-1-115(3)(a) and (d), 'impermissibly conflicts with Article V, Section 14, of the Montana Constitution, and is void on that basis.'" State's Resp. and S.J. Br., at 28 (quoting *Brown v. Mont. Districting & Apportionment Comm'n*) (emphasis added). While Plaintiffs would like to limit the State's argument to merely the *examples* cited in the opening brief, *see* Obj. at 2, that is an obvious misreading of the brief. The argument made was clearly categorical, with the statutes cited as mere examples (hence the use of the word "like"). Plaintiffs cannot seriously complain that they had no notice of the State's position that *any* "legislation attempting to limit the broad constitutional discretion of the redistricting commission" was void under Article V, Section 14.

Similarly, the State argued at length in its opening brief that "the Commission is not an agency ...." State's Resp. and S.J. Br., at 14; *see generally id.* at 12-14. The

State's citation to the definition of "agency" in Black's Law Dictionary is merely additional support for that same argument, not some "new" argument that the Commission is not an agency.

* * *

Plaintiffs' Objection is baseless, and makes sense only as a desperate, last-minute attempt by Plaintiffs to buttress their arguments that even they recognize have serious flaws. But if Plaintiffs insist on having the first, middle, and *last* word in this case, far be it from the State to stand in their way. After all, it can't hurt for the Court to consider more information. The State does not believe the "new arguments" in Plaintiffs' Sur-Reply can change the ultimate outcome in this case, but counsel for the State will be prepared to address these issues, and any other issue the Court wishes to discuss, at the November 8, 2013 hearing.

Respectfully submitted this 4th day of November, 2013.

TIMOTHY C. FOX
Montana Attorney General
LAWRENCE VANDYKE
Montana Solicitor General
J. STUART SEGREST
Assistant Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By:_____
LAWRENCE VANDYKE
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing document to be emailed and mailed to:

Mr. Matthew G. Monforton
Monforton Law Offices, PLLC
32 Kelly Court
Bozeman, MT 59718
matthewmonforton@yahoo.com

DATED: 11-4-13 _____