IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 13-0820

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, ROALD TORGESON, RUTH TORGESON, ED TIMPANO, JEANNIE RICKERT, TED HOGELAND, KEITH KLUCK, PAM BUTCHER, TREVIS BUTCHER, BOBBIE LEE COX, WILLIAM COX, AND DAVID ROBERTSON,

Plaintiffs and Appellants,

v.

STATE OF MONTANA, LINDA McCULLOCH, in her capacity as Secretary of State for the State of Montana,

Defendants and Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, The Honorable Mike Menahan, Presiding

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INTRODUCTION

Appellants are registered voters residing in Senate District #15 (SD-15). They seek to void a surprise, eleventh-hour amendment to the state's redistricting plan approved by the Districting and Apportionment Commission (Commission) during its final hearing on February 12, 2013.

This case raises issues of first impression under both the Right of Participation and Right to Know in Article II, §§ 8 and 9 of the Montana Constitution. Most states provide only statutory rights to open government. In Montana, however, delegates to the 1972 Constitutional Convention considered these rights so fundamental that they enshrined them in the Constitution. By refusing to apply the constructive-quorum rule advocated by Appellants and followed by courts around the nation, the District Court interpreted Montanans' *constitutional* Right to Know under Article II, § 9, more narrowly than courts in other states interpret analogous state *statutory* rights. Fidelity to the delegates' vision of open government in Montana requires correction of this anomaly.

In this case, Commissioners violated Article II, § 9, by privately deliberating before February 12 on amendments to reassign "holdover" senators so that Sen. Llew Jones could be re-elected from SD-9 in 2014. The public did not know the substance of these deliberations or even that they had occurred.

Additionally, the District Court misinterpreted the plain language of the

Right of Participation under Article II, § 8, and its enabling statutes when it held that the Commission was exempt from them. Thus, the District Court let stand the Commission's failure to give notice of proposed holdover amendments. The Commission had assured the public that, before its final hearing on February 12, it would publish proposed amendments online and consider written comments submitted by noon on February 11. While the Commission timely posted other proposed amendments, it did not announce its proposed holdover amendments until the final moments of its final hearing on February 12, thereby making it impossible for Appellants to respond by the deadline at noon on February 11.

While the Commission went to great lengths during most of its existence to encourage openness and public participation, it missed the mark regarding the last-minute holdover amendment it approved on February 12. One Commissioner now acknowledges that approval of the amendment was improper.

This case also raises an issue of first impression under the Right of Suffrage in Article II, § 13 of the Montana Constitution. For Appellants and 19,000 other voters in SD-15, 2010 was the most recent opportunity to cast ballots for state senate candidates. SD-15's next senate election will now occur in 2016 rather than 2014 due to the Commission's approval of the surprise holdover amendment. Advancing Sen. Jones' next campaign by two years is not a compelling state interest justifying the disenfranchisement of SD-15 voters for two years.

For these reasons, Appellants seek an order voiding the Commission's last-minute holdover amendment and enjoining the State from enforcing it. They do not challenge any other portion of the redistricting plan.

STATEMENT OF ISSUES

1) Does the public's right to "observe the deliberations of all government bodies," (Mont. Const. art. II, § 9), apply only when a quorum of the body's governing members convenes contemporaneously in one room or, as with sunshine laws in most other states, does it also apply when a series of one-on-one deliberations occur among members of a constructive quorum ?

2) Is the District Court's holding that the Commission is part of the Legislature and therefore exempt from the Right of Participation, (Mont. Const. art. II, § 8), consistent with this Court's holding that the Commission is a "separate body" from the Legislature and "an independent, autonomous entity"?[1]

3) Is advancing a particular state senator's re-election campaign by two years a compelling state interest under the Right of Suffrage, (Mont. Const. art. II, § 13), that justifies a two-year disenfranchisement of thousands of voters?

[1] *Wheat v. Brown*, 2004 MT 33, ¶¶ 20, 23, 320 Mont. 15, 85 P.3d 765.

STATEMENT OF THE CASE

Appellants filed their complaint in the Montana Fourteenth Judicial District, Wheatland County, on March 14, 2013. (D.C. Doc. 1.) On June 27, 2013, the District Court granted a motion for change of venue filed by Appellees, the State of Montana and Secretary of State Linda McCulloch (hereinafter, the "State") and transferred the case to the First Judicial District. (D.C. Doc. 1.)

Appellants filed an amended complaint on July 31, 2013. (D.C. Doc. 7.) The parties later filed cross-motions for summary judgment. (D.C. Docs. 8 & 16.) On December 6, 2013, the District Court issued its "Decision and Order on Cross-Motions for Summary Judgment" granting summary judgment in favor of the State. (D.C. Doc. 26; a true and correct copy of this Order is attached to the Appendix in accordance with M. R. App. P. 12(1)(h).).

STATEMENT OF FACTS

I THE COMMISSION'S ASSIGNMENT OF HOLDOVER SENATORS

The Commission prepares a plan each decade for redistricting and reapportioning the state's legislative districts, including its 50 senate districts. Mont. Const. art V, § 14. Montana's senators serve four-year terms and are elected on a staggered schedule, resulting in 25 senators elected in 2010 serving terms extending through 2014, and 25 senators elected in 2012 serving terms extending

through 2016. Mont. Const. art V, § 3. Senators in the latter group are commonly referred to as "holdover" senators and are assigned by the Commission to newly drawn districts to serve out the remaining two years of their terms. *Wheat,* ¶¶ 5, 35.

The 2010 Commission consisted of the following five members: Chairman James "Jim" Regnier, Jonathan "Jon" Bennion, Linda Vaughey, Joseph "Joe" Lamson and Carol Williams.[2] (Ex. 34, pp. 14-16; Ex. 35, p. 13.)[3] On November 30, 2012, it assigned all 25 holdover senators to newly drawn districts. (Ex. 5, pp. 14-15; Ex. 34, pp. 48-49.) These assignments included Sen. Rick Ripley to SD-9 and Sen. Bradley Hamlett to SD-10. (Ex. 7.) The Commission did not assign a holdover senator to SD-15 at that time. (Ex. 7.)[4]

Sen. Llew Jones was elected in 2010 to represent SD-14. (Order, p. 3.) His residence became part of SD-9 as a result of redistricting. (Ex. 13; Ex. 34, p. 74). Had Sen. Ripley (currently serving a term that extends through 2016) remained assigned to SD-9, Sen. Jones could not have run for a second term in 2014 in SD-9.

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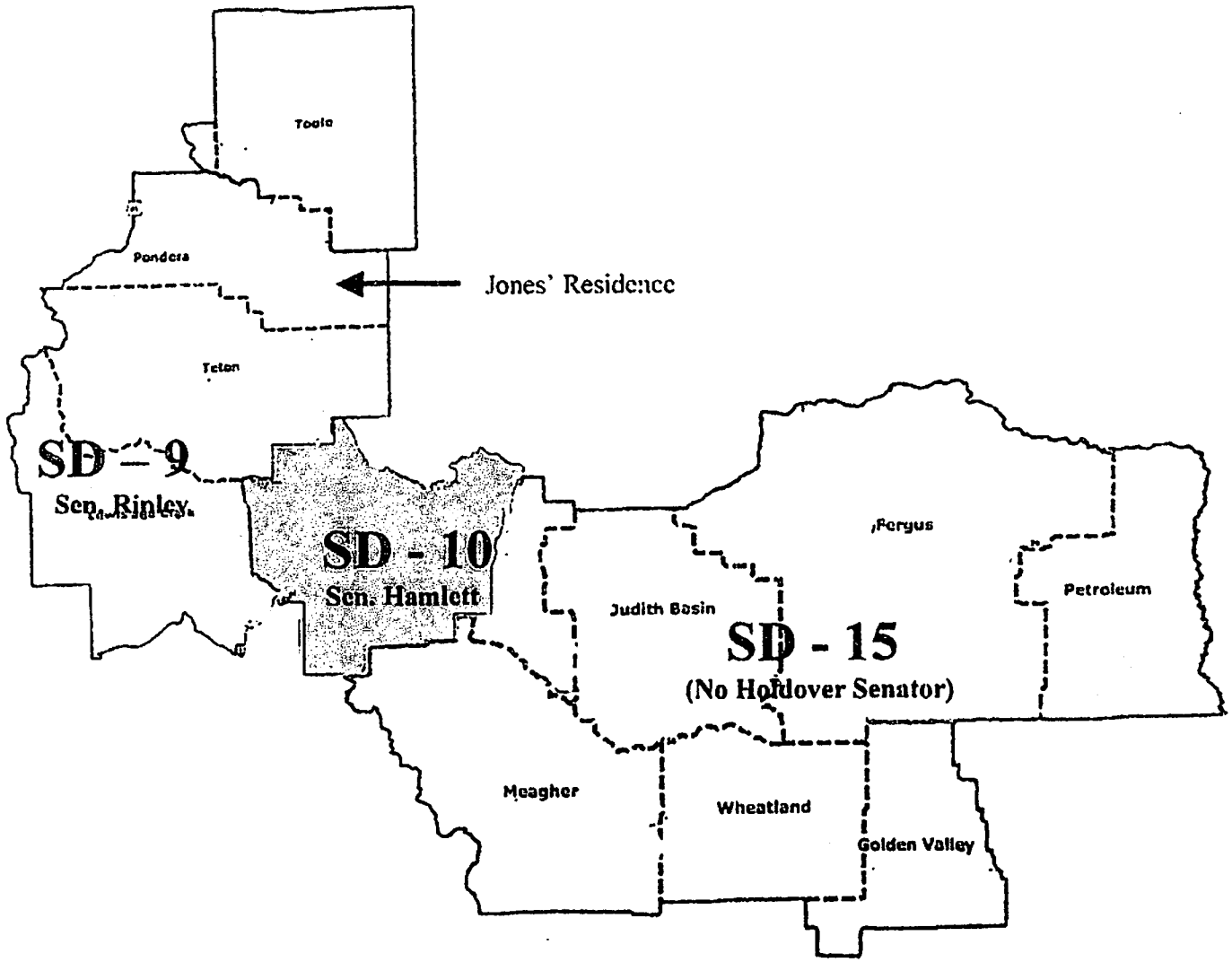
[2] Commissioner Williams replaced Commissioner Pat Smith in January 2013. (Ex. 34, pp. 16-17.)

[3] All exhibits referenced in this Brief are attached to the Compendium of Evidence In Support of Plaintiffs' Motion For Summary Judgment, which was filed in the District Court on August 2, 2013. The Compendium is designated as D.C. Doc. 9.

[4] The Commission's original assignments of holdover senators are depicted in Exhibit 13, which is reproduced on the following page for the Court's convenience. These assignments remained unchanged until February 12, 2013.



SENATE DISTRICTS 9, 10, and 15
(As Submitted by the Commission to the Montana Legislature on January 8, 2013)

II THE COMMISSIONERS' DECISION NOT TO PUBLISH PROPOSED AMENDMENTS FOR REASSIGNING HOLDOVER SENATORS

The Commission enacted "Operating Procedures" which included a procedure for establishing deadlines for public comment on proposed amendments to the redistricting plan. (Ex. 1, p. 4.) On February 1, 2013, the Commission advised the public of its final meeting on February 12 and that "as possible amendments are proposed by the commissioners, the amendments will be posted on the website under the 'Meeting Materials' section." (Ex. 33.) The Commission further advised that written comments "should be submitted by February 11 at noon in order to be distributed to the commissioners at their meeting." (Ex. 33.)

An hour after the Commission issued this statement, Commissioner Bennion asked the staff to prepare an amendment reassigning Sens. Ripley and Hamlett from SD-9 to SD-10 and SD-10 to SD-12 (a district in the Great Falls area), respectively. (Ex. 16; Ex. 34, p. 79.) His request resulted from a letter, (hereinafter, the "Cook Letter"), written by Rep. Rob Cook and other officials asking that Sen. Ripley be reassigned in order to "provide Senator Jones with a Senate district in which he can run during the upcoming (2014) elections." (Ex 15.) Sen. Jones' enthusiasts described him as someone who has "demonstrated a long history of bipartisan policy making," puts people "above party wrangling and political showmanship," and "represents those qualities of Montana's citizen legislature that we all wish to retain." (Ex. 15.)

The staff responded to Commissioner Bennion's request by stating that "we can put the House [district boundary] amendments up on the website, but we don't need to do them for the holdover assignments, because it is just moving somebody over." (Ex. 34, p. 119; see also Ex 16.) Between February 2 and February 10, Commissioners posted online ten proposed House district amendments. (Ex. 37 [Stipulated Fact #17].) They did not post any proposed holdover amendments, however, nor was any other notice of them published. (Ex. 34, pp. 33-34, 107; Ex. 36, p. 105.) Commissioner Bennion later acknowledged that proposed holdover amendments should have been posted because voters in affected districts were entitled to know who their new senator might be. (Ex. 34, p. 107.)

III COMMISSIONERS' PRIVATE DELIBERATIONS PRIOR TO FEBRUARY 12

Commissioners Lamson and Williams discussed reassigning holdover senators on behalf of Sen. Jones during five telephone calls occurring during the first week of February. (Ex. 36, pp. 70-71.) Commissioner Lamson also spoke with Commissioner Regnier approximately ten times during that week on the same subject. (Ex. 36, pp. 71-72.) Commissioners Bennion and Vaughey also conferred around that time on opening SD-9 for Sen. Jones. (Ex. 34, pp. 81-82.)

Commissioners fashioned two competing amendments for opening SD-9. As previously stated, Commissioner Bennion proposed to reassign Sen. Ripley

from SD-9 to SD-10 and Sen. Hamlett from SD-10 to SD-12. (Ex. 16.) A proposal by Commissioners Lamson and Williams also reassigned Sen. Ripley to SD-10, but reassigned Sen. Hamlett to SD-15, (Ex. 30), where Appellants reside.[5]

On February 8, Commissioner Bennion met with Commissioner Lamson to convince him to move Sen. Hamlett to SD-12 rather than to SD-15. (Ex 34, pp. 84-86; Ex. 36, pp. 91-92.) Commissioner Lamson rejected this proposal as benefiting Republicans. (Ex. 36, p. 92.)

Commissioners knew that Chairman Regnier would break any ties and therefore pitched their proposed amendments to him. (Ex. 34, p. 89; Ex. 36, p. 97.) Chairman Regnier was "always striving to get as much consensus as possible," including with regard to opening SD-9 for Sen. Jones. (Ex. 35, pp. 41-42.) On February 9, Commissioner Bennion sent an email to Chairman Regnier containing "Llew Jones" on the subject line and expressing concern with Commissioner Lamson's proposal to "stick [Sen.] Ripley in a district that contains none of his voters." (Ex. 17.) Commissioner Bennion promised to "crunch numbers for you so you can see the most reasonable choices…. based upon sound reasoning and defensible arguments." (Ex. 17.) He prepared a "fact sheet" the following day

[5] These commissioners at one point suggested reassigning Sen. Ripley directly to SD-15. (Ex. 29, p.2; Ex. 36, pp. 65-66.) Commissioners Bennion and Vaughey rejected this idea and it was not pursued further. (Ex. 18; Ex. 36, pp. 89-91.)

entitled "Llew Jones Situation" containing voter statistics in newly drawn senate districts and concluding that Sen. Ripley and Sen. Hamlett should be reassigned to SD-10 and SD-12, respectively. (Ex. 18; Ex. 34, p. 98.)

Chairman Regnier, Commissioner Lamson, and Commissioner Williams discussed the statistics in Commissioner Bennion's fact sheet prior to the hearing on February 12. (Ex. 34, p. 98; Ex. 36, p. 99.) Commissioner Lamson told Chairman Regnier and Commissioner Williams that the statistics were accurate but argued that they were not relevant. (Ex. 36, p. 99.)

On February 10, Commissioners Lamson and Williams spoke further regarding Sen. Jones. (Ex. 36, pp. 77, 95.) Commissioner Lamson also spoke to Chairman Regnier, who "tr[ied] to find out how we could reach some consensus and move forward." (Ex. 36, p. 79.) They also discussed the positions of the other commissioners. (Ex. 36, p. 79.)

Commissioner Lamson asserted later that day in an email to Chairman Regnier that Commissioner Bennion's proposal was a "blatant GOP move to decrease by one the number of likely Democratic seats up for election in 2014," and "the only option that places no hardship or harm on either party is simply reassigning holdovers Senator Ripley and Hamlett one seat to the east," *i.e.*, to SD-10 and SD-15, respectively. (Ex. 30.) Commissioner Lamson also argued that these senators were term limited and would not be "harmed" by the reassignments.

(Ex 30.)

Chairman Regnier proposed a "global motion" to Commissioner Bennion on February 10 that included opening SD-9 for Sen. Jones. (Ex. 34, pp. 93-95; Ex. 35, pp. 46-47.) They discussed Commissioner Lamson's proposal to reassign Sens. Ripley and Hamlett to SD-10 and SD-15, respectively. (Ex. 34, pp. 93-94.) Commissioner Bennion disagreed with the proposal because Sen. Hamlett would be unfamiliar with SD-15. (Ex. 34, p. 94.)

On February 11, the day before the final hearing, Chairman Regnier went to Commissioner Bennion's office and "really press[ed] on a global amendment." (Ex. 34, p. 96.) Commissioner Bennion responded by "trying to plead my case" and "presenting the information that I had developed, as far as the statistics." (Ex. 34, pp. 96-97.) Commissioners Bennion and Lamson conferred again on February 11 regarding Sen. Jones. (Ex. 36, p. 95.) That same day, Commissioner Lamson spoke with Commissioner Williams and Chairman Regnier regarding holdover amendments. (Ex. 36, pp. 95-97.)

Commissioners did not publish any information concerning their deliberations on opening SD-9. (Ex. 34, pp. 97-99; Ex. 35, p. 61.) Their agenda for the February 12th hearing included as its only "Action item" a statement that the Commission would "Discuss and revise Tentative Commission Plan, including justifications for any deviations from ideal population." (Ex 22.) The agenda

contained no reference to proposed holdover amendments. (Ex 22.) Though labeled "Tentative," the agenda was never updated. (Ex. 34, p. 106.)

During the final moments of the hearing on February 12, the Commission approved on a 3-2 vote the amendment reassigning Sen. Ripley to SD-10 and Sen. Hamlett to SD-15 (hereinafter, the "Jones Amendment"). (Ex. 23, pp. 7, 9.)[6] No public comment was offered. (Ex. 23, p. 9.) Commissioners delivered the plan to the Secretary of State later that day, resulting in the Commission's dissolution by operation of law. (Ex. 34, p. 112; Mont. Const art. V, §14(5).)

As a result of the Jones Amendment, 95% of the residents in SD-15 (approximately 19,000 persons) who last voted for a senate candidate in 2010 must wait until Sen. Hamlett's term expires in 2016 before they can vote again for a senate candidate. (Ex. 37 [Stipulated Fact # 10]; Ex. 38 [Plaintiffs' Affidavits, ¶ 6].)[7] Appellants residing in Fergus County were similarly disenfranchised ten years ago. (*Id*., ¶ 7.) Had they known of the Jones Amendment before February 12, they would have objected personally and in writing. (*Id*., ¶ 9.)

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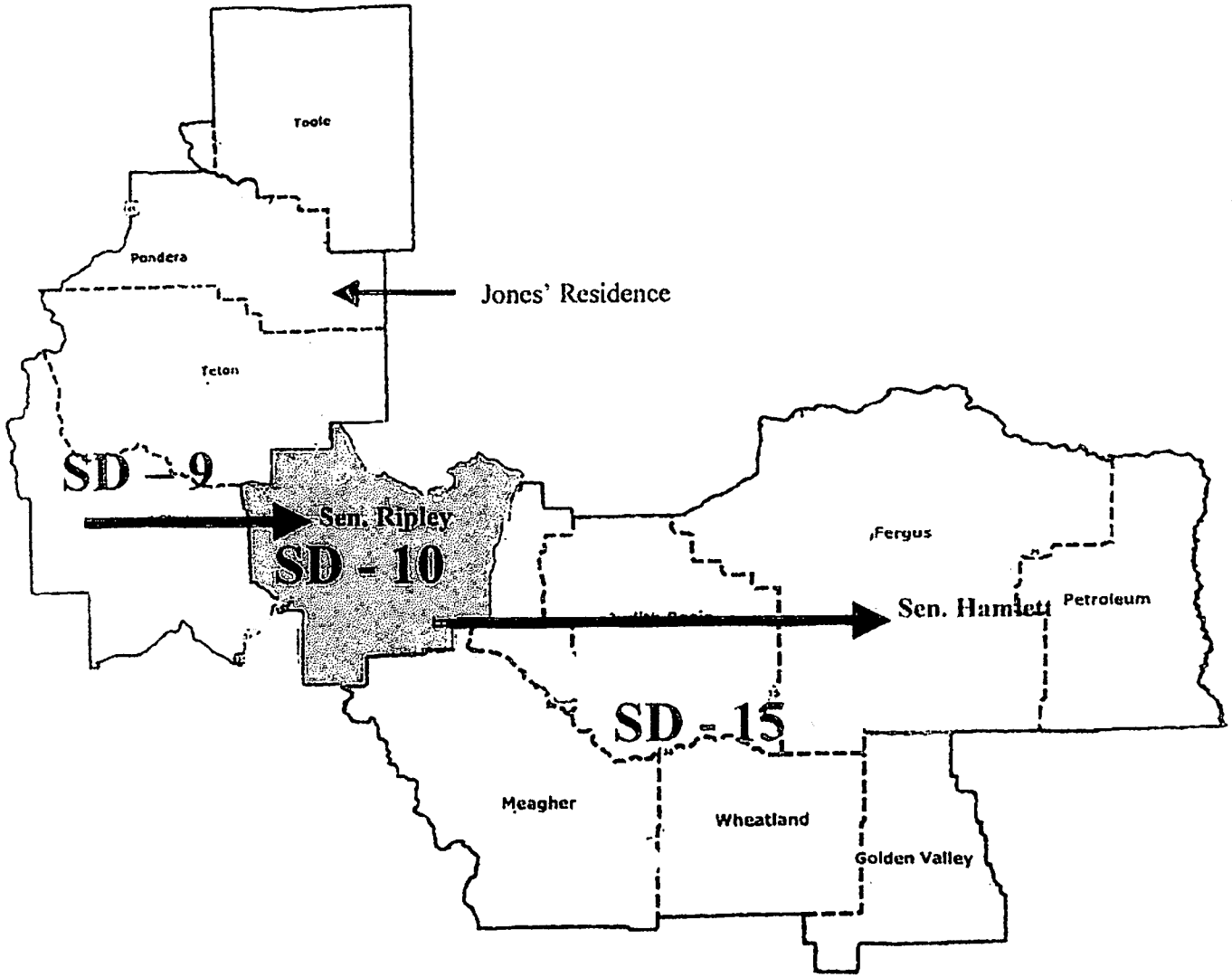
[6] The holdover configuration in SD-9, SD-10, and SD-15 resulting from the Jones Amendment is depicted in Exhibit 21, which is reproduced on the following page for the Court's convenience.

[7] The District Court incorrectly stated that the Commission reassigned Sen. Ripley to SD-15. (Order, p. 4.) In fact, the Commission reassigned Sen. Ripley to SD-10 and Sen. Hamlett to SD-15. (Ex. 23, pp. 7, 9.)



SENATE DISTRICTS 9, 10, and 15
(Based Upon the Commission's Adoption of the "Llew Jones Motion" on Feb. 12, 2013)

STANDARD OF REVIEW

The District Court's summary judgment ruling and its construction of constitutional and statutory provisions are reviewed de novo by this Court. *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶¶ 18-19, 365 Mont. 92, 278 P.3d 455. De novo review "affords no deference to the district court's decision and we independently review the record, using the same criteria used by the district court." *Renville v. Fredrickson*, 2004 MT 324, ¶ 9, 324 Mont. 86, 101 P.3d 773.

SUMMARY OF ARGUMENT

The public's constitutional right to "observe the deliberations of all government bodies," (Mont. Const. art. II, § 9), should apply not only to deliberations by a quorum of governing members physically convening in one location, but also to a series of one-on-one deliberations involving a constructive quorum of members. In this case, all five Commissioners engaged in numerous one-on-one deliberations with each other on reassigning holdover senators so that Sen. Jones could seek re-election in 2014 rather than 2016. The Commission never notified the public of these deliberations prior to its final meeting on February 12, 2013. Attending the hearing without knowing the substance of these deliberations would have provided Appellants nothing more than an "uninformed opportunity to speak." *Bryan v. Yellowstone School Dist.*, 2002 MT 264, ¶ 44, 312 Mont. 257, 60 P.3d 381.

Not only were Appellants unaware of the substance of the Commissioners' deliberations concerning holdover amendments, they were unaware that such amendments were being considered at all. The Commissioners failed to give notice of the proposed amendments despite assuring the public that they would do so. This failure violated Appellants' Right of Participation under Article II, § 8. The District Court held that the Commission is part of the Legislature, however, and therefore exempt from the Right of Participation. This holding contradicts the plain language of the Constitution as well as this Court's holding that the Commission is a "separate body" from the Legislature and "an independent, autonomous entity." *Wheat*, ¶¶ 20, 23. It also conflicts with the drafting history of the Constitution. Convention delegates considered appointive bodies (such as the Commission) to be less responsive to public concerns than entities run by elected officials. They sought to correct this imbalance by applying the Right of Participation to appointive bodies. The District Court's holding also creates bad policy by allowing future commissions to eliminate public participation during the redistricting process, thereby diminishing the quality of future redistricting plans.

Finally, the Commission interfered with Appellants' Right of Suffrage under Article II, § 13, by disenfranchising thousands of voters for two years in order to advance Sen. Jones' next campaign by two years. Facilitating the re-election of a senator is never a compelling state interest justifying disenfranchisement.

ARGUMENT

I. THE COMMISSION'S PRIVATE DELIBERATIONS VIOLATED THE PUBLIC'S RIGHT TO KNOW UNDER ARTICLE II, § 9

A. The District Court Ignored the Relation-Back Rule in M. R. Civ. P. 15(c).

Before analyzing the merits of their claim under the Montana Constitution's Right to Know provision, Appellants first address its timeliness. Appellants timely filed their original complaint containing seven claims on March 14, 2013. (D.C. Doc. 1.) They filed an amended complaint on July 31, 2013, containing an eighth claim under the Right to Know. (D.C. Doc. 7.)

The District Court erroneously held that the eighth claim was untimely. (Order, pp. 12-13.) It completely ignored the rule that an amended complaint relates back to the date of filing of the original complaint if the amendment "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading." M. R. Civ. P. 15(c). The relation-back rule is rooted "in the equitable notion that dispositive decisions should be based on the merits rather than technicalities." *Citizens Awareness Network v. Mont. Bd. of Environmental Rev.*, 2010 MT 10, ¶ 21, 355 Mont. 60, 227 P.3d 583 (amended affidavit supporting challenge to air quality permit related back to original affidavit even though filed over 30 days after challenge because both affidavits concerned same permit). Thus, Rule 15(c) "is

generous toward allowing amendments" and amendments changing "only the legal theory of the action will relate back." *Id.*, ¶ 22.

Appellants' original complaint and amended complaint are identical except that the latter includes an eighth cause of action under Article II, § 9. This new claim arises out of the same conduct, transaction or occurrence set out in Appellants' original complaint: the Commission's approval of the Jones Amendment at its final hearing on February 12. Indeed, the factual allegations supporting the new claim in the amended complaint, (D.C. Doc. 7, ¶¶ 163-64), are identical to those included in the original complaint. (D.C. Doc. 1, ¶¶ 78-79). Appellants' Eighth Cause of Action simply changed their legal theory and therefore relates back to the date of the original complaint.

B. A Constructive Quorum of the Commission Privately Deliberated on Opening SD-9 For Sen. Jones, Thereby Violating the Right to Know

Article II, § 9 of the Montana Constitution affords the public a right to know the workings of public bodies and agencies. The Right to Know "is to be given a broad and liberal interpretation."[8] *Bryan,* ¶ 23, quoting *SJL of Mont. Assoc. v. City*

[8] Article II, § 9, of the Montana Constitution states as follows:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

of Billings, 263 Mont. 142, 146, 867 P.2d 1084, 1086 (1993). When interpreting the Right to Know as well as other constitutional and statutory provisions, this Court first looks to the plain language of the text. *Bryan,* ¶ 23.

The Right to Know grants two substantive rights: the right to (1) examine government documents and (2) observe government deliberations. Mont. Const. Art. II, § 9. This Court has defined "documents" under Article II, § 9.[9] Though the Court has not yet defined "deliberations," the term clearly includes not just a public body's final decision but also the communications leading to that decision. *Associated Press v. Crofts*, 2004 MT 120, ¶ 31, 321 Mont. 193, 89 P.3d 971 ("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").[10]

Deliberations can occur not only when a majority of the governing members

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[9] See, *e.g.*, *Bryan* ¶ 35.

[10] Appellants also note a dissenting opinion defining "deliberation" as "[t]he act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means." *SJL*, 867 P.2d at 1088 (Trieweiler, J., dissenting), quoting BLACK'S LAW DICTIONARY 427 (6th ed.1990); see also *State ex rel. Hardin v. Clermont County,* 972 N.E.2d 115, 125 (Ohio App. 2012) ("Deliberations involve 'the act of weighing and examining the reasons for and against a choice or measure'"); *Neese v. Paris Special Sch. Dist.,* 813 S.W.2d 432, 435 (Tenn.App.1990) ("deliberate" means "to weigh arguments for an against a proposed course of action"); *Sacramento Newspaper Guild v. Sacramento County*, 263 Cal.App.2d 41, 47, 69 Cal.Rptr. 480, 485 (1968) ("to 'deliberate' is to examine, weigh and reflect upon the reasons for or against the choice").

of a public body physically convenes in a meeting room but also when members of a majority communicate one-on-one among themselves regarding a matter within their jurisdiction, as courts around the nation have held.[11] This rule is sometimes referred to as the constructive-quorum rule or the walking-quorum rule.[12] The rule exists because any quorum deliberating privately, even one in which members do

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[11] See, *e.g.*, *Right to Know Committee v. City of Honolulu,* 175 P.3d 111, 122 (Hawaii App. 2008) ("When Council members engaged in a series of one-on-one conversations relating to a particular item of Council business…the spirit of the open meeting requirement was circumvented and the strong policy of having public bodies deliberate and decide its business in view of the public was thwarted and frustrated"); *Harris v. City of Fort Smith*, 197 S.W.3d 461, 467 (Ark. 2004) (city administrator's one-on-one contacts with council members regarding land purchase violated Arkansas open meeting law because the "purpose of the one-on-one meetings was to obtain a decision of the Board as a whole on the purchase….."); *Del Papa v. Bd. of Regents*, 956 P.2d 770, 778 (Nev. 1998) ("a quorum of a public body gathered by using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the body has supervision, control, jurisdiction or advisory power violates the open meeting law"); *Cincinnati Post v. City of Cincinnati*, 668 N.E.2d 903, 906 (Ohio 1996) (Ohio sunshine law "exists to shed light on deliberations of public bodies" and "cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body"); *Booth Newspapers, Inc. v. Wyoming City Council*, 425 N.W.2d 695, 472 (Mich.App. 1988) ("[t]o accept the city council's suggestion that a public body can avoid [Michigan open meeting law] by deliberately dividing itself into groups of less than a quorum and still deliberate on public policy would circumvent the legislative principles as well as the overall objective of the [act] to promote openness and accountability in government"); *Blackford v. Sch. Bd. of Orange County*, 375 So.2d 578, 580 (Fla.App. 1979) (series of meetings between school superintendent and individual board members violated Florida law).

[12] See, *e.g.*, *Booth Newspapers, Inc.*, 425 N.W.2d at 471; *Esperanza Peace & Justice Cntr. v. City of San Antonio*, 316 F.Supp.2d 433, 474 (W.D.Tex. 2001), citing *Brown v. East Baton Rouge Sch. Bd.*, 405 So.2d 1148, 1156 (La.App. 1981).

not all convene in one location at the same time, undermines government transparency:

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors.

Stockton Newspapers v. Redevelopment Agency, 171 Cal.App.3d 95, 102, 214 Cal.Rptr. 561, 564 (1985). Moreover, "no reason appears why the contemporaneous physical presence at a common site of the members of a legislative body" is necessary to trigger an open meetings requirement. *Id.*, 171 Cal.App.3d at 102, 214 Cal.Rptr. at 565. The constructive-quorum rule is sound and, like many other courts in the nation, this Court should adopt it.

In this case, a constructive quorum (indeed, all five Commissioners) privately deliberated on how to reassign Sen. Ripley out of SD-9 in order to open it for Sen. Jones' re-election in November 2014. These deliberations included:

- At least 15 telephone calls between Commissioner Lamson and other commissioners between February 1 and February 7 regarding Sen. Jones, (Ex. 36, pp. 70-72), as well as a similar discussion between Commissioners Bennion and Vaughey during this time, (Ex. 34, pp. 81-82);
- Commissioner Bennion's explanation to Commissioner Lamson on February 8 as to why reassigning Sen. Hamlett to SD-12 would supposedly be the best way to aid Sen. Jones, (Ex. 34, pp. 84-87, 99; Ex. 36, pp. 91-92.);
- An email from Commissioner Bennion to Chairman Regnier on February 9 arguing against Commissioner Lamson's proposal and explaining why reassigning Sen. Hamlett to SD-12 was the best option (Ex. 17);

- Distribution of a "fact sheet" prepared by Commissioner Bennion to other Commissioners containing voter statistics in various districts that he believed would show "the most reasonable choices …. based upon sound reasoning and defensible arguments," (Ex. 17; Ex. 18; Ex. 34, p. 98; Ex. 36);

- An additional discussion between Commissioners Lamson and Williams on February 10 regarding Sen. Jones, (Ex. 36, pp. 77, 95);

- A telephone conference and follow-up email on February 10 between Commissioner Lamson and Chairman Regnier in which Chairman Regnier "tr[ied] to find out how we could reach some consensus and move forward," while Commissioner Lamson argued the merits of his proposal to reassign Sen. Hamlett to SD-15 and criticized Commissioner Bennion's proposed amendment as unfairly benefiting Republicans, (Ex. 30; Ex. 36, pp.79);

- A telephone conference later in the day on February 10 which included a proposal by Chairman Regnier to Commissioner Bennion for a "global motion" encompassing Sen. Jones' problem and also included a claim by Commissioner Bennion that Sen. Hamlett should not be moved to SD-15 because he would be unfamiliar with its voters, (Ex. 34, pp. 93-95);

- A series of discussions on February 11 involving Chairman Regnier and Commissioners Bennion, Lamson and Williams that included "pressing for a global amendment," and "pleading" their cases with each other. (Ex 34, pp. 96-99; Ex 36, pp. 95, 97.)

These communications involved "act[s] of weighing and examining the reasons for and against" proposed amendments to open SD-9 for Sen. Jones and were therefore "deliberations."[13] Under Article II, § 9, these deliberations should have been observable by the public, but were not. The public never knew the substance of these deliberations or even that they had occurred.

The District Court never analyzed Appellants' claim under the

[13] See footnote 10, *supra*.

Constitution's Right to Know. Rather, it held simply that the Commission committed no *statutory* violation because Commissioners never discussed the Jones Amendment in a physical quorum of three or more persons and therefore no "meeting" occurred under § 2-3-202, MCA. (Order, p. 13.)

Constitutions, however, trump statutes. The Right to Know in Article II, § 9 is " 'self-executing' – that is, legislation is not required to give it effect." *Bozeman Daily Chronicle v. Bozeman Police Dept*., 260 Mont. 218, 231, 859 P.2d 435, 443 (1993); *In re Lacy*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989) ("[t]he clear language contained within Article II, Section 9, indicates that there was no intent on the part of the drafters to require any legislative action in order to effectuate its terms"). Thus, "[w]hile the legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the protections found within the Constitution." *Id*.

Accordingly, when reviewing Right-to-Know cases, this Court looks directly to the broad wording of Article II, § 9, rather than narrower statutes. For example, the Court has interpreted the term "documents" in Article II, § 9, "much more broadly" than the Legislature defined "public writings" in § 2-6-101(2), MCA. *Bryan* ¶ 35. Thus, the Constitution's Right to Know is not limited to examining "public writings" as defined by statute but rather includes the broader right of examining "documents" as defined by the Constitution. *Id*.

Likewise, the Constitution's Right to Know is not limited to observing "meetings" as defined by statute but rather includes the broader right of observing "deliberations" as defined by the Constitution. As shown previously, a constructive quorum of Commissioners privately deliberated on opening SD-9 for Sen. Jones.[14] Whether or not any *statute* required Commissioners to open these deliberations to the public, the Deliberations Clause of Article II, § 9, of the Montana Constitution certainly did.

Appellants do not question the dedication or integrity of the Commission. Good faith, however, is not a defense to a Right-to-Know violation. *Bryan*, ¶ 53 (holding that school district's "extraordinary measures to reach a thoughtful, albeit difficult, determination" and lack of "devious intent" did not excuse Right-to-Know violation). Despite the Commission's hard work and properly noticed public hearings held prior to February 2013, the decision mattering most to Appellants, the last-minute reassignment of a holdover senator to their district, was not one they knew about until after the Commission had dissolved. However well-intentioned, a constructive quorum of Commissioners privately deliberated on the Jones Amendment, thereby depriving Appellants of their Right to Know.

Rejection of the constructive-quorum rule by this Court would diminish

[14] See pp. 20-21, *supra*.

government transparency in Montana. Most states have sunshine statutes,[15] and these statutes are applied both when actual quorums convene during formal meetings as well as when members of constructive quorums engage in serial, one-on-one deliberations.[16] If this Court rejects the constructive-quorum rule followed by other states, Montanans' *constitutional* right to observe government deliberations will have less force than analogous *statutory* rights in other states. The District Court's ruling should therefore be vacated.

II THE COMMISSION'S FAILURE TO PUBLISH PROPOSED HOLDOVER AMENDMENTS VIOLATED THE RIGHT OF PARTICIPATION UNDER ARTICLE II, § 8

A. The District Court Erred in Exempting the Commission From the Right of Participation and Its Enabling Statutes

The Right of Participation in Article II, § 8, of the Montana Constitution guarantees Montanans a reasonable opportunity to participate in agency operations prior to final decisions being made. Unlike the Right to Know in Article II, § 9, the Right of Participation is not self-executing but rather is applicable "as may be

[15] Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L.REV. 297, 299 (Summer 2005).

[16] See footnote 11, *supra*.

provided by law," thereby requiring enabling statutes to effectuate it.[17] Accordingly, the Legislature enacted statutory provisions "pursuant to the mandate of Article II, § 8…." § 2-3-101, MCA. These provisions apply to "agencies," the definition of which includes all rule-making commissions such as the Districting and Apportionment Commission. § 2-3-102(1), MCA.

In addition to the plain language of § 2-3-102, MCA, the Constitution's drafting history supports application of the Right of Participation to the Commission. Delegates to the Constitutional Convention believed appointive bodies were less responsive to the public than elective bodies:

> We have drawn clearer lines of election for legislative officials. We have devised a more responsive system of selection and election for judicial officials. We have retained an extensive elective process for our executive officials. But what of the bureaus, the long arm of government with which the average citizen most often comes in contact; the long arm of government which is not responsive to elective officials; the long arms of government with which many, if not most, of our Montana citizens have met frustrating resistance and/or indifference? Elections do not materially affect the bureaus. Political pressures are not sufficient to juvenate [*sic*] response to public need.

Bryan, ¶ 40, quoting Montana Constitutional Convention, Vol. V at 1655, 1657. When another delegate was asked if Article II, § 8, should apply only to appointive

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[17] Article II, § 8, of the Montana Constitution states as follows:

> The 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.

agencies, he stated:

> Basically, that's true, because a city council, for example, just like a Legislature, is not going to act without regard to…citizen participation. They are not going to do it; but the governmental agencies that are not elected, that are appointed, that function to carry out the laws that are passed, are the ones, of course, that will enact rules and regulations and make the decisions that affect people with the effect of law without, sometimes, having any regard for citizen participation.

Montana Constitutional Convention, Vol. V at 1667.

These colloquies show that delegates believed appointed officials were less responsive than elected officials to the public's concerns. Convention delegates corrected this imbalance by requiring appointive bodies, such as the Commission, to allow public participation to a greater degree than elective entities.

Applying the Right of Participation to the Commission is especially important because redistricting is "one of the most conflictual forms of regular politics in the United States short of violence." Gelman & King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 545 (1994). Public participation increases the legitimacy of the Commission's decisions in the eyes of the public and reduces hostility resulting from redistricting, as demonstrated by this case. Prior to February 2013, the Commission held numerous hearings in which it encouraged public participation. (Order, p. 5.) Consequently, none of the decisions made during those hearings have been challenged in court. The only challenge to the 2013 redistricting plan, (*i.e.*, this

case) arose from the last hearing on February 12, 2013 because (as shown in detail in the following sections of this Brief) the Commission did not provide a reasonable opportunity for public participation.

The District Court did not apply the Right of Participation, however, and instead applied § 2-3-102(1)(a), MCA, which excludes from the Right of Participation "the legislature and any branch, committee, or officer thereof." (Order, p. 9, quoting § 2-3-102(1)(a), MCA). This holding contradicts the plain language of both the Constitution and § 2-3-102(1)(a), MCA. The Commission is not part of the Legislature because the "legislature consist[s] of a senate and a house of representatives," not a senate, a house, and a districting commission. Mont. Const. art. V, §1. Rather, the Commission is a "separate body" from the Legislature and "an independent, autonomous entity." *Wheat*, ¶¶ 20, 23.

Similarly, the Commission is not a "branch" of the Legislature under § 2-3-102(1)(a), MCA. A "branch" is "an offshoot, lateral extension, or division of an institution." BLACK'S LAW DICTIONARY 156 (8th ed. 2005). The Commission is a "separate body" from the Legislature and "an independent, autonomous entity," *Wheat*, ¶¶ 20, 23, and therefore cannot be an offshoot, lateral extension, or division of the Legislature. Moreover, when voters in 1972 approved "a <u>*bicameral*</u> (2 houses) legislature," *State ex rel. Cashmore v. Anderson*, 160 Mont. 175, 179, 500 P.2d 921, 924 (1972) (emphasis added), they understood that it would have two

branches: a house and a senate. NEW OXFORD AMERICAN DICTIONARY 161 (2001 ed.) ("bicameral" means "having two branches or chambers"); AMERICAN HERITAGE DICTIONARY 177 (1982 ed.) (defining "bicameral" as "composed of two legislative chambers or branches").[18] Voters did not contemplate a tricameral legislature consisting of a senate, house, and districting commission.

Nor is the Commission a "committee" of the Legislature under § 2-3-102(1)(a), MCA. According to the District Court, the Commission "*operates much like* an interim legislative committee." (Order p. 10, emphasis added.) Argument by simile, however, does not substitute for applying a statute's plain language. Section 2-3-102(1)(a), MCA, applies to committees of the Legislature, not entities that operate much like committees of the Legislature. A "committee" is "[a] subordinate group to which a deliberative assembly or other organization refers business for consideration, investigation, oversight, or action." BLACK'S LAW DICTIONARY 228 (8th ed.2005). The Commission is not subordinate to the Legislature but is instead a "separate body" from the Legislature and "an

[18] Phraseology used by courts around the nation also leads to the unremarkable conclusion that bicameral legislatures have two branches. See, *e.g.*, *Gordon v. New York Stock Exchange*, 422 U.S. 659, 681 (1975) (discussing SEC's duty to file reports "with both branches of Congress"); *Peterson v. Commissioner of Revenue*, 825 N.E.2d 1029, 1039 (Mass. 2005) ("both branches of the Legislature" voted for a particular bill); *Forum For Equality v. City of New Orleans*, 881 So.2d 777, 786 (La.App. 2004) (amendments to joint resolutions can be made prior to "both branches of the legislature" adopting them).

independent, autonomous entity." *Wheat*, ¶¶ 20, 23. Nor does the Legislature "refer business" to the Commission - the Montana Constitution does. Mont. Const. art. V, § 14.

Nor is it even accurate to characterize the Commission as "operat[ing] much like an interim legislative committee." (Order, p. 10.) An interim legislative committee consists of elected legislators with no final authority to enact legislation. § 5-5-211(5)(a), MCA. The Commission, on the other hand, is an appointive body having final authority over all redistricting decisions, thus creating a greater need for public participation during its proceedings that is needed for legislative committees. *Cf. Bryan*, ¶ 40.

Besides misinterpreting the plain language of § 2-3-102(1)(a), MCA, the District Court violated another rule of statutory construction. The Right of Participation consists of "broad policies and protections" deserving a "broad and liberal interpretation." *Bryan* ¶¶ 21, 23. Its exceptions must therefore be construed narrowly. *Cf. Miller v. City of Tacoma*, 138 Wash.2d 318, 324, 979 P.2d 429 (1999) ("liberal construction of [Washington's Open Public Meetings Act] implies a concomitant intent that its exceptions be narrowly confined"). The District Court turned this rule on its head by construing the exception in § 2-3-102(1)(a), MCA, far more expansively than the scope of its plain language, thereby unlawfully diminishing the public's Right of Participation.

The District Court also erred in asserting that the Commission is part of the Legislature because "the powers and duties of the Commission are established under Article V of the Montana Constitution – entitled 'The Legislature.' " (Order, p. 10.) The title of Article V does not trump its text. *In re Maynard*, 2006 MT 162, ¶ 11, 332 Mont. 485, 139 P. 3d 803 ("the text of a statute takes precedence over the heading for purposes of statutory interpretation"). The text of Article V makes clear that the Legislature consists of a senate and a house - not a senate, a house, and a districting commission. Mont. Const., art. V, § 1. The heading of Article V cannot be used to create ambiguity lacking in the Constitution's text.

The District Court also ruled that the Commission is part of the Legislature because the Legislative Services Division assists the Commission. (Order, p. 10). The Legislative Services Division, however, also assists the Governor and elected officials of the Executive Branch with drafting bills.[19] This does not make the Governor and elected officials of the Executive Branch part of the Legislature.

Not only does the District Court's ruling violate several rules of statutory construction, it also creates bad policy. If the Commission is exempted from the Right of Participation, public participation in future redistricting will be subject to

[19] See "Rules Of Procedure, Montana Legislative Council," p. 5, Rules C-4.2 and C-4.4. These Rules are reported at: http://leg.mt.gov/content/Committees/Administration/Legislative%20Council/LC%20Rules%20of%20ProcedureSept2011.pdf

the whims of unelected commissioners. Chairman Regnier noted the importance of public participation when he described redistricting as "a complicated process," that "involves the accumulation of a lot of public information, as far as public input goes. It involves a lot of public comment." (Ex. 35, pp. 59-60.) Exempting the Commission from the Right of Participation will tempt future commissioners to reduce or eliminate public participation, thereby diminishing the quality of future redistricting plans as well as their legitimacy in the eyes of the public.

The plain language of § 2-3-102, MCA, the drafting history of the Constitution, and public policy all necessitate that the Commission be deemed an "agency" subject to the Constitution's Right of Participation and its enabling statutes. The District Court erred in holding otherwise.

B. The Commission Violated § 2-3-103, MCA by Creating Procedures to Notify the Public of Proposed Amendments to the Redistricting Plan, Then Failing to Follow Them

After holding that the Commission was exempt from the Right of Participation in Article II, § 8, the District Court tried covering its bases by asserting that the Commission "complied with the requirements of Article II, Section 8." (Order, p. 10). It never explained what those requirements were.

One requirement is for agencies to "develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant

interest to the public." § 2-3-103(1)(a), MCA. These procedures "must ensure adequate notice and assist public participation before a final agency action is taken…." *Id*.

The Commission had a procedure for setting deadlines to receive public comments on proposed amendments in order "to ensure the comments can be taken into consideration." (Ex. 1, p. 4.) Accordingly, the Commission publicly announced on February 1 that "as possible amendments are proposed by the commissioners, the amendments will be posted on the website under the 'Meeting Materials' section" and written comments "should be submitted by February 11 at noon in order to be distributed to the commissioners at their meeting" on February 12. (Ex. 33.)

The Commission followed this procedure by posting ten proposed House district boundary amendments online between February 2 and February 10. (Ex. 37 [Stipulated Fact #17]). It did not, however, post any proposed holdover amendments. When Commissioner Bennion asked to have his holdover amendment posted, the staff explained that "we can put the House amendments up on the website, but we don't need to do them for the holdover assignments, because it is just moving somebody over." (Ex. 34, p. 119; see also Ex. 16.)

When the Commission assured the public that proposed amendments would be posted on its website in time to allow written public comments before the final

hearing on February 12, and then posted only House boundary amendments during that time, the public had a reasonable expectation that no holdover amendments would be considered at the hearing on February 12. Appellants could not have reasonably foreseen that the Commission would instead violate its own written policy by approving a surprise holdover amendment on February 12.

C. The Commission Violated § 2-3-111, MCA, By Imposing a Deadline of February 11 for Public Comments on Amendments, Then Approving a Surprise Amendment on February 12

The Right of Participation also requires agencies to "afford[ ] interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public." § 2-3-111(1), MCA. A "reasonable opportunity to submit data, views or arguments," in turn, requires that the public know what the "government is doing, has done, and is proposing to do." *Bryan*, ¶ 31 (citations omitted). Accordingly, the government must provide "sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Id.* ¶ 43 (citations omitted). This requires "at a minimum …compliance with the right to know contained in Article II, Section 9." *Id.*, ¶ 44. The Commission's approval of a surprise holdover amendment at its final hearing on February 12 violated these requirements in at least two ways.

First, the Commission did not provide the public with "sufficient factual detail and rationale" for the proposed amendment to reassign Sen. Ripley to SD-10 and Sen. Hamlett to SD-15 that would have "permitted [Appellants] to comment meaningfully." *Bryan* ¶ 43. Commissioner Lamson argued during private deliberations that moving Sen. Hamlett to SD-15 was the only way to avoid benefiting Republicans. (Ex. 36, p. 92.) Commissioner Bennion contended that Sen. Hamlett would be unfamiliar with SD-15 and prepared a fact sheet with statistics to support his argument. (Ex. 18; Ex. 34, pp. 94, 98.)

Appellants did not know about this fact sheet,[20] the arguments for and against moving Sen. Hamlett to SD-15, or even that the Commission was considering this move. Had they known the arguments being made by the Commissioners, Appellants could have voiced their support for Commissioner Bennion, their opposition to Commissioner Lamson, or both. Or they could have advocated for no holdover reassignments at all, an option that was never considered by Commissioners. They could have also offered additional reasons for keeping SD-15 open, such as the fact that Appellants had been assigned a holdover senator during the previous redistricting cycle ten years ago resulting in a similar

[20] *Cf. Bryan*, ¶¶ 45-46 (school district's failure to disclose internal document containing school ratings deprived plaintiff of reasonable opportunity to argue against proposed school closure).

two-year delay in their senate election and that fairness dictated sparing their district this time.[21]

Second, the Commission's policy of requiring that written comments be submitted by February 11, along with its policy of approving surprise amendments at its very last meeting on February 12, prevented Appellants from responding "orally or in *written form*, prior to [the Commission] making a final decision" on the Jones Amendment. § 2-3-111(1), MCA (emphasis added). The Commission reasonably required the public to submit written comments by noon on February 11 in order to be considered during the following day's hearing. (Ex. 33.) But the Commission unreasonably permitted surprise amendments to be raised and approved during that hearing - a day *after* the written comment period had expired.

The Commission's written comment policy could not reasonably be followed even in the absence of the February 11 deadline. Chairman Regnier testified that the Commission could approve non-posted amendments presented at the last minute, such as the Jones Amendment. (Ex. 35, pp. 86-87.) Commissioner Lamson accurately described the consequence of this policy:

[21] Appellants could also have raised more fundamental issues had proper notice been given, such as whether the Commission's facilitation of specific incumbent's re-election is *ever* an appropriate use of government power. No Commissioner apparently realized that a necessary premise underlying the Jones Amendment is that incumbent senators have a special claim to their seats in future elections entitling them to special dispensations from the state.

> The voters in Senate District 15, as well as the voters throughout Montana …should stay tuned to the very last meeting if they had any concerns about what the Commission was doing, because the Commission could make changes up to the very last minute.

(Ex. 36, p.104.) A policy forcing every concerned Montanan to "stay tuned to the very last meeting" and "up to the very last minute" in order to respond to last-minute, unannounced actions by an agency does not provide the public a reasonable opportunity to exercise its right to submit written responses. The preparation and submission of data, views, and arguments on almost any significant issue, such as a proposed holdover reassignment, cannot be done on the fly. Commissioner Bennion needed at least a day to prepare the "fact sheet" he used to counter Commissioner Lamson's proposal to reassign Sen. Hamlett to SD-15. (Ex. 18; Ex 34, p. 98.) Appellants deserved the same opportunity to marshal their evidence and had several arguments, supported by historical data, that they would have presented had proper notice been given.

Forcing every concerned Montanan to "stay tuned to the very last meeting" and "up to the very last minute" of that last meeting is exactly what the Constitution's Right of Participation was intended to prohibit. *Bryan*, ¶ 40, quoting Mont. Const. Conv. Tr., Vol. V at 1655 ("What is intended by [Article II] Section 8 is that any rules and regulations that shall be made and formulated and announced by any governmental agency… shall not be made until some notice is given so that the citizen will have a reasonable opportunity to participate with

respect to his opinion, either for or against that particular administrative action"). The proper way for agencies to act on items first arising during an agency meeting was outlined by then-Attorney General Mike McGrath: simply hold a subsequent meeting and provide notice and a reasonable opportunity for public comment regarding the proposed action. 51 Mont. Op. No.12 Atty. Gen. at 10-11 (Dec. 30, 2005). Instead, the Commission filed its plan with the Secretary of State hours after approving the Jones Amendment, then immediately dissolved by operation of law, (Ex. 34, p. 112; Art. V, §14(5), Mont. Const.), thereby depriving Appellants of their right to participate.

D. Neither the Cook Letter Nor the Commission's Agenda Cured the Notice Violations

The District Court held that the Commission provided sufficient notice of the Jones Amendment because it posted the Cook Letter (Ex 15) online and "provided notice prior to its February 12, 2013 meeting that it would discuss potential revisions to the tentative plan," presumably a reference to the Commission's agenda for the meeting. (Order, p. 10; Ex. 22.) Neither the Cook Letter nor the agenda, however, cured the Commission's violation of §§ 2-3-103(1)(a). As stated earlier, this violation resulted from the Commission's promise to post proposed amendments online and accept written comments submitted by February 11, followed by its approval of a non-posted amendment (the Jones

Amendment) at its final meeting on February 12. Nothing in either the Cook Letter or the agenda alerted the public to the possibility of the Commission disregarding its own policy and approving an un-posted holdover amendment on February 12.

Nor did the Cook Letter and the agenda cure the Commission's failure to provide "reasonable opportunity to submit data, views or arguments," § 2-3-111(1), MCA. As stated previously, this failure occurred because the Commission did not publish "sufficient factual detail and rationale for the [Jones Amendment] to permit [Appellants] to comment meaningfully." *Bryan* ¶ 43. Specifically, the public did not know about Commissioners' deliberations regarding the pros and cons of moving Sen. Hamlett to SD-15 or even that those deliberations had occurred. Nothing in the Cook Letter or the agenda filled this gap.

Additionally, posting public comments such as the Cook Letter did not indicate what the Commission would actually consider. Instead, the Commission as a whole did not deliberate upon a comment from the public unless at least one Commissioner fashioned that comment into a proposed amendment. (Ex. 1, p. 2; Ex. 35, p.87.) Because the Commission promised to post proposed amendments online, and because the Jones Amendment was never posted, Appellants were entitled to assume that it would not be discussed at the hearing on February 12.

Finally, the State does not even know when the Commission actually posted

the Cook Letter online and acknowledges that it could have been as late as February 11, (Ex. 37 [Stipulated Fact # 6]), the deadline for submission of public comments. Thus, even if the Cook Letter had shown (1) that the Commission would open SD-9, (2) that it would do so by moving Sen. Hamlett to SD-15, and (3) the pros and cons privately expressed by Commissioners on moving Sen. Hamlett to SD-15, it might not have been posted in time to give the public meaningful notice.

The Cook Letter and the agenda did not cure the Commission's violations of §§ 2-3-103(1)(a) and 2-3-111(1), MCA, committed when it approved the Jones Amendment. The resulting Right-of-Participation violations render the amendment void. § 2-3-114, MCA.

III ADVANCING SEN. JONES' RE-ELECTION TWO YEARS BY DISENFRANCHISING SD-15 VOTERS FOR TWO YEARS VIOLATES THE RIGHT OF SUFFRAGE UNDER ARTICLE II, § 13

Article II, § 13 of the Montana Constitution provides that "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The Constitution's Right of Suffrage is part of the Declaration of Rights and is therefore a fundamental constitutional right, as the District Court acknowledged. (Order, p. 8, citing *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 113 P.3d 281.) It provides greater

protection for voting rights than does the United States Constitution, which contains no express right to vote. *Cf. Weinschenk v. State*, 203 S.W.3d 201, 211-12 (Mo. 2006) (holding that the Missouri Constitution, which contains a right of suffrage identical to that of the Montana Constitution, gives "more expansive and concrete protections of the right to vote" and therefore "provides greater protection than its federal counterpart"). Strict scrutiny is imposed "when the action complained of interferes with the exercise of a fundamental right," meaning that the action must be narrowly tailored to achieve a compelling state interest. *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996).

When a holdover senator is assigned to a district in which the last senate election occurred in 2010, the district's voters must wait six years rather than four years for their next senate election and are therefore "temporarily disenfranchised."[22] The Jones Amendment substantially increased this form of disenfranchisement. SD-15 consists of approximately 19,000 residents (95% of the district's population) living in areas in which the last senate election occurred in 2010. (Ex. 37 [Stipulated Fact #11].) By assigning Sen. Hamlett to SD-15, the

[22] Comment, *One Person, No Vote: Staggered Elections, Redistricting, and Disenfranchisement*, 121 YALE L.J. 2013, 2013 (2012); *Wilson v. Eu*, 823 P.2d 545, 559 (Cal. 1992) (describing similar phenomenon involving California holdover senators as "partially disenfranchising" voters).

Commission delayed the next senate election in SD-15 from 2014 to 2016, thereby resulting in a net increase of 6,233 disenfranchised voters.[23]

Because the Jones Amendment substantially increases the number of disenfranchised voters, it can only be upheld if it is necessary to achieve a compelling state interest. The amendment's *only* purpose is to enable Sen. Jones to run for re-election in 2014 rather than 2016. Appellants take as read claims by Sen. Jones' enthusiasts that he is the Henry Clay of Montana. (Ex. 15.) Nevertheless, facilitating the political ambitions of a single person should never be a compelling state interest justifying the disenfranchisement of thousands of voters.

The District Court asserted that the Commission did not violate Appellants' Right of Suffrage because "the Commission has many compelling interests, statutory criteria and constitutional rights which they [*sic*] must consider and balance when drafting a redistricting plan." (Order, p. 9.) But the Commission had addressed those matters *before* the hearing on February 12 commenced. The Commission was not balancing many compelling interests, statutory criteria and

[23] Total disenfranchisement resulting from the Jones Amendment is less than the 19,000 voters disenfranchised in SD-15 because the amendment removed a holdover senator (Sen. Ripley) from SD-9, thereby advancing the next senate election in SD-9 from 2016 to 2014. Because SD-9 consists of 12,767 residents living in areas in which the last state senate election occurred in 2010, (Ex 37 [Stipulated Fact #12]), the Jones Amendment decreased the number of disenfranchised residents in SD-9 by 12,767. The total number of voters disenfranchised by the Jones Amendment is therefore 6,233 (19,000 -12,767).

constitutional rights when it moved Sen. Ripley to SD-10 and Sen. Hamlett to SD-15. Rather, it approved the Jones Amendment in order to advance one goal: the salvaging of Sen. Jones' political career. This is not a compelling state interest justifying the disenfranchisement imposed on SD-15 voters.

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that this Court enjoin the State from enforcing the Commission's last minute reassignment of Sen. Rick Ripley from SD-9 to SD-10 and Sen. Bradley Hamlett from SD-10 to SD-15.

DATED: January 7, 2014

Respectfully submitted,

_____

Matthew G. Monforton
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11, I certify that the Appellants' Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word is exactly 9,531 words, excluding caption page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

Dated: January 7, 2014 By:_____
Matthew G. Monforton
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Appellants' Opening Brief to be served via U.S. Mail and email to :

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IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 13-0820

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, ROALD TORGESON, RUTH TORGESON, ED TIMPANO, JEANNIE RICKERT, TED HOGELAND, KEITH KLUCK, PAM BUTCHER, TREVIS BUTCHER, BOBBIE LEE COX, WILLIAM COX, AND DAVID ROBERTSON,

Plaintiffs and Appellants,

v.

STATE OF MONTANA, LINDA McCULLOCH, in her capacity as Secretary of State for the State of Montana,

Defendants and Appellees.

APPENDIX

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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, ROALD TORGERSON, RUTH TORGERSON, ED TIMPANO, JEANNIE 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 and Secretary of State for the State of Montana, Defendants.	Cause No.: ADV-2013-509 .00 **DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Pending before the Court are cross motions for summary judgment. Matthew G. Monforton represents Plaintiffs. Lawrence VanDyke and J. Stuart

Segrest represent Defendants State of Montana and Secretary of State Linda McCulloch. The Court held oral argument on November 8, 2013. Upon consideration of the parties' arguments, the Court grants Defendants' motion for summary judgment in accordance with this Order.

BACKGROUND

On March 14, 2013, Plaintiffs filed a complaint seeking injunctive and declaratory relief in the Montana Fourteenth Judicial District Court, Wheatland County. Plaintiffs are registered voters in Fergus and Wheatland Counties seeking to invalidate the Montana Districting and Apportionment Commission's (Commission) assignment of two "holdover" senators (senators who were elected to a four-year term in 2012 who do not have to seek re-election during the 2014 general election.) Defendant Linda McCulloch (McCulloch) is the Secretary of State for the State of Montana. Her primary responsibility is maintaining the official public records for the State of Montana and conducting elections. In their initial complaint, Plaintiffs alleged the following causes of action: Count I --- denial of right of suffrage in violation of Article II, Section 13 of the Montana Constitution; Count II --- denial of the right to participate in violation of Article II, Section 8 of the Montana Constitution; Count III --- failure to submit redistricting plan to the legislature in violation of Article V, Section 14(4) of the Montana Constitution; Count IV --- denial of equal protection in violation of Article II, Section 4 of the Montana Constitution; Count V --- denial of equal protection (inverse class of one) in violation of Article II, Section 4 of the Montana Constitution; Count VI --- unlawful consideration of an incumbent legislator's address in redistricting in violation of Section 5-1-115(3)(a), MCA; and Count VII --- unlawful consideration of previous election results in redistricting in violation of Section 5-1-115(3), MCA. Plaintiffs request: (1) an Order

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from this Court declaring the Commission's February 12, 2013 assignment of Senator Rick Ripley (Ripley) to Senate District 10 and Senator Brad Hamlett (Hamlett) to Senate District 15 unlawful and void; (2) an Order enjoining Defendants from giving any legal effect to the Commission's February 12, 2013 assignment; and (3) an award of attorney fees and costs.

On May 8, 2013, Defendants filed a motion for change of venue from Wheatland County to Lewis and Clark County. Plaintiffs opposed the motion. On June 27, 2013, the district court granted Defendants' motion and transferred the proceedings to the First Judicial District, Lewis and Clark County. On July 31, 2013, Plaintiffs filed an amended complaint alleging an additional cause of action: Count VIII --- failure to permit public observation of agency deliberations in violation of Article II, Section 9 of the Montana Constitution.

This case arises out of the 2013 redistricting of the Montana Legislature into 100 house districts and 50 senate districts. Specifically, Plaintiffs seek to invalidate the Commission's 2013 redistricting plan wherein the Commission assigned two holdover senators at its February 12, 2013 meeting. The term "holdover senator" refers to those Montana senators who have served two years of their four-year term at the time of redistricting. Plaintiffs allege the reassignments were made without public notice and legislative review and disenfranchised voters in Senate District 15 which includes Judith Basin, Fergus, Petroleum, Wheatland, Meagher, and Golden Valley Counties. Plaintiffs are registered voters in Fergus and Wheatland Counties who last voted for a state senator in the 2010 general election.

In 2010, Llew Jones (Jones) was elected to the Montana Senate in Senate District 14. After reapportionment, Jones' residence (in Pondera County) lies in Senate District 9. Initially, the Commission assigned Ripley as a holdover senator to

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represent Senate District 9. Under the tentative redistricting plan, Jones would have to wait until the 2016 general election to seek re-election to the Montana Senate in Senate District 9, the district in which Jones resides. Under the final redistricting plan, however, the Commission assigned Ripley as the holdover senator in Senate District 15. Plaintiffs, who reside in Senate District 15, will have to wait six years (until the 2016 general election) before having an opportunity to elect a senator to represent them in the Montana Legislature.

Montana's legislative districts are determined after each federal census. Article V, Section 14 of the Montana Constitution establishes a Districting and Apportionment Commission to prepare the plans for redistricting and reapportioning the state into legislative districts. It provides:

> **Section 14. Districting and apportionment.** (1) The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.
>
> (2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative districts and a plan for redistricting the state into congressional districts. The majority and minority leaders of each house shall each designate one commissioner. Within 20 days after their designation, the four commissioners shall select the fifth member, who shall serve as chairman of the commission. If the four members fail to select the fifth member within the time prescribed, a majority of the supreme court shall select him.
>
> (3) Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law.

(4) The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law.

(5) Upon filing both plans, the commission is then dissolved.

After the 2010 federal population census, the legislative leadership appointed four members to the Commission and the Montana Supreme Court selected the fifth member. In an effort to allow citizen participation to establish criteria for redistricting, the Commission held public hearings in Helena, Missoula, and Billings, in which citizens in Havre, Great Falls, Kalispell, and Miles City participated via videoconference. On May 28, 2010, the Commission adopted redistricting criteria. In July 2011, the Commission directed its staff to develop statewide maps for discussion and to elicit public comment. The Commission subsequently held public hearings in 14 different locations across Montana, including rural and urban communities and areas with a sizeable population of Native Americans. In August 2012, the Commission adopted a tentative plan for 100 legislative districts.

The Commission then created senate districts, which it accomplished by joining adjacent house districts. After soliciting public comment on potential senate districts, the Commission considered the assignment of the 25 holdover senators. As an unavoidable consequence of redistricting, each holdover senator is assigned to a newly apportioned and redesigned district to serve the remaining two years of their term. The remaining 25 senate districts will hold elections in 2014. In December 2012, the Commission directed its staff to prepare a "Tentative Commission Plan" for submission to the 63rd Montana Legislature on January 8, 2013. Upon review

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of the tentative plan, the House and Senate adopted resolutions providing its recommendations to the Commission. The legislative resolutions did not address Jones' inability to run for re-election under the Commission's tentative plan. On January 27, 2013, a bipartisan group of six senators, six representatives, and four leaders of non-profit and community associations submitted a letter to the Commission asking it to assign Jones to a district in which he could run for re-election to the Senate in 2014. Like all public comment submitted to the Commission, the letter was posted to the Montana Legislature's website. The Commission also received letters from government and community leaders from northcentral Montana asking the Commission to assign Jones to a senate district in which he could run for re-election in 2014.

Upon receiving the legislative recommendations, the Commission scheduled February 12, 2013 as its final meeting date at which the Commission planned to discuss and revise its tentative plan and adopt a final legislative redistricting plan. The agenda for the February 12, 2013 Commission meeting included an opportunity for public comment. At the meeting, a majority of Commission members voted to assign Senator Ripley to Senate District 10 and assign Senator Hamlett to Senate District 15, thereby leaving Senate District 9 without a holdover senator. This revision, which Plaintiffs' designate the "Llew Jones amendment," was the last matter the Commission considered at its final meeting. Thereafter, the Commission gave an opportunity for public comment. When no one testified, the Commissioners adopted the final redistricting plan. The Commission was dissolved upon submitting its final plan to the Secretary of State.

Plaintiffs argue the Commission violated several provisions of the Montana Constitution by privately deliberating on the Llew Jones amendment and

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failing to provide adequate public notice prior to their February 12, 2013 meeting. The final redistricting plan, according to Plaintiffs, will unlawfully deprive them an opportunity to vote in a senate election in 2014.

Plaintiffs have stipulated to dismissal of their claims arising under the Montana Constitution's guarantee of equal protection, Sections 5-1-115(3)(a) and 5-1-115(3)(d), MCA, the fourth, fifth, sixth, and seventh causes of action in their amended complaint.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. v. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)). Conclusory statements and assertions are not enough to defeat a motion for summary judgment. *Id.* The mere denial of a fact does not satisfy the non-moving party's burden of establishing a genuine issue of material fact and is not a proper basis for denial of a motion for summary judgment. *Vettel-Becker v. Deaconess Med. Ctr. of Billings, Inc.*, 2008 MT 51, ¶ 27, 341 Mont. 435, 177 P.2d 1034.

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DISCUSSION

The Court grants Defendants' cross-motion for summary judgment and denies Plaintiffs' motion for summary judgment in accordance with this Order.

I. Denial of Right of Suffrage --- Article II, Section 13 of the Montana Constitution

Article II, Section 13 of the Montana Constitution provides that "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The right of suffrage is a fundamental constitutional right. *State v. Riggs*, 2005 MT 124, ¶ 47, 327 Mont. 196, 113 P.3d 281 (citations omitted). Plaintiffs claim because approximate 19,000 (95 percent of the district's population) residents of Senate District 15 last voted for a senate candidate in 2010, they are disenfranchised and deprived of their right of suffrage when forced to wait six years between senate elections instead of four. Defendants note Plaintiffs' case is not supported by state or federal law, that in the context of legislative redistricting, the primary concern is that population deviation between districts remain relatively close to the "ideal deviation." *McBride v. Mahoney*, 573 F. Supp. 913 (D. Mont. 1983) (citations omitted). In the present matter, the Commission adopted a deviation criteria of 3 percent from the ideal. In fact, under the Commission's final plan there are no house or senate districts with a deviation greater than 3 percent.

Montana's Constitution requires legislative reapportionment every ten years, resulting in 25 senate districts to which the Commission assigns a holdover senator. As a direct result of the constitutional requirement that Montana state senators serve staggered four year terms, one-half of the state's population will inevitably reside in a district to which the Commission assigns a holdover senator.

It is an inescapable consequence of the redistricting process that many Montanans will cast their votes in two senate (general) elections over a ten year period. The Commission has many compelling interests, statutory criteria and constitutional rights which they must consider and balance when drafting a redistricting plan. As the Commission assigns holdover senators, however, there are no statutes or case law requiring it to minimize the affected population.

II. Denial of the Right to Participate --- Article II, Section 8 of the Montana Constitution

As set forth above, the Commission encouraged and facilitated public participation throughout the redistricting process. Defendants argue the right of participation under Article II, Section 8 of the Montana Constitution applies only to "agencies" defined by Section 2-3-102, MCA, and the Commission is not an "agency" subject to the right to participate. Article II, Section 8 provides: "The 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." Section 2-3-102(1)(a), MCA, excludes from the definition of agency "the legislature and any branch, committee, or officer thereof." Plaintiffs insist the Commission satisfies the definition for an agency which includes "any board, bureau, *commission*, department, authority, or officer of the state or local government." Section 2-3-102(1), MCA (emphasis added).

The Montana Supreme Court determined the Commission is "an independent, autonomous entity," appointed by the legislative leadership, but insulated from political pressure inherent in the redistricting process. *Wheat v. Brown*, 2004 MT 33, ¶¶ 20, 23, 320 Mont. 15, 85 P.3d 765. Although the Commission is independent from the legislature, it is clearly a part of the legislative branch of

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government. The powers and duties of the Commission are established under Article V of the Montana Constitution—entitled "The Legislature." The Commission operates much like an interim legislative committee. The Legislative Services Division provides the research analysts, attorney, and secretary to staff the Commission and maintains its website. (Defs.' Resp. Pls.' Mot. S.J. & Br. Supp. Defs.' Cross-Mot. S.J., Ex. A (Sept. 11, 2013).) In fact, the electronic copy of the Commission's minutes, submitted as Defendants' Exhibits A through I, are maintained and may be accessed from the "Legislative Branch" home page. Because the Commission is not an agency, but a component of the legislative branch, its deliberations are not subject to Article II, Section 8.

Nonetheless, the record in this matter amply demonstrates the Commission strived to ensure public involvement at every step of the redistricting process and thereby complied with the requirements of Article II, Section 8. The Commission provided notice prior to its February 12, 2013 meeting that it would discuss potential revisions to the tentative plan, which could foreseeably have included changes to the assignment of holdover senators. (Pls.' Compendium Evid. Supp. Pls.' Mot. S.J., Ex. 15 (Aug. 2, 2013).) Further, the Commission posted to its website letters from community leaders, legislators and others urging the Commission to assign Jones to a senate district in which he could seek re-election. The Commission provided sufficient notice to the public so that they could participate in the redistricting process, including the assignment of holdover senators.

III. Failure to Submit Redistricting Plan to the Legislature --- Article V, Section 14(4) of the Montana Constitution

Article V, Section 14(4) of the Montana Constitution provides the following:

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> The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law.

The Commission, after receiving the legislature's recommendations, re-assigned Senator Ripley to Senate District 10 and Senator Hamlett to Senate District 15 at the February 12, 2013 meeting. As a result, the Commission filed a final plan for legislative districts with the secretary of state without first presenting it to the legislature for additional recommendations. By failing to do so, Plaintiffs argue the Commission violated Article V, Section 14(4), which renders void the Commission's final assignment of Senators Ripley and Hamlett. Defendants argue the Commission fulfilled its constitutional obligation when, on January 8, 2013, it submitted its tentative redistricting plan to the legislature for its recommendations.

Montana's constitutional requirements do not support the Plaintiffs' claim. The Commission must submit its redistricting plan to the legislature for "its recommendations" only once. As an independent and autonomous body, the Commission is largely insulated from political pressure or similar constraints from the legislature. Wheat, ¶ 20. The Commission is not bound by legislative recommendations nor does the Constitution require the Commission to submit its final plan to the legislature for further recommendations before submitting it to the secretary of state.

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IV. Failure to Permit Public Observation of Agency Deliberations --- Article II, Section 9 of the Montana Constitution

Article II, Section 9 of the Montana Constitution, the Right to Know Clause, provides that "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Section 2-3-203(1), MCA, requires that "All meetings of public or governmental bodies, boards, bureaus, commissions . . . must be open to the public." When government officials violate this requirement, any decision they make "may be declared void by a district court having jurisdiction." Section 2-3-213, MCA. A plaintiff seeking to void a decision, however, must commence a suit "within 30 days of the date on which the plaintiff or petitioner learns, or reasonably should have learned, of the agency's decision." *Id.*

Plaintiffs contend the Commission's private deliberations on reassigning holdover senators violated the public's right to know under Article II, Section 9. In support of their claim, Plaintiffs identify instances in which commissioners conversed, telephoned, or sent e-mail to each other in which they discussed matters pending before the Commission, particularly the proposed amendments to re-assign holdover senators prior to the February 12, 2013 meeting. Defendants argue because Plaintiffs missed the deadline, their Article II, Section 9 claim is time barred and should be dismissed. Plaintiffs filed their amended complaint on July 23, 2013—five months after the Commission reassigned the holdover senators at its February 12, 2013

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meeting.[1] Having waited more than 30 days in which to bring this claim, Plaintiffs cannot now avail themselves of the remedy set forth in Section 2-3-213, MCA.

Nonetheless, the record does not support Plaintiffs' claim members of the Commission violated Montana's open meeting laws. Section 2-3-202, MCA, defines a "meeting" as a "convening of a quorum of the constituent membership of a public agency or association described in [section] 2-3-203, [MCA,] whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power." Although *quorum* is not defined for purposes of the open meeting laws at Sections 2-3-101 through –221, MCA, the Montana Code Annotated provides elsewhere that a majority of the members of a board or commission constitutes a quorum for purposes of transacting business. See Sections 15-2-103, 20-2-101, 20-2-111, 85-8-308, MCA. Thus three out of the five members of the Districting and Apportionment Commission members constitute a quorum. Two Commission members (in person, by telephone or other electronic means) discussing redistricting are not conducting a meeting contemplated in Section 2-3-202, MCA, and are not subject to the open meeting requirements of Article II, Section 9. The record indicates the Commission members communicated with each other outside their formal meetings, but only made their final decisions at public meetings after first considering public comment.

In conclusion, Defendants are entitled to summary judgment in accordance with this Order. Based on the foregoing,

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[1] Plaintiffs' Article II, Section 9 claim first appeared as the eighth cause of action in Plaintiffs' amended complaint.

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IT IS HEREBY ORDERED:

1. Defendants' motion for summary judgment is GRANTED.
2. Plaintiffs' motion for summary judgment is DENIED.
3. Each party shall be responsible for its own attorney fees and costs.

DATED this 6th day of December 2013.

MIKE MENAHAN
District Court Judge

c: Matthew G. Monforton
Lawrence VanDyke/J. Stuart Segrest

MM/d