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MONTANA FOURTEENTH JUDICIAL DISTRICT COURT
WHEATLAND 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. DV-13-07 **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR CHANGE OF VENUE**

Plaintiffs' opposition to the Defendants' motion to transfer venue is based entirely on the notion that a plaintiff's desire to personally "attend as many proceedings" as

possible trumps all other considerations. It doesn't. Nothing in Montana law suggests that desire is even germane, much less given the dispositive weight Plaintiffs place on it. Venue is not, and cannot be, a function of the number or intensity of individuals who wish to watch legal proceedings.

Instead, Montana's venue law recognizes two important considerations relevant in this case. First, Montana cases recognize that citizens should be able to *litigate* (not spectate) against the State in "a forum that is not so distant and remote that access to it is impractical and expensive." *Guthrie v. Mont. Dept. of Health & Envtl. Sciences*, 172 Mont. 142, 146, 561 P.2d 913 (1977) (quotation omitted). This consideration is addressed by § 25-2-126(1) of the Montana Code, which allows plaintiffs to bring suit against the State in their county of residence. *See Kendall v. State*, 231 Mont. 316, 318, 752 P.2d 1091 (1988) ("the purpose of this statute is to afford citizens a practical and inexpensive forum for suits against the State"). Montana law also recognizes that the convenience of witnesses and the ends of justice may, in some cases, favor adjudication in a court different from where suit was originally brought. Thus, a court "must" transfer venue "when the convenience of witnesses and the ends of justice would be promoted by the change." Mont. Code Ann. § 25-2-201(3).

In some cases, those two important interests may be in tension, requiring a court to balance them against each other. But not here. Tellingly, Plaintiffs never argue that *litigating* this case would be any more practical or inexpensive in the Fourteenth District than in the First District. They can't. Their attorney is located in Bozeman, which is closer to Helena than Harlowton, so if anything it will be more impractical and expensive

to have him litigate this case in Harlowton. And all of the key witnesses, evidence, and events giving rise to this dispute are also in or around Helena, not Harlowton.

Instead, Plaintiffs argue that it would be less convenient for individual plaintiffs to *watch* this case in Helena. But that is irrelevant. None of Plaintiffs' cases as much as hint that a desire to personally attend and observe court proceedings has any bearing on the venue inquiry. Rather, those cases merely acknowledge that a plaintiff suing the State should not be required to litigate in a forum "so distant and remote that access to it is impractical and expensive." *Guthrie*, 172 Mont. at 146 (citation omitted); *see also Kendall*, 231 Mont. at 317 (same); *Peterson v. Tucker*, 228 Mont. 393, 396, 742 P.2d 483 (1987) (same).

Plaintiffs' central reliance on *Guthrie* is especially strange, since it differs from this case in every pertinent detail, it never mentions any plaintiff's desire to attend court proceedings, and it ordered that the defendants' motion to transfer venue be *granted.* In *Guthrie*, all of the plaintiffs and defendants except the defendant Montana Department of Health and Environmental Sciences (DHES) were located in Teton County, and the suit sought an injunction to stop a land development in Teton County. *Id.* at 143-44. Nevertheless, the Plaintiffs filed suit in Lewis and Clark County, arguing venue there was proper because the DHES had not prevented the development. *Id.* at 144. Rejecting the plaintiffs' choice of venue, the *Guthrie* Court transferred the case to Teton County because it determined that the cause of action "arose" in Teton County. *Id.* at 147. The Court's venue decision in *Guthrie* clearly had nothing to do with any individual plaintiff's desire to attend court proceedings—the plaintiffs in *Guthrie* wanted the suit to

continue *away from* their home county. Rather, the key lesson from *Guthrie* is that a plaintiff's choice of venue is sometimes secondary to other considerations—for example, in *Guthrie* the plaintiffs' choice was outweighed by the fact that the cause of action arose in a different county.

The cause of action in this case arose in Lewis and Clark County, as *Guthrie* itself makes clear. The Court in *Guthrie* contrasted two different venue cases— *Gilroy v. Anderson*, 159 Mont. 325, 497 P.2d 688 (1972), and *Montana-Dakota Utilities Co. v. Public Service Commission*, 111 Mont. 78, 107 P.2d 533 (1940)—explaining that "[b]oth cases were properly decided, the difference in result is based on the fundamental difference between the nature of the causes of action involved." *Guthrie*, 172 Mont. at 148. This case is clearly much more akin to *Gilroy* than *Guthrie* or *MDU*. In *Gilroy*, as in this case, the plaintiffs brought suit in the Fourteenth District challenging a state official's redistricting decision as unlawful. *Gilroy*, 159 Mont. at 326. Rejecting the plaintiffs' argument that the cause of action arose in their home counties, the Court concluded that a challenge to a state official's redistricting plan falls "within the rule that a cause of action based upon official conduct of a state officer performable at the seat of the state government arises in the county of his official residence." *Id.* at 329. The Court accordingly ordered that venue be transferred to Lewis and Clark County. *Id.* Thus, contrary to Plaintiffs' contention, *Guthrie* (as well as *Gilroy*) supports the venue transfer sought in this case, because the cause of action here "arose" in Helena.

Plaintiffs' claim that granting a venue transfer based on § 25-2-201(3) would somehow "nullify" § 25-2-126(1) is similarly odd. *See* Resp. at 4. It is Plaintiffs'

over-reading of § 25-2-126(1) that nullifies j 25-2-201(3). Under Plaintiffs' misapplication of *Guthrie*, once plaintiffs have sued the State in their county of residence, venue is locked down, regardless of whether the cause of action arose there and regardless of how much that inconveniences potential witnesses. That reading nullifies § 25-2-201(3), which explicitly requires courts to consider inconvenience to witnesses. It also ignores *Gilroy*, which transferred venue away from the plaintiffs' county of residence because a redistricting cause of action arose in Lewis and Clark County. In contrast, Defendants' request for a venue transfer based on the convenience of witnesses and the ends of justice (including where the cause of action arose) in no way invalidates the interests behind § 25-1-126(1). If, in fact, Defendants' sought a venue that made it "impractical and expensive" for Plaintiffs to litigate this case, then this Court would need to balance the interests in *both* § 25-2-126(1) and § 25-2-201(3), not "nullify" either one. Thankfully, however, that is not required in this case.

In reality, Plaintiffs are going even one step farther than asking the Court to simply nullify § 25-2-201(3). Plaintiffs are asking the Court to override important interests that both the Montana Code and Montana courts have explicitly protected—i.e., the convenience of witnesses and litigating where the cause of action arose—with something that no court and no statute has ever even discussed—i.e., the convenience of litigants to *observe* proceedings. Even if a desire to observe the proceedings in this case has legal significance, the individual plaintiffs are not the only individuals likely to have a desire to observe the proceedings. If a court eventually grants the relief sought by Plaintiffs, citizens in Glacier, Teton, Pondera, Toole, and Lewis and Clark Counties will

be assigned a holdover senator, and forced to wait two extra years before they can vote again. There is no reason that some citizens in those counties—all of which are much closer to Helena than Harlowton—would not similarly desire to "attend proceedings" in this case. So even if the underlying basis of Plaintiffs' argument had merit, it would not militate in favor of Harlowton over Helena.

Finally, Plaintiffs attempt to avoid transfer by arguing that "there is likely to be little, if any, live witness testimony offered by either side." Resp. at 4. Tellingly, Plaintiffs are equivocal on this point, stating only that it is "likely." Plaintiffs cannot say for certain that they will not call any of the key witnesses, because Plaintiffs have not even deposed those witnesses yet. Plaintiffs surely cannot say whether the Defendants will seek to call any of those key witnesses. The truth is that neither the Plaintiffs nor the Defendants will know for certain what live witnesses may be necessary in this case until discovery is completed. What we do know, however, is that all of those potential witnesses are in or near Helena. And it is more likely than not that the court hearing this case will be interested to hear directly from at least some of these key witnesses.

* * *

In short, the convenience of witnesses and the location where the cause of action arose both point strongly in favor of transferring venue in this case to Lewis and Clark County. If the expense and impracticality of litigating in Helena outweighed those interests, then perhaps a transfer of venue would be improper. But they don't. All that Plaintiffs have shown is that some affected individuals would prefer to watch the proceedings in Harlowton. No court has ever deemed that a relevant consideration, and

even if it was, there are likely just as many, if not more, affected individuals who would prefer to watch the proceedings in Helena.

Accordingly, Defendants respectfully request the Court to transfer this case to the First Judicial District.

Respectfully submitted this 3rd day of June, 2013.

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By: _____
LAWRENCE VANDYKE
Solicitor General

CERTIFICATE OF SERVICE

The foregoing document was filed by telefax transmission to the Clerk of Court on June 3, 2013. The signed original was also mailed by first class mail to the Clerk of Court on that date.

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

Mr. Matthew G. Monforton
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DATED: 6-3-13 _____