IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 21-0392

THE ASSOCIATED PRESS, THE BILLINGS GAZETTE, THE BOZEMAN DAILY CHRONICLE, THE HELENA INDEPENDENT RECORD, THE MISSOULIAN, THE MONTANA STANDARD, MONTANA FREE PRESS, THE RAVALLI REPUBLIC, LEE ENTERPRISES, HAGADONE MEDIA MONTANA, THE MONTANA BROADCASTERS ASSOCIATION, and THE MONTANA NEWSPAPER ASSOCIATION,

Petitioners and Appellants,

v.

BARRY USHER in his capacity as Chair of the House of Representatives, Judiciary Committee,

Respondent and Appellee.

BRIEF OF APPELLANTS

On Appeal from the First Judicial District Court, Lewis and Clark County, ADV 2021-124, the Honorable Michael T. Menahan, Presiding

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STATEMENT OF THE ISSUE

Whether the district court erroneously deferred to the statutory definition of a "meeting" without consulting or considering the constitutional "right-to-know" provision of the Montana Constitution in Article II, Section 9, when it determined that the Respondent Chair of the House Judiciary Committee could close a meeting of a quorum of the Republican members to the public?

STATEMENT OF THE CASE

This is an appeal from a July 8, 2021, order of the First Judicial District Court, the Honorable Judge Menahan presiding, denying the media Petitioners' Rule 12(c), M.R.Civ.P., motion for judgment on the pleadings and granting the Respondent's Rule 12(b)(6), M.R.Civ.P., motion to dismiss. (July 8, 2021, Dist. Ct. Order, attached hereto as Ex. A.) No hearing on the parties' respective motions was held. The facts giving rise to this "right to know" action are not in dispute, rather the issue presents one of law. The following facts are recited in the Petition and district court's order.

STATEMENT OF FACTS

This is a declaratory judgment action brought by media Petitioners against the Respondent Chair of the Montana Legislature's House Judiciary Committee. It arises from an incident which occurred on January 12, 2021, in which the Chair conducted a Committee meeting to take executive action on several controversial

bills involving transgender health care and abortion. After convening the meeting, but before a vote was taken, the Chair recessed the Committee meeting in order to conduct a private meeting of other members of the Republican majority of the Committee to discuss and deliberate on their vote on the controversial bills.

A reporter for Montana Free Press followed several Republican members of the Committee to a room in the basement of the Capitol building to observe and report on the matters to be discussed in the caucus. She was told by the Chair that she was not allowed to stay during the discussion. He informed her that he made three of the members remain out of the meeting so there would be no quorum of the Committee in attendance. He explained that he did this "on purpose" to conduct the meeting in private. He told her that this was his normal practice, not just something he only did on controversial bills.

A controlling majority of the House Judiciary members on the Committee remained in the room. Accordingly, any decisions made in the room, whether a vote was taken or not, controlled the Judiciary Committee votes on the bills because a majority of the Republican members of the Committee were involved in the closed session. It is undisputed that no rights of individual privacy were implicated by the ensuing discussion on the bills.

After this private meeting concluded, the Chair reconvened the House Judiciary Committee and proceeded to take executive action on the bills.

Respondent said he was following protocol established by those before him: "We just always have, that's the way I was taught. Some of the things we have to talk about when we're talking and discussing how we're going to vote are personal and you know, as you can see, our committee does get a little emotional." (Petition, paragraph 11, p. 4).

All the members of the House Judiciary Committee are publicly elected officials. The full Committee is comprised of nineteen members, twelve of whom are Republicans and seven of whom are Democrats. A quorum of the entire Committee is ten. The Chair believed that by convening only nine members of the Committee, the public's right to know was not implicated and the open meeting requirements of state law did not apply such that he could close the meeting to the public. However, the nine constituent members of his group constitute a majority of the Committee, by party, and those members have the power to control all legislation considered by the Committee.

The district court agreed with the Respondent, but in so ruling, failed to address Petitioners' constitutional claims. Rather, the court merely deferred to the statutory definition of a "meeting" under § 2-3-202, MCA, without analyzing whether the closed meeting violated the public's "right to know" under Article II, Section 9, Mont. Const., and specifically, the public's right to observe the deliberations of all public bodies. A proper analysis reveals that the meeting was

unlawfully closed to the public and violated the public's "right to know."

Accordingly, as argued below, the district court's decision was in error and should be reversed by this Court.

STANDARD OF REVIEW

This Court reviews a district court's decision on a motion for judgment on the pleadings pursuant to Rule 12(c), M.R.Civ.P., *de novo* to determine if the district court's decision was correct. *Kalispell Aircraft Co., LLC v. Patterson*, 2019 MT 142, ¶ 11, 396 Mont. 182, 443 P.3d 1100 (citing *Firelight Meadows, LLC v. 3 Rivers Tel. Coop., Inc*., 2008 MT 202, ¶ 12, 344 Mont. 117, 186 P.3d 869). "A motion for judgment on the pleadings 'is properly granted when, taking all of the well-pleaded factual allegations in the nonmovant's pleadings as true, the material facts are not in dispute and the moving party is entitled to judgment as a matter of law." *Kalispell Aircraft*, ¶ 15 (citing *Firelight Meadows*, ¶ 11).

The same *de novo* standard of review applies to review of a district court's decision on a motion to dismiss for failure to state a claim under Rule 12(b)(6), M.R.Civ.P. *Barthel v. Barretts Minerals Inc*., 2021 MT 232, ¶ 9, 405 Mont. 345, __ P.3d __ (citing *Good Sch. Missoula, Inc. v. Missoula Cty. Pub. Sch. Dist. No. 1*, 2008 MT 231, ¶ 15, 344 Mont. 374, 188 P.3d 1013) ("[w]e review *de novo* an order granting a motion to dismiss under M. R. Civ. P. 12(b)(6)).

The Court construes a complaint in the light most favorable to the plaintiff,

assuming as true all allegations of fact. *Barthel*, ¶ 9 (citing *Robinson v. State*, 2003 MT 110, ¶ 20, 315 Mont. 353, 68 P.3d 750). "A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Barthel*, ¶ 9 (citing *Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6). Dismissal is justified only when the complaint clearly indicates the plaintiff has no claim. *Butrrell v. McBride Land & Livestock Co*., 170 Mont. 296, 298, 553 P.2d 407, 408 (1976).

SUMMARY OF THE ARGUMENT

The legal issue presented is whether Article II, Section 9, of the Montana Constitution guarantees public access to meetings of a public body which has the authority to control public policy—regardless of whether a quorum of the larger body to which it belongs is present in the meeting. Or, conversely, whether a group of public officials composed of sufficient members to control decisions made by the full Committee can evade the open meetings guarantees of Article II, Section 9, Mont. Const., by reducing the members of the sub-group to less than a quorum of the entire body.

The unique circumstances presented by this case—the Respondent's intentional reduction of members of a legislative body to less than a quorum, while maintaining a majority of members of the controlling political party—presents an inherent conflict between the statutory definition of a "meeting" under § 2-3-202,

MCA, and the constitutional requirements of Montana's "right to know" provision in Article II, Section 9, Mont. Const., which explicitly grants the public the right to observe the deliberations of their Legislature without any quorum requirement. As argued below, the district court failed to consider or consult this fundamental constitutional right of the public, and consequently elevated erroneously the statutory "quorum" element over the self-executing constitutional protections for public access mandated by Article II, § 9, Mont. Const. It is an elemental precept of constitutional law that a statute must yield to the fundamental law of the land. The district court's determination to the contrary must be reversed.

ARGUMENT

> "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposed that the power of the people is superior to both and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental." Federalist Papers #78.

Petitioners' claims are rooted in Article II, Section 9, Mont. Const., which guarantees the public the right 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." Yet, the district court ignored this pillar of Petitioners' claim, rephrasing the issue as one of mere statutory interpretation: whether a "subgroup of legislators who

met to discuss proposed legislation constitutes a quorum—as it was comprised of a majority of the members of the majority party on the committee." (Order, pg. 5). The district court declared that it was "unwilling to redefine 'quorum' as a 'majority of a majority'" and determined that "the eight or nine legislators who gather in the Capitol basement did not constitute a quorum of the committee, hence no 'meeting' occurred." (Order, pg. 5).

To be clear, Petitioners did not ask the district court to redefine the statutory definition of a meeting under Montana's open meetings law. Rather, Petitioners argued that Article II, Section 9, of the Montana Constitution is self-executing and compels certain governmental bodies to permit access to their meetings even in the absence of the quorum requirements of § 2-3-202, MCA. Indeed, that statutory provision more appropriately exists to ensure the right of public participation embodied in Article II, Section 8.

In failing to appreciate these constitutional dimensions and determining that the public only has a right to observe the deliberations of a quorum as defined by statute, the district court erroneously elevated the statute over the constitutional guarantee. The public's right to observe is fundamental, self-executing, and cannot be constrained by statute. Indeed, it has long been the law in this State that "when the question of a conflict is presented to the court, and the conflict clearly appears,

the statute must be decided to be inoperative" and must yield to the Constitution. *Criswell v. Mont. Cent. Ry. Co*., 18 Mont. 167, 172, 44 P. 525, 527 (1896).

A particularly instructive case is *Associated Press v. Crofts*, 2004 MT 120, 321 Mont. 193, 89 P.3d 971, where an open meetings issue arose when Richard Crofts, Montana's Commissioner of Higher Education met over an 18-month period with a group of upper-level employees of the University System, such as University presidents and chancellors. The meetings were called to discuss issues related directly to the operation of the University System. The various members who attended the meetings were in their official capacity as upper-level University employees and were compensated for their attendance with public funds.

Crofts contended that the employees with whom he met changed from meeting to meeting, and that it was not a public body as contemplated in the open meeting laws, because the Committee's membership was not fixed, no number of members were required to attend in order to constitute a quorum, and neither direct action nor votes were taken at the meetings. This Court rejected this argument and concluded that under Montana's Constitution and statutes, which must be liberally interpreted in favor of openness, the meetings were subject to Montana's open meetings laws.

In so holding, this Court promulgated the following "factors to consider when determining if a particular committee's meetings are required to be open to the public":

1) whether the committee's members are public employees acting in their official capacity;
2) whether the meetings are paid for with public funds;
3) the frequency of the meetings;
4) whether the committee deliberates rather than simply gathers facts and reports;
5) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions;
6) whether the committee's members have executive authority and experience; and
7) the result of the meetings.

"This list of factors is not exhaustive, and each factor will not necessarily be present in every instance of a meeting that must be open to the public. A proper consideration of these factors does not mandate that every internal department meeting meet the requirements of the open meeting laws." *Crofts*, ¶ 22. This Court consulted these factors to determine that the Commissioner and his policy advisors constituted a "public body." It also consulted the common law definition of a quorum to determine that those members in attendance at a meeting, whose constituency was "of an indefinite number," consisted "of those who assemble[d] at any meeting thereof." *Crofts*, ¶ 31.

This Court determined that media entity plaintiffs were entitled to observe the deliberations of the public advisory Policy Committee, reasoning:

> [O]ur constitution mandates that the deliberations of public bodies be open, which is more than a simple requirement that only the final voting be done in public. Devices such as not fixing a specific membership of a body, not adopting formal rules, not keeping minutes in violation of § 2-3-212, MCA, and not requiring formal votes, must not be allowed to defeat the constitutional and statutory provisions which require that the public's business be openly conducted. . . Article II, Section 9, of the Montana Constitution provides that no person shall be deprived of the right to observe the deliberations of public bodies. Government operates most effectively, most reliably, and is most accountable when it is subject to public scrutiny.

Crofts, ¶¶ 31-32.

The *Crofts* factors applied to the meeting at issue here, justify the same conclusion. All of the members in attendance were public employees acting in their official capacity during the Legislative session; the meeting was paid for with public funds; they regularly met whenever important votes were to be taken in Committee; the Committee was deliberating on votes, not simply gathering facts and reports; and the deliberations concerned matters of public policy, the result of which was how the Committee would vote on controversial bills. Additionally, the members of this group clearly had authority as members of the Judiciary Committee and because they could out-vote the opposing party on the Committee, they have the power to decide the fate of legislation considered by the Committee. Finally, consistent with the tenets of *Crofts*, the closed meeting violated the constitutional and statutory requirements of the "right-to-know" because a quorum

of the Republican members of the House Judiciary Committee were present during the meeting.

The district court concluded that *Crofts* "is readily distinguished" because the Policy Committee was an "organized deliberative body" as opposed to an "ad hoc group" of "Republican members of the House Judiciary Committee who gathered during a committee recess." (Order, pg. 6). Such reasoning is flawed. It matters not whether the body was organized or "ad hoc." There is no *Crofts* factor requiring that a public body be formally organized—only that it be "organized" for a governmental or public purpose. *See Crofts*, ¶ 17. Indeed, neither the plain language of Article II, Section 9, nor any decisional law from this Court require only formally organized bodies to be subject to rights of public access.

While one *Crofts* factor is "the frequency of the meetings," the record here establishes that the Republican members of the House Judiciary Committee met regularly prior to a scheduled vote on bills, including controversial bills. Indeed, the group met precisely to deliberate on how they would vote on issues of public import. It is clear under the *Croft* factors, and the language of Article II, Section 9, that the subject group was a meeting of a deliberative public body and should have been open to the public.

The district court did not apply, let alone discuss, the *Crofts* factors when it determined that because the Republican committee group met on an "ad hoc"

basis, it was not required to let members of the press attend. There is no such distinction in the Constitution. And while this Court in *Crofts*, reasoned that the Policy Committee was not "an ad hoc group which came together to consider a specific matter or to gather facts concerning a particular issue" (*Crofts*, ¶ 23), this comment did not mean that any group formed for a particular purpose is not required to be open to the public. Indeed, there is no *Crofts* factor regarding a group's "ad hoc" nature. The critical distinction the Court was making is that a mere fact-finding body, as opposed to a deliberative body, is not subject to Article II, Section 9's openness requirement.

Regardless, the group here was not ad hoc in nature. The Respondent indicated it was his normal practice to meet in order to discuss and deliberate on controversial bills. Even if a group's ad hoc nature is relevant to the analysis, a single factor is not dispositive. *Crofts*, ¶ 22. The scheme utilized by Respondent to conduct closed discussions with his Republican colleagues on the House Judiciary Committee was simply to reduce the number of meeting members to less than a quorum in order to close public access to the members' discussions and deliberations on votes. This was clearly an effort by the Respondent to subvert the public's right to observe its deliberations—the very practice of which this Court was critical in *Crofts*. *Crofts*, ¶ 31.

The public's fundamental right to know, which includes the public's right to observe the deliberation of all public bodies, is self-executing. *Shockley v. Cascade Cnty*., 2014 MT 281, ¶ 22 n.1, 376 Mont. 493, 336 P.3d 375 ("we have consistently held that Article II, Section 9 is self-executing") (citing *Bozeman Daily Chronicle v. City of Bozeman Police Dept*., 260 Mont. 218, 231, 859 P.2d 435, 443 (1993)). It neither requires legislative direction, nor tolerates legislative interference.

A statute designed to inform whether a particular meeting must be noticed, and whether minutes must be kept and an agenda provided, cannot trump the public's constitutional right observe the deliberations of all public bodies. It should be noted that the statutory definition of a "meeting" and the requirement for a "quorum" in § 2-3-202, MCA, was adopted in order to serve the public participation mandate of Article II, section 8. *See generally*, Title 2, Chapter 3 Public Participation in Governmental Operations. While the statutory provisions also inform the public's right to know in Article II, Section 9, it is Petitioners' position that the definition of a "meeting" in § 2-3-202, MCA, cannot supplant the public's right of observation.

Section 2-3-202, MCA, defines a "meeting" as a "convening of a quorum of the constituent membership of a public agency…to discuss…a matter over which the agency has supervision, control, jurisdiction or advisory power." Under § 2-3-

203(1), MCA, all "meetings" must be open to the public. Respondent's purpose in convening one member short of a quorum was to conduct a meeting to discuss important legislation in private, outside the scrutiny of the public. In other words, he sought to subvert the public's right of observation.

However, recognizing that a public body might seek to evade the open meeting requirements of the statute, the Montana Legislature adopted an amendment to clarify that any such subgroup would also be subject to the law. Specifically, § 2-3-203(6), MCA, provides that "[a]ny committee or subcommittee appointed by the public body…for the purpose of conducting business within the jurisdiction of that agency is subject to the requirements of this section." These statutory "right to know" and "open meeting" provisions" must be "liberally construed" in favor of openness. *Willems v. State*, 2014 MT 82, ¶ 23, 374 Mont. 343, 325 P.3d 1204. If the statutory scheme is interpreted liberally, it is Petitioners' position that the subgroup here so qualifies.

In the course of construing the meaning of Article II, Section 9, this Court has applied the "right to know" to similar subgroups which do not have quorums because they do not vote but do exercise governmental authority. From these decisions, it is clear that the subgroup contrived by the Respondent is subject to the public's right to know and observe. *See e.g. Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices*, 263 Mont. 324, 330, 868

P.2d 604, 608 (1994) (a committee created by statute to assist in the governor's selection of a Commissioner was subject to the open meeting laws); *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 26, 312 Mont. 257, 60 P.3d 381 (a committee created by a school district to research a proposition and submit a recommendation to the school board was subject to the "Right to Know" provision of the Montana Constitution); and *Great Falls Tribune Co., Inc. v. Day*, 1998 MT 133, ¶ 18, 289 Mont. 155, 959 P.2d 508 (a committee created by the Department of Corrections to screen proposals for the construction of a private prison was a public body subject to the right-to-know provision of the Montana Constitution).

The subgroup here is akin to these committees found by this Court to be subject to Article II, Section 9. It should be noted that the make-up of the "body" presented here is unique and uncommon. Subgroups of less than a quorum but containing sufficient constituent members to control public policy are rare. But they do occasionally exist and that is precisely why the factors enunciated in *Crofts* were developed. The failure of the district court to consider these factors rendered the constitutional guarantee of Article II, Section 9 meaningless.

This is not a case of "serial one-on-one discussions" or "accumulated one-on-one conversations" by legislators in a hallway as referenced in *Willems*. Rather, it was convened meeting of committee members, some of whom were

ordered not to attend in an evasive attempt to avoid a quorum. In *Willems*, this Court declined to find that such one-on-one conversations of the Montana Districting and Apportionment Commission constituted to a "meeting" subject to Montana's "right to know," noting that the record indicated that no deliberations, decisions or agreements were made during such conversations. *Willems*, ¶ 25 ("[the Commissioners' one-on-one discussions prior to the February 12 meeting were not subject to Section 9 because a majority of Commission members never 'convened' or 'deliberated' as a 'public body' outside of a public meeting").

While this Court did decline to adopt a "constructive quorum" theory, it did so only based on "the facts presented here." *Willems*, ¶ 25. Petitioners are not seeking to have the Court adopt such a theory, however, when the plain language of Article II, Section 9, requires the "deliberations" of public bodies to be open to the public without any quorum requirement, the same must be strictly construed and enforced as written. It is not enough for the public to be afforded an opportunity to observe a governmental entity's vote or decision—Article II, Section 9, guarantees the public the right to observe "deliberations."

"It is the duty and responsibility of this [C]ourt to ascertain the meaning of the Constitution as written, neither to add to nor to subtract from, neither to delete nor to distort." *Rankin v. Love*, 125 Mont. 184, 188, 232 P.2d 998, 1000 (1951). And "[w]hen resolving disputes of constitutional construction" in a "right to know"

case, this Court "give[s] a broad and liberal interpretation to the Constitution." *Willems*, ¶ 17.

It is quite conceivable that after discussing the legislation in the closed meeting, the members could appear in open session and vote without ever disclosing the reasons or rationale for their action. Indeed, this is likely why the practice first evolved. The only way the public can be privy to the reasons for the members' votes is to observe the matters discussed in the closed session, which as evidenced by this lawsuit, has been obstructed. Such a practice subverts the purpose of Article, II, Section 9, Mont. Const., and violates Montana citizens' right to know and observe all deliberations of public bodies.

Had only a few of the Republican majority members met, without input from the other Republican members of the Committee, the result might be different because, in effect, those members would not have the power to control the vote. However, that is not the case here. This is a unique case where the statutory requirement of a quorum, at least as interpreted by the district court, is at odds with the constitutional mandate that deliberations of public bodies be open. The lower court's determination that failure to meet the statutory definition of a meeting compels dismissal, without consideration of the requirements of Article II, Section 9, was erroneous. Without any rationale, it relegated the constitution subservient to the statute. Its ruling cannot stand.

CONCLUSION

Article II, Section 9, of the Montana Constitution guarantees that no person shall be deprived of the right to observe the deliberations of public bodies. Government operates most effectively, most reliably, and most accountably when it is subject to public scrutiny. *Day*, ¶ 34. Following the general mandate that "right to know" jurisprudence must be liberally construed, the meeting of these Republican members of the Judiciary Committee constitute a public body which deliberates on substantive issues that are the public's business. It is respectfully requested that the Court find and determine that the meetings of this body are subject to the requirements of Montana's open meeting laws and Article II, Section 9, of the Montana Constitution.

Respectfully submitted this ____ day of October, 2021.

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By: */s/ Peter Michael Meloy*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows does not exceed 10,000 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendix.

/s/ Peter Michael Meloy
PETER MICHAEL MELOY

APPENDIX

CERTIFICATE OF SERVICE

I, Peter M. Meloy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-18-2021:

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