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.

APPELLANTS' REPLY BRIEF

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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Appellants respectfully submit the following Reply Brief in response to the Appellee's Answer Brief.

ARGUMENT

This was no "Saturday night at the county rodeo." *Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, ¶ 20, 373 Mont. 212, 316 P.3d 848. And despite Usher's attempt to argue otherwise, the January 21, 2021 "gathering" was precisely a "deliberation" of a "public body" subject to Montana's right to know. Indeed, this "gathering" was a scheduled deliberation of elected public servants in the Capitol building, acting in their official capacities, to discuss upcoming votes--albeit one that was admittedly calculated to circumvent the open meeting requirements of Article II, Section 9, Mont. Const.

In fact, it is precisely the scenario this Court cautioned against in its limited Opinion in *Boulder Monitor*:

> We caution that this Opinion should not be taken as an invitation for subterfuge by public bodies or their members to avoid public scrutiny and to conduct business in violation of the requirements of the open meeting statutes. We determine only that the statutes do not prohibit a member of a public body from observing a meeting of a sub-quorum subcommittee, or even asking questions during the meeting, and that doing so does not constitute the convening of a quorum.

Boulder Monitor, ¶ 21.

Predictably, Usher bases his entire argument on the statutory definition of a "meeting" contained in § 2-3-202 MCA. To him, as well as the district court, resolution of Petitioners' open meeting claim is simple: no quorum means Article II, Section 9 of the Montana Constitution is inapplicable. This is so because the Legislature says it is so. But this easy solution misses the entire point of Petitioners' claim and position on appeal. It is Petitioners' contention that application of the statutory definition to the gathering of legislators in this case, defeats and impedes Petitioners' rights under Article II, Section 9, Mont. Const., and therefore violates "the letter [and] spirit of the open meeting statute." *Boulder Monitor*, ¶ 20.

This case does not present the slippery slope scenario urged by Usher. The issue here is whether a group of public officials composed of sufficient members to control public policy decisions can evade the open meetings guarantees of Article II, Section 9, Mont. Const., by reducing its size to less than a quorum of the entire body. This issue implicates the power of a legislative body to diminish rights guaranteed under the Constitution, an issue only this Court is poised to remedy.

It was Petitioners' position before the district court, and in this appeal, that the public's constitutional right to know is self-executing and may not be limited by legislative acts. In his response, Usher summarily dismisses this basic

proposition by arguing: "Associated Press fails to cite any authority to support the contention that such rights are "self-executing" or apply in the absence of a quorum." In the context of this case, application of the legislatively imposed quorum requirements served to defeat the underlying premise of the right to know and it corresponding right to observe the deliberations of all public bodies. Indeed, it was the district court's strict statutory application of the quorum requirement that permitted Usher to conduct his meeting in private.

A statute must be interpreted consistent with the underlying constitutional right which it was enacted to protect. *Billings v. Batten*, 218 Mont. 64, 70, 705 P.2d 1120, 1124-25 (1985). Indeed, "it is a duty of the courts to construe statutes narrowly to avoid constitutional difficulties if possible." *State v. Lilburn*, 265 Mont. 258, 266, 875 P.2d 1036, 1041 (1994); *see also, State v. Ytterdahl*, 222 Mont. 258, 261, 721 P.2d 757, 759 (1986). In addition, § 2-3-201, MCA, explicitly provides that the open meeting statutes "shall be liberally construed." The district court ignored these principles of interpretation when it used the quorum requirement to "create difficulties" with Petitioners' access to Usher's meeting.

Moreover, this Court has noted the principle that "it is within the power of those who adopt a constitution to make some of its provisions self-executing"

which means "it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it operative." *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 514, 534 P.2d 859, 862 (1975) (citing C.J.S. Constitutional Law § 48). "The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing; nor does the self-executing character of a constitutional provision necessarily preclude legislation for the better protection of the right secured, or legislation in furtherance of the purposes, or of the enforcement, of the provision." *Id. See also, Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 16, 326 Mont. 304, 109 P.3d 257.

That Article II, Section 9 is "self-executing" is so well-settled as not to require citation. In *Shockley v. Cascade Cnty*., 2014 MT 281, ¶ 22 n.1, 376 Mont. 493, 336 P.3d 375 this Court noted "we have consistently held that Article II, Section 9 is self-executing." Nonetheless and to assuage Usher's concerns, the following are a few of the cases, so holding. In *Allstate Insurance v. City of Billings*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989), this Court held:

> …the "Right to Know" as contained in Article II, Section 9 of the Montana Constitution, is a self executing provision. A provision of a constitution is self executing when legislation is not required to give it effect. *State ex rel. Stafford v. Fox-Great Falls Theater*

> *Corp.* (1942), 114 Mont. 52, 74, 132 P.2d 689, 700. The 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.

"As we pointed out in the former case, the Right to Know provision of the Constitution is 'self-executing'— that is, legislation is not required to give it effect." *Bozeman Daily Chron. v. City of Bozeman*, 260 Mont. 218, 231, 859 P.2d 435, 443 (1993). In the *Chronicle* case, the Court also said:

> The legislature does not have the power to provide through the passage of statute who can exercise this right unless it finds that such curtailment is necessary to protect the right of individual privacy. Accordingly, any interpretation of § 44-5-303, MCA, which requires specific legislative authorization to review criminal justice information would render the statute unconstitutional.

In two cases directly applicable to the Petitioners' argument here, this Court actually struck down portions of the open-meeting laws based on the "self-executing" principle. In *Associated Press v. Board of Public Education*, 246 Mont. 386, 804 P.2d 376 (1992), the Court determined that Board of Public Education improperly closed its meeting to privately discuss potential litigation against the governor's office because the litigation exception to open meetings (§ 2-3-203(4) MCA) violated the public's right to know under the state constitution. In *Great Falls Tribune v. Great Falls Public Schools*, 255 Mont. 125, 841 P.2d 502 (1992)

the Court struck down the collective bargaining strategy exception of § 2-3-203(4), MCA, for the same reasons.

Accordingly, if the obverse of Usher's simplistic argument is true, lack of the statutory quorum requirements defeats an open meeting, then the requirement is constitutionally infirm. The only issue, then, is whether Usher's group is subject to Article II, Section 9. This is not the first time this Court has been called upon to define open meeting coverage of a non-traditional body under Article II, Section 9. As the Court noted in *Associated Press v. Crofts*, 2004 MT 120, ¶ 21, 321 Mont. 193, 89 P.3d 971, "[t]he determination of whether advisory committees are public bodies subject to the open meeting laws has been recognized as presenting special problems for courts." In *Crofts*, the "group," sometimes called the "Policy Committee" and later the "Senior Management Group" consisted of membership which varied from meeting to meeting, in which no minutes were kept, no number of members were required to attend in order to constitute a quorum, and neither direct action nor votes were taken at its meetings. Accordingly, Crofts contended that his "group" was not a public body under § 2-3-203, MCA, the same argument propounded by Usher here.

It was necessary, therefore, for the Court in *Crofts* to look beyond the strict definition of a "meeting" found in § 2-3-202 MCA and to devise a formula

applicable to the "special problems" presented by non-traditional groups. Stepping into the vacuum, 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.

In *Crofts*, this Court consulted and applied these factors to determine that the meetings of the Commissioner and his campus advisors were subject to the open meetings' mandates of Article II, Section 9. As discussed in Appellant's Opening Brief, application of these factors to Usher's meeting compels a determination that it is subject to Article II, Section 9.

It is telling that Usher does not discuss these factors in this appeal. This is likely because the district court avoided *Crofts* altogether. In explaining why *Crofts* was "readily distinguished" the lower court misapprehended this Court's statement in the Opinion that the Policy Committee at issue was "not merely a fact

finding body, nor is it an ad hoc group which came together to consider a specific matter or to gather facts concerning a particular issue." *Crofts*, ¶ 23. This sentence was a comment by the Court on the facts of the case as applied to two out of the seven factors. It was not a determination that any meeting or "gathering" of an "ad hoc" group is not subject to the right to know and observe. Application of all of the factors is required.

Yet, the district court erroneously seized upon this Court's "ad hoc" language to distinguish *Crofts* and dismiss its factors as inapplicable to Usher's meeting, which it characterized as ad hoc because it was held on short-notice during a committee recess. (Dist. Ct. Order, pg. 6). Such error of law demands reversal by this Court. An informed application and analysis of the *Crofts* factors reveals that Usher's meeting was required to be open to the public, even if it may have been "ad hoc."

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; the members met regularly whenever important votes were to be taken in Committee; the Committee was discussing pending legislation and matters of public policy, the result of which affected how the Committee would vote on controversial bills. While Usher's last-minute decision as to which members to

exclude (in order to defeat a quorum) might have been made on an ad hoc basis, the meeting itself was not. The members of this group could determine the outcome of Committee votes and had the power to decide the fate of legislation considered by the Committee. Consistent with the tenets of *Crofts*, closing the meeting violated the constitutional requirements of the public's "right-to-know" and observe the deliberations of all public bodies.

Indeed, the make-up of the group is not one of the primary factors the Court has considered in determining application of Article II, Section 9. In *Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices*, 263 Mont. 324, 330, 868 P.2d 604, 607-08 (1994) and *Great Falls Tribune Co., Inc. v. Day*, 1998 MT 133, ¶ 18, 289 Mont. 155, 959 P.2d 508, the Court looked to the public or governmental nature of the group's purpose and whether it was organized to perform a governmental function. *See also Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 26, 312 Mont. 257, 60 P.3d 381 (a group formed by a school board to advise on the closing of a school in Billings.) Indeed, this Court would be hard-pressed to find a group organized with more public purpose and governmental function than a group of deliberating legislators, with the purpose and power to control votes on some of the most controversial legislation of the session.

Challenging the mathematic proficiency of Appellants, Usher argues that since only nine of the Judiciary Committee's nineteen members were present, they were powerless to control any public policy. Moreover, argues Usher, Appellants do not understand the legislative process "as the Judiciary Committee does not wield the power to enact legislation, much less a minority faction of the Judiciary Committee." (Appellee's Answer Brief, pg. 8). Even a casual observer of the legislative process knows that a "do pass" or do not pass" vote from a standing committee is a significant part of the legislative process. And, the overriding concern of Appellants, here, is that should these nine partisan members vote as a bloc the opposing party will be outvoted every time. It is simply naïve to say the discussions held in these meetings are inconsequential.

Here, it is uncontroverted that Usher intentionally reduced the number of Republicans in the meeting to defeat a quorum. The Court in *Crofts* found this motivating factor to be contemptuous:

> [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.

Legislative Immunity.

Usher contends, *arguendo*, that should this Court determine that he violated Article II, Section 9, by denying access to his caucus, the courts may not hold him accountable because he is immune from suit. This argument not only echoes a recent legislative disdain for the judiciary, but is entirely spurious. Unlawfully closing a public deliberation is an act "undertaken in the execution of a law or policy" which is excluded from any legislative immunity under § 2-9-111(1)(c)(ii), MCA. Moreover, Usher is not entitled to legislative immunity as the doctrine applies to an act of the entire body itself, not an individual member. *See* § 2-9-111(1)(b), MCA.

Finally, this case comes before the Court on a grant of dismissal pursuant to Rule 12(b)(6), M.R.Civ.P. As a procedural matter, a complaint is not subject to dismissal under Rule 12(b)(6) unless its allegations indicate the existence of an affirmative defense which "clearly appear[s] on the face of the pleading." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 at 604-06 (1969). The immunity defenses raised by Usher do not rest on any allegations made by Petitioners.

Indeed, the facts as alleged in the Complaint indicate that Respondent's actions were administrative in nature, which do not enjoy legislative immunity. Nor do the Petition's allegations implicate Art. V, Section 8, of the Montana Constitution, as Petitioners are faulting Usher's conduct, not his spoken words. The speech and debate clause protects a legislator from words spoken in debate and does not protect political acts. *See United States v. Brewster*, 408 U.S. 501, 528-29 (1972); *Gravel v. United States*, 408 U.S. 606, 625 (1972). "This action is not about questioning legislators regarding any 'speech or debate' in the legislature" and any declaration as to whether "[party] meetings must be open to the public" does not implicate the clause. *AP v. Mont. Senate Repub. Caucus*, 1998 Mont. Dist. LEXIS 516, *4-5 (Judge Honzel, Cause No. CDV-95-218).

Moreover, some courts have recognized an immunity exception for actions seeking to "vindicate the public interest," such as this one. *State v. Beno*, 341 N.W.2d 668, 678 (Wis. 1984). Indeed, common law immunity for public officials has been chipped away by the courts over the years. Noteworthy scholars have observed a "federal retreat from absolute immunity." Prosser & Keeton on Torts, § 132, at 1062 (5th ed. 1984).

Last, Petitioners are not seeking money damages or a declaration of Usher's civil liability in tort. They are seeking to enforce a fundamental constitutional

right by asking the Court to declare that Usher's actions in closing the meeting violated Montana citizens' right to observe the deliberations of their Legislature. It would wreak a significant injustice if this violation could not be enforced by the courts.

Appellee Usher is not entitled to legislative immunity for his administrative act of convening a closed meeting of elected public officials deliberating on matters of public importance.

Finally, Usher devotes several pages of his response brief to argue against Petitioners' claim for attorney fees. Since Petitioners have not prevailed at this juncture, their entitlement to attorney fees and legislative immunity for such fees is not before the Court in this appeal, and any decision regarding the propriety of an award thereof must be left to another day.

CONCLUSION

Usher wonders whether alternative "line drawing" scenarios would affect the dynamics of right-to-know jurisprudence. He asks whether "a constructive quorum" would exist if a Democrat were included or whether it would include a meeting of the Democrats or a majority of the minority party. Asking these rhetorical questions demonstrates a fundamental misunderstanding of Petitioners' claim and presents the proverbial red herring.

This case is about deliberately excluding the public from a meeting of lawmakers convening with sufficient numbers to control public policy. The issue here is whether under these unique circumstances the citizens of Montana have a right to observe the meeting…nothing more, nothing less. In this case, Usher utilized the statutory quorum requirement, with help from the lower court, to deprive the public of this precious constitutional right.

Petitioners recognize that the easy solution is to affirm. But it is respectfully requested that this Court, "as final interpreters of the Constitution" with "the final obligation to guard, enforce, and protect every right granted or secured [therein]," must reverse the district court's decision. *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 18, __ Mont. __, 493 P.3d 980 (citing *Columbia Falls*, ¶ 18).

In so doing, the Court can fulfill the promise of *Crofts* that government operates most effectively, most reliably, and is most accountable when it is subject to public scrutiny.

Respectfully submitted this 23rd day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 is less than 5,000 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

/s/ Peter Michael Meloy
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CERTIFICATE OF SERVICE

I, Peter M. Meloy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 11-23-2021:

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