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IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 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 Montana House of Representatives, Judiciary Committee,

Respondent and Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and County, The Honorable Michael Menahan, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court correctly held that a gathering of a minority of committee members was not a public meeting that invoked article II, section 9 of the Montana Constitution; and

2. Whether this Court should again reject the adoption of a "constructive quorum" rule.

STATEMENT OF THE CASE

On February 10, 2021, 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 (collectively, "Associated Press") filed a petition against Barry Usher ("Usher"), in his capacity as Chairman of the Montana House of Representatives Judiciary Committee ("Judiciary Committee"), alleging that the gathering of legislators in a group less than a quorum on January 21, 2021, should have been subject to open meeting laws. Doc. 1.

Usher timely filed a motion to dismiss pursuant to Mont. R. Civ. P. 12(b)(6) on April 1, 2021. Docs. 5 and 6. Associated Press filed a motion for judgment on the pleadings on April 1, 2021. Docs. 7 and 8. Both filings were fully briefed on April 21, 2021. Docs. 13 and 15. On July 8, 2021, the district court denied Associated Press' motion for judgment on the pleadings and granted Usher's motion to dismiss, concluding that no quorum was present at the January 12, 2021 gathering. Doc. 22. On July 26, the district court entered final judgment and dismissed the case. Doc. 23. On October 18, 2021, Associated Press appealed. Doc. 25.

Statement of the Facts

On January 21, 2021, Usher presided over a Judiciary Committee meeting during which the committee planned to take executive action "on several controversial bills involving transgender health care and abortion." Doc. 1, ¶ 10; Doc. 2, ¶ 2. After convening the meeting, but before any executive action was taken by the Judiciary Committee, Usher called for a recess. *Id.* During the recess, Usher went to a room in the basement of the Capitol building to gather with eight other members of the Judiciary Committee. Doc. 1, ¶ 10, Doc. 2, ¶ 4. Silvers followed Usher to the basement room, but was denied entry to the room, as only nine

total Judiciary Committee members were present at the gathering. Doc. 1, ¶ 10; Doc. 2, ¶ 4; Doc. 22, pp. 2-3. The Judiciary Committee is composed of 19 members, and a quorum of the committee is satisfied by the presence of at least ten committee members. *Id.* It is undisputed that fewer than ten members of the Judiciary Committee were gathered in the basement room with Usher on January 21, 2021. *Id.*

After the brief gathering of less than a quorum of committee members in the basement, Usher reconvened the public meeting of the Judiciary Committee, and the committee took executive action on bills. Doc. 1, ¶ 11.

STANDARD OF REVIEW

"This Court's standard of review of a decision on a motion to dismiss a complaint as a matter of law is whether the trial court's interpretation of the law is correct." *Hall v. Heckerman*, 2000 MT 300, ¶ 12, 302 Mont. 345, 15 P.3d 869, *see also* *Vencor, Inc. v. Gray,* 2003 MT 24N, ¶ 10, 2003 Mont. LEXIS 24 (the standard of review for a decision on a motion for judgment on the pleadings is whether the decision was correct).

SUMMARY OF THE ARGUMENT

No quorum of a public body was present at the January 21, 2021, gathering, and the district court correctly held that there was no public meeting that invoked article II, section 9 of the Montana Constitution. Associated Press' constructive quorum theory—an interpretation that a "majority of the majority" but a minority of committee members constitutes a quorum—contradicts the plain statutory language and should be rejected again by the Montana Supreme Court. *See* MCA § 2-3-202; House Rule H30-30. This Court should decline "to turn any Saturday night at the county rodeo into a board meeting that must be noticed." *Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, ¶ 20, 373 Mont. 212, 316 P.3d 848.

Article V, section 10(3) of the Montana Constitution provides: "The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public." To constitute a "meeting," a quorum—or majority—of the committee must be present. MCA § 2-3-202; House Rule H30-30. Associated Press acknowledges there was no quorum of the Committee present at the January 21, 2021 gathering. Associated Press ignores the quorum

requirement and argues that—despite clear statutory language—the gathering was subject to open meeting laws. The district court correctly rejected Associated Press' arguments and appropriately dismissed the underlying case.

Although the district court did not address Usher's immunity from Associated Press' claims, legislative immunity—whether constitutional, statutory, or common law—protects the autonomy and integrity of the legislative process and requires dismissal of Associated Press' claims. This Court additionally has made clear that legislative immunity set forth in MCA § 2-9-111 grants the Legislature and its members immunity from fees resulting from an action challenging legislative acts. *Finke v. State*, 2003 MT 48, ¶ 34, 314 Mont. 314, 65 P.3d 576 (citing Mont. Code Ann. § 2-9-111).

The district court correctly applied the law and this Court should uphold the denial of the motion for judgment on the pleadings and dismissal of the Petition.

Argument

I. The district court correctly held that a minority of committee members was not a quorum that invoked article II, section 9.

Article II, section 9 of the Montana Constitution provides: "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." Courts analyzing a claimed violation of this provision apply a three-pronged test, reviewing whether: (1) "the subject entity is a public body or agency of state government or a state government subdivision;" (2) "the proceeding or decision at issue was a deliberation of that body or agency;" and (3) "the disputed deliberation was nonetheless privileged from disclosure on the grounds of individual privacy or other recognized exception to the right to know." *Raap v. Bd. of Trs.*, 2018 MT 58, ¶ 9, 391 Mont. 12, 414 P.3d 788 (citations omitted). Associated Press fails the first two prongs of this test because they are unable show that the January 21, 2021 gathering was a "deliberation" of a "public body or agency" subject to Montana's open meeting laws.

"As referenced in Article II, Section 9, the term 'deliberations of … public bodies or agencies' includes a 'meeting'" as defined in Montana's open meeting statutes. *Id.* ¶ 8 (citing MCA § 2-3-202); *Boulder Monitor*

2014 MT 5, ¶ 13; *see also Raap*, ¶ 9 (equating "meeting" under MCA § 2-3-202 with "deliberation" under Mont. Const. art. II, Sec. 9). Montana Code Annotated § 2-3-202 defines "meeting" as "the convening of a *quorum* of the constituent membership of a public agency or association … 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." (Emphasis added.) Pursuant to Rule H30-30 of the Rules of the Montana House of Representatives (2021), "[a] quorum of a committee is a majority of the members of the committee."[1]

"There is no dispute the Representatives who gathered during the recess did not constitute a quorum." Doc. 22, p. 6. Indeed, Associated Press acknowledges there was "no quorum" of the House Judiciary Committee present at the alleged January 21, 2021 gathering. Doc. 1, ¶ 10. The Judiciary Committee is composed of 19 members; ten members would constitute a quorum; and only nine members were gathered on January 21, 2021. Doc. 2, ¶ 4. By Associated Press' own admission, the

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[1] Available at https://leg.mt.gov/bills/2021/billpdf/HR0002.pdf (last accessed Mar. 8, 2021). While quorum is "not specifically defined in the open meeting law…it is generally held that in the absence of a contrary statutory provision, a quorum consists of a majority of the entire body" (internal citations omitted) 42 Op. Att'y Gen. No. 51, at 200.

January 21, 2021 gathering did not constitute a "meeting" as defined by MCA § 2-3-202, and there was no deliberation of a public body under article II, section 9 of the Montana Constitution. *Accord Allen v. Lakeside Neighborhood Planning Comm.*, 2013 MT 237, ¶ 35, 371 Mont. 310, 308 P.3d 956 (holding no public meeting occurred via Yahoo Group website used by neighborhood planning committee where record contained undisputed evidence that a quorum did not and could not convene).

Associated Press attempted to avoid this fatal flaw by claiming that "any decisions made in the room" controlled the Committee votes on the bills because "a majority of that committee was involved in the closed session." Doc. 1, ¶ 10. Not only is this statement mathematically and legally inaccurate, but it also directly contradicts Associated Press' acknowledgement that "no quorum" was present at the gathering. Doc. 1, ¶ 10; Doc. 2, ¶ 3. This claim also misstates the legislative process as the Judiciary Committee alone does not wield the power to enact legislation, much less a minority faction of the Judiciary Committee.

Associated Press also argues that the presence of a majority of the *Republican members* of the Committee—nine out of 12 Republican committee members—constitutes a quorum. But Associated Press'

argument runs afoul of the plain language of the statute and Constitution. A majority of a partisan majority of a legislative committee is not "a public body or agency of state government." Mont. Const. art. II, § 9. The statutory quorum requirement, as discussed above, requires a majority of the decision-making body itself (here the Committee) to be present for there to be a meeting, not a majority of a particular faction of the body. MCA § 2-3-202; House Rule H30-30. Quite frankly, Associated Press' argument would require this Court to ignore the plain, unambiguous language of a statute.

Because no quorum of a public body was present at the January 21, 2021 gathering, the district court correctly held there was no public meeting and thus no need to apply the open meeting law. The district court made this finding based on the statute's clear language. And the district court was correct.

II. This Court should not adopt Associated Press' argument for a constructive quorum.

Associated Press claims they "did not ask the district court to redefine the statutory definition of a meeting under Montana's open meetings law." Opening Brief, p. 7. But this is exactly what Associated Press asked the district court to do, claiming the distinguishable *Crofts*

case applied to the present case. *See Associated Press v. Crofts*, 2004 MT 120, 321 Mont. 193, 89 P.3d 971.

The district court recognized that "*Crofts* is readily distinguished from the case at hand," Doc. 22, p. 5, and refused to "apply the law in anticipation of the Montana Supreme Court recognizing a standard it has previously declined to adopt." *Id.*, p. 7. The district court explained: "[i]n *Crofts*, the public body at issue was a 'policy committee' … [not] 'merely a fact finding body' or 'an *ad hoc* group which came together to consider a specific matter." Doc. 22, p. 5. In *Crofts*, this Court found:

> The Policy Committee came together at times that were noticed, and agendas were prepared. Moreover […] the agendas make it clear that the matters deliberated were somehow memorialized, as such matters were remembered, and re-discussed at successive meetings. The Policy Committee's meetings required substantial time, inconvenience and travel by the attendees, all of whom were expected to attend. Further, the various costs of conducting the meetings were paid with public funds.

Associated Press v. Crofts, 2004 MT 120, ¶ 24, 321 Mont. 193, 89 P.3d 971. Here, the meeting in the basement was an *ad hoc* group if there ever was one. It is different in virtually every way from the organized deliberative body at issue in *Crofts*. As the district court

concluded, "the precedent established in *Crofts* does not apply." Doc. 22, p. 6.

Undeterred by *Crofts*' inapplicability, Associated Press contends that article II, section 9, of the Montana Constitution contains "self-executing" rights requiring public access "even in the absence of the quorum requirements" of statute. Opening Brief, p. 7. 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. Nor does any such authority exist. Still, Associated Press clings to *Crofts* as supportive of their position. To the contrary, *Crofts* contains no holding that the rights under article II, section 9 are somehow "self-executing" and not subject to the quorum requirement of statute. The Court should reject this unsupported argument.

The Legislature has clearly established that a meeting or deliberation does not occur for the purposes of Montana's open meeting laws unless "a *quorum* of the constituent membership" of the public body convenes. MCA § 2-3-202 (emphasis added). While Montana's open meeting statutes are liberally construed, this Court has consistently "decline[d] to formulate" restrictions where the statutory language does

not provide them, cautioning that penalizing public officials "and the public bodies they serve by an unwarranted application of the statute[s] creates a difficult labyrinth for public servants and threatens to turn any Saturday night at the county rodeo into a board meeting that must be noticed." *Boulder Monitor*, 2014 MT 5, ¶ 20 (holding presence of school board member in audience at public hearing of budget subcommittee did not create a quorum of full board). In other words, "liberal construction" doesn't permit litigants and courts to rewrite statutes altogether.

To read Montana's open meeting laws as applying to gatherings attended by less than a majority of the members of a legislative committee directly contradicts clear statutory language, and this Court has already rejected such a "constructive quorum" theory. *See Willems v. State*, 2014 MT 82, 374 Mont. 343, 325 P.3d 1204. In *Willems*, the Montana Districting and Apportionment Commission (Commission) held a public meeting to submit its final redistricting plan, which included assigning two "holdover senators," who were elected under the old districting system, to a redrawn district to serve the remainder of their terms. *Id.* ¶ 6. A quorum of the Commission constituted three of the five members. *Id.* ¶ 23. Before the meeting, the commissioners talked one-

on-one about how to address public requests related to the holdover senators. *Id.* ¶ 10. The plaintiffs claimed these discussions cumulatively violated their constitutional right to know. *Id.* ¶ 11. The court rejected this argument, declining to adopt a constructive quorum theory, and holding that "the language of § 2-3-202, MCA, is plain and unambiguous, and that the definition of 'meeting' does not include 'serial one-on-one discussions.'" *Id.* ¶ 25. The court further noted that a constructive quorum rule would prohibit legislators from meeting in the halls of the Capitol and discussing pending legislation. *Id.* ¶ 25. The court ultimately concluded: "the Commissioners' one-on-one discussions prior to the February 12 meeting were not subject to [open meeting laws] because a majority of Commission members never 'convened' or 'deliberated' as a 'public body' outside of a public meeting." *Id.* ¶ 25.

Willems controls here. A majority of the House Judiciary Committee never convened or deliberated outside of a public meeting. Thus, there was no violation of Montana's open meeting laws. This result is in line with decisions from other jurisdictions that, like Montana, "recognize that their open meeting laws do not apply when a quorum is not present." *Willems*, ¶ 23 (citing *Dewey*, 119 Nev. 87, 64 P.3d at 1077–

78 (declining to find that "back-to-back briefings" of members of the City of Reno's Redevelopment Agency "created a constructive quorum or serial communication in violation of" Nevada's open meeting laws); *Dillman v. Trs. of Ind. Univ.*, 848 N.E.2d 348, 351 (Ind. Ct. App. 2006) (concluding that, although Indiana's Open Door Law must be liberally construed, the legislature specifically defined meeting as a gathering of a majority of the governing body, and without a majority present, no meeting occurs)).

The position advanced by Associated Press would effectively change the definition of quorum from "a majority of the members of the committee," House Rule H30-30, to "a majority of the members of the majority party on the committee." Not only would this contradict plain statutory language, *see* MCA § 2-3-202, -203, it also would lead to absurd results. For example, under Associated Press' theory, if ten members of a nineteen-member committee were from the same party, just six of those members discussing committee issues would constitute a constructive quorum, even though that is less than a third of the committee membership.

Associated Press' argument also raises line-drawing questions. Would the constructive quorum be defeated by the presence of a member of the other party? Similarly, could the members of a committee's minority party constitute a constructive quorum? What about a majority of the minority members? This is precisely the "difficult labyrinth" that the Montana Supreme Court has cautioned against. *Boulder Monitor*, ¶ 20.

Associated Press' constructive quorum theory directly contradicts plain statutory language and has been routinely rejected by this Court. This Court should therefore reject it once more.

III. Alternatively, Associated Press' requested relief to set aside any decisions made during the January 21, 2021 gathering would violate legislative immunity.

Because the district court appropriately dismissed Associated Press' underlying petition on the grounds that there was no quorum at the January 21, 2021 gathering, it did not address Usher's arguments concerning legislative immunity. Associated Press failed to address Usher's legislative immunity on appeal. But if, *arguendo*, this Court decided to reverse the district court's ruling, rewrite the relevant statutes, and overturn its previous precedent, Associated Press'

requested relief—"that the Court issue an order setting aside any decisions made in the illegally closed meeting"—cannot be granted against Usher.

As a threshold matter, Associated Press failed to allege that any decision was made during the alleged January 21, 2021 gathering. To the contrary, because a quorum of the House Judiciary Committee was not present at the gathering, it is not possible for those present to have acted upon pending legislation. *See* House Rule H30-30. Thus, Associated Press' requested relief is unavailable. Additionally, legislative actions are taken by the committee as a whole, and Associated Press' suit against one legislator cannot reverse actions taken by 8, 50, or 100 other elected officials. And finally, Associated Press' requested relief cannot be granted against Representative Usher without violating legislative immunity, regardless of whether a quorum was present.

Should this Court rewrite the open meetings statutes, eschew its own precedents rejecting constructive quorum theory, and disagree that no legislative act took place in the basement, then—and only then—may the Court consider whether this action can be sustained against Usher. And the answer to that last question would be no. Members of the

Legislature are immune from suit for legislative acts under MCA § 2-9-111; article V, section 8 of the Montana Constitution; and common law legislative immunity. Legislative immunity is a fundamental precept of government and protects the autonomy and integrity of the legislative process. It prevents Associated Press' requested relief against Representative Usher.

A. Representative Usher has statutory immunity from suit for legislative acts.

Article II, Section 18, of the Montana Constitution provides that immunity may be established when approved by two-thirds of each house of the Legislature. Pursuant to this provision, the Legislature enacted MCA § 2-9-111, providing immunity from suit for legislative acts or omissions. "A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff of the legislative body, engaged in legislative acts." MCA § 2-9-111(2). Further, "[a]ny member or staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with legislative acts of the legislative body." MCA § 2-9-111(3).

A decision on pending legislation is, by definition, an action "by a legislative body that result[s] in creation of law or declaration of public

policy." MCA § 2-9-111. Thus, to the extent Associated Press alleges such decisions were made during the January 21, 2021 gathering (which, as discussed above, is impossible because there was no quorum present), those decisions would be legislative acts for which the Legislature and its members—including Representative Usher—have immunity. *See Pub. Ed. v. Admin. Code Comm.*, No. BDV-91-1072, 1992 Mont. Dist. LEXIS 204 (Mont. First Jud. Dist. Mar. 1, 1992) (dismissing Administrative Code Committee from action because State of Montana was more appropriate party).

While Associated Press may challenge the process by which decisions are reached, they cannot obtain their requested relief against Usher, who is immune from suit for any legislative acts. The Legislature was constitutionally provided the power to grant immunity, and it would be a violation of the separation of powers for this Court to conclude otherwise. As a result, Associated Press' requested relief to void any decisions made during the alleged January 21, 2021 gathering cannot be granted against Usher and must be dismissed.

B. Usher has constitutional immunity from suit for legislative actions.

In addition to the immunity granted by statute, immunity provided

by the Montana Constitution prevents Associated Press' requested relief of reversing alleged legislative decisions in a suit naming an individual legislator. The speech and debate in article V, section 8 of the Montana Constitution provides:

> A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.

The language "shall not be questioned in any other place" is identical to that of the United States Constitution. *Compare* article V, section 8 of the Montana Constitution *with* the United States Constitution, article I, section 6, clause 1; *see also Cooper v. Glaser,* 2010 MT 55, ¶ 11, 355 Mont. 342, 228 P.3d 443 ("Article I, Section 6 of the United States Constitution is similar to Montana's legislative immunity provision."). Thus, federal cases are instructive when interpreting Montana's speech and debate clause. *See Cooper*, 2010 MT. 55, ¶¶ 11, 13 (relying on interpretations of federal law to hold a Montana representative was entitled to constitutional immunity in a defamation action for remarks he made on House floor).

The United States Supreme Court has held that the speech and debate clause applies to acts other than words spoken in debate:

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, *to things generally done in a session of the House by one of its members in relation to the business before it*.

Kilbourn v. Thompson, 103 U.S. 168, 204 (1881) (emphasis added); *see also Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 503 (1975) (holding legislators acting within the "sphere of legitimate legislative activity" are protected); *United States v. Brewster*, 408 U.S. 501, 512 (1972) (holding clause "prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts"); *Powell v. McCormack*, 395 U.S. 486, 503 (1969) (holding clause "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation"). Other states likewise have interpreted their similar speech and debate clauses broadly. *See Lincoln Party v. General*

Assembly, 682 A.2d 1326, 1333 (Pa. Commw. Ct. 1996) ("[T]he members, and their staff, of the General Assembly are protected from inquiries into those activities generally said or done in the performance of their official duties.") (citing Pa. Const. art. II, § 15); *Romer v. Colo. Gen. Assembly*, 810 P.2d 215, 225 (Colo. 1991) ("[T]he speech or debate clause protects individual legislators and the legislature as a whole from being named defendants in an action challenging the constitutionality of legislation.") (citing Colo. Const. art. V, § 16).

Associated Press claims that whatever decisions were made during the alleged January 21, 2021 gathering "controlled the Judiciary Committee votes on the bills." Doc. 1, ¶ 10.[2] Applying the reasoning expressed by the United States Supreme Court, "speech or debate" extends to "things generally done in a session" and includes voting. *Kilbourn,* 103 U.S. at 204. Thus, to the extent any vote was decided during the January 21, 2021 gathering—and again, Associated Press has failed to establish that point—it would be protected as speech and debate. Revoking legislation would not be a proper redress for a violation of

[2] This is conjecture. And as a matter of law, no legislative acts could have been taken at the January 21, 2021 gathering because there was no quorum present. *See* House Rule H30-30.

Associated Press' right to know in this case because it would violate Usher's constitutional legislative immunity.

C. Common law also prevents the Court from granting Associated Press' requested relief.

A third type of immunity—common law immunity—also prevents the relief Associated Press seeks. *See Supreme Court of Va. v. Consumers Union of United States*, 446 U.S. 719, 732 (1980) ("We have . . . recognized that state legislators enjoy common-law immunity from liability for their legislative acts…"). Common law immunity from liability for legislative acts is similar in origin and rationale to that accorded congressmen under the speech and debate clause. *Id.* (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)). In fact, the Ninth Circuit has explicitly stated that "Montana legislators 'have an absolute common-law immunity against civil suit for their legislative acts…" *Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 750 (9th Cir. 2003) (quoting *Chappell v. Robbins*, 73 F.3d 918, 920 (9th Cir. 1996)). "[T]his legislative immunity extends to suits for injunctive and declaratory relief, as well as to suits for damages." *Eugster v. Wash. State Bar Ass'n*, 2010 U.S. Dist. LEXIS 75514, *33 (E.D. Wash. 2010) (citing *Supreme Court of Va.*, 446 U.S. at 731).

Here, Associated Press appears to contend that the January 21, 2021 gathering resulted in a decision on whether to pass legislation out of the committee. If that were true, Usher would nevertheless be immune from liability for actions in his legislative capacity. This immunity bars Associated Press' claim for relief in the form of "setting aside any decisions made" during the alleged January 21, 2021 gathering.

IV. Associated Press cannot obtain attorney fees from the Legislature.

Article VIII, section 14 of the Montana Constitution provides, in pertinent part: "no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof." There is no statute providing for attorney fees against the Legislature. The Montana Supreme Court has made clear that the legislative immunity set forth in MCA § 2-9-111 means the Legislature and its members cannot be held liable for fees resulting from an action challenging legislative acts. *Finke v. State*, 2003 MT 48, ¶ 34, 314 Mont. 314, 65 P.3d 576 (citing MCA § 2-9-111).

In *Finke,* several individuals and municipalities sued the State and named the Attorney General, the acting director of the Department of Labor and Industry, and several counties. They argued that Senate Bill

No. 242, enacted in 2001, violated the Montana Constitution. *Finke*, ¶¶ 7–9 . While the court concluded that the election provisions in the bill were unconstitutional, it denied the plaintiffs' requested attorney fees because the Legislature is immune from suit under Mont. Code Ann. § 2-9-111. *Id.* ¶ 34 (holding that Mont. Code Ann. § 2-9-111 "provides that the Legislature, as a governmental entity, is immune from suit for any legislative act or omission by its legislative body. There is, therefore, no avenue whereby attorneys' fees could be imposed against the State in this matter.").

Similarly, here, Associated Press cannot obtain attorney fees from Representative Usher. Associated Press' claim for attorney fees was correctly dismissed.

CONCLUSION

Before the Court is a straightforward question: whether to apply the law as written and affirm the district court, or to adopt a constructive quorum theory lacking any supportive precedent. This Court has rejected the constructive quorum argument before and should reject it again. Appellees respectfully request this Court to affirm the district court's rulings.

DATED this 17th 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 principal brief is printed with a proportionately spaced Century Schoolbook 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 4,836 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Alwyn T. Lansing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-17-2021:

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