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Pursuant to Mont. R. Civ. P. 56, Defendants State of Montana and Secretary of State Linda McCulloch respectfully move the Court for Summary Judgment as to each of Plaintiffs' claims. As explained in the accompanying consolidated Response to

Plaintiffs' Motion for Summary Judgment and Brief in Support of Defendants' Cross-Motion for Summary Judgment, the actions of the independent Districting and Apportionment Commission challenged by Plaintiffs in this case are well within the Commission's constitutional authority and discretion, and do not violate the Constitution or laws of the State of Montana.

Respectfully submitted this 11th day of September, 2013.

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CERTIFICATE OF SERVICE

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

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INTRODUCTION

Plaintiffs in this case have asserted many claims against the 2010 Montana Districting and Apportionment Commission, but ultimately they all boil down to two basic criticisms: (1) the Commission did not allow enough public participation in the challenged "Llew Jones" decision, in part because it did not give enough public notice, and (2) the decision itself was

wrong because it fails to maximize the number of times Plaintiffs will get to vote for a state senator over a ten or twenty year period. Neither criticism has any merit.

First, the Commission went to extraordinary lengths to provide information to the public, gather public feedback, and ensure the public was involved in every facet of its decision-making. This included holding 36 public meetings and hearings all across the Montana, all of which were open to the public and provided time for public comment. The Commission also provided a website on which its staff posted large quantities of relevant maps, documents, and announcements, and the Commission considered more than a thousand comments received from Montanans via public testimony, letters, and email. It is difficult to imagine what more the Commission practically could have done to encourage and facilitate public involvement in the redistricting process, while still completing its important task. Plaintiffs' argument that more public notice and participation was required is simply not realistic.

Plaintiffs' second criticism is even less realistic. As a matter of simple arithmetic, half of the new senate districts in each redistricting cycle must be assigned a holdover senator and will thus be ineligible to vote in the next election. Population changes dictate that the new senate districts will not be the same as the old senate districts—that's why it is called *re*districting. Those two necessary facts taken together—new senate districts and the assignment of holdover senators—will inescapably lead to some Montanans waiting six years to vote for a senator. And this may happen to some Montanans in consecutive redistricting cycles; indeed, three of the five 2010 Commissioners found themselves in precisely that circumstance. Simply put, six year periods for some Montanans between senate voting cycles is an inevitable part of Montana's redistricting process. The inevitable cannot be unconstitutional.

Notwithstanding the Commission's impressive efforts to keep the public informed and involved, and despite the inevitability of what Plaintiffs have pejoratively labeled "disenfranchisement," Plaintiffs invite this Court to impose itself as a "super" redistricting commission and strike a portion of the 2013 Redistricting Plan, while substituting a portion of the prior tentative plan. The effect of such a ruling would be to impose a redistricting plan on Montanans that has not been officially approved by anyone, except this Court. Plaintiffs' legal arguments and their proposed remedy, if entertained, will create unworkable standards, will require sweeping changes to how redistricting is done in Montana, will require almost 13,000 citizens residing in SD-9 to wait six years before participating in a senate election, and will force courts—not the Commission—into the driver's seat for all future redistricting. And paradoxically, Plaintiffs' proposed restrictions would actually undermine the Commission's ability in the future to take action based on public comments after the Legislature has made its "recommendations," or at the Commission's final meeting. Like past courts that have considered similar challenges to Montana's redistricting plans, this Court should reject Plaintiffs' invitation to improperly undermine the Commission's discretion and impose new, unworkable impediments to its important work.

STATEMENT OF FACTS

I. THE 1972 CONSTITUTIONAL CONVENTION INTENTIONALLY CREATED AN INDEPENDENT COMMISSION TO "BYPASS THE LEGISLATURE."

Prior to the 1972 Constitutional Convention, the duty to redistrict Montana's legislative districts lay with the Montana Legislature. In 1965 the Legislature was unable to pass redistricting legislation, despite "[a]bout a dozen bills" being introduced. *Wheat v. Brown*, 2004 MT 33, ¶ 19, 320 Mont. 15, 85 P.3d 765 (quoting 4 Mont. Const. Conv. Tr., at 682). Ultimately a federal district court had to fill the gap and provide a redistricting plan for the State. *Id.* Then,

in 1971, the redistricting plan passed by the Legislature was ruled invalid because it contained a 37 percent variance. *Id.*

"In response to this untenable situation, the Constitutional Convention assigned the duty of redistricting to a separate body, the Montana Districting and Apportionment Commission," including the "power to assign holdover senators to districts." *Id.* ¶¶ 20, 35 (citing Mont. Const. art. V, § 14). The members of the Convention recognized not only the Legislature's ineffectiveness in passing redistricting plans, but also "the inherent conflict of interest in having the Legislature redistrict itself." *Id.* ¶ 20. Consequently, while the legislative leadership would appoint four out of the five members, the Commission "would be somewhat independent and autonomous. *It would, in effect, bypass the Legislature from this point on.*" *Id.* (quoting 4 Mont. Const. Conv. Tr., at 682) (emphasis added by the Court). The role of the Legislature was thereby limited "to that of making 'recommendations.'" *Id.* ¶ 23.

II. THIS COMMISSION'S EARLY EFFORTS TO ENGAGE THE PUBLIC

Redistricting based on the 2010 census was a long process that spanned four years, from 2009 to 2013. The public was extensively involved in each step of the process. While it was deciding its redistricting criteria, for example, the Commission traveled around the state to obtain public comment. The Commission held hearings in Helena, Missoula, and Billings, and included citizens in Havre, Great Falls, Kalispell and Miles City via videoconference. Exs. A-C.[1] As Chairman Regnier explained when describing the purpose of the meetings, "the Commission is committed to involving the public at every step." Ex. A. These hearings "were noticed as

[1] With the exception of Exhibit L, which is a copy of a court order, Defendants' attached exhibits are all public documents available on the Commission's website, located at http://leg.mt.gov/css/committees/interim/2011-2012/districting/.

widely as possible in advance, and the commission also issued an op-ed piece to encourage Montanans to attend the hearings or to submit written testimony." Pls' Ex. 12, at 9.

At the May 28, 2010 meeting, where the Commission discussed and officially adopted the redistricting criteria, Chairman Regnier thanked the public for its comments concerning redistricting criteria and the redistricting process in general. Ex. D. Commissioner Bennion noted that "the current Commission is already on track to have the most open and transparent redistricting process, thanks to the comments received and public hearings." *Id.*

During this time, the Republican-appointed commissioners (Jon Bennion and Linda Vaughey) and the Democrat-appointed commissioners (Joe Lamson and Pat Smith) traveled the State in pairs giving presentations to their constituent groups. Pls' Ex. 35, at 87-88. Additionally, the Commission directed its staff "to visit election administrators, legislators, tribal officials, political party members, local officials, and other interested parties [to] notify them of the redistricting process and solicit local ideas for how district lines might be shifted or redrawn to accommodate the new population figures." Pls' Ex. 12, at 9.

III. PUBLIC COMMENT "TOUR" WITH PROPOSED STATEWIDE MAPS

At the July 2011 meeting, the Commission decided to use statewide maps when obtaining public comment, as opposed to the region-specific maps used by past redistricting commissions. Ex. E; Pls' Ex. 12, at 9. At the request of the Commission, the staff developed four statewide maps for discussion and public comment: (1) an "existing" plan based on the previous districting map; (2) an "urban rural" plan based on separating urban and rural areas; (3) a "subdivision" plan based on keeping political subdivisions intact; and (4) a "deviation" plan emphasizing relative population equality between districts. Pls' Ex. 34, at 23-25; Ex. F. The

Democrat-appointed commissioners submitted their own plan at this meeting as well, which they titled the "Communities" plan. Pls' Ex. 34, at 26.

The Commission then took these statewide maps on the road, holding public hearings in 14 different locations across the State,[2] including "large population centers and more rural areas, as well as . . . several reservations or areas with sizable population of American Indians." Pls' Ex. 12, at 10. At the beginning of the hearings, Chairman Regnier would briefly explain the purpose of the hearing and the proposed statewide maps, and then open the floor to public comment. *Id.* Thousands of Montanans attended these 14 public hearings, with hundreds offering public testimony on the proposed plans and the redistricting process. Additionally, the Commission "accepted pages upon pages of written public testimony on the various plans [and] several [proposed] regional maps." Pls' Ex. 12, at 10. All maps, regardless of source, were made available on the Commission's website. *Id.*

IV. HAMMERING OUT THE HOUSE DISTRICTS

Three months after the Miles City public hearing, during the week of August 13, 2012, the Commission met for five days straight to discuss and ultimately adopt a redistricting plan for Montana's 100 House districts. At the initial August 13 meeting, Chairman Regnier described the week-long schedule: "the majority of each day would be used as an executive work session with a brief period of time allotted daily for public comment." Ex. G, at 2. He explained that while the executive session would "involve tentative voting on different regions," the districts would not be finalized "until later in the process." *Id.* He therefore encouraged citizens to continue to be involved in the process and submit comments. *Id.* Also at the initial meeting, the

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[2] Missoula, Pablo, Kalispell, Butte, Helena, Lewistown, Bozeman, Great Falls, Browning, Havre, Wolf Point, Crow Agency, Billings, and Miles City.

Republican-appointed Commissioners presented their proposed plan, called the "Criteria" plan. *Id.* at 4. The Commission thus had a total of six proposed plans from which to draw ideas.

At the end of the week, Chairman Regnier, while recognizing that there were many objections to the tentative district lines that had been drawn to that point, asked that the Commission take an official vote. Ex. H, at 14. Commissioner Bennion agreed to "vote yes with the understanding that he [would] continue to pursue additional changes in the Helena and Great Falls districts." *Id.* Commissioner Lamson likewise stated that he and Commissioner Smith "have problems with certain areas as well and may also ask to revisit them." *Id.* Having explicitly recognized the fluid nature of the tentative plan, the Commission adopted "the Tentative Commission Plan for 100 districts" by a unanimous vote. *Id.*

V. CREATING SENATE DISTRICTS AND TENTATIVELY ASSIGNING HOLDOVER SENATORS

The Commission next turned to creating senate districts, which it did by pairing adjacent house districts. At the first public hearing on senate pairings the Commission just listened, accepting two hours of public comment from citizens on potential pairings. Ex. I. At the next hearing on November 30, 2012, the Republican-appointed and Democrat-appointed Commissioners each presented proposed senate pairings. Pls' Ex. 5, at 2. Noting that treatment of specific senate districts can have "ripple effects" in other districts, Chairman Regnier questioned the Commissioners about certain pairings. *Id.* at 2-3. After opening the floor to public comment, the Commission then debated the senate districts, with Commissioners often referring to public comment in their arguments. *Id.* at 3-13.

Once all senate districts were discussed and voted upon, the Chairman directed the discussion towards the assignment of holdover senators. *Id.* at 13. Holdover senators are those 25 Senators who were elected in 2012 to four-year terms, and therefore will serve until 2016.

Mont. Const. art. V, § 3; Pls' Ex. 35, at 14-15. Because redistricting does away with the old districts, holdover senators "must be assigned to newly-redrawn districts, where the holdover senators serve the final two years of their terms." *Wheat*, ¶ 8. The next senate election for the new districts that are assigned holdover senators will occur in 2016, while the remaining 25 districts will hold senate elections in 2014.

The four politically-appointed Commissioners agreed on 21 of the 25 holdover placements. Chairman Regnier split his vote on the remaining four placements, voting twice with the Republican-appointed Commissioners and twice with the Democrat-appointed Commissioners. Pls' Ex. 35, at 14-15, 43. Senator Rick Ripley at this time was placed in SD-9, which included all or parts of Lewis and Clark, Teton, Pondera and Toole counties. Pls' Exs. 7; 13. Since Senator Llew Jones was not a holdover senator, he was not assigned a district. Senator Jones's residence is within SD-9. *See* Pls' Ex. 13. Thus, if SD-9 was assigned a holdover senator, as was tentatively approved at the November 30 meeting, Senator Jones would not be able to run in 2014.

VI. PROVIDING THE TENTATIVE, "NOT THE FINAL," PLAN TO THE LEGISLATURE FOR RECOMMENDATIONS

By the December 19, 2012 meeting, the Commission had settled on a tentative redistricting plan. Chairman Regnier therefore moved to direct the staff "to prepare the plan, *as it presently exists*, for submission to the 2013 Legislature on January 8, 2013." Pls' Ex. 11, at 5 (emphasis added). "The motion passed on a unanimous voice vote." *Id.*

Staff then reviewed the draft commission report, noting "that the 'draft' watermark would remain until the final vote, right before submission to the Secretary of State." *Id.* The Commission and staff generally referred to the maps showing the proposed districts as the "Tentative Commission Plan," or "TCP," and the written explanatory material as the draft

"report." *See* http://leg.mt.gov/css/committees/interim/2011-2012/districting/Maps/tcp2013.asp; Pls' Ex. 12. The Tentative Commission Plan was prominently labeled as "not the final plan" on the website. *Id.*

The Tentative Commission Plan and the draft report were provided to the 63rd Legislature on January 8, 2013. Pls' Ex. 12. After reviewing the Tentative Plan, the House and Senate provided its "recommendations" to the Commission via resolutions. Pls' Exs. 19; 20. Both the House and Senate made recommendations regarding district lines and additionally recommended a reassignment of Senator Webb from District 23 to District 22. *Id.*

The Legislature's recommendations did not address Llew Jones's inability to run for reelection under the Tentative Plan. But a bipartisan group of six representatives, six senators, and four leaders of nonprofit and community associations submitted a letter on January 27, 2013 to the Commission asking it to "provide Senator Jones with a Senate district in which he can run during the upcoming (2014) elections." Pls' Ex. 15. Calling the decision to leave Senator Jones without a district a "significant oversight," the letter extolled Jones's service during his three terms in the house and one term as a senator, including a history of "bipartisan policy making," a willingness to place "the state and its citizens above party wrangling and political showmanship," and a "biennial long effort to craft a school funding bill." *Id.* This letter, like all public comment received by the Commission, was posted on the website. Pls' Ex. 37.

The bipartisan letter was not the only public comment received by the Commission in support of Senator Jones. In fact, in October of 2012 the Commission had received six letters from government and community leaders in the "Golden Triangle region" of Montana asking the Commission to provide Jones with a district in which he could run in 2014. Ex. J. These letters

were from the cities of Conrad and Cut Bank, Pondera, Glacier and Toole Counties, and the Conrad public school system. *Id.*

VII. ADOPTION OF THE FINAL PLAN, INCLUDING ACTING ON THE PUBLIC'S REQUEST TO ACCOMMODATE SENATOR LLEW JONES

After receiving the legislative recommendations, the Commission set February 12, 2013 as its final meeting date. The meeting agenda, posted on the website two weeks prior to the final meeting, stated two action items. Pls' Exs. 22; 37. The first notified the public that the Commission planned to "[d]iscuss and revise [the] Tentative Commission Plan, including justifications for any deviations from ideal population." Pls' Ex. 22. The second notified the public that the Commission planned to "[a]dopt [the] final legislative redistricting plan." *Id.* Also included on the agenda was time for public comment "on *any topic* within the jurisdiction of the commission." *Id.* (emphasis added). The February 12 meeting date and agenda were also publicized in a press release issued on February 1 by staff for the Commission. Pls' Ex. 33.

Leading up to the February 12 meeting, Commissioners had one-on-one discussions with each other, but never discussed Commission business with a quorum of Commissioners outside of a public meeting. Pls' Exs. 35, at 87-88; 34, at 131-32. For example, Chairman Regnier spoke individually with Commissioners Lamson and Bennion about a potential solution that would address the concerns raised by citizens about Llew Jones. Pls' Ex. 35, at 53-59. Commissioner Lamson suggested the Commission should consider moving Senator Ripley to SD-10 and Senator Hamlett to SD-15, so that SD-9 would not have a holdover senator. *Id.* at 54. Commissioner Bennion suggested instead that the Commission should move Senator Hamlett to the Great Falls area as opposed to SD-15. Pls' Ex. 34, at 96-97. This was just one of the many issues that the Commissioners discussed individually with each other leading up to February 12

meeting. Commissioner Bennion, for example, also pressed to have the Commission reconsider at its meeting reassigning Senator Webb from District 23 to District 22. Pls' Ex. 34, at 100.

Of course, while Commissioners talked one-on-one to determine possibilities and positions and prepare for the February 12 meeting, no decisions were ever made outside of the public meetings. The record is clear that the Commissioners' "intentions and ultimate decisions is something that occur[ed] during the open public meeting." Pls' Ex. 35, at 63. Notably, Plaintiffs cannot point to *one* example where *any* decision was ever made by the Commission outside of a public meeting. To the contrary, Chairman Regnier, while noting that it was helpful for him "to get some idea of what [the other Commissioners] were going to propose . . . never made a decision without a discussion in the meeting," the only forum in which it was possible to have "a give-and-take debate with the entire Commission." *Id.* at 60.

This was especially true with regard to the Llew Jones decision challenged by Plaintiffs. Chairman Regnier specifically testified that he still had not decided what, if anything, he wanted to do to address the Llew Jones's concerns before the February 12 meeting. Pls' Ex. 35, at 48. Ultimately, it was Chairman Regnier who broached the topic at that meeting. Pls' Ex. 23, at 7. Only after he found persuasive the point made by Commissioner Williams (who replaced Commissioner Smith) that accommodating Senator Jones, a Republican, should not come at the expense of impacting two Democrat senators, did Chairman Regnier vote with Commissioners Lamson and Williams to move Senator Ripley to SD-10 and Senator Hamlett to SD-15, leaving SD-9 without a holdover senator. *Id.* at 8-9.

The Llew Jones amendment was the last issue addressed by the Commission at its final meeting. *Id.* at 9. The Commission then opened the floor for public comment. Receiving none, the Commission turned to its final action item: adopting the final redistricting plan. *Id.* Prior to

the final vote, each Commissioner made final comments. Commissioner Bennion thanked his fellow commissioners and the staff and noted "significant gains" in "population deviations, minority voting rights, and public participation." *Id.* Commissioner Williams "commented that neither side got everything it wanted, which indicates that compromises were made and that good work was done." *Id.* at 10. The Commission then adopted the plan on a 3-2 vote. After filing the final plan with the Secretary of State, the Commission was dissolved. Pls' Ex. 34, at 11; Mont. Const. art. V, § 14(5).

ARGUMENT

I. THE COMMISSION PROVIDED AMPLE NOTICE TO THE PUBLIC.

A. Article II, Section 8 Does Not Apply to the Commission, and Sufficient Public Notice—Both General and Specific—Was Provided in Any Event.

As demonstrated above, maximizing the public's participation in the redistricting process was very important to the Commission. It therefore went to great lengths to facilitate public participation, including providing notices of all meetings and posting all documents and comments on its website. But while the Commission when out of its way to encourage robust public participation, it did not do so because of Article II, section 8 of the Montana Constitution, or any statutes that implement that provision. Important as that provision is, it does not apply to the Commission.

Section 8 on its face applies only to "agencies": "The public has the right to expect governmental *agencies* to afford such reasonable opportunity for citizen participation in the operation of the *agencies* prior to the final decision as may be provided by law." Mont. Const. art. II, § 8 (emphases added). The statutes that implement Section 8—including the Montana Public Meetings Act, which "provides the statutory guidelines for ensuring the requirements of Article II, Section 8 are met," *Jones v. County of Missoula*, 2006 MT 2, ¶ 14, 330 Mont. 205,

127 P.3d 406—obviously cannot extend beyond the reach of Section 8 itself. This is recognized by the Act itself, which specifically defines "agency" as *not* including "the legislature and any branch, committee, or officer thereof." Mont. Code Ann. § 2-3-102(1). The Montana Supreme Court has also recognized that Section 8, unlike Section 9, does not apply generally to "public bodies," but only to "governmental agencies." *Bryan v. Yellowstone Co. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 25, 312 Mont. 257, 60 P.3d 381.

This understanding of Section 8 is congruent with the intentions of the drafters of this constitutional provision. *See generally* 5 Mont. Const. Conv. Tr., at 1655-67 (1972). Delegate McNeil, for example, suggested replacing the word "government" with "agency" in Article II, Section 8, to clarify its meaning:

> I think it will reach to the heart of what the committee was really looking for, and that is making these bureaucratic agencies responsive to the people. It will eliminate any question that the people are *not going to participate by way of vote in terms of the Legislature or the Supreme Court* or anything else and will clearly pinpoint the fact that it is the *governmental agencies* that are the target of this section designed to permit the citizens to participate therein.

5 Mont. Const. Conv. Tr., at 1666 (emphases added).

While the Commission is a "public body," consisting of "a group of individuals organized for a governmental or public purpose," it is not an "agency." *Goldstein v. Comm'n on Practice of the Supreme Court*, 2000 MT 8, ¶ 104, 297 Mont. 493, 995 P.2d 923 (quoting *Common Cause v. Statutory Committee*, 263 Mont. 324, 330, 868 P.2d 604, 608 (1994)). The Commission is not a "board, bureau, commission, department, authority, or officer" that carries out the directives of a principle by making "rules, determin[ing] contested cases, or enter[ing] into contracts." Mont. Code Ann. § 2-3-102(1).

Rather, the Commission is an "independent and autonomous" branch of the Legislature whose final redistricting plan "become(s) law." *Wheat*, ¶ 20; Mont. Const. art. V, § 14(4). It

does not merely adopt "rules," which are defined as a "regulation . . . that implements . . . law." Mont. Code Ann. § 2-3-102(3). The Commission's powers and duties are defined under Article V of the Montana Constitution, which is titled "The Legislature" and is devoted to describing the authority of the Legislature. Because the Commission is not an agency, but a branch of the Legislature, its deliberations are not subject to Section 8. Accordingly, none of Plaintiffs' right-to-participate arguments even state a valid claim for relief.[3]

Of course, the Commission here worked very hard to ensure public involvement. Indeed, its efforts would have more than sufficed even if Section 8 applied. For example, the public was provided *general* notice that any changes to the placement of holdover senators could be discussed and adopted at the February 12 meeting. The agenda stated that the Commission would "[d]iscuss and revise [the] Tentative Commission Plan, including justifications for any deviations from ideal population." Pls' Ex. 15. Everyone knew, or should have known, that discussing and revising the *tentative* redistricting plan could include changing the assignment of holdover senators. *See* Pls' Ex. 34, at 106-07 (Commissioner Bennion acknowledging that revising the Tentative Commission Plan "could include any revisions to the redistricting plan, including holdover assignments"). This general notice alone should be sufficient, even under Section 8.

But here, the public was given more than just general notice—it was provided specific notice too. The January 27 letter urging the Commission to accommodate Llew Jones was posted to the Commission's website before the February 12 meeting. So too were the similar letters received from regional officials in October of 2012. Pls' Ex. 37, at 2; Ex. J. Those letters

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[3] Second Cause of Action in Amended Complaint and parts II to IV of the Argument section in Plaintiffs' Brief.

specifically informed the public of the Llew Jones concerns, and that the Commission might act to address those concerns.

Plaintiffs are apparently not satisfied with this general and specific notice. Presumably, they wish the Commission had explained in advance of the February 12 meeting all the different ways it might address the Llew Jones concern.

That is unrealistic. As a practical matter, there are myriad—perhaps unlimited—ways the Commission could have addressed the Llew Jones situation. Anytime a holdover senator is moved (or basically any other change is made to the "tentative" plan), there are inevitably spillover or "ripple effects" that must also be addressed. *See* Pls' Ex. 34, at 71, 73 (Commissioner Bennion noting the potential "ripple effects" that had to be considered in a solution to the Jones issue). Requiring the Commission to give specific and detailed notice of all of those potential "ripple effects" would be impracticable. It would also tie the Commission's hands, preventing it from implementing better ideas that came forward from the public, staff, or Commissioners during a meeting.

Here, the Commissioners gave as much general and specific notice as was possible, especially given that the Commission did not know what it would decide or specifically discuss in advance of the meeting. Pls' Ex. 35, at 48, 63. As with hearings that occur in the Legislature, it would have been impossible for the Commission to describe with particularity exactly what issues would be discussed or resolved at its final meeting. To demand more specificity than a general statement of what could be discussed or modified would result in a never-ending cycle of "final" meetings until nothing more is accomplished—surely an absurd and unworkable scenario, especially under the tight deadlines the Commission was working under. Or the Commission

could simply schedule one final pro forma meeting where public comment was permitted, but no changes were allowed—hardly the type of "public participation" anyone should want.

Ultimately, citizens who want input into the *final* plan are guaranteed it—but they do need to "stay tuned to the very last meeting." Pls' Br. at 13. That is not unreasonable. Just like the Legislature, which often passes the budget on the last day of the session, the Commission has to be able to take meaningful steps at its last meeting if it is to be anything other than a sham meeting. Limiting the Commission to a perfunctory last meeting where the Commission essentially takes no action, as Plaintiffs' urge, would actually impede the public's right to participate, because the Commission could not act on a suggestions proposed by the public at that meeting. *Compare to* Pls' Ex. 35, at 87 (explaining the Commission would have considered a proposed change if suggested during the public comment period at the last meeting). Such an outcome is illogical and counter to the very purpose of the Commission, which is constitutionally empowered to have the final word on the redistricting plan.

B. Plaintiffs' Article II, Section 9 Claim Is Time-Barred, and Section 9 Does Not Prohibit One-On-One Conversations in any Event.

In order to protect the "Right to Know" provided by Mont. Const. art. II, § 9, the Open Meetings Act requires that "[a]ll meetings of public or governmental bodies . . . must be open to the public." Mont. Code Ann. § 2-3-203. To ensure compliance, "any decision made in violation of 2-3-203 may be declared void by a district court having jurisdiction." Mont. Code Ann. § 2-3-213. Because of the time sensitive nature of this remedy, Section 9's enabling statute requires that a "suit to void a decision must be commenced within 30 days of the date on which the plaintiff or petitioner learns, or reasonably should have learned, of the agency's decision." *Id.*

Here, Plaintiffs missed this deadline, and therefore their Section 9 claims[4] are time barred and must be dismissed. Plaintiffs knew of the Commission's February 12 decision prior to filing their original complaint on March 14, 2013, but failed to amend their complaint to include a Section 9 claim until July 23, 2013—161 days later. Consequently, the remedy provided by Mont. Code Ann. § 2-3-213 is not available to Plaintiffs.

Even if Plaintiffs' had not waived their Section 9 claim, it was not a violation of the open meetings law for two Commissioners to discuss redistricting. "Meeting" is defined as "the convening of a *quorum* of the constituent membership of a public agency or association described in 2-3-203 . . . to hear, discuss, or act upon a matter . . . ." Mont. Code Ann. § 2-3-202 (emphasis added). And a "quorum" is defined as "[t]he minimum number of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business." *Black's Law Dictionary* 1284 (8th ed. 2004).

Three out of the five Commission members constitute a quorum. Two members discussing redistricting are thus not taking part in a "meeting" as contemplated by the Open Meetings Act and therefore their conversation is not subject to the Act's open meeting requirements. *Compare to Common Cause v. Statutory Committee*, 263 Mont. 324, 331, 868 P2d 604 (1994) (concluding that a meeting occurred and the Act applied where a quorum of 3 out of 4 committee members met).

In the case of the Commission, it would be unworkable and unnecessarily burdensome to prohibit two members from discussing redistricting matters outside of public meetings. The Commissioners deposed in this lawsuit—Commissioners Regnier, Bennion and Lamson—disagreed about many things, but they all agreed that, as a practical matter, the Commission's

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[4] Eighth Cause of Action in Amended Complaint and Part I of the Argument section in Plaintiffs' Brief.

important work could not get done if they were barred from communicating one-on-one with other Commissioners outside of public meetings. Pls' Exs. 34, at 132; 35, at 89; 36, at 117. Chairman Regnier emphasized that such one-on-one conversations were necessary to have "any meaningful process." Pls' Ex. 35, at 89. Any new rule prohibiting such one-on-one conversations would have far-reaching implications for the redistricting process, seriously crippling future Commissions. For example, pairs of politically-appointed Commissioners spoke to their constituencies around the state; such vital public discourse would be prohibited under Plaintiffs' suggested limitations.

Such an overly-strict approach would not just affect future redistricting commissions. It would also have serious ramifications for all legislative activity of any type. As Commissioner Lamson explained, "it is a legislative process; and as legislators talk[] amongst themselves from time to time to try to move forward and find solutions, different commissioners from time to time met . . . but never a quorum [and] no decisions were made." Pls' Ex. 36, at 114. Like non-quorum groups of legislatures who meet to "move forward and find solutions," commissioners must be able to have one-on-one discussions to know the options that might be available to the Commission at its public meetings. Otherwise, as noted by Commissioner Bennion, the process "would be very difficult." Pls' Ex. 34, at 132.

Nevertheless, Plaintiffs, relying on extra-jurisdictional case law, allege that Commissioners had "serial one-on-one communications among themselves" that violated Section 9. Pls' Br. at 8-9. But the circumstances of the "serial communications" in *Stockton Newspapers v. Redevelopment Agency*, Plaintiffs' lead case, are readily distinguishable from the conversations between Commissioners here. In *Stockton*, communication was undertaken "for the *commonly agreed* purpose of obtaining a *collective commitment* or promise by a *majority* of

[the governing] body concerning public business . . . ." 171 Cal. App. 3d 95, 98 (Cal. Ct. App. 1985) (emphasis added). In fact, the complaint in *Stockton* alleged that the calls constituted a "one-to-one telephonic *poll*" to establish this "collective commitment." *Id.* at 99 (emphasis added). In short, in cases like *Stockton* courts were concerned about real evidence that government bodies were intentionally manipulating the system to avoid public participation and accountability.

Here, in contrast, the Commissioners did not make any "collective" decisions prior to their formal meetings, and specifically did not decide in advance what if any steps to take concerning holdover senators and Llew Jones. Pls' Ex. 35, at 48 (noting there was no "consensus among the Commission" before the February 12 meeting as to whether to move Senator Ripley out of SD-9). As stated succinctly by Chairman Regnier, "the Commission's . . . ultimate decision is something that occur[ed] during the open public meeting." Pls' Ex. 35, at 63.

In fact, Chairman Regnier still had not made up his own mind as of the night before the meeting, and "wasn't going to make a decision on [the Jones matter] until [the Commission] actually had [its] meeting and had a discussion about it . . . ." Pls' Ex. 35, at 54. It was only at the meeting, after hearing a "compelling" argument advanced by Commissioner Williams (concerning the unfairness of penalizing two Democrats to help a Republican) that Chairman Regnier made up his mind to accommodate Senator Jones by voting in favor of shifting Senators Ripley and Hamlett one district to the east to free up SD-9. Pls' Ex. 35, at 64-65. Tellingly, Plaintiffs have presented no evidence that there was any kind of "collective commitment" as to a "commonly agreed purpose" established during these individual communications.

The record as a whole reflects that the Commission took great pains to ensure the public was involved and informed and that all decisions were made at public meetings (and after public comment). Ultimately, though, the Commission is charged with a huge time- and resource-consuming task. Add to this the fact that four out of the five commissioners are appointed by political parties and thus must consult and negotiate with each other to facilitate compromise, and the fact that the criteria the Commissioners are charged with adhering to is sometimes conflicting. Practically speaking, it would have been impossible for the Commission to have accomplished its formidable task without some one-on-one communication outside of formal meetings. As Chairman Regnier astutely noted, they needed to have some background discussion to facilitate useful debate at meetings so that decisions could be reached. Pls' Ex. 35, at 59-60. But a quorum "never made a decision without a discussion in the meeting because . . . it was in that context that . . . [the Commissioners] had the opportunity for a give-and-take debate with the entire Commission." *Id.* at 60. This is precisely what Montanans expect and require of their government bodies.

II. THE RIGHT OF SUFFRAGE WAS NOT INFRINGED.

Not surprisingly, *re*districting changes districts. The population of Montana changed, both in total size and distribution, between the 2000 and 2010 censuses. The 2013 redistricting map, and each district therein, is thus necessarily different than the 2003 district map. Plaintiffs' oft-repeated comparison of the 2013 districts with the 2003 districts is thus fundamentally flawed; they are comparing apples to oranges.

The central concept in assessing the right to vote is the right of "one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963). In the context of redistricting, the primary concern is with "population equality"—i.e., whether the deviation in population between different

districts is relatively close to the "ideal deviation" constituting one person, one vote (measured by dividing the total state population by the number of districts). *See, e.g., McBride v. Mahoney*, 573 F. Supp. 913, 914 (D. Mont. 1983) (citing *Avery v. Midland County*, 390 U.S. 474, 481 (1968) ("[e]lectoral apportionment must be based on the general principle of population equality"). While the deviation need not be mathematically precise, a deviation "of more than 10% . . . creates a prima facie case of discrimination." *Id.* at 915 (quoting *Brown v. Thomson*, 103 S. Ct. 2690, 2696 (1983)).

The Commission did exceptionally well in meeting this core requirement of suffrage. The deviation criteria adopted by the Commission was 3 percent from the ideal, which is the lowest ever set in Montana history. *See, e.g., id.* (deviation criteria set at 5 percent). And the Commission successfully met this strict criteria: the largest deviation for a house district in the 2013 plan is 2.99 percent, while for a senate district the largest deviation is 2.98 percent, and the mean deviation is 0.91 percent and 0.76 percent respectively. Ex. K; *compare to McBride*, 573 F. Supp. at 915 (overall state deviation of 10.94 percent).

Plaintiffs nevertheless allege that the Commission violated their right of suffrage. Not having population equality of their side, Plaintiffs claim that minimizing the number of holdover senators placed in districts "where residents last voted for a senate candidate in 2010" is constitutionally required. Pls' Br. at 19. But Plaintiffs cannot point to any case holding this novel proposition, because there is none. The closest Plaintiffs come is a case out of California wherein the defendant redistricting commission (not the court) argued, as one of many reasons that petitioners' proposed *alternative plan* should not be accepted, that the alternative plan increased the number of districts where a delay in a vote for state senator might occur. *Id.* (citing to *Vandermost v. Bowen*, 269 P.3d 446, 482 (1981)).

This is far from a declaration that minimizing such a delay is a requirement, or even that it *must* be considered by a redistricting commission. In fact, the dispute in *Vandermost* does not focus on this issue at all, but instead is an action by supporters of a referendum asking the court to determine "which state Senate district map [the one adopted by the Commission or one of several proposed alternatives] should be utilized if the proposed referendum qualifies and triggers a stay of the Commission's certified Senate district map." *Id.* at 449-51. The California Supreme Court thus simply held, as to the second alternative proposal: "At this late stage in the schedule of election preparations, there simply does not exist sufficient time to adequately consider such an undefined new map." *Id.* at 483. *Vandermost* is inapposite here.

Looking instead to the Montana Constitution, what Plaintiffs label as "disenfranchisement" is in fact constitutionally *mandated.* Placement of holdover senators in districts, and the resulting 25 districts that will only vote for two state senators over the next 10 years, is a direct result of the constitutional requirement that state senators serve staggered terms. Mont. Const. art. V, § 3. In theory, the Commission could attempt to minimize the population that is affected by assigning holdover senators, but such a focus obviously would come at a cost to other mandated criteria such as compactness and equal population deviation. *McBride*, 573 F. Supp. at 916-17 (acknowledging that "the conflicts between the criteria as they existed within a district and as they existed between districts had to be balanced in arriving at a plan embracing the entire State," including the resulting "ripple effects."). In truth, attempting to minimize the population affected by holdover senators is one of the many goals the Commission may legitimately pursue—but it must balance that goal with all of its other laudable goals, many of which often conflict.

It is helpful to realize that the Commissioners themselves, as Montana citizens, are not immune to these conflicts. A majority of the five Commissioners reside in areas like the affected portion of SD-15, where a holdover senator was assigned and voters last voted for state senator in 2010 (and voters only voted twice for state senators under the 2003 plan). These areas are Lakeside, where Chairman Regnier resides; northern Jefferson County, where Commissioner Bennion resides; and Arlee, where Commissioner Smith resides. If Plaintiffs are correct, these Commissioners intentionally "disenfranchised" themselves.

That is absurd. Surely these Commissioners did not *want* to vote for a state senator only twice under the 2013 plan, but that was the outcome once all of the various and sometimes conflicting criteria were considered. This is not a violation of the right of suffrage; it is a necessary result of redistricting with holdover senators.

Moreover, Plaintiffs' disenfranchisement argument proves too much. If Plaintiffs are correct that limiting a district to two instead of three senatorial elections over ten years somehow infringes on the right to vote, then this infringement should not turn on how many people are affected. The Constitution would be offended any time even one person is affected in this manner. As Plaintiffs admit, reversing the "Llew Jones Motion" by moving Senators Ripley back to SD-9 will still cause 12,767 residents who only voted twice for senators in the 2000 cycle to again only vote twice in the 2010 cycle. Pls' Br. at 20. While this is less than the 19,000 residents of SD-15 affected in this manner under the 2013 Plan, there would still be 12,767 people supposedly "disenfranchised." And, of course, there are all the other affected areas, such as the districts where of Commissioners Regnier, Bennion, and Smith reside. If Plaintiffs' theory is right, the whole redistricting system of assigning holdover senators must be thrown out.

Ultimately, Plaintiffs' "disenfranchisement" argument cannot be right. How the assignment of holdover senators might affect citizens' ability to vote for senators is simply one of many legitimate concerns that must be balanced in creating a redistricting plan. The "just right" balance is an intractable question without any obvious answers—which is precisely why our Constitutional system vests that process in the redistricting Commission. Plaintiffs' request to have this Court second-guess the balance ultimately struck by the Commission should be rejected.

III. THE COMMISSION FULFILLED ITS CONSTITUTIONAL OBLIGATION BY SUBMITTING THE TENTATIVE REDISTRICTING PLAN TO THE LEGISLATURE FOR "RECOMMENDATIONS."

As explained above, the redistricting commission was intentionally designed to be an "independent and autonomous" body empowered to "bypass the Legislature." *Wheat*, ¶ 20. Under the Montana Constitution, the only duty of the Commission vis-à-vis the Legislature is to submit a tentative plan to the Legislature so that the Legislature may make "recommendations." Mont. Const. art. V, § 14(4); *Wheat*, ¶ 23. As should be obvious from the use of the word "recommendation," the Commission is not obligated by any legislative suggestions (or the lack thereof).

The Commission fulfilled its constitutionally required task with regard to the Legislature. The Commission provided the Tentative Commission Plan to the Legislature on January 8, 2013. Pls' Ex. 12. The tentative plan at that point assigned Senator Ripley to SD-9 and Senator Hamlett to SD-10. The amendment reassigning Ripley to SD-10 and Hamlett to SD-15, thereby allowing Jones to run in 2014, did not occur until later. Plaintiffs now claim this "Jones Amendment" is "void" because it was not contained within the tentative plan submitted to the Legislature. Pls' Br. at 18. In short, Plaintiffs are arguing that the Commission may not make

any changes that were not presented to the Legislature, or at least if it does the Commission must then resubmit its amended plan to the Legislature for additional "recommendations."

This is neither required by the Constitution nor practically feasible. Montana's Constitution only requires the Commission to submit its plan to the Legislature for "its recommendations." Mont. Const. art. V, § 14(4). That is it. Contrary to Montana's longstanding maxim of statutory construction, Plaintiffs are asking this Court to read into the Constitution a further requirement that simply isn't there—i.e., to "insert what has been omitted." Mont. Code Ann. § 1-2-101.

Moreover, even when the Commission receives recommendations from the Legislature and implements them, any change made by the Commission will likely create ripple effects that can result in changes to other parts of the plan. If those latter changes were not specifically included in the Legislature's recommendations, does the entire tentative plan need to be resubmitted again? Taken to its logical conclusion, under Plaintiffs' reading the Commission could not even make the changes recommended by the Legislature without resubmitting the updated plan back to the Legislature, especially if the Legislature's recommendations resulted in unforeseen "ripple effects." And on and on *ad infinitum*. The Constitution, fortunately, only contemplates *one* submission, and does not tie the "independent and autonomous" Commission's hands. *Wheat*, ¶ 20.

It is also important to understand that the Legislature's "recommendations" are not actually "recommendations" from the *entire* Legislature, just the majority of each house. Pls' Exs. 19; 20. Under Plaintiffs' construction, the Commission would be restrained from considering comments or suggestions provided by the minority party or any other group of legislators (or the public) after the tentative plan had been submitted. Not only is this

counterproductive—it seriously undercuts the Commission's independence from the Legislature. Even worse, Plaintiffs' construction would require that the Commission give more weight to the Legislature's "recommendations" than to the comments of the public. This perverse result is thankfully not required by the Constitution.

IV. EQUAL PROTECTION IS NOT IMPLICATED

While Plaintiffs make equal protection claims in their fifth and sixth causes of action, they have not included these claims in their summary judgment brief. This is an implicit acknowledgment of the weakness of these claims.

Here, there are no similarly situated classes that have been treated unequally. The "prerequisite to a meritorious claim under the equal protection clause" is demonstrating that "the state has adopted a classification that affects two or more *similarly* situated groups in an unequal manner." *Powell v. State Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877 (emphasis added). Equal protection "does not preclude different treatment of different groups or classes of people." *Id.*

Plaintiffs loosely allege that "similarly-situated voters elsewhere in Montana will not suffer similar disenfranchisement or vote dilution." Am. Compl. at ¶ 137. Presumably, Plaintiffs are referring to the fact that voters in SD-15 are unique because they will only vote for a state senator twice under the 2013 Plan. But as noted above, this is factually untrue. Many voters in other districts—including Commissioners Regnier, Bennion, and Smith—will only vote twice under the new plan, and will only have voted twice in the last cycle. Moreover, even for those other voters who will vote three times this cycle, Plaintiffs cannot show that they are actually "similarly situated." As already explained, each district is subject to multifarious unique

considerations that the Commission had to take into account and balance. There are no "similarly situated" districts in Montana.

Plaintiffs' equal protection challenge therefore never clears the initial classification hurdle. *See, e.g., State v. Egdorf*, 2003 MT 264, ¶ 15, 317 Mont. 436, 77 P.3d 517 ("If the classes at issue are not similarly situated, then the first criterion for proving an equal protection violation is not met . . . .").

Even if this first criterion was met, rational basis would apply because Plaintiffs have not shown they are a protected class or that the Jones Amendment threatens any fundamental right (as explained in Section III, *supra*, the fundamental right to vote is not implicated). *See Jaksha v. Butte-Silver Bow*, 2009 MT 263, ¶ 17, 352 Mont. 46, 214 P.3d 1248. Rational basis is easily met here. The constitution requires staggered terms for senators and a redistricting commission thus had to assign 25 holdover senators. The Commission could not strictly minimize the number of voters who will again only vote twice for a senator without compromising other required criteria such as compactness and equal population. Nor does equal protection require that 12,767 residents in SD-9 be required to wait six years between senate elections just so that Plaintiffs don't have to.

Finally, Plaintiffs' "class-of-one" claim is inapt. Am. Compl. at ¶¶ 140-48. First, a "class-of-one" theory still requires that the individual be "treated differently from others *similarly situated*," and there are none here. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008) (emphasis added). And the case cited by Plaintiffs (and the cases relied on by the Supreme Court therein when discussing the class-of-one theory) analyzes *discrimination against* an individual, not "privileges" supposedly conferred on an individual. Am. Compl. at ¶¶ 151-52. Here the Commission did at times focus on individuals such as Senator Jones, but not to treat the

individuals unequally. In fact, each holdover senator was "focused on" by necessity in order to place him or her in a district. This is required by the process and does not in any manner violate equal protection.

V. THE COMMISSION CANNOT BE PREVENTED FROM CONSIDERING ADDRESSES AND PRIOR ELECTION RESULTS, AND ANY LEGISLATION THAT ATTEMPTS TO DO SO IS UNCONSTITUTIONAL.

Plaintiffs' motion for summary judgment also does not address their claims, based on Mont. Code Ann. §§ 5-1-115(3)(a) and (d), that the Commission improperly considered incumbent legislators' addresses and previous election results. *See* Sixth and Seventh Causes of Action in Am. Compl. Those claims are clearly meritless in light of existing court rulings. Judge McCarter, in *Brown v. Montana Districting and Apportionment Commission*, has already determined that legislation attempting to limit the broad constitutional discretion of the redistricting commission, like Mont. Code Ann. §§ 5-1-115(3)(a) and (d), "impermissibly conflicts with Article V, Section 14, of the Montana Constitution, and is void on that basis." Ex. L, at 12. This is so because the "Montana Constitution does not authorize the legislature to interfere with the redistricting process beyond the express authority" to appoint four Commissioners and provide "recommendations." *Id.*; *see also Wheat*, ¶ 23 (explaining that the role of the Legislature is limited "to that of making 'recommendations'").

As explained by Commissioner Bennion, it is, practically speaking, necessary to consider the addresses of incumbents and previous election results in order to draw new districts. Pls' Ex. 34, at 127-28. To limit what the Commission may consider during the redistricting process, as the Legislature has attempted to do in Mont. Code Ann. §§ 5-1-115(3)(a) and (d), conflicts with the plain meaning of the Commission's constitutionally delegated power as determined in both *Brown* and *Wheat*, and thus has no force or effect.

VI. PLAINTIFFS HAVE FAILED TO JOIN ALL INTERESTED PARTIES.

As demonstrated above, there are no material facts in dispute and judgment should be entered for the State as a matter of law. In the event summary judgment for the State is not granted, however, this Court should not issue a declaratory judgment in Plaintiffs' favor because Plaintiffs have failed to join as parties "all persons . . . who have or claim any interest which would be affected by the declaration." Mont. Code Ann. § 27-8-301.

Interested parties not joined include Senator Llew Jones, who would be unable to run in 2014 should the Jones Amendment be voided, as well as the residents of SD-9, including the almost 13,000 residents who will only be able to vote twice for a state senator, and those groups who wrote the October letters supporting Llew Jones. Because "no declaration shall prejudice the rights of persons not parties to the proceedings," a declaratory judgment in Plaintiffs' favor may not issue at this time. *Id.*; *see also Williams v. Board of Co. Comm. of Missoula Co.*, 2013 MT 243, ¶ 33, ___ Mont. ___, ___ P.3d ___ (where interested parties to a declaratory judgment action are not joined, "the court must order that the person be made a party") (quoting Mont. R. Civ. P. 19(a)(2)).

CONCLUSION

For the above-stated reasons, Plaintiffs' motion for summary judgment should be denied and the State's cross-motion for summary judgment should be granted.

Respectfully submitted this 11th day of September, 2013.

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