IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 13-0820

ROBERT WILLEMS, PHYLLIS WILLEMS, TOM BENNETT, BILL JONES, PHILIP WILSMAN, LINDA WILSMAN, JASON CARLSON, MICK JIMMERSON, DWAYNE CROOK, MARY JO CROOK, JAMES STUNTZ, RANDY BOLING, ROD BOLING, BOB KELLER, GLORIA KELLER, ROALD TORGESON, RUTH TORGESON, ED TIMPANO, JEANNIE RICKERT, TED HOGELAND, KEITH KLUCK, PAM BUTCHER, TREVIS BUTCHER, BOBBIE LEE COX, WILLIAM COX, AND DAVID ROBERTSON,

Plaintiffs and Appellants,

v.

STATE OF MONTANA, LINDA McCULLOCH, in her capacity as Secretary of State for the State of Montana,

Defendants and Appellees.

APPELLANTS' REPLY BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, The Honorable Mike Menahan, Presiding

APPEARANCES:

MATTHEW G. MONFORTON
Monforton Law Offices, PLLC
32 Kelly Court
Bozeman, Montana 59718
Telephone: (406) 570-2949
Facsimile: (406) 551-6919

Attorney for Plaintiffs & Appellants

TIMOTHY C. FOX
Montana Attorney General
LAWRENCE VANDYKE
Montana Solicitor General
J. STUART SEGREST
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Attorneys for Defendants & Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional and Statutory Provisions:

Other Authorities:

(This Page Intentionally Left Blank)

Appellants respectfully submit the following Reply Brief.

ARGUMENT

I THE RELATION-BACK RULE APPLIES TO APPELLANTS' RIGHT-TO-KNOW CLAIM

New claims in an amended complaint relate back whenever they arise out of "the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading." M. R. Civ. P. 15(c). The State does not challenge the timeliness of the original complaint, which alleged that "[b]etween January 27 and February 12, 2013… commissioners held private discussions among themselves as to where to reassign Senator Ripley in order to open SD-9 for senate candidacy by Senator Jones in 2014." (D.C. Doc. 1, (Orig. Cmpl.), ¶78.) The original complaint further alleged that "[t]hese discussions were not open to the public and no notice of them was published." (*Id*., 79). Appellants' Right-to-Know claim under Article II, § 9, arises out of this conduct and is therefore timely.

The State argues that the relation-back rule is inapplicable because "the 'conduct' challenged by Appellants' Section 9 claim is not the same conduct *challenged by their other claims*." (State's Resp. Br at 38, emphasis added). Rule 15(c) does not require that new claims arise from the same allegations forming the basis of claims in the original pleading. Rather, plaintiffs need only show that the allegations forming the basis of their new claims appear somewhere within the four corners of the original complaint. *Citizens Awareness Network v. Mont. Bd. of*

Environmental Rev., 2010 MT 10, ¶ 22, 355 Mont. 60, 227 P.3d 583 ("Once a suit is filed, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be…."). Indeed, federal courts have rejected the exact argument made by the State in this case. See, *e.g*., *Martell v. Trilogy Ltd*. 872 F.2d 322, 326 (9th Cir.1989) (plaintiff's amended claims did not have to arise from facts "*for which recovery has been sought from [the defendant]*" in the original complaint in order to relate back under F.R.Civ.P. 15(c)) (emphasis in original).

II THIS COURT SHOULD NOT MAKE THE MONTANA CONSTITUTION'S RIGHT TO KNOW WEAKER THAN ANALOGOUS STATUTES IN OTHER STATES BY REJECTING THE CONSTRUCTIVE-QUORUM RULE

Other states apply the constructive-quorum rule when adjudicating claims brought under their sunshine statutes.[1] Doing so expands the reach of these statutes to include not only deliberations occurring when a quorum physically convenes in a meeting room but also when members of a majority deliberate in serial, one-on-one discussions among themselves regarding a matter within their jurisdiction. If this Court rejects the constructive-quorum rule, Montanans' *constitutional* right in Article II, § 9, to observe government deliberations will have less reach than analogous *statutory* rights in other states.

[1] See Appellants' Opening Brf. at 19, n. 11.

The State offers no convincing rationale for this anomaly. It complains that, if private deliberations by constructive quorums are prohibited, "then every time two legislators meet in the halls of the Capitol to discuss pending legislation they are violating Section 9." (Resp. Brf. at 39) This concern is unfounded. As suggested by its name, the constructive-quorum rule is not triggered until deliberations involve a majority of members of a governing body "because the quorum standard is a brightline standard [in] legislative recognition of a demarcation between the public's right of access and the practical necessity that government must function on an orderly, but nonetheless legitimate, basis." *Dewey v. Redevelopment Agency of Reno*, 64 P.3d 1070, 1078 (Nev. 2003), quoting *Delaware Solid Waste Authority v. News–Journal,* 480 A.2d 628, 635 (Del.1984); *Del Papa v. Bd of Regents*, 956 P.2d 770, 778 (Nev. 1998) (officials may "privately discuss public issues or even lobby for votes" but "if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting"). Thus, one-on-one deliberations between two Commissioners would not involve a quorum and therefore not be subject to Article II, § 9. Once a majority of the body joins in, however, the deliberations become those of the "body" for purposes of Article II, § 9, regardless of whether or not they occur contemporaneously and in the same location. *Stockton Newspapers v. Redevelopment Agency*, 171 Cal.App.3d 95, 102,

214 Cal.Rptr. 561, 565 (1985) ("no reason appears why the contemporaneous physical presence at a common site of the members of a legislative body" is necessary to trigger California's open meetings law).

The State also complains that had the Commission adhered to the constructive-quorum rule, its "important business would have ground to a halt." (Resp. Brf. at 2.) The rule has been applied for years to government bodies in other states because "[t]here is rarely any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors." *Stockton Newspapers,* 171 Cal.App.3d at 102, 214 Cal.Rptr. at 564. The State's hyperbole about Montana governmental bodies "grinding to a halt" if they cannot use constructive quorums is undermined by governmental bodies in other states functioning perfectly well without them. The State offers no evidence that Montana governmental bodies will somehow be less effective than their counterparts in other states that are subject to the constructive-quorum rule.

The State argues that no Right-to-Know violation occurred because the Commission did not make a final decision about Sen. Jones until the meeting on February 12. (Resp. Brf. at 41.) The Right to Know encompasses *deliberations*, however, not just *decisions*. *Associated Press v. Crofts*, 2004 MT 120, ¶31, 321 Mont. 193, 89 P.3d 971 ("our 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"); see also *Del Papa*, 956 P.2d at 778 ("a quorum of a public body using serial electronic communication to deliberate *toward a decision* *or* *make a decision*" on any matter within its jurisdiction triggers Nevada's open meetings law)(emphasis added); *Stockton Newspapers,* 171 Cal.App.3d at 102, 214 Cal.Rptr. at 564 ("the collective decision making process consists of both 'actions' and 'deliberations' which must respectively be taken and conducted openly").

Referencing the *Del Papa* opinion, the State claims that the Commissioners' "one-on-one discussions were never geared 'toward a decision' of the Commission." (Resp. Brf. at 40-41.) This statement is grossly inaccurate. Chairman Regnier testified that he "strove to generate a consensus" among the Commissioners regarding Sen. Jones and "was always urging them to try to get some type of agreement rather than making me the deciding vote on everything." (Ex 35, 41-42.) Commissioner Lamson testified that prior to the meeting on February 12, Chairman Regnier tried to "find out how we could reach some consensus" regarding Sen. Jones and "move forward." (Ex 36, 79-80). Commissioner Lamson also sought to "negotiate an agreement with [Chairman Regnier]" on February 11 to reassign Sen. Ripley to SD-10 and Sen. Hamlett to SD-15 and "tried to make my case about why I thought [that holdover configuration] was a good way to go…." (Ex 36, 97.) Commissioner Bennion testified that before the February 12 meeting Chairman Regnier tried to "develop

some kind of overall compromise that could accommodate a lot of concerns all in one global motion and include the Llew Jones thing in that." (Ex 34, p. 93). Other discussions occurred on February 11 involving Chairman Regnier and Commissioners Bennion, Lamson and Williams in which they "press[ed] for a global amendment," and "plead[ed]" their cases with each other. (Ex 34, pp. 96-99; Ex 36, pp. 95, 97.) These efforts to reach an agreement followed continuous deliberations that had been occurring since February 1. (Appellants' Opening Brf at 20-21.) Though these many communications did not result in a decision of the Commission prior to February 12, they were very much "geared 'toward a decision' of the Commission," (Resp. Brf. at 40), and were therefore deliberations that should have been observable by the public.

The State asserts Appellants must demonstrate "deliberate circumvention" by a government body in order to prevail on their Right-to-Know claim. (Resp. Brf. at 40.) This Court has held otherwise. *Bryan v. Yellowstone School Dist.*, 2002 MT 264, ¶ 53, 312 Mont. 257, 60 P.3d 381 (school district's "extraordinary measures to reach a thoughtful, albeit difficult, determination" and lack of "devious intent" did not excuse Right-to-Know violation). The State does not explain why the rule in *Bryan* is inapplicable to this matter. A contrary rule requiring plaintiffs to show that officials violated their Right to Know <u>*and*</u> did so intentionally would produce protracted and expensive litigation.

Finally, the State argues that this Court "implicitly rejected" the constructive-quorum rule in its recent decision in *Boulder Monitor v. Jefferson High Sch. Dist. No. 1,* 2014 MT 5, ___ Mont. ____, 316 P.3d 848. (Resp Brf at 41-42.) The most obvious problem with this argument is that nowhere in *Boulder Monitor* did this Court analyze or even mention the constructive-quorum rule. *San Diego Gas & Electric Co. v. Superior Court,* 920 P.2d 669, 699 (Cal.1996) ("cases are not authority, of course, for issues not raised or resolved").

Contrary to the State's argument, the Court's remand order did not "implicitly reject" the constructive-quorum rule but rather set the stage for using the rule to resolve the case. *Boulder Monitor* concerned a school board subcommittee composed of three members of the school board tasked with considering budget issues and reporting recommendations to the full seven-member board. *Boulder Monitor*, ¶ 2. During one of the subcommittee meetings, a fourth member of the school board attended and asked questions. *Id.* ¶ 5. As noted by the Court, a disputed material fact exists as to whether the fourth member participated in reaching a subcommittee consensus. *Id.* ¶ 16. On remand, if the trier of fact determines that her participation rose to the level of deliberating with the three subcommittee members, the plaintiff newspaper will have a strong argument that the subcommittee meeting was actually a four-member constructive quorum of the full school board. On the other hand, if her participation was

limited to asking innocuous questions, such as requests to subcommittee members to clarify their statements, the newspaper's case will be significantly weaker. In any event, *Boulder Monitor* in no way precludes this Court from joining the rest of the nation in adopting the constructive-quorum rule.

The State's reliance on *Boulder Monitor* is further weakened by obvious dissimilarities between that case and this one. For example, the subcommittee deliberations in *Boulder Monitor* were noticed (though perhaps inaccurately) and open to the public. *Boulder Monitor*, ¶ 14. The Commissioners' private meetings, phone calls, and emails in this case, however, were not. Moreover, the fourth commissioner in *Boulder Monitor* was not a member of the subcommittee and therefore not authorized to conduct subcommittee business. In this case, the Jones Amendment was not relegated to a subcommittee and, instead, all five Commissioners had jurisdiction over the issue and all five deliberated upon it behind closed doors. (Appellants' Opening Brf. at 20-21).

The Commissioners formed a constructive quorum and deprived Appellants of their constitutional right to observe the deliberations regarding proposals to open SD-9. That these deliberations occurred during serial, one-on-one communications rather than contemporaneously in one room did not mitigate this deprivation. The Jones Amendment must therefore be invalidated.

III THE COMMISSION IS AN AGENCY SUBJECT TO PUBLIC'S RIGHT OF PARTICIPATION

The State contends that the Commission falls within the exception to the definition of "agency" provided to "the legislature and any branch, committee, or officer thereof." (Resp. Brf. at 31-32, quoting § 2-3-102(1)(a), MCA.) The Right of Participation consists of "broad policies and protections" deserving a "broad and liberal interpretation." *Bryan* ¶¶ 21, 23. Its exceptions must therefore be construed narrowly. *Cf. Miller v. City of Tacoma*, 979 P.2d 429, 433 (1999) ("liberal construction of [Washington's Open Public Meetings Act] implies a concomitant intent that its exceptions be narrowly confined").

The State argues, *ipse dixit*, that "[r]egardless of where exactly the Commission fits within the legislature, it is clearly part of 'the legislature'," (Resp. at 32) and therefore exempt under § 2-3-102(1)(a), MCA. The State is wrong. The Commission is not part of the legislature because the "legislature consist[s] of a senate and a house of representatives," not a senate, a house, and a districting commission. Mont. Const. art. V, §1. Rather, the Commission is a "separate body" from the legislature and "an independent, autonomous entity." *Wheat v. Brown*, 2004 MT 33, ¶¶ 20, 23, 320 Mont. 15, 85 P.3d 765.

The State then shifts gears and argues that "simply because the Commission is not part of the bicameral legislature does not mean it is not part of the legislative branch more generally." (Resp. at 32.) The exception in § 2-3-102(1)(a), MCA,

applies to "the legislature," however, not "the legislative branch more generally." The State's attempt to rewrite and expand this exception violates the plain-language rule as well as the rule requiring that Right-of-Participation provisions be interpreted broadly and their exceptions narrowly. *Bryan,* ¶¶ 23; *Miller,* 979 P.2d at 433.

Perhaps aware that applying the definition of "agency" in § 2-3-102, MCA, is fatal to its argument, the State argues for a narrower definition found in BLACK'S LAW DICTIONARY. (Resp. Brf. at 28.) This Court has long held, however, that "where the legislature has clearly adopted a definition of words used in an act at variance with that found in dictionaries and decisions, this court will follow the definition as found in the legislative act." *State ex rel. State Bd. of Equalization v. Jacobson*, 107 Mont. 461, 86 P.2d 9, 11 (1938); see also *State Bar of Montana v. Krivec*, 193 Mont. 477, 632 P.2d 707, 710 (1981) (citing *Jacobson* in holding that "in construing definitions, courts will determine the meaning of the definitions as found in the legislative act"); *Jones v. Burns*, 138 Mont. 268, 288, 357 P.2d 22, 33 (1960) (courts are "bound to follow the legislative definitions contained in the act, even though they are contrary to the usual and ordinary meaning of the words"); see also 82 C.J.S. *Statutes* § 372 (2013) ("when the legislature defines a term in a

statute, that definition governs").[2]

The State nevertheless insists the term "agencies" in Article II, § 8 should be given the narrow definition it fancies and, in turn, that definition should supplant the definition in § 2-3-102, MCA. There are at least three problems with this argument.

First, acceptance of the State's narrow definition of "agency" would reduce the number and scope of government operations in which the public would have a right to participate. This would fly in the face of the Court's admonition that the Right of Participation consists of "broad policies and protections" deserving a "broad and liberal interpretation." *Bryan* ¶¶ 21, 23.

Second, the Constitution's Right of Participation is not self-executing but rather applies "as may be provided by law," thereby requiring the legislature to enact statutes effectuating it. Mont. Const. art. II, § 8. Accordingly, this Court has always looked to the legislature's definition of "agency" in § 2-3-102, MCA, in order to determine whether an entity is subject to the Right of Participation. See, *e.g.*, *Jones v. County of Missoula*, 2006 MT 2, ¶38, 330 Mont. 205, 127 P.3d 406;

[2] Of course, dictionaries are appropriate when analyzing statutorily <u>*undefined*</u> terms. *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666. For example, Appellants cited BLACK'S LAW DICTIONARY to define "branch," a statutorily undefined term contained in § 2-3-102(1)(a), MCA. (Appellants' Opening Brf at 27).

SJL of Mont. v. City of Billings, 263 Mont. 142, 147, 867 P.2d 1084, 1087 (1993). The Court has never felt compelled to replace the definition of "agency" in § 2-3-102, MCA, with one of its own. The State offers no persuasive reason why the Court should start now.

Third, the legislature's plenary power would subject the Commission to Montana's open meetings provisions even if the Constitution's Right of Participation in Article II, § 8 did not exist. *Wheat*, ¶ 27, quoting *Missouri River Power Co. v. Steele*, 32 Mont. 433, 438, 80 P. 1093, 1094 (1905). A recent Arizona case illustrates this point. As in Montana, the task of redistricting in Arizona is assigned by its state constitution to a five-member independent redistricting commission (IRC). *State ex rel. Montgomery v. Mathis*, 290 P.3d 1226, 1233-34 (Ariz.App. 2012). The court in *Mathis* held that because the Arizona legislature's power is plenary, the IRC was subject to the state's sunshine statutes and further held that "[i]t is hard to see, as a matter of law, how compliance with [Arizona's] meeting and notice requirements restricts or unduly burdens either the independence of the IRC or the performance of its mandate…." *Mathis*, at 1238.

Likewise, applying Montana's meeting and notice requirements to the Commission will not unduly burden either its independence or the performance of

its mandate.[3] Because Arizona's IRC is subject to Arizona's sunshine statutes, it would be odd if Montana's identically constituted commission was exempted from Montana's sunshine statutes, particularly since the Montana statutes were enacted pursuant to the constitutional directive in Article II, § 8.

Besides the plain language of § 2-3-102, MCA, the drafting history of the Constitution, specifically the delegates' intent to reduce the insularity of appointive bodies, supports Appellants' argument. (Appellants' Opening Brf at 25-26.) The State argues that applying the Right of Participation to all appointed officials would subject judicial clerks and the Commission on Practice to unnecessary interference from the public. (Resp. 30-31.) Avoiding such extremes, however, is precisely why convention delegates gave the legislature authority to delineate the Right of Participation's scope. When one delegate expressed concerns that the public might seek to participate in jury deliberations or drafting judicial opinions, another responded that "we would expect, of course, that the Legislature would outline for us the guideline for participation in order that we might achieve the objective sought." Montana Constitutional Convention, Vol. V at 1664. And because the legislature has properly exercised this authority, the State's parade of

[3] Accordingly, applying the Right of Participation provisions to the Commission does not create the constitutional conflicts that arose when the legislature attempted to remove the Commission's constitutional authority to assign holdover senators. *Wheat* ¶¶ 35-36.

horribles has not materialized. Judicial clerks are exempt from the Right of Participation. § 2-3-102(1)(b), MCA. The Commission on Practice, which is an "arm of [the Supreme] Court," *Goldstein v. Comm'n on Practice of the Sup. Ct.*, 2000 MT 8, ¶ 48, 297 Mont. 493, 995 P.2d 923, is exempt, too. *Id.*

The Districting and Apportionment Commission, by contrast, is exactly the kind of appointive body for which convention delegates intended the public's Right of Participation to apply. Non-elected Commissioners wield enormous power to literally shape the state's political landscape for a decade at a time. In exercising that power, Chairman Regnier noted that "public comment was important, whether it was given in live testimony or whether it was given in a filing with the Commission." (Ex 35, 61.) He also noted that redistricting "involves the accumulation of a lot of public information, as far as public input goes. It involves a lot of public comment." (Ex 35, 59-60.)

The plain language of § 2-3-102, MCA, the drafting history of the Constitution, and the policy considerations outlined in Appellants' Opening Brief at 26-27 necessitate classifying the Commission as an "agency" subject to the Constitution's Right of Participation and its enabling statutes. The State's arguments to the contrary are unavailing.

IV THE STATE FAILS TO REBUT APPELLANTS' EVIDENCE SHOWING THE COMMISSION VIOLATED § 2-3-103, MCA

Section § 2-3-103(1)(a), MCA, required the Commission to develop procedures "permitting and encouraging the public to participate in agency decisions." The Commission's notice to the public that it would post amendments online as proposed by Commissioners fulfilled this requirement. (Ex. 33.) Commissioner Bennion proposed a holdover amendment on February 1 to reassign Sen. Ripley and Sen. Hamlett to SD-10 and SD-12, respectively. (Exs. 16, 18) Commissioner Lamson proposed on February 10 to reassign the senators to SD-10 and SD-15, respectively. (Ex. 30.) Neither proposal was posted. (Ex 34, pp.33-34, 107.)

The State complains that posting holdover amendments online was an "impossible goal" and an "unworkable standard" for the Commission. (Resp. Brf at 34, 35). The record does not support these conclusory remarks. When Commissioner Bennion asked to have his holdover amendment posted online, the staff explained that "we can put the House [boundary] amendments up on the website, but we don't ***need*** to do them for the holdover assignments, because it is just moving somebody over." (Ex. 34, p.119 (emphasis added); see also Ex. 16.) The Commission's failure to post holdover amendments was a deliberate omission – it didn't post them because it didn't think it ***needed*** to, not because doing so was "impossible" or "unworkable."

The State's argument is further undermined by the Commission's posting of ten proposed House boundary amendments several days before the February 12 meeting. (Ex. 37 [Stipulated Fact #17].) These included detailed reports on the amendment's impact upon population deviation as well as maps showing the proposed boundaries.[4] The Commission was able to timely post these amendments even though they contained far more data than the holdover amendments, which involved "just moving somebody over." (Ex. 34, p.119.)

The State also argues that the Commission could not have posted the proposed amendment to reassign Sen. Ripley to SD-10 and Sen. Hamlett to SD-15 in advance because no one "officially" proposed it until the meeting on February 12. (Resp. at 35.) This argument is misleading. Commissioner Lamson first proposed this particular holdover configuration to Chairman Regnier via email several days prior to the meeting. (Ex. 30.)

While "the public meeting statutes do not require the commissioners to utilize a specific method of notification," (Resp at 37, quoting *Jones,* ¶31), they do require agencies to utilize procedures "for permitting and encouraging the public to participate in agency decision [that] ensure adequate notice and assist public participation…" § 2-3-103(1)(a), MCA. Once agencies establish and publish

[4] See http://leg.mt.gov/css/Committees/interim/2011-2012/districting/Meeting-Documents/meetings.asp

these procedures -- and public expectations are formed in reliance upon them -- agencies are not at liberty to disregard them.

Appellants are not faulting the Commission for failing to achieve an "impossible goal" or meet an "unworkable standard." Rather, the Commission needed to follow its own very reasonable procedure, which was to post online amendments as proposed by Commissioners. (Ex. 33.) The Commission followed its procedure with regard to ten proposed House boundary amendment but deliberately chose not to do so with the two holdover amendments. This violation of § 2-3-103(1)(a), MCA, requires that the holdover amendment approved by the Commission, the Jones Amendment, be voided.

V THE STATE FAILS TO REBUT APPELLANTS' EVIDENCE SHOWING THE COMMISSION VIOLATED § 2-3-111, MCA

The State's Brief fails to cite not only § 2-3-103(a), MCA, but also § 2-3-111, MCA, which requires "affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public." A "reasonable opportunity to submit data, views or arguments" requires "sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Bryan,* ¶ 43 (citations omitted). This requires "at a minimum …compliance with the right to know contained in Article II, Section 9." *Id.*, ¶ 44.

The State argues that providing legally sufficient factual detail and rationale for the proposed holdover amendments was impossible because there was "a myriad – perhaps unlimited number" of possible holdover configurations. (Resp. at 34. This argument is misleading. While there were myriad ways Commissioners *could have* addressed the Llew Jones situation, they *actually* considered only two: Commissioner Bennion's proposal and Commissioner Lamson's. (Exs. 16, 18). Posting two holdover amendments online was not a Herculean task.

Appellants' rights under § 2-3-111, MCA, were also prejudiced by the Commission imposing a deadline of February 11 for written comments regarding proposed amendments, then presenting the Jones Amendment for the first time on February 12. The State contends that the February 11 deadline was not really a deadline because the public could have driven to the Commission's meeting in Helena on February 12 and orally commented on surprise amendments. (Resp., 36-37.) This argument has three flaws.

First, the notice informing the public that "[c]omments should be submitted by February 11 at noon in order to be distributed to the commissioners at their meeting," (Ex. 33), strongly implied that no additional amendments would spring up after that date. The Commissioners' policy of presenting surprise amendments at the last meeting was never published. The public was therefore entitled to go

online at noon on February 11 and assume that any amendments not posted on the Commission's website would not be considered at the following day's meeting.

Second, even if the public had been informed that amendments could be proposed at "the very last minute" of "the very last meeting," (Ex 36, 104,) the public was still entitled to "a reasonable opportunity to submit data, views, or arguments, orally or in *written* form, in response to the amendments. The Commission's imposing a February 11 deadline for written responses to proposed amendments, then springing new amendments during the last meeting on February 12, deprived the public of its statutory right to submit written responses. This was particularly prejudicial because analyzing redistricting issues (including this one) invariably requires reference to maps and other documents. Moreover, the agency in question was not a local zoning board but rather a state agency convening in Helena during mid-winter, thereby making travel difficult (or impossible) for many. Because the February 12 meeting was not streamed live on the internet as previous meetings had been, (Ex. 33), citizens seeking to respond to surprise amendments like the Jones Amendment had to be physically present in Helena that day or lose the chance to respond at all.

Third, permitting oral comment at the February 12 meeting in response to surprise amendments did not provide a "reasonable opportunity" to prepare and submit data, views, and arguments. Moreover, the public was not privy to the

deliberations Commissioners had had during the prior two weeks. Commissioner Bennion opposed assigning Sen. Hamlett to SD-15 because the senator would be unfamiliar with that district. (Ex. 18; Ex. 34, pp. 94, 98.) Commissioner Lamson opposed assigning the senator to SD-12 because Republicans would benefit. (Ex 36, p. 92.) Both positions had merit. Appellants needed -- and were entitled -- to know them in advance in order to prepare intelligent responses and "comment meaningfully." *Bryan* ¶ 43.

Finally, like the District Court, the State contends that the Commission's posting of the Cook Letter and agenda provided adequate notice of the Jones Amendment. (Resp. at 34, 37.) This did not cure the Commission's violations of § 2-3-103(1)(a) or § 2-3-111, MCA. (See Appellants' Opening Brf. at 37-39.) The State also claims that letters sent in October 2012 to the Commission provided adequate notice. (Resp. at 34, 37.) These letters were requests to redraw district boundaries near Sen. Jones' residence and contained no reference to holdover senators. (Defs' Ex. J.) They therefore did not provide "specific notice," (Resp. at 34), or any notice, that four months later the Commission would assign a holdover senator to Appellants' district.

VI SAVING A POLITICIAN'S CAREER IS NOT A "LAUDABLE GOAL" WARRANTING THE DISENFRANCHISEMENT OF THOUSANDS OF VOTERS

The State attempts to justify the Commission's infringement of Appellants' Right of Suffrage under Article II, § 13, by explaining that "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 conflict." (Resp. at 25.) The Commission, however, was not balancing "laudable goals" when it moved Sen. Ripley to SD-10 and Sen. Hamlett to SD-15. The Commission approved the Jones Amendment as its very last action in order to advance *one* goal: the salvaging of Sen. Jones' political career, a move that will result in a net increase of disenfranchised voters by over 6,000. (Appellants' Opening Brf. at 41, n. 23.)

The State insists that all was fine because the request to save Sen. Jones came indirectly through his enthusiasts rather than directly from Sen. Jones himself and was "precisely the type of responsiveness Montanans …desire and expect from" the Commission. (Resp. at 27, n.2.) What Montanans really desire and respect, in the words of John Adams, is "a government of laws and not of men." This means that no incumbent has a claim to a seat in the Montana Senate extending beyond his or her current term or to special government protection from the vicissitudes of redistricting.

Regardless of motive, the harnessing of government power to perpetuate the career of an incumbent is as unseemly as it is unconstitutional, particularly when done behind closed doors. Sparing Sen. Jones from a two-year interruption in his senate career was not a "laudable goal" but an abuse of government power. If this Court permits the Jones Amendment to stand, endangered incumbents ten years from now will assemble other politicians and well-connected persons, such as the signatories to the Cook Letter, and lobby the next Commissioners for special privileges. If the Commission is to be truly independent -- and perceived by Montanans as truly independent -- such efforts must not be rewarded.

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that this Court enjoin the State from enforcing the reassignment of Sen. Rick Ripley from SD-9 to SD-10 and Sen. Bradley Hamlett from SD-10 to SD-15.

DATED: February 13, 2014

Respectfully submitted,

By:_____
Matthew G. Monforton
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11, I certify that the Appellants' Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word is exactly 4,939 words, excluding caption page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

Dated: February 13, 2014

By:_____
Matthew G. Monforton
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Appellants' Reply Brief to be served via U.S. Mail and email to :

Lawrence VanDyke
J. Stuart Segrest
Attorney General's Office
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401
LVanDyke@mt.gov,
SSegrest@mt.gov

Dated: February 13, 2014 By:_____
Matthew G. Monforton
Attorney for Appellants