IN THE SUPREME COURT OF THE STATE OF MONTANA

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, ROLAND TORGESON, RUTH TORGESON, ED TIMPANO, JENNIE RICKERT, TED HOGLAND, 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.

BRIEF OF APPELLEES

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

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INTRODUCTION

Appellants present three basic criticisms of the 2010 Montana Districting and Apportionment Commission in this appeal: (1) the Commission did not allow enough public participation in the challenged "Llew Jones" decision, (2) the Commission did not give enough public notice that it might make that decision, and (3) the decision itself was wrong because it fails to maximize the number of times Appellants will get to vote for a state senator over a ten or twenty year period. None of these criticisms have any merit, as the District Court correctly recognized.

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 meetings and hearings all across 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 a multitude of maps, documents, and announcements, and the Commission considered more than a thousand comments received from Montanans via public testimony, letters, and email. Indeed, it was precisely in response to public comments that the Commission considered and addressed the Llew Jones situation that Appellants are challenging here.

Of course, individual commissioners did talk one-on-one about issues before the Commission, just as individual legislators may properly discuss a pending bill. Indeed, all of the commissioners that testified below were adamant that without such conversations, the Commission's important business would have ground to a halt. But the record is clear and unrebutted that a majority of the Commission never tried to deliberate towards a collective decision of the Commission itself outside of a public meeting. All of the commissioners very carefully avoided doing that, to ensure the public could always "observe the deliberations of" the "public body" itself—that is, the Commission. Mont. Const. art. II, § 9. It is difficult to know what more the Commission practically could have done to encourage and facilitate public involvement in the redistricting process, while still completing its important task. Appellants' argument that more public participation was required, and that the commissioners should have never talked one-on-one about commission business, is simply not realistic.

Appellants' second criticism is even less realistic. First, neither Section 8 nor its enabling statute on their face apply to the Commission. But even ignoring that, Appellants are asking the Court to impose an overly strict notice requirement that makes no sense for a legislative body like the Commission. Months before the February 12 meeting where the Llew Jones amendment was adopted, the Commission received and posted online more than a half dozen letters asking the

Commission to address the Llew Jones issue. Appellants cannot deny that these letters provided clear and specific notice to the public that the Llew Jones issue was before the Commission. But Appellants insist on more—they insist that the Commission should have provided specific notice of not only the problem it might address, but exactly how it would address it. Yet Appellants have already acknowledged in the court below that addressing the Llew Jones's problem "could have been done in a 'myriad—perhaps unlimited' number of ways," and that they themselves could not have forecast beforehand how the Commission might address it. *See* Pls' Reply & Resp. Br. at 9 (Dkt. No. 19). Neither could the Commission. Perhaps Appellants' "tell-us-exactly-what-you'll-do-before-you-do-it" standard makes sense for an executive agency that is merely promulgating already-existing law through rulemaking, but it makes no sense for a legislative body like the Commission whose members must balance "a 'myriad—perhaps unlimited' number" of legitimate considerations when voting on brand new law in the first instance. Even if, therefore, the Commission was subject to Section 8 and its enabling statute (which it isn't), Appellants were clearly given notice that the Llew Jones concern was before the Commission, and that the Commission might address it. That is all the notice that can reasonably be required for a legislative body like the Commission.

Appellants' last criticism is the least realistic of all. 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 districts. 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 Appellants have pejoratively labeled "disenfranchisement," Appellants 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. Appellants' legal arguments and their proposed remedy, if entertained, will create unworkable standards, require sweeping changes to how redistricting is done in Montana,

require almost 13,000 citizens residing in Senate District 9 to be "disenfranchised" under Appellants' own theory, and force this Court—not the Commission—into the driver's seat for all future redistricting. And paradoxically, Appellants' proposed restrictions would actually undermine future Commissions' ability to take action based on public comments. This Court should reject Appellants' invitation to improperly undermine the Commission's discretion and impose new, unworkable impediments to its important work.

STATEMENT OF ISSUES

1. Whether Appellees waived their claim under Article II, Section 9 of the Montana Constitution because Montana law requires such a claim to "be commenced within 30 days of the date on which the plaintiff or petitioner learns ... of the agency's decision," Mont. Code Ann. § 2-3-213, and here Appellees inexplicably waited 139 days after filing their first complaint before first raising that claim.

2. Whether the Redistricting Commission never violated Section 9 in any event because (1) a quorum of the Commission never met outside of a public meeting, and (2) the record demonstrates that the one-on-one discussions between individual commissioners were not undertaken in order to deliberate towards a decision, secure a collective commitment by a majority of the commissioners, or otherwise circumvent Montana's open meetings requirements.

3. Whether the Redistricting Commission, as part of the Legislative branch of government and not an executive branch "agency," is covered by Article II, Section 8 of the Montana Constitution, or by its enabling statute, Mont. Code Ann. § 2-3-101 *et seq.*

4. Whether the public notice provided by the Redistricting Commission complied with Section 8 and its enabling statute in any event.

5. Whether the fact that some voters will need to wait six years before voting for a new senator, which is an inevitable by-product of Montana's constitutional scheme of redistricting with staggered elections, constitutes unlawful "disenfranchisement" under the Montana Constitution.

STATEMENT OF FACTS

I. THE 1972 CONSTITUTIONAL CONVENTION INTENTIONALLY CREATED AN INDEPENDENT COMMISSION AS PART OF 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 (1972)). 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 Commission is established under Article V of the Constitution, which governs the legislative branch. *See* Mont. Const. art. V, § 14. While the Commission would thus be part of the legislative branch, it would be independent from the bicameral Legislature itself. 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." *Wheat*, ¶ 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 bicameral Legislature was thereby limited "to that of making 'recommendations'" to the Commission. *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. Defs' 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." Defs' Ex. A. These hearings "were noticed as 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. Defs' Ex. D. Commissioner Bennion noted that "the current Commission

[1] All exhibits referenced in this brief are attached to either the Compendium of Evidence In Support of Plaintiffs' Motion for Summary Judgment (Dkt. No. 9), or Defendants' Response to Plaintiffs' Motion for Summary Judgment and Brief in Support of Defendants' Cross-Motion For Summary Judgment (Dkt. No. 16).

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. Defs' 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;

Defs' 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, 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 later, during the week of August 13, 2012, the Commission met for five days straight to discuss and ultimately adopt a tentative 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." Defs' 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 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. Defs' 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. Defs' 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 done at the November 30 meeting, Senator Jones would not be able to run in 2014.

VI. PROVIDING THE TENTATIVE 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. "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.

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 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. Defs' 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.* These letters were also posted on the Commission's website.

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.* 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 potential solutions 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, Appellants 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 Appellants. Chairman Regnier specifically testified that he still had not decided what, if anything, he wanted to do to address the concerns about Llew Jones 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 at the meeting by Commissioner Williams (who replaced Commissioner Smith) that accommodating Senator Jones, a Republican, should not come at the expense of impacting two Democratic 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).

STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo. *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶¶ 18-19, 365 Mont. 92, 278 P.3d 455.

SUMMARY OF ARGUMENT

Appellants' legal claims in this case are all seriously flawed. First, Appellants repeatedly accuse the Commission of "disenfranchising" them and thousands of other voters in Senate District 15. But if Appellants are right that waiting six years to vote constitutes unconstitutional disenfranchisement, then their own remedy in this case asks the Court to "disenfranchise" nearly 13,000 voters in Senate District 9. Any legal theory that necessarily leads to so many people being disenfranchised regardless of what the Commission or this Court does, while perhaps interesting in the abstract, is not a particularly helpful test or concept to apply in real cases. Appellants cannot point to a single case where any court has struck down a redistricting plan under their novel theory of "disenfranchisement."

Appellants also argue they were deprived of their Article II, Section 8 "right to participate" in the Commission's proceedings because they were never properly notified about the Llew Jones issue and how it would be addressed. But Section 8 on its face applies only to "agencies," and the Commission is not an agency. Unlike executive agencies, the Commission does not carry into effect policy decisions already enacted into law by some other principal; the Commission is itself a principal that enacts new law (the redistricting plan) in the first instance, and its decisions are carried into effect by various other agents, including the Secretary of State. This textual understanding of Section 8 is consistent with the constitutional provision's drafting history, and how this Court has applied Section 8 in past cases.

Even if Section 8 could arguably be interpreted as applying to the Commission, as Appellants have acknowledged it "is not self-executing but rather is applicable 'as may be provided by law,' thereby requiring enabling statutes to effectuate it." Appellants' Opening Br. at 24-25. But Section 8's enabling statute exempts "the legislature," Mont. Code Ann. § 2-3-102(1)(a), and the Commission is part of the legislature. Appellants' Section 8 claim is thus doubly flawed.

Actually, it is triply flawed. Even if Section 8 and its enabling statute both applied to the Commission, Appellants' Section 8 claim would still fail. Appellants ask the Court to impose an impossible standard on the Commission that

would require not only advance specific notice of every *issue* the Commission may try to address at its meetings (which was provided here), but also notice of exactly *how* the Commission will address that issue. As this Court has already recognized, for this type of process, it is sufficient that the public was given notice that "the issue was on the table." *Jones v. Cnty. of Missoula*, 2006 MT 2, ¶ 36, 330 Mont. 205, 127 P.3d 406. The seven letters about the Llew Jones issue publically posted on the Commission's website in advance of the February 12 meeting more than met that reasonable standard. The unfeasibility of Appellants' proposed standard in the legislative context is self-evident, which is why Appellants cannot point to a single instance of their severe standard having ever been applied to a legislative body like the Commission.

Appellants' Article II, Section 9 claim also has multiple fatal defects. First, Montana law requires that a suit under Section 9 "must be commenced within 30 days of the date on which plaintiff or petitioner learns, or reasonably should have learned, of the agency's decision." Mont. Code Ann. § 2-3-213. Appellants here missed that deadline by months. They nonetheless argue their Section 9 claim should relate back to the filing of their original complaint because their new claim "'asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.'" Appellants' Opening Br. at 16 (quoting Mont. R. Civ. P. 15(c)).

But it doesn't. The factual basis of Appellants' Section 8 claim, which focuses on the public notice provided by the Commission, is completely different than the factual focus of their new Section 9 claim, which is all about discussions between commissioners.

Even if the Court reaches Appellants' Section 9 claim, there was no violation here. There is *no* authority that, in the ordinary course, discussions between less than a quorum of the members of a government body implicate Section 9. To the contrary, this Court recently demonstrated that the presumption is just the opposite, and for good reason. *See Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, ¶ 20 ("Penalizing those members and the public bodies they serve by an unwarranted application of [Section 2-3-201 *et seq.*] 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."). Indeed, if Section 9 is implicated by one-on-one discussions like those at issue in this case, then legislators have been violating Section 9 for decades whenever they talk one-on-one in the halls of the Capitol about pending legislation. As both the Legislature and the courts have recognized, Section 9 is ordinarily violated only when at least a "quorum of the constituent membership" meets "to hear, discuss, or act upon" issues within their jurisdiction. Mont. Code Ann. § 2-3-202. There is no dispute that did not happen here.

Of course, as Appellants point out, courts have understandably rebuked attempts by government bodies to *deliberately* circumvent open-meetings requirements by using a "walking quorum" to "'deliberate toward a decision or to make a decision.'" Appellants' Opening Br. at 19 & n.11 (citations omitted). But courts do not simply assume that discussions with less than a quorum are seeking to circumvent open-meetings requirements—plaintiffs must provide compelling evidence of such intent. Here there is none. There is no evidence that any of the commissioners purposely tried to circumvent Section 9 and "deliberate toward a decision" or "make a decision" on behalf of the entire Commission. Nor is there any evidence that a majority of the commissioners ever *actually* reached a consensus—much less made a decision on behalf of the Commission—outside of a public meeting. Here, all of the uncontested evidence unmistakably shows that each commissioner worked very hard to avoid making any decision on behalf of the Commission, except during a public meeting. Decision and Order at 13 (Dkt. 26).

ARGUMENT

I. THE RIGHT OF SUFFRAGE IS NOT INFRINGED WHEN SOME CITIZENS WAIT SIX YEARS BETWEEN VOTING AS AN INEVITABLE RESULT OF REDISTRICTING.

The central concept in assessing the right of suffrage 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 criterion adopted by the Commission was 3 percent from the ideal, which is the lowest ever set in Montana history. *See, e.g., id.* (deviation criterion set at 5 percent). And the Commission successfully met this strict standard: 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. Defs' Ex. K; *compare to McBride*, 573 F. Supp. at 915 (overall state deviation of 10.94 percent).

Appellants nevertheless allege that the Commission violated their right of suffrage. Not having population equality on their side, Appellants claim that minimizing the number of holdover senators placed in districts where "the last

senate election occurred in 2010" is constitutionally required. Appellants' Opening Br. at 40. But Appellants cannot point to any cases holding this novel proposition, because there are none.

The first problem with Appellants' novel theory is their misguided attempt to equate the 2013 districts with the 2003 districts. Obviously, *re*districting changes districts. Appellants are therefore comparing apples to oranges. 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.

Moreover, what Appellants label as "temporar[y] disenfranchise[ment]," *id.*, 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 make it a priority 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 Appellants 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.

Appellants' disenfranchisement argument also proves too much. If Appellants 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 Appellants admit, reversing the "Jones Amendment" 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. Appellants' Opening Br. at 41 n.23. 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." *Id.* And, of course, there are all the other affected areas, such as the districts where of Commissioners Regnier, Bennion, and Smith reside. If Appellants' novel theory is right, the whole redistricting system of assigning holdover senators must be thrown out.

Ultimately, Appellants' "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. Appellants' request to have this

Court second-guess the balance ultimately struck by the Commission should be rejected.[2]

II. ARTICLE II, SECTION 8 DOES NOT APPLY TO THE COMMISSION, AND SUFFICIENT PUBLIC NOTICE WAS PROVIDED IN ANY EVENT.

A. Section 8 Does Not Apply to the Commission.

As already explained, maximizing the public's participation in the redistricting process was extremely important to the Commission. But while the Commission went 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 Section 8 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). This Court has

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[2] Appellants also claim that the Jones Amendment was approved "in order to advance one goal: the salvaging of Sen. Jones' political career." Appellants Opening Br. at 42. That is baseless. There is no evidence that any of the commissioners ever even talked to Llew Jones about his reelection. All of the evidence in the record demonstrates that the Commission addressed the "Llew Jones issue" for one very different reason—in response to the substantial public comments it received about the issue. This is precisely the type of public responsiveness that Montanans—including the Appellants in this case—desire and expect from their Redistricting Commission.

repeatedly recognized that Section 8, unlike Section 9, does not apply to "public bodies" generally, but only to "governmental agencies." *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 25, 312 Mont. 257, 60 P.3d 381; *see also Allen v. Lakeside Neighborhood Planning Comm.*, 2013 MT 237, ¶ 31, 371 Mont. 310, 308 P.3d 956 ("The [Planning Committee] is not an agency ....").

Though a public body, the Commission is no more a government agency than the bicameral legislature. Black's Law Dictionary defines a government "agency" as "[a] governmental body with the authority to *implement* and *administer* particular legislation" and "state agency" as "[a]n executive or regulatory body of a state." Black's Law Dictionary 67-68 (8th ed. 2004) (emphases added). The Commission neither "implements"[3] nor "administers" existing legislation—it legislates directly by passing a "final plan for legislative districts" and filing that plan with the Secretary of State. Mont. Const. art. V, § 14(4). And the Commission is not part of the executive branch or a regulatory body. Instead it is designated by the Constitution as part of the "The Legislature" by its placement within Article V, not Article VI ("The Executive"). As the District Court recognized, in practice the Commission "operates much like an

[3] Meaning "to put into effect." Webster's New College Dictionary at 569 (3rd ed. 2005).

interim legislative committee," with staff and resources provided by the Legislative Services Division. Decision and Order at 10 (Dkt. 26).[4]

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:

> 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).

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[4] Appellants in the court below preferred the definition of "governmental agency" from an older edition of Black's Law Dictionary. *See* Pls' Sur-Reply at 4 (Dkt. No. 29). That edition defines "governmental agency" as "a subordinate creature of the federal, state, or local government intended to carry out a governmental function or to implement a statute or statutes." Black's Law Dictionary 696 (6th ed. 1991). But that definition is just as fatal to Appellants' attempt to paint the Commission as an "agency." The Commission is clearly not "subordinate" to either the legislature or the executive. *See Wheat*, ¶ 20. Nor does the Commission "implement a statute or statutes"; it is an "independent and autonomous" part of the Legislature whose final redistricting plan "become(s) law" in the first instance. *Id.*; Mont. Const. art. V, § 14(4).

Appellants also argued below that the statutory definition of "agency" should be controlling for purposes of Section 8. *See* Pls' Reply & Resp. Br. at 5-7 (Dkt. No. 19); Pls' Sur-Reply at 4 (Dkt. No. 29). Even ignoring that the statutory definition of "agency" expressly exempts "the legislature," and therefore doesn't help Appellants (*see* Section II(B), *infra*), the Legislature cannot retroactively define constitutional terms through subsequent legislation. Section 2-3-102(1)'s definition of "agency" does not control Section 8.

Appellants nonetheless argue that Section 8 must be applied to the Commission, for several reasons. First, Appellants rely on language from the constitutional convention where delegates expressed concern about the responsiveness of appointed agencies. *See* Appellants' Opening Br. at 25-26 (quoting 5 Mont. Const. Conv. Tr., at 1655, 1657, 1667). But these citations cannot overcome the plain fact that Section 8 was only intended to apply to "agencies," not every appointed public body. Indeed, Appellants' own quotations from the convention actually reinforce that the delegates were concerned about and intended Section 8 to apply to appointed *executive* agencies: "the *bureaus*, the long arm of the government with which the average citizen most often comes in contact," and which "function *to carry out* the laws that are passed." *Id.* (emphases added). The Commission legislates; it does not "carry out the laws that are passed." *Id.*

Appellants' appointed versus elected theory has an additional problem: it would pull all staff or committees "appointed" by the legislature or the courts within Section 8's ambit. Under Appellants' theory, therefore, while an elected judge would not be required by Section 8 to allow participation by the public in drafting an opinion, her clerks and court staff would. Before the law clerk submitted a draft opinion to the judge, it would have to be noticed and circulated for public comment. Likewise, legislative committees and Legislative Services

would both be covered by Section 8 under Appellants' theory, and would have to provide notice to the public and the ability to comment before providing an opinion or making a decision. Of course, this is not the practice in Montana, and for good reason. *Cf. Goldstein v. Comm'n on Practice of the Sup. Ct.*; 2000 MT 8, ¶¶ 102-04, 297 Mont. 493, 995 P.2d 923 (Nelson, J., dissenting) (Section 8 does not apply to the Commission on Practice of the Supreme Court, the members of which are appointed by the Supreme Court).

Ultimately, Appellants' Section 8 arguments come down to the odd suggestion that the Commission is an agency disconnected from any other governmental principal, a construction that flies in the face of the plain meaning of "agency." The Commission is not an agency, and is therefore not covered by Article II, Section 8 of the Montana Constitution.

B. Section 8's Enabling Statute Does Not Apply to the Commission.

Section 8 is not self-executing, *see* Appellants' Opening Br. at 24-25, so even if it *could* reach the legislature (including the Commission), it would not without implementing legislation. There is none. The only statute that implements Section 8 expressly exempts "the legislature." Mont. Code Ann. § 2-3-102(1)(a).

But before discussing that further, it is critically important to reemphasize its corollary. Because Section 8 does not apply to the Commission, the Legislature is not empowered to reach the Commission through implementing legislation, and

Mont. Code Ann. § 2-3-101, *et seq.*, should not be read to do so. The statutes that implement Section 8 obviously cannot extend beyond the reach of Section 8 itself.

Any argument to apply Section 2-3-101 and related statues to the Commission is thus immediately suspect. Plaintiffs nevertheless assert that the Commission meets the definition of "agency" under Mont. Code Ann. § 2-3-102, and therefore must be covered. Appellants' Opening Br. at 25. But the plain text of Section 2-3-102(1)(a) exempts "the legislature and any branch, committee, or officer thereof."

Appellants focus on the latter part of this exemption, arguing that the Commission is not a "branch" or "committee" of the legislature. *See* Appellants' Opening Br. at 27-28. But Section 2-3-102(1)(a) does not merely exempt a "branch, committee, or officer" of the legislature—it exempts "the legislature." Regardless of where exactly the Commission fits within the legislature, it is clearly part of "the legislature." Indeed, Appellants have never tried to show that the Commission is part of any other branch of government. Instead, Appellants seek to rely on this Court's recognition that the Commission is a "'separate body'" and "'an independent, autonomous entity'" from the bicameral Legislature. Appellants' Opening Br. at 27 (quoting *Wheat*, ¶ 20, 23). But simply because the Commission is not part of the bicameral legislature does not mean it is not part of the legislative branch more generally. It legislates, and is created under Article V,

not Articles VI or VII, of the Constitution. Appellants are essentially asking the Court to rewrite Section 2-3-102 so that it exempts only "the legislat*ors*," not "the legislature." This rewriting is just as unwarranted as reinterpreting "the judicial branches" under Section 2-3-102(1)(b) to mean only "the judges," thus ensuring that every judge's staff—including clerks—would be subject to Section 2-3-101 *et seq*. Appellants' revision is not consistent with the text of Section 2-3-102, nor have they provided any evidence that the Legislature meant something other than what it clearly said.

Ultimately, Appellants are trying to have it both ways. Appellants want this Court to conclude that the Commission is not part of "the legislature" (or the executive or judiciary either, apparently) for purposes of Section 8's enabling statute, yet it is somehow an "agency"—that is, a subordinate agent of one of these bodies implementing already-enacted law—for purposes of Section 8. They can't both be right, and in fact neither is.

C. Even if the Participation Statutes Applied to the Commission, It Provided Sufficient Notice in Any Event.

Of course, the Commission worked very hard to encourage public participation in the entire redistricting process, and thus did provide sufficient notice to comply with Section 8 and the participation statutes in any event. The public notice for the February 12 meeting stated that that Commission would "[d]iscuss and revise [the] Tentative Commission Plan," which necessarily

includes discussion of holdover senators. Pls' Ex. 15; Ex. 35, at 27. Moreover, the letters from the bipartisan legislators (the "Cook letter"), and the concerned citizens and groups from Llew Jones's district (sent in October of 2012), were posted on the Commission's website before the meeting, providing specific notice that changing the tentative plan to accommodate Llew Jones was very much on the table. Pls' Ex. 37, at 2; Defs' Ex. J.

But Appellants argue that was not specific enough. Instead they insist the Commission was obligated to "provide the public with 'sufficient factual detail and rationale' for the proposed amendment to reassign Sen. Ripley to SD-10 and Sen. Hamlett to SD-15" before the amendment was ever even made at the February 12 meeting. Appellants' Opening Br. at 34 (citation omitted). In other words, the Commission needed to notify the public not only that the Llew Jones issue was before the Commission (which it did), but also exactly how it would address it.

While this strict standard may be workable in the case of administrative rule drafting, where agencies usually already know what rule they intend to promulgate, it is an impossible goal in the complicated legislative process undertaken by the Commission. Appellants have admitted, for example, that addressing Jones's situation "could have been done in a 'myriad—perhaps unlimited' number of ways," and that they could not have forecast beforehand what the Commission

might decide at its meeting. Pls' Reply & Resp. Br. at 9 (Dkt. No. 19). And we know that the Commission did not make decisions prior to public meetings. Pls' Ex. 35, at 60, 63. In fact, Chairman Regnier had not made up his mind as to what he would do the night before the February 12 meeting, and if he had not brought the motion late in the meeting it would not have been made at all, as neither Commissioner Bennion nor Lamson were inclined to do so. *Id.* at 48; Pls' Ex. 23, at 7. This further undermines Appellants' contention that the Commission could have posted the specifics of the Jones amendment online prior to February 12. No one officially proposed the amendment *until* the meeting.

Appellants' unworkable standard is all the more so in light of their argument that individual commissioners cannot speak to each other, even one-on-one, outside of formal meetings. Appellants' Opening Br. at 19. And yet they are somehow required, under Appellants' theory, to not only decide in advance the general subject matter they will discuss at the meeting, but every possible scenario that will be proposed and voted upon. This Catch-22 cannot be what is constitutionally required, and thankfully so. Otherwise, the Commission would be hamstrung in responding to public input, and it would it be no more capable of passing a redistricting plan than the bicameral Legislature was prior to 1972. *Wheat*, ¶¶ 19-20.

Appellants also claim that the Commission set a "deadline" of noon on February 11 for public comments and "assured the public that proposed amendments would be posted on its website in time to allow written public comments before the hearing on February 12." Appellants Opening Br. at 32-33, 35, 38-39. Both are false, and based entirely on a mischaracterization of the Commission's February 1 public notice. *See* Pls' Ex. 33 (cited in Appellants' Opening Br. at 32, 35).

Nowhere does the February 1 notice state that all amendments would be proposed and posted before the February 12 meeting. It simply says that "*As* possible amendments are proposed," they will be posted. Pls' Ex. 33 (emphasis added). As Chairman Regnier testified, this language communicated that "as amendments to those plans were proposed, they were—some of them were put on the website; but I always felt it was within the jurisdiction of the Commission to amend at any particular time, because of what occurred at meetings." Pls' Ex. 35, at 31.

Nor does the public notice set a "deadline" of noon on February 11 for all public comments or state that public comments would not be accepted after that point; it merely encourages comments to be provided by then "in order to be distributed to the commissioners at their meeting." Pls' Ex. 33. Appellants' claim that the Commission had set a "deadline" of February 11 for public comments is

directly belied by the fact that the agenda for the February 12 meeting, which was posted before the meeting, expressly called for public comment *during* the February 12 meeting itself "on any topic within the jurisdiction of the commission." Pls' Ex. 22.

In short, Appellants are not merely asking this Court to apply Section 8 to the Commission; they are asking the Court to apply it in a severe and draconian manner that has never before been imposed on a legislative body like the Commission. Even if Section 8 did apply, "the public meeting statutes do not require the commissioners to utilize a specific method of notification." *Jones*, ¶ 31. Here, the many public letters posted well in advance of the February 12 meeting gave ample notice to "interested [individuals] that the issue was on the table." *Id.*, ¶ 36. That was enough.

III. APPELLANTS' ARTICLE II, SECTION 9 CLAIM IS TIME-BARRED, AND SECTION 9 DOES NOT PROHIBIT ONE-ON-ONE CONVERSATIONS IN ANY EVENT.

A. Appellants' Section 9 Claim is Time-Barred.

In order to protect the "Right to Know" provided by Article II, Section 9 of the Montana Constitution, Montana's 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, Appellants missed this deadline, and therefore waived their Section 9 claim. Appellants 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—139 days later. Consequently, the remedy provided by Mont. Code Ann. § 2-3-213 is not available to Appellants.

Appellants seek to excuse their long delay by relying on the relation-back rule. *See* Appellants' Opening Br. at 16 (citing Mont. R. Civ. P. 15(c)). But Rule 15 only allows relation-back when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out ... in the original pleading." *Id.* The "conduct" challenged by Appellants' Section 9 claim is not the same conduct challenged by their other claims. Appellants' Section 9 claim challenges various one-on-one discussions by the commissioners, which none of their other claims challenge. Therefore, the court below properly denied relation-back of Appellants' Section 9 claim.

Appellants also argue that because the relation-back rule is rooted in equity, this Court should be "'generous toward allowing amendments'" in this case.

Appellants' Opening Br. at 16-17 (quoting *Citizens Awareness Network v. Mont. Bd. of Envtl. Rev.*, 2010 MT 10, ¶ 22, 355 Mont. 60, 227 P.3d 583). But here, equity requires adherence to the 30-day deadline to protect the policy behind the limitation—providing the public body a timely opportunity to address the concerns regarding the challenged decision. *Cf. Zunski v. Frenchtown Rural Fire Dep't Bd. of Trs.*, 2013 MT 258, ¶ 16, 371 Mont. 552, 309 P.3d 21 ("[t]he governing body can remedy the illegality of the meeting without judicial involvement by making a new decision that is not based on anything from the illegal meeting"). Otherwise a plaintiff could wait an indefinite amount of time to finally add a Section 9 claim, long past when the actual decision was made and past when the body could take remedial action. Such a result severely undercuts the purpose of the rule.

B. Section 9 Does Not Prohibit One-on-One Conversations Between Commissioners.

The Commission never violated Section 9 in any case. Appellants' Section 9 claim is predicated entirely on the argument that the commissioners should not have engaged in one-on-one discussions about the Llew Jones issue outside of a public meeting. But such conversations of less than a quorum in this legislative context simply cannot be a violation of the open meetings law. If Appellants are correct, then every time two legislators meet in the halls of the Capitol to discuss pending legislation they are violating Section 9. The better interpretation is that already codified in the law and recognized by this Court: a "meeting" only occurs

when a quorum of the body meets. Mont. Code Ann. § 2-3-202; *Boulder Monitor*, ¶ 19.

The plain language of Section 9 requires that result. The provision only requires that the public be allowed "to observe the *deliberations* of all public *bodies* ...." Thus Appellants' claim doubly fails. Though individual commissioners had discussions outside of meetings, they did not "deliberate" as the Commission until the public meeting was held. *See, e.g.*, Pls' Ex. 35, at 63 (Chairman Regnier making clear that "the Commission's ... ultimate decision is something that occur[ed] during the open public meeting"). Second, two commissioners talking to one another does not constitute a "public body." The Commission, or at least a quorum thereof, is the public body. Two commissioners alone simply do not fall within the reach of Section 9 or its enabling statute. *See Boulder Monitor*, ¶ 19.

As Appellants note, some courts have found violations of open meeting laws when it was clear that a public body was deliberately trying to circumvent the open meetings requirement by, for example, "using serial electronic communication to deliberate toward a decision." Appellants' Opening Br. at 19 n.11 (quoting *Del Papa v. Bd. of Regents*, 956 P.2d 770, 778 (Nev. 1998)).

This type of deliberate circumvention is not even close to what happened here. *All* the evidence is to the contrary. The commissioners' one-on-one

discussions were never geared "toward a decision" of the Commission. *See, e.g.*, Pls' Ex. 35, at 48 (Chairman Regnier noting there was no "consensus among the Commission" before the February 12 meeting as to whether to move Senator Ripley out of SD-9). Instead, the commissioners needed to have some background discussion to facilitate useful debate at meetings so that decisions could be reached there. *Id.* 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. For example, regarding the Llew Jones issue, it was only at the February 12 meeting, after hearing a "compelling" argument advanced by Commissioner Williams *at that meeting*, that Chairman Regnier made up his mind to vote in favor of shifting Senators Ripley and Hamlett one district to the east to free up SD-9. *Id.* at 64-65.

Appellants assume that simply because the number of commissioners that talked one-on-one about an issue adds up to a quorum, they necessarily violated Section 9. But that argument has already been implicitly rejected by this Court in *Boulder Monitor*. In that case, four school board members—a quorum—all discussed issues outside of a public meeting of the board itself. *See Boulder Monitor*, ¶¶ 5-6 (noting that the fourth board member "asked some questions during the discussion" and provided "some suggested revisions" to another board member's notes). If a Section 9 violation turns merely on whether a quorum of the

members talked together about an issue, then *Boulder Monitor* would have come out very differently. But even though a quorum of the board in *Boulder Monitor* had "discussions," the district court there had improperly granted summary judgment against the board because it was not clear that a quorum of the board was actually attempting to *make a decision* on behalf of the board itself. Here, the record is clear that a quorum of the Commission never attempted to make a decision on behalf of the Commission outside of a public meeting. Instead individual commissioners properly discussed issues to facilitate their later decision-making at the public meeting, just as individual legislators often do. Both Section 9 and the open meetings law were complied with, and the District Court's ruling should be upheld.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted this 7th day of February, 2014.

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,818 words, excluding the caption page, table of contents, table of authorities, certificate of service, and certificate of compliance.

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