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LEWIS AND CLARK COUNTY

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## INTRODUCTION

Plaintiffs' response brief cannot save their constitutional challenge in this case, because it simply is not salvageable. Their Section 8 "right of participation" challenge,

for example, suffers from multiple defects, any one of which would alone be fatal. First, the text of the constitutional provision itself, as well as the comments of the delegates at the 1972 constitutional convention, make clear that Section 8 was intended to apply to executive "agencies," not the legislature or judicial branch. Recognizing that, the legislature promulgated an enabling statute that, by its own "plain language," Pls' Resp. Br. at 2, clearly exempts "the legislature." *See* Mont. Code Ann. § 2-3-102(1)(a). Plaintiffs would like the Court to read Section 2-3-102 as exempting only elected legislat*ors*, but that is not what the statute says. So even if Section 8 did reach the legislature, its enabling statute does not. Plaintiffs' Section 8 claim is doubly flawed.

Actually, it is triply flawed. Even if Section 8 applied, Plaintiffs' Section 8 claim would still be meritless. Plaintiffs 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, Defs' Opening Br. at 14-15), but also "specific notice" of exactly *how* the Commission might address that issue. Pls' Resp. Br. at 8-9. Yet Plaintiffs themselves concede that even they "could not have predicted ... how the Commission would reshuffle holdover senators—something that could have been done in a 'myriad—perhaps unlimited' number of ways." *Id.* at 9. To add insult to injury, Plaintiffs insist on such prescience while simultaneously contending that no commissioner can talk to a single other commissioner about such issues unless they're in a public meeting. The unfeasibility of such a standard is self-evident, which is why Plaintiffs cannot point to a single instance of their severe standard having ever been applied to a legislative body like the Commission.

Plaintiffs' Section 9 arguments are just as unmoored from both the law and good policy. 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. 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 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; *see also* Defs' Opening Br. at 17 (citing authorities). There is no dispute that never happened here.

Of course, courts have understandably rebuked attempts by government bodies to purposely circumvent open-meetings requirements by using a "walking quorum" to "deliberate *toward a decision* or to *make a decision*." Pls' Resp. Br. at 16 (emphases added). But courts do not simply assume that discussions with less than a quorum are seeking to circumvent open-meeting requirements. Plaintiffs must provide evidence that such discussions were for the purpose of "mak[ing] a decision" on behalf of the Commission. Here, Plaintiffs cannot provide any such evidence. *All* of the uncontested evidence unmistakably shows that each Commissioner worked very hard to deliberately avoid making any decision on behalf of the Commission itself outside of a public meeting. *See* Defs' Opening Br. at 19-20 (citing the record).

Finally, Plaintiffs' argument that the Commission was somehow bound by the Legislature's "recommendations," Pls' Resp. Br. at 18-19, is wholly invented. Notably,

Plaintiffs do not cite a *single* authority in support of their argument, *see id*, because there is none. The very term "recommendations" belies Plaintiffs' claim. And it is impossible to reconcile Plaintiffs' conception of the Commission with the Montana Supreme Court's recognition that the Commission is "independent and autonomous" with the ability to "bypass the Legislature." *Wheat v. Brown*, 2004 MT 33, ¶ 20, 320 Mont. 15, 85 P.3d 765 (quoting 4 Mont. Const. Conv. Tr. at 682).

Ultimately, Plaintiffs' proposed constitutional and statutory standards read like what they are: forced interpretations specially engineered to attain a specific result in this case, and this case only. Responding to Defendants' concerns about the far-reaching and troubling consequences that Plaintiffs' unusual rules would create if uniformly applied, Plaintiffs have one response: don't worry about it; that "is not an issue arising in *this* case." Pls' Resp. Br. at 18 (emphasis in original); *see also id.* at 19 (dismissing Defendants' concerns about the unworkability of Plaintiffs' misinterpretation of the role of the legislature as "not relevant to this case"). But of course, predictability, fairness, and the rule of law require that courts fashion constitutional rules of *general* applicability. This Court should decline Plaintiffs' invitation to depart from that norm here.

## ARGUMENT

### I. THE COMMISSION, AS A LEGISLATIVE BODY, IS NOT SUBJECT TO SECTION 8, WHICH ONLY APPLIES TO EXECUTIVE AGENCIES.

#### A. By Its "Plain Language," Section 8 Does Not Apply to the Commission.

Plaintiffs beat the "plain language" drum in their response brief, Pls. Resp. Br. at 2, 3, 4, but then blatantly ignore the plain language and meaning of Section 8, which

applies only to "governmental agencies." Mont. Const. art. I, § 8. In contrast, Section 9 is broader, applying to "all public bodies *or* agencies." Mont. Const. art. I, § 9 (emphasis added); *see also Bryan v. Yellowstone Co. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 25, 312 Mont. 257, 60 P.3d 381 (Section 9 "is broader in application than" Section 8); *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 governmental agency than is the bicameral Legislature. Black's Law Dictionary defines "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." *Id.* at 67-68. (8th ed. 2004) (emphases added). The Commission neither "implements"[1] 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 in no way 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"). Section 8, by its plain language, does not apply to the Commission.

This understanding of Section 8 is consistent with the proceedings of the Constitutional Convention, where the delegates made clear that Section 8 was not intended to apply to the legislature or the courts. Defs' Opening Br. at 13 (the language

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

of Section 8 is intended to only apply to "governmental agencies," not "the Legislature or the Supreme Court") (citing 5 Mont. Const. Conv. Tr., at 1666).

Finding no authority that Section 8 applies to the Legislature, Plaintiffs argue instead that the Commission is not a "branch" of the Legislature because it is a "separate body" from the Legislature. Pls' Resp. at 5-6. But Plaintiffs' argument proves too much. As a "separate body" from the bicameral legislature—indeed an "independent, autonomous entity," *Wheat*, ¶ 23—the Commission cannot be an agency at all. Instead it is a unicameral "branch" or "body" of the Legislature created by the Constitution to make one specific law: an updated redistricting plan. It cannot be construed as an agency of the Legislature, because it does not make rules to carry out the Legislature's laws or directives. Nor is it an agency that carries out the directives of any other branch of the government.

Plaintiffs' claim thus comes down to the odd suggestion that the Commission is an agency completely disconnected from any principal, a construction that flies in the face of the plain meaning of "agency." Black's Law Dictionary 67-68 (8th ed. 2004). As explained in *Wheat*, ¶¶ 19-23, the 1972 Constitution reassigned the legislative redistricting function, which had previously been performed by the Legislature, to a new separate body to pass this specific piece of legislation, placing this new body within Article V, the part of the Constitution dedicated to "The Legislature."

Despite the clarity provided by the language and structure of the Constitution, Plaintiffs insist that Section 8 nevertheless must be read to apply to the Commission because the Commission is appointed, not elected. Pls.' Resp. at 4-5. But the

Convention quotes cited by Plaintiffs concern only executive agencies: "the bureaus, the long arm of government with which the average citizen most often comes in contact" and which "function *to carry out* the laws that are passed." *Id.* at 4 (quoting 5 Mont. Const. Conv. Tr., at 1655, 1657, 1667) (emphasis added). The Commission does not "carry out" laws already passed; it enacts its own new law in the form of a new redistricting plan.

Plaintiffs' 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 Plaintiffs' theory, therefore, while a 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 Plaintiffs' 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). Instead Section 8 by its plain terms only applies to executive agencies, not to any part of the Legislative branch, including the Commission.

## B. By Its "Plain Language," the Statutory Provisions Implementing Section 8 Do Not Apply to the Commission.

Section 8 is not self-executing, *see* Pls' Resp. Br. at 2, 14, so even if it *could* reach the Legislature (including the Commission), it would not without implementing legislation. There is no such statute. The only statute that implements Section 8 expressly exempts "the legislature." Mont. Code Ann. § 2-3-102(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. If the Legislature had tried to constrain the Commission by passing Section 2-3-101 *et seq.* (which, as explained below, it did not), not only would it be exceeding the scope of Section 8 of the Constitution, it would also be exceeding its own proper constitutional role of only "making 'recommendations'" to the Commission. *Wheat*, ¶ 23. The Legislature may not limit the broad constitutional discretion of the Commission via legislation—including legislation that purports to implement Section 8. *See Brown v. Montana Districting and Apportionment Comm'n*, Ex. L to Defs' Opening Br., at 12 (such limiting legislation "impermissibly conflicts with Article V, Section 14, of the Montana Constitution, and is void on that basis.").

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.

Pls' Resp. Br. at 2-3. But their myopic focus on Section 2-3-102(1) ignores the plain text of Section 2-3-102(1)(a) and (b). The definition cannot be read to apply to *every* "board, bureau, commission, department, authority, or officer of the state or local government." Mont. Code Ann. § 2-3-102(1). Otherwise, for example, each legislative and judicial "officer" would be covered, and they are specifically excluded. Mont. Code Ann. § 2-3-102(1). And the Supreme Court's "Commission" on Practice would be covered; something no one argues.

The reason these entities are not covered is very simple—they are not part of the executive branch. Section 2-3-102 specifically exempts "the legislature and any branch, committee, or officer thereof," as well as "the judicial branches and any committee or officer thereof." *Id.* at 2-3-102(1)(a)-(b). Plaintiffs 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" to mean only "the judges," thus ensuring that every judge's staff—including clerks—would be subject to Section 2-3-101 *et seq.* Plaintiffs' 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.

Plaintiffs' reading of Section 2-3-102 is strained for yet another reason. The Commission does not "make rules" and thus does not meet the second part of the "agency" definition. To try to shoehorn in the Commission, Plaintiffs literally rewrite the statute; in their response brief, Plaintiffs shorten the definition of "rule" with ellipses, Pls' Resp. Br. at 3, but behind those ellipses lays a full definition that in context only applies

to executive agencies. A "rule" is defined by Mont. Code Ann. § 2-3-102(3) as: "any agency regulation, standard, or statement of general applicability that *implements, interprets, or prescribes* law or policy or describes the organization, procedures, or practice requirements of any agency," (emphasis added). Plaintiffs focus solely on "prescribes," which means to "dictate, ordain, or direct; to establish authoritatively (as a rule or guideline)." Black's Law Dictionary 1220 (8th ed. 2004). An administrative rule, of course, may well dictate, ordain or direct actions or procedure. That is why law school classes and texts focusing on administrative rules and procedure are titled "administrative *law*." In context, then, "prescribes," like "implement" and "interpret," should be read as establishing "rules or guidelines" to effectuate *already existing* legislation, not making law in the first instance as the Commission does when it passes a redistricting plan.

### C. Even if the Participation Statutes Did Apply, the Commission Provided Sufficient Notice to the Public.

Of course, as explained in the State's opening brief, 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. 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. Ex. 15 to Pls' Opening Br. And what's more, 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. Exs. 37 to Pls' Opening Br., at 2; Ex. J to Defs' Opening Br.

But Plaintiffs argue that was not specific enough. Instead they propose that the Commission be required to give notice of the "particular" details of the *exact* issue the Commission will consider at its meeting, and exactly how the issue will be addressed. Pls' Resp. Br., at 7. Here that would have meant, according to Plaintiffs, specifically laying out that the Commission would consider "reassigning Sen.Ripley to SD-10 and Sen. Hamlett to SD-15." *Id.*

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. Plaintiffs admit, 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' Opening Br., at 9. And we know that the Commission did not make decisions prior to public meetings. Ex. 35 to Pls' Opening Br., 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; Ex. 23 to Pls' Opening Br., at 7. This further undermines Plaintiffs' contention that the Commission could have posted the specifics of the Jones amendment online prior to February 12. Pls' Resp. Br., at 8. No one officially proposed the amendment *until* the meeting.

Plaintiffs' 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. Pls' Br. at 15-16. And yet they are somehow required, under Plaintiffs' 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 no more capable of passing a redistricting plan than the Legislature was prior to 1972. *Wheat*, ¶¶ 19-20.

Rather than address the generally impractical nature of their suggestions, Plaintiffs have engaged their own form of Monday morning quarterbacking by asserting that the impossibility of foretelling every possible outcome should not concern the Court, because only a few outcomes are at issue here. Pls' Resp. Br. at 11. The "sole ripple effect[s]" potentially implicated here, according to Plaintiffs, are only the two reassignment solutions proposed by Commissioners Bennion and Lamson. *Id.* But Plaintiffs can only make this argument by looking backwards. Since hindsight is always 20/20, plaintiffs can always say in retrospect that the specific outcome adopted by the Commission should have been posted beforehand. But, of course, that decision had not been made in advance, and there were, as Plaintiffs readily acknowledge, a "myriad—perhaps unlimited number of ways" to address the Jones situation (and every other issue decided by the Commission).

Section 8 is not applicable to legislative bodies such as the Commission, and for good reason—stringent notice requirements demanding advance notice of not only the

issue to be considered, but also the decision that will be made, are simply unworkable if applied to the Commission as Plaintiffs suggest. Plaintiffs' Section 8 claims have no merit and summary judgment should be granted for the State.

## II. ONE-ON-ONE DISCUSSIONS BETWEEN COMMISSION MEMBERS ARE NOT DELIBERATIONS OF A PUBLIC BODY.

Plaintiffs acknowledge that Mont. Code Ann. § 2-3-213 requires that a "suit to void a decision must be commenced within 30 days ... of the agency's decision," and that their Section 9 claim missed this deadline. But Plaintiffs nevertheless argue that their Section 9 claim "relates back" to the original complaint pursuant to M. R. Civ. P. 15(c). Pls' Resp. Br., at 13. Plaintiffs contend that their amended complaint, though adding an entirely new Section 9 claim, changed "only the legal theory of the action." *Id.* (quoting *Citizens Awareness Network v. Mont. Bd. of Envtl. Rev.*, 2010 MT 10, ¶ 21, 355 Mont. 60, 227 P.3d 583).

Plaintiffs' excuse is insufficient for at least two reasons. First, Plaintiffs' original emphasis on the public notice provided by the Commission, which is the factual basis of their Section 8 claim, is completely different than the factual focus of their Section 9 claim, which is all about discussions between Commissioners outside of their meetings. Indeed, as noted above, there is some inherent tension between Plaintiffs' Section 8 claim that the Commission should have given more specific notice, and their Section 9 claim that the Commissioners could not have talked to even determine what notice to give.

But second, and more importantly, as the Supreme Court noted in *Citizens Awareness Network*, the relation-back rule is based on equity. *Id.*, ¶ 21. 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, ___ P.3d ___ ("[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—say until after all alternative claims are defeated—to finally bring their Section 9 claim, long past when the actual decision was made and past when the body can take remedial action. Such a result would effectively eliminate the 30-day limitation.

In any event, Plaintiffs' impracticable claim that Commissioners may not discuss Commission business one-on-one (and therefore with less than a quorum) outside of formal meetings falls flat. One-on-one discussions in this legislative context simply cannot be a violation of the open meetings law. If Plaintiffs are correct, then every time two legislators meet in the halls of the Capitol to discuss pending legislation they are violating Section 9 and the open meetings law. *See* Defs' Opening Br. at 18. Plaintiffs in their response don't even try to address this fatal problem. A better interpretation is that already codified in the law: a "meeting" only occurs when a quorum of the body meets. Mont. Code Ann. § 2-3-202. There is no dispute that never happened here.

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 Plaintiffs' claim doubly fails. Though the Commissioners had discussions outside of meetings, they did not "deliberate" until the public meeting was held. *See, e.g.*, Ex. 35 to

Pls' Opening Br., 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.

As Plaintiffs note, some courts have found violations of open meeting laws when it was clear that a committee was trying to circumvent the open meetings requirement by, for example, "using serial electronic communication to deliberate toward a decision" or "scheduling back-to-back meetings which, taken together, are attended by a majority of a public body." Pls' Resp. Br. at 16 (quoting *Del Papa v. Bd. of Regents*, 956 P.2d 770, 778 (Nev. 1998); *Cincinnati Post v. Cincinnati*, 668 N.E.2d 903, 906 (Ohio 1996)).

This type of deliberate circumvention is not even close what happened here. *All* the evidence is to the contrary. The Commissioners' one-on-one discussions were never geared "toward a decision." *See, e.g.*, Ex. 35 to Pls' Opening Br., 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.

A quorum of the Commission never met outside of a public meeting to discuss official business. Instead the Commissioners properly discussed issues to facilitate their later "deliberations" at the public meeting, just as individual legislators often do. Both Section 9 and the open meetings law were complied with, and summary judgment should be granted for the State.

## III. ASSIGNING HOLDOVER SENATORS DOES NOT RESULT IN DISENFRANCHISEMENT.

Although the Commission managed to limit population deviation to three percent of the ideal—a remarkably low number, well below the core suffrage requirement of "population equality," *see* Defs' Opening Br., at 20-21—Plaintiffs nevertheless insist that they have suffered "disenfranchisement." They have not—at least not in any sense that any court has ever recognized.

Plaintiffs incorrectly assert that the State "does not dispute" that the Jones' amendment "will result in a net increase of 6,000 voters being disenfranchised." Pls' Resp. Br. at 18. The State absolutely disagrees that moving Senator Hamlett to SD-15 resulted in the disenfranchisement of *anyone*. *See, e.g.*, Defs' Opening Br. at 22-24. Otherwise the voters in every district assigned a holdover senator, or at least some portion thereof, would have been disenfranchised. *Id.*

In its opening brief, the State explained the logical fallacy in Plaintiffs' "disenfranchisement" claim. *Id.* Plaintiffs argue that what they characterize as mass

disenfranchisement should not be ended entirely, but merely adjusted to lessen the number of effected voters. But if Plaintiffs are right that real "disenfranchisement" occurs whenever voters are limited to voting in two instead of three senatorial elections over the next ten years, the violation must apply across the board to every voter so affected. The whole system of holdover senator assignments would therefore necessarily be unconstitutional. But even Plaintiffs don't believe that, because the need to assign holdover senators to districts is the direct result of the constitutional requirement that senators serve staggered terms. Mont. Const. art. V, § 3.

As the State explained in its opening brief at pages 23-24, the ramifications of the assignment of holdover senators is simply one of many legitimate concerns that must be balanced in creating a redistricting plan. Our Constitutional system places the ability to weigh these competing considerations squarely with the Commission. Plaintiffs' request to have this Court act as a "super commission" and reevaluate this balancing should be rejected, and summary judgment granted for the State.

## IV. THE LEGISLATURE'S "RECOMMENDATIONS" ARE NOT BINDING ON THE COMMISSION.

The Supreme Court made clear in *Wheat* that the Commission is "an independent, autonomous entity." *Wheat*, ¶ 23. In fact, the very reason the Commission was created was to "bypass the Legislature." *Id.*, ¶ 20. The Constitutional Convention therefore "limited the Legislature's role to that of making 'recommendations.'" *Id.*, ¶ 23. Despite this precedent, Plaintiffs proclaim that "any subsequent changes by the Commission must be within the scope of the Legislature's recommendations." Pls' Resp. Br. at 18.

Plaintiffs provide no authority for this novel proposition that is directly contrary to the holding in *Wheat*, and directly contrary to the plain meaning of "recommendation." A recommendation by definition is not binding, and yet Plaintiffs would have the Legislature's recommendations constrain the Commission's ability to make changes to the redistricting plan.[2]

There are good policy reasons that the Legislature's recommendations should not restrict the Commission. Under Plaintiffs' interpretation, the Commission is prevented from acting upon comments provided by the minority party in the Legislature or any other group of legislators (such as the bipartisan group that sent the "Cook" letter) after the tentative plan has been submitted. Such restrictions would seriously curtail the Commission's "independence and autonomy," not to mention its responsiveness. Even worse, the ability of the Commission to act on subsequently provided public comments would be seriously curtailed.

Nothing in the Constitution requires this undesirable result. Instead, the Constitution merely requires that the independent and autonomous Commission welcome "recommendations" from the Legislature, just as it did here. As such, summary judgment should be granted to the State.

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[2] This is especially puzzling given that Plaintiffs have dropped their claims regarding violations of Mont. Code Ann. § 5-1-115(3), *see* Pls' Resp. Br. at 20, thereby implicitly acknowledging that these statutory restrictions would unconstitutionally constrain the Commission.

## CONCLUSION

As explained above and in Defendants' opening brief, none of Plaintiffs' individual claims have any merit. Each of the constitutional and statutory standards proposed by Plaintiffs are not just unsupported and unusual; they are also unworkable—both as applied to the Commission and more broadly. But Defendants would be remiss if they failed to again emphasize one global problem—Plaintiffs' proposed standards *in toto* are especially troubling, because their whole is even worse than the sum of their parts.

For example, on one hand Plaintiffs insist that the Commission can make no decisions at its meetings without very specific and detailed notice about both the issue to be addressed and *specifically how it will be addressed*. But on the other hand, Plaintiffs insist no Commissioners can talk one-on-one outside of public meetings about any Commission business, including what types of issues will be addressed at upcoming meetings (much less *how* they might be addressed). Plaintiffs seem blissfully unaware that their standards, especially considered together, are conflicting and would undoubtedly reduce all Commission business to a snail's pace, if it progressed at all. Put bluntly, the Commission could never get its work done in the time allotted. This Court need not ignore such practicalities.

The record is clear that the Commission bent over backwards to encourage and ensure public participation in the redistricting process from start to finish, and to ensure that all of the Commission's decisions were made only at public meetings, *after* allowing substantial public input. The Commission held meetings all over the State, and received comments and input from literally thousands of Montanans. Indeed, it was the

Commission's responsiveness to public concerns that led to the decision Plaintiffs are challenging in this case. Plaintiffs' claims have no merit, and Defendants respectfully request that the Court grant Defendants' motion for summary judgment.

Respectfully submitted this 21st day of October, 2013.

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## CERTIFICATE OF SERVICE

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

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