DA 21-0392

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 24

THE ASSOCIATED PRESS, THE BILLINGS GAZETTE, THE BOZEMAN DAILY CHRONICLE, THE HELENA INDEPENDENT RECORD, THE MISSOULIAN, THE MONTANA STANDARD, MONTANA FREE PRESS, THE RAVALLI REPUBLIC, LEE ENTERPRISES, HAGADONE MEDIA MONTANA, THE MONTANA BROADCASTERS ASSOCIATION, and THE MONTANA NEWSPAPER ASSOCIATION,

Petitioners and Appellants,

v.

BARRY USHER in his capacity as Chair of the Montana House of Representatives, Judiciary Committee,

Respondent and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADV-2021-124
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Peter Michael Meloy, Meloy Law Firm, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Kristin Hansen, Lieutenant General, David M.S. Dewhirst, Solicitor General, Derek J. Oestreicher, General Counsel, Alwyn Lansing, Assistant Attorney General, Helena, Montana

Submitted on Briefs: January 12, 2022

Decided: February 8, 2022

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 The Associated Press and other news reporting outlets (collectively, the AP) appeal a July 8, 2021 order from the First Judicial District Court in Lewis and Clark County. The order denied a motion for judgment on the pleadings filed by the AP and granted a motion to dismiss filed by respondent-appellee Barry Usher.

¶2 Usher is the Chair of the Judiciary Committee of the Montana House of Representatives. In January 2021, during the state's biennial legislative session, Usher and a number of other Republican members of the Committee met privately, while Committee proceedings were in recess, to discuss pending legislation. Usher denied the AP access to this gathering, and the AP sued.

¶3 The lawsuit arises at the intersection of Article II, Section 9, of the Montana Constitution, which guarantees the public a right to "observe the deliberations of all public bodies," and § 2-3-202, MCA, which defines such deliberations for certain bodies as only those comprising a "quorum of the constituent membership." In granting Usher's motion to dismiss the case, the District Court held that § 2-3-202, MCA, controlled the character of the gathering in question and placed it outside the bounds of the constitutional right of public access.

¶4 We restate the issue on appeal as follows:

> *Did the District Court err in applying the statutory definition of a meeting to the AP's Article II, Section 9 right to access a gathering of Judiciary Committee members?*

¶5 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶6 The House Judiciary Committee contains 19 members. During the 2021 legislative session, the Committee had 12 Republican members and seven Democratic members. A quorum requires the presence of ten members of the Committee.[1] On January 21, 2021, Usher was presiding over a meeting of the Committee, and he called for a recess. During the recess, nine Republican members of the Committee met privately. The AP requested access to this gathering, but Usher refused, noting that because less than a quorum of the committee was present, it was not subject to the requirements of Montana's open meeting laws.

¶7 The AP filed a complaint in District Court, seeking a declaratory judgment that this denial of access was a constitutional violation. The AP challenged the application of the strict statutory definition of a "meeting" to these circumstances. The AP asked the District Court to order Usher to open up any such meetings in the future and to set aside any decisions made during the gathering in question. Because the underlying facts were undisputed by either party, the AP moved for judgment on the pleadings. Usher filed a motion to dismiss for failure to state a claim, citing the lack of a quorum.

¶8 The District Court denied the AP's motion and granted Usher's, finding that the gathering was controlled by the open meeting statute and that applying the statute here did

[1] The rules adopted by the Montana House of Representatives specifically define a quorum for a House committee as "a majority of the members of the committee," and a quorum must be present to conduct official business. H.R. Res. 2, 67th Leg. § H30-30 (Mont. 2021). What generally constitutes a quorum under the open meetings laws is undefined in § 2-3-202, MCA, but the usual definition is a majority of all members in the body. *See Willems v. State*, 2014 MT 82, ¶ 23 n.2, 374 Mont. 343, 325 P.3d 1204 (citing Black's Law Dictionary).

not violate Article II, Section 9 of the Montana Constitution. The AP appeals the District Court's order to this Court.

STANDARD OF REVIEW

¶9 A motion to dismiss a complaint for failure to state a claim and a motion for judgment on the pleadings each raise questions of judgment as a matter of law. We review district court orders on these motions for whether the district court's interpretation of the law is correct. *Hall v. Heckerman*, 2000 MT 300, ¶ 12, 302 Mont. 345, 15 P.3d 869; *Firelight Meadows, LLC v. 3 Rivers Telephone Coop., Inc.*, 2008 MT 202, ¶ 12, 344 Mont. 117, 186 P.3d 869.

DISCUSSION

¶10 *Did the District Court err in applying the statutory definition of a meeting to the AP's Article II, Section 9 right to access a gathering of Judiciary Committee members?*

¶11 Article II, Section 9, of the Montana Constitution, titled "Right to Know," reads in full as follows: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

¶12 This is an important public guarantee, a right that we have recognized is self-executing and on its own mandates governmental transparency. *Shockley v. Cascade Cty.*, 2014 MT 281, ¶ 22 n.1, 376 Mont. 493, 336 P.3d 375. For example, we have previously enforced the constitutional right to know regarding the activities of bodies like

a budget-focused committee within a school board or a team tasked with screening construction proposals for the Department of Corrections. *See Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 264, 312 Mont. 257, 60 P.3d 382; *Great Falls Tribune Co. v. Day*, 1998 MT 133, 289 Mont. 155, 959 P.2d 508.

¶13 The Montana Legislature has also recognized the importance of enforcing this constitutional guarantee and thus enacted a series of statutes to implement it, at §§ 2-3-201 through -221, MCA. *See Common Cause v. Statutory Committee*, 263 Mont. 324, 329, 868 P.2d 604, 607 (1994) (noting that where transparency is enforced by the open-meeting statutes, "we need not proceed to constitutional analysis"). The statute relevant to this case is § 2-3-202, MCA, which defines what "meetings" must be open to the public. According to the provision, the meetings that this section of law governs are those including a "quorum of the constituent membership of a public agency or association." Section 2-3-202, MCA.

¶14 In past cases, we have applied this statutory quorum rule, when it applies, to help describe the boundaries of Article II, Section 9's implementation. For example, in *Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, 373 Mont. 212, 316 P.3d 848, we held that when a public official witnessed but did not participate in a smaller subcommittee meeting, her passive presence as a non-member observer did not elevate the subcommittee to a quorum of the full committee and implicate the full committee's statutory and constitutional obligations. And in *Willems v. State*, 2014 MT 82, 374 Mont. 343, 325 P.3d 1204, we declined to treat accumulated one-on-one communications among members of a redistricting commission as amounting to a "constructive quorum" that would implicate

the open meeting law and the right to know. We noted that while the commission members had work-related conversations, they had not through these asides "'convened' or 'deliberated' as a 'public body.'" *Willems*, ¶ 25.

¶15 In another case, we held that the right to know can sometimes apply to public bodies even when they do not convene through formalistic structures or operate through mechanisms like requiring a quorum to act. *See Associated Press v. Crofts*, 2004 MT 120, 321 Mont. 193, 89 P.3d 971. *Crofts* concerned an advisory group for the Board of Regents of Higher Education. The group met regularly to deliberate on public policy changes, and it was funded with public money. However, its membership was not consistent or specifically defined, meaning it was not possible to quantify a quorum, and it did not act through rigid processes like voting. Nonetheless, several factors led us to the conclusion that it was a public body subject to the open meeting laws and the right to know. These factors included the members' duties and status as public employees acting in their official capacity, the use of public money for the meetings, the frequency and regularity of the meetings, and the nature and results of the deliberations. *Crofts*, ¶ 22. We distinguished the policy committee in *Crofts* from something like a focused fact-finding mission or an ad hoc group that assembles briefly on a specific matter. *Crofts*, ¶ 23.

¶16 In this case, the question raised by the AP is whether Usher's gathering of House Judiciary Committee members can be simply resolved by the statutory quorum rule or whether it is instead a group more like the one in *Crofts*, to which the quorum rule may not apply but to which the right to know may still attach. We begin by noting that the small

gathering of House Republicans is readily distinguishable from the public body in *Crofts*. The *Crofts* committee met at regular, noticed times, kept agendas, and memorialized and revisited its discourse and its goals. In contrast, Usher's discussion with a handful of his committee colleagues was not so formally structured and instead served more as an ad hoc opportunity to talk about the goings-on in the adjacent setting of the formal committee. The *Crofts* committee also provided official recommendations to the Commissioner of Higher Education and documented the results of its work. In contrast, Usher's gathering was by its very nature incapable of results. Unlike the policy group in *Crofts*, the House Judiciary Committee is governed by a formal set of rules, including a quorum requirement, which precludes an unofficial gaggle of committee members from accomplishing anything of substance outside those strictures.

¶17 The AP disagrees with this characterization about the unofficial, ad hoc nature of the gathering because the AP views Usher's discussions through a lens of partisan control of the full committee. Although the AP does not ask us directly to revisit our holding in *Willems* and call Usher's group a "constructive quorum," the AP does attempt to distinguish this case based on the difference between one-on-one conversations and small-group conversations. Because nine of the Republican members of the Judiciary Committee could outvote the seven Democratic members of the committee, the AP argues that Usher's gathering during the committee recess should be treated as the official deliberations of the committee. The fact that more than a quorum of *Republican* committee

members were present, according to the AP, should render the gathering a "meeting" for right-to-know purposes.

¶18 But we decline to judicially superimpose such partisan calculus on our broad statutory and constitutional principles. Our decision in *Willems* rested in part on concern about how the "constructive quorum" logic could stifle commonplace discussions in places like the Capitol halls by implicating "the accumulated discussions of legislators." *Willems*, ¶ 25. While it is true that Usher's gathering was deliberately convened to include just under a quorum of committee members and was certainly a larger group than one might encounter for elevator chit-chat, the group's posture was more in kind with typical, unofficial legislative chatter than with formal public business. Only by scrutinizing the partisan make-up of the participants and speculating about how the conversation might influence the in-session work of the committee could one reach the AP's conclusion about the group's level of "control."

¶19 A factor that betrays how the AP misapprehends the gathering's effect is the relief the AP sought: in its petition, the AP asked the District Court to "issue an order setting aside any decisions made" in the huddle during the committee recess. But what decisions could the court set aside? Without a quorum of committee members—without an ability to vote or conduct official business—Usher's small group was capable of little more than conversing about later decisions that would occur in the public setting. Imagine, for comparison, two or three legislators speaking privately during a recess to discuss matters like what questions to ask of a witness at a committee hearing. Any "decision" reached

during such an exchange is not yet a public act, nor would these conversations be public meetings subject to statutory notice requirements or the constitutional right to know. This is simply how the legislative process works, with members' individual and collective private forethought informing their conduct during the official public deliberations and debate that occur as bills move through subcommittees, full committees, and the House and Senate as a whole.

¶20 Indeed, the Montana Constitution speaks directly to the openness of the legislative process in particular. Article V, Section 10(3) states that "[t]he sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public." In this provision, the Constitution explicitly draws lines around "sessions," "committee meetings," and "hearings." These must be open to the public, and it follows that other, less formal gatherings of legislators sit outside the bounds of that mandate. The right to know in Article II, Section 9 serves as a complement to this provision by extending a similar mandate to all "public bodies."

¶21 The AP's argument essentially posits that the quorum rule for defining meetings, from § 2-3-202, MCA, is unconstitutional as applied to Usher's conduct here. They ask this Court to hold the balance set by the Legislature unworkable in the political context described and to make perceived partisan secrecy the standard against which we interpret the right in Article II, Section 9, of the Montana Constitution. But the AP fails to demonstrate any more workable balance than that already set by § 2-3-202, MCA. Without it, the alternative is a standardless, case-by-case examination of every legislative

conversation. The separate factors from *Crofts* are inapplicable given the clear and formal structure of the House committee's operation and the ad hoc nature of dialogue among legislators. And the quorum rule has proven workable even when balanced against the realities of social informality. In *Boulder Monitor*, for example, we declined to add extra gloss to the open meeting statutes in a way that would dissuade public officials from engaging with community members in an informal capacity out of fears that even idle encounters would become official. *Boulder Monitor*, ¶¶ 19-20. We respected the established procedures by which a subcommittee had convened and acted, rather than redefining the meeting according to the informal presence of another official in the public audience.

¶22 The same approach is warranted here. This case concerns a subgroup of a formal public body, which by established rules was unable to act in an official capacity. We cannot transform this informal group into an official one without treading over the same concerns addressed in *Boulder Monitor* and *Willems*. We could not define some new numerical size at which such an informal subgroup violates the constitutional right to know unless we strayed into arbitrary or speculative judgment. The reason that House committees operate with quorum requirements, and the reason the Legislature placed such a requirement in § 2-3-202, MCA, was to avoid exactly the kind of uncertainty such a decision would create. This case presents no compelling reason to deviate from our precedent or the established statutory approach.

CONCLUSION

¶23 We affirm the District Court's July 8, 2021 orders denying the AP's motion for judgment on the pleadings and dismissing the case.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶24 I dissent. The Court elides over or flatly excludes several pertinent facts and concludes "[t]his is simply how the legislative process works . . . ." Opinion, ¶ 19. In the process, the Court creates a judicial exception to the public's right to know, upends the Framers' intent for open government, and imparts second-class status upon Montanans' constitutional right to know. I would reverse and hold that the exclusion of legislative committee members, done with the express purpose of avoiding a quorum, violates Montana's constitutional right to know.

¶25 Preliminarily, additional facts are necessary to paint the full picture. The Court correctly notes Usher called for a recess and then nine members of the Committee met privately. Opinion, ¶ 6. However, the Court incorrectly portrays this as merely part of the legislative process. The District Court found the "apparent reason" for Usher's recess was

to allow him to discuss proposed legislation in private with other members of the majority on the committee. The District Court noted Usher's explanation "that three Republican members of the House Judiciary [C]ommittee were excluded from the meeting[,]" and because the meeting of eight or nine members failed to constitute a quorum of the 19-member committee, the meeting could proceed in private. The record further indicates Usher explained he excluded members on purpose as a regular practice because his committee "get[s] a little emotional." The Court's decision to minimize Usher's purposeful manner constitutes, at best, a concerted effort to ignore the reality of the situation. In my opinion, purposefully excluding members to avoid open meeting laws and the constitutional right to know is not "simply how the legislative process works."

¶26 Let me also clarify the relief requested. The AP did not ask the District Court to redefine the meaning of "quorum" under § 2-3-202, MCA. Rather, the AP consistently has sought vindication of the constitutional right to know, addressing the "quorum" argument only in response to Usher. Additionally, the Court concludes the AP's requested relief to set aside any decisions made in the meeting "misapprehends the gathering's effect[.]" Opinion, ¶ 19. Preliminarily, the Court's effort to analogize "two or three legislators speaking privately" to the facts here misses the forest for the trees. Opinion, ¶ 19. Certainly, "two or three legislators speaking privately" retain no real decision-making power, nor would I hold that informal conversations or casual meals between lawmakers constitute "public meetings" implicating the right to know. However, roughly seventy-five percent of the majority party's members on a committee *do* retain decision-making power.

Moreover, the AP no longer asks to set aside any decisions made in the closed meeting. Rather, as requested below, the AP asks this Court to declare the manner in which Usher conducted the meeting violates the constitutional right to know. The AP has filed a declaratory judgment action to determine whether a group of public officials composed of sufficient members to control public policy can evade the open meeting guarantees of Article II, Section 9, by reducing its size to less than a quorum of the entire body. The Judicial Branch of government, and not the Legislative Branch, is charged with the responsibility for determining whether a statute enacted by a legislative body may diminish a fundamental constitutional right of the people. As "final interpreters of the Constitution" with "the final obligation to guard, enforce, and protect every right granted or secured" by the Constitution, this Court must resist the easy solution to affirm based on statutory interpretation. *See Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 488 P.3d 548 (citations omitted). The "slippery slope" of hypothetical cases and scenarios which is predicted by Usher should we condemn the practice of reducing committee membership done for the express purpose of excluding the public, is not before us. Here, this Court is constitutionally charged with the responsibility of defining the scope of a directly implicated fundamental right when there has been purposeful and express action, indeed a common practice, to encroach upon it. Such a determination is particularly well suited for a declaratory judgment where the rights and obligations of the parties are determined and established.

¶27 However, even if the AP sought to set aside any legislative decisions, I see no need to do so. In *Common Cause v. Statutory Comm.*, we concluded that a committee formed under § 13-37-102(1), MCA, to provide a list of candidates to the governor for nomination was subject to Montana's open meeting statutes. 263 Mont. 324, 330-31, 868 P.2d 604, 608-09 (1994). We noted "the Committee's submission of a slate of names to the governor is not directly linked to the eventual action taken -- Argenbright's appointment by the governor and senate confirmation." *Common Cause*, 263 Mont. at 332, 868 P.2d at 609. Therefore, despite the violation of open meeting statutes, we declined to void the appointment of Argenbright. *Common Cause*, 263 Mont. at 333, 868 P.2d at 610. I see no reason not to apply similar reasoning here. The only decisions resulting from Usher's meeting were the votes of the committee members.[1] The House Judiciary Committee's votes on bills under consideration are not directly linked to the eventual action taken—the passage or death of those bills in the Legislature as a whole. The House Judiciary Committee retains no special control over the other members of the House. Thus, I see no reason to set aside the decisions made and would instead address the AP's request to declare Usher's action unconstitutional.

¶28 The right to know has been protected and implemented by the Legislature through open meeting laws, codified at Title 2, chapter 3, part 2, MCA. "The legislature's expressed intent that the open meeting laws be liberally construed, contained in § 2-3-201, MCA, guides our interpretation of these statutes." *Common Cause*, 263 Mont. at

[1] I decline to presume, as the Court does, that the members excluded from Usher's meeting were not informed of the discussions by their colleagues.

329, 868 P.2d at 607. In my opinion, the District Court erred when it relied on the apparent absence of a quorum to determine no meeting occurred under § 2-3-202, MCA. The District Court's treatment of § 2-3-202, MCA, as a gatekeeping provision necessary to invoke further analysis of the AP's constitutional claim undermined the self-executing nature of the right to know. *See In re Lacy*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989) (concluding Article II, Section 9, is self-executing). A provision of a constitution is self-executing when legislation is not required to give it effect. *Lacy*, 239 Mont. at 325, 780 P.2d at 188. I would not conclude, as the Court implicitly does today, that a citizen must first make a threshold showing under § 2-3-202, MCA, before courts address their constitutional claims. "While the legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the protections found in the Constitution." *SJL Assocs. L.P. v. City of Billings*, 263 Mont. 142, 146, 867 P.2d 1084, 1086 (1993) (quoting *Lacy*, 239 Mont. at 325, 780 P.2d at 188). Yet, with a single sentence, the Court brushes aside the AP's constitutional claim. Certainly, we should avoid constitutional issues whenever possible. "However, the doctrine of constitutional avoidance does not allow us to abandon our responsibility to resolve the disputes brought before us." *Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 54, 402 Mont. 168, 477 P.3d 288. The facts here clearly implicate the right to know, and the Court should embrace its responsibility to resolve the claim.

¶29 The intent of the Framers controls our interpretation of a constitutional provision. *Cross v. VanDyke*, 2014 MT 193, ¶ 10, 375 Mont. 535, 332 P.3d 215. We must first look

to the plain meaning of the language used, and resort to extrinsic aids only if the express language is vague or ambiguous. *Cross*, ¶¶ 10, 21. We have previously held that Article II, Section 9, is "unique, clear, unambiguous, and speaks for itself . . . ." *Nelson v. City of Billings*, 2018 MT 36, ¶ 12, 390 Mont. 290, 412 P.3d 1058. However, even in the presence of clear and unambiguous language, we may resort to extrinsic aids to determine constitutional intent in light of the historical and surrounding circumstances at the time of the Constitutional Convention, the nature of the subject matter the Framers faced, and the objective they sought to achieve. *Crites v. Lewis & Clark Cty.*, 2019 MT 161, ¶ 18, 396 Mont. 336, 444 P.3d 1025. These are important rules of constitutional interpretation which prevent a fundamental, self-executing right, such as the right to know, from being eroded by the government *de jure*. In my opinion, the unique facts here warrant examination of the Constitutional Convention transcripts.

¶30 The delegates of the Montana Constitutional Convention would doubtless be surprised by the Court's holding undermining both Article II, Section 9, and Article V, Section 10(3), of the Montana Constitution. Article II, Section 9, sets forth the right to know and provides:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The first clause of this provision sets forth the broad principle of public knowledge in governmental operations, while the second clause provides a limiting circumstance wherein individual privacy must clearly outweigh public disclosure. The Committee

Comments regarding the right to know contained in Article II, Section 9, provide the following:

> [The right to know] arise[s] out of the increasing concern of citizens and commentators alike that government's sheer bigness threatens the effective exercise of citizenship. The committee notes this concern and believes that one step which can be taken to change this situation is to *constitutionally presume the openness of government documents and operations*. The provision stipulates that persons have the right[ ] to examine governmental documents and the deliberations of all public bodies or agencies except to the extent that the demands of individual privacy outweigh the needs of the public right of disclosure. The provision applies to state government and its subdivisions. *The committee intends by this provision that the deliberation and resolution of all public matters must be subject to public scrutiny*. It is urged that this is especially the case in a democratic society wherein the resolution of increasingly complex questions leads to the establishment of a complex and bureaucratic system of administrative agencies. The test of a democratic society is to establish full citizen access in the face of this challenge.
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> . . .
>
> Such a provision, far from limiting the effectiveness of governmental operation, establishes the prerequisite to the effective exercise of citizenship in a democratic society.

Montana Constitutional Convention, Committee Proposals, February 23, 1972, Vol. II, pp. 631-32 (emphasis added, underlining in original). These Committee comments indicate that Article II, Section 9, serves as a companion to Article V, Section 10(3), which sets forth the organization and procedure for the Legislature. Article V, Section 10(3), mandates "The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public." It is clear to me that Article V, Section 10(3), sets forth a general principle of openness in legislative deliberations, while Article II, Section 9, enshrines that principle as a fundamental right and thus provides

heightened protection and an enforcement mechanism for citizens. *See*, *e.g.*, *Ramsbacher v. Jim Palmer Trucking*, 2018 MT 118, ¶ 14, 391 Mont. 298, 417 P.3d 313 ("The rights found in Article II . . . are 'fundamental,' meaning those rights are significant components of liberty, any infringement of which will trigger . . . the highest level of protection by the courts."). Our Constitution, after all, "encompasses a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government. It is a compact of overlapping and redundant rights and guarantees." *Armstrong v. State*, 1999 MT 261, ¶ 71, 296 Mont. 361, 989 P.2d 364. Among those overlapping rights and guarantees are Article II, Section 9, and Article V, Section 10(3). The transcripts of the Constitutional Convention provide context and further clarify the interplay between Article II, Section 9, and Article V, Section 10(3).

¶31 Convention debate over Article II, Section 9, and Article V, Section 10(3), reveals the closely related nature of the provisions. Proponents of a motion, later withdrawn, to delete Article V, Section 10(3), noted the presence of the right to know in the Declaration of Rights as providing a basis to delete Article V, Section 10(3). Montana Constitutional Convention, Verbatim Transcripts, February 19, 1972, Vol. III, 605-06. Regarding Article V, Section 10(3), the Committee Proposal notes provide the following:

> Subsection 3 is self-explanatory. This subsection changes the present Constitution (Section 13, Article V) which allows the legislature to conduct secret proceedings when it determines secrecy is required. The committee believes that the benefits to be derived from an open and visible legislature *far outweigh any need for the peoples' representatives to discuss the peoples' needs and problems behind closed doors*.

Montana Constitutional Convention, Committee Proposals, February 16, 1972, Vol. I, p. 387 (emphasis added). Debate over Article V, Section 10(3), further illuminates the delegates' intent that legislative deliberations be open to the public. Delegate Bugbee noted "The Legislature passes laws that affect[ ] every person in Montana. *There is really no justification for keeping this process secret from the people*. The people need to know and have a right to know the reasons for committee votes." Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. III, p. 603 (emphasis added). The delegates' comments prove prescient to the facts here. In response to a question concerning the occasional legislative view that proceedings should be secret, Delegate Bugbee responded:

> It has been said in our committee meeting, well, if they have something secret to say, if they don't do it here at the Legislature, they'll go down to Jorgenson's, and my answer is, let them go down to Jorgenson's. *The people of this state pay for this building, they pay for the heat, they pay for the salaries and they have a right to have the process open*.

Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. III, p. 603 (emphasis added). Nor did the delegates intend to exclude committee meetings from the requirements of Article V, Section 10(3).[2] Delegate Reichert noted:

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[2] In response to whether Article V, Section 10(3), includes caucuses, Delegate Bugbee responded "proceedings of the Legislature could not possibly include a caucus. A caucus is not a part of the proceedings of a Legislature." Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. III, p. 605. Delegate Robinson echoed this understanding that "Political party caucuses are simply not a part of the proceeding of the Legislature-of the legislative body." Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. III, p. 606.

However, the delegates did not consider the possibility of a committee chairman purposely excluding members of his party to avoid a quorum of the committee. Moreover, while the AP occasionally terms the meeting as a "caucus," the purposeful exclusion of several party members defeats the distinction. *See*, *e.g.*, *Caucus*, *Black's Law Dictionary* (11th ed. 2019) ("The term

> I think it's critical that all proceedings of our Legislature, particularly committee meetings, be open to the public. I've seen committee meetings in session and *after the public hearings people are ushered out and the votes are taken in secret*. I think if we left this to statutory law, we would continue having secret votes in committee meetings.

Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. III, p. 604 (emphasis added). Pertinently, the delegates noted the protections Article V, Section 10(3), provides the press. Delegate Kelleher, in support of Article V, Section 10(3), remarked:

> I want to know that my representatives on the floor are - everything that they do - and in committee is open to my representatives in the press, in the news media. These are my eyes and my ears that let me know what's going on up here in Helena, and if they can go into Executive session any time they please and cast secret ballots, then there's no way that I can know what my Legislature is doing and therefore there is no way that I can trust my Legislature.

Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. III., p. 607. During debate over whether to delete Article V, Section 10(3), Delegate Romney defended the section:

> [I]f we should delete this section, this subsection, the members of the news media - press, radio, TV -- would not be able, unless the committee Chairman and members of the committee opened up the doors to them, to attend committee hearings and meetings. What kind of a reception is this sort of a thing going to receive out over the breadth of Montana *if the press reports that we're closing the doors upon their ability to report on the proceedings of the Legislature*? I think it would be very bad and . . . I think that if someone gets into a mess that requires impeachment or the secrecy in the Senate or a House, so that they have - a committee has to go into Executive session so it

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caucus is also sometimes applied to a similar meeting of *all* the known or admitted partisans of a particular position on an important issue . . . ." (emphasis added)). Accordingly, I would not consider this meeting a "caucus" excluded from official legislative proceedings that implicate the right to know.

> can be considered without being the property of the press so that the public can know what's going on.

Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. III, p. 607 (emphasis added). In closing, Delegate Heliker summed up the debate over Article V, Section 10, by noting "We are saying to the Legislature, 'You shall not conduct the people's business behind closed doors. You shall not keep from the people the secrets that belong to the people. You shall let the people in and the people shall know.'" Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. IV, p. 611.

¶32 Consistent with the desire for legislative transparency, the debate over Article II, Section 9, highlights the delegates' intent that the courts, and not the legislature, would serve as the protector of the citizens' right to know. In presenting the right for debate at the Constitutional Convention, Delegate Eck, a member of the Bill of Rights Committee, noted the Committee's belief that the court would determine exceptions to the right to know. *See* Montana Constitutional Convention, Verbatim Transcript, March 1, 1972, Vol. V, p. 1671. The delegates twice rejected motions to amend the right to allow the Legislature to define the scope and provide exceptions. *See* Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, pp. 1671, 1679; Vol. VII, pp. 2497-98. Opposing the first motion to amend, Delegate Foster noted "*our committee had faith in our courts* to strike [the balance between public disclosure and privacy]. And we did not feel that this particular provision should be left to the Legislature to interpret . . . ." Montana Constitutional Convention, Verbatim Transcript, March 7, 1972,

Vol. V, p. 1672. Chairman Graybill asked to be relieved of his chair to voice his opinion that the Declaration of Rights "is our statement of the rights of the people . . . and this language says we'll give it to the Legislature. . . . [W]e should not push on the Legislature the duty of determining what the rights of the people are in this state." Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, Vol. VII, p. 2496. Indeed, rather than completely deleting the right and leaving it to the Legislature to determine, the delegates voted for it to remain a fundamental right enshrined in the Declaration of Rights. *See* Montana Constitutional Convention, Verbatim, March 16, 1972, Vol. VII, pp. 2491-93 (rejecting Delegate Davis's motion to delete the right to know). The Court chooses to ignore the weight of this history and, in the process, proves the delegates misplaced their faith. Instead, the Court abdicates its constitutional responsibility to protect Montanans' rights and defers to the legislative quorum rule. Conceding the quorum rule may not apply in all instances, as in *Crofts*, the Court nevertheless attempts to thinly distinguish *Crofts* from the facts here.

¶33 I see no reason to distinguish *Crofts*. Obliquely considering some of the factors we noted in *Crofts*, the Court concludes *Crofts* is distinguishable because the committee in *Crofts* met at regular, noticed times, kept agendas, memorialized its meetings, and provided official recommendations to the Commissioner of Higher Education. Opinion, ¶ 16. In *Crofts*, we concluded the following factors may inform our analysis of whether a meeting must be open to the public: (1) whether the committee's members are public employees acting in their official capacity; (2) whether the meetings are paid for with public funds;

(3) the frequency of meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than ministerial or administrative functions; (6) whether the committee members have executive authority and experience; and (7) the result of the meetings. *Crofts*, ¶ 22. We noted these factors are "not exhaustive, and each factor will not necessarily be present in every instance of a meeting that must be open to the public." *Crofts*, ¶ 22.

¶34 Here, the House Judiciary Committee members were duly elected legislators acting in their official capacity. The meeting occurred during a publicly funded legislative session. Usher admitted the exclusion of committee members to avoid the creation of a quorum was his regular practice. Logically, the meetings occurred at regular intervals, i.e., when the House Judiciary Committee met to deliberate. The District Court found the apparent reason for these meetings was the deliberation of proposed legislation, which constitutes a matter of policy and not merely ministerial functions. Like the committee in *Crofts*, the House Judiciary Committee deliberates on proposed legislation before it and votes on whether to send such legislation to the House at large. *See Crofts*, ¶ 23.

¶35 The lack of memorialization here does not prove fatal. Usher excluded members on purpose, and the record indicates this practice was an attempt to keep discussions private. Memorialization of private discussions would necessarily defeat that very purpose. Moreover, in *Crofts*, we noted the committee "deliberated on legislative strategy" and "ma[d]e decisions on how to proceed[,]" which were "[c]learly . . . matters of substance." *Crofts*, ¶¶ 27-28. What, then, did the House Judiciary Committee do here, but deliberate

on legislative strategy and decide how to proceed? Nor does the apparent lack of results prove fatal. Setting aside the Court's conclusion that "an unofficial gaggle" of legislators cannot accomplish anything outside of the formal rules and procedures, we addressed the absence of direct action related to a meeting in *Crofts*. We noted that nothing in § 2-3-202, MCA, "requires that a meeting produce some particular result or action, or that a vote on something be taken. All that is required is that a quorum of the membership convene to conduct its public business." *Crofts*, ¶ 30. We further noted in *Crofts* that:

> Devices such as not fixing a specific membership of a body, not adopting formal rules, not keeping minutes in violation of § 2-3-212, MCA, and not requiring formal votes, must not be allowed to defeat the constitutional and statutory provisions which require that the public's business be openly conducted.

Crofts, ¶ 31. I would not consider the lack of directly attributable action fatal, nor would I allow the purposeful avoidance of a quorum to defeat the constitutional and statutory guarantees of open government.

¶36 The Court is dealing a substantial blow to the public's constitutionally protected right to know, allowing the legislature to conduct public business in secret and without public scrutiny. The Court ignores its admonishment that we will not allow "subterfuge by public bodies or their members to avoid public scrutiny and to conduct business in violation of the requirements of the open meeting statutes." *Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, ¶ 21, 373 Mont. 212, 316 P.3d 848. Instead, the Court shrugs its collective shoulders and declares "This is simply how the legislative process works." Opinion, ¶ 19. What, if not subterfuge, is the purposeful exclusion of members to avoid

creating a quorum? I would not allow such subterfuge to continue and would instead afford Montanans' right to know the heightened protection it deserves. *See Ramsbacher*, ¶ 14. History reveals secret legislative deliberations are *exactly* what our constitutional right to know and the constitutional requirement of open legislative proceedings was designed to prevent. Effectively, the Court is saying to the Legislature, "As long as you do not create a quorum, you may conduct the people's business behind closed doors. You may keep from the people the secrets that belong to the people. You may keep the people out and the people shall not know." *Contra* Montana Constitutional Convention, Verbatim Transcript, February 19, 1972, Vol. IV, p. 611. In my opinion, such a conclusion stands contrary to the Constitution and not in the public interest. Nor can I think of any valid reason for denying the AP and other members of the media access to the committee meeting here. No serious argument exists that the public interest is better served by keeping the deliberations of their elected officials private.

¶37 Today, the Court tells Montana the constitutional right to know does not apply because, in short, Usher's tactics worked. This is untenable. It cannot be the case that a duly elected representative, acting in his official capacity and planning to discuss public matters, can evade public scrutiny by deliberately excluding fellow legislators. The Court should not be so content to ignore its constitutional obligations to protect the rights of Montanans. Today, more than ever, our government institutions need transparency and the confidence of the people for whom they work. Public confidence is the only currency that courts and judges have; public confidence in our decisions is the proxy for judicial

independence and legitimacy. In my opinion, endorsing the tactics that occurred here erodes public confidence, not just in the legislature, but in the judiciary and this Court as well. Because the Court's decision rewards tactics designed to avoid constitutional protections and inflicts significant harm on Montanans' constitutional rights, I dissent. I would reverse the District Court and conclude Usher's practice violates the Montana constitutional right to know, affording that right the necessary protection.

/S/ LAURIE McKINNON