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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

JUSTICE JIM RICE,

Petitioner,

v.

THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Representative Wylie Galt, Speaker of the House of Representatives,

Respondents.

Cause No. ADV 2021 451

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF; AND EMERGENCY REQUEST TO QUASH OR ENJOIN LEGISLATIVE SUBPOENA PENDING PROCEEDINGS

Petitioner has been served a Subpoena by the Montana State Legislature, requiring him to appear at the Montana State Capitol on Monday, April 19, 2021, at 3:00 p.m., to produce documents relating to "any and all emails and other communications" sent and received from his government e-mail account, "text messages, phone messages, and phone logs sent or received by [his] personal" phone, and "notes or records of conferences of the Justices," between January 4, 2021, and April 14, 2021, with regard to polls sent to members of the Judiciary, business conducted by the Montana Judges Association, and "legislation pending before, or potentially pending before, the 2021 Legislature." *Subpoena,* attached

hereto as Exhibit A. Petitioner submits that the Subpoena has been issued beyond the Legislature's lawful subpoena authority, and is an impermissible encroachment into the Judiciary. In support of the petition, Petitioner respectfully states and alleges as follows:[1]

PARTIES

1. Petitioner is a Justice on the Montana Supreme Court. The position of Justice is of constitutional creation. Mont. Const., Art VII, § 3(1). Petitioner has served on the Supreme Court since he was appointed by Gov. Judy Martz and was sworn in following a unanimous 50-0 confirmation vote by the State Senate on March 15, 2001, over 20 years ago. Petitioner has since stood for election three times, in both contested and retention elections. Prior to serving on the Montana Supreme Court, Petitioner practiced law for nineteen years and was elected to three terms in the Montana Legislature, including the 51st or Centennial Session in 1989, serving as a Republican Representative from then-House District 43 in Lewis and Clark County, and was selected to be the Majority Whip of the House of Representatives in 1993. Petitioner has an affinity for the legislative process, holds legislators in high regard, and greatly respects the critical service rendered by legislators to the State and People of Montana.

2. Respondent Montana State Legislature, acting herein by Mark Blasdel, President of the Senate, and Wylie Galt, Speaker of the House of Representatives, is the legislative branch of government for the State of Montana. Mont. Const., Art. III, § 1. President

[1] Petitioner's statements herein are made for purposes of this proceeding, to address the subpoena issued to him individually.

Blasdel and Speaker Galt issued the subpoena that is challenged herein. The 67th Regular Session of the Montana Legislature is scheduled to conclude next week.

BACKGROUND

3. In an original proceeding filed before the Montana Supreme Court on March 17, 2021, *Brown, et. al. v. Gianforte,* OP 21-0125, in which SB 140, a bill recently passed by the Montana Legislature, is challenged, Respondent Greg Gianforte, represented by the Department of Justice, raised concerns about an email-based membership poll conducted by the Montana Judges Association concerning SB 140 when it was legislatively considered. Outside of OP 21-0125, on April 8, Respondent State Legislature issued a subpoena to the Department of Administration, which administers the state computer system, including the system used by the Judiciary, requiring production of, *inter alia*, "[a]ll emails and attachments sent and received" by the Court Administrator for the judicial branch, between January 4, 2021 and April 8, 2021. Such subpoena was issued without notice to the judicial branch, and required production of the emails in approximately 24 hours, on April 9, 2021. Court Administrator McLaughlin was provided a courtesy copy of the subpoena on the afternoon of April 9, 2021. However, despite her request for delay and consultation prior to production of the emails, particularly regarding potential private and confidential information therein, the Department of Administration complied with the request and provided thousands of emails to the Legislature.[2]

[2] Recent filings with the Supreme Court by Respondent State Legislature states that the number of emails produced by the Department of Administration in response to the McLaughlin subpoena

4. McLaughlin immediately filed an emergency motion to quash or enjoin the subpoena with the Supreme Court, which issued a Temporary Order on April 11, 2021. The Supreme Court noted that the Legislature's subpoena was "facially, extremely broad in scope," and that McLaughlin's filings had demonstrated "a substantial potential of the infliction of great harm if permitted to be executed as stated." *Temporary Order*, p.2, April 11, 2021, *Bradley*, OP 21-0125. McLaughlin has asserted that the Legislature's subpoena of the judiciary's emails "commands production of documents that by the breadth requested contain highly confidential, privileged, and sensitive information." *Petition for Original Jurisdiction*, p. 13, April 12, 2021, *McLaughlin*, OP 21-0173.

5. However, on April 12, 2021, Petitioner, who is serving as Acting Chief Justice in OP 21-0125, wherein the Temporary Order was entered, received a letter from Kristen Hansen, Lieutenant General of the Montana Department of Justice, filed with the Supreme Court's Clerk of Court, stating that the Department of Justice has been "retained by the legislative leadership, acting through the Speaker of the House, Wylie Galt, and Senate President, Mark Blasdel, to represent the interests of the Montana State Legislature"—Respondent herein—regarding McLaughlin's request for emergency relief. Citing the Separation of Powers provision of the Montana Constitution, Art. III, § 1, Hansen wrote:

> The Legislative power is broad. In fulfilling its constitutional role, the Legislature's subpoena power is similarly broad. The questions the Legislature seeks to be informed on through the instant subpoena directly address whether

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exceeded 5,000. *Motion to Dismiss*, p. 2, *Declaration of Kristin Hansen*, p.1, filed April 14, 2021, *McLaughlin v. The Montana State Legislature and the Montana Department of Administration*, OP 21-0173.

> members of the Judiciary and the Court Administrator have deleted public records and information in violation of state law and policy; whether the Court Administrator has performed tasks for the Montana Judges Association during taxpayer funded worktime. . . .and whether current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation. . . .
>
> The Legislature does not recognize this Court's Order as binding and will not abide by it. The Legislature will not entertain this Court's interference in the Legislature's investigation of the serious and troubling conduct of the members of the judiciary.

Hansen Letter, April 12, 2021, attached hereto as Exhibit B.

6. Two days later, the statements in the Hansen Letter were furthered by Respondent State Legislature's Motion to Dismiss, filed in OP 21-0173, wherein Respondent stated the Supreme Court "lacks jurisdiction to hinder the Legislature's power to investigate these matters of statewide importance," and that the order of protection sought by McLaughlin therein "will not bind the Legislature and will not be followed." *Motion to Dismiss*, p. 8, April 14, 2021, *McLaughlin*, OP 21-0173. Respondent State Legislature stated therein it would pursue this course even if the subpoenaed materials would "tend to 'disgrace' the Judicial Branch or render it 'infamous,'" citing § 5-5-105(2), MCA. What was being insinuated by this comment in Respondent's briefing concerning potential "disgrace" to the Judiciary is unknown to Petitioner.[3]

[3] The Department of Justice has made similar recent out-of-court statements attacking the Supreme Court. Following the Court's order in OP 21-0125, stating the case would be heard by the remaining six justices who had neither recused themselves nor participated in the MJA poll about SB 140, so that the objectionable issue would be removed from the litigation, the Department of Justice publicly stated, "The Supreme Court is trying to put the cash back in the vault after they got caught robbing the bank." *Independent Record*, April 8, 2021, Justices will hear challenge to law.

7. On that same day, April 14, 2021, the Supreme Court received a telephone call from the Montana Department of Justice advising that Subpoenas would be served upon the Justices individually. Petitioner agreed to accept service of the Subpoenas on behalf of the Justices, and did so that afternoon, receiving the Legislative Subpoena that is challenged herein from a Department of Justice employee. Due to a technical error in the Subpoenas, a new or corrected Subpoena, Exhibit A, was served upon Petitioner by a Department of Justice employee on April 15, 2021. As noted, it requires the production of extensive documentation related to Petitioner's work as a Justice, as further described in Exhibit A, on Monday, April 19, 2021, at 3:00 p.m.

THE SUBJECT EMAILS AND COMMUNICATIONS

8. The COVID-19 pandemic judicial branch protocols prompted many branch employees, both judicial staff and Justices, to work remotely, including during the period of time covered by the Subpoena. Consequently, the use of email to conduct all aspects of the business of the Supreme Court multiplied dramatically from pre-pandemic levels. Transmission by email of administrative, human resource, case management, court scheduling, work product, and other matters became the primarily mode of communication, often times with overlapping or multiple topics within a single email.

9. All emails and communications from Petitioner's work accounts or devices demanded by the Subpoena have been preserved by Petitioner. Further, since service of the Subpoena, Petitioner has not deleted any messages or communications on his personal phone or devices that could conceivably fall within the demands of the Subpoena, although not all

of these messages and communications have yet been retrieved. Every effort will be made by Petitioner to preserve all of these communications for purposes of this proceeding, including, if necessary, an in camera review by this Court.

10. Petitioner believes and therefore alleges that not a single communication subject to the Subpoena is or would be a basis for judicial discipline, claims of bias, including, in the words of the Subpoena, "to prejudge legislation and issues which have come and will come before the courts for decision," disqualification from any case, a "disgrace" to Petitioner's service, as cited by the Subpoena and the Department of Justice, or that would even be "off-color" or inappropriate in any way. In short, Petitioner has nothing to hide. But Petitioner does have something to fear, that being a potentially inappropriate intrusion into the communications of the Judiciary and into a Justice's private affairs, and what Petitioner believes is a recent disturbing pattern of overreaching by the Department of Justice, sometimes in concert with Respondent State Legislature, as described above, which has led inexorably to Respondent's issuance of subpoenas to the Justices, including the Subpoena Petitioner is challenging herein. Because of threatened harm and injury, both personally and judicially, Petitioner objects to the Subpoena and seeks the protection of this Honorable Court.

LEGAL AUTHORITIES AND ARGUMENT

A legislatively initiated subpoena to a member of the judiciary inherently raises, directly and indirectly, multiple constitutional issues. Below is a briefing of the legal principles that govern this dispute and, Petitioner submits, compel the issuance of declaratory

and injunctive relief. Because the Legislature granted only several days to react to the Subpoena, Petitioner can provide only this summary. Should the Court desire to make further inquiry on any issue, Petitioner would welcome the opportunity to file supplemental briefing.

I. THE LEGISLATURE'S SUBPOENA POWER IS NARROWED WHEN DIRECTED TO THE JUDICIARY.

A. The Legislature has broad subpoena power within the confines of pursuing a valid legislative purpose.

Petitioner acknowledges the Legislature's subpoena power, which is inherent within the constitutional establishment of the legislative branch of government. Mont. Const., Art. V, § 1.; § 5-5-101, MCA, et. seq. When Congress "seeks information 'needed for intelligent legislative action,'" it is the general duty of all citizens to cooperate. *Trump v. Mazars USA, LLP*, ___ U.S. ___, 140 S. Ct. 2019, 2036, 207 L. Ed. 2d 951, 970 (2020). However, "[i]t is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose." *Watkins v. United States*, 354 U.S. 178, 201, 77 S. Ct. 1173, 1186, 1 L. Ed. 2d 1273, 1294 (1957).

In this proceeding, the legal question will narrow to whether the Legislature's Subpoena to Petitioner satisfies the furtherance of a valid legislative purpose, or "intelligent legislative action," by the State Legislature. *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970. Petitioner will argue herein that the challenged Subpoena fails to do so. But first, there are considerations which necessarily limit the range and nature of permissible legislative purposes when the target of a legislative subpoena is another branch of government.

B. Constitutional separation of powers must be considered and requires a heightened assessment of a legislature's purpose.

In *Coate v. Omholt*, 203 Mont. 488, 662 P.2d 591 (1983), the Montana Supreme Court declared unconstitutional legislation enacted by the State Legislature intended to hasten case decisions by sanctioning judges who failed to meet stated timeframes. *Coate*, 203 Mont. 488, 490, 662 P.2d 591, 592. Addressing separation of powers, the Court explained the independence of the judiciary generally:

> Courts are an integral part of the government, and entirely independent, deriving their powers directly from the Constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the Constitution or established in pursuance of the provisions of the Constitution, *cannot be directed, controlled, or impeded in its functions by any of the other departments of the government.* The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts.

Coate, 203 Mont. 488, 490, 662 P.2d 591, 592 (citing *State ex rel. Kostas v. Johnson* (Ind. 1946), 69 N.E.2d 592, 595) (emphasis added) (quotations omitted).

In *Sullivan v. McDonald*, 2006 Conn. Super. LEXIS 2073, the Judiciary Committee of the Connecticut General Assembly subpoenaed the recently retired Chief Justice Sullivan of the Connecticut Supreme Court, commanding him to appear and give testimony concerning—not a court decision—but the circumstances surrounding the issuance of the court decision. Sullivan petitioned a general jurisdiction court to quash the subpoena. In granting Sullivan's request, the court held:

> In the absence of express constitutional authority, the legal authority of the Legislative Branch to subpoena members of the judiciary *cannot be coterminous with the broad scope of the legislature's constitutional authority*

> *to enact legislation*. . . . Otherwise, the legislature's authority to compel the testimony of a judicial officer would be virtually limitless.
>
> . . . .
>
> *There must be a constitutional separation of powers* by recognizing that the legislature may not subpoena a judicial official to give testimony relating to his official duties or the performance of judicial functions, except where the Constitution expressly contemplates such a direct legislative encroachment into judicial affairs.

Sullivan, 2006 Conn. Super. LEXIS 2073, *17-18 (emphasis added). This case is notable here, in light of the Montana Department of Justice's statements, noted above, which equate the State Legislature's authority to enact legislation with its authority to issue subpoenas, without distinction.

The U.S. Supreme Court has required a careful consideration of separation of powers when reviewing legislatively initiated subpoenas. In *Trump*, the Supreme Court provided a framework to be applied to inter-branch subpoena disputes. *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 968-69 (noting "an approach that accounts for these concerns" was lacking). The framework begins with the directive that "*courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake*," including both the legislative interests of Congress and the unique position of, at issue there, the President. *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 969 (emphasis added). "*First, courts should carefully assess whether the asserted legislative purpose warrants* the significant step" of issuing the subpoena, because "occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 969 (citation, internal quotations omitted) (emphasis added). "A balanced approach is

necessary," the Supreme Court explained, that "'resist[s]' the 'pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 969 (citation omitted).

II. THE PURPOSES ASSERTED BY THE LEGISLATURE DO NOT CONSTITUTE A "LEGISLATIVE PURPOSE" AS DEFINED BY LAW, AND THEREFORE DO NOT WARRANT OR JUSTIFY ISSUANCE OF A SUBPOENA TO PETITIONER.

The Legislature's Subpoena served upon Petitioner sets forth its purposes as follows:

> This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Exhibit A, p.1.

A. Under the circumstances here, the "Deletion Investigation" is not a valid legislative purpose for Petitioner's Subpoena.

The Legislature's first proffered purpose for the Subpoena is to investigate "whether members of the Judiciary or employees deleted public records and information." However, about this concern there is no mystery. The deletion of information has been widely reported in numerous news reports and declared in many court filings. As stated in the Court Administrator's petition initiating OP 21-0173, filed April 12, 2021, "McLaughlin saves some emails and deletes others, all in the normal course of business. She knows, as does everyone, that 'deleted' does not mean 'gone forever.'" And, McLaughlin "inform[ed] the Montana Legislature that some emails relating [to] the poll had been deleted in the normal

course of business. . ." *Petition*, p. 5-6, April 12, 2021, *McLaughlin*, OP 21-0173. On April 14, 2021, Respondent State Legislature filed a motion to dismiss in OP 21-0173, to which it attached hundreds of emails from the Judiciary. The accompanying Declaration from the Legislature's counsel declared that "over 5,000 emails" have already been produced in response to the Legislature's subpoena to DOA Director Giles for the Judiciary's emails. *Declaration of Kristen Hansen*, p.1, filed April 14, 2021, OP 21-0173. Similarly, in OP 21-0125, the Declaration and exhibits attached to the Respondent State Legislature's motion to disqualify included many judicial emails.

Consequently, there has already been a mass disclosure of the information the Legislature claims it needs to engage in lawmaking. The Legislature has already been provided extensive information about the practices of the Judiciary necessary to satisfy any need and purpose for enacting public policy—that is, a lawful "legislative purpose." How many more thousands of emails does the Legislature need before it is prepared to engage in lawmaking? Given this wide disclosure, any additional information that can be gleaned from the documentation Petitioner can produce is negligible and can do nothing to further the Legislature's ability to undertake "intelligent legislative action." *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970. Notably, and counter to the stated purpose to investigate "whether members of the Judiciary. . . *.deleted* public records and information," the subpoena seeks <u>not</u> information about Petitioner's deletion of documents, but, rather, ostensibly commands that he produce information he necessarily did <u>not</u> delete. Production of "undeleted"

information by Petitioner offers little support for an investigation into deleted records, particularly under the strict constitutional standards that must be applied here.[4]

Indeed, on this point, courts are to serve as gatekeepers to ensure legislative subpoenas are permitted only for clearly demonstrated legislative purposes. "[C]ourts should be attentive to the *nature of the evidence offered* by Congress to establish that a subpoena advances a valid legislative purpose. The more *detailed and substantial* the evidence of Congress's legislative purpose, the better." *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970 (emphasis added). In contrast, "vague" and "loosely worded" evidence of a legislative purposes are disfavored. *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970. "[T]he *mere semblance of legislative purpose would not justify* an inquiry. . ." *Watkins*, 354 U.S. at 198, 77 S. Ct. at 1185, 1 L. Ed. 2d at 1290 (emphasis added). Here, the Legislature's proffered purpose provides no "detailed and substantial" evidence of legislative purpose and is a loosely worded and vague attempt to state a valid legislative purpose. Rather, it constitutes the "mere semblance" of a legislative purpose, and should fail. *Watkins*, 354 U.S. 178, 198, 77 S. Ct. 1173, 1185, 1 L. Ed. 2d 1273, 1290.

Courts are also to consider whether "*other sources* could provide [the Legislature] the information it needs," so that the constitutional conflict can be avoided. *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970 (emphasis added). As explained above, the Legislature has

[4] The confidentiality of judicial deliberations, discussed below, and the exclusion of the Supreme Court as an agency or public body, further illustrates that the Legislature does not have a legitimate interest in the deletion of judicial records.

already obtained from sources other than Petitioner "the information it needs" for any valid legislative purpose.

B. The second proffered purpose, to investigate the processes of the Judicial Standards Commission for addressing the "polling controversy," fails to state a valid legislative purpose for Petitioner's Subpoena.

The Legislature's second proffered purpose within the Subpoena to Petitioner is to investigate "whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision." Essentially, the proffered purpose is to investigate whether the Judicial Standards Commission (JSC) can adequately address the "polling controversy" discussed above.

The JSC is of constitutional creation, within Article VII of the Montana Constitution, *The Judiciary*. Mont. Const. Art. VII, § 11. The Constitution directs the Legislature "to create a judicial standards commission," and sets the membership of the JSC. Mont. Const. Art. VII, § 11(1). The Constitution directs the JSC to "investigate complaints," "make rules implementing this section" of the Constitution, and authorizes the JSC to "subpoena witnesses and documents." Mont. Const. Art. VII, § 11(2). Upon recommendation of the JSC, the Montana Supreme Court may discipline, including removal, "any justice or judge" for the reasons stated in the Constitution. Mont. Const. Art. VII, § 11(3). The Constitution makes proceedings before the JSC confidential, "except as provided by statute." Mont. Const. Art. VII, § 11(4). Pursuant to the Constitution, the Legislature has created the JSC and enacted statutes governing its administration. Section 3-1-1101, et. seq.

Petitioner concedes the Legislature has a constitutional role to play in the creation of the JSC and in the issue of confidentiality, as provided in the Constitution. While the Legislature has enacted several related statutes, *see* § 3-1-1101, MCA, the JSC functions, consistent with its placement within Article VII of the Constitution, as part of the Judicial Branch. Issues of bias, prejudice, misconduct, malfeasance, ethics, and disability fall squarely within the Judiciary's purview.

Whatever role the Legislature may validly play in the JSC's operation, that role and the proffered purpose to investigate the sufficiency of the JSC's processes to address the polling controversy does not state a valid legislative purpose necessary to support Petitioner's Subpoena, for the following reasons. And, to repeat, a legitimate legislative purpose for this inter-branch controversy is one for which the Legislature has proffered sufficient evidence to demonstrate the Subpoena will further the Legislature's pursuit of lawmaking.

First, the Subpoena does not command production of Petitioner's communications with the JSC or its members, or of any documentation related to Petitioner's prior experience or work on administrative issues related to the JSC. Rather, the Subpoena commands production of Petitioner's official and personal communications regarding the polling controversy, legislation that pended before the 2021 Montana Legislature, and the Montana Judges Association (MJA).

Petitioner recognizes that legislation regarding the JSC pended before the 2021 Legislature, including HB 685, and that an MJA poll was conducted regarding that bill. In

OP 21-0125, involving SB 140, the Montana Supreme Court recently entered an order stating that none of the six justices sitting on that case, including Petitioner, participated in the SB 140 poll during the session. *Order*, p. 1., April 7, 2021, *Brown*, OP 21-0125 ("the parties are advised that no member of this Court participated in the [SB 140] poll.") Petitioner signed the Order because this was the truth, but further, it is also the truth that Petitioner did not participate in *any* of the MJA polls during the session. This has already been unequivocally demonstrated by the thousands of judicial emails the Legislature has seized and included in filings before the Supreme Court, which contain the email responses to the polls. Thus, the Subpoena's stated purpose of obtaining documentation of Petitioner's poll participation has already been accomplished, and is moot. While it is theoretically possible that Petitioner could have *orally* communicated a vote on the polls, the emails already produced would appear to eliminate that possibility, as the vast majority of votes are accounted for in the emails. Further, the Subpoena to Petitioner does not expressly command production of oral messages and, in any event, Petitioner cannot provide orally transmitted messages in response to this particular Subpoena.

It is also theoretically possible that Petitioner could have exchanged official and private written or electronic communications about pending legislation outside of the MJA polling process, which would also be covered by the Subpoena. However, at some point we must stop to consider: What possible connection to the legitimate function of enacting legislation regarding the JSC is served by a further search of Petitioner's communications to determine these details, in the framework of an inter-branch constitutional dispute? The U.S.

Supreme Court has explained that "efforts to craft legislation involve predictive policy judgments" that are "not hamper[ed] . . . when every scrap of potentially relevant evidence is not available." *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970 (citing *Cheney v. United States District Court*, 542 U. S. 367, 384, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)). Petitioner's additional "scraps" of information will have no bearing on the Legislature's ability to legislate. Under the gatekeeping duty of the courts to consider "the nature of the evidence offered" by the Legislature "to establish that a subpoena advances a valid legislative purpose," *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970, the Subpoena to Petitioner must justify the intrusion, but, again, woefully fails. The Court should conclude that this "asserted legislative purpose" fails to "warrant[] the significant step" of issuing a subpoena, and avoid "the constitutional confrontation." *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 969.

Lastly, the failure of the Subpoena to identify any specific legislation, any lawful legislative function for which the information is needed, or even a scheduled hearing or meeting for which the commanded information is relevant, underscores that there is no identified legislative purpose at all. This raises the following, disconcerting, point.

III. THE COURT SHOULD CONSIDER WHETHER THE SUBJECT SUBPOENA WAS ACTUALLY ISSUED FOR AN IMPROPER PURPOSE.

Generally, the Legislature's subpoena power is for pursuing policy, not people. The power is "'justified solely as an adjunct to the legislative process.'" *Trump*, 140 S.Ct. at 2031, 207 L. Ed. 2d at 964 (citation omitted). The Legislature "may not issue a subpoena for

the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'" *Trump*, 140 S.Ct. at 2032, 207 L. Ed. 2d at 964 (citation omitted). There is "no 'general' power to inquire into private affairs and compel disclosures," and there is "no congressional power to expose for the sake of exposure." *Trump*, 140 S.Ct. at 2032, 207 L. Ed. 2d at 964 (internal quotations omitted). "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Trump*, 140 S.Ct. at 2032, 207 L. Ed. 2d at 964 (internal quotations omitted).

A legislative subpoena must "concern a subject on which legislation *could be had*." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506, 95 S.Ct. 1813, 44 L.Ed. 2d 324 (1975) (emphasis added). The 2021 legislative session is scheduled to end next week. The transmittal deadlines have passed. There appears to be insufficient time remaining for the Legislature to consider, process, and enact new legislation, and thus, legislation regarding the purposes expressed in the Subpoena cannot "be had" this session. If the Legislature would offer that the information sought is for the purposes of future sessions, then why was Petitioner given only days in which to appear and produced the commanded material?

The Background section of this Petition sets forth what Petition believes to inappropriate overreach by the Department of Justice and the State Legislature. Given that overreach, the Legislature's failure to demonstrate a valid legislative purpose, and the inability for valid lawmaking to now occur, the Court should conclude that the record proves the Subpoena has been pursued inappropriately, particularly regarding the pursuit of the

Petitioner's private communications. In other words, not only does the Subpoena fail for lack of legitimate legislative purpose, it also fails as an abuse of subpoena authority.

IV. THERE ARE ADDITIONAL REASONS TO QUASH THE LEGISLATIVE SUBPOENA ISSUED TO PETITIONER.

"[R]ecipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation," and "recipients have long been understood to retain common law and constitutional privileges" related to the production of materials. *Trump*, 140 S.Ct. at 2032, 207 L. Ed. 2d at 965. Petitioner asserts all of his privileges and immunities related to his work and the work of the Montana Supreme Court. The Supreme Court is not a government or public body, its communications are not subject to the open deliberation requirements of the Montana Constitution, and the justices' communications must be privileged and confidential. *See generally, Order, In re Selection of a Fifth Member to the Montana Districting Apportionment Commission,* August 3, 1999. Judges are immune for actions taken during the lawful discharge of their public duties. *Hartsoe v. McNeil*, 2012 MT 221, ¶ 5, 366 Mont. 335, 286 P.3d 1211 ("Judicial immunity is a public policy designed to safeguard principles of independent decision making. The principles of judicial immunity are well established in the United States."). Petitioner asserts his constitutional right to privacy, particularly regarding the Subpoena's command to produce all messages "sent or received by your personal" phone. For example, a comment in a text message received on Petitioner's private phone from his daughter, asking, "Where will people be able to carry now under that bill?", will suddenly make his daughter's words a subject for legislative oversight.

WHEREUPON, Petitioner requests the following relief:

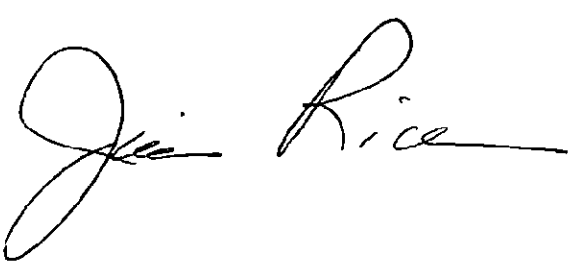
1. In light of the threatened great injury to Petitioner, and the appearance that he is entitled to relief, Petitioner requests that the Court immediately quash or stay the Subpoena, or preliminarily enjoin Respondent from pursuing the Subpoena or issuing further subpoenas, pending a hearing and pending this proceeding pursuant to § 27-19-201, MCA. By the time judgment could be entered in Petitioner's favor, the harm would have already been done. Petitioner's Declaration is submitted herewith.

2. That the Court set a hearing on the temporary order.

3. That the Court declare the Subpoena invalid pursuant to § 27-8-202, MCA, and permanently enjoin it pursuant to § 27-19-102, MCA.

4. For such other relief as the Court deems appropriate.

DATED this 19th day of April, 2021.



Ex. A

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice James A. Rice
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice Rice.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, jrice@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.
(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government e-mail account, jrice@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.
(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, jrice@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.*, a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, this 15th day of April, 2021.

By: 

Senator Mark Blasdel, President of the Montana Senate.

By: 

Representative Wylie Galt, Speaker of the Montana House of Representatives.

EX. B

AUSTIN KNUDSEN

STATE OF MONTANA

FILED

APR 12 2021

Bowen Greenwood
Clerk of Supreme Court
State of Montana

April 12, 2021

Dear Acting Chief Justice Rice,

The Department of Justice, acting through the Lieutenant General, undersigned, has been retained by legislative leadership, acting through the Speaker of the House, Wylie Galt, and Senate President, Mark Blasdel, to represent the interests of the Montana State Legislature to resolution of the ex parte Motion of Beth McLaughlin filed in the Montana Supreme Court on Saturday, April 10, 2021, outside of business hours and without opportunity for response.

We have reviewed the Court's Order, issued Sunday, April 11, 2021, presuming to temporarily quash the Legislature's duly authorized subpoena to the Director of the Department of Administration (DOA), and simultaneously, attempting to cure the multiple procedural irregularities presented in the filing through the mechanism of giving the Court Administrator a briefing schedule. As the Court recognizes in its Order, none of the Legislature, DOA, and the Court Administrator, are parties to this action. Further, the Court correctly notes that the Legislature's subpoena has no relation to the pending proceeding in OP 21-0125 and is not properly filed in that suit. In fact, the Court's discomfort with the procedural posture of this Motion is well taken. The subpoena at issue is wholly unrelated to the pending matter and concerns the ethical conduct of the Court Administrator and members of the Montana State Judiciary. This Court cannot assume the Motion is properly filed in OP 21-0125 because it is not.

Article III, Section 1 of the Montana Constitution, states, in full, as follows:
Separation of Powers. The power of the government of this state is divided into three distinct branches -legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The Legislative power is broad. In fulfilling its constitutional role, the Legislature's subpoena power is similarly broad. The questions the Legislature seeks to be informed on through the instant subpoena directly address whether members of the Judiciary and the Court Administrator have deleted public records and information in violation of state law and policy; whether the Court Administrator has performed tasks for the Montana Judges Association during taxpayer funded worktime in violation of state law and policy; and whether current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling

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members of the Judiciary to prejudge legislation and issues which have come and will come before courts for decision.

Every employee of the State of Montana is responsible to protect the constitutional privacy interests of individuals as required by law. Nothing authorizes the public release of confidential information under any circumstance. It is a flailing argument by the Court Administrator to suggest the Legislature, when reviewing documents produced in response to subpoena, would not understand and act on its duty to redact personal or private information, and there is no suggestion that would ever have happened in this matter.

The Legislature does not recognize this Court's Order as binding and will not abide it. The Legislature will not entertain the Court's interference in the Legislature's investigation of the serious and troubling conduct of members of the Judiciary. The subpoena is valid and will be enforced. All sensitive or protected information will be redacted in accordance with law. To the extent there is concern, upon production, the Legislature will discuss redaction and dissemination procedures with the Court Administrator.

Sincerely,

Kristin Hansen
Lieutenant General
Montana Department of Justice

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