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MONTANA FIRST JUDICIAL DISTRICT

COUNTY OF LEWIS AND CLARK

\* \* \* \* \*

JIM RICE,	)	
	)	
PETITIONER,	)	
	)	
VS.	)	CAUSE NO. BDV 2021-451
	)	
MONTANA STATE	)	
LEGISLATURE,	)	
	)	
RESPONDENT.	)	
	)	

-----

TRANSCRIPT OF PROCEEDINGS  
HEARING

Before the Honorable Michael F. McMahon  
Judge Presiding

Date and time: MONDAY, MAY 10, 2021  
1:56 P.M.

Place: Lewis and Clark  
County Courthouse  
228 East Broadway Street  
Helena, MT 59601

Mark Nikkel  
Official Court Reporter, First Judicial District  
228 East Broadway  
Helena, Montana 59601  
(406) 447-8267  
Mark.Nikkel@mt.gov

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APPEARANCES

For the Petitioner

Curt Drake  
111 N. Last Chance Gulch, Ste. 3J  
Helena, Montana 59601

For the Respondent

Derek Oestreicher  
Office of the Commissioner of Securities  
and Insurance  
840 Helena Avenue  
Helena, Montana 59601

Katie Smithgall  
Office of Attorney General  
215 North Sanders; P.O. Box 201401  
Helena, Montana 59620-1401

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1                   Helena, Montana; Monday, May 10, 2021

2                                   1:56 p.m.

3

4                   THE COURT: Please be seated. Thank you.

5                   Thank you. The Court will now call

6 Cause No. BDV 2021-451. This is Justice Jim Rice, as  
7 Petitioner. And the Montana State Legislature, by  
8 Senator Mark Blasdel, President of the Senate, and  
9 Representative Wylie Galt, Speaker of the House of  
10 Representatives, is the respondent.

11                   This is the time set by the -- set by the  
12 Court to determine whether this Court's April 19,  
13 2021, order temporarily enjoined the Montana State  
14 Legislature's April 15th, 2021, subpoena issued to  
15 Justice Rice should be vacated, modified, or made  
16 permanent.

17                   Mr. Drake, you are here on behalf of Justice  
18 Rice?

19                   MR. DRAKE: That's correct, Your Honor.

20                   THE COURT: And counsel for the Legislature,  
21 please identify yourselves for the record, please.

22                   MR. OESTREICHER: Derek Oestreicher, Your  
23 Honor.

24                   Katie --

25                   MS. SMITHGALL: Katie Smithgall.

1 THE COURT: Thank you.

2 All right. Mr. Drake?

3 MR. DRAKE: May it please the Court.

4 Would Your Honor find any openings helpful,  
5 or should we go directly to the evidence?

6 THE COURT: I would simply go right to the  
7 evidence, and then you can make summations, if you  
8 like.

9 MR. DRAKE: Very good.

10 THE COURT: Thank you.

11 MR. DRAKE: Petitioner calls Justice James  
12 Rice.

13 THE COURT: Thank you.

14 Sir, if you would come forward and be sworn  
15 in.

16

17 JAMES RICE

18 called as a witness, and having been first  
19 duly sworn, was examined and testified as follows:

20 THE WITNESS: I do.

21 THE CLERK: Okay. Have a seat right there  
22 in the witness box.

23 ///

24 ///

25 ///

1 DIRECT EXAMINATION

2 BY MR. DRAKE:

3 Q. State your name for the record please,  
4 Justice Rice.

5 A. Jim Rice, R-I-C-E.

6 Q. Justice Rice, by way of brief introduction  
7 of yourself, could you tell us a little bit about  
8 your legal career here in Montana?

9 A. I graduated from law school in 1982, came to  
10 Helena to practice, was a contract public defender  
11 for four years, practiced for 19 years here in  
12 Helena, during which time I was also elected to three  
13 terms in the Montana Legislature.

14 In 2001 I was appointed to a vacancy to the  
15 Supreme Court by Governor Judy Martz and since then  
16 have been through three elections. Both were tension  
17 and contested elections.

18 Q. And when will you next stand for reelection?

19 A. 2022.

20 Q. Have you filed a petition with this Court  
21 seeking some relief as described by the judge in his  
22 introductory remarks?

23 A. Yes.

24 Q. Do you affirm that petition, what it  
25 contains in terms of the facts and opinions that you

1 offered in it?

2 A. Yes.

3 Q. As though you gave testimony under oath to  
4 it today?

5 A. Yes.

6 Q. Turning to the subpoena -- I should ask you  
7 first, I apologize.

8 Is there anything that you would like to  
9 change or update from the petition since it was  
10 originally filed that you think the Court should be  
11 aware of?

12 A. I wouldn't change anything in the petition.  
13 But I would say in the subsequent three weeks there  
14 have been further developments related to the issues  
15 discussed in the petition.

16 Q. And what have been those developments been?

17 A. Additional actions with regard to the  
18 respondents, correspondence from the respondents to  
19 myself, and further actions in regard to proceedings,  
20 two proceedings before the Montana Supreme Court that  
21 are related to the subpoena.

22 Q. Could you outline those for us, please?

23 A. Well, I filed the petition in -- on Monday,  
24 April 19th. One day before the petition, which was a  
25 Sunday, I received a letter from the Attorney



1 General's office with regard to my subpoena. That  
2 letter was not discussed in the -- in this petition  
3 itself.

4           And then, since that time, there have been  
5 additional actions and statements taken by the  
6 Attorney General's office with regard to the Court  
7 and allegations made in pleadings they have filed in  
8 the -- in the two proceedings, 21-125 and 21-173,  
9 that have regarded the subpoenas issued by the  
10 Legislature.

11           Q. Had those events occurred prior to your  
12 petition filing, would you have included comments  
13 about them in your petition?

14           A. Yes.

15           Q. And what would your comments have been?

16           A. My comments would have been that these  
17 events illustrate the continuing actions taken by the  
18 respondent and the Attorney General, which I believe,  
19 in my own opinion, are extraconstitutional and are a  
20 constitutional overreach.

21           Q. Very well. Turning to the subpoena that you  
22 have brought for relief to the Court; in general,  
23 what did the subpoena served upon you by the Attorney  
24 General's office on behalf of the Legislature require  
25 that you do?

1           A.    It required that I produce both my official  
2   communications and my private communications up off  
3   my government account and my private accounts related  
4   to legislation that was considered before the  
5   Legislature of this past session and legislation that  
6   could have been considered.

7                    It asked for communications regarding the --  
8   the business of the MJA, the Montana Judges  
9   Association, and any communications I had with regard  
10  to polling conducted by the MJA regarding issues that  
11  pending before the session.

12           Q.    Now, you have listed the items of the  
13  subpoena.

14                    Do you dispute the general power of the  
15  Legislature to subpoena in general?

16           A.    No, I don't dispute that the Legislature has  
17  a constitutional subpoena power.  That is related  
18  only to the -- to the conduct of legislating and the  
19  enactment of public policy.

20           Q.    Despite agreeing that there is a general  
21  power of the Legislature to subpoena, why are you  
22  resisting this subpoena in particular?

23           A.    Because I believe that the particular  
24  subpoena issued to me is a -- is an invalid exercise  
25  of that legislative authority.

1 Q. And when you say, "Invalid," could you tell  
2 us what you mean by that?

3 A. I believe the subpoena raises threshold  
4 constitutional issues that would have to be resolved,  
5 and I believe that the subpoena violates those  
6 threshold constitutional considerations and that the  
7 subpoena is part of a greater campaign, if you will,  
8 or series of actions that are extraconstitutional and  
9 constitute an improper purpose for the issuance of  
10 the legislative subpoena.

11 Q. What are the constitutional issues that you  
12 believe are implicated by the subpoena served upon  
13 you?

14 A. First, under state and federal law, and I'll  
15 -- I will just briefly mention them, there are other  
16 separation of powers issues. They -- they require  
17 the -- a sufficient statement supporting legitimate  
18 legislative purpose and one that would warrant the  
19 intrusion into the judicial branch by the  
20 Legislature, and -- and the assurance that the  
21 subpoena has not been issued for an improper purpose,  
22 and also that it requires a consideration of whether  
23 there are alternatives available for the Legislature  
24 to obtain the information it needs for lawmaking and  
25 thereby avoiding the constitutional conflict.

1 Under state constitutional law, there is the  
2 principle of the confidentiality of judicial  
3 proceedings and the communications that are  
4 necessarily attended to that. And beyond those,  
5 there are the usual times of due process  
6 considerations with the issuance of any subpoena,  
7 including the protection of privileges and privacy.

8 Q. I would just characterize those in general  
9 as sort of base level, not meaning "lower," but first  
10 threshold, I think you may have said, constitutional  
11 issues.

12 Are there other concerns that caused you to  
13 file this petition other than those threshold  
14 constitutional issues?

15 A. Yes. I -- I believe that the legislative  
16 subpoena had been issued pursuant to the -- the  
17 actions which I considered extraconstitutional, and  
18 -- and therefore it concerned me and -- and led me to  
19 seek relief because I thought that the Legislature  
20 had issued the -- the subpoena for a purpose that was  
21 improper.

22 Q. And when you say, "A purpose that was  
23 improper," what purpose was on your mind?

24 A. I perceived that the -- the Legislature was  
25 using the legislative subpoena for purposes other

1 than legislating, for things like litigation strategy  
2 and the attempt to remove judges from cases. And  
3 also, I think, in my personal view, it was a campaign  
4 to discredit and undermine the integrity of the  
5 Court.

6 Q. And what in particular caused you to feel  
7 there was an attack on the integrity of the Court?  
8 And I presume by that you mean the Supreme Court, or  
9 do you mean the entire the judicial branch?

10 A. I'm sorry. I -- I meant particularly the  
11 Supreme Court.

12 Q. And what in particular caused you to feel  
13 that way about the subpoena served upon you?

14 A. Well, it started on April 12th with a  
15 receipt of a letter from the Attorney General's  
16 office which refused to recognize the previous order  
17 issued the previous day, in 125, and stated that, you  
18 know, the -- the Court's order had been issued was  
19 invalid, would not be bound -- or, would not be  
20 bound, would not be followed by the Attorney General  
21 and the respondent, and claimed to itself the power  
22 to issue a legislative subpoena without judicial  
23 interference and the power to make all privacy and  
24 confidentiality determinations.

25 Q. Was there anything about the Court's view

1 with the public at large that affected your decision?

2 A. I'm sorry?

3 Q. Was there anything about the Court's view in  
4 the public at large that affected your decision to  
5 file a petition?

6 A. Yes. I -- well, I felt that the actions of  
7 the respondents were undermining public confidence in  
8 the Supreme Court, and therefore I felt like I needed  
9 to pick up the issue.

10 Q. Why did you choose to file a petition in  
11 district court?

12 A. Well, as I conducted legal research,  
13 frankly, there wasn't a lot of precedent. I found  
14 about what the proper procedure would be for a  
15 Supreme Court justice to take in this kind of  
16 situation. I did find some authority that indicated  
17 that this particular avenue had been taken, and so I  
18 chose to take it also.

19 MR. DRAKE: Your Honor, the next subject  
20 areas I was going to examine about involve some  
21 reference to dates, all in April of 2021. I have a  
22 handout blank calendar that may be of some use. If  
23 anyone would like to give -- I was going to propose  
24 to hand one to the Court, if it might be --

25 THE COURT: Any objection from the

1 Legislature?

2 MR. OESTREICHER: No objection, Your Honor.

3 THE COURT: Do you want me to provide this  
4 copy to Justice Rice?

5 MR. DRAKE: Unless it's useful for the  
6 Court. I think Justice Rice's memory is fairly  
7 strong.

8 Sorry, Your Honor. I have an extra for  
9 Justice Rice. I overlooked it.

10 BY MR. DRAKE:

11 Q. You mentioned briefly, Justice Rice, that  
12 communications from the Legislature about potentially  
13 subpoenaing members of the court before you were  
14 actually served on April 15th may have set the stage  
15 for your own decision about what to do here.

16 Did I get that correctly?

17 A. Yeah, in part, yes. Of course, I -- I  
18 wasn't aware until I first received the first  
19 subpoena on the 14th and then the corrected one on  
20 the 15th that I was going to be subpoenaed.

21 But when I did receive it, then some of  
22 these events that have occurred made more sense to me  
23 about it.

24 Q. And some of those events were prior to you  
25 filing your petition in court; is that --

1 A. Correct.

2 Q. -- correct?

3 MR. DRAKE: May I approach the witness to  
4 have him identify an exhibit, Your Honor?

5 THE COURT: What we're doing is just to  
6 avoid -- The six-foot rule. My court reporter can  
7 just hand them to me, and I will hand them to the  
8 witness.

9 MR. DRAKE: Very good.

10 THE COURT: Thank you.

11 THE WITNESS: Thank you.

12 BY MR. DRAKE:

13 Q. Can you identify that document for us,  
14 Justice Rice?

15 A. Yes. This is a letter I received in my role  
16 as acting Chief Justice on Action 125, pending before  
17 the U.S. -- I mean, pending before the Montana  
18 Supreme Court.

19 Q. Did you receive that while you were involved  
20 in your official duties on behalf of the Court?

21 A. Yes.

22 MR. DRAKE: I will offer Exhibit 1.

23 MR. OESTREICHER: No objection.

24 THE COURT: Exhibit 1 is admitted.

25 ///



1 (Petitioner's Exhibit 1 was admitted into  
2 evidence by the Court)

3 MR. DRAKE: I have a copy for the Court, if  
4 the Court can --

5 THE COURT: I have a copy, too.

6 MR. DRAKE: Okay.

7 THE COURT: It's attached to his petition.

8 MR. DRAKE: Very well. Yes, you're right.

9 THE COURT: Thank you.

10 BY MR. DRAKE:

11 Q. Referring to Exhibit 1, Justice Rice, who is  
12 this written from?

13 A. It's written from the Montana Department of  
14 Justice.

15 Q. On the letterhead of the Attorney General  
16 for the State of Montana?

17 A. Yes. Austin Knudsen, Attorney General,  
18 State of Montana.

19 Q. Who signed it?

20 A. Signed by Kristin Hansen, Lieutenant  
21 General.

22 Q. Turning to the first paragraph, does that  
23 Exhibit 1 identify to you, or did it at the time,  
24 that this was intended to advise you that the  
25 Department of Justice, acting through this writer,

1 represented the Legislature?

2 MR. OESTREICHER: Objection, Your Honor.

3 The Department of Justice is not a party to this  
4 action. And the Department of Justice, through this  
5 letter, is representing the Legislature. That's --  
6 that's the party here.

7 THE COURT: So no speaking objections. Just  
8 state your objection for the record, and I will rule  
9 on it.

10 What's your specific objection?

11 MR. OESTREICHER: The objection is that we  
12 -- we're -- it's -- it's not a party to the action.

13 THE COURT: I am going to overrule the  
14 objection. The document speaks for itself. It's on  
15 your boss's letterhead. It's signed by Lieutenant  
16 General.

17 MR. OESTREICHER: On behalf of the  
18 Legislature, Your Honor.

19 THE COURT: That's noted for the record.

20 MR. OESTREICHER: Thank you.

21 BY MR. DRAKE:

22 Q. Did you have concerns about your own  
23 petition response when you saw this April 12th letter  
24 ultimately?

25 A. Yes. The -- the letter itself is -- is --

1 was alarming to me because of the claims made in it.

2 Q. What claims were alarming to you?

3 A. Well, it was -- it was making the claim that  
4 a Court order issued in 125, which is the pending  
5 legislation challenging Senate Bill 140, that the  
6 Court had issued an order in the day before was not  
7 valid and it would not be obeyed.

8 Q. When you say, "125," is that shorthand for  
9 the heading of a Montana Supreme Court case that was  
10 then pending?

11 A. Yes. It's -- it's actually OP 21-0125. But  
12 I have been referring to it as "125."

13 Q. So as you understood this letter to  
14 summarize your testimony, you were concerned because  
15 this letter was advising you that, quote, "The  
16 Legislature does not recognize this Court's order,"  
17 in caps, "as binding and will not abide it," in  
18 quote.

19 Is that what concerned you?

20 A. That -- that was the first thing that  
21 concerned me.

22 Q. Did anything else concern you about it?

23 A. Yes. It's continuing claims that the --  
24 despite any order of the Court, which the order of  
25 April 11th had temporarily quashed the -- the

1 subpoena issued in that --

2 Well, to back up, a subpoena had been issued  
3 by the Legislature to Beth McLaughlin, the Court  
4 Administrator, to obtain --

5 Let me back up again. The first subpoena  
6 was issued to the Department of Administration for  
7 production of judicial communications, e-mail  
8 communications.

9 Court Administrator McLaughlin, when she  
10 discovered that, she first tried informal ways to  
11 stop that process or delay it until there could be  
12 input about the release of those communications. And  
13 when those informal requests were denied, then she  
14 sought formal relief within 125.

15 And on Sunday, April 11th, the Court  
16 temporarily quashed the subpoena to the Department of  
17 Administration until such time as we could have  
18 briefing on -- on the order. And this is -- that  
19 order is what this letter is responding to, and it's  
20 saying that the order is invalid, it won't be  
21 complied with, and, further, that it reaffirms the  
22 validity of the Legislature's subpoena to the  
23 Department of Administration and says it will be  
24 carried out despite the Court's order.

25 Q. This Exhibit 1, the April 12th, 2021, letter

1 of the Attorney General's Office representing the  
2 Legislature to you cites constitutional authority on  
3 its behalf for not following the Supreme Court order;  
4 is that correct?

5 A. It does.

6 Q. And what constitutional authority did the  
7 Attorney General's office cite to you as the basis  
8 for why it would not follow a Supreme Court order?

9 A. It was citing the separation of powers  
10 provision in Article III.

11 Q. To your understanding, is separation of  
12 powers a grant of authority to any branch of  
13 government not to obey another branch of government?

14 MR. OESTREICHER: Objection, Your Honor.  
15 Calls for legal conclusion.

16 MR. DRAKE: I agree that it does, Your  
17 Honor. I believe Justice Rice is qualified to offer  
18 legal opinion about the Constitution of Montana.

19 MR. OESTREICHER: Maybe in a different  
20 setting, Your Honor, but not as a witness in his own  
21 case. He can't be a judge in his own case. I think  
22 therein lies the problem.

23 THE COURT: I will sustain the objection.

24 MR. DRAKE: Very well.

25 ///

1 BY MR. DRAKE:

2 Q. Did the April 12th, 2021, letter to you  
3 describe how information was supposed to be given in  
4 response to the subpoena and who would sort out what  
5 information was properly received or not?

6 A. Yes.

7 Q. And what was the process that the Justice  
8 Department told you was to be followed with respect  
9 to the legislative subpoena?

10 A. Well, it stated that, of course, the  
11 subpoena was valid, it would be enforced, and so the  
12 judicial communications would be delivered to the  
13 Legislature and that the Legislature itself, as the  
14 requesting party, would also be the party to conduct  
15 any review with regard to privacy or confidentiality  
16 concerns.

17 Q. Did that cause you concern when you saw that  
18 that was the process they were saying you had to  
19 follow at the Court?

20 A. Yes. I -- I thought it was a violation of  
21 due process, in my own opinion, and -- and I thought  
22 they were improperly acting as, you know, prosecutor,  
23 judge, and executioner by making all the decisions  
24 with regard to -- to privileges to the documents they  
25 had requested.

1 Q. Did you have any concerns about the tone of  
2 this letter to the Supreme Court from the  
3 Legislature?

4 A. I -- I think it's a very negative tone. It  
5 criticizes the Court publicly. Yeah, I thought it  
6 was -- it was undermining the authority of the Court.

7 MR. DRAKE: Very well.

8 If I may approach?

9 THE COURT: Certainly.

10 MR. DRAKE: I am handing the Court proposed  
11 Exhibit 2.

12 THE COURT: Thank you.

13 BY MR. DRAKE:

14 Q. Do you recognize that, Justice Rice?

15 A. This is a pleading. That was filed in  
16 OP 21-0173, which is another action pending before  
17 the Montana Supreme Court, which was initiated by the  
18 Court Administrator, Beth McLaughlin, in response to  
19 the subpoena that was issued to the Department of  
20 Administration and later also issued -- there was  
21 another one issued to Beth McLaughlin herself.

22 Q. Is this a public record maintained after  
23 Supreme Court of Montana in the usual course of its  
24 business or operations as the Supreme Court of  
25 Montana?

1 A. Yes.

2 MR. DRAKE: I offer Exhibit 2.

3 MR. OESTREICHER: No objection, Your Honor.

4 THE COURT: Thank you.

5 Exhibit 2 is admitted.

6 (Petitioner's Exhibit 2 was admitted into  
7 evidence by the Court)

8 BY MR. DRAKE:

9 Q. Can you tell us when this Exhibit 2 was  
10 filed?

11 A. This was filed on April 14th.

12 Q. So with respect to the Exhibit 1 we just saw  
13 two days later; is that correct?

14 A. Yes. Two days after the -- the letter of  
15 April 12th.

16 Q. Did you review this document at the time?

17 A. I did.

18 Q. Did it affect your own decision about what  
19 you would do if served with the subpoena and what you  
20 have ultimately decided to do?

21 A. I thought it was -- yes.

22 Q. What particularly affected you that you read  
23 here?

24 A. Well, the positions taken in it are  
25 consistent with the positions that -- that were



1 taken, although -- I was going to say the same as the  
2 letter. The letter wasn't a pleading. But this  
3 particular docket -- document makes similar kinds of  
4 claims against the Court and the Court's authority  
5 that the letter did.

6 Q. Did the pleading address whether the Supreme  
7 Court had what they called, quote, "jurisdiction,"  
8 end quote, to either rule upon legislative subpoenas?

9 A. Yes.

10 Q. And what position was taken in this motion  
11 to dismiss?

12 A. See, the -- the pleading takes the position  
13 that Court orders will not bind the Legislature or  
14 will not be followed. The Legislature will continue  
15 its investigation. Actor/Director Giles, she is the  
16 Director of Department of Administration, will obey  
17 the legislative subpoena or be subject to contempt,  
18 and this Court lacks jurisdiction to hinder the  
19 Legislature's power to investigate these matters.

20 MR. DRAKE: Thank you.

21 If I may approach, Your Honor?

22 THE COURT: Certainly.

23 BY MR. DRAKE:

24 Q. Justice Rice, you have been handed what I  
25 marked as Exhibit 3.

1           Can you tell us what that is, if you know?

2           A.    Yes.  This is the letter that I and the  
3 other justices of the Montana Supreme Court received  
4 on April 18th.

5           Q.    And what does that letter address as a  
6 subject matter?

7           A.    So April 18th is a Sunday.  On Friday, the  
8 16th of April, the Montana Supreme Court had issued  
9 an order in 173 with regard to the legislative  
10 subpoenas that had been issued requesting all  
11 judicial communications.  And this letter addresses  
12 that order.

13          Q.    Did this letter also affect your own  
14 decision about whether you would resist a subpoena  
15 which was served upon you?

16          A.    Yes.

17               MR. DRAKE:  I offer Exhibit 3.

18               MR. OESTREICHER:  No objection, Your Honor.

19               THE COURT:  Exhibit 3 is admitted.

20               (Petitioner's Exhibit 3 was admitted into  
21 evidence by the Court)

22 BY MR. DRAKE:

23          Q.    Could you tell us, if you would, if this  
24 prompted any additional or greater concerns for you  
25 about what the petition process was intended by the

1 Legislature when you read it?

2 A. Could you rephrase that?

3 MR. DRAKE: Yeah. I hope so.

4 BY MR. DRAKE:

5 Q. Did this cause you any concern to read  
6 Exhibit 3?

7 A. Yes.

8 Q. And what concerns did you have when you read  
9 it?

10 A. Well, I thought it was an even more extreme  
11 step, and the nature of the steps that had been  
12 taken, because it was basically saying that the Court  
13 was without authority, the Montana Supreme Court was  
14 without authority to have any review of subpoenas  
15 issued by the Legislature.

16 Q. And when you say that, what part of the  
17 letter are you referring to?

18 A. Well, I would say paragraph 3. The Court  
19 here -- citing our order of April 16th in 173:

20 "The Court here lays claim to sole authority  
21 over provision of due process for all branches of  
22 government, which is ludicrous. The statement  
23 implies that the Legislature is not capable of  
24 providing a forum in which due process may be had by  
25 the subjects of legislative inquiry. This statement

1 is wholly outside the bounds of rational thought."

2 I think that captured it pretty well.

3 MR. DRAKE: Yes.

4 (Discussion between Mr. Drake and  
5 Mr. Oestreicher)

6 BY MR. DRAKE:

7 Q. Having proposed Exhibit 4, is this a copy of  
8 the subpoena which was served upon you by the  
9 legislative representative represented by the  
10 Attorney General's office?

11 A. It -- yes. It's the second subpoena that  
12 was served upon me, on -- on April 15th.

13 Q. Perhaps it's worth just describing briefly  
14 why you say, "Second subpoena served upon you."

15 A. The first one, which was served on April  
16 14th, had a technical error in it, and so the  
17 subpoena was reissued.

18 And this one, with the correct government  
19 account, addresses -- was -- was the second one to be  
20 served on me, and it was served April 15th.

21 MR. DRAKE: I offer Exhibit 4, the subpoena  
22 served upon Justice Rice.

23 MR. OESTREICHER: No objection, Your Honor.

24 THE COURT: Thank you.

25 Exhibit 4 is admitted.

1 (Petitioner's Exhibit 4 was admitted into  
2 evidence by the Court)

3 BY MR. DRAKE:

4 Q. Did you have any concerns when you reviewed  
5 the subpoena that had been served upon you?

6 A. Yes.

7 Q. What concerns did you have?

8 A. Well, probably first and foremost, the  
9 request for my personal communications was high on  
10 the list of my concerns.

11 But in addition to that, I had  
12 constitutional concerns about its attempt to obtain  
13 judicial communications, official communications in  
14 my office.

15 Q. Taking notes to -- just for a moment, your  
16 own personal communications and others that you just  
17 mentioned, what process did the subpoena dictate to  
18 you was going to be followed as to sorting out  
19 personal communications or other communications that  
20 may be improper for it to receive from those that you  
21 turned over pursuant to a subpoena?

22 A. The process would be that I would turn over  
23 everything without review or any third party or any  
24 judicial review and that the Legislature itself, upon  
25 its receipt of my materials, would conduct any

1 necessary confidentiality review.

2 Q. Were you satisfied with that suggested  
3 approach?

4 A. No.

5 Q. What was your concern?

6 A. I -- I thought it was a violation of due  
7 process, that there would not be any -- anybody  
8 reviewing the information turned over except by the  
9 person who is requesting them.

10 Q. Did you consider that communications with  
11 your own -- own family members who are within the  
12 intended scope of the subpoena to you?

13 A. Yeah, I did. That -- that was chilling to  
14 all of us.

15 Q. Did you start to try to gather private  
16 information from, for example, off a cellphone to  
17 your family to see what that process would entail if  
18 you tried to comply with this?

19 A. Yes.

20 Q. What did you find?

21 A. It's hard to get. Norine's been spending a  
22 lot of time with Verizon and Apple and other places,  
23 trying to figure out how there could be some sort of  
24 collection of the large number of communications so  
25 that they could be reviewed and without having to

1 scroll back on my phone through every communicant,  
2 one by one, through each e-mail trail to try to  
3 figure out what messages might come within the  
4 parameters of the subpoena.

5 Q. And Norine is your wife; is that correct?

6 A. She is.

7 Q. And what did you find -- for example, how  
8 long did it take you to take the early steps in  
9 trying to see if you could comply with the subpoena?

10 A. I don't know how much time she spent on it.  
11 It's been quite a bit.

12 Q. How much time did the subpoena give you for  
13 the production of these materials?

14 A. Well, roughly four days, about two to three  
15 business days.

16 Q. Two of those days of the four were over a  
17 weekend?

18 A. Yes.

19 Q. Did you work on a subpoena attempted  
20 production over the weekend?

21 A. I did.

22 Q. Did you ultimately instead prepare the  
23 petition that you have placed before the Court?

24 A. I did.

25 Q. Did you work on that over that same weekend?

1 A. I did.

2 Q. How long did that take you?

3 A. Oh, about better part of three days, I  
4 think, to research and write it.

5 Q. Did you understand what the rush was to have  
6 you produce private e-mails, all these other e-mails  
7 listed here, in just four days?

8 A. I did not know what the rush was. I  
9 surmised that it was -- had something to do with the  
10 forthcoming conclusion of the legislative session and  
11 the desire to have the information prior to that, but  
12 I didn't know.

13 Q. Does the Legislature, to your knowledge,  
14 have any published rules regarding its use of  
15 subpoenas?

16 A. I don't know the answer to that.

17 Q. Very well. Are you aware of subpoenas being  
18 used in litigation in Montana before Courts, like we  
19 are in here today, commonly?

20 A. Judicially, yes, uh-huh.

21 Q. Are there other recognized ways that persons  
22 subject to subpoenas are provided some protection in  
23 our judicial process?

24 A. Yes. For judicial subpoenas, there is a --  
25 there is a process set forth in the rules.



1 Q. And where are those found?

2 A. The Rules of Civil Procedure.

3 Q. And is Rule 45 on subpoenas?

4 A. Yes.

5 Q. Example of that?

6 A. Yes.

7 Q. How widely used is Rule 45, in your  
8 experience?

9 A. I think it's very widely used.

10 Q. And in general, how long does Rule 45  
11 provide for a witness to provide materials in  
12 response to a subpoena?

13 A. Generally ten days.

14 Q. What is the remedy of the person if they  
15 don't feel they were given enough time to produce  
16 with respect to an onerous subpoena that requires  
17 more time?

18 A. They can petition the Court for review.

19 Q. And do the rules provide what the Court is  
20 to do in those instances?

21 A. Yes, I believe they do. The Court can  
22 conduct a hearing.

23 Q. And can the Court provide relief to people  
24 in the form of sanctions or even attorney's fees if  
25 not enough time is provided to someone served a

1 subpoena or the subpoena is too burdensome or  
2 harassing?

3 A. You got me there. I -- I'd have to read the  
4 rule again.

5 MR. DRAKE: Okay. Very well. Very well.  
6 Turning to your subpoena briefly, Justice Rice, I  
7 want to ask you whether -- in your view, when you  
8 received this, the reasons provided to you by the  
9 Legislature through their counsel matched the items  
10 that you were being required to produce, okay?  
11 That's the subject that I will be asking you about.

12 THE WITNESS: Okay.

13 BY MR. DRAKE:

14 Q. The first claimed reason here relates to  
15 Supreme Court e-mails and deletions and potential  
16 communications.

17 You see that?

18 A. Yes.

19 Q. Did you have concerns about whether there  
20 was a match there between what the Legislature said  
21 they were doing is for and what they were requiring  
22 you to do?

23 MR. OESTREICHER: Your Honor, I am going to  
24 object. This calls for a legal conclusion as well as  
25 to whether or not the legislative purpose is valid as

1 to whether or not the items requested match the  
2 legislative purpose listed. It -- it calls for a  
3 legal contusion. I think it would be --

4 THE COURT: I am going to overrule the  
5 objection. He can certainly testify as to what he  
6 received and what his understanding of the  
7 legislative purpose was as identified in the  
8 subpoena. That's not calling him to make a legal  
9 conclusion. That's just asking him.

10 MR. OESTREICHER: Okay. Thank you, Your  
11 Honor.

12 THE WITNESS: I did have concerns about the  
13 stated purpose of investigating the judicial branch's  
14 deletion of communications.

15 BY MR. DRAKE:

16 Q. What was your concern?

17 A. Well, first of all, as I have stated in the  
18 petition that has occurred thereafter, there has been  
19 substantial public dissemination of information about  
20 the judiciary's -- judicial branch's deletion of  
21 e-mails. There is no secret about it, and there is  
22 no mystery. In the filings by the Court  
23 Administrator and the proceedings that I have  
24 discussed, she openly acknowledges that -- that the  
25 judicial branch has deleted e-mail communications.

1           And since then, there has been an on --  
2 since -- meaning since I filed my petition, there has  
3 been an ongoing dialogue between the respondent State  
4 Legislature and the judicial branch, which is a good  
5 thing. A dialogue is what the U.S. Supreme Court  
6 said really should be the way that we should resolve  
7 these kinds of separation of powers disputes. But  
8 there has been that dialogue that has continued,  
9 questions about the deletion of e-mails, and the  
10 judicial branch has reported to the committee about  
11 the deletion of e-mails.

12           So this is a -- this is a widely discussed  
13 and a point in both the media and in these  
14 interbranch communications and is specifically a  
15 reason the U.S. Supreme Court says there's -- it's  
16 not necessary to have a subpoena if there is an  
17 alternative method of obtaining this information.

18           Q. In that respect, when this subpoena was  
19 served upon you, did the legislative counsel, that --  
20 using that loosely, meaning the lawyer working for  
21 the Legislature in the AG's office, already have a  
22 substantial number of judicial branch e-mails?

23           A. Yes.

24           Q. About how many have been represented to the  
25 Supreme Court were already in their possession?

1           A.    In the filings by the Department of Justice  
2 in the two actions pending that I have discussed,  
3 they have indicated they have secured over 5,000  
4 e-mails of the judicial branch already.

5           MR. DRAKE:  I'm handing to the Court  
6 proposed Exhibit 5.

7 BY MR. DRAKE:

8           Q.    Do you recognize this?

9           A.    Yes.

10          Q.    Has that been filed with the Montana Supreme  
11 Court, and is it maintained there as a public record  
12 as it would any record in the ordinary course of the  
13 Court's duties?

14          A.    Yes.  It was filed in 173.

15          MR. DRAKE:  I offer Exhibit 5.

16          MR. OESTREICHER:  Your Honor, my only  
17 concern here is that the referenced exhibits in this  
18 declaration are not attached to the declaration.  I  
19 don't know -- maybe that's just the case in my copy.

20          MR. DRAKE:  No, it isn't.

21          Your Honor, I have a complete copy.  It's  
22 just got a lot of extraneous material other than what  
23 we were going to present, but we certainly can.  The  
24 Court can see how large it is.  It's mostly e-mails  
25 of the Supreme Court.

1 THE COURT: Counsel, would you like to  
2 review that? I certainly have no --

3 MR. OESTREICHER: I -- I --

4 THE COURT: I have no problem you reviewing  
5 it. But I will tell you what, I am not going to  
6 review it.

7 MR. OESTREICHER: Your Honor, I know what's  
8 in it. And -- and the reason why I ask is I -- I  
9 would like to be able to reference the exhibits  
10 referenced in this document potentially during my  
11 cross-examination.

12 THE COURT: That's fine. I am assuming you  
13 have a copy as well that you brought with you, if  
14 you're going to --

15 MR. OESTREICHER: I do not.

16 THE COURT: Well, I am sure that Mr. Drake  
17 will allow you the opportunity to use that copy. But  
18 I don't -- I am going to --

19 MR. DRAKE: Whatever I can do to help.

20 MR. OESTREICHER: No. That's fine.

21 I have no objection. I just wanted to note  
22 that for the record, Your Honor.

23 Thank you.

24 THE COURT: Thank you.

25 MR. DRAKE: So no objection to Exhibit 5?

1 MR. OESTREICHER: No. No objection.

2 THE COURT: Exhibit 5 is admitted.

3 (Petitioner's Exhibit 5 was admitted into  
4 evidence by the Court)

5 BY MR. DRAKE:

6 Q. So I would like you to turn, if you would,  
7 Justice Rice, to the second page of this declaration,  
8 at paragraph 5.

9 Can you tell us what that paragraph tells  
10 us?

11 A. It says that on April 9th that the Director  
12 of Administration, Director of the Department of  
13 Administration, produced over 5,000 e-mails in  
14 response to the Legislature's subpoena to her.

15 Q. And were those 5,000 e-mails e-mails of the  
16 Justice Department?

17 A. I'm sorry?

18 Q. Were those 5,000 e-mails e-mails of the  
19 Supreme Court?

20 A. I don't know what all of the e-mails were.  
21 I believe from the subsequent filings in which some  
22 of these e-mails have been attached they did include  
23 judicial e-mails and communications. I don't know if  
24 they also included other things.

25 Q. Are the Supreme Court's e-mails hosted at

1 the Department of Administration?

2 A. Yes.

3 Q. So at least to some extent, tell me if I  
4 have this correct; the executive branch, through the  
5 Department of Justice, representing the Legislature,  
6 was serving a subpoena upon its own branch to receive  
7 e-mails of this Montana Supreme Court that were  
8 maintained at the Department of Administration; is  
9 that correct?

10 A. Well, I think the subpoena originated with  
11 the Legislature to a -- an executive branch  
12 department.

13 Q. As represented by the Department of  
14 Justice's attorneys; is that correct?

15 A. Correct.

16 Q. And --

17 A. Well, I don't know on -- on that last point.  
18 I can't say what the Department of Justice's  
19 attorneys' involvement were behind the production of  
20 the Legislature's subpoena to the Department of  
21 Administration.

22 Q. In any event, whoever the agent was that  
23 delivered the subpoena, it was a legislative  
24 subpoena, and it's being served upon a different  
25 branch of government, the executive branch, as



1 represented the Department of Administration;  
2 correct?

3 A. Correct.

4 Q. To receive materials held by the Department  
5 of Administration for the third branch of government,  
6 the Montana Supreme Court; is that correct?

7 A. Correct.

8 Q. And the basis, as we have seen in the  
9 letters written by the Attorney General's office, for  
10 this constitutional right to seek through legislative  
11 subpoena Supreme Court materials was the separation  
12 of powers; is that correct?

13 A. They cited the separation of powers as -- as  
14 their authority to do so.

15 THE COURT: Thank you.

16 MR. DRAKE: I am handing you proposed  
17 Exhibit 6.

18 THE WITNESS: I got an extra one, if you're  
19 missing one.

20 MR. DRAKE: That's what happened to it.

21 MR. OESTREICHER: No objection, Your Honor.

22 THE COURT: Thank you.

23 Exhibit 6 is admitted.

24 (Petitioner's Exhibit 6 was admitted into  
25 evidence by the Court)

1 BY MR. DRAKE:

2 Q. Exhibit 6 is the subpoena served upon the  
3 Department of Administration for its records, and we  
4 can see there at Items 1, 2, and 3 that these are all  
5 for Supreme Court records; correct?

6 A. That's correct.

7 Q. So we can see from the subpoena issued on  
8 April 8th that, in fact, the Legislature was serving  
9 the executive Branch to receive judicial branch  
10 e-mails hosted at the Department of Administration;  
11 correct?

12 A. Correct.

13 Q. With respect to the timing for that, what is  
14 the date on the subpoena?

15 A. April 8th.

16 Q. And according to the declaration of  
17 Kristin Hansen that we have entered into evidence  
18 already, how long did it take the Department of  
19 Administration to turn over 5,000 Supreme Court  
20 e-mails to the legislative -- Legislature's  
21 representative?

22 A. One day.

23 Q. And is it further represented in that  
24 declaration that these e-mails were somehow reviewed  
25 in one day, 5,000 e-mails, to protect the privacy

1 concerns or to be sure that there were not  
2 confidential Supreme Court memos or other information  
3 within that 5,000 documents that should not be  
4 produced personally to the legislative subpoena?

5 A. Yes. According to the declaration, the  
6 legal review was conducted prior to the release of  
7 the information.

8 Q. And when the legislative subpoena was served  
9 upon the Department of Administration, as we have  
10 just seen with the subpoena issued on April 8th, was  
11 that same office, the Department of Justice,  
12 representing then both the governor and, then as we  
13 now see, the Legislature?

14 A. If you could restate it? I am not quite  
15 following.

16 Q. Very well. If I direct your attention to  
17 proposed Exhibit 7, is this the cover sheet for an  
18 officially filed document in the Montana Supreme  
19 Court?

20 A. Yes.

21 Q. And is it maintained there as a public  
22 record which anyone may view?

23 A. Yes.

24 Q. And does it show us that the appearances for  
25 Governor Gianforte in this action involving a

1 challenge, if you will, to the pending legislation  
2 the same Department of Justice is representing  
3 Governor Gianforte, as we saw a few moments ago, then  
4 issued legislative subpoenas?

5 A. Yes. This is the filing in -- this is a  
6 filling in 125 that shows the appearance -- those  
7 appearances as you have stated.

8 MR. DRAKE: And I will offer Exhibit 7.

9 MR. OESTREICHER: I -- I have no objection,  
10 Your Honor.

11 THE COURT: Thank you.

12 Exhibit 7 is admitted.

13 (Petitioner's Exhibit 7 was admitted into  
14 evidence by the Court)

15 BY MR. DRAKE:

16 Q. And does the legislative branch attorneys  
17 who served you with the subpoena, saying they wanted  
18 your personal e-mails, amongst other things, still  
19 have those 5,000 pages of judicial branch e-mails  
20 which they received personally to a prior subpoena  
21 that they served upon the Department of  
22 Administration?

23 A. I assume that they do because they have been  
24 the subject of filings in these proceedings.

25 Q. And did Ms. Hansen's declaration, which is

1 already in evidence, at paragraph 8, recite that, in  
2 fact, they still held those 5,000 pages of judicial  
3 branch e-mails?

4 A. Yes. It indicates that the e-mails produced  
5 are held by the Legislature's counsel.

6 Q. Did these events give you faith that the  
7 Legislature would provide you due process in the  
8 production of items for your own subpoena?

9 A. No.

10 Q. Did they give you faith that the stated  
11 reasons for the subpoena were the actual reasons?

12 A. No.

13 Q. We've just been talking at some length about  
14 the first reason that was stated in the -- in the  
15 subpoena for the needed production of your records.

16 I want to turn to the second reason, which  
17 was polling of the Montana Justice Association  
18 records, that might bear upon that question.

19 Would, in your view, providing the  
20 Legislature private text messages to your family  
21 members provide any information that would be useful  
22 to the Legislature about the Montana Justices  
23 Association -- or, excuse me -- Judges Association?

24 A. Would my private communications provide any  
25 information about the Montana Judges Association?

1 MR. DRAKE: Correct.

2 THE WITNESS: I do not believe they would.

3 BY MR. DRAKE:

4 Q. Turning to the third reason given in the --  
5 in the subpoena, that they -- Legislature wanted to  
6 investigate the, quote, "sufficiency," end quote, of  
7 the Judicial Standards Commission, do you have any  
8 concerns about that third stated reason for needing  
9 your information?

10 A. Yes.

11 Q. What -- what are those concerns?

12 A. Well, first of all, it's -- it's stating  
13 that the reason for the legislation is to consider  
14 the sufficiency of the Judicial Standards Commission  
15 to investigation the controversy.

16 Of course, the -- the Judicial Standards  
17 Commission is part of the judicial branch. It's a  
18 constitutional body. Its work is the work of the  
19 judicial branch. Most of its governance positions  
20 are set forth -- governance provisions are set forth  
21 in the Constitution. And the Legislature, in my  
22 view, has a very, very narrow or limited  
23 constitutional role with regard to the Judicial  
24 Standards Commission. So that was my first concern.

25 My second concern was that my subpoena

1 didn't ask me about the Judicial Standards Commission  
2 at all. It didn't ask about my work, my experience,  
3 any documents I had with regard to the Judicial  
4 Standards Commission. So it just took a complete  
5 pass with regard to that particular function.

6 Q. Were you affected by the choice of words,  
7 the tone of the subpoena that was served on you?

8 A. Yeah. I didn't -- I didn't really like it.  
9 I know it's quoting a statute, but I didn't like the  
10 fact that I was told I had to produce any information  
11 that even if it would disgrace me to do so.

12 So, yeah, I -- I don't have anything to  
13 hide, and I don't think that anything I have done in  
14 the Supreme Court would be a disgrace, so --

15 Q. Drawing up to the present, now, could you  
16 have withdrawn your petition, in your view, if your  
17 faith in the motives of the Legislature in serving  
18 you with this subpoena had improved?

19 A. Yes.

20 Q. Has your view of what's really going on here  
21 improved?

22 A. No.

23 Q. And can you tell us why?

24 A. The Attorney General has continued to take  
25 actions that undermine the integrity and the public

1 confidence in the Court.

2 Q. What do you mean by that?

3 A. On April 23rd the Attorney General of the  
4 State of Montana issued a public statement saying  
5 that the Court was corrupt. This was four days after  
6 I filed a -- a petition to obtain judicial review of  
7 the issue, and the Attorney General said that  
8 justices were scrambling to hide the information.

9 So I think that this series of actions I  
10 have been talking about as an attack on the Court,  
11 undermine the Court, are simply continuing.

12 Q. I am handing you proposed Exhibit 8.

13 Is this the public statement that you just  
14 referred to?

15 A. Yes.

16 MR. DRAKE: I offer Exhibit 8.

17 MR. OESTREICHER: No objection.

18 THE COURT: Exhibit 8 is admitted.

19 (Petitioner's Exhibit 8 was admitted into  
20 evidence by the Court)

21 THE COURT: Thank you.

22 BY MR. DRAKE:

23 Q. Obviously, Justice Rice, would it have been  
24 easier for you in some respects to simply provide the  
25 information requested in the subpoena?



1 A. Yes, much.

2 Q. Why have you decided to continue this  
3 resistance?

4 A. Because although I don't have anything to  
5 hide by producing the information, I think that what  
6 has happened here is an attack upon the judicial  
7 branch and the integrity of the Court and the public  
8 reputation of justices individually and an intrusion  
9 upon the official confidential communications of the  
10 Court and the private communications of the justices,  
11 and I think it needed to be brought to the courts.

12 Q. What are you asking this Court to do?

13 A. I am -- I am asking the Court today, of  
14 course, to preliminarily enjoin the subpoena pending  
15 the outcome of this action and, ultimately, to  
16 permanently enjoin the subpoena.

17 MR. DRAKE: No further questions.

18 THE COURT: Thank you.

19 Any cross?

20 MR. OESTREICHER: Yes, Your Honor.

21 THE COURT: Thank you.

22 MR. OESTREICHER: Thank you.

23

24 CROSS-EXAMINATION

25 MR. OESTREICHER: Thank you, Justice Rice,

1 for being here today.

2 I'd like to walk through the timeline, if we  
3 can, and I appreciate your counsel bringing the --  
4 the calendar for the month of April 2021.

5 And if you don't mind, I turn your attention  
6 to Exhibit 7 that's been introduced. This is the --  
7 this is the cover page of the motion to disqualify  
8 Judge Kurt Krueger and for other miscellaneous  
9 relief.

10 THE WITNESS: I have it.

11 MR. OESTREICHER: Thank you.

12 BY MR. OESTREICHER:

13 Q. And this was filed on April 1st; correct?

14 A. Correct.

15 Q. And do you recall why the Governor, as  
16 respondent to this action, filed this motion to  
17 disqualify Judge Kurt Krueger?

18 A. Yes.

19 Q. And what was the reason for that?

20 A. The motion to disqualify was based upon  
21 participation by Judge Krueger and an MJA poll in  
22 regard to the bill that was the subject of this  
23 action.

24 Q. Okay. And the -- and the particular bill  
25 that we are talking about is Senate Bill 140;

1 correct?

2 A. Correct.

3 Q. And Senate Bill 140 was being challenged in  
4 OP 21-125?

5 A. Yes.

6 Q. Can we just call it 125?

7 A. Please.

8 MR. OESTREICHER: It's a mouthful.

9 BY MR. OESTREICHER:

10 Q. And in the -- in the attachments to this  
11 filing, Justice Rice, there were a multitude of  
12 e-mails filed with this motion; correct?

13 A. Correct.

14 Q. And -- and what did those e-mails  
15 demonstrate?

16 MR. DRAKE: Objection. Calls for hearsay.  
17 Irrelevant.

18 THE COURT: Any response?

19 MR. OESTREICHER: They're not irrelevant.  
20 They are entirely relevant.

21 THE COURT: There is also a hearsay  
22 objection.

23 MR. OESTREICHER: Well, I can -- I can go  
24 through the -- the e-mails as well, if we --

25 THE COURT: It would still be hearsay.

1 MR. OESTREICHER: Okay.

2 THE COURT: So I am going to -- now -- and  
3 now it gets to the fact of you enter the exhibit on  
4 this -- Miss Hansen's affidavit without those  
5 documents. He wants the documents. It looks like --  
6 put that as a complete document, and he can go  
7 through one by one with Justice Rice if he wants.

8 MR. DRAKE: I would respectfully suggest  
9 that the Completeness Rule doesn't make hearsay  
10 admissible.

11 THE COURT: I understand. But he can  
12 certainly ask him if he has personal knowledge of it.

13 MR. DRAKE: Sure.

14 MR. OESTREICHER: If you don't mind, I --  
15 May I approach, Your Honor? I'll come this way.

16 THE COURT: Sounds like you may need them to  
17 ask questions.

18 MR. OESTREICHER: Well, maybe I can just ask  
19 some general questions. We don't necessarily have to  
20 go one by one, but --

21 THE COURT: Thank you.

22 BY MR. OESTREICHER:

23 Q. And, Justice Rice, I apologize. I -- I  
24 don't have the document before me, but I believe if  
25 you turn to Exhibit A, there should be the start of

1 the -- the compilation of e-mails.

2 And, Justice Rice, my question is this: On  
3 the MJA poll, and specifically the e-mail from  
4 February 1st from Judge Krueger in which he says, "I  
5 am adamantly opposed to this bill," were you carbon  
6 copied on that e-mail?

7 A. From the documents in this file?

8 MR. OESTREICHER: Yes.

9 Your Honor, and I -- I am -- I am sorry. I  
10 am not sure the page number.

11 THE WITNESS: So I would need to find the --

12 MR. DRAKE: Your Honor, I respectfully  
13 object, that it's hearsay regardless -- it's not  
14 his --

15 THE COURT: He can certainly try to lay the  
16 foundation under 8038.

17 MR. DRAKE: I'm sorry, Your Honor?

18 THE COURT: He can try to lay the foundation  
19 --

20 MR. DRAKE: Yes.

21 THE COURT: -- under 8038.

22 THE WITNESS: Do you know where  
23 Judge Krueger's e-mail is in this? I guess I don't.

24 MR. OESTREICHER: I can -- I can search for  
25 it if you give me a -- a brief moment. I am sorry.

1           THE COURT: Can't the Court just take  
2 judicial notice that Judge Krueger disqualified  
3 himself from the case?

4           MR. OESTREICHER: You can, Your Honor. But  
5 -- but what I am driving at is that Justice Rice and  
6 all of the Supreme Court justices were carbon copied  
7 on that particular e-mail.

8           THE COURT: Well, then why don't you take  
9 the documents, try to find it for him.

10          MR. OESTREICHER: Thank you.

11          THE COURT: Sir, can I have that document,  
12 please? Thank you.

13          MR. OESTREICHER: Thank you, Your Honor.

14          THE COURT: Take your time.

15          MR. OESTREICHER: Sorry, Your Honor. I --

16          THE COURT: Maybe you can move on, and she  
17 can try to find --

18          MR. OESTREICHER: Yep.

19          THE COURT: -- the document, if that would  
20 help.

21          MR. OESTREICHER: It does help, Your Honor.  
22 Thank you.

23          THE COURT: Maybe we can go back to it? I  
24 am not trying to give you a job. I just would like  
25 to save some time.

1 MR. OESTREICHER: No. Thank you, Your  
2 Honor. I appreciate the suggestion.

3 BY MR. OESTREICHER:

4 Q. Justice Rice, do you recall MJA polls being  
5 conducted by the Court Administrator,  
6 Miss McLaughlin?

7 A. Yes.

8 Q. And typically, in your experience, are those  
9 polls conducted using her state e-mail account?

10 A. Yes.

11 Q. And you receive a carbon copy of these polls  
12 in your e-mail?

13 A. Not always.

14 Q. Not always. Okay. But you have?

15 A. I have in the past.

16 Q. And have you ever participated in one of  
17 these polls?

18 A. No.

19 Q. And why not?

20 A. It's generally been the position of the  
21 Montana Supreme Court, generally speaking, to not  
22 engage itself in matters that are pending before the  
23 Legislature, if at all possible. And that's the  
24 general policy as I have understood it. I don't know  
25 if it's written down somewhere, but it's certainly

1 what has been understood in this practice.

2 And so whenever I can avoid participation in  
3 -- in regard to an issue pending before the  
4 Legislature, I have -- have done so.

5 THE REPORTER: I'm sorry. That very last  
6 part? Sorry?

7 THE WITNESS: I have done so.

8 THE REPORTER: Okay. Thank you.

9 BY MR. OESTREICHER:

10 Q. And, Justice Rice, why would it be important  
11 for Supreme Court justices to refrain from -- from  
12 engaging in -- in the polls on -- on pending  
13 legislation?

14 A. Well, I can tell you, it's been the  
15 practice, I -- as it probably didn't start the policy  
16 or state the reasons for it, I think it's just good  
17 as a -- as a matter of policy that it's -- it's  
18 better not to than -- than to do it.

19 And so, you know, the -- the judicial branch  
20 has a presence in front of the Legislature, and we do  
21 occasionally from time to time participate in regard  
22 to legislation, either supporting it or opposing it,  
23 and, you know, I just think that it's good for the  
24 branch to kind of speak with one voice, and I have  
25 not been that voice. So that's -- that's been my



1 approach.

2 Q. You said you think it's -- it's good to  
3 refrain -- I am just trying to understand your --  
4 your testimony, Justice Rice. It's good for justices  
5 to refrain from engaging in commenting or -- or  
6 taking a position on legislation?

7 A. That's -- that's --

8 THE COURT: Hold on. I'm sorry.

9 MR. DRAKE: I object to -- to relevance,  
10 Your Honor.

11 MR. OESTREICHER: Your Honor, the relevance  
12 here is that Justice Rice is saying that -- that the  
13 Court, the judicial branch is under attack and that  
14 it's -- it's an attack from the Legislature or an  
15 attack from the Department of Justice. And what I am  
16 -- what I would like to -- to --

17 THE COURT: I believe his testimony was how  
18 he felt personally attacked, what this meant to him  
19 as a justice and as an individual.

20 MR. OESTREICHER: Respectfully, Your Honor,  
21 I believe Justice Rice has said that the judicial  
22 branch and the Supreme Court has been under -- under  
23 attack.

24 THE COURT: Can I just take judicial notice  
25 of that with Exhibit 8?

1 MR. OESTREICHER: Judicial notice of -- of a  
2 statement made by a politician, not by my client, the  
3 Legislature?

4 THE COURT: I'm sorry, but isn't Mr. Knudson  
5 your boss?

6 MR. OESTREICHER: That's correct, Your  
7 Honor.

8 THE COURT: And isn't he the Attorney  
9 General of Montana?

10 MR. OESTREICHER: That's correct, Your  
11 Honor.

12 THE COURT: And didn't he issue Exhibit 8?

13 MR. OESTREICHER: That's correct, Your  
14 Honor.

15 THE COURT: I am going to give you a little  
16 leeway, but not much. You don't have much time,  
17 so --

18 MR. OESTREICHER: Okay. Thank you, Your  
19 Honor.

20 BY MR. OESTREICHER:

21 Q. Justice Rice, what I am getting at here is,  
22 is it appropriate for district court judges to take  
23 part and participate in polls on pending legislation?

24 A. You're ask my opinion about that?

25 MR. OESTREICHER: I am asking your opinion,

1 yes.

2 THE WITNESS: I think it's appropriate --

3 MR. DRAKE: Your Honor, this is further  
4 afield in relevance than we were a moment ago --

5 THE COURT: Sustained.

6 MR. DRAKE: -- in regard to relevance.

7 (Discussion off the record)

8 BY MR. OESTREICHER:

9 Q. Justice Rice, does the judicial branch  
10 receive public records requests?

11 A. Yes.

12 Q. Okay. And does the judicial branch fulfill  
13 these public records requests?

14 A. I don't have personal knowledge about that  
15 because that's not something I handle. I just know  
16 that there has been such requests. And how they are  
17 fulfilled or -- or how that process works, I don't  
18 know.

19 Q. Are you familiar with how public records  
20 requests are -- are generally fulfilled by state  
21 agencies?

22 A. Generally, yeah.

23 Q. And is it your understanding that when you  
24 receive a public records request if the request seeks  
25 protected information, let's say in a document, that

1 that protected information can be redacted?

2 A. Correct.

3 Q. But yet the entire document still produced  
4 with the redacted, protected information taken out;  
5 correct?

6 A. It could be unless there is a contest about  
7 whether the document is the public document that is  
8 subject to disclosure.

9 Q. Okay. Justice Rice, we were talking about  
10 the motion to disqualify Judge Krueger, and that was  
11 filed on April 1st; correct?

12 A. I believe it was.

13 Q. And it's Exhibit 7?

14 A. Yes.

15 Q. And a week later, on April 8th, DOA  
16 Director, then acting director Misty Ann Giles,  
17 received a subpoena to produce Miss McLaughlin's  
18 e-mails; correct?

19 A. Correct. Correct.

20 Q. Okay. And those e-mails were produced on  
21 April 9th?

22 A. Correct.

23 Q. Okay. And that was a Friday?

24 A. Correct.

25 Q. Okay. And was Miss McLaughlin a party to

1 OP 21-125 on April 9th?

2 A. No.

3 Q. Okay. Miss McLaughlin, through counsel,  
4 filed a petition in OP 125 on Saturday, April 10th;  
5 correct?

6 A. Correct.

7 Q. And the Supreme Court issued an order on  
8 Sunday, April 11th; correct?

9 A. Correct.

10 Q. In that case, granting relief for Miss  
11 McLaughlin from the subpoena issued to the Department  
12 of Administration; correct?

13 A. Granting temporary relief.

14 Q. But relief nonetheless?

15 A. Correct.

16 Q. And, again, Miss McLaughlin was not party to  
17 that case prior to the weekend?

18 A. No. Her motion was seeking to intervene in  
19 the case.

20 Q. Okay. And was that then granted in that  
21 order on Sunday?

22 A. No. The Court entered temporary quashing of  
23 the subpoena and gave McLaughlin, I believe it was  
24 seven more days, to provide additional briefing on --  
25 on the procedural issues regarding her request in

1 that case.

2 Q. Okay. And the Department of Administration  
3 was not a party to that action prior to that Sunday  
4 order; correct?

5 A. That's correct.

6 Q. And the Legislature was not party to that  
7 action prior that Sunday order?

8 A. Not at that time.

9 Q. Correct. It became party later; correct?

10 A. Yes.

11 Q. First of all, Justice Rice, in your  
12 experience -- You have been on -- on the Supreme  
13 Court bench for 20 years; correct?

14 A. Correct.

15 Q. In your experience, is it typical to issue  
16 emergency orders on -- on the weekend?

17 MR. DRAKE: Your Honor, I object again. We  
18 are very far afield from our petition here.

19 THE COURT: I would agree. But at the same  
20 time, you went through the litany of things with him.  
21 I am going to allow --

22 MR. OESTREICHER: Thank you, Your Honor.

23 THE COURT: -- the Legislature to at least  
24 address them. I think everybody would be surprised  
25 that judges actually do work on Sunday, but --

1           Go ahead.

2           MR. OESTREICHER: I -- I believe you, Your  
3 Honor.

4 BY MR. OESTREICHER:

5           Q. But -- is -- is it common practice, has it  
6 been common in your experience that the Supreme Court  
7 would convene and issue an order on -- on a Sunday?

8           A. It's -- it's not common. It has been done.  
9 But it's not common.

10          Q. Has a Supreme Court ever issued an order on  
11 a Sunday prior to Miss McLaughlin's case here? Has  
12 -- in your experience, has the Supreme Court issued  
13 an order on a Sunday concerning nonparties to an  
14 action?

15          A. Well, you're testing my memory there. I --  
16 over 20 years, I -- I don't know if I know the answer  
17 to the question. I know that we have issued, you  
18 know, orders at unusual times, including weekends,  
19 but I -- I couldn't say about the party status.

20          Q. Okay. And my -- my point here, Justice  
21 Rice, would you agree with me that this is pretty  
22 extraordinary to issue an order on a Sunday  
23 concerning three nonparties to a pending matter  
24 before the Supreme Court?

25          A. Well, I -- I think the context is

1 extraordinary, that all the judicial e-mails are  
2 being taken by a subpoena without notice, so I guess  
3 all of it was extraordinary.

4 Q. Including the -- the order on the Sunday?  
5 That was extraordinary? Yes?

6 A. Yes.

7 Q. Justice Rice, you stated that you don't  
8 necessarily have faith that the Legislature will  
9 afford you due process with respect to the subpoena  
10 issued to you; correct?

11 A. Correct.

12 Q. And I -- I would just throw that back to  
13 you; is it not true that that's what the Legislature  
14 has told you in various letters that have been  
15 submitted as exhibits and through motions filed in  
16 the Court that the Legislature is not certain that  
17 they will be guaranteed due process with respect to  
18 their subpoena power?

19 A. Well, they have -- they have claimed to not  
20 need the Court's review in order for due process to  
21 be provided. But I think that's contrary to my  
22 understanding of how the system works.

23 Q. Well, you did mention earlier that -- that  
24 there is certainly federal jurisprudence, typically  
25 in the situation where the Legislature and the



1 executive branches have an interbranch dispute, that  
2 the appropriate remedy or resolution to such a  
3 dispute is through negotiation and accommodation; is  
4 that correct?

5 A. The -- the U.S. Supreme Court has said that  
6 -- that should be the first avenue to try to resolve  
7 disputes so that Courts, as -- as a preference to the  
8 issuance of a subpoena, there should be discussions  
9 and dialogue.

10 Q. Well, I appreciate that, Justice Rice. I --  
11 I would like to ask you, are you willing to continue  
12 exploring negotiation and accommodation as a dispute  
13 resolution alternative to judicial adjudication?

14 A. Well, I think the branch has been doing that  
15 in terms of its work with the Legislature. I -- I am  
16 not interested in negotiating my own personal  
17 subpoena further because I don't think it's valid.

18 Q. Okay. Let's go through the subpoena.

19 Justice Rice, if you would turn to -- I am  
20 looking at your petition, so forgive me. But I  
21 believe your subpoena has been submitted as  
22 Exhibit 4. And I would like to walk through the  
23 items requested in the subpoena, Justice Rice.

24 Number one, the subpoena seeks any and all  
25 communications results, responses related to any and

1 all polls sent by -- sent to members of the judiciary  
2 by Court Administrator Beth McLaughlin between  
3 January 4th and April 14th.

4 My question, Justice Rice, is, are the polls  
5 conducted by Court Administrator Beth McLaughlin  
6 case-related or decisional?

7 A. No.

8 Q. Okay. Are the polls conducted by Court  
9 Administrator Beth McLaughlin, are those part of your  
10 official function as a Supreme Court Justice?

11 A. They have certainly been part of the  
12 communications of the justices over a period of many  
13 years, so --

14 Q. I appreciate that answer, Justice Rice. But  
15 are they a -- an integral component of your official  
16 function as a Supreme Court Justice? I understand  
17 they are a part of your communications, but have --  
18 do these have bearing on -- on pending litigation or  
19 pending matters before the Supreme Court?

20 MR. DRAKE: Objection. It's compound.  
21 Argumentative.

22 THE COURT: Sustained.

23 MR. OESTREICHER: I -- I will rephrase.

24 BY MR. OESTREICHER:

25 Q. Are -- are the polls conducted by the Court

1 Administrator part of your official function as  
2 Supreme Court Justice?

3 A. I would say that they have been part of the  
4 communications of my office. And that's all I can  
5 say.

6 Q. Okay. Let's move on to -- to Item No. 2.

7 The Legislature is seeking any and all  
8 e-mails or other communications between that same  
9 time period, January 4th and April 14th, regarding  
10 pending legislation or potentially pending  
11 legislation before the 2021 Montana Legislature.

12 Again, Justice Rice, are communications  
13 between members of the judiciary concerning the  
14 Legislature part of your official duties as a Supreme  
15 Court Justice?

16 A. I think that communications with the  
17 legislative branch does come within the job  
18 responsibilities of the justices.

19 Q. With the legislative branch. But are there  
20 other communications concerning pending legislation?

21 Like for example, if a judge or a justice  
22 were to opine on the constitutionality of a bill that  
23 has yet been passed into law, would that be a part of  
24 that judge or justice 's official functions?

25 A. Yes.

1 Q. And why -- why is that, Justice Rice?  
2 That's surprising.

3 A. Okay. The justices engage in a wide variety  
4 of communication, and especially during the pandemic,  
5 it has been heavily so upon e-mails.

6 We regularly communicate about the  
7 possibility of legal issues and the impact upon  
8 decisions made by other Courts and other branches of  
9 government.

10 For -- I will use a little different  
11 example. Like, a decision issued by the U.S. Supreme  
12 Court, hands down a decision, okay? We may not be  
13 talking about a particular case, you know, Jones  
14 versus Smith, but we are talking about the impact of  
15 that decision and the rule of law that has been made  
16 by that and how that may impact the -- the process of  
17 decision making of the Court.

18 Those have to be confidential  
19 communications. We can't have lawyers and parties  
20 saying, "Oh. Look at -- This is what the Supreme  
21 Court is saying about this case that's been handed  
22 down by the U.S. Supreme Court. This is going to  
23 impact our argument."

24 And so, yes, we do communicate about the  
25 possibility of -- of U.S. Supreme Court decisions or

1 -- or legislation impacting that the work we do. We  
2 communicate about something that is notable or  
3 important in our decision-making process.

4 MR. OESTREICHER: Thank you, Justice Rice.

5 May I approach?

6 THE COURT: Certainly.

7 MR. OESTREICHER: Thank you, Your Honor.

8 BY MR. OESTREICHER:

9 Q. Justice Rice, you said something -- and I  
10 can appreciate, Justice Rice, that there are  
11 case-related and official function communications  
12 between members of the judiciary that must be  
13 confidential; correct?

14 A. I -- I agree.

15 Q. Okay. Justice Rice, what I have handed you  
16 is marked as Exhibit B to that complication of  
17 documents submitted as part of the exhibits attached  
18 to the declaration of Kris Hansen. I believe it's  
19 open to the start of Exhibit B, the judicial e-mail  
20 policy.

21 Do you recognize that?

22 A. Yes.

23 Q. All right. Are you familiar with this  
24 policy?

25 A. Not in detail. I have read it in the past.

1 Q. Okay. And the judicial branch e-mail policy  
2 states that there is no privacy with respect to any  
3 communications exchanged using your state e-mail;  
4 isn't that correct?

5 A. Correct.

6 Q. So I would ask you, Justice Rice, if -- if  
7 communications regarding pending legislation or the  
8 constitutionality or any constitutionality of pending  
9 legislation need to be had between members of the  
10 judiciary, why would those communications be  
11 conducted on a medium for which there is no privacy?

12 A. Well, it's not a medium for which there is a  
13 printed policy that says there is no privacy. I  
14 don't think that this policy overrules the  
15 constitutional principle that the -- that the  
16 deliberations and the work of the justices are  
17 confidential, and to the extent it does the policy is  
18 erroneous.

19 Q. So is it your position that -- and I am  
20 trying to understand, Justice Rice -- that judges and  
21 justices are making deliberations about pending  
22 legislation before it even becomes law?

23 A. No.

24 Q. Can you -- can you help clarify that for me?

25 A. Yeah. We are not deliberating, the term

1 that you have used, about the validity of -- of  
2 pending legislation, or we're not deliberating about  
3 the impact of a U.S. Supreme Court decision, but we  
4 are talking about it. We are educating each other.  
5 We are discussing developments in the law that may  
6 become important when a case arrives.

7 Q. Justice Rice, I would agree with you that --  
8 that certain statements certainly become important  
9 when a case arises, especially those statements that  
10 tend to show judges or justices taking a position one  
11 way or another on a piece of legislation that might  
12 end up being challenged.

13 Would you agree with that?

14 A. Could you rephrase that one more time?

15 MR. OESTREICHER: Well, maybe I can do it in  
16 a -- in a hypothetical.

17 THE WITNESS: Okay.

18 MR. OESTREICHER: Or maybe a real-world  
19 example --

20 THE WITNESS: Okay.

21 MR. OESTREICHER: -- Justice Rice.

22 BY MR. OESTREICHER:

23 Q. We have a district court judge in Butte,  
24 Judge Krueger, who makes a statement on February 1st  
25 about his adamant opposition to Senate Bill 140. We

1 then have the Chief Justice, McGrath, recuse himself  
2 from that case. And you sign the order appointing  
3 Judge Krueger to sit in Chief Justice McGrath's place  
4 on that same case, having been carbon copied on that  
5 statement that Judge Krueger made just a month and a  
6 half prior.

7 That's my example of when a statement made  
8 by a judge about pending legislation can rise to a  
9 level of importance regarding whether or not that  
10 judge should preside over that case.

11 A. Well, I --

12 MR. OESTREICHER: Please.

13 THE WITNESS: I think your question is  
14 asking whether a judge who makes some statement in  
15 whatever form could be a basis for disqualification.

16 And I think the answer is that would have to  
17 be the subject of a disqualification proceeding. It  
18 certainly could be something that a litigant could --  
19 could use as a basis to attempt to disqualify a judge  
20 if the litigant felt that that was appropriate. But  
21 there is no pro se -- or, per se rule. It -- it has  
22 to be a process that goes forward.

23 BY MR. OESTREICHER:

24 Q. Well, I'm glad you brought that up. You're  
25 familiar with the Code of Judicial Conduct --



1 A. Correct.

2 Q. -- Justice Rice?

3 A. Yes.

4 Q. In Rule 2.12, regarding disqualification;  
5 correct?

6 A. Yes.

7 Q. There -- there, in fact, is a per se rule  
8 concerning when judges must disqualify themselves  
9 when they have taken a prior position or made a  
10 public statement concerning the issue of a case;  
11 correct?

12 THE COURT: Mr. Drake?

13 MR. DRAKE: I object that it's further  
14 irrelevant, Your Honor.

15 THE COURT: You're really pushing the  
16 envelope petition and the relief being requested  
17 here.

18 MR. OESTREICHER: Your Honor, I am -- I am  
19 just trying to highlight that we have an interbranch  
20 dispute.

21 We have the -- the judicial branch, who does  
22 not trust that due process will be afforded to them  
23 by the Legislature, and the Legislature not trusting  
24 that due process will be afforded by the judicial  
25 branch. And in those situations, negotiation and

1 accommodation, as Justice Rice has said, is the  
2 appropriate -- the only appropriate avenue forward.

3 THE COURT: I am going to sustain the  
4 objection.

5 Move on.

6 BY MR. OESTREICHER:

7 Q. Justice Rice, No. 3 on the subpoena,  
8 Exhibit 4. And this -- this specific request is even  
9 more narrowly tailored, as it's requesting items sent  
10 and received by your government e-mail account; isn't  
11 that correct?

12 A. Yes.

13 Q. Okay. And it's seeking e-mails or other  
14 communications, again, the same time period, January  
15 4th through April 14th, regarding business conducted  
16 by the Montana Judge's Association, using the State  
17 resources.

18 Is it appropriate for members of the  
19 judicial branch to conduct business on behalf of a  
20 private third-party entity using state resources?

21 A. Are you equating the Montana Judges  
22 Association with a third-party entity?

23 Q. Yes. It's -- it's not the judicial branch;  
24 correct?

25 A. Well, yeah. I don't know if it's an issue

1 in this proceeding, but the -- the Montana Judge's  
2 Association is also judges who are conducting public  
3 business using state resources. Judges communicate  
4 with each other and -- in regard to many state  
5 issues. So it's -- it's not simply a third-party  
6 reference here.

7 Q. Well, yeah. I -- I would agree with that,  
8 Justice Rice, except the -- I think the specific  
9 reference in the information sought by the subpoena  
10 is specific business conducted by the Montana Judges  
11 Association that tends to invade into the province of  
12 the Legislature and the Legislature's function.

13 Would you agree with that?

14 A. It's -- it's possible. It's arguable.

15 Q. And when the judiciary, or the judicial  
16 branch, conducts -- I mean, conducting a poll on  
17 legislation is what the Legislature does concerning  
18 legislation; isn't that correct?

19 A. Conducting a poll is what the Association  
20 does?

21 MR. OESTREICHER: No. No. I want to back  
22 up and take a look at what the Legislature's function  
23 is in terms of voting up or down on a piece of  
24 legislation.

25 The Legislature conducts polls on

1 legislation to pass it.

2 THE WITNESS: The Legislature conducts  
3 polls?

4 MR. OESTREICHER: They vote.

5 THE WITNESS: They vote. Yes, they do.

6 BY MR. OESTREICHER:

7 Q. Okay. And -- and essentially what the  
8 judiciary, what the judicial branch has done by way  
9 of the Montana's Judges Association is conduct the  
10 same type of function regarding legislation. It's  
11 just judges weighing in and voting; correct?

12 A. I wouldn't say that, no.

13 MR. OESTREICHER: You wouldn't say that.

14 THE WITNESS: I wouldn't equate what the MJA  
15 does to the Legislature voting on the bills.

16 BY MR. OESTREICHER:

17 Q. Okay. The MJA is not voting on bills?

18 A. Well, that wasn't the question. I would say  
19 I wouldn't equate it to what the Legislature does on  
20 voting on bills.

21 Q. Well, it's -- it's very similar, is it not?

22 A. I don't think so.

23 Q. Okay. Justice Rice, counsel for the  
24 Legislature has reached out to you personally prior  
25 to you being represented; correct? Regarding

1 negotiation and accommodation?

2 THE COURT: Hold on.

3 You're in the wrong forum to be addressing  
4 settlement discussions.

5 Let's move on.

6 MR. OESTREICHER: Okay. Thanks, Your Honor.

7 BY MR. OESTREICHER:

8 Q. Justice Rice, you mentioned that the  
9 Legislature did not seek any communications between  
10 you and the Judicial Standards Commission.

11 Do you recall that?

12 A. Correct.

13 Q. Could it not be that the Legislature was  
14 giving deference to your official functions, your  
15 case related -- your official functions and official  
16 communications between that constitutionally created  
17 entity?

18 A. That could be.

19 MR. OESTREICHER: Okay. No further  
20 questions, Your Honor. Thank you.

21 THE COURT: Thank you, sir.

22 Any re-direct?

23 MR. DRAKE: None, Your Honor.

24 THE COURT: Thank you, sir. You may step  
25 down.

1 Mr. Drake, any other witnesses?

2 MR. DRAKE: No -- no, Your Honor.

3 Petitioner rests.

4 THE COURT: Any witnesses for the  
5 Legislature?

6 MR. OESTREICHER: No, Your Honor.

7 THE COURT: All right. Been going about an  
8 hour and half. I am going to give Mr. Nikkel 15  
9 minutes. Should give you time to put your thoughts  
10 down for short summations.

11 Fair enough?

12 MR. DRAKE: Very good. Thank you.

13 MR. OESTREICHER: Thank you, Your Honor.

14 (Proceedings were in recess from 3:29 p.m.  
15 to 3:44 p.m.)

16 THE COURT: We are going to go back on the  
17 record in BDV 2021-451. Justice Rice is present with  
18 counsel. The respondent is present through its  
19 counsel.

20 Mr. Drake, would you like to have any -- and  
21 I say short summations because -- I say this only  
22 because I am needling Justice Rice. He has a  
23 granddaughter who is playing my softball team  
24 tomorrow. I need to get to practice.

25 Mr. Drake?

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## SUMMATION BY MR. DRAKE

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MR. DRAKE: Thank you, Your Honor. And I will be brief, and the Court's free to cut me off. I've got no big message here except to try to help, I guess, slightly with context.

The context I think that's so interesting here where we find ourselves here today is someplace that Courts have almost never found themselves. Legislatures rarely attempt to subpoena another branch of government. I thought it was very interesting. I didn't know that.

Reading the Trump case, which is the U.S. Supreme Court's very recent opinion on this point, that was the first decision in our republic in which a legislature had tried to subpoena the executive branch. It had never been done. And that's a little bit of where we find ourselves today.

THE COURT: Well, let me stop you there. And with all due respect to Justice Rice, let's go to 5-5-101.

MR. DRAKE: Yes.

THE COURT: Where in that statute does it authorize the Legislature to subpoena documents?

MR. DRAKE: It's a good point. It's a very

1 good point. It has been noted elsewhere that the  
2 subpoenas that do not say that a subpoena, so called  
3 duces tecum is, in fact, included within subpoena  
4 power. It is not. And I have no other guidance to  
5 provide to the Court other than that does appear to  
6 be settled law. But if it's not included in subpoena  
7 power, it doesn't exist.

8 Now, we would, of course, have to compare  
9 that somewhat to does the Constitution provide for a  
10 greater subpoena power than the Montana statute does  
11 in Title 5.

12 THE COURT: Well, let me give you an  
13 example.

14 MR. DRAKE: Yes.

15 THE COURT: There is nothing that this Court  
16 could find with respect to the Legislature's power  
17 under the Constitution to subpoena documents.

18 MR. DRAKE: But --

19 THE COURT: We have a constitutional mandate  
20 with respect to the Judicial Standards Commission.  
21 And in subsection 2 of that, it does authorize the  
22 power to subpoena witnesses and documents.

23 MR. DRAKE: Yes. It's an excellent point,  
24 in my view. I wondered the same similar line, which  
25 is, why are we talking about a constitutionally



1 suspect subpoena route when, in fact, we already have  
2 a constitutionally created Judicial Standards  
3 Commission with constitutionally granted power for  
4 this purpose? Kind of brings us back to the sort of  
5 principle that we shouldn't go here if we don't have  
6 to. We clearly don't have to.

7           If their ultimate point, which they have  
8 expressed, is that the Judicial Standards Commission  
9 is implicated here by conduct of the Court, then let  
10 the Judicial Standards Commission go forward on a  
11 constitutional basis, which it has.

12           I think it's an excellent point. I -- I  
13 have wondered the same thing but also had no greater  
14 authority than the Court has already cited.

15           But of course, we do have that authority in  
16 Montana in which the Montana Supreme Court has  
17 recognized that if a subpoena power is not granted in  
18 that case to the Commission on Political Practices,  
19 it doesn't exist.

20           And as much as we may have a divisive world  
21 in terms of Republican and a Democrat, that was our  
22 Montana Supreme Court this last month telling the  
23 Commission on Political Practices that they could not  
24 enforce a subpoena against a Montana Republican Party  
25 because they had no granted subpoena power in their

1 statutes.

2 THE COURT: They can subpoena witnesses, not  
3 documents.

4 MR. DRAKE: Correct. Correct. I may have  
5 overstated that.

6 THE COURT: So from the Court's standpoint,  
7 this is not a case about the constitutionality, and  
8 this Court is not going to address Senate Bill 140.  
9 I am only looking at whether this subpoena is valid.

10 And if it's not valid, do I turn the  
11 temporary injunction to a preliminary injunction and  
12 then we move forward in this, or I vacate the order  
13 issued by this Court and -- and let the documents be  
14 produced? That's the whole issue before us today.

15 Is that agreed to, Mr. Drake?

16 MR. DRAKE: Yes, I agree.

17 THE COURT: Thank you.

18 MR. OESTREICHER: I would agree, Your Honor.

19 THE COURT: All right. I didn't mean to cut  
20 you off.

21 MR. DRAKE: Not at all. I mean, it -- it  
22 actually --

23 THE COURT: His -- his granddaughter is a  
24 very good softball player. That's why I need to get  
25 to practice.

1 MR. DRAKE: Yeah, that's right. Somebody  
2 could be in a box.

3 On your Court -- on the Court's point,  
4 though, maybe I can offer one thing. This is a small  
5 point to me.

6 Title 5, which the Court has already  
7 referenced, the statutes which enable the petitioning  
8 by the Legislature require a certain form. Theirs  
9 does not meet the form. You may have noted that. It  
10 looks like --

11 THE COURT: That is a question that -- that  
12 I have.

13 MR. DRAKE: You know, all I would say is the  
14 subcommittee which -- or the select committee which  
15 has been charged with this now has been budgeted, it  
16 is continuing beyond the Legislature, has already  
17 made clear publicly they are going to issue more  
18 subpoenas. They like this process.

19 So whether this one procedurally is endowed,  
20 which it is, you know, they believe they could issue  
21 another one tomorrow, and we would be right back here  
22 tomorrow. So for that reason, we moved on to other  
23 items here today.

24 With respect to this petition, again, in  
25 particular whether its scope makes sense, I think we

1 should exercise restraint. That is, we branches of  
2 government should exercise restraint. They already  
3 got 5,000 of the Supreme Court branch's e-mails by  
4 essentially serving themselves with the subpoena  
5 without notice to the people whose interests were  
6 actually affected by that. When they found out, they  
7 then issued an order enjoining it, but what  
8 difference did it make? The e-mails were out.

9           The Supreme Court has warned against that,  
10 in Trump, that we should not allow the sidestepping  
11 of a constitutional conflict of this potential by  
12 simply going to a third party that holds the  
13 protected information in getting it there. That's  
14 what happened. That may be a case for another day.  
15 But it certainly makes this subpoena upon Justice  
16 Rice more suspect.

17           They don't need this information. They  
18 don't need to have him sitting up on a weekend,  
19 protecting himself with a petition or paying me here  
20 today to do it.

21           So I will cut it short there. And I  
22 appreciate the Court's attention.

23           THE COURT: Thank you, sir.

24           Counsel?

25           MR. OESTREICHER: Thank you, Your Honor.

1

2

SUMMATION BY MR. OESTREICHER

3

THE COURT: Let's go to my first question.

4

MR. OESTREICHER: Your first question. I --

5

I would point to 5 -- MCA 5-5-105, sub 2. And the

6

statute reads that a witness cannot refuse to testify

7

to any fact or to produce any paper concerning which

8

the witnesses examined for the reason that the

9

witness' testimony --

10

THE COURT: Now, if the Legislature put that

11

in 5-5-105(2), how come it didn't put it in 5-5-101?

12

MR. OESTREICHER: I -- I have no idea, Your

13

Honor. You would have to ask the Legislature.

14

THE COURT: Because doesn't 5-5-101

15

specifically state a subpoena requiring the

16

attendance of any witness before either House of the

17

Legislature or a committee?

18

Attendance is different than production of

19

documents, isn't it, sir?

20

MR. OESTREICHER: And I -- I would tell you,

21

Your Honor, that the -- the subpoenas required the

22

subpoenaed persons to appear at a -- at a time and

23

place certain --

24

THE COURT: Well, let's not get --

25

MR. OESTREICHER: -- and to produce --

1 THE COURT: Let's not get there. My  
2 question goes to the production of documents.

3 MR. OESTREICHER: Correct, Your Honor. And  
4 I would -- I would argue that 5-5-105, sub 2,  
5 contemplates production of documents pursuant to the  
6 legislative subpoena.

7 THE COURT: Now, with respect to  
8 **Commissioner of Political Practice versus Republican**  
9 **Party**, when we construe statutes, you're asking this  
10 Court to insert what has been placed in, and I am  
11 just going to paraphrase, 105-2, to insert that  
12 language into 101, aren't you?

13 MR. OESTREICHER: No, Your Honor. I am -- I  
14 am asking you not to omit what has been inserted in  
15 105-2. The -- the contemplation that documents can  
16 be requested and -- and witnesses cannot fail or  
17 neglect to produce documents requested by a subpoena  
18 issued by the Legislature.

19 THE COURT: Where does it say "requested by  
20 the subpoena" in 105? That exact line: "It's  
21 request by the subpoena"?

22 MR. OESTREICHER: It does not say that exact  
23 language I was paraphrasing, Your Honor. It says --  
24 it says what it says, Your Honor. It says that a  
25 witness cannot refuse to testify to any fact or to

1 produce any paper concerning which the witnesses  
2 examined for the reason that the witness' testimony  
3 or the production of the paper tends to disgrace the  
4 witness or render the witness infamous.

5 THE COURT: All right. Anything else you  
6 would like to say about that issue?

7 MR. OESTREICHER: Your Honor, I think it's  
8 -- it's clear that the Legislature contemplates that  
9 pursuant to a subpoena a witness has immunity for the  
10 documents that they produce and the testimony that  
11 they give. And that's codified here in -- in 105.

12 So it -- the Legislature contemplated being  
13 able to request documents pursuant to legislative  
14 subpoenas.

15 THE COURT: But you would agree on behalf of  
16 your client -- clients 101 does not authorize the  
17 Legislature to request or under a subpoena of  
18 documents?

19 MR. OESTREICHER: I -- I would argue that  
20 105 does. But I would agree that, yes, Your Honor,  
21 101 does not specifically say that the Legislature  
22 can compel production of documents, but I would say  
23 that 105 contemplates that the Legislature can  
24 request documents.

25 THE COURT: And what is your client's

1 position as to the validity of the subpoena as to  
2 compliance with 101?

3 MR. OESTREICHER: That it -- that it  
4 complies.

5 THE COURT: All right. Where in the  
6 subpoena does it indicate whether the proceeding is  
7 before the House of Representatives, the Senate, or  
8 the Committee?

9 MR. OESTREICHER: I -- I think it -- is says  
10 it's issued pursuant to the Senate, the Senate  
11 President, and the Speaker of the House of  
12 Representatives. So I -- I would argue that it's  
13 both.

14 THE COURT: Signed by those two individuals.  
15 Where does it say whether the proceeding is  
16 before the House of Representatives, the Senate, or a  
17 Committee?

18 MR. OESTREICHER: Your Honor, it doesn't.  
19 It doesn't.

20 THE COURT: Thank you.

21 MR. OESTREICHER: No.

22 THE COURT: And that's required under 101;  
23 correct?

24 MR. OESTREICHER: I would have to take a  
25 look at 101, Your Honor, to refresh my recollection.



1 But I believe you.

2 THE COURT: All right. You may continue.

3 MR. OESTREICHER: Okay. Well, before  
4 getting into the -- the merits and the substance of  
5 Justice Rice's petition, I think it's really  
6 important that we set the stage for what this dispute  
7 is really about.

8 Justice Rice's petition was borne out of a  
9 dispute between two co-equal branches of government,  
10 the legislative branch and the judicial branch. And  
11 the nature of this dispute and the parties involved  
12 in this dispute require a different approach to  
13 resolution, and Justice Rice alluded to it earlier.  
14 That -- that resolution that's required in a  
15 situation like this is negotiation and accommodation.

16 THE COURT: 408 precludes (unintelligible)  
17 considered.

18 MR. OESTREICHER: I'm sorry?

19 THE COURT: As I indicated, this is the  
20 wrong forum. 408 precludes me from considering any  
21 negotiations.

22 As I have said many times before,  
23 courthouses were built to resolve disputes. That's  
24 what we're going to do today.

25 MR. OESTREICHER: I -- I understand, Your

1 Honor, but I believe the dispute is a little bit  
2 different in this situation. And -- and if you will  
3 allow me, I would like to explain some additional  
4 federal jurisprudence.

5 THE COURT: Didn't Justice Rice do the right  
6 thing in protecting himself in seeking judicial  
7 relief of the Legislature's subpoenas?

8 MR. OESTREICHER: Your Honor, I -- I  
9 wouldn't necessarily characterize it as doing the  
10 right thing. I think he did what was less wrong in  
11 terms of it was -- it was wrong to issue an order on  
12 his own subpoena, to be a judge in his own case. He  
13 was less wrong to file this petition. But our  
14 position, the Legislature's position, is that the  
15 only pathway forward, the only appropriate one is  
16 through negotiation.

17 And I am not asking the Court to -- to be  
18 the mediator. But I -- I would like to point to  
19 federal case law that states just that, that judicial  
20 adjudication of an interbranch dispute must be a last  
21 resort. And before that occurs, negotiation of  
22 accommodation between the two branches of government,  
23 because they are co-equal, that must occur.

24 THE COURT: What accommodation did the  
25 Legislature give Justice Rice before it issued the

1 subpoena? Zero; correct?

2 MR. OESTREICHER: Well, Your Honor, what --  
3 what accommodation --

4 THE COURT: Just answer the question.

5 MR. OESTREICHER: That's -- that's fine,  
6 Your Honor. And --

7 THE COURT: We have gone through this  
8 calendar --

9 MR. OESTREICHER: Sure.

10 THE COURT: -- and you have identified  
11 dates.

12 At no time, would you agree, that the  
13 Legislature gave Justice Rice any advance notice what  
14 it was going to do? It simply put pen to paper,  
15 issued a -- what -- a suspect subpoena, and said,  
16 "You have certain amount of days to produce these  
17 documents and appear"; correct?

18 MR. OESTREICHER: I don't know if I would  
19 characterize it that way, but -- but, yes, the issue  
20 to subpoena to -- to all of the Supreme Court  
21 justices and the Court Administrator, requesting  
22 public records, yes, Your Honor.

23 THE COURT: All right. So what  
24 accommodation that you are seeking for did you give  
25 Justice Rice, if your clients give Justice Rice?

1           MR. OESTREICHER: Your Honor, I think the  
2 accommodation comes after the dispute. And -- and  
3 with all due respect, the Legislature is more than  
4 willing to negotiate and accommodate and resolve this  
5 dispute with -- with the co-equal branch of  
6 government.

7           THE COURT: If the Legislature believes that  
8 a justice of the Montana Supreme Court or a district  
9 judge has violated a code of conduct, a Judicial Code  
10 of Conduct, its obligation is to do what?

11           MR. OESTREICHER: Well, there -- there's  
12 multiple obligations there, Your Honor. The  
13 Legislature could file complaints with the Judicial  
14 Standards Commission.

15           THE COURT: That's the only obligation.  
16 Because under this -- even under the Constitution,  
17 the Judicial Standards Commission has the right to  
18 subpoena witnesses and documents.

19           MR. OESTREICHER: And -- and --

20           THE COURT: And it's a confidential  
21 proceeding, isn't it?

22           MR. OESTREICHER: Yes, but --

23           THE COURT: Okay. So what gives the  
24 Legislature the right to do something other than any  
25 individual on the street, a client, an attorney who

1 has a dispute with a judge?

2 MR. OESTREICHER: I -- I would argue, Your  
3 Honor, that the Legislature seeking public records --  
4 this -- this doesn't mean protected or  
5 confidential --

6 THE COURT: That's not my question.

7 What gives it the right to do something  
8 other than the normal person has the right to do?

9 MR. OESTREICHER: I think they -- I think  
10 they are doing what a normal person has the right to  
11 do by seeking these public records, Your Honor,  
12 respectfully.

13 THE COURT: Isn't that the avenue for relief  
14 when someone has a complaint about a member of the  
15 judiciary? And that's constitutional.

16 MR. OESTREICHER: Yes. But, Your Honor, I  
17 don't think we're framing it correctly because this  
18 isn't the Legislature making a complaint about a  
19 judge or a justice.

20 THE COURT: It's doing its own investigation  
21 --

22 MR. OESTREICHER: This is --

23 THE COURT: -- when the Judicial Standards  
24 Commission should be doing the investigation;  
25 correct?

1           MR. OESTREICHER: That is an avenue, but  
2 it's not the only avenue available to the  
3 Legislature. The Legislature is pursuing valid  
4 legislative purposes and considering whether or not  
5 to enact policy. That's what The Legislature does.  
6 It doesn't cease to exist after -- after sine die.  
7 The Legislature continues in the interim. The  
8 Legislature is a co-equal branch of government with  
9 its own inherent powers, and it has the power compel  
10 attendance and testimony and the production of  
11 documents.

12           The Legislature very well could do what the  
13 ordinary citizen might do if they wanted public  
14 records held by a branch of government. The  
15 Legislature could submit a public records request for  
16 this information. It could.

17           THE COURT: Let's take that step.

18           When does the public records request?

19           MR. OESTREICHER: Public records request.

20           THE COURT: Would, for example, Justice Rice  
21 get a copy that public records request?

22           MR. OESTREICHER: Potentially. I -- I don't  
23 know, Your Honor. The internal process is for the  
24 judicial branch. I would assume that the Court  
25 Administrator would receive that public records

1 request.

2 THE COURT: And doesn't Justice Rice, in  
3 that example, if he thinks there is -- there are  
4 privileged or confidential communications to come to  
5 district court and try to limit the production under  
6 that request?

7 MR. OESTREICHER: Not necessarily, Your  
8 Honor. In -- in the context of a public records  
9 request, typically the -- the agency that is  
10 producing will make an internal review of their own  
11 documents, and they will determine whether or not  
12 something is protected and confidential. And if  
13 something is protected and confidential, they will  
14 redact that portion. But they will nonetheless  
15 produce the whole document with the redacted portions  
16 included.

17 If the requesting party wants to see what  
18 was hidden behind that redaction, then they would  
19 bring in action to district court to say, "This isn't  
20 private," or "This shouldn't be confidential, and we  
21 should be allowed to see that information."

22 THE COURT: So you are saying in this  
23 example that, "Let's just take the subpoena issue to  
24 Justice Rice," that he doesn't get the opportunity to  
25 review the documents, he just produces them, and then

1 the Legislature is the gatekeeper, according to Miss  
2 Hansen's letter, will determine what's confidential  
3 and what's not confidential --

4 MR. OESTREICHER: No.

5 THE COURT: -- correct?

6 MR. OESTREICHER: No, Your Honor. I -- I --

7 THE COURT: Isn't that what she says?

8 MR. OESTREICHER: That may be what Miss  
9 Hansen is -- is saying. The document speaks for  
10 itself. It says what it says.

11 But what I am here saying on behalf of the  
12 Legislature is that these minor issues over whether  
13 or not -- we don't want text messages between Justice  
14 Rice and his daughter over new gun legislation.  
15 That's -- that's not what the Legislature is after.

16 THE COURT: Let's look at the subpoena.

17 Didn't she request all personal information?  
18 Text from his work and his personal phone?

19 MR. OESTREICHER: Regarding legislation, we  
20 requested any and all communications on his work or  
21 personal phone concerning pending legislation. But  
22 that's -- that's why these interbranch disputes,  
23 that's why the Trump v. Mazars and the Valley Forge  
24 Christian College versus Americans United for  
25 Separation of Church and State, that's 454 U.S. 464,



1 that's why the Supreme Court jurisprudence says when  
2 you have a dispute between these two co-equal  
3 branches, you've got to negotiate, you've got to  
4 accommodate, you've got to come to the table.

5           And these types of things can be resolved  
6 over the course of an afternoon. Justice Rice can  
7 ask, "You really want the text messages between me  
8 and my daughter?" The Legislature doesn't.

9           No, we don't, Justice Rice.

10           On your official state e-mail, have you made  
11 statements about pending legislation? Have you  
12 received statements from other judges about pending  
13 legislation that might affect their ability to  
14 preside over a challenge of that legislation? These  
15 are the things that are -- that have been brought to  
16 light over the course of a past month and a half and  
17 have concerned the Legislature, enough to form a  
18 special committee and -- and carry on this  
19 investigation through the interim.

20           Only after all other avenues have been  
21 exhausted is judicial review appropriate. The  
22 parties have to arrive at an impasse. That comes  
23 from -- from federal case law. That comes from  
24 **Commission on Judiciary of the United States House of**  
25 **Representatives versus McGahn** [SIC], a D.C. circuit

1 case, 968 F.3d 755. Judicial review is premature and  
2 inappropriate at this point. This interbranch  
3 dispute has to be resolved a different way.

4           And there is additional reasons for that  
5 Your Honor. There is the doctrine of prudential  
6 standing. The Montana Supreme Court has recognized  
7 that prudential standing is a form of judicial  
8 self-governance that discretionarily limits the  
9 exercise of judicial authority consistent with the  
10 separation of powers. That's from **Bullock v. Fox,**  
11 2019 MT 50. Prudential standing holds that Courts  
12 generally should not adjudicate matters more  
13 appropriately in the domain of the legislative or  
14 executive branches.

15           Another consideration is separation of  
16 powers. The principles of separation of powers  
17 prevent one branch of government from hearing and  
18 arbitrating its own dispute with another branch of  
19 government. And that comes from **Commission on**  
20 **Political Practices versus the Republican Party**  
21 [SIC], 2021 MT 99. There are -- there are due  
22 process concerns, Your Honor. Due process guarantees  
23 a fair trial to both sides.

24           Another fundamental requirement of due  
25 process holds that no man is allowed to be a judge in

1 his own case. Now, we have talked about Justice Rice  
2 was complimented by the Legislature and their  
3 committee on judicial transparency and accountability  
4 because he brought this petition to district court.  
5 We talked about it. I wouldn't say that it was the  
6 right thing to do. I think it was less wrong. The  
7 appropriate thing to do is to sit down and negotiate.

8           With all this framework in mind, Your Honor,  
9 I think we also need to properly understand the scope  
10 of the subpoena. And that -- that scope can and  
11 should be resolved if there is any dispute as to  
12 whether or not it applies to personal text messages  
13 exchanged between Justice Rice and his daughter. If  
14 there is any confusion about that, the Legislature  
15 does not want that type of information.

16           THE COURT: But according to Miss Hansen,  
17 she will be the one who decides what's in and what's  
18 out.

19           She's the gatekeeper; correct?

20           MR. OESTREICHER: Your Honor, I think that's  
21 on the table in negotiation with Justice Rice. We  
22 are certainly willing to make those types of  
23 accommodations to make sure that this gets resolved.

24           On behalf of the Legislature, I can tell you  
25 that the subpoena itself is -- is -- we've gone over

1 this. It's seeking communications, results, and  
2 responses related to polls sent to members of the  
3 judiciary by the Court Administrator, Beth  
4 McLaughlin, in a four-month date range, January 4th  
5 through April 14th.

6 When you compare that to public records  
7 requests that are received by State agencies weekly,  
8 very often, public records requests often request  
9 information spanning years. Years. This is the span  
10 of a few months. This is not onerous. And -- and we  
11 talked about the Department of Administration being  
12 able to produce 5,000 e-mails very quickly.

13 I am sure that the judicial branch's IT  
14 department can conduct a -- a relevant search based  
15 on factors that we can agree to.

16 THE COURT: You're not talking about the  
17 judicial branch here in this case. We are talking  
18 about Justice Rice.

19 MR. OESTREICHER: I think we are talking  
20 about the judicial branch, Your Honor. I  
21 think that's --

22 THE COURT: The subpoena was issued to  
23 Justice Rice.

24 MR. OESTREICHER: The subpoena -- we --  
25 there were multiple issues -- or, subpoenas issued.

1           THE COURT: I am aware of that. But I am  
2 only dealing with one.

3           MR. OESTREICHER: Well, I -- I think this  
4 dispute is much bigger than just one Supreme Court  
5 justice. It's the Legislature on one side and the  
6 judicial branch on the other, two --

7           THE COURT: Has the executive branch given  
8 the legislative branch the e-mails?

9           MR. OESTREICHER: At -- at one point, yes,  
10 Your Honor, and then refusing to do so at another  
11 point. So we -- we have all three branches of  
12 government in -- in a sort of Mexican standoff.

13           It's an extraordinary circumstance that --  
14 that calls for a different way of resolving the  
15 dispute than through judicial adjudication for all  
16 the reasons we -- we talked about; prudential  
17 standing, separation of powers, due process. The  
18 judicial branch shouldn't sit and resolve a dispute  
19 involving the judicial branch.

20           I would like to address some of the  
21 arguments made by Justice Rice, and then I'll -- I'll  
22 be finished, Your Honor, because I know you got a  
23 softball game and --

24           THE COURT: No. We got -- it's pregame  
25 before we play the Bengals.

1 No offense, Justice Rice.

2 MR. OESTREICHER: I -- I was more of a  
3 basketball person myself, but --

4 Justice Rice cites to -- to Montana case  
5 Coate v. Omholt. That's 203 Mont 488. And he argues  
6 that the scope of legislative subpoenas are narrowed  
7 when dealing with the judicial branch.

8 He implies that the Legislature cannot  
9 direct, control, or impede the judicial branch by  
10 issuing a subpoena, and we agree. The Legislature is  
11 not threatening to direct, control, or impede the  
12 judiciary or Justice Rice by issuing a subpoena. The  
13 Legislature is seeking public records. These are  
14 public records, Your Honor, exchanged over State  
15 resources or public records exchanged using a  
16 personal communication device.

17 Your Honor, if I discuss work on my personal  
18 cell phone, that's a public record.

19 THE COURT: But you have a privilege.

20 MR. OESTREICHER: Potentially, if it's --

21 THE COURT: A couple of them.

22 MR. OESTREICHER: -- if it's related to --  
23 potentially. But those -- those privileges can be  
24 raised and addressed through negotiation and  
25 accommodation, and the Legislature is more than

1 willing, again, to negotiate and accommodate with  
2 Justice Rice and any other member of the judiciary.

3 THE COURT: But if it happened to you, sir,  
4 you get to file a privilege log, send it to a  
5 district judge, and the judge will decide if it's  
6 work product, ordinary or opinion, or  
7 attorney-client.

8 MR. OESTREICHER: Absolutely. And that's --

9 THE COURT: But you don't have Justice Rice,  
10 let's for example he issued that request, be the  
11 gatekeeper and say, "I will decide what's privileged  
12 and not privileged."

13 MR. OESTREICHER: Sure. And I -- I think  
14 that's an avenue that -- that can be negotiated, and  
15 that's an accommodation that the Legislature might be  
16 willing to entertain.

17 Justice Rice also cites to a Connecticut  
18 case, a *Sullivan v. McDonald*, and that's  
19 2006 Conn. Super. Lexis 2073, and that holds that the  
20 Legislature cannot compel testimony or information  
21 related to a judge's official duties or the  
22 performance of judicial functions.

23 Now, unlike that case, the Legislature here  
24 is not seeking information related to official  
25 duties, official functions of judges or justices.

1 The polls conducted by Supreme Court Administrator  
2 Beth McLaughlin using state resources are not a part  
3 of a Supreme Court Justice's official duties. It's  
4 not the official duty of any judge or justice to  
5 opine on the constitutionality of pending legislation  
6 using their state e-mail before that legislation is  
7 even passed.

8 Exchanging those state e-mails creates a  
9 public record. Those are then public statements,  
10 public statements that can be used against a judge or  
11 a justice to recuse them. Public statements that  
12 call into question why a judge would --

13 THE COURT: But isn't that why we have the  
14 Judicial Standards Commission?

15 MR. OESTREICHER: I think it's why we have  
16 the Judicial Code of Conduct and the Judicial  
17 Standards Commission, and I think it's why we have  
18 the Legislature as a check and balance on a another  
19 co-equal branch of government.

20 The last point I will make on the cases  
21 here, Your Honor, Justice Rice cites to the **Trump**  
22 case, which we have talked about, but that case  
23 actually lends way to our position on negotiation and  
24 accommodation.

25 In that case, the Supreme Court did not



1 strike down the legislative subpoena at issue. The  
2 Court cautioned the lower Court that interbranch  
3 disputes raise special considerations that must be  
4 taken into account, like separation of powers, due  
5 process, but the Court recognized that the most  
6 appropriate resolution for interbranch disputes is  
7 negotiation and accommodation.

8 I know I have repeated that over and over,  
9 but that's -- that's the avenue that we need to head  
10 down.

11 THE COURT: That's the avenue the  
12 Legislature would like.

13 MR. OESTREICHER: That's -- that's the most  
14 appropriate avenue based on Supreme Court precedent,  
15 Your Honor. That is the avenue for an interbranch  
16 dispute.

17 And I would also note that in the Trump  
18 case, the legislative subpoena was seeking private  
19 bank records of the President. Private bank records.  
20 Here, the Legislature is seeking public records.  
21 Public records.

22 I -- I got to point out Justice Rice, in the  
23 Krakauer case, said, "People need to know what their  
24 institutions are up to." That's what the Legislature  
25 is trying to do. They are seeking public records,

1 public information through this legislative subpoena.

2           And if there is any dispute or issue with  
3 the scope of that subpoena, the Legislature stands  
4 ready to negotiate with any member of the judicial  
5 branch and curtail the scope of the subpoena to make  
6 sure that privacy interests and privacy concerns are  
7 addressed properly. The Legislature doesn't need to  
8 be the gatekeeper of what's private and protected,  
9 and we are certainly willing to work with the  
10 judicial branch to accomplish a resolution.

11           And I point out, we alluded to it in  
12 testimony, the Legislature did not seek  
13 communications between Justice Rice, or any of the  
14 justices, and the Judicial Standard Commission. And  
15 there is a reason for that. The Legislature didn't  
16 seek those types of communications because they are  
17 part of the official function of the -- the justices,  
18 because they are part of the official duties of  
19 judges and justices. That -- that is something that  
20 the Sullivan case in -- in Connecticut, you know,  
21 holds. Legislative subpoenas can't get that type of  
22 information, and that's not the type of information  
23 sought by the Legislature subpoena here.

24           THE COURT: So do you believe that  
25 subsections 1, 2, and 3 of the document request

1 relate to the second full paragraph that starts,  
2 "This request pertains to the Legislature's  
3 investigation," et cetera? I call it "the purpose  
4 clause."

5 MR. OESTREICHER: Okay. Yes. These are  
6 valid legislative purposes, Your Honor. And they  
7 have been --

8 THE COURT: But do you believe the documents  
9 requested fall within the category of the, what I  
10 would generally clarify as -- classify as the purpose  
11 clause of a subpoena?

12 MR. OESTREICHER: Absolutely.

13 THE COURT: Issued by --

14 MR. OESTREICHER: Absolutely, Your Honor,  
15 yes. I -- I believe they fall within that. But, you  
16 know, the Legislature hasn't seen the documents.  
17 Justice Rice certainly has, and -- and that's part of  
18 that negotiation and accommodation process.

19 If Justice Rice says, "Look. It appears  
20 that these documents over here in this pile might be  
21 responsive, but I don't think it -- it goes to any  
22 one of your express purposes," the Legislature can  
23 say, "You know what? You're probably right. The  
24 text messages between you and your daughter we don't  
25 need." That's part of the reason why these

1 interbranch disputes need to be resolved in a special  
2 way.

3 Yes, I do think all three of these types of  
4 information sought by the Legislature tie back to the  
5 legislative purposes expressed by the Legislature.

6 And the Legislature, again, it doesn't just  
7 come into existence and then fall out of existence.  
8 It's just -- it's not a 90-day entity. It continues  
9 in force. It doesn't disappear. During the interim,  
10 the Legislature is working on policy. And it -- it's  
11 looking at the judicial branch, and that may be  
12 uncomfortable. But the Legislature is more than  
13 willing to negotiate and accommodate so that privacy  
14 and confidentiality concerns are addressed.

15 So the last thing I will say here is -- is  
16 Justice Rice urges the Court to conclude that the  
17 subpoena has been issued for some sort of improper  
18 purpose. And he bases that assertion on two mistaken  
19 points:

20 One, that the Legislature doesn't have a  
21 valid purpose. The Legislature has multiple valid  
22 purposes.

23 And, two, he states, essentially, that the  
24 Legislature cannot make law right now because they  
25 are -- they are not in town, they are not in session.

1           Again, that's -- that's a false premise.  
2   The Legislature continues in force. They can  
3   investigate and have hearings and interim committees  
4   when not in session.

5           THE COURT: So long as it's in accordance  
6   with the law.

7           MR. OESTREICHER: Correct. Correct. But  
8   the Legislature has expressed a multitude of valid  
9   legislative purposes for its investigation, and these  
10   purposes do, in fact, concern subjects on which  
11   legislation could be had. Without question, the  
12   Legislature can enact policy and legislation next  
13   session based on what their committee on judicial  
14   transparency and accountability concludes or  
15   recommends and based on all the other interim  
16   committees that are working during the interim.

17           So with that, Your Honor, we would request  
18   at the very least a stay of this proceeding so that  
19   negotiation and accommodation can be had. The  
20   Legislature is more than willing to sit down with  
21   Justice Rice to resolve this. And, frankly, it can  
22   be done over the course of an afternoon, potentially  
23   in less time than we have been here in this hearing.  
24   This can be resolved and should be resolved through  
25   negotiation and accommodation.

1           And I -- I would just leave one last point,  
2   that the federal case law dealing with interbranch  
3   disputes is -- is all related to executive and  
4   legislative disputes, where the judiciary is stepping  
5   back and saying, "You two other branches of  
6   government need to sit down, negotiate, and  
7   accommodate."

8           It's never been the situation with the  
9   judicial branch is actually a part of the dispute,  
10   and that's what we have here. So these concerns are  
11   even more heightened in this case. If the judicial  
12   branch is saying in a -- in a dispute between two  
13   other branches of government at the federal level  
14   that "you need to sit down, negotiate, and  
15   accommodate and work this out," it's even more  
16   important to do so in this scenario where the  
17   judicial branch is that other branch of government  
18   involved in the dispute.

19           THE COURT: Thank you, sir.

20           MR. OESTREICHER: Thank you.

21           THE COURT: Mr. Drake, you get the last  
22   word.

23           MR. DRAKE: One last word, if I may, Your  
24   Honor?

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FINAL SUMMATION BY MR. DRAKE

MR. DRAKE: The point that what should happen is negotiation and accommodation and nice words like that, and that Justice Rice jumps the gun by coming to court, he should have never petitioned so quickly, he did the least bad thing, as they put it, they served Justice Rice on Thursday, April 15th, with a subpoena that required him to be before the Legislature the following Monday by 3:00 p.m., or he could risk arrest power from the Legislature.

These are the people that now want to tell us what we should have done is negotiate. Instead, he had to spend the weekend writing the subpoena that they now say he jumped the gun with.

That's all I have. Thank you.

THE COURT: Thank you. Well done. I will get an order out as soon as possible.

(The proceedings concluded at 4:22 p.m.)

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REPORTER'S CERTIFICATE

I, Mark Nikkel, an Official Court Reporter,  
residing in the City of East Helena, State of  
Montana, hereby certify:

That prior to being examined, the witnesses  
named in the foregoing proceeding were sworn to  
testify to the truth, the whole truth, and nothing  
but the truth;

That the said proceeding, taken down by me  
in stenotype, was thereafter reduced to typewriting  
by computer-aided transcription under my direction  
and is a true record of the testimony given.

I further certify that I am not in any way  
interested in the outcome of this action and that I  
am not related to any of the parties thereto.

Witness my hand this 15th day of  
June 2021.

/s/ Mark Nikkel