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MAY 18 2021

ANGIE SPARKS, Clerk of District Court
By **K. KRESGE**, Deputy Clerk

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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

<p>JUSTICE JIM RICE, Petitioner, v. THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Representative Wylie Galt, Speaker of the House of Representatives, Respondents.</p>	<p>Cause No.: BDV-2021-451 PRELIMINARY INJUNCTION ORDER</p>
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On May 10, 2021, a Show Cause hearing was held to determine whether this Court's April 19, 2021 Order temporarily enjoining the Montana State Legislature's (Legislature) April 15, 2021 Subpoena issued to Justice James A. Rice (Justice Rice) should be modified to a preliminary injunction or vacated. At the hearing, Justice Rice appeared with his counsel, Curt Drake.

1 Senator Mark Blasdel and Representative Wylie Galt appeared via their
2 Department of Justice attorney, Derek Oestreicher.

3 Justice Rice was sworn, testified, and was cross-examined. In
4 addition, Exhibits 1-8 were admitted. Thereafter, counsel made summation
5 arguments.

6 MATERIAL FACTUAL BACKGROUND¹

7 The Honorable Jim Rice has been a Montana Supreme Court
8 Justice for over twenty years.

9 On March 16, 2021, Governor Gianforte signed SB 140. It
10 provided, among other things, the governor direct judicial appointment power
11 and abolished the Montana Judicial Nomination Commission.

12 On March 17, 2021, *Brown et al. v. Gianforte*, OP 21-0125, was
13 filed as an original proceeding with the Montana Supreme Court challenging
14 SB 140. In that proceeding, Governor Gianforte, represented by the Justice
15 Department, raised concerns about a Montana Judges Association email-based
16 poll relative to SB 140 before the Legislature passed the bill and sent it to
17 Governor Gianforte.

18 On April 8, 2021, the Legislature, outside of the *Brown*
19 proceeding, issued a subpoena to the Montana Department of Administration
20 (DOA) requiring production on April 9, 2021 of “[a]ll emails and attachments
21 sent and received” by the Court Administration for the Judicial Branch, between
22 January 4, 2021 and April 8, 2021. The Judicial Branch was not notified of the
23 subpoena. In response, the DOA timely produced “over 5,000 emails to the
24 Legislature. (Hearing Ex. 7, K. Hansen Declaration.) Thereafter, the Court

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¹ For additional background, please see *McLaughlin v. The Montana Legislature et al.*, 2021 MT 120-1, ¶¶ 2-7.

1 Administrator sought judicial relief from the Montana Supreme Court in the
2 *Brown* proceeding.

3 On April 11, 2021, the Montana Supreme Court temporarily
4 quashed the Legislature's subpoena issued to the DOA.

5 On April 12, 2021, Ms. Hansen, in her capacity as Montana
6 Department of Justice Lieutenant General and on behalf of the Legislature, wrote
7 to Justice Rice and indicated, in relevant part, that:

8 The Legislative power is broad. In fulfilling its constitutional role,
9 the Legislature's subpoena power is similarly broad. The questions
10 the Legislature seeks to be informed on through the instant subpoena
11 directly addresses whether members of the Judiciary and the Court
12 Administrator have deleted public records and information in
13 violation of state law and policy; whether the Court Administrator
14 has performed tasks for the Montana Judges Association during
15 taxpayer funded worktime in violation of state law and policy; and
16 whether current policies and processes of the Judicial Standards
Commission are sufficient to address the serious nature of polling
members of the Judiciary to prejudge legislation and issues which
have come and will come before the court for decision.

• • •

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

23 On April 15, 2021, Senator Blasdel and Representative Galt signed
24 a Subpoena for Justice Rice to appear before it on April 19, 2021 and produce:

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- 1 (1) Any and all communications, results, or responses, related to any and
2 all polls sent to members of the Judiciary by Court Administrator Beth
3 McLaughlin between January 4, 2021, and April 14, 2021; including
4 emails and attachments sent and received by your government e-mail
5 account, [redacted email address], delivered as hard copies and .pst
6 digital files; as well as text messages, phone messages, and phone logs
7 sent or received by your personal or work phones; and any notes or
8 records of conferences of the Justices regarding the same.
- 9 (2) Any and all emails or other communications between January 4, 2021
10 and April 14, 2021 regarding legislation pending before, or potentially
11 pending before the 2021 Montana Legislature; including emails and
12 attachments sent and received by your government e-mail account,
13 [redacted email address], delivered as hard copies and .pst digital files;
14 as well as text messages, phone messages, and phone logs sent or
15 received by your personal or work phones; and any notes or records of
16 conferences of the Justices regarding the same.
- 17 (3) Any and all emails or other communications between January 4, 2021
18 and April 14, 2021 regarding business conducted by the Montana
19 Judges Association using state resources, including emails and
20 attachments sent and received by your government e-mail account,
21 [redacted email address], delivered as hard copies and .pst digital files;
22 as well as text messages, phone messages, and phone logs sent or
23 received by your personal or work phones; and any notes or records of
24 conferences of the Justices regarding the same.

18 The Subpoena indicated, in relevant part, that:

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

24 ////

25 ////

1 The Department of Justice will continue to represent the legislature
2 as it carries out its necessary investigation of potential judicial
3 misconduct. The Supreme Court justices must also act to restore the
4 public's confidence. Fully cooperating with the investigation instead
5 of taking extraordinary measures to hide public documents would be
6 (sic) good place for them to start.

7 What has been happening behind closed doors at the Supreme Court
8 is ugly: Violations of our judicial codes of conduct, potential
9 violations of the law, and a pattern of corruption. The Supreme
10 Court justices and staff are scrambling to cover this up. The first
11 step toward cleaning up our legal and judicial culture is more
12 transparency and less of the self-policing that has enabled the current
13 system to spiral out of control.

14 (Hearing Ex. 8.)

15 DISCUSSION

16 A. Preliminary Injunction Standard

17 A district court may issue a preliminary injunction in any of the
18 following cases:

19 (1) when it appears that the applicant is entitled to the
20 relief demanded and the relief or any part of the relief consists in
21 restraining the commission or continuance of the act complained
22 of, either for a limited period or perpetually;

23 (2) when it appears that the commission or continuance of
24 some act during the litigation would produce a great or irreparable
25 injury to the applicant;

(3) when it appears during the litigation that the adverse
party is doing or threatens or is about to do or is procuring or
suffering to be done some act in violation of the applicant's rights,
respecting the subject of the action, and tending to render the
judgment ineffectual;

(4) when it appears that the adverse party, during the
pendency of the action, threatens or is about to remove or to dispose
of the adverse party's property with intent to defraud the applicant,

1 an injunction order may be granted to restrain the removal or
2 disposition; [or]

3 (5) when it appears that the applicant has applied for an order
4 under the provisions of [Section] 40-4-121 or an order of protection
5 under Title 40, chapter 15.

6 Mont. Code Ann. § 27-19-201 (2019).

7 Justice Rice only needs to meet the criteria in one of these subsections
8 for a preliminary injunction order. *Sweet Grass Farms, Ltd. v. Bd. of Co.*
9 *Comm'rs*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825. A preliminary
10 injunction does not resolve the merits of the case, but rather prevents further
11 injury or irreparable harm by preserving the status quo of the subject in
12 controversy pending adjudication on its merits. *See Four Rivers Seed Co. v.*
13 *Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342 (citing
14 *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995)). When
15 considering an application for a preliminary injunction, a district court has the
16 duty to balance the equities and minimize potential damage. *Id.* It is error for a
17 district court to determine the ultimate merits of the case at the preliminary
18 injunction stage.

19 In determining the merits of a preliminary injunction, it is not the
20 province of either the District Court or this Court on appeal to
21 determine finally matters that may arise upon a trial on the merits.
22 The limited function of a preliminary injunction is to preserve the
23 *status quo* and to minimize the harm to all parties pending full trial;
24 findings and conclusions directed toward the resolution of the
25 ultimate issues are properly reserved for trial on the merits. In
determining whether to grant a preliminary injunction, a court should
not anticipate the ultimate determination of the issues involved, but
should decide merely whether a sufficient case has been made out to
warrant the preservation of the *status quo* until trial. A preliminary

1 injunction does not determine the merits of the case, but rather,
2 prevents further injury or irreparable harm by preserving the *status*
3 *quo* of the subject in controversy pending an adjudication on the
merits.

4 *Yockey v. Kearns Props., LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185.
5 (citations omitted).

6 “Section 27-19-201(1), MCA, provides that a preliminary injunction
7 may issue when an applicant has demonstrated that he is entitled to the injunctive
8 relief he has requested. To prevail under Section 27-19-201(1), MCA, an
9 applicant must establish that he has a legitimate cause of action, and that he is
10 likely to succeed on the merits of that claim.” *Cole v. St. James Healthcare*,
11 2008 MT 453, ¶ 15, 348 Mont. 68, 72, 199 P.3d 810, 814 (citing *Benefis*
12 *Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 22, 334 Mont. 86, 146
13 P.3d 714; *M.H. v. Mont. High Sch. Assn.*, 280 Mont. 123, 135, 929 P.2d 239
14 (1996)).

15 **B. Justice Rice is Entitled to a Preliminary Injunction**

16 **Legislature’s Subpoena Power**

17 (1) A subpoena requiring the attendance of any witness before
18 either house of the legislature or a committee of either house may be
19 issued by the president of the senate, the speaker of the house, or the
presiding officer of any committee before whom the attendance of
20 the witness is desired.

21 (2) A subpoena is sufficient if:

22 (a) it states whether the proceeding is before the house of
representatives, the senate, or a committee;

23 (b) it is addressed to the witness;

24 (c) it requires the attendance of the witness at a time and place
certain;

25 //

1 (d) it is signed by the president of the senate, speaker of the house,
2 or presiding officer of a committee.

3 Mont. Code Ann. § 5-5-101 (2019).

4 (1) A person sworn and examined before either house of the
5 legislature or any committee of the legislature may not be held to
6 answer criminally or be subject to any penalty or forfeiture for any
7 fact or act relating to the required testimony. A statement made or
8 paper produced by the witness is not competent evidence in any
9 criminal proceeding against the witness.

10 (2) A witness cannot refuse to testify to any fact or to produce any
11 paper concerning which the witness is examined for the reason that
12 the witness's testimony or the production of the paper tends to
13 disgrace the witness or render the witness infamous.

14 (3) This section does not exempt a witness from prosecution and
15 punishment for perjury committed by the witness during the
16 examination.

17 Mont. Code Ann. § 5-5-105 (2019).

18 "In the construction of a statute, the office of the judge is simply to
19 ascertain and declare what is in terms or in substance contained therein, not to
20 insert what has been omitted or to omit what has been inserted." Mont. Code
21 Ann. § 1-2-101 (2019). "It is not [a court's] prerogative to read into a statute
22 what is not there." *Bates v. Neva*, 2014 MT 336, ¶ 13, 377 Mont. 350, 339 P.3d
23 1265. "We construe statutes 'according to the plain meaning' of their language."
24 *Comm'r of Political Practices for Mont. v. Montana Republican Party*, 2021 MT
25 99, ¶ 7, 404 Mont. 80, ___ P.3d ___ (citing *Comm'r of Political Practices for
Mont. v. Wittich*, 2017 MT 210, ¶ 19, 388 Mont. 347, 400 P.3d 735 (quoting
Fellows v. Saylor, 2016 MT 45, ¶ 21, 382 Mont. 298, 367 P.3d 732)). "[A] court
may not create an ambiguity where none exists, [or] ignor[e] clear and
unambiguous language to accomplish a 'good purpose.'" *Heggem v. Capitol*

1 *Indem. Corp.*, 2007 MT 74, ¶ 22, 336 Mont. 429, 154 P.3d 1189. “‘Law’ is a
2 solemn expression of the will of the supreme power of the state.” Mont. Code
3 Ann. § 1-1-101 (2019). “The will of the supreme power is expressed by: (1) the
4 constitution; (2) statutes.” Mont. Code Ann. § 1-1-102 (2019).

5 The Legislature’s April 15, 2021 Subpoena to Justice Rice does
6 not, as its counsel conceded, state “whether the proceeding is before the house of
7 representatives, the senate, or a committee.” Mont. Code Ann. § 5-5-101 (2)(a)
8 (2019). Moreover, it appears that the Legislature may not have the power to
9 subpoena documents under Mont. Code Ann. § 5-5-101 (1) (2019). While it
10 certainly has the power to subpoena Judge Rice’s attendance “before either house
11 of the legislature or a committee of either house,” it appears there is no such
12 corresponding Legislative statutory document subpoena power. See, e.g.,
13 *Republican Party*, ¶ 9.

14 At the hearing, the Legislature argued such power is found in
15 Mont. Code Ann. § 5-5-105 (2). In this regard, it appears the Legislature wants
16 this Court to insert what the Legislature omitted in section 5-5-101(1) to broaden
17 its investigatory authority. Respectfully, this Court declines the Legislature’s
18 apparent improper statutory construction invitation. The word “subpoena” does
19 not appear in Mont. Code Ann. § 5-5-105. Moreover, the Legislature’s authority
20 is not boundless. It is subject to judicial oversight, particularly when those it
21 investigates are potentially subjected to unlawful document subpoena oppression.
22 Such judicial oversight involves the balance of powers between the judicial
23 branch and the legislative branch as well as the executive branch. The
24 Legislature should not be allowed to circumvent its own implemented legislative
25 safeguards by possible overreaching conduct not statutorily authorized.

1 For purposes of Justice Rice’s preliminary injunction request, this
2 Court shall not insert Mont. Code Ann. §§ 5-5-105(1) or 5-5-105(2)’s “paper
3 produced” or “produce any paper” into Mont. Code Ann. § 5-5-105(1). The same
4 is true in that this Court will not insert the word “subpoena” found in section 5-5-
5 101(1) into either section 5-5-105(1) or section 5-5-105(2). At this juncture in
6 the proceeding, the Court has found no constitutional or statutory support for the
7 Legislature’s power to subpoena documents directed at those it subpoenas to
8 appear before either house or a committee.

9 **Legislature’s Investigatory Power**

10 The Montana Constitution provides for a Legislature consisting of
11 a Senate and House of Representatives and invests it with “legislative power.”
12 Art. V, sec. 1, Mont. Const. Since 1876, Montana legislative power has
13 encompassed “all rightful subjects of legislation.” *United States v. Ensign*, 2
14 Mont. 396, 400 (1876). Approximately fifty years later, the United States
15 Supreme Court considered whether legislative power included investigative
16 authority. *McGrain v. Daugherty*, 273 U.S. 135 (1927). The *McGrain* Court
17 stated:

18 [T]he power of inquiry -- with process to enforce it --is an essential
19 and appropriate auxiliary to the legislative function. . . . [I]t falls
20 nothing short of a practical construction, long continued, of the
constitutional provisions respecting their powers . . .

21 . . .

22 A legislative body cannot legislate wisely or effectively in the
23 absence of information respecting the conditions which the
24 legislation is intended to affect or change . . .

25 . . .

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1 Thus there is ample warrant for thinking, as we do, that the
2 constitutional provisions which commit the legislative function to
3 the two houses are intended we must conclude that investigations by
4 legislative committees, as such, are not a recent innovation; that
5 many functions and activities are proper; and that, when acting
6 within the scope of their authority concerning matters reasonably
7 germane to potential legislation, judicial supervision or review is
8 inappropriate.

9 *Id.*, at 174-75.

10 Thirty years later, the United States Supreme Court declared:

11 The power . . . to conduct investigations is inherent in the legislative
12 process. That power is broad. It encompasses inquiries concerning
13 the administration of existing laws as well as proposed or possibly
14 needed statutes. It includes surveys of defects in our social,
15 economic or political system for the purpose of enabling the
16 Congress to remedy them.

17 *Watkins v. United States*, 354 U.S. 178, 187 (1957). Two years later, it stated, in
18 relevant part,

19 The scope of the power of inquiry, in short, is as penetrating and far
20 reaching as the potential power to enact and appropriate under the
21 Constitution.

22 Broad as it is, the power is not, however, without limitations.
23 Since Congress may only investigate into those areas in which it may
24 potentially legislate or appropriate, it cannot inquire into matters
25 which are within the exclusive province of one of the other branches
of the Government. Lacking the judicial power given to the
Judiciary, it cannot inquire into matters that are exclusively the
concern of the Judiciary. Neither can it supplant the Executive in
what exclusively belongs to the Executive. And the Congress, in
common with all branches of the Government, must exercise its
powers subject to the limitations placed by the Constitution on

1 governmental action, more particularly in the context of this case the
2 relevant limitations of the Bill of Rights.

3 *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959).

4 Most recently, the United States Supreme Court recognized that
5 Congress does not have an enumerated constitutional power to subpoena, but it
6 has held that “each House has power ‘to secure needed information’ in order to
7 legislate.” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting
8 *McGrain*, at 161.) Even though the power is “broad” and “indispensable,” *Id.*
9 (quoting *Watkins*, at P. 187), it is “justified solely as an adjunct to the legislative
10 process,” and is therefore limited. Most importantly, a congressional subpoena is
11 valid only if it is “related to, and in furtherance of, a legitimate task of the
12 Congress.” The subpoena must serve a “valid legislative purpose,” . . . ; it must
13 “concern[] a subject on which legislation ‘could be had.’” *Id.*, at 2031-32
14 (citations omitted).

15 Finally, recipients of legislative subpoenas retain their constitutional
16 rights throughout the course of an investigation. And recipients have
17 long been understood to retain common law and constitutional
18 privileges with respect to certain materials, such as attorney-client
19 communications and governmental communications protected by
executive privilege.

20 *Id.*, at 2032. The *Trump* Court also indicated that legislative subpoena powers
21 may not be used for law enforcement, general inquiry into private affairs,
22 exposure for the sake of exposure, and that “[i]nvestigations conducted solely for
23 the personal aggrandizement of the investigators or to ‘punish’ those investigated
24 are indefensible.” *Id.* Moreover, the *Trump* Court held that if other sources could
25 reasonably provide the information, the Legislature may not rely on an inter-

1 branch subpoena which implicates weighty separation of powers concerns. *Id.*, at
2 2035.

3 Based on the United Supreme Court's guidance cited above, the
4 following appear to be legislative investigative power limitations:

- 5 1. the legislative action must be within the scope of the
6 Legislature's authority; and
- 7 2. the investigation must focus on issues connected to future
8 lawful legislation.

9 Here, the Subpoena issued to Justice Rice provided, in relevant
10 part, that:

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

16 While the Legislature argues it has the power to conduct this judicial
17 investigation, it cites no authority for the argument that the Subpoena issued to
18 Justice Rice supersedes existing and valid statutory provisions governing the
19 processes and procedures of the constitutionally created Montana Judicial
20 Standards Commission (MJSC).

21 In accordance with a constitutional mandate and the Legislature's
22 statutory directive therein, the MJSC was created. Mont. Const., Art. VII § 11(1)
23 ("The legislature shall create a judicial standards commission consisting of five
24 persons and provide for the appointment thereto of two district judges, one
25 attorney, and two citizens who are neither judges nor attorneys."). As such, the

1 Legislature's only MJSC constitutional role is its constitutionally mandated
2 creation.

3 The MJSC's purpose . . .

4 is to protect the public from improper conduct or behavior of judges;
5 preserve the integrity of the judicial process; maintain public
6 confidence in the judiciary; create a greater awareness of proper
7 judicial conduct on the part of the judiciary and the public; and
8 provide for the expeditious and fair disposition of complaints of
9 judicial misconduct.

10 MJSC R. 1(a).

11 The MJSC is confined to investigating and making
12 recommendations to the Montana Supreme Court. Mont. Const., Art. VII § 11(2)
13 (“The commission shall investigate complaints, and make rules implementing
14 this section.”) It has explicit power to “subpoena witnesses and documents.” *Id.*

15 MJSC's proceedings “are confidential except as provided by
16 statute.” Mont. Const., Art. VII, § 11(4).

17 (1) Except as provided in 3-1-1107 and 3-1-1121 through 3-1-
18 1126, all papers filed with and proceedings before the commission
19 or masters are confidential and the filing of papers with and the
20 testimony given before the commission or masters is privileged
21 communication.

22 (2) The commission shall make rules for the conduct of its affairs
23 and the enforcement of confidentiality consistent with this part.

24 Mont. Code Ann. 3-1-1105 (2019).

25 (a) All papers filed herewith and all proceedings before the [MJSC]
shall be confidential while pending before the [MJSC]. A
Complaint dismissed by the [MJSC] under Rule 10(e)-(f) is no
longer confidential, and a complainant may disclose the complaint
and the [MJSC's] response. If and investigation results in formal
proceedings, then the record filed by the [MJSC] with the Supreme

1 Court loses its confidential character upon its filing. Further, a
2 proceeding loses its confidentiality if §§ 3-1-1121 through 1126,
3 MCA, are invoked in accordance with the terms thereof.

4 • • •

5 (c) Every witness in every proceeding under these Rules shall be
6 sworn to the tell the truth and not to disclose the existence of the
7 proceedings or the identity of the judge until the proceedings are no
8 longer confidential under these rules. Violation of the
9 confidentiality proceedings may result in summary dismissal of the
10 complaint.

11 MJSC R. 7(a) and (c). Here it appears that the Legislature is demanding that
12 Justice Rice ignore, waive and/or violate his constitutional and statutory
13 confidential nature of MJSC proceedings.

14 The Montana Supreme Court has the ultimate judicial supervision
15 power, which under recommendation of the MJSC may retire, censure, suspend,
16 or remove any justice or judge for wrongdoing or incapacity. Mont. Const., Art.
17 VII § 11(3); Mont. Code Ann. § 3-1-1107(1) (2019) (“The supreme court shall
18 review the record of the [MJSC] proceedings and shall make such determination
19 as it finds just and proper and may: (a) order censure, suspension, removal, or
20 retirement of a judicial officer; or (b) wholly reject the recommendation.”); *Hicks*
21 *v. Judicial Standards Comm’n*, No. OP 08-0376, 2008 Mont. LEXIS 518, at *3
22 (Aug. 13, 2008) (“the [MJSC] makes requests of and recommendations to this
23 Court, and we act upon those recommendations.”); *State ex rel. Smartt v. Judicial*
24 *Standards Comm’n*, 2002 MT 148, ¶ 21, 310 Mont. 295, 302, 50 P.3d 150, 155
25 (“Article VII, Section 11 of the Montana Constitution grants the [MJSC]
jurisdiction to investigate misconduct on behalf of the judiciary”).

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1 Here, it appears the Legislature's Subpoena to Justice Rice exceeds
2 its investigatory authority because its stated purpose interferes with the MJSC's
3 constitutional authority. The MJSC, not the Legislature, investigates alleged
4 judicial misconduct. The MJSC, not the Legislature, has the constitutional
5 authority to subpoena witnesses and documents in alleged judicial misconduct
6 matters. The MJSC, not the Legislature, has the constitutional authority to make
7 rules implementing Mont. Const. Art. VII. §11(2). Here, the Legislature is not
8 above the law. At this juncture, it appears the Legislature's Subpoena to Justice
9 Rice exceeds its legislative investigatory authority. Moreover, the information it
10 seeks from Justice Rice may be directly available to it from the MJSC under
11 controlling MJSC law already created by the Legislature. See Mont. Code Ann.
12 § 3-1-1126 (2019). As the *Trump* Court indicated, a subpoena should not be
13 allowed if there are other sources for the information sought. *Trump*, at 2035.
14 Section 3-1-1126 provides:

- 15 (1) The commission shall, as provided in 5-11-210, submit to the
16 legislature a report containing the following information:
17 (a) identification of each complaint, whether or not verified, received
18 by the commission during the preceding biennium by a separate
19 number that in no way reveals the identity of the judge complained
20 against;
21 (b) the date each complaint was filed;
22 (c) the general nature of each complaint;
23 (d) whether there have been previous complaints against the same
24 judge and, if so, the general nature of the previous complaints;
25 (e) the present status of all complaints filed with or pending before
the commission during the preceding biennium; and
 (f) whenever a final disposition of a complaint has been made during
the preceding biennium, the nature of the disposition, the
commission's recommendation, if any, to the supreme court, and the
action taken by the supreme court.

1 (2) The commission must observe the confidentiality provisions of
2 this part in fulfilling the requirements of this section.

3 Mont. Code Ann. § 3-1-1126 (2019)

4 For purposes of Justice Rice's preliminary injunction request, this
5 Court shall neither condone governmental action that appears to ignore existing
6 constitutional and statutory mandates, nor ignore the Legislature's apparent lack
7 of legislative investigatory authority. At this juncture in the proceeding, the
8 Court has found no constitutional or statutory support for the Legislature's
9 investigatory power that usurps the MJSC's constitutional and statutory
10 investigatory authority.

11 **Legislature's Stay Request**

12 At the hearing, the Legislature argued this Court should stay this
13 proceeding so it could negotiate with Justice Rice as suggested by the *Trump*
14 Court. While that may be true, the *Trump* Court's judicial insight equally applies
15 in this proceeding because this Court would have to be "blind" not to see what
16 "[a]ll others can see and understand" that the Justice Rice Subpoena does not
17 represent a run-of-the-mill legislative effort but rather a clash between separate
18 government branches over records of intense Legislative political interest.
19 *Trump*, at 2034. This Legislative political interest is evident in Ms. Hansen and
20 Mr. Knudson's caustic express representations set forth in Exhibits 3 and 8.
21 Based on these exhibits, there is no evidence that the Legislature would or could
22 negotiate in good faith with Justice Rice.

23 In addition, this Court would be remiss in not pointing out the
24 United States Supreme Court's view regarding judicial impartiality in light of
25 Exhibits 3 and 8:

1 One meaning of "impartiality" in the judicial context -- and of course
2 its root meaning -- is the lack of bias for or against either party to the
3 proceeding. Impartiality in this sense assures equal application of the
4 law. That is, it guarantees a party that the judge who hears his
5 case will apply the law to him in the same way he applies it to any
6 other party. This is the traditional sense in which the term is used.
7 See Webster's New International Dictionary 1247 (2d ed. 1950)
8 (defining "impartial" as "not partial; esp., not favoring one more
9 than another; treating all alike; unbiased; equitable; fair; just"). It is
10 also the sense in which it is used in the cases cited by respondents
11 and amici for the proposition that an impartial judge is essential to
12 due process. *Tumey v. Ohio*, 273 U.S. 510, 523, 531-534, 71 L. Ed.
13 749, 47 S. Ct. 437, 5 Ohio L. Abs. 839, 25 Ohio L. Rep. 236 (1927)
14 (judge violated due process by sitting in a case in which it would be
15 in his financial interest to find against one of the parties); *Aetna Life*
16 *Ins. Co. v. Lavoie*, 475 U.S. 813, 822-825, 89 L. Ed. 2d 823, 106 S.
17 Ct. 1580 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58-62,
18 34 L. Ed. 2d 267, 93 S. Ct. 80, 61 Ohio Op. 2d 292 (1972) (same);
19 *Johnson v. Mississippi*, 403 U.S. 212, 215-216, 29 L. Ed. 2d 423, 91
20 S. Ct. 1778 (1971) (per curiam) (judge violated due process by
21 sitting in a case in which one of the parties was a previously
22 successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899,
23 905, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997) (would
24 violate due process if a judge was disposed to rule . . .
25

. . .

18 It is perhaps possible to use the term "impartiality" in the judicial
19 context (though this is certainly not a common usage) to mean lack
20 of preconception in favor of or against a particular legal view. This
21 sort of impartiality would be concerned, not with guaranteeing
22 litigants equal application of the law, but rather with guaranteeing
23 them an equal chance to persuade the court on the legal points in
24 their case.
25

. . .

24 A third possible meaning of "impartiality" (again not a common one)
25 might be described as open mindedness. This quality in a judge

1 demands, not that he have no preconceptions on legal issues, but that
2 he be willing to consider views that oppose his preconceptions, and
3 remain open to persuasion, when the issues arise in a pending case.
4 This sort of impartiality seeks to guarantee each litigant, not an
5 equal chance to win the legal points in the case, but at
6 least some chance of doing so.

7 *Republican Party v. White*, 536 U.S. 765, 776-778 (2002).

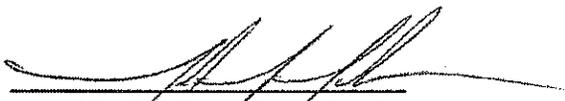
8 Nonetheless, while this Court will not interfere with any
9 negotiations between the parties, it will certainly not mandate that Justice Rice
10 negotiate with the Legislature. Especially since, at this juncture, Justice Rice has
11 established “he has a legitimate cause of action, and that he is likely to succeed
12 on the merits of that claim.” *Cole*, ¶ 15.

13 ORDER

14 Based on the above, the Court hereby **ORDERS, ADJUDGES AND**
15 **DECREES** as follows:

- 16 1. Justice Rice’s preliminary injunction request is **GRANTED**;
17 and
18 2. This Court’s April 19, 2021 Order that temporarily enjoined the
19 Legislature’s April 15, 2021 Subpoena issued to Justice Rice is converted to a
20 Preliminary Injunction until further order of this Court in all respects.

21 DATED this 18th day of May 2021.

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23 MICHAEL F. McMAHON
24 District Court Judge
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