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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

JUSTICE JIM RICE,

Petitioner,

vs.

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

Respondents.

Cause No. BDV-2021-451

**PETITIONER'S RESPONSE IN
OPPOSITION TO MOTION TO DISMISS**

INTRODUCTION

Respondent's Motion to Dismiss is the latest chapter in a "clash between separate government branches over records of intense Legislative political interest." Preliminary Injunction Or., May 18, 2021, at 18. The Court is well familiar with this history, having twice previously ruled against the Legislature's misguided exercise of its investigative powers against the Judiciary. Now, having lost at every preliminary stage, Respondents want to exit the legal process altogether and unilaterally declare the

dispute they have created moot by the voluntary withdrawal of the subpoena that is the subject of this petition, all the while vowing publicly to continue with their extraconstitutional inquisition. The Court should not give credence to this disingenuous position.

ARGUMENT

Mootness is a threshold issue that this court must resolve before addressing the merits of a dispute. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 31, 333 Mont. 331, 142 P.3d 864. A matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy. *Id.* An issue is moot when the court can no longer grant effective relief. *Id.* A justiciable controversy in which the parties have a stake must exist at the beginning of the action and continue until its conclusion. *Id.* There are exceptions to the doctrine of mootness. Applicable here are the voluntary cessation exception and the public interest exception.

I. THE LEGISLATURE'S VOLUNTARY CESSATION OF THE CHALLENGED ACTION DOES NOT RENDER THE DISPUTE MOOT.

The voluntary cessation exception applies when a defendant's conduct is voluntarily terminated before completion of appellate review. *Havre Daily News*, ¶ 34. The purpose of this exception to the mootness doctrine is to prevent a defendant from manipulating the litigation process by voluntarily ceasing challenged conduct at opportune moments, only to retain the potential of resuming it once the threat of litigation has passed. *Id.* For that reason, the party asserting mootness bears "the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000)). Thus, a case is considered

moot under the voluntary cessation exception only when it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.*, ¶ 38 (quoting *Laidlaw*, 528 U.S. at 189, 120 S. Ct. at 708).

In this case, the challenged conduct is the legislature’s use of its investigative powers, including subpoena power, to invade the province of the judiciary. Preliminary Injunction Or., May 18, 2021, at 12 (citing *Barenblatt v United States*, 360 U.S. 109, 111-12 (1959) (“Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary”)). This controversy is not rendered moot by the Respondents’ decision to pursue that aim through other means. Far from demonstrating that “the challenged conduct cannot reasonably be expected to start again,” *Havre Daily News*, ¶ 34, Respondents have expressly stated their intent to continue, writing:

To be clear, the Legislature’s justified interests in the underlying matters, and in pursuing [sic] negotiations, remain. But to the extent the pending subpoenas, including the subpoena issued to Justice Rice, may have contributed to a stalemate between the parties, the Legislature is pleased to take the first step and remove that obstacle.

Respondents’ Motion to Dismiss at 2. State Senator Greg Hertz, chair of the committee investigating the judicial branch, has told the press, “To be clear, we expect the judicial branch to release public records We’re *still seeking documents* and information that will provide more clarity on the issues identified in our committee’s initial report and inform legislative fixes to problems within our judicial system.” Seaborn Larson, *Lawmakers abandon investigative subpoenas for judges’ records*, Helena Independent Record, June 22, 2021 (emphasis added) (attached as Exhibit A).

There frankly can be no more obvious statement of intent both to continue the challenged conduct and to manipulate the litigation process by voluntary cessation. Respondents' withdrawal of the pending subpoena is a transparent attempt to unilaterally choose the forum for this dispute and avoid judicial determination of the extent of the legislative subpoena power. See *McLaughlin v. Mont. State Leg.*, 2021 MT 120, ¶ 11 (describing issuance of subpoenas to Montana Supreme Court justices as a "unilateral attempt to manufacture a conflict" and subsequent motion for disqualification as "directed to disrupt the normal process of [the] tribunal"); Or., *McLaughlin v. Mont. State Legislature*, OP 21-0173, June 29, 2021 ("Unfortunately, the actions of counsel before this Court during these proceedings have raised serious concerns of 'manipulat[ion] of the litigation process.'").

Respondents affirmatively intend to continue seeking the documents requested in the subpoena. They do not even bother to assert that they will not reissue an identical subpoena if they deem it necessary to do so in the future. Indeed, Respondents have already attempted to stay the present proceedings in order to avoid a ruling on the issue, and this Court has already rejected the pretense that "the Legislature would or could negotiate in good faith with Justice Rice." Preliminary Injunction Or., May 18, 2021, at 18. They simply don't want the court determining this dispute. This manipulation of the judicial process is the circumstance for which the voluntary cessation exception to the mootness doctrine was designed. See *Havre Daily News*, ¶¶ 37-38.

II. THE RESOLUTION OF THIS DISPUTE REGARDING THE POWERS OF PUBLIC OFFICERS WILL AVOID FUTURE LITIGATION AND IS IN THE PUBLIC INTEREST.

The public interest exception holds that a court may examine constitutional issues that involve issues of public concern, if doing so will avoid future litigation on a point of law. *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872. The public interest exception applies where “(1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer to the issue will guide public officers in the performance of their duties.” *Ramon v. Short*, 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 867. Issues of public importance are those concerning fundamental constitutional questions or the legal power of a public official. *Id.*

In this case, the constitutional scope of the Legislature’s investigative powers is at issue. *See McLaughlin v. Mont. State Legislature*, 2021 MT 120, ¶ 10, 404 Mont. 166, (“In this case, the Court is called upon to assess, for the first time, the appropriate scope of the legislative subpoena power in Montana.”). This is a fundamental constitutional question addressing the separation of powers, and also addresses the legal powers of public officials, namely, the power of the Legislature to issue investigative subpoenas to members of the judiciary. The Montana Supreme Court, ruling on a motion to dismiss in an original proceeding concerning judicial subpoenas, recently held that “the scope of the legislative subpoena power is clearly an issue of great public interest, as it goes to not only the ‘legal power of a public official’, but the very core of a constitutional system premised on separation of powers. Or., *McLaughlin v. Mont. State Legislature*, OP 21-0173, June 29, 2021 at 3 (quoting *Ramon*, ¶ 22).

The issue is also likely to recur. *Id.* Despite the present withdrawal of subpoenas, Respondents have shown no intent to abandon the pursuit of their investigation of the judiciary. In fact, they have repeatedly affirmed their intent to continue. *Supra*, part I; Or., *McLaughlin* at 3. As the Montana Supreme Court noted in its recent order in the companion original proceeding, “The history of this litigation has given us reason to be skeptical of the representations by the Legislature and its counsel in this matter.” *Id.* at 4. This Court has made similar observations, holding that it “would have to be ‘blind’ not to see . . . that the Justice Rice Subpoena does not represent a run-of-the-mill legislative effort.” Both courts have therefore questioned Respondent’s intention to act in good faith in these proceedings. *Id.* at 18; Or., *McLaughlin*, at 5.

Finally, an answer to the issue will guide both the Judicial Branch and the Legislature in the performance of their duties, *Ramon*, ¶ 21, by defining for the Legislature the scope of its subpoena powers as to the Judiciary, and for the Judicial Branch, defining the scope of its duty of compliance. Doing so now will avoid future litigation on the point, in the event that the Legislature determines to reissue subpoenas during its continuing judicial investigation. See Exhibit A. There is no Montana caselaw currently addressing the issue raised in this petition, “which could guide the Legislature, the Court Administrator, and the [Department of Administration] in the future.” Or., *McLaughlin*, at 4. Resolution of this matter is in the public interest.


CONCLUSION

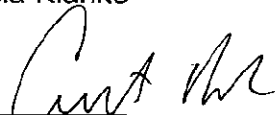
The Court has already held that it “will certainly not mandate that Justice Rice negotiate with the Legislature.” Preliminary Injunction Or., May 18, 2021, at 20. Nevertheless, the Legislature now comes before this Court and asks it to involuntarily

deprive Justice Rice of the right to have this dispute resolved by the Court and, instead, to force him into negotiations. This unilateral manipulation of the legal process should not be permitted. The Legislature's decision that it would rather address the dispute through other means does not render the dispute moot. This Court should proceed with a decision on the merits.

DATED this 1 day of July, 2021.

DRAKE LAW FIRM, P.C.

BY: 
Patricia Klanke

BY: 
Curt Drake

CERTIFICATE OF SERVICE

I, Curt Drake, attorney for the Petitioner, above-named, hereby certify that I mailed a true and correct copy of the **PETITIONER'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS**, on the 1st day of July, 2021, postage fully prepaid by U. S.

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Curt Drake

https://helenair.com/news/state-and-regional/govt-and-politics/lawmakers-abandon-investigative-subpoenas-for-judges-records/article_87b2fb25-0f1a-5e51-a83c-6a0c160d3199.html

EDITOR'S PICK TOPICAL ALERT

Lawmakers abandon investigative subpoenas for judges' records

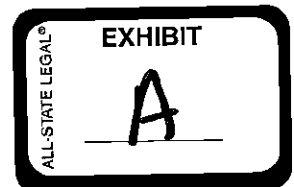
Seaborn Larson
Jun 22, 2021



Sen. Greg Hertz, R-Polson, speaks on the Senate floor in the state Capitol.

THOM BRIDGE, Independent Record

Seaborn Larson



A GOP-led legislative committee investigating the judicial branch has withdrawn its embattled **subpoenas for Montana Supreme Court records**, a spokesperson said late Tuesday.

Sen. Greg Hertz, a Polson Republican chairing the investigative committee, said in an emailed statement the decision to pull back the subpoenas came after consultation with the state Department of Justice. That Republican-led agency has represented the committee during the escalating confrontation with the judiciary over claims of improper use of state resources, lobbying efforts by judges and failure to retain public records.

The subpoenas had been challenged in court as an overreach of the Legislature's constitutional authority by Supreme Court Administrator Beth McLaughlin, whose own emails had been subpoenaed by the committee.

Supreme Court Justice Jim Rice, a former Republican lawmaker, also challenged the subpoena for his own records in state District Court. Rice **testified in Lewis and Clark County District Court** in May that he believed the mounting investigation led by Republican lawmakers was a "campaign to discredit and undermine the integrity of the court."

A District Court judge subsequently blocked the subpoena for Rice's records until the case concluded, **noting he would have to be "blind" not to see** that the subpoena was not a legislative effort but a clash over records of political interests.



Montana Supreme Court Justice Jim Rice, right, takes the witness stand as Judge Mike McMahon watches in the Lewis and Clark County Courthouse in May.

THOM BRIDGE, Independent Record

Lawmakers hatched the investigation and the Select Committee on Judicial Transparency and Accountability after court filings in a lawsuit over new laws passed by the Legislature showed McLaughlin had deleted an internal email poll of judges offering approve-or-oppose opinions on pending legislation that would affect judicial functions. The Supreme Court justices **told lawmakers in a committee hearing in April** that they had not participated in the polling as state District Court judges had, but lawmakers pursued their records in light of the deleted email poll results.

The committee had produced a **preliminary report** by the end of that month outlining its concerns with the judicial branch following a month of investigation. That included a subpoena that successfully cached more than **5,000 of McLaughlin's emails that were turned over by the Department of Administration**, a department of the executive branch.

Hertz said in Tuesday's announcement the committee's position "all along" has been that the dispute should have been handled outside of the courts.

"To be clear, we expect the judicial branch to release public records, the same as they have ruled the legislative and executive branches must do in numerous court rulings over the years," Hertz said.

Hertz also said withdrawing the subpoenas meant the litigation over the Legislature's subpoena power likewise ended Tuesday.

Earlier on Tuesday, the Montana Supreme Court met for a conference meeting on a recent motion by lawmakers asking for the justices to recuse themselves because they, too, were under subpoena. It was the second such motion; the first request for recusal was heartily denied, with **Justice Laurie McKinnon writing in the unanimous decision** that lawmakers had attempted to "manufacture a conflict" in an effort to evade the judicial branch getting the final say on the Legislature's subpoena power.



Sen. Greg Hertz, R-Polson

Photo Courtesy of the Montana Legislature



Montana Supreme Court Justice Laurie McKinnon asks a question during arguments in the Jon Krakauer records request hearing at the Strand Union Building at Montana State University in Bozeman in April 2016.

Casey Page, Billings Gazette

Randy Cox, McLaughlin's attorney, said late Tuesday he would likely file a motion to see the challenge out in the coming days, citing a need to have the matter settled by the courts.

"We are going to oppose the dismissal because we think this is an important issue," Cox said.

Rep. Kim Abbott of Helena, one of two Democrats on the committee who have repeatedly criticized the subpoenas as having no legislative purpose, said she hoped the move signaled a downturn in the committee's investigation.

"This Select Committee was always an overreach that threatened the separation of powers and checks and balances that Montanans expect and that our system of government depends on," Abbott, the House minority leader, said in an email Tuesday. "We hope this puts an end to expending resources on partisan attacks against a co-equal and independent branch of government."

Hertz, however, gave no indication that the investigation was winding down.

“We’re still seeking documents and information that will provide more clarity on the issues identified in our committee’s initial report and inform legislative fixes to problems within our judicial system,” Hertz said. “I look forward to working with committee members and the judicial branch as we continue this legislative investigation.”



Kim Abbott

Provided photo

The committee’s website does not list the next date the investigative committee is expected to meet.



Seaborn Larson

State Reporter

Capitol bureau reporter Seaborn Larson covers justice-related areas of state government and organizations that wield power.