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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 Wylie Galt, Speaker of the House of Representatives, Respondents.	Cause No. BDV-2021-451 (email) Hon. Michael F. McMahon **RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

The Legislature has withdrawn the subpoena at issue in this case, and any opinion from this Court would constitute an advisory opinion. Without a subpoena on which to rule, this case is moot. The Legislature therefore moves to dismiss the proceeding.

I. THIS CASE IS NON-JUSTICIABLE

"[T]he judicial power of Montana courts is limited to justiciable controversies—in other words, a controversy that can be disposed of and resolved in the courts." *Gateway Opencut Mining Action Grp. v. Bd of Cnty. Comm'rs*, 2011 MT 198, ¶ 16, 361 Mont. 398, 260 P.3d 133. A justiciable controversy exists where "a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion." *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 8, 355 Mont. 142, 226 P.3d 567. If no case or controversy exists, the court lacks jurisdiction, and rendering any decision would amount to an advisory opinion. *Id.* ¶¶ 6, 9. Thus, "justiciability is a threshold issue." *Clark v. Roosevelt Cnty.*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48.

When a case is moot, it is nonjusticiable. Mootness is the "doctrine of standing set in a time frame" and requires the interests that exist at the start of litigation to continue throughout the litigation. *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881. The Legislature withdrew Justice Rice's subpoena. The underlying "controversy" that may have existed at the outset of this case no longer exists. Any merits ruling from this Court—for or against

Justice Rice—would be entirely philosophical and academic. *See Plan Helena*, ¶ 8.

Only three narrow exceptions—one of which is effectively a factor of another and not an independent exception—may allow courts to maintain an otherwise moot case, and none of them apply here. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 32–33, 333 Mont. 331, 142 P.3d 864. These exceptions are "public interest," "voluntary cessation," and "capable of repetition, yet evading review." *Id.*

Because the Legislature has rescinded Justice Rice's subpoena, no case or controversy remains for this Court to adjudicate. Justice Rice has asked this Court to quash his legislative subpoena and declare it unlawful. But the Court cannot "immediately quash or stay" a subpoena that has been withdrawn. Petition at 20. It cannot preliminarily or permanently enjoin a subpoena that has been withdrawn. *Id.* And it cannot issue an abstract injunction against all "further [legislative] subpoenas."[1] *Id.* Accordingly, there is no relief available for Justice Rice and this case is moot.

[1] This request is not limited to enjoining further subpoenas only in this case or against Justice Rice. It is a request that this Court preliminarily enjoin the Legislature from issuing *any* further subpoenas.

II. THIS CASE DOES NOT FALL WITHIN THE SO-CALLED "PUBLIC INTEREST" EXCEPTION

No Montana court has resuscitated an otherwise moot case based on "public interest" alone. And the Montana Supreme Court on one occasion flatly rejected the exception. *See Montanans Against Assisted Suicide (MAAS) v. Bd. of Med. Examiners*, 2015 MT 112, ¶ 14, 379 Mont. 11, 347 P.3d 1244. The Court noted that the public interest exception alone would lead the Court to issue "an opinion on the merits of a decision without the benefit of concrete facts or adversarial development of arguments." *Id.*

In practice, Montana courts treat the public interest exception as a factor to be considered in analyzing the other exceptions to mootness, not as a standalone exception. *See, e.g., In re Mental Health of K.G.F.*, 2001 MT 140, ¶ 19, 306 Mont. 1, 29 P.3d 485, *overruled on other grounds by In re J.S.*, 2017 MT 214, 388 Mont. 397, 401 P.3d 197 (holding the case was not moot because it was "capable of repetition, yet evading review"); *In re N.B.*, 190 Mont. 319, 322–23, 620 P.2d 1228, 1230–31 (1980) (same); *see also, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (noting that voluntary cessation and public interest together can "militate[] against a mootness conclusion"). And for good reason; the public interest exception is a "broad, mal-defined principle." *Havre Daily News*, ¶¶ 32–33. Instead of a standalone exception, public interest is at best a relevant factor to the capable of repetition exception.

Even in the Montana Supreme Court's latest opinion purporting to apply the public interest exception, the Court still found that the case was not moot because of *both* the public interest exception *and* the voluntary cessation doctrine. *See McLaughlin v. Legislature*, 2021 MT 120, 404 Mont. 166. Again, no Montana court has ever held that the public interest exception alone can save an otherwise moot case. In *Ramon v. Short*, 2020 MT 69, 399 Mont. 254, 460 P.3d 867, which Justice Rice cites and the Court relied on in *McLaughlin*, the Court claimed to apply the public interest exception, but it used language to suggest it was really applying the "capable of repetition" exception. The Court said the case was one of "public importance" but then determined the issue was "likely to recur" and the Court's review was necessary "to avoid future litigation on a point of law." *Id.* ¶ 25. The Court then quoted language from *Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872, for its discussion about the capable of repetition exception. *Ramon*, ¶ 25.

To treat "public interest" as a standalone mootness exemption would arrogate enormous and unconstitutional power to the Montana judiciary. It would empower a single judge (or court) to make subjective decisions about what disputes are in the public interest. And then, in the absence of a case or controversy, that single judge could simply "substitut[e] [his] pleasure to that of the legislative body," or the executive branch, or the People. THE FEDERALIST NO. 78 (Alexander Hamilton). Montana judges—like their federal

counterparts—are constitutionally prohibited from exerting their *will*; they may only exercise *judgment*. *See id.*; *see also* Mont. Const. art. III, § 1 ("No person ... charged with the exercise of power properly belonging to one branch shall exercise any power properly belong to ... the others ....").

Even if the public interest exception could be applied to make a case justiciable, it would not apply in this case. The public interest exception has only been referenced in a few cases involving "broad public concerns." *N.B.*, 190 Mont. at 323, 620 P.2d at 1231. In *N.B.*, for example, the public interest at stake was the approximately 100 Montanans involuntarily committed to Warm Springs mental health facility each year. *Id.* at 322–23, 620 P.2d at 1230–31. In *K.G.F.*, the public interest at stake was the "constitutional right to effective assistance of counsel in civil involuntary commitment proceedings." *K.G.F.*, ¶ 19. And, again, in both these cases, the court ultimately found that the cases were capable of repetition, yet evading review.

Here, there are no threats to individual rights as there were in *N.B.* and *K.G.F.* This case involves a single justice of the Montana Supreme Court challenging a subpoena issued to him by the Legislature.[2] But the subpoena

[2] Acting Chief Justice Rice appointed District Judge Kurt Krueger to sit on a case challenging SB 140. After judicial public records were brought to light, Judge Krueger immediately recused himself because it was evident he had entered prejudgment against the law when it was being debated in the Legislature. Justice Rice was on the email where Judge Krueger made his feelings clear, and yet Justice Rice proceeded to appoint Judge Krueger to hear the case. This set of facts—among others—precipitated the legislative subpoena.

has been withdrawn. And the dispute has finally returned to the place it belongs, and where the Legislature has insisted it has belonged the entire time: discussions, negotiation, and accommodation. *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 67 (D.C. Cir. 2008); *see also Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020). Because the subpoena against Justice Rice—the very basis of this litigation—has been withdrawn, any opinion would be advisory based only "upon a hypothetical state of facts or upon an abstract proposition." *Plan Helena*, ¶ 12.

III. THIS CASE IS NOT CAPABLE OF REPETITION, YET EVADING REVIEW

The next mootness exception—capable of repetition, yet evading review—likewise does not apply. This exception requires Justice Rice to show that "the challenged action was in its duration too short to be fully litigated prior to the cessation or expiration of the action" and "there was reasonable expectation the same complaining party would be subjected to the same action again." *In re Mental Health of D.V.*, 2007 MT 351, ¶ 30, 340 Mont. 319, 174 P.3d 503.

As to the durational requirement, Justice Rice must show the "challenged conduct *invariably* ceases before courts can fully adjudicate the matter." *Havre Daily News*, ¶ 33. That is, the "time between [the challenged wrong] and [the occurrence rendering the case moot] is *always* so short as to

evade review." *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)). "Speculative" assertions are insufficient to establish that an alleged wrongful conduct is "inherently of limited duration." *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, ¶ 15, 335 Mont. 94, 149 P.3d 565.

Subpoenas in general are not "always so short as to evade review." *Havre Daily News*, ¶ 33. The duration of the subpoena continues indefinitely until the subpoena is complied with, quashed, or withdrawn. Absent an affirmative act by an outside entity, a subpoena will continue forever, which necessarily defeats the "capable of repetition" exception. *Id.* Here, Justice Rice's legislative subpoena has been withdrawn in an effort to meaningfully explore negotiated resolution of serious questions about judicial conduct as it relates to pending legislation that will (and has) come before judges. But just as Justice Rice's compliance with the subpoena wouldn't fall within the "capable of repetition" exception, the Legislature's withdrawal of the subpoena doesn't fall within the exception. A subpoena is indefinite in nature absent outside interruption. Thus, a subpoena will not always evade review, and the "capable of repetition" exception doesn't apply. *See, e.g., Southern Pac. Terminal v. Interstate Commerce Commission*, 219 U.S. 498 (1911) (short duration of Interstate Commerce Commission orders will always expire before full appellate review); *Nebraska Press v. Stuart*, 427 U.S. 539 (1976) (short duration of pre-trial gag order always evades full appellate review); *Dunn v.*

Blumstein, 405 U.S. 330 (1971) (one-year residency requirement for voter registration will always evade full appellate review).

IV. THIS CASE IS NOT SUBJECT TO THE VOLUNTARY CESSATION EXCEPTION

Finally, the voluntary cessation exception does not apply here. In many cases, including this one, a single instance of voluntary cessation is insufficient to save a case from mootness—only repeated instances of voluntarily ceasing alleged wrongful conduct will lead courts to apply this exception. *Havre Daily News*, ¶ 39; *see also Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100, ¶ 21, 404 Mont. 89, 485 P.3d 731 (holding that the plaintiffs "failed to point to concrete evidence suggesting that [they] will perpetrate a substantially similar wrong in the future" (internal quotations omitted)); *MAAS*, ¶ 16 (finding that plaintiffs failed to show repeated conduct or evidence of future conduct). In *Havre Daily News*, the Montana Supreme Court held the voluntary cessation exception does not apply unless the plaintiff can show that the same entity "repeatedly" engaged in the same "transparently manipulative" conduct. *Havre Daily News*, ¶ 39. Only after there is "concrete evidence" of this type of conduct will it "become[] reasonable to expect that if a substantially similar situation occurs, the [plaintiff] will repeat the obstructive tactics." *Id.* ¶¶ 39–40; *see also Zunski v. Frenchtown Rural Fire Dep't Bd. of Trs.*, 2013 MT 258, ¶21, 371 Mont. 552, 309 P.3d 21 (declining to "presume...bad faith" and

holding there was "no reasonable expectation" that the defendant would engage in wrongful conduct again).

In this case, the Legislature has not "repeatedly" engaged in issuing and withdrawing subpoenas against Justice Rice. *See McLaughlin*, ¶ 62 (McKinnon, J., concurring) (describing the unprecedented nature of these proceedings). And there is no "concrete evidence" of any "obstructive tactics." Rather, the express tactic chosen by the Legislature is to engage the Justice in negotiation to produce public records. There is speculation that the Legislature might possibly issue subpoenas in the future. But raw speculation does not save this case from mootness. This case involves a single subpoena issued to a single justice. This Court has not been asked to determine the full scope of the Legislature's subpoena power in a vacuum. This case doesn't raise a pure question of law completely devoid of the facts. The facts here matter.

Justice Rice points to public statements about the Legislature's continuing interest in the judiciary's documents, but these statements contradict his argument. First, Justice Rice cites to the Legislature's Motion to Dismiss, which clearly states that it "rescinds its subpoenas as a measure of good faith" to spur negotiations. Respondent's Motion to Dismiss at 2; *see Miers*, 558 F. Supp. 2d at 67 (discussing negotiation and accommodation as the path to resolution for interbranch disputes). Just because the interbranch

dispute remains ongoing does not give rise to any presumption that subpoenas for public records will be issued again.

Second, Justice Rice cites to a statement made by State Senator Greg Hertz, who stated that the Legislature is "still seeking documents and information that will provide more clarity on...our judicial system." Seaborn Larson, *Lawmakers abandon investigative subpoenas for judges' records*, Helena Independent Record (June 22, 2021). Nowhere in this statement did Senator Hertz indicate that the Legislature would reissue subpoenas. Legislative committees exist to enlighten and inform the Legislature and the public of problems and successes in government. It is only on rare and serious occasions that the Legislature issues subpoenas. Mere speculation that the Legislature may reissue subpoenas is not sufficient to invoke the voluntary cessation doctrine.

Furthermore, the nature of the broader controversy is tension between the Legislature and the Judiciary—this type of conflict *requires* ongoing negotiation and accommodation. *See Miers*, 558 F. Supp. 2d at 67; *see also Mazars USA*, 140 S. Ct. at 2029. Here, the Legislature has attempted to negotiate with the Judiciary by withdrawing the subpoenas. To find this case not moot would discourage the Legislature from taking any steps towards resolution and signal that the Legislature should have kept the subpoenas in place. This creates perverse incentives and marks a serious breakdown in our

system of separated but interworking powers. Thus, the voluntary cessation exception is inapplicable in this case.

CONCLUSION

Based on the foregoing, the Legislature respectfully moves to dismiss this proceeding.

DATED the 22nd day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document by email to the following addresses:

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Date: July 22, 2021

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