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FILED

JUL 30 2021

ANGIE SPARKS, Clerk of District Court
By:  Deputy Clerk

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

**BRIEF OF PETITIONER IN SUPPORT
OF PETITION FOR DECLARATORY
JUDGMENT**

Petitioner Justice Jim Rice, pursuant to this Court's June 3 Declaratory Relief Petition Briefing Order, submits this initial brief in support of his petition for declaratory judgment.

FACTUAL BACKGROUND

The Court is familiar with the facts giving rise to this dispute. Those facts are set out in the Court's Preliminary Injunction Order, May 18, 2021, and in *McLaughlin v. Montana State Legislature*, 2021 MT 120, 404 Mont. 166, ___ P.3d ___ ("*McLaughlin I*"). Limited background relevant to this motion is given here.

On April 15, 2021, the Montana Legislature issued to Justice Rice a subpoena requiring him to appear and produce documents relating to “any and all emails and other communications” sent and received from his government email account, “text messages, phone messages, and phone logs sent or received by [his] personal” phone, and “notes or records of conferences of the Justices,” between January 4, 2021, and April 14, 2021, with regard to polls sent to members of the Judiciary, business conducted by the Montana Judges Association, and “legislation pending before, or potentially pending before, the 2021 Legislature.” Subpoena, Ex. A. The stated purpose of the subpoena was to inform

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

Exhibit A at 1.

On June 22, 2021, the Legislature withdrew its subpoenas. Ex. B. The same day, the Legislature moved to dismiss the original proceeding pending in the Montana Supreme Court concerning the subpoena issued to Court Administrator Beth McLaughlin, on the basis that the petition was moot following withdrawal of the subpoena. Mot. to Dismiss as Moot, *McLaughlin*, OP 21-0173 (Mont. June 22, 2021), Ex. C. On June 23, 2021, the Legislature moved to dismiss Justice Rice’s petition on the same basis. In the motion to dismiss filed in this Court, the Legislature stated, “To be clear, the Legislature’s justified interests in the underlying matters, and in pursuing negotiations, remain.” Resp. Mot. to Dismiss at 2.

Concurrent with its withdrawal of the subpoenas, Sen. Greg Hertz, Chair of the Special Joint Select Committee on Judicial Accountability and Transparency (“Select

Committee”), stated to the press that the Select Committee is “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, Exhibit D.

On June 29, 2021, the Montana Supreme Court denied the motion to dismiss McLaughlin’s petition, holding that the issue was not moot as to the “thousands of unredacted Judicial Branch emails . . . previously obtained, without judicial oversight or procedural protections, through the [Department of Administration].” Or., *McLaughlin*, OP 21-0173 (Mont. June 29, 2021) at 2, Ex. E. The Court further held that the withdrawal of the subpoena did not moot McLaughlin’s petition to quash, finding that both the public interest and voluntary cessation exceptions to the mootness doctrine were applicable. *Id.* at 3-6.

This Court, on July 6, 2021, likewise denied the Legislature’s motion to dismiss, finding that it had neglected to file a brief in support, thereby conceding that its motion was without merit. Or. at 2.

On July 14, 2021, the Montana Supreme Court issued an opinion in *McLaughlin v. Montana State Legislature*, 2021 MT 178, ___ Mont. ___, ___ P.3d ___ (“*McLaughlin II*”). In that opinion, the Court held that the subpoenas issued to the Director of the Department of Administration and to the Court Administrator did not serve a valid legislative purpose, were impermissibly broad, and therefore were invalid. *Id.* at ¶ 55.

In response, Sen. Hertz issued a statement declaring: “The Legislature and our attorneys will continue to review this astounding ruling in more detail. We have even more work to do than we thought to ensure that Montana’s Judicial Branch is subject to

the same transparency and accountability that governs the Executive and Legislative branches.” Statement of Senator Greg Hertz, July 14, 2021, retrieved from <https://twitter.com/MTSenateGOP/status/1415376664276570114>, Exhibit F. Hertz has additionally criticized the Montana Supreme Court, calling its ruling “poisoned by a massive conflict of interest” and “exactly what you’d expect to get from people acting as judges in their own case, protecting their own interests.” Amy Beth Hanson, *Montana justices say lawmakers overstepped in seeking emails*, Associated Press, July 14, 2021, Ex. G.

Sen. Hertz’s repeated statements of intent to continue pursuing internal Judicial Branch communications and documents, and the Legislature’s assertion of its “justified interests in the underlying matters” in its Motion to Dismiss, are also consistent with the Select Committee’s Report, which concluded with recommendations including:

1. That this Committee continue into the interim, with proper funding, in order for the Committee to complete its investigation.

...

4. That the Committee determine whether evidence indicates that the conduct of state employees or officials should be referred to the appropriate authorities for further investigation.

5. That the Committee submit complaints to the disciplinary bodies of the judicial or legal profession if facts and evidence indicate such complaints are warranted.

6. That the Committee, through Counsel, work with the Justices to resolve their non-compliance with document production on the original subpoenas.

7. *That the Committee issue further subpoenas deemed necessary to complete its investigation.*

Special Joint Select Committee on Judicial Accountability and Transparency, *Initial Report on Judicial Accountability and Transparency* (May 2021) at 22 (emphasis added) (“Select Committee Report”), Exhibit H.¹ The Select Committee Report, subsequent

¹ Items 4 and 5 would appear to be in direct conflict with a memorandum from the Montana Legislative Services Division Legal Services Office, cited on the Select Committee’s website, which states that, among other limitations, “The legislature has no right to conduct an investigation for the purpose of laying

statements by Sen. Hertz, and the Legislature's pleadings in this matter make clear that the Legislature intends to continue its pursuit of the documents that are the subject of the withdrawn subpoenas.

DISCUSSION

Despite the Legislature's withdrawal of its subpoena, this case is rooted in a controversy between the Legislature and judicial branch that is very much live and an appropriate subject for declaratory relief.² A determination of the parties' legal relations is appropriate to inform and define the bounds of ongoing negotiations. *See Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 97 (D.D.C. 2008).

The Legislature's subpoena powers do not extend to the information sought in this case. The Legislature's statutory subpoena power does not include the production of documents. Further, the Legislature's constitutional investigative powers extend only to matters that are appropriate subjects of prospective legislation, and the use of subpoena power should be limited to circumstances where information relevant to the legitimate legislative purpose is not available from other sources. Those requirements are not met here. Information relevant to the stated purposes of the subpoena is available from other sources, and the subpoena does not serve a valid legislative purpose. While the Supreme Court's ruling in *McLaughlin II* resolved some issues regarding the proper use of legislative subpoenas, those principles have not been

a foundation for the institution of criminal proceedings, . . . for the purpose of intentionally injuring such persons or for any ulterior purpose." Memorandum from Todd Everts, Chief Legal Counsel, to Representative Ron Ehli, Vice Chair, Special Select Committee on State Settlement Accountability (April 18, 2018) (retrieved from <https://leg.mt.gov/content/Committees/JointSlctJudical/everts-memo-legislative-authority.pdf>).

² In addition to the following discussion, Petitioner incorporates the arguments concerning mootness, including the public interest and voluntary cessation exceptions, briefed in Petitioner's Response in Opposition to Motion to Dismiss and Response in Opposition to Second Motion to Dismiss.

applied as to a subpoena issued to an elected Supreme Court Justice. *McLaughlin II* also left unresolved critical issues for this Court to address.

This Court can, and should, issue a judgment declaring:

- That the Legislature's statutory subpoena power does not include the power to compel production of documents via subpoena duces tecum;
- That the Legislature, pursuant to *McLaughlin II*, may not issue a subpoena seeking the communications of a Supreme Court Justice for the stated purpose of "investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy;"
- That the Legislature, pursuant to *McLaughlin II*, may not issue a subpoena seeking the communications of a Supreme Court Justice for the stated purpose of investigating "whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision;"
- That the Legislature may not issue a subpoena for personal communications without demonstrating that production is necessitated by a legitimate legislative interest, and not for purposes of political exposure or to serve an investigative interest that is the purview of the executive branch; and
- That the Legislature may not issue a subpoena for the purpose identified in its Brief in Support of Motion to Dismiss of investigating alleged judicial misconduct.

I. THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY APPROPRIATE FOR DECLARATORY JUDGMENT.

The Uniform Declaratory Judgments Act ("UDJA") "is to be liberally construed and administered," consistent with its remedial purpose to resolve uncertainty "with respect to rights, status, and other legal relations." Section 27-8-102, MCA. "The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation and to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined." *Murray v. Mott*, 2015 MT 216, ¶ 11, 380 Mont. 162, 354 P.3d 197 (quoting *In re Dewar*, 169 Mont. 437, 444, 548 P.2d

149, 153-54 (1976)). A declaratory judgment may be entered in any proceeding “in which a judgment or decree will terminate the controversy or remove an uncertainty.” Section 27-8-205, MCA. A court may decline to enter judgment where doing so “would not terminate the uncertainty or controversy giving rise to the proceeding.” Section 27-8-206, MCA.

Though the UDJA is to be liberally construed, a justiciable controversy must exist before a court may entertain such an action. *Northfield Ins. Co. v. Mont. Ass'n of Cntys.*, 2000 MT 256, ¶ 10, 301 Mont. 472, 10 P.3d 813. A justiciable controversy exists where:

First, [the] parties have existing and genuine, as distinguished from theoretical, rights or interest[s]. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical, or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status, or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Lee v. State, 195 Mont. 1, 6, 635 P.2d 1282, 1284-85 (1981). The justiciable controversy test is intended “to prevent courts from determining purely speculative or academic matters, entering anticipatory judgments, providing for contingencies which may arise later, declaring social status, dealing with theoretical problems, answering moot questions, or giving abstract or advisory opinions.” *City of Missoula v. Fox*, 2019 MT 250, ¶ 11, 397 Mont. 388, 450 P.3d 898 (quoting *Northfield Ins. Co.*, ¶ 19). A justiciable controversy must be “real and substantial, admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.” *Armone v. City of Bozeman*, 2016 MT 184, ¶ 7, 384 Mont. 250, 376 P.3d 786 (quoting *Plan*

Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567) (internal ellipses omitted)).

In *Amone*, petitioners filed suit against the City of Bozeman seeking a declaration that a recently-adopted nondiscrimination ordinance, which prohibited landlords from discriminating on the basis of sexual orientation or gender identity, was invalid. *Amone*, ¶¶ 2-3. Only one of the petitioners was a landlord. *Id.* ¶ 3. The ordinance could only be enforced upon action by an aggrieved party who had experienced alleged discrimination. *Id.* ¶ 9. No such action had been taken against any of the petitioners. *Id.* The Montana Supreme Court held that these circumstances did not present a justiciable controversy. *Id.*, ¶ 10. The Court relied upon *Northfield*, ¶ 18, which involved “a contractual duty which has not yet arisen and which may, in fact, never arise,” and *Hardy v. Krutzfeldt*, 206 Mont. 521, 523-25 672 P.2d 274, 275-76 (1983), which involved contractual restraints on the sale of real property where “there was no pending sale or offer for sale of the properties.” *Amone*, ¶ 10. The Court distinguished these from situations where a justiciable controversy was present because “there existed at least a putative dispute between the plaintiffs and the defendants.” *Id.* ¶ 12 (citing *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997) and *Mont. Immigrant Justice Alliance (MIJA) v. Bullock*, 2016 MT 104, 383 Mont. 318, 371 P.3d 430).

Here, the dispute between Justice Rice and the Legislature is concrete and ongoing. The interests of the parties in this matter are not theoretical—the dispute is very much existing and genuine. *Lee*, 195 Mont. at 6, 635 P.2d at 1284-85. The Legislature has announced and repeated its intention to continue pursuing documents from the judicial branch, and has not forsworn serving future subpoenas upon Supreme

Court Justices as part of that process, notwithstanding the withdrawal of the earlier subpoenas, Mot. to Dismiss at 2; Ex. H at 22.

The Petition in this matter requested an order enjoining the Legislature from issuing further subpoenas. Petition at 20. This actual dispute exceeds the “putative” disputes contemplated in *Gryczan* and *MIJA*, where the contested statutes had not yet been enforced against the petitioners, but presented a threatened injury. *MIJA*, ¶ 2; *Gryczan*, 283 Mont. at 446, 942 P.2d at 120. It is distinguishable from *Arnone*, where no enforcement could potentially have occurred absent the independent action of a third party. *Arnone*, ¶ 13. The Court rightly concluded in *Arnone* that because there was no actual or putative dispute between the parties, the petitioners were impermissibly “fish[ing] in ponds for legal advice.” *Arnone*, ¶ 10. That is not the case here, where the parties are embroiled in a continuing controversy with respect to which their legal rights are uncertain. A judgment from this Court would remove that uncertainty. Section 27-8-205, MCA.

The controversy is one upon which the judgment of the court can effectively operate. *Lee*, 195 Mont. at 6, 635 P.2d at 1284-85. A justiciable controversy exists where the judgment “would have real impact on the parties’ rights, status, or legal relationships,” as contrasted with a purely academic question that would have no “real impact” on the status of the parties. *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 22, 366 Mont. 450, 288 P.3d 193. In this case, a judgment concerning the scope of the Legislature’s subpoena power and investigative authority would have a real impact on the parties’ rights and status, by clarifying what limitations may exist on legislative subpoenas which were not resolved in *McLaughlin II* such as whether production of

documents by legislative subpoena is even statutorily allowed. These areas, for which Justice Rice seeks the ruling of this Court, are further detailed below.

Finally, a justiciable controversy is one “the judicial determination of which will have the effect of a final judgment in law.” *Lee*, 195 Mont. at 6, 635 P.2d at 1284-85. In *Northfield*, the Montana Supreme Court held that this standard was not met in a case seeking a declaratory judgment regarding a secondary insurer’s duty to indemnify, because developments in the underlying liability case could potentially “nullify any declaratory judgment that Northfield and Lloyds have no duty to indemnify,” and would “require the District Court to amend or withdraw the declaratory judgment.” *Northfield*, ¶ 19. Similarly, in *Murray*, the petitioner filed an action in the Eighteenth Judicial District Court contesting actions taken against him in the First Judicial District Court by the Commissioner of Political Practices. *Murray*, ¶ 5. The Supreme Court held that the declaratory action filed in the Eighteenth Judicial District Court would not have the effect of a final adjudication because its judgment would not be binding on the First Judicial District Court. *Id.* ¶ 16. In this case, there is no other proceeding that would potentially conflict with or nullify this Court’s judgment, as there was in *Northfield* and *Murray*. This Court’s judgment would “terminate the uncertainty or controversy giving rise to the proceeding,” § 27-8-206, MCA, and have the effect of a final judgment.

Though the Legislature insists that negotiation is the proper realm to resolve this dispute—an insistence nevertheless belied by its action of issuing subpoenas to all seven Supreme Court Justices, the Court Administrator, and the Acting Director of the Department of Administration—a declaration of the rights of the parties is appropriate to inform the scope and bounds of any such negotiations. In considering an assertion of executive privilege in response to a congressional subpoena, the U.S. District Court for

the District of Columbia held that application of the federal Declaratory Judgment Act was appropriate for resolution of the dispute, observing that “[r]esolution of the immunity issue will determine the next steps (if any) the parties must take in this matter.” *Miers*, 558 F. Supp. 2d at 97. The Court further noted, “Two parties cannot negotiate in good faith when one side asserts legal privileges but insists they cannot be tested in court in the traditional manner. That is true whether the negotiating partners are private firms or the political branches of the federal government.” *Id.* at 99. It is true here, as well. A determination of whether the records sought can ultimately be compelled will inform the parties’ positions in negotiations concerning this live and ongoing dispute.

The fact that the subpoena has been withdrawn does not change this fact, and indeed makes application of the UDJA more, not less, appropriate. This is especially so in light of the Legislature’s announced intention to continue its broad investigation of the judicial branch, including the use of additional investigative subpoenas. The purpose of the UDJA is to resolve disputes *which might result in future litigation*. *Murray*, ¶ 11. It is not necessary for a separate cause of action, such as a petition to enjoin or enforce a subpoena, to exist before the provisions of the Act may be invoked. As the District Court for the District of Columbia observed in *Miers*, “enabling anticipatory review in order to eliminate the necessity of litigation in the defensive posture” is of particular benefit in high-profile disputes of constitutional magnitude, such as this one, where continuation of the controversy into potential contempt proceedings “would carry the possibility of precipitating a serious constitutional crisis.” 558 F. Supp. 2d at 82.

The controversy is not mooted by the Legislature’s unilateral decision that it prefers “to engage the Justice in negotiation,” particularly in light of the Legislature’s repeated denial of any judicial authority over its actions. Ex. C at 7-8 (“McLaughlin’s

current Petition seeks yet another Court order which will not bind the Legislature and will not be followed. The Legislature will continue its investigation, Acting-Director Giles will obey the legislative subpoena or be subject to contempt, and this Court lacks jurisdiction to hinder the Legislature's power to investigate these matters of statewide importance.").

The Legislature plainly intends to continue its probe of the Judicial Branch. See Respondent's Br. in Supp. of Mot. to Dismiss at 6-7. The Select Committee expressly recommended the issuance of further subpoenas. Ex. H at 22. The dispute is present and ongoing, and the parties are entitled to a judicial declaration governing the scope of potential negotiations, on issues not resolved by *McLaughlin II* before those negotiations again "precipitat[e] a serious constitutional crisis." *Miers*, 558 F. Supp. 2d at 82.

II. THE SUBPOENA EXCEEDS THE SCOPE OF THE LEGISLATURE'S INVESTIGATIVE AND SUBPOENA POWERS.

The Montana Supreme Court recently addressed the validity of the subpoena sent to Court Administrator McLaughlin, which identified the same purpose as the subpoena to Justice Rice. *McLaughlin II*, ¶ 21. In that opinion, the Court held that the subpoena did not serve a valid legislative purpose and was impermissibly broad. *Id.* ¶ 55. This decision is also determinative of this case as to the issues it addressed, though the issuance of a legislative subpoena to a Justice of the Supreme Court, an independently elected constitutional officer, raises additional and even more severe concerns regarding the separation of powers and the abuse of legislative authority. The repeated and misguided insistence by members of the Legislature and its counsel that the Montana Supreme Court is not a proper forum for this dispute, thereby arguing its

authority is tainted, provides this Court with an important role to play. See Ex. G; Mot. to Disqualify Justices, *McLaughlin*, OP 21-0173 (Mont. April 30, 2021), Ex. I.

a. Section 5-5-101, MCA, does not permit the Legislature to subpoena documents.

The *McLaughlin II* decision rested on the Legislature's purported constitutional basis for its subpoena power, rooted in the Legislature's inherent powers of investigation. *McLaughlin II*, ¶¶ 6, 7 n.2. The Court also observed, however, as this Court concluded in its Preliminary Injunction Order, that the Legislature's statutory subpoena power does not expressly extend to the production of documents, though it did not go on to rule conclusively on this issue, leaving a question yet to be addressed by this Court. *Id.*, ¶ 7 n.2; Preliminary Injunction Order at 11.

Section 5-5-101, MCA, provides:

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

(2) A subpoena is sufficient if:

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

(b) it is addressed to the witness;

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

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

The statute "does not expressly authorize the Legislature to subpoena documents."

McLaughlin II, ¶ 7 n.2. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. "It is not a court's prerogative to read into a statute what is not there." *Bates v. Neva*, 2014

MT 336, ¶ 13, 377 Mont. 350, 339 P.3d 1265. As this Court correctly concluded, it may not insert the power to command the production of documents via subpoena into a statute the terms of which contain no such provision. Preliminary Injunction Or. at 11.

Although the *McLaughlin* Court observed in a footnote that § 5-5-101, MCA, does not include the power to subpoena documents, it did not rest its holding on this basis, instead addressing the Legislature's Constitutional subpoena power arising from its implicit investigative authority. *McLaughlin II*, ¶ 7 n.2. The Court also did not address whether § 5-5-105(2), MCA, which states that a witness subpoenaed by the Legislature "cannot refuse to testify to any fact or to produce any paper concerning which the witness is examined for the reason that the witness's testimony or production of the paper tends to disgrace the witness or render the witness infamous," implies that the Legislature has the power to compel production of papers under that statute. This Court correctly held in its Preliminary Injunction Order that it does not. Preliminary Injunction Or. at 11. These statutory questions are clearly at issue in the ongoing dispute between the Legislature and Justice Rice and should be resolved here by final order.

b. The principles announced in *McLaughlin* should be applied here as to the subpoena to a Supreme Court Justice.

In *McLaughlin II*, the Montana Supreme Court ruled that the subpoena issued to Court Administrator McLaughlin did not advance a valid legislative purpose, where the stated purpose of that subpoena was, like the subpoena to Justice Rice, to further the Legislature's:

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

McLaughlin II, ¶ 21; Ex. A at 1. The ruling in *McLaughlin II* is the law and should be applied as to any requests for the documents and communications of a Supreme Court Justice.

While the subpoena to *McLaughlin* requested “all emails and attachments sent and received by your government e-mail account” and “any and all laptops, desktops, hard-drives, or telephones owned by the State of Montana,” Emergency Mot to Quash Rev. Legislative Subpoena, *McLaughlin*, OP 21-0173 (Mont. April 15, 2021) at 3, Ex. J, the subpoena to Justice Rice went further and requested “text messages, phone messages, and phone logs sent or received by your *personal* or work phones.” Ex. A at 1. (Emphasis added). A request for a Supreme Court Justice’s personal communications is not germane to an investigation of public records.

Nor is it pertinent to an investigation of the efficacy of the “policies and processes” of the Judicial Standards Commission, particularly where information relevant to this purpose is available without subpoena. Section 3-1-1125, MCA, provides that “[t]he legislative auditor may audit the commission to determine whether it is efficiently and effectively processing complaints against judicial officers in the state” The Commission is further required to submit a report to the legislature containing:

- (a) identification of each complaint, whether or not verified, received by the commission during the preceding biennium by a separate number that in no way reveals the identity of the judge complained against;
- (b) the date each complaint was filed;
- (c) the general nature of each complaint;
- (d) whether there have been previous complaints against the same judge and, if so, the general nature of the previous complaints;
- (e) the present status of all complaints filed with or pending before the commission during the preceding biennium; and

(f) whether 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.

Section 3-1-1126(1), MCA. A legislative subpoena is not appropriate where other sources could reasonably provide the information necessary to achieve the legislative purpose. *McLaughlin II*, ¶ 10 (citing *Mazars*, 140 S. Ct. at 2035-36).

This Court should make clear that the Legislature may not issue a subpoena for personal communications without demonstrating that production is necessitated by a legitimate legislative interest, and not an investigative interest that is the purview of the executive branch.

c. The true purpose of the subpoena is to investigate alleged judicial misconduct, a role not within the constitutional purview of the Legislature.

The fact that information regarding the processes of the Judicial Standards Commission is available to the Legislature through other means, together with the Recommendations of the Select Committee Report stating that committee's intent to "determine whether evidence indicates that the conduct of state employees or officials should be referred to the appropriate authorities for further investigation" and "submit complaints to the disciplinary bodies of the judicial or legal profession if facts and evidence indicate such complaints are warranted," Ex. H at 22, tends to establish that the purpose of the subpoena is not to audit the effectiveness of the Judicial Standards Commission—which the Legislature may already do, by statute, without resort to subpoena—but to enable the Select Committee to investigate judicial misconduct itself, in violation of the role constitutionally committed to the Judicial Standards Commission. The Legislature admits as much in its brief in support of its most recent motion to dismiss, describing the purpose of the subpoena as follows:

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.

Resp. Br. in Supp. of Mot. to Dismiss at 6 n.2. The reason for the legislative subpoena to Justice Rice is plainly not to investigate deleted emails or the efficacy of the Judicial Standards Commission. It is to pursue a public investigation of alleged judicial misconduct for political purposes, in violation of the constitutional role of the Judicial Standards Commission and avoidance of the confidentiality—also constitutionally mandated—under which that body operates. Mont. Const. Art. VII, sec. 11. The attack on Justice Rice relative to the appointment of Judge Krueger was not directly addressed in *McLaughlin*, and is an important matter still left for this Court's ruling.

The legislative investigative power may not be used to inquire into matters that are exclusively the concern of the judiciary. *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959). Nor may it be used for the executive branch function of law enforcement, *McLaughlin II*, ¶ 9, nor “for the personal aggrandizement of the investigators[,] to ‘punish’ those investigated,” or “to expose for the sake of exposure.” *Watkins*, 354 U.S. at 178, 200, 77. S. Ct at 1179, 1185. A request for personal communications should be viewed with particular caution in light of these impermissible uses. The legislative subpoena issued to Justice Rice is an invalid exercise of legislative power.

CONCLUSION


The Legislature's subpoena to Justice Rice serves no valid legislative purpose. If the Legislature wishes to learn more about Judicial Branch email retention policy, or the effectiveness of the Judicial Standards Commission, it may do so through other

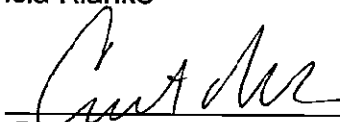
sources, without resort to subpoena. The Legislature has instead attempted to violate the purview of the Judicial Branch by launching a public and politically motivated investigation into judicial misconduct, an act that the constitutional separation of powers does not permit. For the foregoing reasons, Petitioner requests a declaration:

- That the Legislature's statutory subpoena power does not include the power to compel production of documents via subpoena duces tecum;
- That, pursuant to *McLaughlin II*, the Legislature may not issue a subpoena seeking the communications of a Supreme Court Justice for the stated purpose of "investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy;"
- That, pursuant to *McLaughlin II*, the Legislature may not issue a subpoena seeking the communications of a Supreme Court Justice for the stated purpose of investigating "whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision";
- That the Legislature may not issue a subpoena for personal communications without demonstrating that production is necessitated by a legitimate legislative interest, and not for purposes of political exposure or to serve an investigative interest that is the purview of the executive branch; and
- That the Legislature may not issue a subpoena for the purpose identified in its Brief in Support of Motion to Dismiss of investigating alleged judicial misconduct.

DATED this 30 day of July, 2021.

DRAKE LAW FIRM, P.C.

BY: 
Patricia Klanke

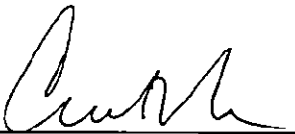
BY: 
Curt Drake

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 30th day of July, 2021, postage fully prepaid by U. S.

Mail and email, to the following:

Kristen Hansen
Derek J. Oestreicher
Office of the Attorney General
215 N Sanders
P.O. Box 201401
Helena, MT 59620-1401


Curt Drake

MONTANA STATE LEGISLATURE

SUBPOENA

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

THE MONTANA STATE LEGISLATURE, to Justice Rice.

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

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

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

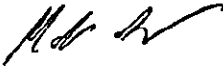
Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and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

EXHIBIT
A

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

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

By:



Senator Mark Blasdel, President of the Montana Senate.

By:



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

AUSTIN KNUDSEN



STATE OF MONTANA

June 22, 2021

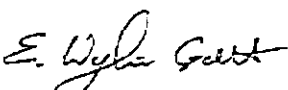
Justice Beth Baker
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Baker:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: 
Senator Mark Blasdel, President of the Montana Senate

By: 
Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

EXHIBIT
B

AUSTIN KNUDSEN



STATE OF MONTANA

June 22, 2021

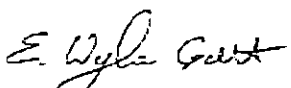
Director Misty Ann Giles
Department of Administration
State of Montana
Mitchell Building, 125 N. Roberts St.
Helena, MT 59620

Director Giles:

Please take notice that the Subpoena issued to you on the 8th of April, 2021, is hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of this Subpoena extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: 
Senator Mark Blasdel, President of the Montana Senate

By: 
Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
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mtdoj.gov

Ex.B. p. 2

AUSTIN KNUDSEN



STATE OF MONTANA

June 22, 2021

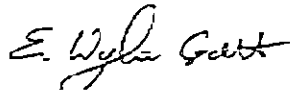
Justice Ingrid Gustafson
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Gustafson:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: 
Senator Mark Blasdel, President of the Montana Senate

By: 
Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

AUSTIN KNUDSEN



STATE OF MONTANA

June 22, 2021

Chief Justice Mike McGrath
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Chief Justice McGrath:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: 

Senator Mark Blasdel, President of the Montana Senate

By: 

Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

AUSTIN KNUDSEN



STATE OF MONTANA

June 22, 2021

Justice Laurie McKinnon
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601


Justice McKinnon:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: 

Senator Mark Blasdel, President of the Montana Senate

By: 

Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

AUSTIN KNUDSEN



STATE OF MONTANA

June 22, 2021

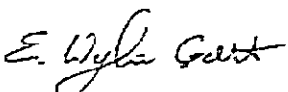
Beth McLaughlin
Supreme Court Administrator
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Ms. McLaughlin:

Please take notice that the Subpoena issued to you on the 14th of April, 2021, is hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of this Subpoena extinguishes any obligation for you to comply with the Subpoena and produce the requested documentation and information.

Sincerely,

By: 
Senator Mark Blasdel, President of the Montana Senate

By: 
Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

AUSTIN KNUDSEN



STATE OF MONTANA

June 22, 2021


Justice James Rice
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Rice:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: 
Senator Mark Blasdel, President of the Montana Senate

By: 
Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

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AUSTIN KNUDSEN



STATE OF MONTANA

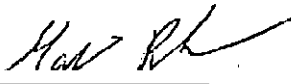
June 22, 2021

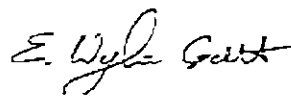
Justice Dirk Sandefur
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Sandefur:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: 
Senator Mark Blasdel, President of the Montana Senate

By: 
Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contactdoj@mt.gov
mtdoj.gov

AUSTIN KNUDSEN



STATE OF MONTANA

June 22, 2021


Justice James Jeremiah Shea
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Shea:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: 
Senator Mark Blasdel, President of the Montana Senate

By: 
Representative Wylie Galt, Speaker of the Montana House of Representatives

DEPARTMENT OF JUSTICE

215 North Sanders
PO Box 201401
Helena, MT 59620-1401

(406) 444-2026
Contact:doj@mt.gov
mtdoj.gov

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

BETH McLAUGHLIN,

Petitioner,

v.

The MONTANA STATE LEGISLATURE, and the
MONTANA DEPARTMENT OF ADMINISTRATION,

Respondents.

THE MONTANA STATE LEGISLATURE'S
MOTION TO DISMISS AS MOOT

APPEARANCES:

KRISTIN HANSEN
Lieutenant General
DEREK J. OESTREICHER
General Counsel
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
khansen@mt.gov
derek.oestreicher@mt.gov

RANDY J. COX
BOONE KARLBERG P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807-9199

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT
MONTANA STATE LEGISLATURE

EXHIBIT

C

Pursuant to Rule 16 of the Montana Rules of Appellate Procedure, the Legislature respectfully moves to dismiss this proceeding because it is now moot. The Legislature hereby provides notice that the subpoenas issued to the Department of Administration (“DOA”), Supreme Court Administrator Beth McLaughlin, and the Supreme Court Justices have been rescinded and withdrawn. Accordingly, the Legislature will not seek enforcement of these subpoenas. Letters have been sent to the aforementioned parties formally rescinding and withdrawing these subpoenas, and copies of these letters are attached as Appendix A.

In various filings before this Court, the Legislature has consistently maintained that the only appropriate path to resolution in this dispute between co-equal branches of government is for the branches to negotiate and make accommodations in good faith. That path has been foreclosed because the Court has used this action—initiated by its appointed employee—to spurn any such negotiations. The Legislature also rescinds its subpoenas as a measure of good faith that will hopefully encourage the judiciary to interact in good faith with its sister branch of government.

To be clear, the Legislature's justified interests in the underlying matters, and in pursuing negotiations, remain. But to the extent the pending subpoenas may have contributed to a stalemate between the parties, the Legislature is pleased to take the first step and remove that obstacle. This first step will lay a foundation for amicable discussions between the Judicial and Legislative branches.

By rescinding and withdrawing the subpoenas at issue, this proceeding is moot. To the extent this matter was ever properly before the Court, it can be no longer. There is accordingly no justiciable case or controversy, and this matter should be dismissed.

CONCLUSION

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

Counsel for the Legislature has contacted counsel for the Department of Administration and counsel for Beth McLaughlin. The Department of Administration does not object to this motion. Ms. McLaughlin's counsel has not yet determined if Ms. McLaughlin will object.

Respectfully submitted this 22nd day of June, 2021.

AUSTIN KNUDSEN
Montana Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Kristin Hansen
Kristin Hansen
Lieutenant General

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 of the Montana Rules of Appellate Procedure, I certify that this pleading is printed in a proportionately spaced Century Schoolbook, 14-point font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 340 words, excluding certificate of service and certificate of compliance.

By: /s/ Kristin Hansen
Kristin Hansen
Lieutenant General

CERTIFICATE OF SERVICE

I, Kristin N. Hansen, hereby certify that I have served true and accurate copies of the foregoing Motion - Dismiss to the following on 06-22-2021:

Randy J. Cox (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: Beth McLaughlin
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Montana State Legislature
Service Method: cService

Dale Schowengerdt (Attorney)
900 N. Last Chance Gulch
Suite 200
Helena MT 59624
Representing: Administration, Department of
Service Method: eService

Michael P. Manion (Attorney)
Department of Administration
P.O. Box 200101
Helena MT 59620-0101
Representing: Administration, Department of
Service Method: E-mail Delivery

Electronically signed by Rochell Standish on behalf of Kristin N. Hansen
Dated: 06-22-2021

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

Lawmakers abandon investigative subpoenas for judges' records

By SEABORN LARSON Lee Newspapers
Jun 22, 2021



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

THOM BRIDGE, Independent Record

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

EXHIBIT
D

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.



Sen. Greg Hertz, R-Polson

Photo Courtesy of the Montana Legislature

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.



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 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.