Curt Drake
Patricia Klanke
DRAKE LAW FIRM, P.C.
111 North Last Chance Gulch
Suite 3J, Arcade Building
Helena, Montana 59601
Telephone: (406) 495-8080
Facsimile: (406) 495-1616
Email: curt@drakemt.com

Attorneys for Petitioner

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. Motl*, 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.'" *Arnone 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 *Arnone*, 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. *Arnone*, ¶¶ 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." *Arnone*, ¶ 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
Contactdoj@mt.gov
mtdoj.gov

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

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

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
Contactdoj@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

ATTORNEYS FOR RESPONDENT
MONTANA STATE LEGISLATURE

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

ATTORNEY FOR PETITIONER

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 pursing 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: eService

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.

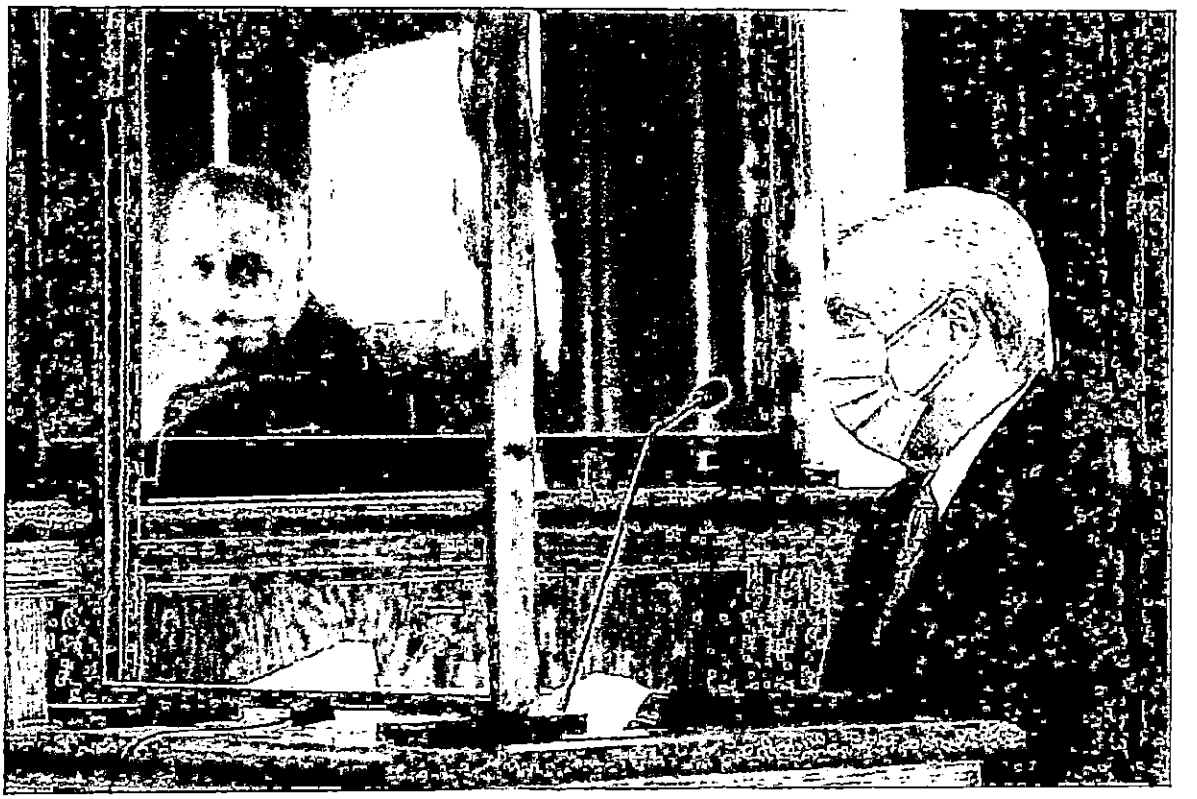
EXHIBIT
D

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.

"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."

Kim Abbott

Provided photo

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."

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

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173

BETH McLAUGHLIN,

Petitioner,

v.

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

Respondents.

ORDER

On June 22, 2021, Respondent Montana State Legislature (Legislature) filed a motion to dismiss this action as moot, citing the Legislature's June 22, 2021 letter to Petitioner Beth McLaughlin (McLaughlin) withdrawing the April 14, 2021 legislative subpoena to McLaughlin at the center of this proceeding. McLaughlin opposes this motion.

The background facts of this case have been laid out in *McLaughlin v. Legislature*, 2021 MT 120, 404 Mont. 166, ___ P.3d ___. The procedural history relevant here is summarized as follows.

McLaughlin's April 12, 2021 emergency petition to this Court requested, among other things, that this Court temporarily stay further production of Judicial Branch emails by the Department of Administration (DOA), acting pursuant to an April 8, 2021 Legislative Subpoena. *See* Petition for Original Jurisdiction and Emergency Request to Quash/Enjoin Enforcement of Legislative Subpoena. It also asked this Court to enjoin the Legislature from "disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the Subpoena" and to issue an order "directing the Montana Legislature to immediately return any documents produced pursuant to the Subpoena, or any copies or reproductions thereof, to Beth McLaughlin." On April 14, 2021, the Legislature issued another subpoena, this one to

EXHIBIT
E

McLaughlin, directing her to appear before the Legislature and produce documents as well as State "laptops, desktops, hard-drives, or telephones" used to facilitate polling of Montana judges and justices on pending legislation. McLaughlin filed a supplementary filing notifying the Court of this development and requesting an order quashing the new subpoena. This Court ordered a temporary stay on all Legislative subpoenas seeking electronic judicial records pending consideration of proper legal filings in due course. The Legislature withdrew its subpoena to McLaughlin and moved to dismiss this matter as moot on June 22, 2021.

A matter is considered moot when the issue has ceased to exist such that it no longer presents an actual controversy and the court cannot grant effective relief. *Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 19, 293 Mont. 188, 974 P.2d 1150. The mootness doctrine does, however, contain several exceptions, including "public interest," "voluntary cessation," and "capable of repetition, but evading review." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 32-33, 333 Mont. 331, 142 P.3d 864. McLaughlin cites all three doctrines in support of her response to the Legislature's motion to dismiss.

McLaughlin petitions this Court to address both (a) the temporarily-stayed subpoenas directed to her and her information and (b) the documents that the Legislature has already obtained through the DOA, before McLaughlin was able to seek review from this Court. The Legislature's withdrawal of its subpoena to McLaughlin does not impact the litigation surrounding the status of the documents the Legislature has already obtained. The Legislature has not made this Court aware of any effort to return, destroy, account for, or otherwise address the thousands of unredacted Judicial Branch emails that it previously obtained, without judicial oversight or procedural protections, through the DOA. Thus, McLaughlin's request that this Court order such documents be immediately returned is not moot. As counsel for McLaughlin pointed out while unsuccessfully attempting to negotiate for a pause amidst the ongoing release of thousands of unredacted Judicial Branch emails with which to implement legal and procedural protections, it is "uncertain how that bell can be un-rung," once the information has been released. Petitioner's Response to Respondent's Motion to Dismiss as Moot, Exhibit A-4 (filed June 24, 2021) (Petitioner's

Response). The Legislature's decision to act first, and deal with legal ramifications later, does not allow it to declare the issue moot when it determines that it has achieved what it wishes. Because the issue has not ceased to exist as an actual controversy and it is within the power of this Court to grant effective relief, McLaughlin's petition is not moot with respect to these documents. *See Shamrock Motors*, ¶ 19.

Addressing the Legislature's April 14, 2021 subpoena directed to McLaughlin, McLaughlin raises the "public interest exception" to the mootness doctrine. *Havre Daily News, LLC*, ¶ 32 (quoting *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872). This exception applies to a "[(1)] question of public importance [(2)] that will likely recur and [(3)] whose answer will guide public officers in the performance of their duties." *Gateway Opencut Mining Action Group v. Bd. of County Comm'rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133. "We have consistently held that where questions implicate fundamental constitutional rights or where the legal power of a public official is in question, the issue is one of public importance." *Ramon v. Short*, 2020 MT 69, ¶ 22, 399 Mont. 254, 460 P.3d 867 (citations omitted); *see also Ramon*, ¶ 24 (noting that a ruling would benefit the government officers at issue by providing "authoritative guidance on an unsettled issue" in the absence of an existing Montana Supreme Court ruling on the matter).

First, the scope of the legislative subpoena power when directed towards another branch of government is clearly an issue of great public interest, as it goes to not only the "legal power of a public official," *Ramon*, ¶ 22, but the very core of a constitutional system premised on separation of powers. *See Brown v. Gianforte*, 2021 MT 149, ¶¶ 52-66, 404 Mont. 269, ___ P.3d ___ (Rice, J., concurring).

Second, while conflicts between the political branches and members of the judicial branch have been exceedingly rare—perhaps a prerequisite to the long-term survival of functioning democracy—it appears in this case that the issue is likely to reoccur. McLaughlin points to material in the record demonstrating that the Legislature intends to continue seeking the documents at the heart of the present controversy. *See* Petitioner's Response, Exhibit B-3 (quoting Senator Greg Hertz, Chair of the "Select Committee on Judicial Transparency and Accountability" stating that "[t]o be clear, we expect the judicial

branch to release public records . . . ."). In its motion to dismiss, the Legislature represents that its "justified interests in the underlying matters" remains fully intact, despite its motion to dismiss. *See* The Montana State Legislature's Motion to Dismiss as Moot at 3 (filed June 22, 2021) (Motion to Dismiss).

The history of this litigation has given us reason to be skeptical of the representations by the Legislature and its counsel in this matter. Rather than work in good faith with McLaughlin to develop an orderly process to protect confidential and privileged materials, the Legislature unilaterally accessed thousands of unredacted messages, without proper procedural protections, through the DOA. Once McLaughlin learned of this release, the record shows that the repeated efforts made by McLaughlin's counsel to seek a good faith resolution to implement a process to protect citizens' privacy rights went unrequited. *See* Petitioner's Response, Exhibit A (showing a series of correspondence from Petitioner's counsel repeatedly requesting "an orderly process that protects existing privacy interests" amidst the wholesale release of judicial branch communications likely containing "private medical information, personnel matters including employee disciplinary issues, discussions with judges about ongoing litigation, information regarding Youth Court cases, judicial work product, ADA requests for disability accommodations, confidential matters before the Judicial Standards Commission, and information that could subject the State to liability were protected information exposed.").

Third, a ruling on the matter will guide public officers in the performance of their duties. We are aware of no Montana caselaw directly addressing the issue presented by this Petition, which could guide the Legislature, the Court Administrator, and the DOA in the future. The matter at hand is one of serious public interest, is likely to reoccur, and is in need of a ruling to guide public officers in the performance of their duties. The public interest exception to the mootness doctrine applies.

The second mootness exception pointed to by McLaughlin is the "voluntary cessation" doctrine. This doctrine applies when the challenged conduct is of indefinite duration but is voluntarily terminated prior to the completion of appellate review. *Havre Daily News, LLC*, ¶ 34. Due to the concern that a party "may utilize voluntary cessation

to manipulate the litigation process, 'the heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.'" *Havre Daily News, LLC*, ¶ 34 (quoting *Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000) (internal quotations and alterations omitted)).

Unfortunately, the actions of counsel before this Court during these proceedings have raised serious concerns of "manipulat[ion] of the litigation process." *See McLaughlin v. Mont. State Legislature*, 2021 MT 120, ¶¶ 3, 11, 404 Mont. 166, ___ P.3d ___ (noting that counsel's representations that Court orders would not be respected and subsequent "unilateral attempt to manufacture a conflict by issuing subpoenas to the entire Montana Supreme Court . . . . appears directed to disrupt the normal process of a tribunal"). Notably, in its Motion to Dismiss, the Legislature has *not* committed itself to refraining from resuming the challenged conduct if its motion were granted. The gravity of the problem is once again magnified by the fact that the Legislature already has in its possession thousands of unredacted Judicial Branch emails—after demonstrating a willingness to act quickly and without notice before an aggrieved party can seek procedural protections or judicial review—significantly raising the stakes should the Legislature resume the complained-of conduct. *See* Petitioner's Notice of Additional Legislative Subpoena at 3 (filed Apr. 26, 2021) (notifying the Court that the Legislature had sent another subpoena to DOA seeking McLaughlin's emails on April 13, 2021, without notifying McLaughlin); Legislative Subpoena to Director Misty Ann Giles of April 8, 2021 (directing DOA to compile and produce thousands of McLaughlin's emails to the Legislature by the next day). Here, the Legislature has failed to bear its "heavy burden" of persuading this Court that it will not simply reissue the same subpoena to McLaughlin should it be dissatisfied with the results of its efforts to obtain the sought-after materials without litigation. Thus, the "voluntary cessation" exception to the mootness doctrine applies.

For the reasons stated above, this Court has determined that the matter is not moot with regard to documents already in the Legislature's possession. Additionally, the

mootness doctrine does not apply with respect to the withdrawn subpoena to McLaughlin as it falls within the public interest and voluntary cessation exceptions.

THEREFORE,

IT IS ORDERED that the motion to dismiss is DENIED.

DATED this 29th day of June, 2021.

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA
/S/ DONALD HARRIS
Honorable Donald Harris, District Judge
sitting for Justice Jim Rice

Montana Senate GOP
@MTSenateGOP

Statement from Senator @HertzRep on today's Montana Supreme Court ruling.
#mtleg #mtpol

"Montanans demand accountability and transparency from their elected officials. Today, the Montana State Supreme Court told Montanans they will not uphold those values, and will instead continue to delete emails, use state resources for their private lobbying efforts, and bend the law to protect their personal interests.

This ruling is exactly what you'd expect to get from people acting as judges in their own case, protecting their own interests. Not only did the Montana Supreme Court rule in their own favor on the subpoena question, they have gone way beyond that and ruled in their own favor on a wide variety of other issues that weren't before the Court. This ruling is poisoned by a massive conflict of interest and it's judicial activism at its worst.

We are deeply troubled by this ruling. The Court appears to be saying that only people chosen by the Court can police their conduct. They also appear to be claiming that they don't have to follow public records laws and retain emails for public inspection. Today, the Montana Supreme Court declared itself above reproach, and, potentially, above the law.

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."

12:24 PM · Jul 14, 2021 · Twitter Web App

2 Retweets **2** Quote Tweets **3** Likes

EXHIBIT F

Montana justices say lawmakers overstepped in seeking emails

By AMY BETH HANSON July 14, 2021

HELENA, Mont. (AP) — The Montana Supreme Court ruled Wednesday that legislative leaders overstepped their authority in issuing a subpoena for months of emails belonging to the court's administrator, saying the request was not related to a valid legislative interest.

The email issue was raised while the court was considering a legal challenge to a new law that eliminated the Judicial Nomination Commission and allowed the governor to fill judicial vacancies between elections. The law is an element of a longer-term effort by Republican lawmakers to remake what they consider an activist judiciary and to appoint or elect more conservative judges.

Lawmakers had asked Court Administrator Beth McLaughlin for emails involving a poll of state judges

Lawmakers then issued a subpoena to the Department of Administration, which includes the state's internet technology division, for nearly all of McLaughlin's emails, including deleted emails.

The director of the Department of Administration "failed to consider the significant confidentiality and privacy interests implicated when she began her blanket release of the entirety of McLaughlin's emails," did not notify McLaughlin of the subpoena or give her a chance to review the materials or challenge their release in court, states the order, written by Justice Beth Baker.

Republican lawmakers argued they needed the emails for a Select Committee that was investigating whether the judicial branch was following its email retention policies and if members were using government time and resources to lobby the legislature on behalf of the Montana Judges Association.

The unanimous court found that the Judicial Standards Commission, not the Legislature, is responsible for investigating allegations of judicial misconduct, such as following email retention and equipment use policies, or expressing opinions about legal matters.

Justices also noted the U.S. Supreme Court has upheld the right for judicial candidates to state their views on disputed legal and political issues, saying that does not affect their ability to make an impartial decision based on law.

Montana's rules of judicial conduct encourage judges to share their "special expertise" with the Legislature on matters concerning the law, the legal system and court administration, the opinion notes.

The justices ordered the emails returned to McLaughlin and said the subpoenas are not valid and cannot be reissued.

legal arguments because the court is predisposed against it or is engaged in some sort of nefarious self-protection. The Legislature lost every legal issue on the merits."

Republican lawmakers had also subpoenaed emails from the justices themselves and asked them to appear before the Select Committee, leading justices to argue the Legislature was trying to create a conflict of interest in an effort to prevent the Supreme Court from ruling on the subpoenas.

"This ruling is exactly what you'd expect to get from people acting as judges in their own case, protecting their own interests," Republican Sen. Greg Hertz said in a statement Wednesday. "Not only did the Montana Supreme Court rule in their own favor on the subpoena question, they have gone way beyond that and ruled in their own favor on a wide variety of other issues that weren't before the court. This ruling is poisoned by a massive conflict of interest and it's judicial activism at its worst."

Less than two weeks after the court upheld the constitutionality of the law eliminating the Judicial Nomination Commission, the Legislature withdrew the subpoenas and asked the Supreme Court to dismiss McLaughlin's challenge.

Hertz, chair of the Select Committee, said at the time he still expected McLaughlin to work with lawmakers to provide emails about the poll.

Lawmakers could have started by negotiating with the Judicial Branch for emails and "might have averted interbranch confrontation," if they had done so, the court said.

In a concurring opinion, Justice Dirk Sandefur wrote that the effort to obtain the court administrator's emails — under the stated reason of investigating whether the legislature needed to pass a law to set email retention policies for the Judicial Branch — was "an unscrupulously calculated and coordinated partisan campaign to undermine the constitutional function of the Judicial Branch to hear constitutional challenges to new laws."

Hertz said the Legislature and its attorney will continue to review the ruling.

May 2021

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY

INITIAL REPORT TO THE 67TH MONTANA LEGISLATURE

INITIAL REPORT ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY

EXHIBIT
H

TABLE OF CONTENTS

Special Joint Select Committee on Judicial Accountability and Transparency

Committee Members

The President of the Senate and the Speaker of the House created the Special Joint Select Committee on Judicial Transparency and Accountability on April 14, 2021.

Senate Members

Senator Greg Hertz, Chair
Polson, MT
Ph: (406) 253-9505
Email: greg.hertz@mtleg.gov

Senator Tom McGillvray
Billings, MT
Ph: (406) 698-4428
Email: tom.mcgillvray@mtleg.gov

Senator Diane Sands
Missoula, MT
Ph: (406) 251-2001
Email: senatorsands@gmail.com

House Members

Representative Sue Vinton, Vice Chair
Billings, MT
Ph: (406) 855-2625
Email: sue.vinton@mtleg.gov

Representative Amy Regier
Kalispell, MT
Ph: (406) 253-8421
Email: amy.regier@mtleg.gov

Representative Kim Abbott
Helena, MT
Ph: (406) 439-8721
Email: kim.k.abbott@gmail.com

RECOMMENDATIONS

1. That this Committee continue into the interim, with proper funding, in order for the Committee to complete its investigation.
2. That the Committee complete its work on the same schedule as that of regular interim committees and produce a final report to the 68th Legislature.
3. That the Committee examine whether legislation is necessary to address Committee findings.
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 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.
8. That the Committee consider whether the current lobbying practices of the Montana Judges Association negatively impact public confidence in the branch or compromise the integrity of the judicial branch by creating the appearance of bias for or against legislation that may later be challenged in the courts.
9. That the Committee consider whether the Montana Judges Association should remain the primary education and ethics provider to the Montana judiciary, or whether a third-party would be better suited to provide such services to the branch.

AUSTIN KNUDSEN
Montana Attorney General
KRISTIN HANSEN
Lieutenant General
DEREK J. OESTREICHER
General Counsel
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
Derek.Oestreicher@mt.gov

COUNSEL FOR RESPONDENT
MONTANA STATE LEGISLATURE

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.

MOTION TO DISQUALIFY JUSTICES

Pursuant to Mont. R. App. P. 16, the Legislature moves for the immediate disqualification of all Justices from this case.

EXHIBIT I

LEGAL STANDARDS

I. Due process

"It is axiomatic that a fair tribunal is a basic requirement of due process" under the Fourteenth Amendment to the United States Constitution. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *see also Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995) (citing *Ward v. Monroeville*, 409 U.S. 57 (1972)). Likewise, Montana's Due Process Clause, *see* Mont. Const. art. II, § 17, is the "guiding principle of our legal system" and contemplates tenacious adherence "to the ideal that both sides of a lawsuit be guaranteed a fair trial." *Lopez v. Josephson*, 2001 MT 133, ¶ 35, 305 Mont. 446, 30 P.3d 326. Due process demands disqualification when a judge has an interest in the outcome of a case that presents a serious risk of actual bias or prejudgment "under a realistic appraisal of psychological tendencies and human weaknesses." *Id.*, *Caperton,* 883-84 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Given that Due process evaluates human nature realistically, it is no surprise that "no man is allowed to be a judge in his own cause." *Caperton*, 556 U.S. at 876 (citations omitted).

II. Judicial disqualification

A party cannot get a fair trial if the presiding Tribunal has a personal interest in the outcome. Montana law requires disqualification to avoid any such travesty. Mont. Code Ann. § 3-1-803(1). Montana's Code of Judicial Conduct ("MCJC")

expounds upon that law. The MCJC declares that an independent, fair, and impartial judiciary is indispensable to our system of justice. MCJC, Preamble (2009) (cited by *French v. Jones*, 876 F.3d 1228, 1230 (9th Cir. 2017)). A judge is required to act at all times in a manner that promotes "public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." MCJC 1.2. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." MCJC 2.12. A judge is required to disqualify himself or herself in any circumstance where the "judge has a personal bias or prejudice concerning a party . . . or personal knowledge of facts that are in dispute in the proceeding." *Id.* at Rule 2.12(A)(1).

DISCUSSION

A quick recitation of the facts demonstrates the bewilderingly obvious conflict of interest this Court faces with the parties and subject matter at issue here. This conflict justifies and requires summary disqualification of each member of this Court. Administrator McLaughlin—who was appointed by *this Court*,[1] who performs duties assigned by this Court, and who serves at the pleasure of *this Court*—

[1] Mont. Code Ann. § 3-1-701, *et seq.*

filed this Petition to prevent the production of *this Court's* public records. McLaughlin's close relationship with this tribunal—and her efforts to prevent the disclosure of this Court's records—poses far more than a reasonable question about the Court's ability to hear and decide this matter impartially. This dispute has darkened other doors, too. Look at the separate original proceeding, *Brown, et al. v. Gianforte et al.*, OP 21–0125. There, the Court granted an unnoticed motion to McLaughlin over a weekend, when neither she nor the entity she sought to enjoin—the Legislature—were yet parties to the action.[2] That weekend transaction, which necessarily included ex parte communications that have neither been acknowledged nor disavowed,[3] resulted in the Court stifling the production of its own public records held by McLaughlin. Members of this Court have an obligation to promote confidence in the independence, integrity, or impartiality of the judiciary, *see* MCJC 1.2, but these actions do precisely the opposite.

---

[2] Both of McLaughlin's Petitions fail to satisfy the Rules of Appellate Procedure. Justice Rice has sought review of the same or similar issues presented in McLaughlin's Petition in District Court. This act maps out a more proper process and confirms that the "litigation in the trial courts and the normal appeal process" is adequate and correct. *See* Mont. R. App. P. 14(4).

[3] Rule 2.10 of the Code of Judicial Conduct requires that the members of this Court disclose all such *ex parte* communications with McLaughlin.

This matter has arisen because evidence of judicial misconduct has come to public light. The Legislature is actively investigating that misconduct, and the judiciary is the target of that investigation. The Court should not presume to self-adjudicate the limits of that investigation. The self-interest is so apparent, any attempt by this Court to decide the question runs afoul of state law and the MCJC.

But there is more. All Supreme Court Justices, save Justice James Rice, ruled on Legislative *subpoenas issued to the Justices themselves*. The April 16, 2021 Order states, "any subpoenas issued by the Montana State Legislature for electronic judicial communications, **including those served on this Court April 14, 2021**, are temporarily stayed." The Justices are therefore umpiring their own game by ruling for themselves in a case to which they are not parties.[4] But under any realistic appraisal of human nature, it is entirely unreasonable for the Justices to declare their freedom from personal bias and prejudice when ruling on the proper scope of subpoenas the Legislature issued *to them*. This Court's April 16 Order therefore

---

[4] Justice Rice refrained from ruling on his own behalf, but, like every other Justice, must disqualify himself or be disqualified from ruling in this case because he is actively litigating in District Court and has personal knowledge of the facts at issue.

squarely implicates MCJC 2.12, which requires disqualification when a judge "has a personal bias or prejudice concerning a party." *See* also Mont. Code Ann. § 3-1-803 (requiring that a Justice recuse himself or herself in any proceeding "to which he is a party, or in which he is interested."). In this case, every Supreme Court Justice faces this conflict. They are not named parties in this case but have granted themselves relief as if they were.[5] Would this Court not overturn and admonish a district court judge granting himself such relief? With respect, it is equally—perhaps more—inappropriate when our state's highest court engages in the same behavior.

The Legislature does not concede that the Court has the "exclusive constitutional duty" it claims to determine the scope of Legislative Subpoenas. But its determination to do so here violates the Legislature's due process rights under the federal and state constitutions. Due process cannot tolerate the inherent bias and prejudice created when a judge "is allowed to be a judge in his own cause." *Caperton*, 556 U.S. at 876.

---

[5] Moreover, the Justices have "personal knowledge" of their own state email accounts which are the subject of the Legislative Subpoenas which requires their disqualification under MCJC 2.12.

CONCLUSION

The U.S. Supreme Court has long held that due process requires, at minimum, an impartial judiciary. *United States v. Washington*, 157 F.3d 630, 660 (9th Cir. 1998) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.")). All Justices must be immediately disqualified to salvage due process and protect the reputation of the Montana Supreme Court. We are well beyond the point where the Court's impartiality and independence "might reasonably be questioned." This is not merely the appearance of impropriety. This is actual impropriety. The Legislature cannot get a fair and impartial trial in this case under these circumstances.

Respectfully submitted this 30th day of April, 2021.

AUSTIN KNUDSEN
Montana Attorney General
KRISTIN HANSEN
Lieutenant General
DEREK J. OESTREICHER
General Counsel
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Derek J. Oestreicher*
Derek J. Oestreicher
General Counsel

CERTIFICATE OF SERVICE

I, Derek Joseph Oestreicher, hereby certify that I have served true and accurate copies of the foregoing Motion - Disqualification/Substitution to the following on 04-30-2021:

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: eService

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 Beverly Holnbeck on behalf of Derek Joseph Oestreicher
Dated: 04-30-2021

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.

EMERGENCY MOTION TO QUASH REVISED LEGISLATIVE SUBPOENA

APPEARANCES:

Randy J. Cox
BOONE KARLBERG P.C.
201 West Main, Suite 300
P. O. Box 9199
Missoula, MT 59807-9199
Tel: (406)543-6646
Fax: (406) 549-6804
rcox@boonekarlberg.com

Counsel for Petitioner

Mike Manion
Chief Legal Counsel
Mont. Dept. of Administration
Mitchell Building,
125 N Roberts St.
PO Box 20010
Helena, MT 59620
mmanion@mt.gov

Counsel Department of Administration

Kristin Hansen
Derek J. Oestreicher
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401
Tel: (406) 444-2026
Fax: (406) 444-3549
khansen@mt.gov
derek.oestreicher@mt.gov

Counsel for Respondent Montana State Legislature

EXHIBIT J

MOTION

Recognizing the serious problems with the unlawful subpoena quashed by the Court's Temporary Order in OP 21-0125, today the Legislature served Court Administrator Beth McLaughlin with a new version ("Revised Subpoena"), attached as Exhibit A. The Revised Subpoena still suffers from fundamental deficiencies and must be quashed. This is particularly true given the Legislature's stated position it will not abide by court decisions it does not agree with. McLaughlin is entitled to protection before being compelled to testify and turn over sensitive information to a body which now, apparently, regards itself as unshackled from any check or balance.

The Revised Subpoena requires McLaughlin to appear, testify, and provide information on Monday, April 19, 2021. Pursuant to M.R.App.P. 14, MCA §§ 3-2-205, 26-2-401, and M.R.Civ.P. 45, McLaughlin requests an immediate order temporarily quashing the Revised Subpoena to maintain the status quo and prevent further irreparable injury, and ordering the Legislature to show cause why the Revised Subpoena should not be permanently quashed. Respondents object.

BACKGROUND

Most of the pertinent background is set forth in McLaughlin's Petition for Original Jurisdiction, filed April 12, 2021. The new facts are limited but significant.

The Revised Subpoena was served on McLaughlin today, April 15, 2021, and states:

> **THE MONTANA STATE LEGISLATURE,** to Administrator McLaughlin.
>
> 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 9:00 a.m., to produce the following documents and answer questions regarding the same:
>
> (1) All emails and attachments sent and received by your government e-mail account, bmclaughlin@mt.gov, including recoverable deleted emails, between January 4, 2021, and April 12, 2021 delivered as hard copies and .pst digital files.
> (2) Any and all laptops, desktops, hard-drives, or telephones owned by the State of Montana which were utilized in facilitating polls or votes with Montana Judges and Justices regarding legislation or issues that may come or have come before Montana courts for decision.
>
> This request excludes any emails, documents, and information related to decisions made by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.
>
> 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.

(Ex. A.)

The Revised Subpoena is broader than the prior version in key respects. It requires McLaughlin, in two business days, to produce not just "all emails and attachments," but also "[a]ny and all laptops, desktops, hard-drives, or telephones

owned by the State" which were used in polling any members of the judiciary. It requires her to "answer questions" about the documents, which will number in the thousands. It also extends the date range for responsive information to April 12, 2021, despite SB140 being signed into law on March 16, 2021. (Ex. A.)

The Revised Subpoena appears to exclude at least some communications subject to the judicial deliberative privilege, but does not exclude a host of other private and confidential information.

The other change is the addition of a statement of purpose. Rather than help the Legislature's cause, however, it only underscores the lack of a legitimate legislative purpose, laying bare the most fundamental problem with the Revised Subpoena.

ANALYSIS

The legal basis for the Court's original jurisdiction and authority to grant the requested relief is set forth in McLaughlin's Petition for Original Jurisdiction, incorporated by reference.

A. Invalid Exercise of Legislative Subpoena Power.

The Legislature's power to issue subpoenas is finite. The U.S. Supreme Court recently addressed this precise issue in connection with a subpoena issued by Congress to President Donald J. Trump, wherein the Chief Justice wrote legislative subpoena power is "justified solely as an adjunct to the legislative process" and

"must serve a valid legislative purpose." *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031-32 (2020).

The Montana Constitution similarly provides for limited investigative authority by the Legislature. Mont. Const. Art V, § 1. As advised by the Legislature's own Chief Legal Counsel and its rules, "the power to investigate must be exercised for a proper legislative purpose related to enacting law, and the application and exercise of the legislative investigation power must protect the rights of citizens and adhere to all constitutional protections related to privacy, life, liberty and property." (April 18, 2018 Montana Legislative Services Division Memorandum, Exhibit B (emphasis added).) The Legislature thus recognizes legal limitations on its investigative powers, including:

- "It is the general rule that the legislature has no power . . . to make inquiry in the private affairs of a citizen except to accomplish some authorized end."
- "A state legislature, in conducting any investigation, must observe the constitutional provisions relating to the enjoyment of life, liberty and property."
- "An investigation instituted for political purposes and not connected with intended legislation or with any of the matters upon which a house should act is not a proper legislative proceeding and is beyond the authority of the house or the legislature."
- "When a committee is appointed by resolution to make an investigation and the object of the investigation, as shown by the resolution, is not a proper legislative objective but is to establish an extraordinary tribunal for the trial of judicial and other officers, the duties imposed on the commission being strictly judicial and not ancillary to legislation, the committee has no legal status."

- "The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action."

(Ex. B at 7).

The limitations are even more pronounced here, because legislative subpoena power is most limited when directed toward the judicial or executive branches. *Trump,* 140 S. Ct. at 2035-36. "[C]ourts should carefully assess whether the asserted legislative purpose warrants the 'significant step' of subpoenaing the documents of a co-equal branch of government" and, "to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Id.*

Here, the Legislature is violating the *Trump* principles. It is attempting to use its limited subpoena power to obtain judicial communications—not for any legitimate legislative purpose, but for a litigation purpose, political purpose, or something tantamount to "an extraordinary tribunal for the trial of judicial and other officers." (Ex. B.)

B. Privileged Information.

With the Revised Subpoena, the Legislature excludes some information subject to the judicial deliberations privilege, but not all. It only excludes communications "by Montana justices or judges in the disposition of any final

opinion or any decisional case-related matters." (Ex. A (emphasis added).) To the extent that language is decipherable, it is insufficient. The privilege extends broadly to "communications between judges and between judges and the court's staff made in the performance of their judicial duties and relating to official court business." *E.g., Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. 2005).

C. Private and Confidential Information.

The Legislature believes privacy rights cannot be violated by disclosure to the Legislature, as long as it promises the information "will be redacted and not subject to public disclosure." (Ex. A.) There is no legal authority for this position. To the contrary, the Montana Constitution is clear: The right to privacy "shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 10.

As set forth in her Petition, McLaughlin receives a wide variety of emails and attachments that implicate the rights and privileges of other parties. These privacy concerns do not vanish simply because the Legislature promises not to further disclose information, or because the Legislature says it will protect the information.

D. Insufficient Time for Compliance.

Montana law provides a court "must quash or modify a subpoena that . . . fails to allow a reasonable time to comply." MRCP 45(3)(A)(i) (emphasis added). Two business days is insufficient to review thousands of emails and "[a]ny and all laptops, desktops, hard-drives, or telephones owned by the State of Montana," review for privilege, and be prepared to testify regarding the same.

E. End-Around the Court's Temporary Order.

The Court quashed the original subpoena in its Temporary Order on April 11, 2021, and directed the parties to file additional briefing—an approach consistent with Montana law on temporary injunctive relief. *See* MCA §§ 27-19-314 to -319. Pending further order of the Court, the original Subpoena no longer "remains in effect." MCA § 26-2-11. The Revised Subpoena is nothing short of an end-run around the Court's Temporary Order and directives.

CONCLUSION

For the reasons stated, the Revised Subpoena must be quashed.

Dated this 15th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 1250 words, excluding the caption, Certificate of Compliance and Certificate of Service.

Dated this 15th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

Exhibit Index

- Exhibit A – Revised Subpoena
- Exhibit B – April 18, 2018 Montana Legislative Services Division Memorandum

CERTIFICATE OF SERVICE

I, Randy J. Cox, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 04-15-2021:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Montana State Legislature
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 Tina Sunderland on behalf of Randy J. Cox
Dated: 04-15-2021