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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

JUSTICE JIM RICE, Petitioner, vs. THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate and Representative Wylie Galt, Speaker of the House of Representatives, Respondents.	Cause No. BDV-2021-451 **PETITIONER'S RESPONSE IN OPPOSITION TO SECOND MOTION TO DISMISS**

INTRODUCTION

This dispute between the Legislature and Justice Rice is not moot. The controversy regarding the Legislature's authority to investigate the Judicial Branch and to obtain the records of members of the Judiciary and their employees began before the subpoenas were issued, and continues after their withdrawal. The Legislature has recognized that the litigation over subpoenas does not encompass the full dispute, stating in other filings, "This is an interbranch conflict. The lawsuit came second . . . ." Pet. for Rehearing, *McLaughlin v. Mont. State Legislature*, OP 21-0173 (Mont. May 26,

2021) at 2, Ex. A. The Legislature has also recommended the issuance of further subpoenas. Special Joint Select Committee on Judicial Accountability and Transparency, *Initial Report on Judicial Accountability and Transparency* (May 2021), at 22 ("Select Committee Report"), Ex. B. There is a justiciable issue here appropriate for declaratory judgment. *See generally* Br. of Pet. in Support of Pet. for Declaratory Judgment. Even if the Court finds that the withdrawal of the instant subpoena would otherwise moot this action, however, there are exceptions to the mootness doctrine applicable here.

ARGUMENT

Mootness is a threshold issue that this court must resolve before addressing the merits of a dispute. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 31, 333 Mont. 331, 142 P.3d 864. A matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy. *Id.* The fundamental question with respect to mootness is "whether it is possible to grant some form of effective relief." *Briese v. Mont. Pub. Employees' Retirement Bd.*, 2012 MT 192, ¶ 14, 366 Mont. 148, 285 P.3d 550. A determination that a controversy is moot is proper when the judgment of the court would no longer have any "practical impact" on the matter at hand. *Montanans Against Assisted Suicide ("MAAS") v. Bd. of Med. Exam'rs*, 2015 MT 112, ¶ 11, 379 Mont. 11, 347 P.3d 1244. This matter is not moot, because the Court's judgment would still have a practical impact on the continuing controversy between the parties.

Although often cited, "[c]areful reflection . . . reveals that the description of mootness as 'standing set in a time frame' is not comprehensive." *Friends of the Earth,*

Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000). If a matter is mooted by a subsequent event, there are nevertheless exceptions to the mootness doctrine that permit a court to "'rule on non-extant controversies in order to provide guidance concerning the legality of expected future conduct.'" *MAAS*, ¶ 15 (quoting *Havre Daily News*, ¶ 38). Applicable here are the voluntary cessation and public interest exceptions.

I. THE DISPUTE REGARDING LEGISLATIVE INVESTIGATION OF THE JUDICIAL BRANCH, INCLUDING ITS USE OF SUBPOENA POWER, IS LIVE AND ONGOING.

As set forth in Petitioner's Brief in Support of Petition for Declaratory Judgment, this dispute is not moot. The controversy regarding the Legislature's ability to investigate and request documents and communications from the Judicial Branch began before the subpoenas were issued, and continues despite the withdrawal of those subpoenas. Declaratory judgment is appropriate in just such a circumstance, where the legal rights of the parties to a concrete and actual dispute are uncertain, and where the judgment of the court would effectively operate to terminate that uncertainty. Section 27-8-206, MCA; *see generally* Petitioner's Br. in Support of Pet. for Declaratory Judgment.

The Legislature admits that the dispute is ongoing when it declares its intention to continue to negotiate—if the controversy were moot, there would be nothing to negotiate. Resp. Br. in Supp. of Mot. to Dismiss at 8. Multiple public statements by members of the Legislature indicate that they consider their purported investigative work to be ongoing, declaring, "We have even more work to do than we thought." Statement of Senator Greg Hertz, July 14, 2021, retrieved from https://twitter.com/MTSenateGOP/status/1415376664276570114, Ex. C. The

Legislature has also stated its intention to issue additional subpoenas as it finds necessary. The Initial Report of the Special Joint Select Committee on Judicial Accountability and Transparency ("Select Committee"), concludes with the following recommendations:

> 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.*

Select Committee Report at 22 (emphasis added), Ex. B.

A controversy is moot only when the court can no longer grant effective relief. *Briese*, ¶ 14, *MAAS*, ¶ 11. Here, the court can grant relief by issuing an order guiding the parties in the conduct of any negotiations, including by foreclosing or narrowing the basis for the issuance of further legislative subpoenas to members of the Judicial Branch.

II. THE LEGISLATURE HAS NOT MET ITS HEAVY BURDEN TO DEMONSTRATE THAT IT WILL NOT ENGAGE IN THE ISSUANCE OF IMPROPER SUBPOENAS AGAIN.

The voluntary cessation exception applies when a defendant's conduct is voluntarily terminated before completion of appellate review. *Havre Daily News*, ¶ 34. The purpose of this exception to the mootness doctrine is to prevent a defendant from manipulating the litigation process by voluntarily ceasing challenged conduct at opportune moments, only to retain the potential of resuming it once the threat of

litigation has passed. *Id.* For that reason, the party asserting mootness bears "'the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000)). A case is considered moot under the voluntary cessation exception only when it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.*, ¶ 38 (quoting *Laidlaw*, 528 U.S. at 189, 120 S. Ct. at 708). In adopting this exception, the Montana Supreme Court "appreciate[d] the importance of properly assigning this burden." *Id.*, ¶ 34.

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

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

Respondents' Motion to Dismiss at 2. State Senator Greg Hertz, chair of the Select Committee purportedly investigating the judicial branch, has told the press, "To be clear, we expect the judicial branch to release public records . . .. We're *still seeking*

documents and information that will provide more clarity on the issues identified in our committee's initial report and inform legislative fixes to problems within our judicial system." Seaborn Larson, *Lawmakers abandon investigative subpoenas for judges' records*, Helena Independent Record, June 22, 2021 (emphasis added), Ex. D. The Legislature is also continuing its pursuit of subpoena authority over Judicial Branch communications in the Montana Supreme Court. Darrell Ehrlick, *Lawmakers, AG will make another run at Supreme Court for subpoenas, court administrator's emails*, Daily Montanan, July 29, 2021, Ex. E.

Although the Legislature claims that statements indicating it will continue its pursuit of records do not mean it will issue future subpoenas, the Select Committee expressly recommended the issuance of future subpoenas in its report. Ex. B. at 22. The Legislature claims it has not "repeatedly" engaged in the disputed conduct, claiming this case "involves a single subpoena issued to a single justice," when in fact it has issued and withdrawn multiple subpoenas to each of NINE different parties: the seven Supreme Court Justices, the Court Administrator, and the Acting Director of the Department of Administration. Ex. F. The conduct at issue here is not limited to the issuance of subpoenas, but includes the Legislature's inappropriate pursuit of documents, including the private communications of an elected Supreme Court Justice, in the first instance.

Moreover, the Legislature attempts to reassign the burden of proof, in defiance of explicit case law declaring that the party asserting mootness carries a "heavy burden" to make "absolutely clear" that the challenged conduct will not recur. *Havre Daily News*, ¶ 34. In the presence of repeated public statements vowing to continue its investigation,

multiple subpoenas issued, re-issued, and withdrawn, and a legislative report recommending the issuance of future subpoenas, the Legislature cannot meet this burden, nor can it seriously maintain that there is no "concrete evidence suggesting that the defendant will perpetrate a substantially similar wrong in the future." *MAAS*, ¶ 16 (quoting *Havre Daily News*, ¶ 40) (internal brackets omitted). Indeed, in *MAAS*, the Court found that there was no evidence the defendant would continue its conduct based on the fact that the defendant had "rescinded all of its position statements." *Id.* The Legislature, on the other hand, continues to make statements, both in the press and in filings before both this Court and the Montana Supreme Court, indicating its intention to continue seeking the disputed records. Even its second Motion to Dismiss ends with a veiled threat to reissue subpoenas if the Court finds this case not moot. Resp. Br. in Supp. of Mot. to Dismiss at 11.

Respondents' withdrawal of the pending subpoena is a transparent attempt to unilaterally choose the forum for this dispute and avoid judicial determination of the extent of the legislative subpoena power. *See McLaughlin v. Mont. State Legislature*, 2021 MT 120, ¶ 11, 404 Mont. 166, ___ P.3d ___ ("*McLaughlin I*") (describing issuance of subpoenas to Montana Supreme Court justices as a "unilateral attempt to manufacture a conflict" and subsequent motion for disqualification as "directed to disrupt the normal process of [the] tribunal"); Or., *McLaughlin*, OP 21-0173 (Mont. June 29, 2021) at 5 ("Unfortunately, the actions of counsel before this Court during these proceedings have raised serious concerns of 'manipulat[ion] of the litigation process.'"), Ex. G. Respondents have already attempted to stay the present proceedings in order to avoid a ruling on the issue, and this Court has already rejected the pretense that "the

Legislature would or could negotiate in good faith with Justice Rice." Preliminary Injunction Or., May 18, 2021, at 18. They simply don't want the court determining this dispute. Ex. A at 2 n.1 ("The bottom line is this: not every dispute has a judicial solution. This is one such case.") *Contra*, *Best v. Police Dep't of Billings*, 2000 MT 97, ¶ 16, 299 Mont. 247, 999 P.2d 334 ("it is the province and duty of the judiciary 'to say what the law is.'" (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). This manipulation of the judicial process is the circumstance for which the voluntary cessation exception to the mootness doctrine was designed. *See Havre Daily News*, ¶¶ 37-38.

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

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

In this case, the constitutional scope of the Legislature's investigative powers is at issue. *See McLaughlin I*, ¶ 10 ("In this case, the Court is called upon to assess, for the first time, the appropriate scope of the legislative subpoena power in Montana."). This is a fundamental constitutional question addressing the separation of powers, and also addresses the legal powers of public officials, namely, the power of the Legislature to issue investigative subpoenas to members of the judiciary. The Montana Supreme

Court, ruling on a motion to dismiss in an original proceeding concerning judicial subpoenas, recently held that "the scope of the legislative subpoena power is clearly an issue of great public interest, as it goes to not only the 'legal power of a public official', but the very core of a constitutional system premised on separation of powers. Ex. G at 3 (quoting *Ramon*, ¶ 22).

The issue is also likely to recur. Despite the present withdrawal of subpoenas, Respondents have shown no intent to abandon the pursuit of their investigation of the judiciary. In fact, they have repeatedly affirmed their intent to continue. *See, e.g.*, Exs. A, B, C, D, E. As the Montana Supreme Court noted in its recent order in the related original proceeding, "The history of this litigation has given us reason to be skeptical of the representations by the Legislature and its counsel in this matter." Ex. G at 4. This Court has made similar observations, holding that it "would have to be 'blind' not to see . . . that the Justice Rice Subpoena does not represent a run-of-the-mill legislative effort." Preliminary Injunction Or. at 18. Both courts have therefore questioned Respondent's intention to act in good faith in these proceedings.

Finally, an answer to the issue will guide both the Judicial Branch and the Legislature in the performance of their duties, *Ramon*, ¶ 21, by defining for the Legislature the scope of its subpoena powers as to the Judiciary, and for the Judicial Branch, defining the scope of its duty of compliance. Doing so now will avoid future litigation on the point, in the event that the Legislature determines to reissue subpoenas during its continuing judicial investigation. *See* Ex. B at 22. Resolution of this matter is in the public interest.

Just as the Legislature redrafted the burden of proof as to the voluntary cessation exception, it engrafts additional requirements never stated by the Court onto the public interest exception, asserting that it only applies when in combination with another recognized exception. This is not the law. It is not clear how the Legislature believes this advances its position when there is another exception, voluntary cessation, applicable to this case.

IV. ISSUANCE OF A LEGISLATIVE SUBPOENA MAY BE AN ACT CAPABLE OF REPETITION YET EVADING REVIEW.

The Legislature preemptively asserts that the exception for wrongs capable of repetition, yet evading review is not applicable here. In *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 98, the U.S. District Court for the District of Columbia did indeed find that "[t]he combination of the congressional process and litigation time (including appeal) means that every subpoena dispute of this nature would likely run up against the two-year window," referring to the expiration of a congressional subpoena with the expiration of the Congress every two years. Petitioner is not aware of current authority governing the expiration of a legislative subpoena in Montana, but as a new Legislature is seated every two years, it appears premature, at best, for Respondents to assume that a legislative subpoena continues indefinitely and that the issuance of a legislative subpoena could never evade review. Given, however, the progression of the related proceedings before the Montana Supreme Court in *McLaughlin*, by now well known to this Court, Petitioner does not assert that exception here.

CONCLUSION

The Court has already held that it "will certainly not mandate that Justice Rice negotiate with the Legislature." Preliminary Injunction Or. at 20. Nevertheless, the

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

DATED this 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:

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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 PETITION FOR REHEARING REGARDING THE COURT'S MAY 12 ORDER

EXHIBIT
A

The Legislature hereby petitions this Court to reconsider its May 12 Order denying the Legislature's Motion to Disqualify all Montana Supreme Court Justices.

I. BACKGROUND

On April 20, 2021, the Legislature moved to disqualify all the Justices of the Montana Supreme Court. On May 12, 2021, the Court denied that motion.[1]

This is an interbranch conflict. The lawsuit came second and is now being used by this Court as an off-ramp from that interbranch conflict. This cannot be, however, for the simple and timeless reason that the Court may not act as a judge in its "own cause." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). The Legislature did not file this action and has consistently argued that it is improper. And it doesn't matter that the Justices have been individually subpoenaed. For even if only

[1] As a threshold matter, the Legislature reasserts that no state court can decide this matter free from disqualifying conflict. Given that this case's question—the scope of legislative subpoenas—bears directly on the subpoenas issued to Administrator McLaughlin and the Justices, and on the judiciary in toto, seating district court judges as replacements would perhaps be less bad but would not cure the institutional conflict. The bottom line is this: not every dispute has a judicial solution. This is one such case.

Administrator McLaughlin's subpoena was at issue,[2] the basis underlying the motion to disqualify would remain the same. McLaughlin is the Court's appointed administrator. The Legislature subpoenaed her to discover the full scope of seemingly inappropriate *judicial* communications, including several by at least one member of this Court. For purposes of this case, the individual subpoenas to the Justices don't alter the conflict calculus at all. The Court's errant resort to the Rule of Necessity merely concedes the point—every judicial officer is disqualified here.

This is not a conflict between a superior and inferior division of government—despite what one might infer from the Court's recent Order. Order, *McLaughlin v. Montana State Legislature*, OP 21-0173 (Mont. May 12, 2021) ("Order"). This is not even a conflict between the Legislature and the Executive, where courts reluctantly interpose only as "a last resort." *Raines v. Byrd*, 521 U.S. 811, 833 (1997). Here the Court has presumed authority over a conflict between itself and the Legislature, a sister branch of government, despite—again—what one might infer from the Court's recent Order ... and emails. *See, e.g.*, Order; Ex. A–F

[2] *But see* Order, *Brown v. Gianforte*, OP 21-0125 (Mont. Apr. 16, 2021) ("April 16 Order") (sue sponte quashing the non-party Justices' individual subpoenas).

(describing legislation as "ridiculous" and "unconstitutional in its inception").

Rehearing is appropriate if the Court (i) "overlooked some fact material to the decision"; (ii) "overlooked some question presented by counsel that would have proven decisive to the case"; or (iii) "its decision conflicts with a statute." Mont. R. App. P. 20(1). All three justify rehearing here. And given the "clearly demonstrated exceptional circumstances" at issue in this case, the Court should grant this petition and reconsider its Order.

II. DISCUSSION

A. The Court Overlooked and Misstated Material Facts

As an initial matter, the Court asserts "this case does not involve adjudication of any subpoena issued to a member of this Court." Order ¶9. The Legislature agrees. Yet the Court sua sponte quashed the Justices' individual subpoenas issued to the members of the Court. *See* April 16 Order. The Court cannot reach outside this case, stay its own subpoenas, and then argue that this case doesn't involve those subpoenas. At least, it should not.

The Court also notes that "no suggestion has been made that any justice presiding over these proceedings would be unfair or partial in

adjudicating the scope of the legislative subpoena power." Order ¶9. Correct. No such "suggestion" was made. The Legislature instead came right over tackle, requesting disqualification because of the "obvious conflict of interest this Court faces." Motion to Disqualify at 3. Even if this case was solely an academic inquiry into the scope of the legislative subpoena power, the Court (along with its appointee, McLaughlin) are the test subjects of that power. McLaughlin isn't asking the Court to pen a law review article; she's asking it to invalidate the Legislature's subpoena for her documents, which contain communications from this Court's members. And if those are anything like some of the other intemperate emails already publicly available, the Court and its members have an obvious interest in providing a specific answer to that dusty old legal question about the scope of legislative subpoena power.

The Court further asserts the Legislature has not presented allegations of "actual" bias on the part of any justices. Not so. The Legislature has repeatedly stated that the Court's failure to disclose and produce ex parte communications between the justices and the Court Administrator demonstrates actual bias. And the Chief Justice's emails betray a disdain for the Legislature that amounts to actual bias. Ex. A. But more

importantly, "actual" bias is not the standard for disqualification. Rather, the standard is whether the Justices' "impartiality might reasonably be questioned." Mont. Code Jud. Cond. 2.12(A). Impartiality requires the "maintenance of an open mind," and determining whether a justice is impartial "requires an examination of the nature of the judge's interest in the issues before the judge." *Draggin' Y Cattle Co. v. Junkermier*, 2017 MT 125, ¶ 19, 387 Mont. 430, 395 P.3d 497 (affirming a judge's disqualification because his decision in one case could impact a case to which he was a party) (quotations and citations omitted). Here, the Justices are institutionally and personally interested in the outcome, so their ability to be impartial is justifiably suspect.

Specifically, the Court asserts that no Justice "participate[d]" in the polls conducted by the MJA. Order ¶ 11. Respectfully, public records tell a different tale. For example, the Chief Justice ordered the Court Administrator to "get a membership vote" regarding at least one piece of legislation. Ex. A. Did other Justices follow suit? Every Justice, after all, appears to be copied on emails relating to these polls wherein fellow judges generously explained their verdicts on pending legislation. Hopefully, no Justices "voted" in these polls—but that unsupported assertion

runs counter to other publicly available information. The Court's bare assertion is easily supportable—with the production of the requested documents. Instead, the Court appears determined to rule on the issue of whether the legislative subpoena can reach those documents. The Court must therefore forgive the Legislature if reasonable doubt persists about the Court's statements and ability to fairly adjudicate ~~this~~ its dispute.

The Court also emphasizes that it has previously presided over matters involving the Court Administrator.[3] Order ¶ 10. But those cases were nothing like this one. Here, the Court Administrator affirmatively sought relief from the Justices, in an Original Proceeding, to which she was not a party, to prevent disclosure of *the Justices' own communications*. Again, with or without regard to the Justices' individual subpoenas, this case does not simply involve the Court's Administrator—it involves this Court. And the underlying question about the scope of

[3] In *State v. Berdahl*, the court decided, based on statutory language, that the State could refuse to indemnify an employee who sexually harassed and retaliated against a subordinate after he entered an unauthorized settlement agreement. 2017 MT 26, ¶ 23, 386 Mont. 281, 389 P.3d 254. And *Boe v. Court Administrator for the Montana Judicial Branch of Personnel Plan & Policies* simply affirmed a district court's dismissal for lack of subject matter jurisdiction of a challenge to the Judicial Branch Personnel Plan, which was subject to the exclusive authority of the Supreme Court. 2007 MT 7, ¶¶ 13–14, 335 Mont. 228, 150 P.3d 927. These cases miss the point—they did not involve interbranch disputes or institutional conflicts that made it inappropriate for the Court to play referee.

the Legislature's subpoena power is, in this context, a question about the boundaries of both judicial and legislative power. As such, the Court cannot unilaterally draw these boundaries.

B. The Court Ignored and Overlooked Issues

The Court deigns that this is a dispute between two "co-equal branches of government." Order ¶ 15. It nevertheless has designated itself the arbiter of this dispute and asserted that the Legislature will be bound by whatever decision it makes regarding the legislative subpoena (to it).[4] Perhaps "co-equal" has more than one meaning. But the Legislature takes the conventional view; and under that view—which the framers shared—the Court's proposed arrangement would in fact render the branches *unequal*. The Court cannot therefore be a fair tribunal to decide the instant issues. *See Caperton*, 556 U.S. at 876. These obvious institutional dynamics demonstrate clearly why interbranch disputes must be resolved through negotiation and accommodation. *Comm. on the*

[4] The Court muddles the issue by saying that it first must determine whether the MJA polling of judges constitutes judicial misconduct. But this is not a threshold inquiry. Whether judges have engaged in misconduct does not determine the scope of the subpoena power—rather, the scope of the subpoena power determines what information the Legislature can obtain to prevent one sister branch of government from asserting an excess of power. And it is perverse to suggest that this Court will determine whether its own polling practices are misconduct.

Judiciary v. Miers, 558 F. Supp. 2d 53, 67 (D.C. Cir. 2008); *see also Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020). The judiciary may not spurn these established tools of interbranch dispute resolution to pursue a course it prefers and unilaterally controls. Separation of powers has grown far too sophisticated for that since the time of the Chancellor of Oxford.

Speaking of which—the Rule of Necessity. *See* Order ¶¶ 14–15. Invoking this rule of course concedes that the Justices are conflicted from hearing this case. And a review of the *more contemporary* Rule of Necessity cases undermine the Court's reliance on the Rule here. For instance, the Legislature is not a vexatious plaintiff, like the angry father in *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit,* 453 F.3d 1160 (9th Cir. 2006), who sued and named every Ninth Circuit judge to force an out-of-circuit assignment. No, the Legislature doesn't think this case should exist at all; both its genesis and its maintenance are improper. The Rule, importantly, also depends on the premise that a particular dispute should be settled *judicially*. This interbranch dispute should not be settled judicially, as explained above, below, and in virtually every pleading the Legislature has so far filed. The Court's exasperated remark that,

under the Legislature's logic, "no Montana judge is free of a disqualifying interest," is exactly right. Order ¶ 15. But the Court's conclusion—that it should invoke the Rule of Necessity—is exactly wrong. It's not all that surprising, but the Court appears to suffer from the bias of Maslow's Hammer. *See* Abraham Maslow, THE PSYCHOLOGY OF SCIENCE 15 (1966) ("if all you have is a hammer, everything looks like a nail"). Wielding its gavels, the Court sees every constitutional controversy as a case fit for judicial resolution. *See* Order ¶14 (explaining the Court's understanding of "its constitutional duties": "to adjudicate difficult and controversial *matters*") (emphasis added). But again, this presumes that the exercise of judicial power is always appropriate. Here, where the judiciary is a party in interest, it is not appropriate. Not every dispute has a judicial solution.

C. The Court's Order Conflicts with Controlling Authority

The Court ignores the cases that instruct political branches to resolve conflicts through the "process of negotiation and accommodation." *Miers*, 558 F. Supp. 2d at 67; *see also Mazars USA, LLP*, 140 S. Ct. at 2029. Upon receipt of the subpoena, the Court should have raised objections and negotiated with the Legislature. But instead, the Court refused and purported to immediately quash McLaughlin's and the Justices' subpoenas.

This Court also ignores its obligation under the doctrine of prudential standing to refrain from adjudicating "abstract questions of wide public significance ... most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (quoting *Warth v. Seldin*, 422 U.S. 422 U.S. 490, 499–500 (1975)). The separation of powers mandates that the judiciary only resolve cases "implicating the powers of the three branches of Government as a last resort." *Raines v. Byrd*, 521 U.S. 811, 833 (1997) (internal quotations omitted). Here, the Court jumped straight to the last resort, even before it shored up jurisdiction.

Finally, the Court's reliance on *Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, is misplaced. First, it was amici—not the parties themselves—who sought disqualification in *Reichert*, based on the Justices' hypothetical interests in running for reelection. Here, however, the disqualifying interest is not hypothetical. It is evident in the petitioning party (the Court's Administrator), her objectives (to prevent disclosure of more embarrassing and ethically dubious judicial emails; to use judicial power to curtail legislative power in a dispute between the judiciary and the Legislature), and the Court's multiple procedural irregularities (granting unnoticed weekend relief to nonparties for nonparties, refusing to disclose ex parte communications, etc.) that disqualifying interests are clear and present.[5] Under the *Caperton* standard, this is more than just a "*risk* of actual bias or prejudgment"—it is actual bias and prejudgment. 556 U.S. at 883–84 (emphasis added).

[5] One of the cases cited in *Reichert* is instructive. In *Lavoie*, the Supreme Court held that one Justice's refusal to set aside a large punitive award in one case when he had an identical case pending at the time "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986). He essentially "acted as a judge in his own case." *Id.* The same is true here. The outcome of the Court's decision on McLaughlin's subpoena will have a "clear and immediate effect" on whether the Justices must meaningfully respond to their own subpoenas.

CONCLUSION

The three branches of government are co-equal, but the Court's actions belie this constitutional fact. Which begs the question: who will judge the judges?[6] According to this Court—the judges. The judges will judge the judges. That of course defies common and constitutional sense.

For the foregoing reasons, the Legislature asks the Court to grant the petition and reconsider its Order on the motion to disqualify.

Respectfully submitted this 26th day of May, 2021.

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[6] "*Sed quis custodiet ipsos custodes*?" Decimus Junius Juvenalis, Satire VI, lines 347-348.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 20 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 2,439 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 Petition - Rehearing to the following on 05-26-2021:

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: 05-26-2021

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY

INITIAL REPORT TO THE 67TH MONTANA LEGISLATURE

INITIAL REPORT ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY

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.

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 C

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.

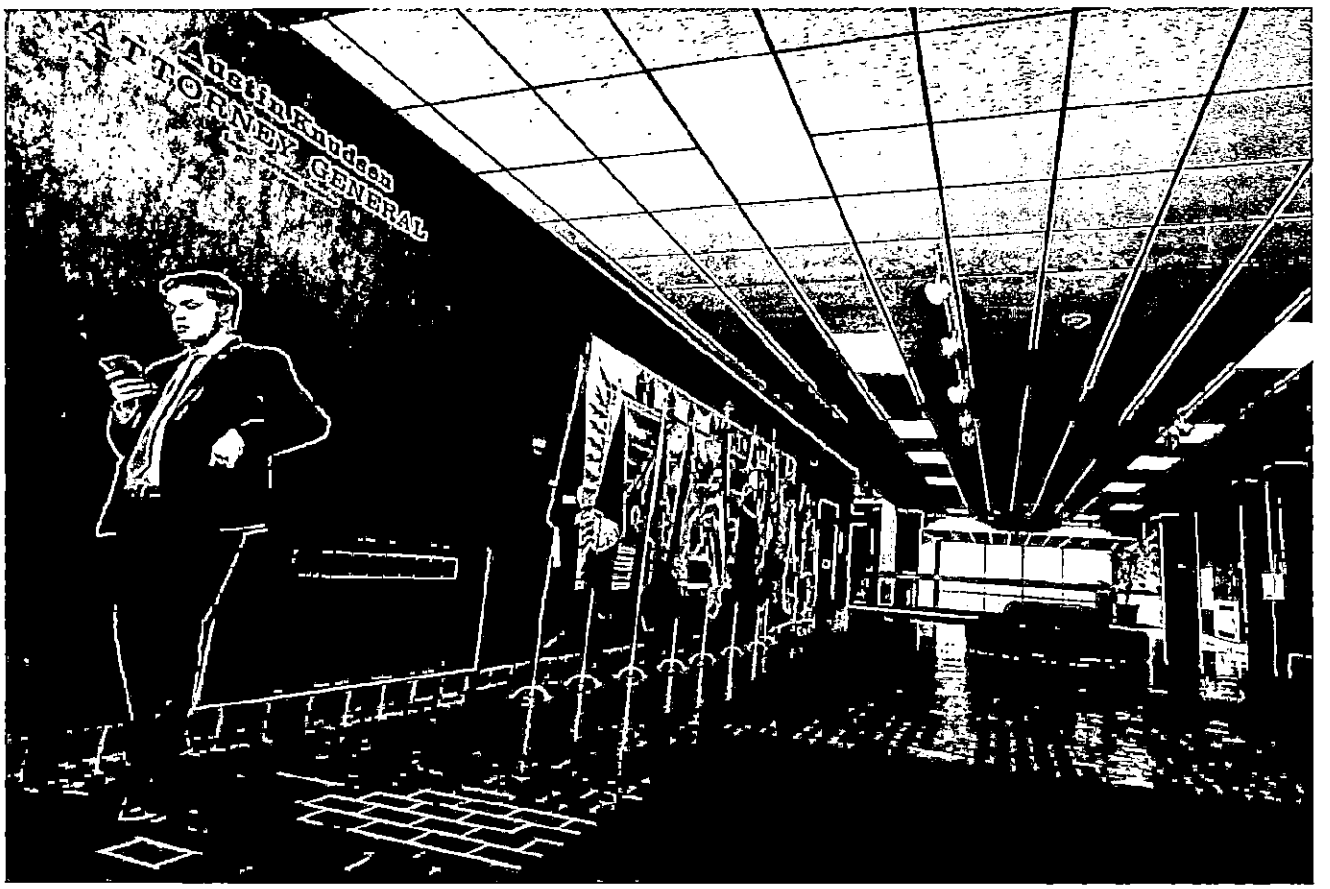
Government & Politics
Justice

Lawmakers, AG will make another run at Supreme Court for subpoenas, court administrator's emails

EXHIBIT
E

Supreme Court allows the AG until Aug. 11 to file its motion

By: Darrell Ehrlick - July 29, 2021 12:03 pm



The office of the Attorney General of Montana (Photo by Eric Seidle/ For the Daily Montanan).

The Montana Legislature and the Attorney General's Office will continue to challenge the Supreme Court and the state's court administrator in a matter that challenges the limit of the lawmakers' subpoena power and whether it can review thousands of emails belonging to the judiciary.

Kristen Hansen, the lieutenant attorney general, filed a motion for an extension of time last week so that the office could prepare a petition to get the Supreme Court to rehear the case.

That motion for an extension was granted by the court, and the Attorney General's Office will now have until Aug. 11 to file its petition.

That means the lawmakers and the Attorney General's Office will attempt to have the court reconsider its lengthy unanimous decision that ruled the Legislature's subpoenaing of Court Administrator Beth McLaughlin's email was invalid and served no legitimate purpose. The court also ruled that all the email the Legislature had received via the Department of Administration must be returned. The opinion wasn't just a unanimous opinion; Justices Dirk Sandefur and Laurie McKinnon contributed concurring opinions that accompanied the main opinion that was written by Justice Beth Baker.

The filing merely asks the court for an extension of time, and does not lay out its legal arguments for wanting the case reheard. Hansen notes in her request for extension, though, that the Attorney General's Office needs more time to review the decision, which is novel in case law for Montana. In other words, the court had not previously weighed in on the extent and the legitimacy of legislative subpoenas.

Moreover, Hansen requested the extension for more time to consult with legislative leaders who are out of session.

With the motion, the case continues to be considered open and active, and the thousands of emails that the Legislature had received from Department of Administration Director Misty Ann Giles have not been returned to McLaughlin.

"The issues are complex and wide-ranging, the July 14, 2021 opinion is lengthy, and the Montana State Legislature therefore requires additional time to prepare its petition for rehearing," the court filing asks.

On Thursday, Emilee Cantrell, the spokesperson for Attorney General's Office, said "we will not participate in your blog."

Republish

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

EXHIBIT F

DEPARTMENT OF JUSTICE

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

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

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

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

OP 21-0173

BETH McLAUGHLIN,

Petitioner,

v.

ORDER

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

Respondents.

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
G

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