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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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| JUSTICE JIM RICE,<br><br>Petitioner,<br><br>vs.<br><br>THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Wylie Galt, Speaker of the House of Representatives,<br><br>Respondents. | Cause No. BDV-2021-451 (email)<br><br>Hon. Michael F. McMahon<br><br>**RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS** |

The question before the Court is a simple one: would granting Justice Rice any further relief on the basis of a legislative subpoena that is now withdrawn constitute an advisory opinion by this Court? The answer is yes. And it must especially be "yes" because Justice Rice now seeks relief further reaching than that requested in his petition. Because issuing any further orders regarding Justice Rice's properly requested relief would constitute an advisory opinion, opining on the widened scope of his requests would *a fortiori* constitute an advisory opinion. The Court should dismiss.

## ARGUMENT

### I. The Court Cannot Grant Effective Relief.

Justice Rice attempts to reframe the controversy. He first states that this controversy is about "the Legislature's ability to investigate and request documents and communications from the Judicial Branch." Response to Motion to Dismiss (Doc. 24) at 3. Then he claims the controversy is about the "legislature's use of its investigative powers ... to invade the province of the judiciary." *Id.* at 5. Then, he goes on, this case is really about "the Legislature's inappropriate pursuit of documents." *Id.* at 6. Finally, he states that the controversy is about "the

constitutional scope of the Legislature's investigative powers" and "the power of the Legislature to issue investigative subpoenas to members of the judiciary." *Id.* at 8. None of these summaries are entirely accurate, and each distorts and expands the present controversy's scope beyond Justice Rice's initial petition.

This case only concerns "whether the Legislature's Subpoena to Petitioner satisfies the furtherance of a valid legislative purpose." Petition for Declaratory Judgment (Doc. 1) at 8. It is about a single subpoena issued to a single justice. It is not a wayfaring constitutional excursion. Justice Rice's petition requests subpoena-specific relief—he asks the Court to quash his legislative subpoena and declare it unlawful.[1] Doc. 1 at 20. But the Court cannot quash or otherwise declare unlawful a subpoena that has been withdrawn. *See* Brief in Support of Motion to Dismiss (Doc. 23) at 3.

Justice Rice, for the first time in his response, asserts that the "court can grant relief by issuing an order guiding the parties in the conduct of any negotiations, including by foreclosing or narrowing the

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[1] To the extent Justice Rice asks for exceedingly broad relief to prevent the Legislature from issuing *any* further subpoenas, he has not established standing or shown that he will be injured by any future issuance of subpoenas. Doc. 1 at 20.

basis for the issuance of further legislative subpoenas to members of the Judicial Branch." Doc. 24 at 4. This is not the relief Justice Rice sought in his Petition, and far exceeds the scope of this case, which only addresses the now-withdrawn subpoena issued to Justice Rice. This request also raises at least one thorny constitutional question—whether it undermines the separation of powers for a district judge to dictate the conduct and content of interbranch negotiations between the legislature and judiciary. Justice Rice is not engaging in any good faith negotiations at this time. And this new, broadened request for relief indicates an ongoing reluctance to enter good faith negotiations without judicially manufactured restraints preemptively imposed on one party. By design, this constitutionally mandated interbranch conflict resolution process is entirely separate and distinct from an adjudicatory proceeding. Judicially controlled "negotiations" would not be negotiations at all. The Court should not indulge this late-coming attempt to transform a narrow case into a comprehensive constitutional exegesis.

## II. The Voluntary Cessation Doctrine Does Not Apply

This case is moot, and no mootness exception doctrine can save it. The voluntary cessation exception does not apply here. There has been no pattern of unlawful conduct that gives rise to the exception. *See* Doc. 23 at 9 (citing Montana cases holding that the same entity must "repeatedly" engage in the same conduct for the voluntary cessation doctrine to apply). Under any of Justice Rice's shifting and expansive theories, issuing legislative subpoenas isn't unlawful. Obtaining information is a power set forth in statute as an inherent prerogative of the Legislature. *See McLaughlin v. Legislature*, 2021 MT 178, ¶ 8, __ Mont. __, __ P.3d __ ("A legislature's power to obtain information is broad and indispensable.") (internal quotation marks and citations omitted). Legislative subpoenas are also quite rare, so Justice Rice cannot seriously argue the Legislature repeatedly engages in the conduct.

Nor is there evidence any subpoenas will reissue. Justice Rice tries to show repetitive behavior by stating that the Legislature has "issued and withdrawn multiple subpoenas to each of NINE different parties." Doc. 24 at 6. Nine is not a large number, and all the subpoenas were issued close in time to similarly situated individuals, including the seven

justices, and are plainly related in subject matter. They all flowed from the pre-subpoena disclosure of judicial emails that definitively exposed questionable judicial conduct, including by Justice Rice himself. [2] The fact that the Legislature issued a batch of related subpoenas and then revoked them simultaneously (to facilitate negotiation and accommodation Justice Rice has so far spurned) does not demonstrate a pattern consistent enough to trigger the voluntary cessation exception. *See* Doc. 23 at 9 (compiling cases).

Even if the voluntary cessation exception could be activated solely by suggesting the Legislature may reissue subpoenas, there is no evidence here. *See, e.g., Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100, ¶ 21, 404 Mont. 89, 485 P.3d 731 (noting that plaintiffs "failed to point to concrete evidence suggesting that [they] will perpetrate a substantially similar wrong in the future" (internal quotations omitted)); *see also Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 39–40, 333 Mont. 331, 142 P.3d 864 (noting that only where there is "concrete

[2] For example, Acting Chief Justice Rice appointed Judge Krueger to sit on the *Brown v Gianforte*, OP 21-0125, panel after receiving an email from Judge Krueger containing disqualifying statements. Other judges appeared to engage in lobbying for a private entity using state time and resources and prejudging matters that would come before the courts.

evidence" will it "become[] reasonable" to expect repeat behavior in the future). The larger dispute between the Court and the Legislature may persist, but this case is moot.

## III. Public Interest Alone Does Not Save This Case

Justice Rice points to the public interest exception as another basis for not finding the present controversy moot. But respectfully, treating that as a standalone mootness exception breeds an environment where advisory opinions are the norm and gives courts a platform to issue pronouncement outside the careful jurisdictional confines of actual cases and controversies. It invites judges "to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure for that of the legislative body." THE FEDERALIST NO. 78 (Alexander Hamilton). Once again, the Legislature reiterates that no Montana court—including the one where Justice Rice sits—has saved an otherwise moot case based solely on the public interest exception alone. *See* Doc. 23 at 4–7. Justice Rice cites no authority to the contrary.

## CONCLUSION

This case is moot, and any further order addressing Justice Rice's requests for relief would constitute an advisory opinion. The Legislature respectfully moves for dismissal.

DATED the 12th day of August, 2021.

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## CERTIFICATE OF SERVICE

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

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Date: August 12, 2021

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