FILED
AUG 23 2021
ANGIE SPARKS, Clerk of District Court
By [signature] Deputy Clerk

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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JUSTICE JIM RICE, Petitioner, v. 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 **JULY 26, 2021 DISMISSAL MOTION ORDER**

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BACKGROUND[1]

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22 On March 16, 2021, Governor Gianforte signed SB 140. It
23 provided, among other things, the governor direct judicial appointment power
24 and abolished the Montana Judicial Nomination Commission.
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[1] For additional background, please see *McLaughlin v. The Montana Legislature et al.*, 2021 MT 120-1, ¶¶ 2-7, 404 Mont. 166, 489 P.3d. 482; and *McLaughlin v. The Montana Legislature et al.*, 2021 MT 178, ¶¶ 3-4.

On March 17, 2021, *Brown et al. v. Gianforte*, OP 21-0125, was filed as an original proceeding with the Montana Supreme Court challenging SB 140. In that proceeding, Governor Gianforte, represented by the Justice Department, raised concerns about a Montana Judges Association email-based poll relative to SB 140 before the Montana Legislature (Legislature) passed the bill and sent it to Governor Gianforte.

On April 8, 2021, the Legislature, outside of the *Brown* proceeding, issued a subpoena to the Montana Department of Administration (DOA) requiring production on April 9, 2021 of "[a]ll emails and attachments sent and received" by the Court Administration for the Judicial Branch, between January 4, 2021 and April 8, 2021. The Judicial Branch was not notified of the subpoena. In response, the DOA timely produced "over 5,000 emails to the Legislature. (Hearing Ex. 7, K. Hansen Declaration.) Thereafter, the Court Administrator sought judicial relief from the Montana Supreme Court in the *Brown* proceeding.

On April 11, 2021, the Montana Supreme Court temporarily quashed the Legislature's subpoena issued to the DOA.

On April 12, 2021, Ms. Hansen, in her capacity as Montana Department of Justice Lieutenant General and on behalf of the Legislature, wrote to Justice Rice and indicated, in relevant part, that:

> The Legislative power is broad. In fulfilling its constitutional role, the Legislature's subpoena power is similarly broad. The questions the Legislature seeks to be informed on through the instant subpoena directly addresses whether members of the Judiciary and the Court Administrator have deleted public records and information in violation of state law and policy; whether the Court Administrator has performed tasks for the Montana Judges Association during

taxpayer funded worktime in violation of state law and policy; and whether 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 court for decision.

• • •

The Legislature does not recognize this Court's Order as binding and will not abide by it. The Legislature will not entertain the Court's interference in the Legislature's investigation of the serious and troubling conduct of members of the Judiciary. The subpoena is valid and will be enforced. All sensitive or protected information will be redacted in accordance with the law. To the extent there is concern, upon production, the Legislature will discuss redaction and dissemination procedures with the Court Administrator.

On April 15, 2021, Senator Blasdel and Representative Galt signed a Subpoena for Justice Rice to appear before it on April 19, 2021 and produce:

(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, [redacted email address], 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, [redacted email address], 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.

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> (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, [redacted email address], 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.

The Subpoena indicated, in relevant part, that:

> 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.

On April 15, 2021, Justice Rice was personally served with the Subpoena.[2]

On April 19, 2021, Justice Rice, *pro se*, commenced this proceeding against the Legislature. In his "Petition for Declaratory and Injunctive Relief; and <u>Emergency</u> Request to Quash or Enjoin Legislative Subpoena Pending Proceedings," he requested this Court, among other things:

> 1. ... [I]mmediately quash or stay the Subpoena, or preliminarily enjoin [the Legislature] from pursuing the Subpoena or issuing further subpoenas, pending a hearing and pending this proceeding pursuant to § 27-19-201, MCA; and
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> 3. ... [D]eclare the Subpoena invalid pursuant to § 27-8-202, MCA, and permanently enjoin it pursuant to § 27-19-102, MCA.

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[2] On May 10, 2021, Justice Rice testified that this was the second subpoena issued to him. The first subpoena had technical deficiencies which were corrected and then served on him.

On April 19, 2021, this Court temporarily enjoined the Subpoena pending further proceedings.

On April 23, 2021, Montana Attorney General Knudsen issued a "general statement" that indicated, in relevant part:

> The Department of Justice will continue to represent the legislature as it carries out its necessary investigation of potential judicial misconduct. The Supreme Court justices must also act to restore the public's confidence. Fully cooperating with the investigation instead of taking extraordinary measures to hide public documents would be (sic) good place for them to start.
>
> What has been happening behind closed doors at the Supreme Court is ugly: Violations of our judicial codes of conduct, potential violations of the law, and a pattern of corruption. The Supreme Court justices and staff are scrambling to cover this up. The first step toward cleaning up our legal and judicial culture is more transparency and less of the self-policing that has enabled the current system to spiral out of control.

(Hearing Ex. 8.)

On or about May 5, 2021, the Special Select Committee on Judicial Accountability and Transparency (Committee) issued its Final Committee Report (Report). The Committee concluded that:

> The testimony and information collected by the Committee over the past weeks raise serious concerns about the practices of the judicial branch concerning the topics highlighted above.
>
> The use of state time and resources by multiple branch employees, including judges, to facilitate a complex lobbying effort on behalf of the Montana Judges Association, a private non-profit educational and lobbying entity, is a serious violation of Montana's laws. These violations have not been acknowledged by judicial branch officials or employees as violations at all. Improper use of

state time and resources is a serious issue. State law and policy regarding proper use of state time and resources applies to all state employees and public officials, including judges and justices.

The Judicial Code of Conduct provides strong rules defining acceptable conduct for judges and employees supervised by judges. In an email from Chief Justice McGrath, he openly states his disrespect for Montana citizens' ability to understand and apply the law, and in another email openly states his disdain for the idea that Montana citizens could read the Code of Conduct and apply it. He also was copied on emails by other judges that contained potential violations of the Code yet, he expressed no concerns about their "colorful" comments or remarks that indicated potential bias.

At the same time, it appears that multiple canons of the Code of Conduct have been violated by judges and court employees who either directly or indirectly report to the Chief Justice. Yet, in his statement to the Committee, the Chief Justice attempted to distance himself from these responsibilities by stating that the court administrator is "independent" of his supervision or the supervision of the court. Whether this is abdication of responsibility or intentional distancing on the part of the Chief Justice, failure to supervise Court employees or remind other Judges of the responsibilities under the Code of Conduct are concerning.

The branch's failure to comply with its own email and public records policies has not been adequately or consistently explained by either the Court Administrator or the Chief Justice. What is clear is that the justices themselves are grossly misinformed about their personal responsibilities for maintenance of records versus what the branch's IT staff is responsible for. Emails are routinely deleted by court employees and judges in violation of state law and policy, and the IT department does not appear to be retaining these emails in an archived format once they are deleted.

Report, p. 21.

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The Committee made nine 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

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to the Montana judiciary, or whether a third-party would be better suited to provide such services to the branch.

Report, p.22 (emphasis added.)

On May 10, 2021, a Show Cause hearing was held in this proceeding.

On May 18, 2021, this Court granted Justice Rice's preliminary injunction request, and converted the April 19, 2021 temporary order "to a Preliminary Injunction until further order of this Court in all respects."

On June 3, 2021, this Court issued a briefing schedule on Justice's Rice's declaratory judgment request.

On June 22, 2021, Senator Blasdel and Representative Galt wrote Justice Rice informing him that:

> Please take notice that the Subpoenas issued to you on 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.

On the same day, the Legislature filed a dismissal motion in OP 21-0173 claiming that proceeding was moot because it withdrew similar subpoenas issued to Beth McLaughlin. In addition, on or about June 22, 2021, Senator Hertz, the Committee's chair, informed the press that:

> 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.

Larson, *Lawmakers Abandon Investigative Subpoenas for Judges' Records*, Independent Record, June 22, 2021.

On June 23, 2021, the Legislature moved to dismiss this proceeding as moot since it withdrew the subpoenas issued to Justice Rice.

On June 29, 2021, the Montana Supreme Court denied the Legislature's dismissal motion concluding that:

> 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.

McLaughlin v. Mont. State Legislature et al., OP 21-0173, Order (Denying Dismissal Motion) (June 29, 2021) ("*McLaughlin Dismissal Order*").

On July 6, 2021, this Court summarily denied the Legislature's dismissal request because it:

> admitted that its … motion is without merit by failing to file a supporting brief. Mont. Unif. Dist. Ct. R. 2(b). Consequently, its motion should be **DENIED**. In the event the Legislature files another dismissal motion, the Court respectfully requests the parties also address whether, based upon the withdrawn subpoena, Justice Rice is now seeking an advisory opinion from this Court relative to his April 19, 2021 Declaratory and Injunctive Relief Petition.[3] See *Arnone v. City of Bozeman*, 2016 MT 184, ¶ 10, 384 Mont. 250, 376 P.3d 786 (citing authority) (the Uniform Declaratory Judgment Act "does not license litigants to fish in judicial ponds for legal advice").

On July 14, 2021, the *McLaughlin* Court, among other things, permanently enjoined the Legislature and its counsel "from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the subject subpoenas." *McLaughlin*, 2021 Mont. 178, ¶57(c). In summary, it concluded:

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[3] Justice Rice specifically requested, in relevant part, that this Court "declare the Subpoena invalid pursuant to § 27-8-202, MCA, and permanently enjoin it pursuant to § 27-19-102, MCA."

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> Acknowledging the Legislature's authority to obtain information in the exercise of its legislative functions under the Montana Constitution, we conclude that the subpoenas in question are impermissibly overbroad and exceed the scope of legislative authority because they seek information not related to a valid legislative purpose, information that is confidential by law, and information in which third parties have a constitutionally protected individual privacy interest. We hold further that, if the Legislature subpoenas records from a state officer like the Court Administrator auxiliary to its legislative function, whether those records be in electronic or other form, a Montana court—not the Legislature—must conduct any needed *in camera* review and balance competing privacy and security interests to determine whether records should be redacted prior to disclosure.

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In response to the *McLaughlin* Court's July 14, 2021 decision, Senator Hertz stated:

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> 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.
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> 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.
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> 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

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> Montana Supreme Court declared itself above reproach, and, potentially, above the law.
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> 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.

On July 26, 2021, the Legislature moved, with a supporting brief, to dismiss Justice Rice's Declaratory Relief Petition. Similar to *McLaughlin*, it claims this proceeding is moot since the subpoenas issued to Justice Rice were withdrawn.

On July 30, 2021, Justice Rice filed his response brief along with various exhibits in opposition to the Legislature's dismissal motion. He argues his declaratory judgment petition is not moot based on the voluntary cessation and public interest exceptions. *See McLaughlin Dismissal Order*; *see also*, *McLaughlin v. Mont. State. Leg.*, 2021 MT 120, ¶ 11, 404 Mont. 166, 489 P.3d. 482; *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶34, 333 Mont. 331, 142 P.3d 864; *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872.

On August 11, 2021, the Legislature petitioned the *McLaughlin* Court for rehearing. In its conclusion, the Legislature argued:

> Montanans are sensible and can see plainly what happened here. Judicial misconduct or embarrassing malfeasance was revealed to the public, and this Court seems bent to put Jack back in the box. The only path forward is for the judiciary and Legislature to talk. To facilitate those discussions, the Legislature went so far as to withdraw the subpoenas and reset the conversation. But the Court

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> has steadfastly refused to negotiate over the production of public records in its possession.
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> When one branch of government throws the balance so violently out of kilter as the Court does here, our institutions—including the Court—are on the brink. *See State ex rel. Hall v. Niewoehner*, 116 Mont. 437, 473 (1944) (Morris, J., dissenting) ("[t]he safety of our government is dependent to a great extent on the confidence and respect which the people have for the courts, and it is the duty of every court to strive by honorable means to merit and preserve that confidence and respect.") The Legislature seeks public records. The Court holds them. Their disclosure does not have to be rife with animosity.
>
> The Legislature respectfully requests that this Court withdraw the Opinion and Orders, dismiss the case, and enter the field of negotiation and accommodation for the good of Montana.

On August 12, 2021, the Legislature filed its reply brief. On the same day it filed a submittal notice. Neither the Legislature nor Justice Rice requested oral arguments.

For the reasons stated below, the Legislature's dismissal motion is **DENIED, without prejudice.**

REVIEW STANDARD[4]

A complaint should not be dismissed unless it appears "beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle[] him to relief." *Spencer v. Beck*, 2010 MT 256, ¶ 10, 358 Mont. 295, 245 P.3d 21. For these reasons, dismissal motions are not favored and are rarely granted…" *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250.

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[4] Neither Justice Rice nor the Legislature argued for a particular review standard. As such, this Court has determined to evaluate the Legislature's dismissal motion under Civ. P. R. 12(b)(6). See *Northfield Ins. Co. v. Mont. Ass'n of Counties*, 2000 MT 256, ¶ 8, 301 Mont. 472, 10 P.3d 813 (Rule 12(b) standard recited in declaratory judgment dismissal motion).

In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true. *Id.* "[S]hould defendants desire any further degree of specificity, they may obtain the same by use of the appropriate discovery devices such as depositions, interrogatories and requests to admit. This Court does not favor the short circuiting of litigation at the initial pleading stage unless a complaint does not state a cause of action under any set of facts...

Willson v. Taylor, 194 Mont. 123, 128, 634 P.2d 1180, 1183 (1981) (citing authority).

Moreover, the only relevant documents when considering a dismissal motion are the complaint and any documents it incorporates by reference.[5] *Cowan v. Cowan*, 2004 MT 97, ¶ 11, 321 Mont. 13, 89 P.3d 6.

Furthermore, whether to dismiss a declaratory judgment petition because such relief is not "necessary or proper" rests in "the sound discretion of the district court." *Northfield*, ¶ 8. "[E]ven though all of the necessary elements of jurisdiction exist, the district court is not required to exercise that jurisdiction." *Brisendine v. Department of Commerce, Bd. of Dentistry*, (1992), 253 Mont. 361,

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[5] Each party referred to matters outside the original pleadings. Moreover, Justice Rice did not amend his Petition so as to allow this Court to lawfully consider, for example, the Committee's Report, the Legislature's "desire to negotiate," or Senator Hertz's threating and rhetorical statements. This Court concludes that it must follow *Cowan*. To do otherwise would completely ignore the *stare decisis* doctrine and possibly lead to an improper result orientated decision or worse yet, blatant judicial activism. This Court has a solemn duty to follow the *Cowan* precedent. In addition, this Court will not actively partake in eroding Montana case law's stability which attorneys, judges and litigants must and do rely upon. Accordingly, for purposes of the Legislature's dismissal motion, this Court will only consider the Legislature's June 22, 2021 express subpoena withdrawal which is completely undisputed for purpose of the Legislature's motion. This Court will not consider any other matters not set forth in the pleadings. It appears the *McLaughlin* Court was not "*Cowan*" restrained in its *Dismissal Order*. (See pp. 3-4, "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)". Furthermore, this Court declines to *sua sponte* convert the Legislature's dismissal motion into a Rule 56 summary judgment motion.

364, 833 P.2d 1019 (1992) (citing authority). Furthermore, a district court's decision whether a justiciable controversy exists is a conclusion of law. *Northfield*, ¶ 8.

DISCUSSION

As the *Brisendine* Court noted, under Mont. Code Ann. § 27-8-102, "[t]he purpose of the Montana Declaratory Judgment Act is remedial and is meant 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.'" *Brisendine*, 253 Mont. at 363-64.

> Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Mont. Code Ann. § 27-8-202 (2021).

> Although the Uniform Declaratory Judgment Act (UDJA) "is to be liberally construed and administered," *Lee v. State*, 195 Mont. 1, 6, 635 P.2d 1282, 1284 (1981) (citing § 27-8-102, MCA), it "does not license litigants to fish in judicial ponds for legal advice," *Mont. Dep't of Natural Res. & Conservation v. Intake Water Co.*, 171 Mont. 416, 440, [**254] 558 P.2d 1110, 1123 (1976) (citation omitted). *See also Northfield*, ¶ 10 ("[L]iberal interpretation of the [UDJA] is tempered by the necessity that a justiciable controversy exist before courts exercise jurisdiction."). In *Northfield*, secondary insurers sought a declaratory judgment as to their contractual duty to indemnify a primary insurer, even though the primary insurer had not yet sought indemnification. *Northfield*, ¶ 16. We held: "the judicial determination [the secondary insurers] seek involves a contractual duty which has not yet arisen and which may, in fact,

> never arise. A determination of the issue, therefore, would constitute an advisory opinion and courts have no jurisdiction to issue such opinions." *Northfield*, ¶ 18. In reaching this conclusion, we cited *Hardy v. Krutzfeldt*, 206 Mont. 521, 672 P.2d 274 (1983). *Northfield*, ¶ 18. In *Hardy*, the plaintiffs sought a judicial declaration that several preemptive rights of first refusal pertaining to their real property were unreasonable restraints on alienation. *Hardy*, 206 Mont.at 523, 672 P.2d at 275. We held that there was no justiciable controversy because there was no pending sale or offer for sale of the properties that would be affected by the rights of first refusal, and no third party was seeking relief from the contractual provisions providing for the refusal rights. *Hardy*, 206 Mont. at 524-25, 672 P.2d at 275-76.

Arnone v. City of Bozeman, 2016 MT 184, ¶ 10, 384 Mont. 250, 376 P.3d 786.

The Legislature claims that since it "has withdrawn the subpoena at issue in this case, …any opinion from this Court would constitute an advisory opinion. Without a subpoena on which to rule, this case is moot." The Legislature argues that this proceeding is no longer justiciable since "[t]he underlying 'controversy' that may have existed at the outset of this case no longer exists."

> 'A justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion.' *Clark v. Roosevelt County*, 2007 MT 44, P 11, 336 Mont. 118, 154 P.3d 48; *accord Seubert*, P 20; *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997). The central concepts of justiciability have been elaborated into more specific categories or doctrines--namely, advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions--each of which is governed by its own set of substantive rules. *Greater Missoula*, P 23.

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Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, ¶ 8, 355 Mont. 142, 226 P.3d 567.

> Mootness is a category of justiciability. *Plan Helena, Inc.*, ¶ 8. We have often described mootness as the "doctrine of standing set in a time frame," stating that "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *E.g., Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881; *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 31, 333 Mont. 331, 142 P.3d 864. A matter is moot when "a court's judgment will not effectively operate to grant relief." *Clark*, ¶ 11. "The fundamental question to be answered in any review of possible mootness is 'whether it is possible to grant some form of effective relief to the appellant.'" *Briese v. Mont. Pub. Employees' Retirement Bd.*, 2012 MT 192, ¶ 14, 366 Mont. 148, 285 P.3d 550 (*quoting Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 37, 364 Mont. 390, 276 P.3d 867).

Montanans Against Assisted Suicide (MAAS) v. Bd. of Med. Examiners, 2015 MT 112, ¶ 11, 379 Mont. 11, 347 P.3d 1244.

On its face, the Legislature's simple and straightforward argument seems well taken. Especially since the *Arnone* Court emphatically reinforced its previous holdings that Montana courts will not render advisory opinions. *Arnone*, ¶ 7 (citing authority).

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

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Justice Rice, on the other hand, argues "[t]his matter is not moot, because the Court's judgment would still have a practical impact on the continuing controversy between the parties." He claims, similar to the *McLaughlin Dismissal Order*, that "the voluntary cessation and public interest exceptions" likewise apply in this proceeding. 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).

In regard to "the voluntary cessation" exception, Justice Rice maintains that it applies because:

> 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.

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As to the "public interest" exception, he argues it applies when:

> '(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.

The Legislature claims that neither exception applies in this proceeding:

> 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 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.
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> 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.

1 This Court is firmly convinced that the Legislature's limited
2 investigative subpoena power as recognized by the *McLaughlin* Court can be
3 abused and impede individual liberty and privacy interests especially in the
4 current heated dispute contrived by the Legislature[6] against the Judiciary. This
5 Court's concern is greater enhanced because the Legislature, through its current
6 counsel, has already informed Justice Rice that "[t]he Legislature does not
7 recognize [the Montana Supreme Court's] Order as binding and will not abide by
8 it."

9 The 1972 Montana Constitution vested the Legislature with the
10 exclusive authority to enact [laws], the Governor, as the chief officer
of the executive, with the exclusive authority and duty to see that
11 [laws are] faithfully executed, and the judiciary with the exclusive
12 authority and duty to adjudicate the nature, meaning, and extent of
applicable constitutional, statutory, and common law. Mont. Const.
13 arts. III, § 1, VI, § 4(1), VII, § 1.

14 *Bullock v. Fox*, 2019 MT 50, ¶ 26, 395 Mont. 35, 435 P.3d 1187.

15 Here, if the Legislature will not abide by a Montana Supreme
16 Court order, then, in that event, what will stop it from issuing Justice Rice
17 another subpoena to him? In this regard, the Legislature, through its counsel,
18 also informed Justice Rice that its "subpoena [in *McLaughlin* proceeding] is valid
19 and will be enforced." For purposes of this proceeding, this Court will determine
20 whether the Legislature's subpoena to Justice Rice was valid despite it being
21 withdrawn since there is still a dispute over the subpoena's legality.

22 According to the *Havre Daily News* Court, only where "it is
23 'absolutely clear that the allegedly wrongful behavior could not reasonably be
24 expected to recur'" is the matter moot. In this regard, to date, the Legislature has
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[6] "There's value in people you don't agree with. It's easy to find people you agree with. There's value in people that you may disagree with on something strongly, but it doesn't inherently make them a bad person, Learn to understand people and judge less and love more and let's have less hatred. It's destroying our society," Rep. Paul Mitchell, (R Mich.) (deceased), P. LeBlanc, CNN (08/22/21).

not met its heavy burden by clearly demonstrating to this Court that there is no reasonable expectation the alleged illegal conduct will again rear its purported politically motivated improper head as to Justice Rice. "The [Legislature] is free to return to [its] old ways. This, together with a public interest in having the legality of the [alleged illegal subpoena] settled, militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citing authority). The Legislature could have simply expressly represented to Justice Rice and this Court that it will not issue another subpoena to him because it will proceed with its complaints against Justice Rice before the constitutionally created Montana Judicial Standards Commission. Such a representation, in this Court's view, would have satisfied the *Havre Daily News* Court's "absolutely clear" mootness requirement.

Furthermore, whether the subpoena issued to Justice Rice was legal is publicly important and will be shortly presented by Justice Rice and Legislature in their respective declaratory judgment briefs for this Court's decision.

Accordingly, this Court concludes[7] that despite the Legislature withdrawing the subpoena issued to Justice Rice, this proceeding is not moot under the voluntary cessation and public interest exceptions. The Legislature is

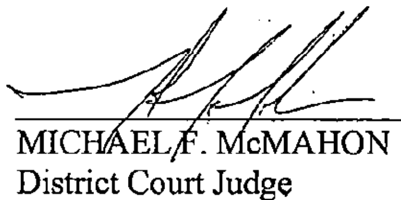
[7] Certainly, this Court expects the Legislature and its counsel to socially broadcast this decision as "judicial activism." That presumed response's apex is that any judge who disagrees with the Legislature or its counsel is a judicial activist and any judge who agrees with their position is not a judicial activist. Respectfully, it is not the Legislature's province or duty to adjudicate what the law is, that is left to the judiciary. A district court has no power to declare or pronounce new law. It is duty bound to "adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law." *Bullock*, ¶26. Such conservative jurisprudence is not judicial activism. Moreover, in this regard, the Montana Supreme Court has never hesitated to overrule this Court's "strict construction" decisions. See, e.g., *Estate of Scheideckerv. Montana Dep't of Pub. Health and Human Services*, 2021 MT 158, 404 Mont. 407, _ P.3d _. In doing so, such a reversal should likewise not be touted as judicial activism since the Montana Supreme Court is the ultimate Montana adjudicator of "the nature, meaning, and extent of applicable constitutional, statutory, and common law." *Bullock*, ¶ 26.

therefore not entitled to a dismissal as a matter of right. Consequently, its dismissal motion must, and shall be, **DENIED, without prejudice.**

ORDER

Based on the above, the Court hereby **ORDERS, ADJUDGES AND DECREES** that the Legislature's dismissal motion is **DENIED, without prejudice.**

DATED this 23rd day of August 2021.



MICHAEL F. McMAHON
District Court Judge

cc: Curt Drake, 111 North Last Chance Gulch, Suite 3J, Arcade Building, Helena, MT 59601, (via email to: curt@drakemt.com)
Kristin Hansen/Derek Oestreicher, P.O. Box 201401, Helena, MT 59620-1401, (via email to: KHansen@mt.gov and derek.oestreicher@mt.gov)

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