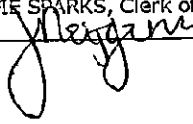


FILED

SEP 17 2021

AUSTIN KNUDSEN  
Montana Attorney General  
DEREK J. OESTREICHER  
General Counsel  
P.O. Box 201401  
Helena, MT 59620-1401  
Tel: (406) 444-2026  
Fax: (406) 444-3549  
derek.oestreich@mt.gov

ANGIE SPARKS, Clerk of District Court  
By  Deputy Clerk

*Attorneys for Respondents*

MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

<p>JUSTICE JIM RICE,  Petitioner,  vs.  THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Wylie Galt, Speaker of the House of Representatives,  Respondents.</p>	<p>Cause No. BDV-2021-451  Hon. Michael F. McMahon  (email) <b>BRIEF IN OPPOSITION TO PETITION FOR DECLARATORY JUDGMENT</b></p>
---	---

The Montana State Legislature respectfully submits its Brief in Opposition to Justice Rice's Petition for Declaratory Judgment. On June 22, 2021, the Legislature withdrew the subpoena giving rise to this case. Based on this withdrawal, the Court lacks jurisdiction to adjudicate this matter. And even if the Court did have jurisdiction, the subpoena issued to Justice Rice was a valid exercise of the Legislature's subpoena power.

Justice Rice’s Petition for Declaratory and Injunctive Relief seeks to “immediately quash or stay the Subpoena, or preliminarily enjoin Respondent from pursuing the Subpoena or issuing further subpoenas.” Petition at 20. Justice Rice also asks that the “Court declare the Subpoena invalid pursuant to § 27-8-202, MCA, and permanently enjoin it pursuant to § 27-19-102, MCA.” *Id.* Because the Legislature withdrew the subpoena issued to Justice Rice, there is no relief available to Justice Rice. *See State’s Brief in Support of Motion to Dismiss.* The Court cannot permanently enjoin or declare invalid a subpoena that has been withdrawn. Any opinion issued from this Court therefore constitutes an advisory opinion, and the Legislature continues to object to this Court’s jurisdiction. *Id.*

This Court has summarized the issue as “whether the subpoena issued to Justice Rice was legal.” July 26, 2021 Dismissal Motion Order at 20. Justice Rice has most recently summarized the issue as whether the Legislature’s subpoena powers “extend to the information sought in this case.” Brief in Support of Petition for Declaratory Judgment at 5. *But see* Response to Motion to Dismiss at 3 (framing the controversy as being about “the Legislature’s ability to investigate and request documents and communications from the Judicial Branch”); *id.* at 5 (framing the controversy as being about “legislature’s use of its investigative powers ... to invade the province of the judiciary”); *id.* at 6 (framing the controversy as being about “the Legislature’s inappropriate pursuit of documents”); *id.* at 8 (framing the controversy as being 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”). The Legislature disagrees with both the Court’s and Justice Rice’s framing of the controversy and instead refers back to Justice Rice’s original Petition where he stated that this case is about “whether the Legislature’s Subpoena to Petitioner satisfies the furtherance of a valid legislative purpose.” Petition for Declaratory Judgment at 8. The now withdrawn subpoena did.

Justice Rice now seeks additional relief. Beyond asking for a declaration that the withdrawn subpoena is invalid because it does not satisfy the furtherance of a valid legislative purpose, *see* Petition at 8, 20, Justice Rice now asks the Court for the following declarations:

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

- That the Legislature may not issue a subpoena for the purpose identified in its Brief in Support of Motion to Dismiss of investigating alleged judicial misconduct

Brief in Support of Petition for Declaratory Judgement at 6.

This is the first time the Legislature has been made aware of these requests, and these broad declarations about the Legislature's subpoena power are outside the scope of this case, which is about a specific subpoena issued to a specific justice that has since been withdrawn.

It is clear to the Legislature that this Court has already made up its mind on this case. See July 26, 2021 Dismissal Motion Order at 19 ("This Court is firmly convinced that the Legislature's *limited* investigative subpoena power ... can be abused and impede individual liberty and privacy interests especially in the current heated dispute *contrived by the Legislature* against the Judiciary.") (emphasis added). And after this Court enters its order, the Legislature's only recourse is to appeal to the Montana Supreme Court, which was the focus of the investigation that gave rise to the subpoena at issue here and is where Justice Rice sits. Accordingly, the Legislature reiterates and rests on its previous arguments:

- The Legislature issued a subpoena to Justice Rice in furtherance of a valid legislative purpose, which was to investigate potential judicial misconduct. This exercise of authority is within the Legislature's investigative and subpoena powers under Mont. Code Ann. §§ 5-5-101, 5-5-105(2).
- This controversy is now moot because the subpoena has been withdrawn and no mootness exceptions apply. See Brief in Support of Motion to Dismiss; Reply in Support of Motion to Dismiss.

- This controversy is not justiciable because the relief Justice Rice requested in his Petition is no longer available given that the subpoena has been withdrawn. *Id.*
- Any opinion by this Court constitutes an advisory opinion. *Id.*

For these reasons, the Legislature requests that this Court deny Justice Rice's Petition for Declaratory Relief.

DATED the 17th day of September, 2021.

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

By: /s/ Derek J. Oestreicher  
DEREK J. OESTREICHER  
General Counsel

*Attorney for Respondents*

## CERTIFICATE OF SERVICE

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

Justice Jim Rice  
jrice@mt.gov

Curt Drake  
Patricia Klanke  
curt@drakemt.com  
patricia@drakemt.com

Date: September 17, 2021

  
ROCHELL STANDISH