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OCT 06 2021

ANGIE SPARKS, Clerk of District Court
By **K KRESGE** Deputy Clerk

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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

<p>JUSTICE JIM RICE,</p> <p>Petitioner,</p> <p>v.</p> <p>THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Representative Wylie Galt, Speaker of the House of Representatives,</p> <p>Respondents.</p>	<p>Cause No.: BDV-2021-451</p> <p>DECLARATORY JUDGMENT PETITION ORDER</p>
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Justice James A. Rice’s (Justice Rice) April 19, 2021 Declaratory Judgment Petition (Petition) has been fully briefed by the parties. Neither he nor the Montana State Legislature (Legislature) requested oral arguments.

For the reasons stated below, Justice Rice’s Petition is **GRANTED** in part, and **DENIED** in part.

1 **MATERIAL FACTUAL BACKGROUND¹**

2 Justice Rice has been a Montana Supreme Court Justice for over
3 twenty years.

4 On March 16, 2021, Governor Gianforte signed SB 140. It
5 provided, among other things, the governor with direct judicial appointment
6 power and abolished the Montana Judicial Nomination Commission.

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

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

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

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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.

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

4 The Legislative power is broad. In fulfilling its constitutional
5 role, the Legislature's subpoena power is similarly broad. The
6 questions the Legislature seeks to be informed on through the instant
7 subpoena directly addresses whether members of the Judiciary and
8 the Court Administrator have deleted public records and information
9 in violation of state law and policy; whether the Court Administrator
10 has performed tasks for the Montana Judges Association during
11 taxpayer funded worktime in violation of state law and policy; and
12 whether current policies and processes of the Judicial Standards
13 Commission are sufficient to address the serious nature of polling
14 members of the Judiciary to prejudge legislation and issues which
15 have come and will come before the court for decision.

12 . . .

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

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

- 24 (1) Any and all communications, results, or responses, related to any and
25 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

1 digital files; as well as text messages, phone messages, and phone logs
2 sent or received by your personal or work phones; and any notes or
3 records of conferences of the Justices regarding the same.

4 (2) Any and all emails or other communications between January 4, 2021
5 and April 14, 2021 regarding legislation pending before, or potentially
6 pending before the 2021 Montana Legislature; including emails and
7 attachments sent and received by your government e-mail account,
8 [redacted email address], delivered as hard copies and .pst digital files;
9 as well as text messages, phone messages, and phone logs sent or
10 received by your personal or work phones; and any notes or records of
11 conferences of the Justices regarding the same.

12 (3) Any and all emails or other communications between January 4, 2021
13 and April 14, 2021 regarding business conducted by the Montana
14 Judges Association using state resources, including emails and
15 attachments sent and received by your government e-mail account,
16 [redacted email address], delivered as hard copies and .pst digital files;
17 as well as text messages, phone messages, and phone logs sent or
18 received by your personal or work phones; and any notes or records of
19 conferences of the Justices regarding the same.

20 The Subpoena indicated, in relevant part, that:

21 This request pertains to the Legislature’s investigation into whether
22 members of the Judiciary or employees of the Judicial Branch deleted
23 public records and information in violation of state law and policy; and
24 whether the current policies and processes of the Judicial Standards
25 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

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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.

1 Injunctive Relief; and Emergency Request to Quash or Enjoin Legislative
2 Subpoena Pending Proceedings,” he requested this Court, among other things:

3 1. [I]mmediately quash or stay the Subpoena, or preliminarily
4 enjoin [the Legislature] from pursuing the Subpoena or issuing
5 further subpoenas, pending a hearing and pending this proceeding
6 pursuant to § 27-19-201, MCA; and

6 . . .

7 3. [D]eclare the Subpoena invalid pursuant to § 27-8-202, MCA,
8 and permanently enjoin it pursuant to § 27-19-102, MCA.

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

11 On April 23, 2021, Montana Attorney General Knudsen issued a
12 “general statement” that indicated, in relevant part:

13 The Department of Justice will continue to represent the
14 legislature as it carries out its necessary investigation of potential
15 judicial misconduct. The Supreme Court justices must also act to
16 restore the public’s confidence. Fully cooperating with the
17 investigation instead of taking extraordinary measures to hide public
18 documents would be (sic) good place for them to start.

18 What has been happening behind closed doors at the Supreme
19 Court is ugly: Violations of our judicial codes of conduct, potential
20 violations of the law, and a pattern of corruption. The Supreme
21 Court justices and staff are scrambling to cover this up. The first
22 step toward cleaning up our legal and judicial culture is more
23 transparency and less of the self-policing that has enabled the current
24 system to spiral out of control.

23 (Hearing Ex. 8.)

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

4 The testimony and information collected by the Committee
5 over the past weeks raise serious concerns about the practices of the
6 judicial branch concerning the topics highlighted above.

7 The use of state time and resources by multiple branch
8 employees, including judges, to facilitate a complex lobbying effort
9 on behalf of the Montana Judges Association, a private non-profit
10 educational and lobbying entity, is a serious violation of Montana's
11 laws. These violations have not been acknowledged by judicial
12 branch officials or employees as violations at all. Improper use of
13 state time and resources is a serious issue. State law and policy
14 regarding proper use of state time and resources applies to all state
15 employees and public officials, including judges and justices.

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

25 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

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1 supervise Court employees or remind other Judges of the
2 responsibilities under the Code of Conduct are concerning.

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

12 Report, p. 21.

13 The Committee made nine recommendations:

14 1. That this Committee continue into the interim, with proper
15 funding, in order for the Committee to complete its investigation.

16 2. That the Committee complete its work on the same
17 schedule as that of regular interim committees and produce a final
18 report to the 68th Legislature.

19 3. That the Committee examine whether legislation is
20 necessary to address Committee findings.

21 4. That the Committee determine whether evidence indicates
22 that the conduct of state employees or officials should be referred to
23 the appropriate authorities for further investigation.

24 5. That the Committee submit complaints to disciplinary
25 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.

1 7. That the Committee issue further subpoenas deemed
2 necessary to complete its investigation.

3 8. That the Committee consider whether the current lobbying
4 practices of the Montana Judges Association negatively impact
5 public confidence in the branch or compromise the integrity of the
6 judicial branch by creating the appearance of bias for or against
7 legislation that may later be
8 challenged in the courts.

9 9. That the Committee consider whether the Montana Judges
10 Association should remain the primary education and ethics provider
11 to the Montana judiciary, or whether a third-party would be better
12 suited to provide such services to the branch.

13 Report, p.22.

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

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

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

21 Please take notice that the Subpoenas issued to you on 14th and
22 15th of April, 2021, are hereby withdrawn by the Montana State
23 Legislature. The Legislature's withdrawal of these Subpoenas
24 extinguishes any obligation for you to comply with the Subpoenas
25 and produce the requested documentation and information.

26 On the same day, the Legislature filed a dismissal motion in OP 21-0173
27 claiming that proceeding was moot because it withdrew similar subpoenas issued

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1 to Beth McLaughlin. In addition, on or about June 22, 2021, Senator Hertz, the
2 Committee’s chair, informed the press that:

3 To be clear, we expect the judicial branch to release public records
4 We’re still seeking documents and information that will provide more
5 clarity on the issues identified in our committee’s initial report and
inform legislative fixes to problems within our judicial system.

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

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

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

12 For the reasons stated above, this Court has determined that the
13 matter is not moot with regard to documents already in the
14 Legislature’s possession. Additionally, the mootness doctrine does
15 not apply with respect to the withdrawn subpoena to McLaughlin as
it falls within the public interest and voluntary cessation exceptions.

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

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

20 admitted that its ... motion is without merit by failing to file a
21 supporting brief. Mont. Unif. Dist. Ct. R. 2(b). Consequently, its
22 motion should be **DENIED**. In the event the Legislature files another
23 dismissal motion, the Court respectfully requests the parties also
24 address whether, based upon the withdrawn subpoena, Justice Rice is
25 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

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.”

1 (citing authority) (the Uniform Declaratory Judgment Act “does not
2 license litigants to fish in judicial ponds for legal advice”).

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

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

18 *McLaughlin*, ¶ 2.

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

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

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

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

14 The Legislature and our attorneys will continue to review this
15 astounding ruling in more detail. We have even more work to do
16 than we thought to ensure that Montana's Judicial Branch is subject
17 to the same transparency and accountability that governs the
18 Executive and Legislative branches.

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

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

25 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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1 has steadfastly refused to negotiate over the production of public
2 records in its possession.

3 When one branch of government throws the balance so
4 violently out of kilter as the Court does here, our institutions—
5 including the Court—are on the brink. *See State ex rel. Hall v.*
6 *Niewoehner*, 116 Mont. 437, 473 (1944) (Morris, J., dissenting)
7 (“[t]he safety of our government is dependent to a great extent on the
8 confidence and respect which the people have for the courts, and it is
9 the duty of every court to strive by honorable means to merit and
10 preserve that confidence and respect.”) The Legislature seeks public
11 records. The Court holds them. Their disclosure does not have to be
12 rife with animosity.

13 The Legislature respectfully requests that this Court withdraw
14 the Opinion and Orders, dismiss the case, and enter the field of
15 negotiation and accommodation for the good of Montana.

16 On August 23, 2021, this Court denied the Legislature’s second
17 dismissal motion, without prejudice.⁴ In doing so, this Court indicated that
18 “[f]or purposes of this proceeding, this Court will determine whether the
19 Legislature’s subpoena to Justice Rice was valid despite it being withdrawn since
20 there is still a dispute over the subpoena’s legality.”

21 On September 7, 2021, the Montana Supreme Court denied the
22 Legislature’s rehearing request. It held, in relevant part, that:

23 Having reviewed the petition and response, we conclude that the
24 Legislature has not established grounds for rehearing. Instead, it
25 mischaracterizes or misapprehends numerous provisions of the Court's
decision and suggests rulings the Court did not make. First, the Court
cited *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 207 L. Ed. 2d 951
(2020), not—as the Legislature fears—as controlling authority to justify
“forever expropriat[ing] legitimate legislative oversight tool[s]”, but as an

⁴ “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.”

1 insightful analysis of legislative subpoena power and a helpful "balanced
2 approach" to the consideration of subpoenas that raise "interbranch
3 confrontation" concerns. *McLaughlin*, ¶ 19. Second, the Opinion did not
4 hold in any fashion that the Legislature cannot issue a subpoena to or
otherwise obtain appropriate information from a government official.

5 *McLaughlin v. Mont. State Legislature*, OP 21-0173, 2021 Mont. LEXIS 696.

6 Since April 19, 2021, the Legislature has not issued another
7 subpoena to Justice Rice.

8 DISCUSSION

9 Declaratory Judgment Standard

10 The Montana Supreme Court has held that “[t]he purpose of the
11 Montana Declaratory Judgment Act is remedial and is meant ‘to settle and to
12 afford relief from uncertainty and insecurity with respect to rights, status, and
13 other legal relations; and it is to be liberally construed and administered.’”

14 *Brisendine v. Department of Commerce, Bd. of Dentistry*, 253 Mont. 361, 363-
15 64, 833 P.2d 1019 (1992).

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

21 Mont. Code Ann. § 27-8-202 (2021).

22 Notwithstanding, however, Montana district courts are precluded from
23 issuing advisory opinions in declaratory judgment proceedings. See *Lee v. State*,
24 195 Mont. 1, 6, 635 P.2d 1282, 1284 (1981) (UDJA “does not license litigants to
25 fish in judicial ponds for legal advice.”); *Mont. Dep’t of Natural Res. &*

1 *Conservation v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 1123
2 (1976) (citation omitted). In *Northfield Ins. Co. v. Mont. Ass'n of Counties*, 2000
3 MT 256, ¶ 18, 301 Mont. 472, 10 P.3d 813, the Montana Supreme Court held that
4 a judicial determination of secondary insurers' declaratory judgment request as to
5 their contractual duty to indemnify a primary insurer, even though the primary
6 insurer had not yet sought indemnification "would constitute an advisory opinion
7 and courts have no jurisdiction to issue such opinions." Consequently, as this
8 Court understands, if the declaratory relief or question is based upon abstract,
9 hypothetical, or contingent events, a Montana district court must dismiss the
10 claim for lack of jurisdiction.

11 **Future Montana Legislative Subpoenas Issued to Justice Rice**

12 Justice Rice petitioned, in relevant part, that this Court
13 "preliminarily enjoin [the Legislature] from . . . **issuing further subpoenas**,
14 pending a hearing and pending this proceeding pursuant to § 27-19-201." He
15 argues, in relevant part, that "the Legislature has announced and repeated its
16 intention to continue pursuing documents from the judicial branch, and has not
17 forsworn serving future subpoenas upon Supreme Court Justices as part of that
18 process, notwithstanding the withdrawal of the earlier subpoenas, Mot. to
19 Dismiss at 2; Ex. H at 22." Now, Justice Rice requests, in relevant part, that this
20 Court declare:

- 21 • That, pursuant to *McLaughlin II*, the Legislature may not issue a
22 subpoena seeking the communications of a Supreme Court Justice for the
23 stated purpose of "investigation into whether members of the Judiciary or
24 employees of the Judicial Branch deleted public records and information
25 in violation of state law and policy;"

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1 • That, pursuant to *McLaughlin II*, the Legislature may not issue a
2 subpoena seeking the communications of a Supreme Court Justice for the
3 stated purpose of investigating “whether the current policies and
4 processes of the Judicial Standards Commission are sufficient to address
5 the serious nature of polling members of the Judiciary to prejudge
6 legislation and issues which have come and will come before the courts
7 for decision”;

8 • That the Legislature may not issue a subpoena for personal
9 communications without demonstrating that production is necessitated by
10 a legitimate legislative interest, and not for purposes of political exposure
11 or to serve an investigative interest that is the purview of the executive
12 branch; and

13 • That the Legislature may not issue a subpoena for the purpose
14 identified in its Brief in Support of Motion to Dismiss of investigating
15 alleged judicial misconduct.

16 In this regard, this Court finds that Justice Rice has "put the cart
17 before the horse" in requesting such “hypothetical” declaratory relief. Especially
18 since the *McLaughlin* Court “did not hold in any fashion that the Legislature
19 cannot issue a subpoena to or otherwise obtain appropriate information from a
20 government official.” *McLaughlin*, OP 21-0173, 2021 Mont. LEXIS 696. Justice
21 Rice is not entitled to a declaratory ruling from this Court relative to as-yet
22 unissued and unserved subpoenas until a subpoena is actually issued by the
23 Montana Legislature, served on him, and resisted by him on *McLaughlin II* or
24 any other legal basis. None of these hypothetical things have occurred or may
25 ever occur.

Consequently, this Court must, and shall, **DENY**, Justice Rice’s
requested declaratory relief relative to future subpoenas because any such
declaratory determination would constitute an improper advisory opinion as to

1 both the hypothetical subpoena issue and the hypothetical subpoena's legality.
2 This Court has no jurisdiction to issue a declaratory ruling based on contingent,
3 hypothetical or abstract future Legislative subpoenas that may never be issued to
4 Justice Rice.

5 **The April 15, 2021 Subpoena Issued to Justice Rice was Invalid**

6 **Legislature's Documentary Subpoena Power**

7 The Legislature had no statutory authority on April 15, 2021 to
8 subpoena documents from Justice Rice. Neither Mont. Code Ann. § 5-5-101(1),
9 Mont. Code Ann. § 5-5-102, nor Mont. Code Ann. § 5-5-105 granted the
10 Legislature to issue the April 15, 2021 subpoena relative to the identified and
11 demanded documents from him. While the Legislature certainly had the statutory
12 power to subpoena Judge Rice's attendance "before either house of the
13 legislature or a committee of either house," there was no such corresponding
14 Legislative statutory document subpoena power. See, e.g., *Comm'r of Political*
15 *Practices for Mont. v. Mont. Republican Party*, 2021 MT 99, ¶ 9, 404 Mont. 80,
16 485 P.3d 741.

17 On May 10, 2021, the Legislature argued such power is found in
18 Mont. Code Ann. § 5-5-105 (2). In this regard, this Court will not insert what the
19 Legislature omitted in section 5-5-101(1) to broaden its investigatory authority.
20 The word "subpoena" does not appear in Mont. Code Ann. § 5-5-105. This
21 Court shall not insert Mont. Code Ann. §§ 5-5-105(1) or 5-5-105(2)'s "paper
22 produced" or "produce any paper" into Mont. Code Ann. § 5-5-105(1). The same
23 is true in that this Court will not insert the word "subpoena" found in section 5-5-
24 101(1) into either section 5-5-105(1) or section 5-5-105(2).

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1 Furthermore, as previously indicated, the Legislature’s authority
2 remains subject to judicial oversight, particularly when those it “investigates” are
3 subjected to unlawful document subpoenas. Such judicial oversight involves the
4 balance of powers between the judicial branch and the legislative branch as well
5 as the executive branch. This Court will not judicially condone or ignore the
6 Legislature circumventing statutory due process safeguards by overreaching
7 conduct not statutorily authorized.

8 Accordingly, this Court hereby **GRANTS** Justice Rice’s Petition
9 as to the April 15, 2021 subpoena documentary requests and declares the
10 subpoena invalid in that respect since the Legislature had no statutory authority to
11 subpoena documents from Justice Rice.

12 **Legislature’s Investigatory Subpoena Power**

13 In reliance upon the *McLaughlin* Court’s extensive analysis, this
14 Court finds that the Legislature’s April 15, 2021 subpoena issued to Justice Rice
15 relative to the identified and requested documents exceeded the Legislature’s
16 limited legislative investigatory subpoena authority. Specifically, the April 15,
17 2021 subpoena issued to Justice Rice was “impermissibly overbroad and
18 [exceeded] the scope of legislative authority because [it] seeks information not
19 related to a valid legislative purpose, information that is confidential by law, and
20 information in which [Justice Rice had] a constitutionally protected individual
21 privacy interest.” *McLaughlin*, ¶ 2.

22 Furthermore, the April 15, 2021 subpoena interferes with the
23 Montana Judicial Standards Commission (MJSC) constitutional authority and
24 exceeds the Legislature’s investigatory authority as to alleged judicial
25 misconduct. The MJSC, not the Legislature, investigates alleged judicial

1 misconduct. The MJSC, not the Legislature, has the constitutional authority to
2 subpoena witnesses and documents in alleged judicial misconduct matters. The
3 MJSC, not the Legislature, has the constitutional authority to make rules
4 implementing Mont. Const. Art. VII. §11(2).

5 Accordingly, this Court hereby **GRANTS** Justice Rice’s Petition
6 as to the April 15, 2021 subpoena documentary requests and declares the
7 subpoena invalid and void in that respect since the Legislature exceeded its
8 limited Montana legislative investigative authority as determined by the
9 *McLaughlin* Court.

10 **ORDER**

11 Based on the above, the Court hereby **DECLARES, ADJUDGES,**
12 **AND DECREES** as follows:

13 1. Justice Rice’s Petition is **GRANTED** as to the April 15, 2021
14 Subpoena issued to him by the Montana Legislature relative to the documents
15 identified, requested and/or demanded in that Subpoena;

16 2. The Legislature’s April 15, 2021 Subpoena issued to Justice
17 Rice is invalid, void, and not enforceable against Justice Rice relative to the
18 documents identified, requested and/or demanded in that Subpoena;

19 3. This Court’s April 19, 2021 temporary order is converted to a
20 Permanent Injunction against the Legislature relative to the documents identified,
21 requested and/or demanded in the April 15, 2021 Subpoena; and

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1 4. Justice Rice’s Petition as to future Legislative subpoenas issued
2 to him is **DENIED**.

3 DATED this 6th day of October 2021.

4
5 Michael F. Digitally signed by Michael
 McMahon F. McMahon
 Date: 2021.10.06 15:43:01
 -06'00'

6 MICHAEL F. McMAHON
7 District Court Judge

8 cc: Curt Drake / Patricia Klanke, (via email to: curt@drakemt.com)
9 Austin Knudsen / Derek Oestreicher, (via email to:
10 derek.oestreicher@mt.gov)

11 MFM/tm/BDV-2021-451 Justice Jim Rice v. The Montana State Legislature, et al. - Declaratory Judgment Petition Order.doc