IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and the LEAGUE OF WOMEN VOTERS OF MONTANA,

Petitioners,

v.

GREG GIANFORTE, Governor of the State of Montana,

Respondent.

MOTION TO STRIKE AND VACATE

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Pursuant to Rule 16, Respondent Governor Gianforte moves to strike the weekend moving papers of Supreme Court Administrator McLaughlin filed in this case. Those filings are procedurally and legally defective and disrupt from the actual issues in this case. First, the Administrator—a nonparty—sought to quash the subpoena of the Legislature—a nonparty—issued to the director of the Department of Administration (DOA)—a nonparty. Second, the subject matter of her motion is unrelated to the issues in this proceeding. And third, justiciability and the separation of powers counsel sharply against requests like Administrator McLaughlin's—*a functionary of this Court* asking *this Court* to quash a subpoena issued by the nonparty Legislature pursuant to its separate investigation *of this Court*.

The Court acknowledged these extraordinary irregularities but nevertheless granted its Administrator's requested relief, on a Sunday, without prior notice to Respondent. The same defects extant in the Administrator's filings necessarily infect the April 11, 2021 Temporary Order (Order). The Court lacks jurisdiction, this lawsuit cannot provide Administrator McLaughlin's desired relief, and the Court, in granting that relief, has now designated itself arbiter of an inter-branch dispute

between itself and the Legislature. Administrator McLaughlin tacitly conceded all this by filing, this morning, a new Petition for Original Jurisdiction under OP 21–0173.

This Court should immediately strike and vacate Administrator McLaughlin's filings and the resulting Order in OP 21–0125.

The undersigned notified opposing counsel about this motion and they object.[1]

I. This Court lacked jurisdiction to grant this relief.

"It is a fundamental principle of our jurisprudence that it is only against a party to the action that a judgment can be taken and that the judgment is not binding against a stranger to the action." *Kessinger v. Matulevich*, 278 Mont. 450, 460, 925 P.2d 864, 870-71 (1996) (citation omitted). *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (superseded on other grounds by statute) ("The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person ….").

[1] Administrator McLaughlin failed to notify or attempt to notify the Governor in advance of her motion. *See* Mot. at 3; *see also* Mont. R. App. P. 16 (denial warranted where notice is un-attempted).

Here, the Court recognized "McLaughlin's motion raises serious procedural questions" because "[n]either the Legislature nor the [DOA] are parties to this litigation." Order at 2.[2] The Court also noted that the legislative subpoena didn't reference to SB 140 or any other litigation. *Id*. Because nonparty McLaughlin cannot seek relief from two other nonparties about a matter wholly divergent from the issues in this case, this Court lacks jurisdiction to grant her requested relief; her motion should be stricken, and the Order vacated, not least because it is moot.

II. McLaughlin's motion is non-justiciable.

An issue is justiciable only if it is "within the constitutional power of a court to decide, an issue in which the asserting party has an actual, non-theoretical interest, and an issue upon which a judgment can 'effectively operate' and provide meaningful relief." *Larson v. State*, 2019 MT 28, ¶ 18, 394 Mont. 167, 434 P.3d 241 (citations omitted); *see also Clark v. Roosevelt Cnty.*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48 (Justiciability is "a threshold requirement"). McLaughlin's motion is non-justiciable because she lacks standing and her requested relief—now

[2] The Governor previously notified the Court that the Legislature intends to intervene and defend SB 140's constitutionality. But at no point during the events addressed herein was the Legislature a party.

granted—violates the separation of powers.

a. McLaughlin lacks standing.

Where standing is lacking, a court has no "power to resolve a case brought by a party." *Mitchell v. Glacier County*, 2017 MT 258, ¶ 9, 389 Mont. 122, 406 P.3d 427 (citation omitted). "Standing is one of several justiciability doctrines that limit Montana courts to deciding only cases and controversies." *Id.* ¶ 6 (citation omitted). To have standing, a "plaintiff must show, at an irreducible minimum … that the injury would be alleviated by successfully maintaining the action." *Id.* ¶ 10 (citation and internal quotation marks omitted).

McLaughlin's papers warn of several alleged injuries to the judiciary, but those harms are not redressable through this case because she challenges the actions of nonparties. Without citation, the Administrator contends: "This emergency request arises from discovery efforts to obtain information for use in this original proceeding." Mot. at 4. That is false. The Governor—the only named respondent in this case—did not issue the Legislative subpoena; nor has the Governor issued discovery.[3] The Legislature, the issuer of the subpoena—is not a

[3] Even though there are glaring factual omissions in this case, like the absence of any facts (or allegations) supporting Petitioners' standing to bring this action.

party in this case.

McLaughlin lacks standing and her alleged injuries are unredressable in this case. Her filings and the Court's Order should be stricken and vacated.

b. McLaughlin's requested relief violates the separation of powers.

The Constitution prohibits the judiciary from exercising roving jurisdiction and enjoining nonparties "to prevent the infliction of harm." Order at 3; *cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring) (critiquing a legislative delegation tantamount to "a roving commission to inquire into evils and upon discovery correct them"). This is doubly anathema when the Court restrains a coordinate branch of government not before it. *See* Mont. Const. art. III, § 1.

McLaughlin's request and the Court's Order also violate one of the oldest and most bedrock legal guarantees of natural justice: *nemo judex in sua causa* (no one is judge in his own cause). The request and the Order both require the Judiciary to unilaterally umpire a conflict between the Legislature *and the Judiciary*. Whatever the dispute between the legislative and judicial branches, designating one of them

the arbiter cannot—and will not—foster resolution. The Governor respectfully suggests that the only path forward is for the branches to engage in good faith discussions regarding the subpoena.

III. Administrator McLaughlin's putative intervention is inappropriate and now moot.

Although styling herself an "intervenor," Administrator McLaughlin neither sought to intervene in this action nor explained why intervention was proper. The Court nevertheless set out a lengthy briefing schedule to address questions about, inter alia, intervention. But Administrator McLaughlin's filing of a new action this morning alleging the same harms and requesting the same relief render her filings and the Court's Order in this case moot.

But again, what is now moot was at first misplaced. The legislative investigation and subpoena are entirely separate from this case's operative question: whether SB 140 is constitutional.

CONCLUSION

"Much more than legal niceties are at stake here. The … constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and … permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). The Administrator warns that the legislative subpoena threatens "a constitutional crisis," Mot. at 3, but the Governor respectfully suggests that the Court's April 11, 2021 attempt to stymie that threat may have unintentionally facilitated it.

For these reasons, the Governor respectfully requests that this Court immediately strike Administrator McLaughlin's weekend filings and vacate its April 11, 2021 order.

Respectfully submitted this 13th day of April, 2021.

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CERTIFICATE OF SERVICE

I, David M.S. Dewhirst, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 04-13-2021:

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