

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

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

Petitioners,

v.

GREG GIANFORTE, Governor of the State of Montana,

Respondent,

and

MONTANA STATE LEGISLATURE,

Intervenor-Respondent.

UPDATED MOTION TO STRIKE

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For the same reasons stated in Respondent’s April 13, 2021 Motion to Strike and Vacate, the Court should strike McLaughlin’s April 15, 2021 motion to quash filed in this case.¹ The Montana State Legislature does not oppose this motion. Opposing counsel has been contacted with respect to whether they oppose this motion, but the Governor has not yet received a response.

Though the Legislature is now a party in this case *for purposes of defending the constitutionality of SB 140*, this court lacks jurisdiction to grant McLaughlin’s requested relief because the subject matter of the legislative subpoena is unrelated to the constitutional challenge at issue here, and court action on this second motion would threaten the separation of powers. If the Court reaches the merits—it should not—the subpoena serves obvious legislative purposes. The Court should safeguard our constitutional structures by striking McLaughlin’s motions and the April 11, 2021 Order.

¹ For brevity’s sake, the Governor refers the Court to his previous motion, which has not yet been ruled upon, rather than rehashing these arguments. Additionally, McLaughlin once again failed to properly notify the parties of her motion. *See* Mot. at 2; Mont. R. App. P. 16. After business hours on the day of filing, McLaughlin’s counsel sent an e-mail asking whether the parties objected. However, he did not include Emily Jones or Talia Damrow, the only attorneys who represent the Legislature in this proceeding.

In its temporary order on April 11, 2021—which, as the Governor stated in his previous motion to strike, should be vacated—this Court recognized “serious procedural” issues with McLaughlin’s previous motion to quash, including: “the subpoena itself does not reference this litigation, or SB 140.” Temp. Or. at 2 (Apr. 11, 2021). The Court further stated: “we cannot be certain, at this juncture, that the subpoena challenged by McLaughlin has anything to do with the pending proceeding in OP 21-0125.” *Id.* Now, however, the Court can be certain it does not. The purpose of the subpoena is evident on its face:

This request pertains to the Legislature’s investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records 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.

The subpoena does not mention this proceeding or SB 140 because the information it seeks is unrelated to this litigation.

McLaughlin apparently recognizes these defects. Immediately following the Court’s order, she filed a new Petition for Original Jurisdiction under OP 21-0173 and has similarly filed motions to quash in that proceeding. The Legislature’s motion to dismiss in that case affirms the

subpoena's stated purposes, which are entirely unrelated to the subject matter of this case—the constitutionality of SB 140. OP 21-0173, Mot. to Dismiss at 4 (Apr. 14, 2021).²

Agreeable or not, these are *legitimate* legislative purposes, and this Court should refrain, for prudential reasons, from declaring or inferring otherwise, especially when the movant is an appointee and functionary of this Court. *Id.* at 4–7. The legislature is also still considering several judicial reform bills as well as the judiciary's budget, and the information gleaned in its investigation will likely aid its legislative purpose related to those bills.³

McLaughlin's repeated concerns about the disclosure of private, health, or otherwise-confidential information being released have simply

² Given her new original proceeding, it doesn't even appear McLaughlin will pursue intervention in this case.

³ *See, e.g.*, House Bill 2 (General Appropriations Act); House Bill 380 (Revise appointments process for certain members of the judicial standards commission); House Bill 685 (Revise judicial standards laws); House Joint Resolution 40 (Judicial Standards Commission study and audit request); Senate Bill 252 (Generally revise laws related to judicial review); Senate Bill 318 (Revise laws related to the judiciary); Senate Bill 366 (Revise judicial standards commission complaint process); Senate Bill 402 (Generally revise laws related to the judiciary); LC 0675 (Generally revise laws related to the judicial branch); LC 1138 (Generally revise laws for public officials); LC 1723 (Revise judicial standards commission laws); LC 2003 (Revise judicial branch laws); LC 2004 (Revise judicial branch laws); LC 2043 (Revise judicial procedure laws); LC 2044 (Revise judicial procedure laws); LC 2171 (Generally revise laws related to the judiciary); LC 2524 (Generally revise laws related to state employees); LC 3158 (Generally revise judicial branch laws).

not borne out. And the e-mails DOA has so far produced “are held by the Legislature’s counsel and no sensitive or protected information has been disclosed.” OP 21-0173, Mot. to Dismiss at 2. In fact, “[n]one of the concerns raised by McLaughlin ... have been implicated by disclosure of these public documents.” *Id.* at 2–3.

CONCLUSION

McLaughlin is not a party to this case, and her motion to quash is entirely unrelated to the subject matter of this proceeding. These serious questions should strongly dissuade the Court from even considering her second motion. As with her previous motion to quash, this Court lacks jurisdiction to provide the extraordinary relief requested and attempting to provide such relief in this unrelated case will only ratchet up the current inter-branch tensions. For all these reasons, this Court should strike McLaughlin’s second motion.

Respectfully submitted this 16th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this pleading is printed in a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 900 words, excluding certificate of service and certificate of compliance.

/s/ David M.S. Dewhirst
David M.S. Dewhirst
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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 - Strike to the following on 04-16-2021:

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