IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

BETH McLAUGHLIN,

Petitioner,

v.

The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT of ADMINISTRATION,

Respondents.

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

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Respondent Montana State Legislature does not dispute Petitioner Beth McLaughlin has met the requirements for original jurisdiction under M.R.App.P. 14. Instead, it argues:

(1) legislative subpoenas are immune from judicial review, and

(2) a conflict of interest precludes the Court from ruling.

Both arguments are wrong.

A. Jurisdiction.

The Court has recognized its "exclusive adjudicatory authority" under the Montana Constitution "regarding the scope and application of the legislative subpoena power." (4/16/21 Order.) "Unlike the English practice," ripe with "the evil effects of absolute power," in America "from the very outset the use of contempt power by the legislature was deemed subject to judicial review." *Watkins v. U.S.*, 354 U.S. 178, 192 (1957).

The Court's authority is also expressed in very laws passed by the Legislature. These define "subpoena" to include one seeking testimony or documents before a "judge, justice, or other officer authorized to administer oaths or take testimony," MCA §§ 26-2-101, 102(2), which includes the Legislature, MCA § 5-5-201. Thus, legislative subpoenas are limited by MCA § 26-2-401. Moreover, to the extent a legislative statutory/interim

committee subpoena is disobeyed, Title 5 ("Legislative Branch") expressly provides for enforcement by the judiciary. MCA § 5-11-107(2). (Ex. A, 6.)

The Legislature claims unfettered authority to investigate perceived impropriety "as the check and balance for the judicial branch," but it misunderstands its role. The Legislature does not sit in judgment of other branches, and has no subpoena power "for the sake of exposure." *Watkins*, 354 U.S. at 200. Its own rules recognize it "has no legal status . . . to establish an extraordinary tribunal for the trial of judicial and other officers. . . ." (Legislative Memorandum, Ex. A.) Its check and balance comes through the enactment of legislation, and its subpoena power is "justified solely as an adjunct to the legislative process." *Id*.

B. Conflict of Interest.

The Legislature posits that because this case is brought by an individual whom the Justices know and work with, there is a "conflict of interest" which "requires recusal of, at minimum, the entire panel of Justices." Not so. Courts commonly address conflicts of interest without recusal.

A compelling example is *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004), where Justice Scalia's impartiality was challenged after he was on a hunting trip with Vice President Cheney, a named party. Justice Scalia denied the recusal motion himself, explaining:

> . . . While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot faults.

Id. at 928.

The Legislature assumes this Court is "corruptible" because it knows McLaughlin and judicial communications might be disclosed. This falls far short of demonstrating the Court cannot be impartial in evaluating the appropriate scope of legislative subpoena power in Montana.

The Legislature cites the Code of Judicial Conduct, yet tellingly declines to discuss or apply those rules. Rule 2.12, M.C.Jud.Cond., lists the circumstances requiring disqualification. None exist here.

Even if they did, "wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be." *Reichert v. State*, 2012 MT 111, ¶ 36 n.5, 365 Mont. 92, 278 P.3d 455. In *Reichert*, the justices declined to recuse themselves from reviewing an initiative to change judicial selection procedures, even though the law "could possibly" affect their own re-election:

> . . . Like sitting Supreme Court justices, district court judges have "the potential" to run for a seat on this Court in the future, "could possibly"

> be prevented by LR-119 from getting elected, and thus (under Legislators' theory) have an "interest" in the outcome of this case. That being so, the rule of necessity would apply and none of the justices would be disqualified. *See* ¶37, *supra; see also* Mont. Code of Jud. Conduct, Rule 2.12 cmt.[3] ("The rule of necessity may override the rule of disqualification.").

Reichert, ¶ 44.

Here too, it is "highly speculative" a potential "interest" in the outcome of McLaughlin's case renders the justices incapable of impartiality, and the rule of necessity applies nevertheless.

The Legislature's only other authority on this point is *Walker v. Birmingham*, 388 U.S. 307 (1967). *Walker* had nothing to do with judicial disqualification, but its holding is instructive: A party who has been temporarily enjoined cannot "bypass orderly judicial review of the injunction before disobeying it." *Id*. at 320. Because "no man can be judge in his own case," an enjoined party is not "free to ignore all the procedures of law." *Id*. at 320-21. Despite an "impatient commitment to [one's] cause . . . respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Id*. at 321. Here, by declaring its subpoena power free from any judicial process, the Legislature is acting as its own judge.

C. Scope.

The key issue is "the scope, limitations, and parameters to be applied by courts when the Legislature exercises its authority to obtain information and

competing interests are presented." (4/16/21 Order.) The Legislature's own rules recognize "the power to investigate must be exercised for a proper legislative purpose related to enacting law. . . ." (Ex. A.) That power is most limited when directed to another government branch, and must be articulated with "undisputed clarity." *Watkins,* 354 U.S. at 214.

The Legislature claims investigation is necessary to expose "violation of state law and policy." That, by definition, is not a legitimate legislative purpose, as it does not relate to "proposed or possibly needed statutes" or "the administration of existing laws." *Id.* at 187 (distinguishing "administration" from "violation" of laws, as the latter invokes "the functions of the executive and judicial departments of government").

The Legislature also claims a need to investigate the Judicial Standards Commission, but exclusive jurisdiction over judicial standards is vested with the Commission. Mont. Const. Art. VII, § 11. The Legislature's role is limited to "creat[ing]" the Commission and "providing for the appointment" of its members. *Id*.

Nor is there evidence, much less "detailed and substantial evidence," that the stated legislative purpose is real. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2025 (2020). While McLaughlin deleted some emails she regarded as ministerial from her computer, she knew the emails would be retained on the State server.

And they were. No law or policy prohibited this practice, and there is zero evidence any email was "destroyed." To the contrary, the Legislature has collected over 5,000 of McLaughlin's emails.

Lastly, despite the requirement that a subpoena directed to a co-equal branch be "no broader than reasonably necessary," *Trump*, 140 S. Ct. at 2025, the subpoenas at issue encompass materials with no nexus to the stated legislative objective and which are protected by the judicial privilege and myriad privacy rights.

CONCLUSION

The Court has jurisdiction to review the legislative subpoenas, which are no more valid than if legislators wanted to wander around a judge's chambers, turning over pieces of paper to see what they said. The Motion to Dismiss must be denied.

Dated this 28th day of April, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 1,243 words.

Dated this 28th day of April, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

Exhibit Index

- Exhibit A – April 18, 2018 Montana Legislative Services Division Memorandum

CERTIFICATE OF SERVICE

I, Randy J. Cox, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 04-28-2021:

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