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COUNSEL FOR RESPONDENT
MONTANA STATE LEGISLATURE

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.

MOTION TO DISQUALIFY JUSTICES

Pursuant to Mont. R. App. P. 16, the Legislature moves for the immediate disqualification of all Justices from this case.

LEGAL STANDARDS

I. Due process

“It is axiomatic that a fair tribunal is a basic requirement of due process” under the Fourteenth Amendment to the United States Constitution. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *see also Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995) (citing *Ward v. Monroeville*, 409 U.S. 57 (1972)). Likewise, Montana’s Due Process Clause, *see* Mont. Const. art. II, § 17, is the “guiding principle of our legal system” and contemplates tenacious adherence “to the ideal that both sides of a lawsuit be guaranteed a fair trial.” *Lopez v. Josephson*, 2001 MT 133, ¶ 35, 305 Mont. 446, 30 P.3d 326. Due process demands disqualification when a judge has an interest in the outcome of a case that presents a serious risk of actual bias or prejudgment “under a realistic appraisal of psychological tendencies and human weaknesses.” *Id.*, *Caperton*, 883-84 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Given that Due process evaluates human nature realistically, it is no surprise that “no man is allowed to be a judge in his own cause.” *Caperton*, 556 U.S. at 876 (citations omitted).

II. Judicial disqualification

A party cannot get a fair trial if the presiding Tribunal has a personal interest in the outcome. Montana law requires disqualification to avoid any such travesty. Mont. Code Ann. § 3-1-803(1). Montana’s Code of Judicial Conduct (“MCJC”)

expounds upon that law. The MCJC declares that an independent, fair, and impartial judiciary is indispensable to our system of justice. MCJC, Preamble (2009) (cited by *French v. Jones*, 876 F.3d 1228, 1230 (9th Cir. 2017)). A judge is required to act at all times in a manner that promotes “public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” MCJC 1.2. “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” MCJC 2.12. A judge is required to disqualify himself or herself in any circumstance where the “judge has a personal bias or prejudice concerning a party . . . or personal knowledge of facts that are in dispute in the proceeding.” *Id.* at Rule 2.12(A)(1).

DISCUSSION

A quick recitation of the facts demonstrates the bewilderingly obvious conflict of interest this Court faces with the parties and subject matter at issue here. This conflict justifies and requires summary disqualification of each member of this Court. Administrator McLaughlin—who was appointed by *this Court*,¹ who performs duties assigned by this Court, and who serves at the pleasure of *this Court*—

¹ Mont. Code Ann. § 3-1-701, *et seq.*

filed this Petition to prevent the production of *this Court's* public records. McLaughlin's close relationship with this tribunal—and her efforts to prevent the disclosure of this Court's records—poses far more than a reasonable question about the Court's ability to hear and decide this matter impartially. This dispute has darkened other doors, too. Look at the separate original proceeding, *Brown, et al. v. Gianforte et al.*, OP 21–0125. There, the Court granted an unnoticed motion to McLaughlin over a weekend, when neither she nor the entity she sought to enjoin—the Legislature—were yet parties to the action.² That weekend transaction, which necessarily included *ex parte* communications that have neither been acknowledged nor disavowed,³ resulted in the Court stifling the production of its own public records held by McLaughlin. Members of this Court have an obligation to promote confidence in the independence, integrity, or impartiality of the judiciary, *see* MCJC 1.2, but these actions do precisely the opposite.

² Both of McLaughlin's Petitions fail to satisfy the Rules of Appellate Procedure. Justice Rice has sought review of the same or similar issues presented in McLaughlin's Petition in District Court. This act maps out a more proper process and confirms that the "litigation in the trial courts and the normal appeal process" is adequate and correct. *See* Mont. R. App. P. 14(4).

³ Rule 2.10 of the Code of Judicial Conduct requires that the members of this Court disclose all such *ex parte* communications with McLaughlin.

This matter has arisen because evidence of judicial misconduct has come to public light. The Legislature is actively investigating that misconduct, and the judiciary is the target of that investigation. The Court should not presume to self-adjudicate the limits of that investigation. The self-interest is so apparent, any attempt by this Court to decide the question runs afoul of state law and the MCJC.

But there is more. All Supreme Court Justices, save Justice James Rice, ruled on Legislative *subpoenas issued to the Justices themselves*. The April 16, 2021 Order states, “any subpoenas issued by the Montana State Legislature for electronic judicial communications, **including those served on this Court April 14, 2021**, are temporarily stayed.” The Justices are therefore umpiring their own game by ruling for themselves in a case to which they are not parties.⁴ But under any realistic appraisal of human nature, it is entirely unreasonable for the Justices to declare their freedom from personal bias and prejudice when ruling on the proper scope of subpoenas the Legislature issued *to them*. This Court’s April 16 Order therefore

⁴ Justice Rice refrained from ruling on his own behalf, but, like every other Justice, must disqualify himself or be disqualified from ruling in this case because he is actively litigating in District Court and has personal knowledge of the facts at issue.

squ岸ely implicates MCJC 2.12, which requires disqualification when a judge “has a personal bias or prejudice concerning a party.” *See* also Mont. Code Ann. § 3-1-803 (requiring that a Justice recuse himself or herself in any proceeding “to which he is a party, or in which he is interested.”). In this case, every Supreme Court Justice faces this conflict. They are not named parties in this case but have granted themselves relief as if they were.⁵ Would this Court not overturn and admonish a district court judge granting himself such relief? With respect, it is equally—perhaps more—inappropriate when our state’s highest court engages in the same behavior.

The Legislature does not concede that the Court has the “exclusive constitutional duty” it claims to determine the scope of Legislative Subpoenas. But its determination to do so here violates the Legislature’s due process rights under the federal and state constitutions. Due process cannot tolerate the inherent bias and prejudice created when a judge “is allowed to be a judge in his own cause.” *Caperton*, 556 U.S. at 876.

⁵ Moreover, the Justices have “personal knowledge” of their own state email accounts which are the subject of the Legislative Subpoenas which requires their disqualification under MCJC 2.12.

CONCLUSION

The U.S. Supreme Court has long held that due process requires, at minimum, an impartial judiciary. *United States v. Washington*, 157 F.3d 630, 660 (9th Cir. 1998) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”)). All Justices must be immediately disqualified to salvage due process and protect the reputation of the Montana Supreme Court. We are well beyond the point where the Court’s impartiality and independence “might reasonably be questioned.” This is not merely the appearance of impropriety. This is actual impropriety. The Legislature cannot get a fair and impartial trial in this case under these circumstances.

Respectfully submitted this 30th day of April, 2021.

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By: /s/ Derek J. Oestreicher
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CERTIFICATE OF SERVICE

I, Derek Joseph Oestreicher, hereby certify that I have served true and accurate copies of the foregoing Motion - Disqualification/Substitution to the following on 04-30-2021:

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Electronically signed by Beverly Holnbeck on behalf of Derek Joseph Oestreicher
Dated: 04-30-2021