IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

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BETH McLAUGHLIN,

Petitioner,

v.

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

Respondents.

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**PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISQUALIFY JUSTICES**

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Seeking to shield unlawful subpoenas from judicial review, the Legislature moves to disqualify all the Court's justices with no suggestion as to what happens then. The motion is baseless.

The Legislature argues recusal is mandated by the Due Process Clause. Citing *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), it invokes "objective standards that require recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id*. at 872 (internal quotes omitted). This high constitutional standard is not met here.

Before *Caperton*, the Court had required recusal on due process grounds in just two kinds of cases: (1) where a judge had a financial interest in the outcome, or (2) where the judge was trying a defendant for criminal contempt. *Id*. at 880-81. The *Caperton* majority expanded these circumstances to judicial elections, though only in "an exceptional case." *Id*. at 884. The defendant in *Caperton*, knowing a $50 million verdict against his company would be reviewed by a particular appellate judge, contributed $3 million to replace the judge. *Id*. at 885-86. His contributions exceeded by $1 million the combined amount spent by <u>both</u> candidates' campaigns. *Id*. The Court found the size of the contributions, coupled

with the temporal relationship between the contributions, the election, and the pendency of the case, required recusal. *Id*.[1]

In contrast, the Legislature offers no evidence of a "probability of actual bias." Its primary argument is that the justices know and work with McLaughlin. But this case calls upon the Court to assess, for the first time, the appropriate scope of legislative subpoena power in Montana—not to adjudge the conduct of McLaughlin or render any ruling affecting her fortune or freedom.

Moreover, the mere existence of a personal relationship does not require recusal. *E.g.*, *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004). Although personal friendship may be grounds for recusal "where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue. . . ." *Id*. at 916 (emphasis original).

Also, recusal in the face of baseless allegations would "harm the Court" by encouraging others to attempt to exercise veto power over judges and "to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons." *Id*. at 927. Confidence in the justices' integrity "cannot exist in a system

[1] The other cases cited by the Legislature are even further off the mark and did not involve the disqualification of judges. *Clements v. Airport Auth.*, 69 F.3d 321, 325 (9th Cir. 1995) (questions of fact as to whether post-termination administrative board harbored malice stemming from the plaintiff's prior whistleblowing activities); *Lopez v. Josephson*, 2001 MT 133, ¶ 48, 305 Mont. 446, 30 P.3d 326 (misconduct of counsel prevented fair trial).

that assumes them to be corruptible by the slightest friendship or favor." *Id*. at 928. The Legislature simply assumes the Court is corruptible in this case because it has a relationship with McLaughlin. Not only is that untrue, the mischief lies in the making of bogus allegations, no matter how far-fetched, in an attempt to manipulate judges off of cases.

The Legislature next argues "evidence of judicial misconduct" requires recusal, but the Court is not being called upon to adjudge its own conduct. Furthermore, "[t]he decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." *Cheney,* 541 U.S. at 914 (emphasis added).

The Legislature makes noise about deleted emails, a known red herring. Not a single email was lost. Every state employee knows deleting emails from one's own computer does not render them irretrievable. Indeed, this is why the Legislature has been able to recover, albeit by improper means, over 5,000 judicial branch emails.

More important, the Legislature does not identify a single rule, standard or law that prohibits deletion of judicial emails. No argument is made that any deleted email was an "essential record" under MCA § 2-6-1014. In fact, employees are specifically directed to regularly delete or archive emails to keep their email operative. There are some 13,000 state employees. Even if each

creates a modest 20 emails a day, that totals 67 million emails a year. Who would manage or pay for duplicative storage of emails on state employee computers? To characterize the deletion of emails as "misconduct," much less misconduct demonstrating a high probability of actual bias, is silly.

The Legislature also rails against the Court's granting "an unnoticed motion to McLaughlin over the weekend."[2] Given its back-door hacking of judicial emails late on a Friday afternoon, before McLaughlin had notice or an opportunity to respond, the Legislature's complaints ring hollow. Moreover, Montana law explicitly provides a court may "preserve the status quo" by issuing immediate injunctive relief without notice to the adverse party. *See* MCA §§ 27-19-315, 3-2-205. Suggesting there is something improper ignores well-established law and practice regarding emergency proceedings. *See id.; see also, e.g., State ex. rel. Cumming v. Dist. Court of the Eleventh Jud. Dist.*, 165 Mont. 205, 207, 527 P.2d 239, 240 (1974).

When McLaughlin filed her emergency motion, thousands of emails had already been produced without review. The DOA was working over the weekend to produce remaining emails on Monday, and McLaughlin's pleas to temporarily suspend production were falling on deaf ears. Given the circumstances, it was

[2] McLaughlin did, in fact, contact the Legislature's chief legal counsel, Todd Everts, as well as DOA counsel, Michael Manion, before filing her motion.

eminently appropriate to seek temporary relief in the very case (*Brown*) where the Court just days earlier denied a stay of proceedings to allow Respondent to seek the same information. (April 7, 2021 Order at 2.)

Tellingly, the Legislature does not even refer to the Code of Judicial Conduct as a source for its claim of disqualification. Rule 2.12, M.C.Jud.Cond., lists the specific circumstances requiring disqualification. None exist here.

Even if they did, the rule of necessity would apply: "[W]herever 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 affect their own re-election. *Id*. Because the same conflict could be ascribed to any judge, "the rule of necessity would apply and none of the justices would be disqualified." *Reichert*, ¶ 44 (citing Mont. Code of Jud. Conduct, Rule 2.12 cmt.[3] ("The rule of necessity may override the rule of disqualification.")).

Here, too, the same conflict asserted against the justices could be asserted against every Montana judge who knows or works with McLaughlin (presumably

all of them). It simply cannot be that McLaughlin is left with no avenue to seek protection.

There is no evidence of a probability of actual bias or circumstances requiring recusal under M.C.Jud.Cond. 2.12. McLaughlin is entitled to a remedy against unlawful subpoenas. The Motion to Disqualify must be denied.

Dated this 10th day of May, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 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 1,222 words.

Dated this 10th day of May, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
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## 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 the following on 05-10-2021:

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