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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.

THE MONTANA STATE LEGISLATURE'S PETITION FOR REHEARING REGARDING THE COURT'S MAY 12 ORDER

The Legislature hereby petitions this Court to reconsider its May 12 Order denying the Legislature's Motion to Disqualify all Montana Supreme Court Justices.

I. BACKGROUND

On April 20, 2021, the Legislature moved to disqualify all the Justices of the Montana Supreme Court. On May 12, 2021, the Court denied that motion.[1]

This is an interbranch conflict. The lawsuit came second and is now being used by this Court as an off-ramp from that interbranch conflict. This cannot be, however, for the simple and timeless reason that the Court may not act as a judge in its "own cause." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009). The Legislature did not file this action and has consistently argued that it is improper. And it doesn't matter that the Justices have been individually subpoenaed. For even if only

[1] As a threshold matter, the Legislature reasserts that no state court can decide this matter free from disqualifying conflict. Given that this case's question—the scope of legislative subpoenas—bears directly on the subpoenas issued to Administrator McLaughlin and the Justices, and on the judiciary in toto, seating district court judges as replacements would perhaps be less bad but would not cure the institutional conflict. The bottom line is this: not every dispute has a judicial solution. This is one such case.

Administrator McLaughlin's subpoena was at issue,[2] the basis underlying the motion to disqualify would remain the same. McLaughlin is the Court's appointed administrator. The Legislature subpoenaed her to discover the full scope of seemingly inappropriate *judicial* communications, including several by at least one member of this Court. For purposes of this case, the individual subpoenas to the Justices don't alter the conflict calculus at all. The Court's errant resort to the Rule of Necessity merely concedes the point—every judicial officer is disqualified here.

This is not a conflict between a superior and inferior division of government—despite what one might infer from the Court's recent Order. Order, *McLaughlin v. Montana State Legislature*, OP 21-0173 (Mont. May 12, 2021) ("Order"). This is not even a conflict between the Legislature and the Executive, where courts reluctantly interpose only as "a last resort." *Raines v. Byrd*, 521 U.S. 811, 833 (1997). Here the Court has presumed authority over a conflict between itself and the Legislature, a sister branch of government, despite—again—what one might infer from the Court's recent Order … and emails. *See, e.g.*, Order; Ex. A–F

[2] *But see* Order, *Brown v. Gianforte*, OP 21-0125 (Mont. Apr. 16, 2021) ("April 16 Order") (sue sponte quashing the non-party Justices' individual subpoenas).

(describing legislation as "ridiculous" and "unconstitutional in its inception").

Rehearing is appropriate if the Court (i) "overlooked some fact material to the decision"; (ii) "overlooked some question presented by counsel that would have proven decisive to the case"; or (iii) "its decision conflicts with a statute." Mont. R. App. P. 20(1). All three justify rehearing here. And given the "clearly demonstrated exceptional circumstances" at issue in this case, the Court should grant this petition and reconsider its Order.

II. DISCUSSION

A. The Court Overlooked and Misstated Material Facts

As an initial matter, the Court asserts "this case does not involve adjudication of any subpoena issued to a member of this Court." Order ¶9. The Legislature agrees. Yet the Court sua sponte quashed the Justices' individual subpoenas issued to the members of the Court. *See* April 16 Order. The Court cannot reach outside this case, stay its own subpoenas, and then argue that this case doesn't involve those subpoenas. At least, it should not.

The Court also notes that "no suggestion has been made that any justice presiding over these proceedings would be unfair or partial in

adjudicating the scope of the legislative subpoena power." Order ¶9. Correct. No such "suggestion" was made. The Legislature instead came right over tackle, requesting disqualification because of the "obvious conflict of interest this Court faces." Motion to Disqualify at 3. Even if this case was solely an academic inquiry into the scope of the legislative subpoena power, the Court (along with its appointee, McLaughlin) are the test subjects of that power. McLaughlin isn't asking the Court to pen a law review article; she's asking it to invalidate the Legislature's subpoena for her documents, which contain communications from this Court's members. And if those are anything like some of the other intemperate emails already publicly available, the Court and its members have an obvious interest in providing a specific answer to that dusty old legal question about the scope of legislative subpoena power.

The Court further asserts the Legislature has not presented allegations of "actual" bias on the part of any justices. Not so. The Legislature has repeatedly stated that the Court's failure to disclose and produce ex parte communications between the justices and the Court Administrator demonstrates actual bias. And the Chief Justice's emails betray a disdain for the Legislature that amounts to actual bias. Ex. A. But more

importantly, "actual" bias is not the standard for disqualification. Rather, the standard is whether the Justices' "impartiality might reasonably be questioned." Mont. Code Jud. Cond. 2.12(A). Impartiality requires the "maintenance of an open mind," and determining whether a justice is impartial "requires an examination of the nature of the judge's interest in the issues before the judge." *Draggin' Y Cattle Co. v. Junkermier*, 2017 MT 125, ¶ 19, 387 Mont. 430, 395 P.3d 497 (affirming a judge's disqualification because his decision in one case could impact a case to which he was a party) (quotations and citations omitted). Here, the Justices are institutionally and personally interested in the outcome, so their ability to be impartial is justifiably suspect.

Specifically, the Court asserts that no Justice "participate[d]" in the polls conducted by the MJA. Order ¶ 11. Respectfully, public records tell a different tale. For example, the Chief Justice ordered the Court Administrator to "get a membership vote" regarding at least one piece of legislation. Ex. A. Did other Justices follow suit? Every Justice, after all, appears to be copied on emails relating to these polls wherein fellow judges generously explained their verdicts on pending legislation. Hopefully, no Justices "voted" in these polls—but that unsupported assertion

runs counter to other publicly available information. The Court's bare assertion is easily supportable—with the production of the requested documents. Instead, the Court appears determined to rule on the issue of whether the legislative subpoena can reach those documents. The Court must therefore forgive the Legislature if reasonable doubt persists about the Court's statements and ability to fairly adjudicate ~~this~~ its dispute.

The Court also emphasizes that it has previously presided over matters involving the Court Administrator.[3] Order ¶ 10. But those cases were nothing like this one. Here, the Court Administrator affirmatively sought relief from the Justices, in an Original Proceeding, to which she was not a party, to prevent disclosure of *the Justices' own communications*. Again, with or without regard to the Justices' individual subpoenas, this case does not simply involve the Court's Administrator—it involves this Court. And the underlying question about the scope of

[3] In *State v. Berdahl*, the court decided, based on statutory language, that the State could refuse to indemnify an employee who sexually harassed and retaliated against a subordinate after he entered an unauthorized settlement agreement. 2017 MT 26, ¶ 23, 386 Mont. 281, 389 P.3d 254. And *Boe v. Court Administrator for the Montana Judicial Branch of Personnel Plan & Policies* simply affirmed a district court's dismissal for lack of subject matter jurisdiction of a challenge to the Judicial Branch Personnel Plan, which was subject to the exclusive authority of the Supreme Court. 2007 MT 7, ¶¶ 13–14, 335 Mont. 228, 150 P.3d 927. These cases miss the point—they did not involve interbranch disputes or institutional conflicts that made it inappropriate for the Court to play referee.

the Legislature's subpoena power is, in this context, a question about the boundaries of both judicial and legislative power. As such, the Court cannot unilaterally draw these boundaries.

B. The Court Ignored and Overlooked Issues

The Court deigns that this is a dispute between two "co-equal branches of government." Order ¶ 15. It nevertheless has designated itself the arbiter of this dispute and asserted that the Legislature will be bound by whatever decision it makes regarding the legislative subpoena (to it).[4] Perhaps "co-equal" has more than one meaning. But the Legislature takes the conventional view; and under that view—which the framers shared—the Court's proposed arrangement would in fact render the branches *unequal*. The Court cannot therefore be a fair tribunal to decide the instant issues. *See Caperton*, 556 U.S. at 876. These obvious institutional dynamics demonstrate clearly why interbranch disputes must be resolved through negotiation and accommodation. *Comm. on the*

[4] The Court muddles the issue by saying that it first must determine whether the MJA polling of judges constitutes judicial misconduct. But this is not a threshold inquiry. Whether judges have engaged in misconduct does not determine the scope of the subpoena power—rather, the scope of the subpoena power determines what information the Legislature can obtain to prevent one sister branch of government from asserting an excess of power. And it is perverse to suggest that this Court will determine whether its own polling practices are misconduct.

Judiciary v. Miers, 558 F. Supp. 2d 53, 67 (D.C. Cir. 2008); *see also Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020). The judiciary may not spurn these established tools of interbranch dispute resolution to pursue a course it prefers and unilaterally controls. Separation of powers has grown far too sophisticated for that since the time of the Chancellor of Oxford.

Speaking of which—the Rule of Necessity. *See* Order ¶¶ 14–15. Invoking this rule of course concedes that the Justices are conflicted from hearing this case. And a review of the *more contemporary* Rule of Necessity cases undermine the Court's reliance on the Rule here. For instance, the Legislature is not a vexatious plaintiff, like the angry father in *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160 (9th Cir. 2006), who sued and named every Ninth Circuit judge to force an out-of-circuit assignment. No, the Legislature doesn't think this case should exist at all; both its genesis and its maintenance are improper. The Rule, importantly, also depends on the premise that a particular dispute should be settled *judicially*. This interbranch dispute should not be settled judicially, as explained above, below, and in virtually every pleading the Legislature has so far filed. The Court's exasperated remark that,

under the Legislature's logic, "no Montana judge is free of a disqualifying interest," is exactly right. Order ¶ 15. But the Court's conclusion—that it should invoke the Rule of Necessity—is exactly wrong. It's not all that surprising, but the Court appears to suffer from the bias of Maslow's Hammer. *See* Abraham Maslow, THE PSYCHOLOGY OF SCIENCE 15 (1966) ("if all you have is a hammer, everything looks like a nail"). Wielding its gavels, the Court sees every constitutional controversy as a case fit for judicial resolution. *See* Order ¶14 (explaining the Court's understanding of "its constitutional duties": "to adjudicate difficult and controversial *matters*") (emphasis added). But again, this presumes that the exercise of judicial power is always appropriate. Here, where the judiciary is a party in interest, it is not appropriate. Not every dispute has a judicial solution.

C. The Court's Order Conflicts with Controlling Authority

The Court ignores the cases that instruct political branches to resolve conflicts through the "process of negotiation and accommodation." *Miers*, 558 F. Supp. 2d at 67; *see also Mazars USA, LLP*, 140 S. Ct. at 2029. Upon receipt of the subpoena, the Court should have raised objections and negotiated with the Legislature. But instead, the Court refused and purported to immediately quash McLaughlin's and the Justices' subpoenas.

This Court also ignores its obligation under the doctrine of prudential standing to refrain from adjudicating "abstract questions of wide public significance … most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (quoting *Warth v. Seldin*, 422 U.S. 422 U.S. 490, 499–500 (1975)). The separation of powers mandates that the judiciary only resolve cases "implicating the powers of the three branches of Government as a last resort." *Raines v. Byrd*, 521 U.S. 811, 833 (1997) (internal quotations omitted). Here, the Court jumped straight to the last resort, even before it shored up jurisdiction.

Finally, the Court's reliance on *Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, is misplaced. First, it was amici—not the parties themselves—who sought disqualification in *Reichert*, based on the Justices' hypothetical interests in running for reelection. Here, however, the disqualifying interest is not hypothetical. It is evident in the petitioning party (the Court's Administrator), her objectives (to prevent disclosure of more embarrassing and ethically dubious judicial emails; to use judicial power to curtail legislative power in a dispute between the judiciary and the Legislature), and the Court's multiple procedural irregularities (granting unnoticed weekend relief to nonparties for nonparties, refusing to disclose ex parte communications, etc.) that disqualifying interests are clear and present.[5] Under the *Caperton* standard, this is more than just a "*risk* of actual bias or prejudgment"—it is actual bias and prejudgment. 556 U.S. at 883–84 (emphasis added).

[5] One of the cases cited in *Reichert* is instructive. In *Lavoie*, the Supreme Court held that one Justice's refusal to set aside a large punitive award in one case when he had an identical case pending at the time "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986). He essentially "acted as a judge in his own case." *Id.* The same is true here. The outcome of the Court's decision on McLaughlin's subpoena will have a "clear and immediate effect" on whether the Justices must meaningfully respond to their own subpoenas.

CONCLUSION

The three branches of government are co-equal, but the Court's actions belie this constitutional fact. Which begs the question: who will judge the judges?[6] According to this Court—the judges. The judges will judge the judges. That of course defies common and constitutional sense.

For the foregoing reasons, the Legislature asks the Court to grant the petition and reconsider its Order on the motion to disqualify.

Respectfully submitted this 26th day of May, 2021.

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By: */s/ Kristin Hansen*
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[6] "*Sed quis custodiet ipsos custodes*?" Decimus Junius Juvenalis, Satire VI, lines 347-348.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 20 of the Montana Rules of Appellate Procedure, I certify that this pleading is printed in a proportionately spaced Century Schoolbook, 14-point font; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,439 words, excluding certificate of service and certificate of compliance.

By: */s/ Kristin Hansen*
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CERTIFICATE OF SERVICE

I, Kristin N. Hansen, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 05-26-2021:

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