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STATE OF MONTANA
Case Number: OP 21-0173

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 THE MONTANA STATE LEGISLATURE'S PETITION FOR REHEARING

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The Montana Legislature again petitions for rehearing from an adverse order, this time from the Court's thorough and careful 54-page Opinion declaring illegal subpoenas served by the Legislature for judicial records. To support its petition, the Legislature requested and received permission to file an over length brief. Granting that motion, however, the Court specifically warned the Legislature to be mindful of the straightforward legal standard applicable to petitions for rehearing:

> M. R. App. P. 20 allows for very limited criteria for petitions for rehearing. Whether the Court overlooked a material fact or a question presented by counsel, or the decision conflicts with a statute or controlling decision not addressed by the Court are the <u>only</u> grounds available for the Court to consider rehearing a case.

August 10, 2021, Montana Supreme Court Order (emphasis added).

Despite having been clearly directed to Rule 20 and its limited criteria for rehearing, the petition simply reruns earlier arguments, though now louder and with a threatening tone.[1] Though Rule 20 sets forth the only three limited criteria for rehearing, the Legislature does not even try to show how its petition comports with the rule. Indeed, the only mention of Rule 20 in the entirety of the

[1] It is difficult to understand why the Legislature blames the Court for putting government institutions "on the brink." Had the Legislature accepted the early repeated invitations to agree on a process for production of emails while protecting private information, none of this would have happened. *See* Exh. A to Petitioner's Response to Respondent's Motion to Dismiss as Moot.

Legislature's petition is in a footnote on page 21 in which the Legislature asks the Court to <u>waive</u> a portion of the rule.

Even the specific provisions of Rule 20 are barely mentioned. "Material fact" is mentioned in a heading, but the Legislature does not argue that a "material fact" was overlooked. The phrase "question presented" does not appear and there is no attempt to argue that a particular question presented was overlooked – just that the Court got it wrong. Virtually every losing party thinks the Court got the decision wrong, but that alone does not satisfy the criteria for rehearing.

Likewise, while Rule 20 allows the Court to rehear a case if the decision "conflicts with a statute or controlling decision," the petition does not make that argument or even use those words. There is no claim that the decision conflicts with a Montana statute. The Legislature inexplicably ignores the Rule 20 criteria for rehearing, even though the criteria were called to its attention the day before the petition was filed. Though the Legislature complains about and repeatedly mocks the Court's opinion, the petition raises no "fact material to the decision" that was overlooked, no "question presented by counsel that would have proven decisive to the case," and no "conflict[] with a statute or controlling decision not addressed by

the supreme court." Mont. R. App. P. 20(1)(a). Once again, the petition is a second swing with the same bat – an approach clearly prohibited by Montana law.[2]

Failure to satisfy the criteria of Rule 20 is reason enough to deny the petition for rehearing. Though no further response is necessary, the Legislature has cited two new sources it claims should change the result in this case – an Office of Legal Counsel memorandum and a federal district court case from Washington, D.C. Neither is sufficient.

The Legislature first argues that a memorandum issued by the United States Department of Justice Office of Legal Counsel regarding the propriety of a congressional tax committees' request for former President Trump's tax returns and other tax information (OLC Memo) "confirms the Legislature's reading of the relevant case law and its application to this dispute[.]" Beyond rehashing arguments made in the briefs and already considered and resolved by the Court, the Legislature's reliance on the OLC Memo is misplaced.

The OLC Memo does not warrant reconsideration because it is not a "controlling decision" under Mont. R. App. P. 20(1)(a)(iii). To start, it is not a

[2] Lest there be concern that the Court's rules are unfair or that Rule 20 deprives the Legislature of its "day in court," it should be noted that Montana Rules of Appellate Procedure, though adopted by the Court, are subject to "disapproval by the legislature" in either of the two sessions following promulgation. Montana Constitution, Article VII, Section 2. *Stanley v. Lemire*, 2006 MT 304, ¶ 43, 334 Mont. 489, 148 P.3d 643.

"decision" issued by a court. It is well-settled that OLC opinions are not binding on courts in general, *Cherichel v. Holder*, 591 F.3d 1002, 1016 n.17 (8th Cir. 2010), let alone on Montana courts in particular. In fact, the question whether OLC opinions are binding even within the executive branch itself "remains somewhat unsettled." *Cty. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1213 (N.D. Cal. 2017) (citing Randolph Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 Admin. L. Rev. 1303, 1318 (2000)); *see also* Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) (https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf) (explaining that, "[b]y delegation, the Office of Legal Counsel (OLC) exercises the Attorney General's authority under the Judiciary Act of 1789 to provide the President and executive agencies with advice on questions of law.").

Because the OLC Memo is not a controlling decision within the meaning of Mont. R. App. P. 20(1)(a)(iii), it does not support reconsideration. Even setting that aside, the substantive analysis and opinions of the OLC Memo neither change nor undermine the Court's analysis. The Memo's specific and narrow focus addresses the "unambiguous" statutory authority of the Ways and Means Committee of the House of Representatives to request former President Trump's tax returns from the Secretary of the Treasury, and the Secretary's attendant

obligation to furnish the requested information. The OLC's analysis of federal tax-related laws has no relationship to Montana law as analyzed and decided by the Court in this case. Of note, however, is the OLC Memo's consistency with this Court's analysis, including its determination that the subpoenas at issue do not serve a valid legislative purpose. The OLC Memo makes clear that the legislature's investigatory authority, though "broad and indispensable," is not unlimited, does not extend to matters which are within the exclusive province of one of the other branches of the government, and is subject to constitutional limitations on government action, including in the Bill of Rights. OLC Memo at 20-21, 26. Thus, the OLC Memo provides no support for the Legislature's petition.

Similarly, the federal district court's decision on remand in *Donald J. Trump, et al. v. Mazars USA LLP*, 19-cv-01136, ___ F. Supp. 3d___ (D.D.C. Aug. 11, 2021) is not controlling and does not alter the Court's analysis or conclusions.[3] Federal district court decisions may serve as guidance to Montana courts, but do not constitute controlling precedent. *Miners & Merchants Bank v. Dowdall*, 158 Mont. 142, 152, 489 P.2d 1274, 1279 (1971); *see also Bullock v. Fox*, 2019 MT 50,

[3] The Attorney General's submission of supplemental authority on August 16 ignored Rule 12(6) of the Montana Rules of Appellate Procedure. Citations of supplemental authority are to set forth "the citation(s) without argument." The submission included four pages of argument.

¶ 30, 395 Mont. 35, 435 P.3d 1187 (federal court's interpretation of federal law is persuasive—not binding—authority on Montana courts). Since state courts are not bound by the decisions of any federal court other than the United States Supreme Court, this federal district court decision is not "controlling" as required to satisfy Rule 20.

Two other points should be made. The first is the scope of the Court's opinion, which the Legislature overstates, and the second is the issue of the Court's order regarding return of illegally subpoenaed materials.

The Legislature repeatedly argues it has authority to obtain email records from the Judiciary and claims the Court has held to the contrary. That the Legislature has authority to obtain records is not and never has been disputed – not by McLaughlin and certainly not by the Court. The Legislature can get unprivileged and otherwise properly obtainable records, it just has to do it correctly. Here, the Legislature went about its task with a wrecking ball instead of a scalpel, leaving no room for protection of potentially privileged or private information prior to its production. McLaughlin, through counsel, repeatedly asked the Legislature to slow down and allow an opportunity for review. *McLaughlin v. The Montana State Legislature, et al., OP 21-0173, Order Denying Respondents' Motion to Dismiss,* p. 4 (June 29, 2021). It is now more than a little ironic that the Legislature begs for "negotiation and accommodation" when in its

rush to obtain the judiciary's records from a custodian in the executive branch, it ignored every procedural suggestion made by McLaughlin. (*See* Exh. A to Petitioner's Response to Respondent's Motion to Dismiss as Moot in which counsel beseeched the DOA and the Legislature to establish a process whereby the records being sought could be produced after a review to protect privileged and private information. Each request was ignored.)

Far from ever seeking to negotiate, the Legislature tried to skirt this Court's April 11, 2021, order putting compliance with subpoenas on hold pending review. On April 13, the Legislature reissued essentially the same subpoena even though this Court had stayed compliance two days earlier. Remarkably, however, the reissued subpoena also included a demand for all "emails and attachments sent and received" and any "recoverable deleted emails sent or received" by McLaughlin between April 8 and April 12. By that time, the Legislature knew McLaughlin was represented by counsel. (Exhibit A-5 to Petitioner's Response to Respondent's Motion to Dismiss as Moot). The Legislature was apparently seeking to obtain, back door through the Department of Administration, attorney-client privileged communications between McLaughlin and her counsel. (*See* Petitioner's Notice of Additional Legislative Subpoena, filed April 26, 2021, and the subpoena attached as Exhibit A.)

The second point has to do with the Court's remedy directing return of the illegally obtained emails and prohibiting their use – something akin to the venerable fruit of the poisonous tree doctrine. Yet, the Legislature again overstates, complaining that the Court's Order prohibits legislative discussion of the emails or their contents which it construes as a violation of the Speech and Debate clause of the Montana Constitution. But the Court's Order is quite simple – the emails were illegally obtained and must be returned. No copies. Just give them back. The Legislature, having created this mess, should not complain that the mess is too hard to clean up.

CONCLUSION

The Legislature had its day in court. Every motion it has brought, every position it has taken, has been thoroughly analyzed and unanimously rejected by the Montana Supreme Court. Appropriately so. There is no legal basis in Rule 20 or otherwise for the Court to rehear, withdraw, modify or in any way alter its July 14 Opinion. The petition for rehearing should be denied.

Dated this 2nd day of September, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
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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 1,833 words.

Dated this 2nd day of September, 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 - Objection to Petition for Rehearing to the following on 09-02-2021:

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