APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125 and OP 21-0173

[Filed April 16, 2021]

BOB BROWN, DOROTHY BRADLEY, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,
Petitioners,

v.

GREG GIANFORTE, Governor of the State of Montana,
Respondent.

BETH MCLAUGHLIN,
Petitioner,

v.

THE MONTANA STATE LEGISLATURE, AND THE MONTANA DEPARTMENT OF ADMINISTRATION,
Respondents.

ORDER

Beth McLaughlin, Office of the Court Administrator, has filed a "Petition for Original Jurisdiction and Emergency Request to Quash/Enjoin Enforcement of Legislative Subpoena," initiating an original proceeding assigned as Cause No. OP 21-0173. In the petition, McLaughlin challenges the legality of a subpoena issued by the Montana State Legislature on April 8, 2021, which demanded production of all emails and documents sent and received by McLaughlin over a three-month period and seeks declaratory and injunctive relief. In response, Respondent Montana State Legislature has filed a motion to dismiss the petition. Finally, McLaughlin has filed a new Emergency Motion to Quash a Revised Subpoena issued yesterday that requires McLaughlin to appear, testify, and provide additional information on Monday, April 19, 2021.

McLaughlin is here challenging the same legislative subpoena she has similarly challenged by requesting to intervene within Cause No. OP 21-0125, a proceeding challenging SB 140, legislation recently enacted by the Legislature, based on her allegation that the subpoena arose from the Legislature's inquiry to her office about a poll of members of the Montana Judges Association "pertaining to SB 140." *Intervenor Beth McLaughlin's Emergency Motion to Quash and Enjoin Legislative Subpoena Duces Tecum,* 21-0125, p. 4. In response to that emergency motion, this Court entered a Temporary Order on April 11, 2021. The Order acknowledged that McLaughlin had demonstrated "a substantial potential of the infliction of great harm" if the subpoena, which we noted was "extremely broad in scope," was "permitted to be executed as stated."

Temporary Order, 21-0125, issued April 11, 2021, p. 2. However, the Order also raised questions concerning the procedural propriety of challenging the subpoena within 21-0125, stating that "we cannot be certain, at this juncture, that the subpoena challenged by McLaughlin has anything to do with the pending proceeding in OP 21-0125, or is properly filed herein." *Temporary Order,* 21-0125, issued April 11, 2021, p. 2. Consequently, the Court granted McLaughlin seven days in which to file a supplemental pleading "demonstrating the propriety of the filing of the motion in this matter, as opposed to the initiation of an entirely new proceeding before the Court," granted other parties in the action, and interested parties, the opportunity to respond to McLaughlin's supplemental pleading, and, to preserve the status quo pending resolution of those matters, quashed the subpoena until further order of the Court. *Temporary Order,* 21-0125, issued April 11, 2021, p. 3. Further background of the matter is set forth in the Temporary Order. On April 13, the Respondent in 21-0125 filed a Motion to Strike and Vacate, requesting that McLaughlin's filings therein be stricken and that the Temporary Order be vacated.

McLaughlin alleges in 21-0173 that, on April 8, 2021, the Legislature issued the subpoena to Director Misty Ann Giles of the Montana Department of Administration, not to the Judicial Branch, requiring that Giles appear before the Legislature the next day and produce the subject emails and attachments. McLaughlin was provided only a courtesy copy of the subpoena on the afternoon of Friday, April 9, after which she requested a delay while she sought legal

advice. This request went unanswered. On Saturday, April 10, McLaughlin, through counsel, proposed to Giles and Todd Everts of the Legislative Services Division that production be delayed until the parties could address concerns, but Giles declined. McLaughlin immediately sought judicial relief.

McLaughlin contends that the subpoena "commands production of documents that by the breadth requested contain highly confidential, privileged, and sensitive information," and that "over 2,000 documents have already been produced, creating new time-sensitivities and concerns." She contends the documents were produced "without McLaughlin or any other court official being afforded the opportunity to review the production and protect the privacy rights and privileges implicated." She alleges she has now had a brief opportunity to partially review the documents produced by the Department of Administration "and can confirm they contain, as suspected, privileged and confidential information." She alleges the legal and constitutional issues raised are of statewide importance and that emergency factors exist that render litigation in the trial courts and subsequent appeal inadequate, citing M. R. App. P. 14(4). As relief, she seeks a declaration that the subpoena is illegal and invalid, the temporary quashing and permanent enjoining of the subpoena, the permanent enjoining of the Legislature "from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced" pursuant to the subpoena, and return of those documents.

Central to the petition in this matter are threshold questions of law subject to the exclusive adjudicatory authority of this Court under Article III, Section 1, and Article VII, Sections 1-2(1), of the Montana Constitution regarding the scope and application of the legislative subpoena power. *See Larson v. State By & Through Stapleton,* 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241 (noting exclusive constitutional duty and authority of this Court to "adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law and to render appropriate judgments thereon"—citing Mont. Const. arts. III, § 1, and VII, § 1, *inter alia*); *Best v. City of Billings Police Dep't*, 2000 MT 97, ¶ 16, 299 Mont. 247, 999 P.2d 334 (among the three coordinate branches of a constitutional government "it is the province and duty of the judiciary 'to say what the law is'"— citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *Marbury,* 5 U.S. at 177, 2 L.Ed. at 26 (the constitution is the "fundamental and paramount law" and the fundamental "theory of every such [constitutional] government" is "that an act of the legislature, repugnant to the constitution, is void. . . . It is emphatically the province and duty of the judicial department to say what the law is" and "of necessity [to] expound and interpret that rule" to resolve any conflict of law). It is clear the Legislature, to exercise its separate and distinct powers of governance effectively, must have the power to acquire information regarding the subject matter of its legislation. However, neither the subpoena power of the Legislature, nor that of the judiciary, is subject to unquestioned enforcement. This Court has not previously considered the extent of any limitations on

the Legislature's subpoena power. The scope of the Legislature's inherent legal authority to compel information, and how it applies under particular circumstances, are quintessentially functions for this Court to determine within our exclusive constitutional duty and authority under Article III, Section 1, and Article VII, Sections 1-2(1), of the Montana Constitution. We have not heretofore considered whether that authority is limited when competing rights or privileges exist and are expressed.

In the legislative subpoenas previously issued to the Montana Department of Administration, this Court, and the Court Administrator, the Legislature seeks to obtain a broad swath of internal judicial branch documents and communications, some of which appear to be confidential and privileged as a matter of law from compelled disclosure to the Legislature, but some of which may very well be reachable by legislative subpoena. All those requests, moreover, are directly or indirectly related, and certainly have directly arisen from, the matters now squarely at issue before this Court in the above-captioned *Brown* and *McLaughlin* proceedings, in both of which the Legislature is now a party under the personal jurisdiction of this Court. As a result, the legality of the previously issued legislative subpoenas, and any similar subpoenas regarding the same subject matter, is currently at issue before this Court in the above-captioned *McLaughlin* proceeding (21-0173) for adjudication, upon participation of the parties thereto under due process of law, under the exclusive constitutional power and authority of this Court under Article III, Section 1, and Article VII, Sections 1-2(1), of the Montana Constitution. Within

that legal framework, it is the exclusive constitutional duty of this Court to consider the competing constitutional and other legal interests at issue and adjudicate them accordingly to resolve the dispute matters at issue as a matter of law.

Consequently, to address these issues raised herein in a manner that provides due process and prevents the infliction of harm as the process moves forward in an orderly manner, we hereby order as follows:

1. Respondents Montana State Legislature and Montana Department of Administration are granted fourteen (14) days, until Friday, April 30, 2021, in which to file a summary response to the Petition, to present any arguments not already included within Respondent Montana State Legislature's motion to dismiss.

2. Petitioner Beth McLaughlin is granted fourteen (14) days, until Friday, April 30, 2021, in which to file a response to the Motion to Dismiss.

3. The substance of our prior Temporary Order of enjoinder in 21-0125 is hereby continued unabated within 21-0173. The subpoena issued by the Legislature on April 8, 2021, remains enjoined pending further order of the Court. Additionally, enforcement of the Revised Subpoena issued April 15, 2021, is temporarily enjoined pending further proceedings in this matter and further Order of this Court.

4. Given the release of documents related to electronic judicial branch communications by the Department of the Administration, as described herein, without legal process or the opportunity for

consultation, the Department of Administration is temporarily enjoined from any further release of any judicial communications in response to any request or subpoena, legislative or otherwise, until further order of this Court.

5. Similarly, until the issues raised in this proceeding can be presented and adjudicated in the course of due process, enforcement of any subpoenas issued by the Montana State Legislature for electronic judicial communications, including those served on this Court April 14, 2021, are temporarily stayed, until this Court can establish the scope, limitations, and parameters to be applied by courts when the Legislature exercises its authority to obtain information and competing interests are presented. Justice Jim Rice has requested that his subpoena not be stayed, so he may seek review in the district court, and it is so ordered.

6. McLaughlin's filings within 21-0125 are dismissed.

7. The Motion to Strike and Vacate filed by the Respondent in 21-0125 is denied as moot.

8. McLaughlin's request to file an overlength petition in 21-0173 is granted.

IT IS SO ORDERED.

The Clerk is directed to provide copies of this Order to all counsel of record in this matter.

DATED this 16th day of April, 2021.

s/_____

s/_____

_____

s/_____

s/_____

s/_____
Chief Justice (21-0173)

The Chief Justice has signed this order only for purposes of participating in 21-0173.

Justice Beth Baker and Justice Jim Rice joins in Paragraphs 1-4 and Paragraphs 6-8 of the foregoing Order.

s/_____

s/_____
Active Chief Justice (21-0125)

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173

[Filed May 5, 2021]

BETH MCLAUGHLIN, Petitioner, v. DEPARTMENT OF ADMINISTRATION, and MONTANA STATE LEGISLATURE, Respondent.	)))))))))

ORDER

On April 28, 2021 , Justice Jim Rice recused himself from all proceedings in this matter.

IT IS HEREBY ORDERED that District Court Judge Donald L. Harris is designated to participate in this matter in place of Justice Jim Rice,

The Clerk is directed to provide copies of this Order to the Hon. Donald L. Harris, and to all counsel of record.

DATED this 5th day of May, 2021.

For the Court,

By s/_____
Chief Justice

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173
2021 MT 120

[Filed May 12, 2021]

BETH MCLAUGHLIN,
Petitioner,

v.

THE MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT OF ADMINISTRATION,
Respondents.

ORIGINAL PROCEEDING: Petition for Original Jurisdiction

COUNSEL OF RECORD:

For Petitioner:

Randy J. Cox, Boone Karlberg P.C., Missoula, Montana

For Respondent Montana State Legislature:

Austin Knudsen, Montana Attorney General, Kristin Hansen, Lieutenant General, Derek J. Oestreicher, General Counsel, Helena, Montana

For Respondent Montana Department of Administration:

Michael P. Manion, Department of Administration, Helena, Montana

Dale Schowengerdt, Crowley Fleck PLLP, Helena, Montana

Decided: May 12, 2021

Filed: s/_____
Clerk

Justice Laurie McKinnon delivered the Opinion and Order of the Court.

¶1 Respondent, Montana State Legislature (Legislature), has filed in this original proceeding a motion "for the immediate disqualification of all Justices" of the Montana Supreme Court.[1] Petitioner, Beth McLaughlin (McLaughlin), the Judicial Branch's Court Administrator, has responded and objects to the Legislature's motion. To best address the Legislature's

[1] Since the Legislature's filing of the instant motion, the Court appointed District Court Judge Donald Harris to preside in place of Justice Jim Rice, who had recused himself. The Legislature has not indicated whether their disqualification request pertains to Judge Harris. However, for purposes of this ruling the Court will assume that it does.

motion, some discussion of the procedural background and underlying issues is necessary.

¶2 In an original proceeding before this Court filed March 17, 2021, *Brown, et. al. v. Gianforte*, OP 21-0125, the Legislature, as an intervenor, and Respondent Governor Greg Gianforte raised concerns about a Montana Judges Association (MJA) survey of its members (poll) facilitated by McLaughlin regarding Senate Bill 140 (SB 140). At the time of the poll, the Legislature was considering SB 140. SB 140, which has since been signed into law, changes the way the Governor fills vacancies for judges and justices in Montana. After learning of the MJA poll, the Legislature requested McLaughlin provide information on the poll. McLaughlin provided the final tally of the poll but indicated some of the emails from judges responding to the poll had been routinely deleted. On April 8, 2021, the Legislature issued an investigative subpoena to the Department of Administration, which administers the Judiciary's computer system, seeking the production of "[a]ll emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 . . ." and "[a]ny and all recoverable deleted e-mails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 . . . ." The legislative subpoena required production of the documents by 3 p.m. the next day, April 9; however, the Court was informed that the Department of Administration began producing the documents immediately. In the subpoena, purportedly issued by the Chair of the Senate Judiciary Committee, the Legislature did not provide a reason or purpose for its

request or otherwise state what it was investigating. The subpoena was issued without notice to McLaughlin or to the Judicial Branch. When McLaughlin learned of the investigative subpoena one day later, on April 9, several thousand emails involving her communications with Montana's judges and justices had been released to the Legislature. It now appears there were more than 5,000 Judicial Branch e-mails disclosed to the Legislature. The Legislature determined on its own that many of those e-mails were not privileged, sensitive, or work related, and it released these judicial communications for distribution to the press. In response to an emergency motion filed by McLaughlin, this Court entered an order on April 11, 2021, quashing the subpoena until we could address the scope and parameters of the Legislature's subpoena power when privileges have been asserted. Thereafter, McLaughlin, who was not a party or intervenor in OP 21-0125, filed a Petition for Original Jurisdiction and Emergency Request to Quash/Enjoin Enforcement of Legislative Subpoena on April 12, 2021, which began the instant proceeding.

¶3 Also, on April 12, 2021, the Court received a letter from Lieutenant General Kristen Hansen, of the Montana Department of Justice, stating that she had been retained by the legislative leadership to "represent the interests of the Montana State Legislature to resolution [sic] of the ex parte Motion of Beth McLaughlin . . . ." In her letter, Hansen wrote:

> The Legislative power is broad. In fulfilling its constitutional role, the Legislature's subpoena power is similarly broad. The questions the

> Legislature seeks to be informed on through the instant subpoena directly address whether members of the Judiciary and the Court Administrator have deleted public records and information in violation of state law and policy; whether the Court Administrator has performed tasks for the Montana Judges Association during taxpayer funded worktime in violation of state law and policy; and whether current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts . . . .
>
> The Legislature does not recognize this Court's Order as binding and will not abide [by] it. The Legislature will not entertain the Court's interference in the Legislature's investigation of the serious and troubling conduct of members of the Judiciary. The subpoena is valid and will be enforced.

In like regard, the Legislature, through its counsel, Derek J. Oestreicher, filed a Motion to Dismiss stating the Montana Supreme Court "lacks jurisdiction to hinder the Legislature's power to investigate these matters of statewide importance," and that this Court's order "will not bind the Legislature and will not be followed." These representations from counsel that the Court's orders would not be followed were disruptive to the Court's functioning as a tribunal and the administration of justice, particularly because the

Court was dealing with the unrestrained and ongoing dissemination of thousands of Judicial Branch e-mails.

¶4 Two days later, on April 14, 2021, and during the pendency of the instant proceeding, the Legislature issued a subpoena to each justice of the Montana Supreme Court demanding that the justices appear before it on April 19, 2021, and produce:

> (1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021 and April 14, 2021; including emails and attachments sent and received by your government e-mail account . . . as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.
> (2) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account . . . as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same. (3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by

> the Montana Judges Association using state resources . . . .

The subpoena provided that:

> [t]his request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

¶5 Also on April 14, 2021, Hansen sent e-mails with an attachment entitled "PRESERVATION REQUEST" to all District Court judges, their staff members, and employees or contracted employees of the MJA "who might have received emails from or sent emails to Ms. McLaughlin" between January 4, 2021 and April 8, 2021. The letter asked all recipients to segregate and hold "any emails, documents, notes, or other records" sent to or received from McLaughlin and to "preserve all existing materials relevant to this dispute . . . ." Hansen asked the recipients to suspend any deletion, overwriting or destruction of such documents and that "[t]his hold overrides what might be your normal retention policy so these documents and data should not be deleted even if otherwise allowed." Hansen stated that the Legislature had previously sought the information from McLaughlin but "received an unsatisfactory response."

¶6 On April 16, 2021, this Court entered its first order in these proceedings, which continued the injunction against the subpoena issued to McLaughlin in OP 21-0125; set a briefing schedule; and stayed enforcement of any subpoenas for judicial communications, including those served on the Court on April 14, 2021, until the issues presented by the Legislature's subpoenas could be adjudicated during the course of due process. At the time, and in light of the representations made by Hansen, Oestreicher, and the Legislature, it was unclear whether the release of judicial e-mails to the Legislature was ongoing and would continue indiscriminately. The Department of Administration has since retained counsel who immediately assured this Court that it will abide by the Court's orders and would not release any more judicial communications unless directed by the Court to do so. On April 19, 2021, every justice of the Montana Supreme Court appeared before the Legislature and answered, to the extent permitted by the Montana Code of Judicial Conduct, questions propounded by the Special Joint Select Committee on Judicial Transparency and Accountability, a newly formed legislative committee to investigate alleged misconduct in the Judicial Branch.

¶7 In its Response to Petition for Original Jurisdiction, the Legislature provided its purpose behind seeking McLaughlin's records:

> The purpose of the Select Committee is to investigate and determine whether legislation should be enacted concerning: the judicial branch's public information and records

> retention protocols; members of the judicial branch improperly using government time and resources to lobby on behalf of a private entity; judges' and justices' statements on legislation creating judicial bias; and the courts' conflict of interest in hearing these matters.

Important to the forthcoming discussion, the MJA includes Montana's district judges and justices.

¶8 Before addressing the law as it applies to the Legislature's disqualification motion, we make several observations about the motion. First, the Legislature argues that "[t]his matter has arisen because evidence of judicial misconduct has come to public light" and "[t]he Legislature is actively investigating that misconduct, and the judiciary is the target of that investigation." Presumably, this refers to the MJA poll and the Judicial Branch permitting the poll to be conducted using state resources. However, this Court has not yet determined whether the MJA polling of judges constitutes "judicial misconduct" or an improper use of state resources; that issue implicates the scope and legitimacy of the legislative subpoenas and is directly at issue in this case. The Legislature concedes that the subpoenas issued to the justices raise "the same or similar issues presented in McLaughlin's Petition . . . ." This representation and others made in the Legislature's pleadings, letters, and subpoenas make abundantly clear that the Legislature's investigation is directed to the *Judicial Branch as a whole*, and, therefore, includes *every judicial officer employed in the Judicial Branch*. Thus, the scope of the Legislature's authority when issuing subpoenas to

judicial officers for judicial electronic communications implicates the potential interests of *every* judge in Montana—district judges, water court judges, worker's compensation court judges, limited jurisdiction judges, and justices.

¶9 Second, the Legislature argues the "Court should not presume to self-adjudicate the limits of that investigation" and that we are "umpiring [our] own game" in a case in which we "are not parties." However, none of the justices are parties to this case or any other pending litigation involving the scope of the Legislature's subpoena power,[2] and this case does not involve adjudication of any subpoena issued to a member of this Court. Nonetheless, the Legislature relies on § 3-1-803, MCA, to assert a justice must recuse himself or herself in any proceeding "to which he is a *party*, or in which he is *interested* . . .," and argues due process does not allow a judge to be a judge in his own case (emphasis added). There are no cases in which any of the justices sitting on this case are *parties*; nor has there been established, with respect to any justice, any *interest* in the outcome of this litigation, apart from each justice being a member of the Judicial Branch and the MJA. However, that fact would disqualify every judge in Montana. Moreover, no suggestion has been made that any justice presiding over these proceedings would be unfair or partial in adjudicating the scope of legislative subpoena power in

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[2] The exception is Justice Jim Rice, who filed an individual proceeding in district court challenging the legislative subpoena issued to him. As noted, Justice Rice has recused himself from this proceeding.

the context of Judicial Branch communications. The Legislature's unilateral act of issuing legislative subpoenas to the justices after this litigation was commenced does nothing to impugn the integrity, impartiality, and honesty in the justices serving as adjudicators. Once this issue is decided, the Judicial Branch and its members will be able to adjudicate related issues respecting legislative subpoenas in the district courts and on appeal.

¶10 Third, Counsel for the Legislature argues this Court cannot preside over a case involving the Court Administrator. It maintains that McLaughlin's purported "efforts to prevent disclosure of this Court's records" equate to this Court being unable to maintain its impartiality. However, Montana judges have in the past presided over cases where the Court Administrator has been a party, without a conflict of interest. *See State v. Berdahl,* 2017 MT 26, 386 Mont. 281, 389 P.3d 254; *Boe v. Court Adm'r for the Mont. Judicial Branch of Pers. Plan & Policies,* 2007 MT 7, 335 Mont. 228, 150 P.3d 927. In this case, the Court is called upon to assess, for the first time, the appropriate scope of the legislative subpoena power in Montana—not to judge the conduct of McLaughlin. Importantly, if the Court were to adopt the Legislature's argument, then Judicial Branch officers and employees, as well as parties seeking relief from their actions, would be denied access to justice, and their interests in having their rights vindicated would be frustrated in every court in Montana. Accordingly, the Legislature's argument runs afoul of Article II, Section 16, of the Montana Constitution, which guarantees, as a fundamental right, that "[c]ourts of

justice shall be open to every person . . . and that no person should be deprived of this full legal redress for injury incurred in employment . . . ." The Legislature's position that it will be the arbiter of the scope and purpose of its own subpoenas effectively abrogates Article II, Section 16.

¶11 Fourth, conspicuously absent from the Legislature's motion is any specific allegation or assertion of actual bias on the part of a justice. The Legislature has not alleged that a member of this Court has an actual bias, prejudice, or is otherwise unable to adjudicate these proceedings fairly and impartially. The Legislature's unilateral attempt to manufacture a conflict by issuing subpoenas to the entire Montana Supreme Court must be seen for what it is. Much of the same information the Legislature subpoenaed from the justices after this case was filed is being requested in the subpoena issued to McLaughlin; the Legislature has conceded this point. Thus, once the issues determining purpose and scope of legislative subpoena authority are adjudicated, the Legislature can acquire those documents through McLaughlin's subpoena. The Legislature's blanket request to disqualify all members of this Court appears directed to disrupt the normal process of a tribunal whose function is to adjudicate the underlying dispute consistent with the law, the constitution, and due process. Importantly, each justice has made abundantly clear, on several occasions, that they did not participate in the activity that is the primary subject of the Legislature's investigation—the poll conducted by the MJA.

¶12 This is not the first time legislators have moved to disqualify justices in cases where the Court will decide the constitutionality of their legislation or actions. In *Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455, voters brought an action against the Montana Secretary of State seeking to have Legislative Referendum 119, which addressed statutory changes regarding the election of justices to the Montana Supreme Court, declared constitutionally defective and to enjoin the State from having it placed on the ballot. Seven legislators, who appeared as amici curiae, argued that non-retiring justices of the Court should recuse themselves under the Due Process Clause and the Montana Code of Judicial Conduct, contending that they have an interest in the outcome of the case. As does the Legislature here, legislators in *Reichert* relied on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), to argue that the non-retiring justices had an interest in the outcome of the case, requiring their disqualification. We concluded that the justices' interest in being reelected by statewide election did not arise to the level of a constitutional due process violation as in *Caperton*. We noted that "the interest identified by Legislators as necessitating recusal is not exclusive to the four not-presently-retiring justices." *Reichert*, ¶ 37. We explained in the event of a justices' disqualification, a district judge would be appointed. "A district judge, however, has '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 Legislator's theory) has an 'interest' in the outcome of the case." *Reichert*, ¶ 37. Therefore, "[u]nder a logical extension of Legislator's argument, no judge in this state—indeed, no otherwise qualified person with

'the potential' to run for Supreme Court justice—could sit on this case." *Reichert*, ¶ 37. We applied the Rule of Necessity to conclude none of the justices would be disqualified. *Reichert*, ¶ 37.

¶13 In the case of disqualification generally, when an individual judge is disqualified from a particular case by reason of §§ 3-1-803 and 3-1-805, MCA, the disqualified judge simply steps down and allows the normal administrative process of the court to assign the case to another judge not disqualified.[3] In the highly unusual circumstances of this case, all Montana judges have an interest in the outcome of this case since it involves an investigation into alleged judicial misconduct of the Judicial Branch and the polling procedures of an entity in which every judge and justice in Montana is a member and from which they receive e-mails. It was precisely considerations of this kind that gave rise to the Rule of Necessity, a well-settled principle at common law that had its genesis at least five and a half centuries ago. Its earliest invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge. Rolle's Abridgment summarized this holding as follows: "[i]f an action is sued in the bench against all the Judges there, then by necessity they shall be their own Judges." 2 H. Rolle, *An Abridgment of Many Cases and Resolutions at Common Law* 93 (1668) (translation).

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[3] Section 3-1-803, MCA, applies to all judges, including justices, in Montana. In contrast, § 3-1-805, MCA, which provides a procedure for adjudicating challenges for cause does not apply to justices.

¶14 When the matter to be decided affects the interests of every judge qualified to hear it, the Rule of Necessity applies without resort to further factual development. *State ex rel. Hash v. McGraw*, 376 S.E.2d 634, 639 (W. Va. 1988). The theory on which the Rule rests when such circumstances arise is that "where all are disqualified, none are disqualified." *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160, 1165 (9th Cir. 2006) (*quoting Pilla v. Am. Bar Ass'n.*, 542 F.2d 56, 59 (8th Cir. 1976)) (applying the Rule because a litigant sued all the judges in a federal circuit); *see Bd. of Trs. v. Hill*, 472 N.E.2d 204, 206 (Ind. 1985) (applying the Rule to consider a challenge to a statutory amendment affecting judicial retirement benefits); *see also Weinstock v. Holden*, 995 S.W.2d 408, 410 (Mo. 1999) (applying the rule to consider a resolution affecting judicial pay). Courts ordinarily invoke the Rule of Necessity in such circumstances because disqualifying every judge with an interest to be decided would leave the parties with no court in which to resolve the dispute. The common law tradition has "long regarded the absence of an appropriate forum in which to resolve a legitimate case to be intolerable." *Hill*, 472 N.E.2d at 206. The Rule of Necessity thus reflects the longstanding principle that to deny an individual access to courts for vindication of his or her rights constitutes a far more egregious wrong than to permit a judge to hear a matter in which he or she has some interest. *See Weinstock*, 995 S.W.2d at 410. Thus, implicit in the Rule is the concept of the absolute duty of judges to hear and decide cases within their jurisdiction and that "actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to

do so would result in denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *United States v. Wills*, 449 U.S. 200, 214 (1980) (quoting *State ex rel. Mitchell v. Sage Stores Co.*, 143 P.2d 652, 656 (Kan. 1943)).

¶15 Here, the Legislature's investigation into alleged misconduct of the Judicial Branch and the polling practices of the MJA is an investigation of every judge of this State. Because of the expansive and overarching nature of the Legislature's investigation into the Judicial Branch of government, no Montana judge is free of a disqualifying interest and, thus, this Court is required to invoke the Rule of Necessity; where "all judges are disqualified, none are disqualified." *Ignacio*, 453 F.3d at 1165. In reaching this conclusion, we are mindful of Montana Code of Judicial Conduct 2.7, which states: "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.12 or other law." The comment to this Rule explains:

> Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use

> disqualification to avoid cases that present difficult, controversial, or unpopular issues.

M. C. Jud. Cond. 2.7 cmt [1]. Were we to grant the Legislature's request to disqualify every member of Montana's highest court on an issue involving co-equal branches of government and principles of separation of powers, the Court's ability to fulfill its constitutional duties to adjudicate difficult and controversial matters would be compromised. *See Larson v. State*, 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241 (noting exclusive constitutional duty and authority of this Court to "adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law and to render appropriate judgments thereon . . . .") (citing Mont. Const. arts. III, § 1, and VII, § 1, *inter alia*; *Best v. City of Billings Police* Dep't, 2000 MT 97, ¶ 16, 299 Mont. 247, 999 P.2d 334 (among the three coordinate branches of a constitutional government "it is the province and duty of the judiciary 'to say what the law is'") (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (the constitution is the "fundamental and paramount law" and the fundamental "theory of every such [constitutional] government" is "that an act of the legislature, repugnant to the constitution, is void. . . . It is emphatically the province and duty of the judicial department to say what the law is" and "of necessity [to] expound and interpret that rule" to resolve any conflict of law)).

¶16 Finally, and perhaps most importantly, we would be remiss in our analysis of the Legislature's disqualification request, if we did not consider the context in which it has been made. The Legislature has

unilaterally attempted to create a disqualifying conflict for every duly constituted and elected member of this Court, during the pendency of a proceeding before the Court, by issuing a subpoena to every presiding justice in the case which is nearly identical to the subject of the litigation—McLaughlin's subpoena. It is well recognized that a party's unilateral acts personally attacking or suing the judge for acts taken in his or her judicial capacity do not create a proper basis for recusal. Recusal under such circumstances would permit a party to avoid a particular judge simply by attacking or suing him. *See United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986); *see also United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977); *see also United States v. Whitesel*, 543 F.2d 1176, 1181 (6th Cir. 1976). Here, the Legislature itself has created the conflict by issuing a subpoena to each justice during a pending proceeding involving the same issues raised in a legislative subpoena. The Legislature's unilateral act of issuing subpoenas to the justices during the pendency of this case is not ground for recusal of every member of this Court. A judge is required to act 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." M. C. Jud. Cond. 1.2. Were the Court to succumb to the Legislature's request and evade our responsibilities and obligations as a Court, we are convinced that public confidence in our integrity, honesty, leadership, and ability to function as the highest court of this State would be compromised.

¶17 IT IS HEREBY ORDERED that the Legislature's Motion to Disqualify the justices of the Court is DENIED.

DATED this 12th day of May, 2021.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ DONALD HARRIS
Hon. Donald Harris, District Judge,
sitting by designation

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173

[Filed June 29, 2021]

BETH MCLAUGHLIN, Petitioner, v. The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT OF ADMINISTRATION, Respondents.	)

ORDER

On June 22, 2021, Respondent Montana State Legislature (Legislature) filed a motion to dismiss this action as moot, citing the Legislature's June 22, 2021 letter to Petitioner Beth McLaughlin (McLaughlin) withdrawing the April 14, 2021 legislative subpoena to McLaughlin at the center of this proceeding. McLaughlin opposes this motion.

The background facts of this case have been laid out in *McLaughlin v. Legislature*, 2021 MT 120, 404 Mont.

166, ___ P.3d ___. The procedural history relevant here is summarized as follows.

McLaughlin's April 12, 2021 emergency petition to this Court requested, among other things, that this Court temporarily stay further production of Judicial Branch emails by the Department of Administration (DOA), acting pursuant to an April 8, 2021 Legislative Subpoena. *See* Petition for Original Jurisdiction and Emergency Request to Quash/Enjoin Enforcement of Legislative Subpoena. It also asked this Court to enjoin the Legislature from "disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the Subpoena" and to issue an order "directing the Montana Legislature to immediately return any documents produced pursuant to the Subpoena, or any copies or reproductions thereof, to Beth McLaughlin." On April 14, 2021, the Legislature issued another subpoena, this one to 06/29/2021 Case Number: OP 21-0173 McLaughlin, directing her to appear before the Legislature and produce documents as well as State "laptops, desktops, hard-drives, or telephones" used to facilitate polling of Montana judges and justices on pending legislation. McLaughlin filed a supplementary filing notifying the Court of this development and requesting an order quashing the new subpoena. This Court ordered a temporary stay on all Legislative subpoenas seeking electronic judicial records pending consideration of proper legal filings in due course. The Legislature withdrew its subpoena to McLaughlin and moved to dismiss this matter as moot on June 22, 2021.

A matter is considered moot when the issue has ceased to exist such that it no longer presents an actual controversy and the court cannot grant effective relief. *Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 19, 293 Mont. 188, 974 P.2d 1150. The mootness doctrine does, however, contain several exceptions, including "public interest," "voluntary cessation," and "capable of repetition, but evading review." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 32-33, 333 Mont. 331, 142 P.3d 864. McLaughlin cites all three doctrines in support of her response to the Legislature's motion to dismiss.

McLaughlin petitions this Court to address both (a) the temporarily-stayed subpoenas directed to her and her information and (b) the documents that the Legislature has already obtained through the DOA, before McLaughlin was able to seek review from this Court. The Legislature's withdrawal of its subpoena to McLaughlin does not impact the litigation surrounding the status of the documents the Legislature has already obtained. The Legislature has not made this Court aware of any effort to return, destroy, account for, or otherwise address the thousands of unredacted Judicial Branch emails that it previously obtained, without judicial oversight or procedural protections, through the DOA. Thus, McLaughlin's request that this Court order such documents be immediately returned is not moot. As counsel for McLaughlin pointed out while unsuccessfully attempting to negotiate for a pause amidst the ongoing release of thousands of unredacted Judicial Branch emails with which to implement legal and procedural protections, it is "uncertain how that bell can be un-rung," once the

information has been released. Petitioner's Response to Respondent's Motion to Dismiss as Moot, Exhibit A-4 (filed June 24, 2021) (Petitioner's Response). The Legislature's decision to act first, and deal with legal ramifications later, does not allow it to declare the issue moot when it determines that it has achieved what it wishes. Because the issue has not ceased to exist as an actual controversy and it is within the power of this Court to grant effective relief, McLaughlin's petition is not moot with respect to these documents. *See Shamrock Motors*, ¶ 19.

Addressing the Legislature's April 14, 2021 subpoena directed to McLaughlin, McLaughlin raises the "public interest exception" to the mootness doctrine. *Havre Daily News, LLC*, ¶ 32 (quoting *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872). This exception applies to a "[(1)] question of public importance [(2)] that will likely recur and [(3)] whose answer will guide public officers in the performance of their duties." *Gateway Opencut Mining Action Group v. Bd. of County Comm'rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133. "We have consistently held that where questions implicate fundamental constitutional rights or where the legal power of a public official is in question, the issue is one of public importance." *Ramon v. Short*, 2020 MT 69, ¶ 22, 399 Mont. 254, 460 P.3d 867 (citations omitted); *see also Ramon*, ¶ 24 (noting that a ruling would benefit the government officers at issue by providing "authoritative guidance on an unsettled issue" in the absence of an existing Montana Supreme Court ruling on the matter).

First, the scope of the legislative subpoena power when directed towards another branch of government is clearly an issue of great public interest, as it goes to not only the "legal power of a public official," *Ramon*, ¶ 22, but the very core of a constitutional system premised on separation of powers. *See Brown v. Gianforte*, 2021 MT 149, ¶¶ 52-66, 404 Mont. 269, ___ P.3d ___ (Rice, J., concurring).

Second, while conflicts between the political branches and members of the judicial branch have been exceedingly rare—perhaps a prerequisite to the long-term survival of functioning democracy—it appears in this case that the issue is likely to reoccur. McLaughlin points to material in the record demonstrating that the Legislature intends to continue seeking the documents at the heart of the present controversy. *See* Petitioner's Response, Exhibit B-3 (quoting Senator Greg Hertz, Chair of the "Select Committee on Judicial Transparency and Accountability" stating that "[t]o be clear, we expect the judicial branch to release public records . . . ."). In its motion to dismiss, the Legislature represents that its "justified interests in the underlying matters" remains fully intact, despite its motion to dismiss. *See* The Montana State Legislature's Motion to Dismiss as Moot at 3 (filed June 22, 2021) (Motion to Dismiss).

The history of this litigation has given us reason to be skeptical of the representations by the Legislature and its counsel in this matter. Rather than work in good faith with McLaughlin to develop an orderly process to protect confidential and privileged materials, the Legislature unilaterally accessed thousands of

unredacted messages, without proper procedural protections, through the DOA. Once McLaughlin learned of this release, the record shows that the repeated efforts made by McLaughlin's counsel to seek a good faith resolution to implement a process to protect citizens' privacy rights went unrequited. *See* Petitioner's Response, Exhibit A (showing a series of correspondence from Petitioner's counsel repeatedly requesting "an orderly process that protects existing privacy interests" amidst the wholesale release of judicial branch communications likely containing "private medical information, personnel matters including employee disciplinary issues, discussions with judges about ongoing litigation, information regarding Youth Court cases, judicial work product, ADA requests for disability accommodations, confidential matters before the Judicial Standards Commission, and information that could subject the State to liability were protected information exposed.").

Third, a ruling on the matter will guide public officers in the performance of their duties. We are aware of no Montana caselaw directly addressing the issue presented by this Petition, which could guide the Legislature, the Court Administrator, and the DOA in the future. The matter at hand is one of serious public interest, is likely to reoccur, and is in need of a ruling to guide public officers in the performance of their duties. The public interest exception to the mootness doctrine applies.

The second mootness exception pointed to by McLaughlin is the "voluntary cessation" doctrine. This doctrine applies when the challenged conduct is of

indefinite duration but is voluntarily terminated prior to the completion of appellate review. *Havre Daily News, LLC*, ¶ 34. Due to the concern that a party "may utilize voluntary cessation to manipulate the litigation process, 'the heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.'" *Havre Daily News, LLC*, ¶ 34 (quoting *Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000) (internal quotations and alterations omitted)).

Unfortunately, the actions of counsel before this Court during these proceedings have raised serious concerns of "manipulat[ion] of the litigation process." *See McLaughlin v. Mont. State Legislature*, 2021 MT 120, ¶¶ 3, 11, 404 Mont. 166, ___ P.3d ___ (noting that counsel's representations that Court orders would not be respected and subsequent "unilateral attempt to manufacture a conflict by issuing subpoenas to the entire Montana Supreme Court . . . . appears directed to disrupt the normal process of a tribunal"). Notably, in its Motion to Dismiss, the Legislature has *not* committed itself to refraining from resuming the challenged conduct if its motion were granted. The gravity of the problem is once again magnified by the fact that the Legislature already has in its possession thousands of unredacted Judicial Branch emails—after demonstrating a willingness to act quickly and without notice before an aggrieved party can seek procedural protections or judicial review—significantly raising the stakes should the Legislature resume the complained-of conduct. *See* Petitioner's Notice of Additional Legislative Subpoena at 3 (filed Apr. 26,

2021) (notifying the Court that the Legislature had sent another subpoena to DOA seeking McLaughlin's emails on April 13, 2021, without notifying McLaughlin); Legislative Subpoena to Director Misty Ann Giles of April 8, 2021 (directing DOA to compile and produce thousands of McLaughlin's emails to the Legislature by the next day). Here, the Legislature has failed to bear its "heavy burden" of persuading this Court that it will not simply reissue the same subpoena to McLaughlin should it be dissatisfied with the results of its efforts to obtain the sought-after materials without litigation. Thus, the "voluntary cessation" exception to the mootness doctrine applies.

For the reasons stated above, this Court has determined that the matter is not moot with regard to documents already in the Legislature's possession. Additionally, the mootness doctrine does not apply with respect to the withdrawn subpoena to McLaughlin as it falls within the public interest and voluntary cessation exceptions.

THEREFORE,

IT IS ORDERED that the motion to dismiss is DENIED.

DATED this 29th day of June, 2021.

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA
/S/ DONALD HARRIS
Honorable Donald Harris, District Judge
sitting for Justice Jim Rice

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173

[Filed July 14, 2021]

BETH MCLAUGHLIN, Petitioner, v. The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT OF ADMINISTRATION, Respondents.	)

ORDER

On May 26 2021, Respondents filed a Petition for Rehearing regarding this Court's decision entered May 12, 2021. Petitioner filed a response on June 4, 2021.

M. R. App. P. 20 provides that this Court will consider a petition for rehearing only if the Court opinion overlooked a material fact or a question presented that would have proven decisive to the case or the decision conflicts with a statute or controlling decision not yet addressed by the Court. This Court has reviewed the Petition for Rehearing and the response

and has determined that the Petition for Rehearing does not satisfy an of the criteria in M. R. App. P. 20.

IT IS ORDERED that the Petition for Rehearing is DENIED.

The Clerk is directed to provide a copy of this Order to all counsel of record.

DATED this 14th day of July, 2021.

s/_____
Chief Justice
s/_____

s/_____

s/_____

s/_____

s/_____
Justices
s/_____
District Court Judge Donald Harris,
sitting for Justice Jim Rice

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173
2021 MT 178

[Filed July 14, 2021]

BETH MCLAUGHLIN,
Petitioner,

v.

The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT OF ADMINISTRATION,
Respondents.

ORIGINAL PROCEEDING: Petition for Original Jurisdiction

COUNSEL OF RECORD:

For Petitioner:

Randy J. Cox, Boone Karlberg P.C., Missoula, Montana

For Respondent Montana State Legislature:

Austin Knudsen, Montana Attorney General, Kristin Hansen, Lieutenant General, Derek J. Oestreicher, General Counsel, Helena, Montana

For Respondent Montana Department of Administration:

Michael P. Manion, Department of Administration, Helena, Montana

Dale Schowengerdt, Crowley Fleck PLLP, Helena, Montana

Decided: July 14, 2021

Filed:

s/_____
Clerk

Justice Beth Baker delivered the Opinion and Order of the Court.

¶1 Beth McLaughlin, Court Administrator for the Montana Judicial Branch, brought this original proceeding seeking to quash and permanently enjoin the enforcement of successive subpoenas the Montana Legislature issued, first to the Director of the State Department of Administration and later to McLaughlin, for the production of McLaughlin's e-mails between January 4 and April 12, 2021. The second subpoena also directed production of McLaughlin's state-owned computers and telephones used to facilitate polling of state judges. At our request, both Respondents have submitted summary responses in

accordance with M. R. App. P. 14(7). The Legislature also filed a motion to dismiss, which McLaughlin opposes. We considered all parties' submissions and relevant legal authorities and submitted the matter for decision on May 26, 2021.[1]

¶2 Acknowledging the Legislature's authority to obtain information in the exercise of its legislative functions under the Montana Constitution, we conclude that the subpoenas in question are impermissibly overbroad and exceed the scope of legislative authority because they seek information not related to a valid legislative purpose, information that is confidential by law, and information in which third parties have a constitutionally protected individual privacy interest. We hold further that, if the Legislature subpoenas records from a state officer like the Court Administrator auxiliary to its legislative function, whether those records be in electronic or other form, a Montana court—not the Legislature—must conduct any needed *in camera* review and balance competing privacy and security interests to determine whether records should be redacted prior to disclosure.

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[1] On June 22, 2021, Legislative leadership notified both McLaughlin and Department of Administration Director Misty Ann Giles by letter that the Legislature had withdrawn the subject subpoenas. The Legislature then moved to dismiss this action as moot. McLaughlin opposed the motion. On June 29, this Court denied the motion because it did not address documents already in the Legislature's possession and the issues the withdrawn subpoenas raised fall within the public interest and voluntary cessation exceptions to mootness.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 We described the events giving rise to this proceeding in our May 12, 2021 Opinion and Order. *McLaughlin v. Montana State Legislature*, 2021 MT 120, 404 Mont. 166, ___ P.3d ___ (*McLaughlin I*). Briefly summarized, the Montana Legislature asked McLaughlin to provide information on a poll she facilitated of the Montana Judges Association pertaining to Senate Bill 140, a bill then under consideration by the Legislature. She responded to the request but had not retained and did not provide narrative responses that some of the judges had included. Under an unsigned April 8, 2021 subpoena from the Chair of the Senate Judiciary Committee, the Legislature directed Montana Department of Administration Director Misty Ann Giles to appear the following afternoon and produce without subject matter limitation "[a]ll emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021." The Subpoena also requested "[a]ny and all recoverable deleted emails" McLaughlin sent or received during the same time period. The subpoena excluded only "any emails and attachments related to decisions made by the justices in disposition of final opinion." The subpoena did not identify the purpose or subject of the inquiry. Though not served, McLaughlin learned of the subpoena when she received a "courtesy copy" late afternoon on April 9, 2021. By that time, Director Giles already had provided several thousand pages of e-mail messages to the Legislature.

¶4 McLaughlin commenced this proceeding on April 12, the day after we issued a temporary order to stop further production until the issues could be reviewed following response from the Legislature and the Department. Two days later, through a subpoena signed by the Senate President and Speaker of the House of Representatives, the Legislature directed McLaughlin to appear the following Monday and to produce:

> (1) All emails and attachments sent and received by your government email account, [redacted], including recoverable deleted emails, between January 4, 2021, and April 12, 2021 delivered as hard copies and .pst digital files.
> (2) Any and all laptops, desktops, hard-drives, or telephones owned by the State of Montana which were utilized in facilitating polls or votes with Montana Judges and Justices regarding legislation or issues that may come or have come before Montana courts for decision.

The subpoena advised that it "excludes any emails, documents, and information related to decisions made by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters." It stated further that "[a]ny personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure." McLaughlin filed a motion in this proceeding to quash the second subpoena as well; we temporarily enjoined its enforcement pending further proceedings in this matter.

STANDARDS OF REVIEW

¶5 This is an original proceeding seeking interpretation of statutory and constitutional provisions. This Court exercises plenary authority in the construction and application of the Montana Constitution and statutes. *In re Engel*, 2008 MT 215, ¶ 4, 344 Mont. 219, 194 P.3d 613 (citing *State v. Racz*, 2007 MT 244, ¶ 13, 339 Mont. 218, 168 P.3d 685). "Whether an issue presents a non-justiciable political question is a legal conclusion that this Court reviews de novo." *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 12, 326 Mont. 304, 109 P.3d 257; *see also Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241; *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455.

DISCUSSION

Legislative Power to Investigate

¶6 The Montana Constitution divides the power of government "into three distinct branches—legislative, executive, and judicial." Mont. Const. art. III, § 1. "The legislative power is vested in a legislature consisting of a senate and a house of representatives." Mont. Const. art. V, § 1. Like the United States Constitution, Montana's Constitution contains "no enumerated constitutional power [in the Legislature] to conduct investigations or issue subpoenas," but it is well-established that a legislative body "has power 'to secure needed information' in order to legislate." *Trump v. Mazars USA, LLP*, ___ U.S. ___, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 161, 47 S. Ct. 319, 324 (1927)). "This 'power

of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.'" *Mazars*, 140 S. Ct. at 2031 (quoting *McGrain*, 273 U.S. at 174, 47 S. Ct. at 328); *see also* 43 Mont. Op. Att'y Gen. 60 at 222 (1990) ("The legislative power described by Article V, section 1 of the Montana Constitution contains the inherent power of investigation."). "This has been recognized from the earliest times in the history of U.S. legislation, both federal and state, and from even earlier epochs in the development of British jurisprudence." Mason's Manual of Legislative Procedure (2010 ed.), § 795.1 at 561.

¶7 The Montana Legislature has by statute set forth its authority to issue subpoenas "requiring the attendance of any witness before either house of the legislature or a committee of either house" and the requisite form of the subpoenas so issued. Section 5-5-101, MCA. A witness subpoenaed by the Legislature "cannot refuse to testify to any fact or to produce any paper concerning which the witness is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous." Section 5-5-105(2), MCA.[2] *See also*

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[2] Both subpoenas at issue invoke Title 5, Chapter 5, part 1, MCA, for their authority. This law extends the subpoena power to the "attendance of [a] witness" but does not expressly authorize the Legislature to subpoena documents. Section 5-5-101, MCA. We held recently that a similar statute concerning investigative authority of the Commissioner of Political Practices did not permit the Commissioner to subpoena the production of documents; instead, the Commissioner had to seek documents through compulsory process issued by a court. *Comm'r of Political Practices for Mont. v. Mont. Republican Party*, 2021 MT 99, ¶ 11, 404 Mont.

§ 5-11-107, MCA (providing that a statutory or interim committee of the legislature "may hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony, and cause depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in district court" and allowing enforcement of the same by "the district court of any county[.]").

¶8 A legislature's "power to obtain information is 'broad' and 'indispensable.'" *Mazars*, 140 S. Ct. at 2031. Courts generally must indulge a presumption that the legislative activity has as its object a legitimate goal toward possible legislation, *McGrain*, 287 U.S. at 178-79, 47 S. Ct. at 330. But the Legislature's investigative power, broad as it is, "is not unlimited." *Mazars*, 140 S. Ct. at 2031; *Watkins v. U.S.*, 354 U.S. 178, 187, 77 S. Ct. 1173, 1179 (1957). The Supreme Court has stated,

> Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking

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80, 485 P.3d 741. That case, however, involved an executive branch agency created by statute and vested with only those powers the Legislature confers. *See generally Core-Mark Int'l, Inc. v. Mont. Bd. of Livestock*, 2014 MT 197, ¶ 45, 376 Mont. 25, 329 P.3d 1278. Because the Legislature now asserts a constitutional basis for its subpoena power in addition to the statutory basis it cited in the subpoenas, we do not rely on our decision in *Mont. Republican Party* in resolving the questions at issue here.

> the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive.

Barenblatt v. United States, 360 U.S. 109, 111-12, 79 S. Ct. 1081, 1085 (1959).

¶9 The legislative branch is not a law enforcement agency; its inquiry "must be related to, and in furtherance of, a legitimate task of the [Legislature]." *Watkins*, 534 U.S. at 187, 77 S. Ct. at 1179. To serve a "valid legislative purpose," the subpoena "must 'concern[] a subject on which legislation "could be had."'" *Mazars*, 140 S. Ct. at 2031 (quoting *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 506, 95 S. Ct. 1813, 1823 (1975)). "The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action." Mason's Manual of Leg. Procedure, § 797.7 at 567. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*, 354 U.S. at 178, 77 S. Ct. at 1179. And "'there is no congressional power to expose for the sake of exposure.'" *Mazars*, 140 S. Ct. at 2032 (quoting *Watkins*, 354 U.S. at 200, 77 S. Ct. at 1185).

¶10 In *Mazars*, the Court examined Congressional subpoenas seeking the President's information under the lens of separation of powers, announcing a non-exhaustive series of safeguards—in contrast to the generally applicable presumption stated in *McGrain*—when the legislative subpoena authority is directed at

another branch of government. "First, courts should carefully assess whether the asserted legislative purpose warrants the significant step" of issuing the subpoena, because "occasion[s] for constitutional confrontation between the two branches should be avoided whenever possible." *Mazars*, 140 S. Ct. at 2035 (citation, internal quotations omitted). In this regard, the legislative body may not compel information from a coequal branch of government "if other sources could reasonably provide" the information necessary for "its particular legislative objective." *Mazars*, 140 S. Ct. at 2035-36.

¶11 Second, "to narrow the scope of possible conflict between the branches," the subpoena must be "no broader than reasonably necessary to support [the] legislative objective." *Mazars*, 140 S. Ct. at 2036.

¶12 Third, courts must examine the asserted legislative purpose and the "nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose." *Mazars*, 140 S. Ct. at 2036. The legislative body must "adequately identif[y] its aims and explai[n] why the [requested] information will advance its consideration of the possible legislation." *Mazars*, 140 S. Ct. at 2036. "[D]etailed and substantial . . . evidence of . . . legislative purpose" is "particularly" important when the legislative body "contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency" or—in this case—the Judiciary. *Mazars*, 140 S. Ct. at 2036.

¶13 Finally, in the context of considering the burden an interbranch subpoena imposes, courts must "carefully

scrutinize[]" such subpoenas, "for they stem from a rival political branch" with "incentives to use subpoenas for institutional advantage." *Mazars*, 140 S. Ct. at 2036.

Justiciability of the Controversy

¶14 With these principles in mind, we turn first to the Legislature's first Motion to Dismiss. The Motion makes three points, which in the aggregate argue that the case does not present a justiciable controversy as the matter is vested exclusively with the Legislature and, because the subpoenas pertain to the Judicial Branch, the Court has an insurmountable conflict of interest that requires it to refrain from adjudicating the dispute. The Legislature concludes that this Court "must refuse to further interfere with a duly authorized legislative investigation" and "has no authority but to dismiss this Petition." McLaughlin responds that in the constitutional system of checks and balances, implemented through Montana statutes and rules, the Legislature enacts statutes, the legislative subpoena power must be "adjunct to the legislative process," and the judiciary determines the permissible scope and enforcement of subpoenas.

¶15 We addressed the conflict-of-interest argument in our Opinion and Order denying the Legislature's motion to disqualify the members of this Court from presiding in this proceeding. *McLaughlin I*, ¶¶ 10-14. We do not address it further.

¶16 We touched also in that opinion on the justiciability issue, noting the "exclusive constitutional duty and authority of this Court to 'adjudicate the

nature, meaning, and extent of applicable constitutional, statutory, and common law and to render appropriate judgments thereon[.]'" *McLaughlin I*, ¶ 15 (quoting *Larson v. State*, 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241 (citing Mont. Const. arts. III, § 1, and VII, § 1)). The Legislature takes issue with the applicability of this principle, maintaining that when the judicial branch of government is itself the subject of the Legislature's action, the conflict is one directly between the branches of government and must be handled exclusively through negotiation between the branches.

¶17 The judiciary has an unflagging responsibility to decide cases and controversies, even those that involve the authority of a coordinate branch of government or the courts' own functions. *See Coate v. Omholt*, 203 Mont. 488, 662 P.2d 591 (1983) (declaring unconstitutional two statutes that directed the State Auditor to withhold a month's pay from district court judges and supreme court justices if decisions were not reached or opinions written within certain procedural and time constraints set by statute); *see also Gabler v. Crime Victims Rights Bd.*, 897 N.W.2d 384, 386 (Wis. 2017) (Wisconsin Supreme Court declaring unconstitutional a law authorizing a special executive branch board to investigate and adjudicate complaints against the judiciary, including the ability to seek equitable relief and forfeiture against judges); *State ex rel. Kostas v. Johnson*, 69 N.E.2d 592, 595 (Ind. 1946) ("A court of general jurisdiction, whether named in the Constitution or established in pursuance of the provisions of the Constitution, cannot be directed, controlled, or impeded in its functions by any of the

other departments of the government. The security of human rights and safety of free institutions require the absolute integrity and freedom of action of courts.") (citation omitted). Though not a frequent subject of litigation, disputes over the scope of legislative subpoena power are squarely within the authority of the courts. *See, e.g.*, *Mazars*, *Eastland*, *McGrain*, *Watkins*.

¶18 What is more, this Court on several occasions has been called upon to resolve disputes about its own authority. *See, e.g.*, *Matter of McCabe*, 168 Mont. 334, 544 P.2d 825 (1975) (holding that the Supreme Court, not the Legislature, had authority to set standards for admission to the bar and conduct of members of the bar); *Goetz v. Harrison*, 154 Mont. 274, 462 P.2d 891 (1969) (entertaining an original proceeding filed against all members of the Supreme Court to determine the constitutionality of the Montana statutory "diploma privilege" for admission to the bar and to consider the Court's corresponding rule under its "exclusive" and "inherent jurisdiction, in all matters involving admission of persons to practice law in this state"). Even when a constitutional provision is non-self-executing because it commits authority to the Legislature, "the courts, as final interpreters of the Constitution, have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution . . . .'" *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 18, 326 Mont. 304, 109 P.3d 257 (quoting *Robb v. Connolly*, 111 U.S. 624, 637, 4 S. Ct. 544, 551 (1884)). *See also Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, ___ P.3d ___ (citing *Columbia Falls Elem. Sch. Dist. No. 6*, ¶ 18) and ¶ 56

(Rice, J., concurring) (observing that, "since the early 1800s, 'the idea that the Supreme Court had the power to pass upon constitutional questions and that its decisions were final and binding upon the other two departments of government ha[s] been . . . widely accepted'") (citation omitted); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is.").

¶19 The Legislature cites *Mazars* and other federal cases for the proposition that "negotiation and compromise" are the singular path for resolving conflicts in subpoena matters between branches of government. To be sure, an "interbranch conflict" presented by a legislative subpoena "implicate[s] weighty concerns regarding the separation of powers." *Mazars*, 140 S. Ct. at 2035. The cited authority does not, however, support the Legislature's position that there can be no judicial solution when a controversy involves legislative subpoenas to a judicial branch official. The Supreme Court's decisions on Congressional subpoenas make clear that the courts have a role regardless of the office or the government stature of the subject to whom the subpoena pertains. *E.g.*, *Mazars*, 140 S. Ct. at 2035 ("[S]eparation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held."). The *Mazars* Court harkened the two-century tradition of the political branches "resolv[ing] information disputes using the wide variety of means that the Constitution puts at their disposal."

Mazars, 140 S. Ct. at 2035. But it did so in preface to its prescription of the "balanced approach" the courts must take when the branches reach impasse, accounting for "both the significant legislative interests of Congress and the 'unique position' of [in that case] the President." *Mazars*, 140 S. Ct. at 2035. The "practice of the government" to avoid such interbranch confrontation informs the courts' consideration of the controversy but does not abrogate their obligation to decide it. Although the *Mazars* Court examined Congressional subpoenas to the Executive, its articulated "balanced approach" extends logically to subpoenas to the judicial branch, which raise similar "interbranch confrontation" concerns.

Legislative Purpose and Scope of Subpoenas

¶20 We accordingly turn to the merits of the controversy presented, whether the stated legislative purposes of the subpoenas for the Court Administrator's records are "related to, and in furtherance of, a legitimate task of the [Legislature]," *Watkins*, 354 U.S. at 187, 77 S. Ct. at 1179, and whether, consistent with the separate powers the Constitution confers on each branch, the subpoenas seek only information within the scope of such a task.

¶21 We look to the purposes the Legislature identifies.[3] The April 8 subpoena to Director Giles did not identify

[3] The Department of Administration takes no position on the legal issues raised in this case but offers a proposed framework for identifying potential exclusions and redactions and its assurance that it "will await an order from the Court before releasing any documents in response to the subpoenas."

any purpose for which the subpoena was issued. The April 14 subpoena to McLaughlin stated:

> This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

In its Response to Petition for Original Jurisdiction, the Legislature provided the following purpose behind seeking McLaughlin's records:

> The purpose of the Select Committee is to investigate and determine whether legislation should be enacted concerning: the judicial branch's public information and records retention protocols; members of the judicial branch improperly using government time and resources to lobby on behalf of a private entity; judges' and justices' statements on legislation creating judicial bias; and the courts' conflict of interest in hearing these matters.

Finally, the Legislature's Motion to Dismiss contains this list of its identified purposes:

> an investigation into whether members of the Judiciary and the Court Administrator have deleted public records and information in

> violation of state law and policy; whether the Court Administrator has performed tasks for the Montana Judges Association during taxpayer funded worktime in violation of law and policy; and whether current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before courts for decision.

We distill these variously stated purposes to three principal categories: (1) the Judicial Branch's records retention policy and practices; (2) the Court Administrator's use of state e-mail to communicate with judges and the Montana Judges Association about matters pending before the Legislature; and (3) the statements and conduct of members of the judiciary.

¶22 Records Retention

¶23 We address the asserted legislative purpose relating to judicial records retention first.

¶24 The subpoenas' proffered legislative purpose here is problematic. For one, though it reframed the purpose after McLaughlin filed this action, the Legislature indicated in the April 14 subpoena to McLaughlin that it sought "investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy." Addressing alleged violations of existing law is an enforcement matter entrusted to the executive, not to the legislative, branch of government; it is therefore not a valid legislative purpose. *Watkins*,

354 U.S. at 187, 77 S. Ct. at 1179 (holding that the legislative branch is not "a law enforcement or trial agency" as those "are functions of the executive and judicial departments").

¶25 Relying on a legislative interest relating to judicial branch records retention is further troubling in light of the *Mazars* considerations. *Mazars* directs us to examine the "nature of the evidence" establishing that the subpoena advances the purported legislative purpose. *Mazars*, 140 S. Ct. at 2036. The Legislature points to evidence that the Court Administrator did not retain access to the e-mails later sought through the Department of Administration. This is not, however, a "violation of state law and policy," as the subpoenas allege.

¶26 Montana statutes address the management of public records and public information by public officers and agencies, which include the judicial branch of state government. Sections 2-6-1001 (purpose of public records chapter), 2-6-1002(10) (defining "public agency"), 2-6-1002(12) (defining "public officer"), MCA. The statute defines "public record" as:

> public information that is:
>
> (a) fixed in any medium and is retrievable in usable form for future reference; and
> (b) designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee.

Section 2-6-1002(13), MCA. "Public information" does not include "confidential information that must be

protected against public disclosure under applicable law." Section 2-6-1002(11), MCA.

¶27 Section 2-6-1012(1)(e), MCA, requires the Judicial Branch to establish a records management plan.[4] The office of the Clerk of Court, an independent elected position, maintains Judicial Branch records, as designated by law. Section 3-2-402(1)(a), MCA. Current Judicial Branch policies do not require Judicial Branch members to save e-mails or retain access to their electronic communications. *See* Montana Judicial Branch Administrative Policies 1530, Electronic Mail (Effective July 1, 2002); Montana Judicial Branch Administrative Policies 1510, Computer Use (Effective June 6, 2017) (both available at https://courts.mt.gov/cao/CourtServices/hr/policies) (last accessed 7/7/2021). As Judicial Branch e-mail messages are not "designated for retention by the . . . judicial branch," § 2-6-1002(13)(b), MCA, its records management plan, § 2-6-1012(1)(e), MCA, or any other provision, their retention is not required by statute or administrative policy and neither McLaughlin nor any other Judicial

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[4] Unlike the legislative branch, the statute allows—but does not require—the Judicial Branch to seek assistance with the plan from "the secretary of state, the state records committee, the local government records committee, and the Montana historical society." Section 2-6-1012(1)(e), MCA. The Judicial Branch 8th Information Technology Strategic Plan, adopted by its Commission on Technology on November 5, 2020, includes among its objectives to "[r]eview and develop retention policies and procedures for electronic work products based on best practices." 2021 Goal 1, Objective 1.c. at 9. https://courts.mt.gov/external/cao/docs/it-strategic-plan.pdf (https://perma.cc/2U7J-K6GC) (last accessed 7/7/2021).

Branch member was required by state law or policy to retain access to e-mail messages.

¶28 The Legislature unquestionably may seek data from the court administrator "relating to the business transacted by the courts." Section 3-1-702(2), MCA. In light of the statutes and Judicial Branch policies explained above, however, the Legislature has not "adequately identif[ied] its aims and explain[ed]" the connection between the subject of its investigation—alleged violations of state law and policy—and the evidence offered—unretained e-mails. Investigating potential violation of unspecified state law or policy is not a valid legislative purpose to justify the subpoenas. *Mazars*, 140 S. Ct. at 2036 (citing *Watkins*, 354 U.S. at 201, 205, 77 S. Ct. at 1186, 1188, as "preferring such [detailed and substantial] evidence over 'vague' and 'loosely worded' evidence of [legislative] purpose").

¶29 Importantly, "other sources could reasonably provide" information that would be relevant for understanding Judicial Branch records retention, such as the branch's publicly available e-mail policy, *see* Montana Judicial Branch Administrative Policies 1530, Electronic Mail (https://courts.mt.gov/cao/CourtServices/hr/policies) (effective July 1, 2002), public statements by members of the Judicial Branch, or inquiries to the relevant Judicial Branch and information technology staff. *See Mazars*, 140 S. Ct. at 2035-36. The Legislature has not suggested that the Judicial Branch's policies are not available to the public,[5] that its efforts to seek information on Judicial Branch policy

[5] *See* https://courts.mt.gov/cao/CourtServices/hr/policies.

and practice have been rebuffed, or that it is otherwise incapable of understanding Judicial Branch retention practices and policies without resorting to a subpoena of Judicial Branch electronic correspondence.

¶30 Neither has the Legislature—either in its subpoenas or in its representations offered in the course of litigation—"adequately identif[ied] its aims and explain[ed]" how the release of thousands of unredacted Judicial Branch e-mails will "advance its consideration" of possible legislation regarding records retention. *Mazars*, 140 S. Ct. at 2036. It is undisputed that, pursuant to Judicial Branch policy, branch members regularly clear correspondence from their computers, though the messages may be retained by the Department of Administration.[6] The Legislature also has not demonstrated that the subpoenas' blanket demands for the contents of every unretained message in the given time period is "no broader than reasonably necessary to support [a] legislative objective." *Mazars*, 140 S. Ct. at 2036.

¶31 We therefore conclude that the Legislature's first proffered legislative purpose—an investigation into Judicial Branch members' e-mail retention practices as an alleged violation of state law or policy—is not a

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[6] A significant amount of discussion about pending cases is conducted by e-mail and protected by judicial privilege. The State of Montana retains deleted messages within the Outlook system used by the Judicial Branch. However, once the "deleted items" box is emptied, these e-mails cannot be retrieved and must be obtained through a retrieval process by the Department of Administration. The Legislature's April 8 subpoena to Director Giles indicates its awareness of this process.

legitimate purpose of the Legislative Branch of government. It is based on an unsubstantiated premise that Judicial Branch members are required to retain all e-mails and fails to show that compelling production of thousands of unredacted Judicial Branch messages, rather than undertaking other forms of inquiry, will advance its consideration of legislation on the matter of a judicial records retention policy. The Legislature's subpoenas cannot be supported by this alleged legislative purpose.

¶32 Use of State Resources to "Lobby"

¶33 The Legislature identifies a second legislative purpose in its response to the Petition as seeking to determine "whether the Court Administrator has performed tasks for the Montana Judges Association during taxpayer funded worktime in violation of law and policy" and "members of the judicial branch improperly using government time and resources to lobby on behalf of a private entity." This purpose was not expressed in either subpoena.

¶34 Montana long has had a statutory code of ethics governing the conduct of public officers and employees. *See* Tit. 2, ch. 2, pt. 1, MCA. "State officers" are defined under that code to include elected officers and directors of the executive—not of the legislative or judicial—branch of state government. Section 2-2-102(12), MCA. But all state employees, including those in the Judicial Branch, are included within the definition of "public employee." Section 2-2-102(7)(a), MCA ("any temporary or permanent employee of the state"). The code of ethics prohibits public employees from using public time or equipment for the

"employee's private business purposes" or to support or oppose political committees, candidates, or ballot issues (with certain exceptions specified for the latter). Section 2-2-121(2)(a), (3), MCA. It also restricts public employees from "lobbying, as defined in 5-7-102, on behalf of an organization . . . of which the . . . public employee is a member while performing the . . . public employee's job duties." Section 2-2-121(6), MCA. Executive branch officers—the Commissioner of Political Practices (Commissioner), the county attorneys, and the Attorney General—are responsible, respectively, for investigating and for enforcing a state employee's alleged violations of the ethics code. Once again, the Legislature has alleged a violation of existing law, investigation of which is not within the purview of that branch of government.

¶35 More, the "nature of the evidence" offered by the Legislature demonstrates that it has not "adequately identif[ied] its aims and explain[ed]" how the acts alleged would constitute a legal violation as the subpoena asserts. *Mazars*, 140 S. Ct. at 2036. Section 5-7-102(11)(b), MCA, excludes actions of public officials acting in their governmental capacities from the definition of "lobbying." As public officials acting in their governmental capacities, district court judges therefore are not "lobbying" when they inform members of the Legislature of how proposed legislation will affect the function of the Judicial Branch. The statute further excludes from the definition of "lobbyist" "an individual working for the same principal as a licensed lobbyist who does not have personal contact involving lobbying with a public official or the legislature on behalf of the principal." Section 5-7-102(12)(b)(ii), MCA.

To the extent the court administrator coordinates or facilitates district judges' contacts with legislators, her activity is not lobbying.[7]

¶36 To the same point, Judicial Branch policy does not prohibit these activities. Its E-mail Policy 2.2 prohibits use of "the state e-mail system for: 1) 'for-profit' activities, 2) 'non-profit' or public, professional or service organization *activities that aren't related to an employee's job duties*, or 3) extensive use for private, recreational, or personal activities." https://courts.mt.gov /cao/CourtServices/hr/policies (emphasis added). As the liaison between the Judicial Branch and the Legislature, the Court Administrator acts within her job duties when she coordinates contacts between district court judges and legislators or conducts a poll to allow district judges, through the Montana Judges Association, to provide the Legislature with relevant information regarding how proposed legislation will affect Judicial Branch functions. *See* § 3-1-702(10), MCA (providing that the Court Administrator's duties include those "that the supreme court may assign"). It is undisputed that members of coordinate branches, including elected officials, department heads, and other appointed officials, routinely respond to legislative requests on matters related to their department or branch. In that same vein, Rule 3.1 of the Montana Code of Judicial Conduct allows judges to use court "premises, staff, stationery, equipment, or other

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[7] The Montana Judges Association does register as a principal, and its registered lobbyist files lobbying reports of his activity before the Legislature. *See* https://lobbyist-ext.mt.gov/LobbyistRegistration /public/searchRegistry/home (last accessed 7/7/2021).

resources" for "incidental use for activities that concern the law, the legal system, or the administration of justice," because "[j]udges are uniquely qualified to engage in the extrajudicial activities that concern" such matters. Mont. Code of Jud. Conduct 3.1 & Comment 1.

¶37 Because the Legislature has not articulated a legitimate legislative purpose related to lobbying and predicates it on an erroneous legal premise, this suggested purpose is insufficient to support the legislative subpoenas at issue.

¶38 Statements by Judges

¶39 The Legislature's third proffered legislative purpose supporting the subpoenas relates to the statements and conduct of members of the judiciary—in particular, the practice by district court judges of responding to polls used by the Montana Judges Association to determine whether to take a policy position on proposed legislation affecting the Judicial Branch. The Legislature suggests that such responses indicate improper judicial "bias" or what it terms "pre-judging" with regard to pending legislation that, if enacted and subsequently challenged in court, judges could potentially be asked to determine as a matter of constitutional law or statutory interpretation.

¶40 Article VII, section 11, of the Montana Constitution addresses the removal and discipline of judges. It provides in its entirety:

> (1) The legislature shall create a judicial standards commission consisting of five persons and provide for the appointment thereto of two

> district judges, one attorney, and two citizens who are neither judges nor attorneys.
>
> (2) The commission shall investigate complaints, and make rules implementing this section. It may subpoena witnesses and documents.
>
> (3) Upon recommendation of the commission, the supreme court may:
> (a) Retire any justice or judge for disability that seriously interferes with the performance of his duties and is or may become permanent; or
>
> (b) Censure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform his duties, violation of canons of judicial ethics adopted by the supreme court of the state of Montana, or habitual intemperance.
>
> (4) The proceedings of the commission are confidential except as provided by statute.

Pursuant to this provision, the Legislature has provided for the Judicial Standards Commission and set staggered terms for its members. Sections 3-1-1101, -1102, MCA. Also in accordance with the limited authority conferred by this section, the Legislature has enacted statutes prescribing the confidentiality of the Commission's proceedings until the Commission finds good cause for a hearing on a complaint against a judge or the judge waives confidentiality. Sections 3-1-1121, -1122, MCA. The Commission must, on or before September 1 of each year preceding a regular legislative session, submit a report to the Legislature of complaints against judges, the status of the

complaints, and all dispositions during the preceding biennium. Sections 3-1-1126, 5-11-210, MCA.

¶41 "The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law." Mont. Const. art. VII, § 1. The Constitution bestows the Supreme Court with general supervisory control over all other courts and vests authority in the Supreme Court for the discipline or removal from office of "any justice or judge." Mont. Const. art. VII, §§ 2(2), 11(3). Although the Legislature is required to establish the Judicial Standards Commission, Article VII, section 11, delegates implementation of its provisions to the Commission by rulemaking and confers upon the Legislature only the development of provisions regarding confidentiality of the Commission's proceedings. *Compare* Mont. Const. art. VII, § 8(2) (providing for nominees for judicial vacancies to be selected broadly "in the manner provided by law"). *See Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, ___ P.3d ___. To maintain the independence of the judiciary, the Constitution commits the oversight of judges to the judicial branch of government. *See Coate*, 203 Mont. at 497-98, 662 P.2d at 596-97 (holding that neither Art. VII, § 11, nor Art. VIII, § 12 (requiring the Legislature to "insure strict accountability" of money spent by the state) conferred authority on the Legislature regarding judges' timely performance of judicial duties, which was exclusively and inherently within the power of the judiciary). The Legislature's stated purpose of "[i]nvestigation into whether members of the Judiciary . . . [have acted] in violation of state law and policy" thus does not pertain to an

"area[] in which it may potentially legislate or appropriate." *Barenblatt*, 360 U.S. at 111, 79 S. Ct. at 1085. The Judicial Standards Commission, not the Legislature, investigates allegations of judicial misconduct. Mont. Const. art. VII, § 11(2). Any concern about a judge or justice "pre-judging" a case or making statements about matters pending or that could come before the courts would be within the exclusive authority of the Judicial Standards Commission and the Supreme Court. *See* Mont. Code Jud. Cond. Rule 2.11(A) ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.").

¶42 Again, the Legislature fails to "adequately identif[y] its aims and explai[n]" how the "the evidence offered" connects to the legislative purpose it puts forth. *Mazars*, 140 S. Ct. at 2036. The Legislature asserts that district court judges engage in "pre-judging" amounting to "bias" when they respond to polls used by the Montana Judges Association to determine whether to take a position, as a matter of policy, on proposed legislation affecting the function of the judiciary.

¶43 The Legislature does not define its use of the term "pre-judging." Presumably, it implies a scenario in which a judicial officer reaches a conclusion on a pending or potential case before fully considering the law and facts presented through appropriate filings. This scenario, however, does not arise from a judge

sharing his or her view of how proposed legislation will affect the function of the judiciary, information that—provided by individuals most knowledgeable of the day-to-day functions of the judiciary—is critical to informed legislative efforts. The Montana Judges Association's public testimony before the Legislature to advise it of the Judiciary's policy position on how a proposed measure will impact operation of the courts is to be distinguished from the role of a judge when called upon to determine the constitutionality of a statute once enacted. *See, e.g., Brown*, ¶ 50 (noting, in upholding constitutionality of legislation abolishing the Judicial Nomination Commission, that "it is not the function of this Court to determine which process we think is the better process for making judicial appointments—it is to determine whether the process prescribed by SB 140, which is presumed to be constitutional, complies with the language and constitutional intent of Article VII, Section 8(2)" of the Montana Constitution);[8] *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 26, 382 Mont. 256, 368 P.3d 1131 (noting that, "in the context of the constitutional analysis of [an] Act [passed by the Legislature], '[o]ur role is not to second guess the prudence of a legislative decision.'" (quoting *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 34, 353 Mont. 265, 222 P.3d 566). The sworn obligation of every judge is to render decisions based solely on the law and the facts of a given case. *See* Mont. Code Jud. Cond. 2.4(A)-(B) ("A

[8] Notably, this was the same piece of legislation that many respondents to the Montana Judges Association polling giving rise to some of the Legislature's concerns had recommended against enacting, as a matter of policy.

judge shall not be swayed by public clamor or fear of criticism" or allow "family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."). Should a judge's ability or willingness to do so be called into question because of the judge's personal bias or statements, rules of this Court provide an avenue for disqualification or voluntary recusal. *See* § 3-1-805, MCA; Mont. Code Jud. Cond. 2.12.

¶44 Neither does the Legislature specify what it means by "bias." In *Republican Party v. White*, the United States Supreme Court provided useful insight into the matter when it considered a Minnesota rule of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues. *Republican Party v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002). Proponents of the law asserted that it furthered a compelling government interest in protecting the impartiality, or appearance of impartiality, of the state judiciary. *White*, 536 U.S. at 775, 122 S. Ct. at 2535. Before ultimately ruling that the provision was an unconstitutional restriction on protected First Amendment speech, the Court addressed the possible meanings of the word "impartiality" in the context of statements by members of the state judiciary on disputed legal and political issues:

> One meaning of "impartiality" in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it

guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used.

. . .

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. . . . A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

. . .

A third possible meaning of "impartiality" (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when issues arise in a pending case.

White, 536 U.S. at 775-78, 122 S. Ct. at 2535-36 (quotations and citations omitted).

¶45 In using the term "bias," the Legislature does not indicate that it wishes to investigate whether any judges had developed views on legal matters, the absence of which the United States Supreme Court found to be not only impossible but an undesirable indication of incompetence. *See also* Mont. Code Jud. Cond. 2.5 Comment 1 ("Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office."). Neither has the Legislature explained how the practice of responding to Montana Judges Association polls could suggest partiality for or against any given party or a lack of open-mindedness by district court judges. Failing to show any nexus between the target of the subpoenas—polling of district court judges on their policy positions on proposed legislation that could affect the judiciary—with the supporting allegations of "pre-judging" or "bias," the Legislature has not "adequately identif[ied] its aims and explain[ed]" how the information sought relates to a valid legislative purpose or to any matter not constitutionally committed to the oversight of the Judicial Standards Commission. *Mazars*, 140 S. Ct. at 2036. Perhaps more importantly, the Legislature's asserted legislative purpose of addressing the "serious nature" of conducting such polls is undercut by the First Amendment principles at play. And in fact, the practice the Legislature seeks to investigate is encouraged by established canons of judicial conduct that recognize judges' "special expertise" in matters concerning the

law, the legal system, and the administration of justice and allow judges expressly to "share that expertise with governmental bodies and executive or legislative branch officials." Mont. Code of Jud. Conduct 3.2(A) & Comment 1.

¶46 Examining the two subpoenas insofar as they concern conduct of the Court Administrator or of other Judicial Branch employees, the Legislature has failed to provide a single legitimate legislative purpose tied to matters "concern[ing] a subject on which 'legislation could be had.'" *Eastland*, 421 U.S. at 506, 95 S. Ct. at 1823 (quoting *McGrain*, 273 U.S. at 177, 47 S. Ct. at 330). The asserted legislative purpose—both expressed in the April 14 subpoena and in the Legislature's filings with the Court—is to determine whether individuals violated the law. Enforcement of the law is not a "legitimate task" of the legislative function. *Watkins*, 354 U.S. at 187, 77 S. Ct. at 1179. More pointedly, the conduct the Legislature alleges does not, as a matter of law, constitute the purported legal violations it uses to support its asserted legislative purposes. And there is, of course, no legislative "power to expose for the sake of exposure.'" *Mazars*, 140 S. Ct. at 2032 (quoting *Watkins*, 354 U.S. at 200, 77 S. Ct. at 1185).

¶47 Finally, beyond the failure of a legitimate legislative purpose, the subpoenas sweep far too broadly. The subpoenas compel production of ***all*** of McLaughlin's e-mails within the designated time frame, not just those limited to the purposes the Legislature now articulates. The subpoenas' breadth is vast; they demand information without limitation to

"public records" or "public information" and encompass all personnel-related matters, which may include confidential medical information and potential employee disciplinary matters; information regarding Youth Court matters, which are confidential by law—§§ 41-5-215 through -221, MCA; information regarding confidential matters before the Judicial Standards Commission; information in which third parties have protected privacy interests, such as disability accommodations requested by members of the public; information about potential on-going security risks to individual judges, including communications with law enforcement; and confidential information related to ongoing cases and judicial work product.[9] In sum, the subpoenas are sweepingly overbroad and exceed the legislative power to "obtain[] information on matters that fall within its proper field of legislative action." Mason's Manual of Leg. Procedure, § 797.7 at 567.

¶48 In addition, the subpoenas fail to safeguard the process that ordinarily attends the issuance of such compelled process. As observed, the first subpoena was served on Director Giles only and demanded production within a twenty-four-hour period. Contrast this with Rule 45(c) and (d) of the Montana Rules of Civil

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[9] *See Nelson v. City of Billings*, 2018 MT 36, ¶¶ 20-21, 390 Mont. 290, 412 P.3d 1058 (citing Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, pp. 1678; Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, Vol. VII, pp. 2499-500 (in which the delegates discussed that the term "public bodies" under the right to know provision could not reasonably be read to allow judicial deliberations to become public)).

Procedure, which requires service of a subpoena "no less than 10 days before the commanded production of [information]" (M. R. Civ. P. 45(c)(1)); requires the party responsible for issuing the subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" (M. R. Civ. P. 45(d)(1)); affords opportunity for the subject of the subpoena to object (M. R. Civ. P. 45(d)(2)(B)); and requires the subpoena to be quashed or modified if it "requires disclosure of privileged or other protected matter, if no exception or waiver applies" (M. R. Civ. P. 45(d)(3)(A)(iii)). Director Giles, in turn, failed to consider the significant confidentiality and privacy interests implicated when she began her blanket release of the entirety of McLaughlin's e-mails without giving McLaughlin notice or an opportunity to review the materials and raise any such concerns or seek protection of such interests in a court of law. These basic safeguards guarantee minimum standards of due process and should have been understood and respected by both the legislative and executive branch officials involved. *See Labair v. Carey*, 2017 MT 286, ¶ 20, 389 Mont. 366, 405 P.3d 1284 (recognizing notice and opportunity to be heard as "the hallmarks of due process" and noting that "[n]otice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests") (internal citations and quotations omitted); *Dorwart v. Caraway*, 1998 MT 191, ¶ 93, 290 Mont. 196, 966 P.2d 1121 (stating, "[i]n general, due process requires notice which, under the circumstances, is reasonably calculated to inform interested parties of the action and afford them an opportunity to present objections") (citations omitted).

¶49 In short, the two subpoenas fail to offer evidence that would "establish that a subpoena advances a valid legislative purpose," seek information that "other sources could reasonably provide," are far "broader than reasonably necessary" to serve the stated goals, and jeopardize the protected constitutional rights of others. *Mazars*, 140 S. Ct. at 2035-36. *Mazars* instructs us to "carefully scrutiniz[e]" subpoenas that do "not represent a run-of-the-mill legislative effort" but originate from a "political branch" with "incentives to use subpoenas for institutional advantage" over another independent branch. *Mazars*, 140 S. Ct. at 2034, 2036. These concerns undoubtedly are implicated here.

¶50 This is not to say that the Court Administrator is insulated from revealing information to the legislative branch of state government. Far from it. As noted, the Legislature has enacted statutes that require her to submit regular reports to the Legislature regarding budgetary matters, as well as requested information about "business transacted by the courts." Section 3-1-702(2), MCA. In addition, the Legislature has vested its Legislative Auditor with broad authority to conduct financial and compliance audits of all agencies and to examine their "books, accounts, activities, and records, confidential or otherwise[.]" Sections 5-13-303, -309, MCA. The Legislative Auditor's authority encompasses review of the Judicial Standards Commission. Section 3-1-1125, MCA. The Legislature thus has provided for alternative means by which to obtain information and to determine accountability of administrative matters in the Judicial Branch. *See Mazars*, 140 S. Ct. at 2035 (a legislative body may not

compel information from a coequal branch of government through subpoena "if other sources could reasonably provide" the necessary information).

¶51 Is there nonetheless, as the Legislature suggests, a place for discussion among the branches if it desires more dialogue with the Court or information from the Judicial Branch? Likely so. But that is not what this Petition is about and not what the Legislature suggested when it resorted to direct subpoena without opening any such discussion with the Judicial Branch and without even giving McLaughlin notice of the first subpoena. Inquiries for information through these means might have averted interbranch confrontation—and could in the future—had the Legislature pursued a path of "negotiation and compromise" before it subpoenaed the broad swath of McLaughlin's records at issue without any notice to the Judicial Branch.

¶52 Finally, we address the Legislature's assurances that it will review and redact any personal, confidential, or otherwise protected information and will not publicly disclose such information. Here again, the balancing of interests to protect individual privacy rights and other confidential information is exclusively a function of the courts. For example, Montana's Constitutional Convention delegates presumed the judiciary would conduct the balancing of constitutional interests such as the right to know (Art. II, § 9) and right to privacy (Art. II, § 10). *See* Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, pp. 1671-72, 1677 (showing that the delegates rejected an amendment that would have allowed the Legislature to "set the situations in which

individual privacy exceeds the merits of public disclosure" because they "had faith in our courts to strike this balance" and "did not feel that this particular provision should be left to the Legislature to interpret").

¶53 Indeed, as recently explained in *Comm'r of Political Practices*, ¶ 15, "[w]henever a government entity seeks to exercise the power of the state to compel an individual . . . to relinquish documents or to appear for examination, due process concerns are necessarily implicated, which in turn necessarily implicates judicial oversight." *See also Bozeman Daily Chronicle v. City of Bozeman Police Dep't*, 260 Mont. 218, 229, 859 P.2d 435, 442 (1993) (recognizing that the "proper method" to ensure protection of rights to individual privacy and to public participation is for the courts to conduct *in camera* review of the documents allegedly implicating privacy interests); *Krakauer v. State*, 2016 MT 230, ¶ 39, 384 Mont. 527, 381 P.3d 524 (noting that "*in camera* review is particularly appropriate when the interests of third parties are involved" and where the records are "extensive"); *Crites v. Lewis & Clark County*, 2019 MT 161, ¶ 27, 396 Mont. 336, 444 P.3d 1025 (holding that, "[b]ecause the judiciary has authority over the interpretation of the Constitution, it is the courts' duty to balance the competing rights at issue in order to determine what, if any information, should be given to a party requesting information from the government," and thus "a district court always retains the authority to conduct an *in camera* review"); *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 23, 333 Mont. 331, 142 P.3d 864 (recognizing that balancing constitutional rights "demands that the court

determine the merits of publicly disclosing the discrete pieces of information at issue, which again involves a fact-specific inquiry, taking consideration of the particular context from which such disclosure will proceed").

¶54 Legislative subpoenas to a governmental officer reaching information that may be protected by law require that the matter first be submitted to a court for *in camera* review of the affected information and an order for any necessary redactions. *See, e.g., Billings Gazette v. City of Billings*, 2013 MT 334, ¶¶ 50, 53, 372 Mont. 409, 313 P.3d 129; *T.L.S. v. Mont. Advocacy Program*, 2006 MT 262, ¶ 25, 334 Mont. 146, 144 P.3d 818. Further, before releasing any requested records or seeking court review, the governmental officer should have the opportunity to review the requested records to determine if any constitutionally protected privacy rights could be implicated. *See City of Billings Police Dep't v. Owen*, 2006 MT 16, ¶¶ 28-29, 331 Mont. 10, 127 P.3d 1044 (holding that a government agency validly reviewed its records subject to a right to know request to determine what information and documentation should be kept confidential in order to protect the privacy rights of third party individuals; "denying administrative agencies the authority or jurisdiction to make the initial decision on whether its records may be examined, would put the 'right to know' out of reach for most citizens").

CONCLUSION

¶55 For the foregoing reasons, we conclude that the April 8, 2021, subpoena issued by the Chair of the Senate Judiciary Committee to Director Misty Ann

Giles and the April 14, 2021, subpoena issued by the Senate President and Speaker of the House to Court Administrator Beth McLaughlin do not serve a valid legislative purpose, are impermissibly overbroad, and therefore are invalid.

¶56 IT IS THEREFORE ORDERED that the Legislature's Motion to Dismiss the Petition is DENIED.

¶57 IT IS FURTHER ORDERED:

a. The April 8, 2021 subpoena to Montana Department of Administration Director Misty Ann Giles and the April 14, 2021 subpoena to Beth McLaughlin are QUASHED or, if withdrawn, not available for reissue.

b. Director Giles or anyone acting under the Department's or the Legislature's direction is permanently ENJOINED from further compliance with the subject subpoenas and prohibited from producing, re-producing, or disclosing any documents or information sought under the subject subpoenas;

c. The Montana Legislature and its counsel are permanently ENJOINED from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the subject subpoenas; and

d. The Montana Legislature is ORDERED to immediately return any materials produced

pursuant to the subject subpoenas, or any copies or reproductions thereof, to Court Administrator Beth McLaughlin.

The Clerk of this Court is directed to notify all counsel of record of the entry of this Opinion and Order.

DATED this 14th day of July, 2021.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ DONALD HARRIS
Hon. Donald Harris, District Judge,
sitting by designation for Justice Jim Rice

Justice Laurie McKinnon, specially concurring.

¶58 I write separately to underscore that quashing the Legislature's subpoenas is mandated by the constitutional doctrine of separation of powers. While the Court correctly states the law on many areas related to the Legislature's inherent investigatory power; here, the dispositive question is whether the Legislature seeks to investigate misconduct of the Judicial Branch—a question that raises serious separation of powers concerns. As it clearly does seek to investigate purported judicial branch misconduct, and this clearly does *not* constitute a "valid legislative purpose," I would decide this case upon that basis. By

addressing the particulars and substance of the subpoenas (public records and records retention, Opinion, ¶¶ 22-31; use of state resources to lobby, Opinion, ¶¶ 32-37; statements by judges, Opinion, ¶¶ 38-45; overbreadth, Opinion, ¶ 47, process attendant to issuing subpoenas, Opinion, ¶ 48) the Court, though correct on the law, obscures the mark. In doing so, the Court implicitly lends credibility and legitimacy to a legislative act which was blatantly designed to interfere with, if not malign, a coequal and independent branch of government. The constitutional doctrine of separation of powers does not tolerate the control, interference, or intimidation of one branch of government by another. Upon this basis I would quash the subpoenas.

¶59 I begin by addressing the Legislature's motion to dismiss. In its motion, the Legislature maintains it "has the power and the obligation to serve as the check and balance for the judicial branch of government, and the Legislature's investigation will not be further disrupted or disturbed." The Legislature maintains that the Court's April 11, 2021 order is "not binding on the legislative branch and will not be followed" and that this Court has no jurisdiction or authority over the Legislature's subpoena power. The Legislature advises it "will continue its investigation" and that "Acting-Director Giles will obey the legislative subpoena or be subject to contempt . . . ." The Legislature states that the Court must dismiss the Petition for "failure of jurisdiction."

¶60 The constitutional doctrine of separation of powers provides that, while vested with the power to make

laws, the Legislature cannot also execute and adjudicate them. The Legislature's argument is the same as that expressed by Parliament in seventeenth century England when Parliament declared that no court had jurisdiction to consider the exercise of its contempt power or the assertion of privilege when Parliament exercised its authority to investigate. "Almost from the beginning, both the House of Commons and the House of Lords claimed absolute and plenary authority over their privileges" and "[o]nly Parliament could declare what those privileges were or what new privileges were occasioned, and only Parliament could judge what conduct constituted a breach of privilege." *Watkins*, 354 U.S. at 188, 77 S. Ct. at 1179. It was thus inevitable that the power claimed by Parliament would be abused. Individual rights and an independent judiciary could not, and did not, exist in seventeenth century England. As Montesquieu warned, if the judicial powers were "joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator." 1 Charles de Secondat baron de Montesquieu, *The Spirit of the Laws* 182 (J. V. Prichard ed. & Thomas Nugent trans., D. Appleton and Co. 1900) (1748). And, as late as the mid-nineteenth century, absolute and plenary authority remained with Parliament. In 1835, the House of Commons appointed a select committee to inquire into the Orange Institution, a political-religious organization opposed to the Protestant religion and in favor of the growth of the British Empire. The House of Commons summoned a witness and demanded that he produce all the records of the organization. When he refused because the "letter-book" contained records of private

communications, the House of Commons committed him to Newgate Prison. *Watkins*, 354 U.S. at 191, 77 S. Ct. at 1181 (citing H. Comm. J. (1835) 533, 564-65, 571, 575).

¶61 Presently, Parliament uses Royal Commissions of Inquiry which are comprised of experts who closely adhere to the subject matter committed to them. "Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents." *Watkins*, 354 U.S. at 192, 77 S. Ct. at 1181. "Their success in fulfilling their fact-finding missions without resort to coercive tactics is a tribute to the fairness of the processes to the witnesses and their close adherence to the subject matter committed to them." *Watkins*, 354 U.S. at 192, 77 S. Ct. at 1181.

¶62 Until today, this Country's history was quite different from seventeenth century England. Never has a legislative branch of government presumed, until today, that its investigative authority to summon witnesses and documents was unrestrained, plenary, and unreviewable by the judicial branch for violations of fundamental rights and privileges. As there lingered direct knowledge of the evil affects of absolute power in England, Congress rarely utilized compulsory process, except when making inquiries concerning the elections or privileges of members to Congress. Indeed, the nation was over 100 years old before the Supreme Court heard its first dispute concerning the authority of Congress to subpoena witnesses pursuant to its inherent investigative authority. In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), the House of

Representatives authorized an investigation into the circumstances surrounding the bankruptcy of Jay Cooke & Company, in which the United States had deposited funds and a private real estate pool that was a part of the financial structure became the subject of the House's interest. The Supreme Court concluded that the subject matter of the inquiry was "in its nature clearly judicial and therefore one in respect to which no valid legislation could be enacted." *Watkins*, 354 U.S. at 194, 77 S. Ct. at 1182 (citing *Kilbourn*, 103 U.S. at 192, 195). Thus, "[u]nlike the English practice, from the very outset the use of contempt power by the legislature was deemed subject to judicial review." *Watkins*, 354 U.S. at 192, 77 S. Ct. at 1181.

¶63 Even before *Kilbourn* was decided there was a fundamental and basic understanding in every court of this country, and those coming before the courts, that the constitution is "the fundamental and paramount law" and the fundamental "theory of every [constitutional] government" is "that an act of the legislature, repugnant to the constitution, is void. . . . It is emphatically the province and duty of the judicial department to say what the law is" and "of necessity [to] expound and interpret that rule" to resolve any conflict of law. *Marbury*, 5 U.S. (1 Cranch) at 177. Montana, for anyone who did not know, follows *Marbury v. Madison*. "[T]his Court and its subordinate courts have the exclusive authority and duty to adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law and to render appropriate judgments thereon in the context of cognizable claims of relief." *Larson v. State*, 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241.

¶64 Montana is not seventeenth century England. This Court has the constitutional responsibility to assess whether the Legislature's subpoena infringes upon fundamental rights, violates privileges recognized by law, or is otherwise improper. Upon this basis, I would deny the Legislature's motion to dismiss.

¶65 We are asked to determine whether the Legislature's subpoena is within the legislative power, a question that raises serious separation of powers concerns about how a legislative committee may investigate the judicial branch. The Supreme Court stated in *Loving v. United States*, 517 U.S. 748, 757, 116 S. Ct. 1737, 1743 (1996), "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." Former Chief Justice Warren Burger wrote in his concurring opinion in *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61, 102 S. Ct. 2690, 2707 (1982), that "the essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." No branch of government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to exercise the constitutional power. *See Marbury*, 5 U.S. (1 Cranch) at 176-77. Montana's Separation of Powers provision is contained in Article III, Section 1, of Montana's 1972 Constitution. It provides:

> The power of the government of this state is divided into three distinct branches—legislative,

> executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

¶66 Constitutional powers, however, do not stand in isolation; rather, they are part of a complex structure in which each power acquires specific content and meaning in relation to the others. The Supreme Court often defines the scope and locates the limits of one constitutional power by identifying what is at the core of the other. *See*, *e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 722, 106 S. Ct. 3181, 3186 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."); *Myers v. United States*, 272 U.S. 52, 164, 47 S. Ct. 21, 41 (1926) ("[A]rticle II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices . . . ."); *Kilbourn*, 103 U.S. at 192, (the House "not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial.").

¶67 Our federal and state constitutions vest legislatures with an investigative power ancillary to their power to enact laws. The investigative power is "co-extensive with the power to legislate." *Quinn v. United States*, 349 U.S. 155, 160, 75 S. Ct. 668, 672 (1955); *Watkins*, 354 U.S. at 187, 77 S. Ct. at 1179

("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad."). Thus, the legislature can issue a subpoena in connection with any proper legislative function or concerning any area in which it can appropriately legislate. In *McGrain*, the Supreme Court stated that "[t]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function . . . . [I]t falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers . . . ." *McGrain*, 273 U.S. at 174, 47 S. Ct. at 328-29.

¶68 Determining the constitutional limits of the legislature's plenary lawmaking authority in the context of the separation of powers between the judicial and legislative branches must proceed on a case-by-case basis. *State ex rel. Veskrna v. Steel*, 894 N.W.2d 788, 801 (Neb. 2017). The overlapping exercise of constitutionally delegated powers focuses on the extent to which one branch is prevented from accomplishing its constitutionally assigned functions, balanced against the other branch's need to promote the objectives within its constitutional authority. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443, 97 S. Ct. 2777, 2790 (1977). Most importantly, a legislative subpoena is valid only if it is "related to and in furtherance of, a legitimate task of the [legislature]." *Watkins*, 354 U.S. at 187, 77 S. Ct. at 1179. The subpoena must serve a "valid legislative purpose," *Quinn*, 349 U.S. at 161, 75 S. Ct. at 672; it must "concern[] a subject on which 'legislation could be had.'" *Eastland*, 421 U.S. at 506, 95 S. Ct. at 1823 (quoting *McGrain*, 273 U.S. at 177, 47 S. Ct. at 330.)

¶69 The scope of legislative authority over the judicial branch is illustrated by several scenarios. First, the legislature has the power to define the substantive law that courts must apply; however, the judiciary must ensure that those laws do not violate individual rights. If the legislature disagrees with a court's decision it may enact a statute to reverse the effect of the decision, provided it does not change the result of the specific case. Thus, the legislature has substantial investigatory power to investigate the appropriateness of proposed new substantive laws. The legislature also has substantial, although not unlimited nor undisputed, power to regulate the procedures utilized by courts—the distinction being drawn between substantive and procedural rulemaking. Additionally, the legislature, through its control of the appropriations process, has substantial authority over both the judicial branch budget and the administrative structure by which the judicial branch is managed. Given the legislature's authority to create, modify, and fund the bureaucracy by which the judicial branch manages itself, the legislature has substantial authority over changes in the structure of the judicial branch and what changes should be made to advance its policy objectives.

¶70 Weighed against the legislature's authority to investigate is the equally weighty authority of the judicial branch to maintain its independence from the political influences of the legislature. The Framers clearly intended the courts would operate independently from the political and partisan interests and influences of both the executive and legislative branches. There must be a constitutional separation of

powers by recognizing that the legislature's investigatory authority does not extend to investigating the duties or the performance of judicial branch employees while performing judicial branch work-related functions. Other limitations on the legislature's inherent investigatory authority include Montana's Article II fundamental rights, our federal rights contained in the Bill of Rights, and other privileges and protections provided by law. The mere semblance of a legislative purpose would not justify an inquiry that violates individual rights, particularly our fundamental rights contained in Article II and the Bill of Rights. *Watkins*, 354 U.S. at 198, 77 S. Ct. at 1185. Furthermore, we cannot simply assume that a legislative inquiry, presumably premised upon public need, outweighs the individual rights of an unwilling witness who believes the subpoena is unlawful. To do so would be to abdicate the "responsibility placed by the Constitution upon the judiciary to insure that the [legislature] does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." *Watkins*, 354 U.S. at 198-99, 77 S. Ct. at 1185. Lastly, there is no legitimate legislative purpose to expose for the sake of exposure. The public is entitled to be informed concerning the workings of government, but that cannot be inflated into a power to expose at the cost of individual rights. *Watkins*, 354 U.S. at 200, 77 S. Ct. at 1185-86.

¶71 When addressing a separation of powers issue, it is important to understand the branches are to work together to secure a workable government for its citizens while respecting each branch's autonomy.

"Though faithful to the precept that freedom is imperiled if the whole of legislative, executive, and judicial power is in the same hands, The Federalist No. 47, pp. 325-26 (J. Madison) (J. Cooke ed. 1961), the Framers understood that a 'hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.'" *Loving*, 517 U.S. at 756, 116 S. Ct. at 1743 (quoting *Buckley v. Valeo*, 424 U.S. 1, 121, 96 S. Ct. 612, 683 (1976) (per curiam)). A key contention in Justice Robert H. Jackson's[1] concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 870 (1952) was that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." When one branch fails to afford proper deference to the authority and expertise of a coequal branch, the goal of securing a "workable government" becomes elusive. For instance, Chief Justice William H. Rehnquist deplored the failure of Congress to obtain the views of the judicial branch before enacting the Feeney Amendment of the PROTECT Act, which restricted a judge's authority to authorize downward departures from the federal Sentencing Guidelines and required de novo review of a judge's fact-based departures from the Guidelines. The Chief Justice wrote:

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[1] President Truman named Justice Jackson as chief prosecutor for the United States at the Nuremberg war-crimes trials, which necessitated his absence from work of the Supreme Court for nearly a year and a half.

> Obtaining the views of the Judiciary before the PROTECT Act was enacted would have given all members of Congress the benefit of a perspective they may not have been aware of on this aspect of the legislation and other aspects that deal with a delicate process that judges understand very well. Congress may well have enacted these provisions of the PROTECT Act in any event. But at least judges would have known that the process included a meaningful opportunity to have their views heard.
>
> . . .
>
> Judges, though, have a perspective on the administration of justice that is not necessarily available to members of Congress and the people they represent. Judges have, again by Constitutional design, an institutional commitment to the independent administration of justice and are able to see the consequences of judicial reform proposals that legislative sponsors may not be in a position to see. Consultation with the Judiciary will improve both the process and the product.[2]

¶72 In the spirit of integrating diverse powers of government and providing citizens with a "workable government," judges have frequently testified before the legislature on matters concerning judicial administration, representation of indigent defendants,

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[2] William H. Rehnquist, 2003 Year-End Report on the Federal Judiciary, pt. II (Jan. 1, 2004), https://www.supremecourt.gov/publicinfo/year-end/2003year-endreport.aspx.

habeas corpus appeals, exclusionary rule modifications, judge's use of legislative history, juvenile delinquency reform, criminal justice reform, and civil justice reform. Judicial input on matters that relate so integrally to the operation of the judicial branch clearly benefits both the courts and the legislature. Restricting these opportunities would have a serious adverse effect on the ability of the judicial and legislative branches to offer its citizens a workable government that integrates each branch's diverse powers.

¶73 I now turn to the legislative subpoenas issued in these proceedings.[3]

¶74 There can be no denying that the subpoenas issued here were for the purpose of investigating purported judicial misconduct. The mere semblance or whitewashing of a legislative purpose does little to conceal that the Legislature's primary goal is to find and expose violations by judges, if not the entire Judicial Branch, of ethical codes, state law, and state

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[3] The Supreme Court in *Mazars*, 140 S. Ct. at 2035 held that:

> separation of powers concerns are no less palpable here simply because the subpoenas were issue to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held—it is, after all, the President's information. Were it otherwise, Congress could sidestep constitutional requirements any time a President's information is entrusted to a third party—as occurs with rapidly increasing frequency.

Accordingly, no distinction can be drawn because the subpoena was issued to the judicial branch's Court Administrator. The subpoenas still seek Judicial Branch email communications.

policy—and, presumably, to cast the Judicial Branch in a nefarious light. The misconduct specifically alleged is that the judiciary and the Court Administrator deleted public records in violation of state law and policy; that a Montana Judges Association poll was conducted using state resources; and members of the judiciary were polled to "prejudge" legislation and issues which would come before the courts for decision. These are plainly allegations of misconduct, without any connection to a legitimate legislative purpose. Clearly a valid legislative purpose for issuance of an investigatory subpoena could be related to the judiciary's budget, appropriations, substantive civil and criminal law reform, court programs, pretrial programs, treatment courts, and the like. However, that is not the stated purpose of the legislative subpoena here. Moreover, the legislature is already provided information by the Court Administrator through § 3-1-702, MCA, which informs the legislature of judicial branch operations. That section provides that the Court Administrator will:

> (1) prepare and present judicial branch requests to the legislature, including the costs of the state-funded district court program;
> (2) collect, compile, and report statistical and other data relating to the business transacted by the courts and provide the information to the legislature on request.

Section 3-1-702, MCA, thus, is the statutorily created method by which the judicial branch informs the legislature about judicial branch operations so that the legislature may enact well-informed legislation. Section

3-1-702, MCA, helps facilitate the legislature's ancillary authority to investigate for purposes of developing law consistent with the legislature's policy and agenda.

¶75 The Legislature's ill-informed efforts to investigate the judiciary are also plainly incongruous to Montana's Constitution and the constitutionally created method for addressing the discipline and removal of judges for misconduct. Section 11 of the Judiciary Article provides for the removal and discipline of Montana judges and requires that the legislature create a Judicial Standards Commission. The purpose of the Judicial Standards Commission is:

> to protect the public from improper conduct or behavior of judges; preserve the integrity of the judicial process; maintain public confidence in the judiciary; create a greater awareness of proper judicial conduct on the part of the judiciary and the public; and provide for the expeditious and fair disposition of complaints of judicial misconduct.

Procedural Rules of the Judicial Standards Commission Rule 1(b). The Commission "shall investigate complaints" and has the constitutional authority to subpoena witnesses and documents. Mont. Const. art. VII, § 11(2). Consistent with the separation of powers, the Judicial Standards Commission is confined to investigating and making recommendations, with the final decision on removal and discipline of judges left to the Montana Supreme Court. Mont. Const. art. VII, § 11(2). The Constitution, therefore, commits judicial oversight over misconduct

to the judicial branch and limits the legislature's role to the creation of a commission. Mont. Const. art. VII, § 11. By allocating specific powers and responsibilities to the Commission fitted to the task, the Delegates to the 1972 Constitutional Convention created a process that is both effective and accountable for addressing judicial misconduct. Allegations of judicial branch misconduct, consistent with the separation of powers and the constitutionally created commission, are left to be handled by the judicial branch.

¶76 Here, the purpose of the Legislature's subpoena is to investigate purported Judicial Branch misconduct. The most important question is not whether the Legislature has put forth some vague statement of a legitimate legislative purpose, but rather whether the Legislature is investigating suspicions of judicial misconduct. Such investigations by the Legislature may constitutionally be pursued by filing a complaint with the Judicial Standards Commission. The independence of the judicial branch would be undermined if a legislative body, in its discretion, possessed the authority, outside of constitutional authority, to compel the production of judicial branch communications. "In the absence of express constitutional authority, the legal authority of the Legislative Branch to subpoena members of the [the judicial branch] cannot be coterminous with the broad scope of the legislature's constitutional authority to enact legislation or otherwise conduct hearings on matters of public interest." *Sullivan v. McDonald*, No. CV064010696, 2006 Conn. Super. LEXIS 2073, at *17-18 (June 30, 2006). Otherwise, the legislature's authority to compel testimony about purported judicial

misconduct would be limitless. These constitutional boundaries make sense. If members of the judiciary operated under the constant threat of having their work-related communications and judicial communications brought before the legislature, the judicial branch would be at serious risk of losing its identity as an independent branch of government. It remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another or impair another branch in the performance of its constitutional duties.

¶77 Finally, I must address the propriety of conducting the Montana Judges Association[4] poll to advise the Legislature on a matter that concerned the Judicial Branch. Informing a coequal branch of government about a matter that concerns judicial branch operations is part of each branch's obligation to provide for a "workable government." The poll informed the Legislature on a process about which judges have distinct and expert knowledge. Every judge in Montana's Judicial Branch has gone through a "selection" process—whether by appointment or election. The statute being considered by the Legislature altered the manner in which judges would be selected for interim vacancies. The survey sent to Montana judges asked whether the Judicial Branch, as a whole, thought the legislation was advisable. The poll generally expressed the view that the legislation, which affected the Judicial Branch, was not. The poll did not

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[4] The Montana Judges Association purpose is to provide an education forum for Montana judges.

seek a judicial decision concerning whether the proposed legislation was constitutional. The Legislature has failed to draw this important distinction between a judge's oath to make a fair and impartial judicial decision and advising the legislature on a matter that affects branch operations. As recognized by Chief Justice Rehnquist, judges' perspectives on a matter affecting the judicial branch will improve both the process and the product. Judges are able to see the consequences of legislative efforts at judicial reform, and their perspective on the administration of justice and communication to the legislature of their views helps ensure that Montana citizens have a workable government. The poll was an effort towards this end, not a prejudgment on the Legislature's newly enacted laws. To the extent any judge cannot fairly and impartially judge the constitutionality of a statute, they are obligated by both the Judicial Code of Ethics and their conscience to recuse themselves. Judges ask themselves these questions every day. The Legislature fails to grasp this distinction and continues to assert judicial misconduct, making a workable government for the people of Montana ever more elusive.

¶78 In conclusion, it seems fitting, given the circumstances of this litigation and its blemish upon Montana's history, that a final reference to *Marbury v. Madison* be had. "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury*, 5 U.S. (1 Cranch) at 176. The constitutional

doctrine of separation of powers is one such limit. It is upon this basis that I would resolve these proceedings.

/S/ LAURIE McKINNON

Justice Dirk Sandefur, concurring.

¶79 I concur completely in the Court's comprehensive analysis and holdings regarding the constitutional contours of the Legislature's constitutionally implied subpoena power in general, and the manifest invalidity of the subject legislative subpoenas in particular. I briefly write separately, however, to further concur in Justice McKinnon's special concurrence, as supplemental reasoning wholly consistent with the Court's main analysis and holdings, and to call-out what this recklessly ginned-up "crisis" is truly about.

¶80 Contrary to the irresponsible rhetoric that has and will likely continue to spew forth from those intoxicated with their long-sought unitary control over the political branches of government, this case is not about judicial disregard of the public's right to know, noncompliance with applicable public records retention laws, judicial bias, or judicial "lobbying." The Court's opinion clearly lays bare the absurdity of those patently false and intentionally inflammatory political talking-points, revealing a far more sinister motive. Beyond the smoke-screen of the catchy but demonstrably false allegations leveled against the judiciary is an unscrupulously calculated and coordinated partisan campaign to undermine the constitutional function of Montana's duly-elected nonpartisan judicial branch to conduct independent judicial review of legislative

enactments for compliance with the supreme law of this state—the Montana Constitution.

¶81 Despite the dismissive assertions of some, this case and the underlying case from which it sprung[1] are not the result of some petty and obscure turf war between government entities, with the public interest trailing far behind, if at all. This and the related cases are about protecting and preserving the existence and integrity of rule of law under the supreme law of this State for the mutual benefit of all and posterity, *regardless of partisan political stripe, agenda, or divide*. These cases are about the exclusive constitutional authority of the Judicial Branch to interpret the meaning and scope of constitutional rights, protections, limitations, the nature and extent of the duties and powers apportioned to each of the separate branches of government and constitutional officers thereunder, and to interpret and apply the governing law to particular factual circumstances. And, fundamentally, this case is also about dispelling the infantile notion that one coequal branch of constitutional government can legally divest another of its constitutional authority and duty based on contrived allegations of institutional conflict of interest.

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[1] *See* Order, *McLaughlin v. Montana State Legislature*, No. OP 21-0173 (June 29, 2021); *McLaughlin v. Montana State Legislature*, 2021 MT 120, 404 Mont. 166, __ P.3d __; *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, __ P.3d __; Order, *McLaughlin v. Montana State Legislature*, No. OP 21-0173 (April 16, 2021); Order, *Bradley v. Gianforte*, No. OP 21-0125 (April 7, 2021). *See also* Preliminary Injunction Order, *Rice v. Montana State Legislature*, BDV-2021-451, Mont. First Judicial Dist., Lewis and Clark County, (May 18, 2021).

¶82 Regardless of competing interests pertinent in the two political branches of government and society in general, or the dominant will of any majority political faction at any particular time, the continued survival and vitality of our constitutional democracy, and all of the personal and societal freedoms, protections, and other benefits it provides, depend on the preservation of and respect for the distinct functions of all three co-equal branches of government, without any usurpation or interference with one by another. This simple, self-evident principle is more important than ever when, as now, a single political faction overwhelmingly controls the two partisan branches of state government, rendering it quite expedient to irresponsibly attack and attempt to undermine the only non-partisan branch in an effort to attain unitary, unfettered—in effect, authoritarian—power, unconstrained by constitutional limits.

¶83 Justice McKinnon's reminder of the rampant "legislative" abuses of the then-unchecked English Parliament aptly illustrates the historical abuse of legislative power that led to the development and continued essential utility of our distributed form of constitutional democracy. It thus calls to mind the 1887 observation of English historian and moralist John Emrich Edward Dalberg Acton (Lord Acton) that "absolute power corrupts absolutely," a circumstance our distributed form of constitutional government is designed to avoid. Though undeniable, the fleeting mandate and accompanying delirium of unitary control of the two political branches of government is no warrant or excuse for reckless disregard of the sacred oath and duty of *all* elected officials to "support,

protect, and defend the constitution" of this State. *See* Mont. Const. art. III, § 3.

/S/ DIRK M. SANDEFUR

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173

[Filed September 7, 2021]

BETH MCLAUGHLIN,
Petitioner,

v.

The MONTANA STATE LEGISLATURE and the MONTANA DEPARTMENT OF ADMINISTRATION,
Respondents.

ORDER

Respondent Montana State Legislature petitions for rehearing of this Court's July 14, 2021 Opinion and Order quashing two subpoenas, one issued to the Department of Administration and the second to the Petitioner and directing the Legislature to return the documents it obtained pursuant to those subpoenas. *McLaughlin v. Montana State Legislature* 2021 MT 178. Petitioner Beth McLaughlin opposes the petition.

Under M. R. App. P. 20 this Court will consider a petition for rehearing only if the opinion "overlooked some fact material to the decision," if the opinion

missed a question provided by a party or counsel that would have decided the case, or if our decision "conflicts with a statute or controlling decision not addressed" by the Court. M. R. App. P. 20. Without addressing these three criteria the Legislature urges the Court to rehear its case "incorporat[ing] its prior arguments" and arguing that the Court must reconsider essentially every aspect of its decision including whether to hear the case at all. Following its petition, the Legislature also submitted supplemental authority a decision from the United States District Court for the District of Columbia.[1] McLaughlin responds that the Legislature has not shown that the Court overlooked any material facts or issues the parties presented or that its decision conflicts with a controlling statute or case.

Having reviewed the petition and response, we conclude that the Legislature has not established grounds for rehearing. Instead, it mischaracterizes or misapprehends numerous provisions of the Court's decision and suggests rulings the Court did not make. First, the Court cited *Trump v. Mazars USA, LLP,* 140 S. Ct. 2019 (2020) not—as the Legislature fears—as controlling authority to justify "forever expropriat[ing] legitimate legislative oversight tool[s]", but as an insightful analysis of legislative subpoena power and a helpful "balanced approach" to the consideration of subpoenas that raise "interbranch confrontation" concerns. *McLaughlin,* ¶ 19. Second, the Opinion did

---

[1] We have considered the supplemental authority but in accordance with M. R. App. P. 12(6), we do not entertain additional argument included in a party's post-briefing notice.

not hold in any fashion that the Legislature cannot issue a subpoena to or otherwise obtain appropriate information from a government official.

As it did in briefing on McLaughlin's Petition, the Legislature argues again that the Court must forego consideration of the matter in favor of negotiation with its coordinate branch of government. Contrary to the Legislature's arguments the Opinion neither addressed nor foreclosed discussions between the branches or "refused any further consideration of production of the Court administrator's public records." The Court instead analyzed and resolved the legal issues presented by the two subpoenas the Legislature issued without first engaging in the negotiation it now urges. The Opinion does not contain the "absolute rule[s]" the Legislature grafts onto it. The Court examined the language of the subpoenas at issue and the Legislature's own stated purposes and decided the case before it.

Finally, the Court did not order the Legislature to "put the Jack back in the box" by retrieving from others the e-mails it already disseminated, nor did it purport to forbid the Legislature's discussions with its own attorneys. The Order is clear and speaks for itself.

IT IS THEREFORE ORDERED that the petition for rehearing is DENIED.

The Clerk is directed to provide copies of this Order to all counsel of record.

Dated this 7th day of September 2021.

s/_____
Chief Justice
s/_____
s/_____
s/_____
s/_____
s/_____
Justices
s/_____
Hon. Donald Harris, District Judge, sitting by designation for Justice Jim Rice

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed March 24, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY and MONTANA LEAGUE OF WOMEN VOTERS Petitioners	)
v.	)
GREG GIANFORTE, Governor of the State of Montana Respondent.	)

ORDER

IT IS HEREBY ORDERED that District Judge Kurt Krueger is designated to participate in this matter in place of Chief Justice Mike McGrath who has recused himself from all proceedings in the case.

The Clerk is directed to provide copies of this Order to the Hon. Kurt Krueger, to counsel for Petitioners, and to all parties on whom the Petition has been served.

DATED this 24th day of March 2021.

For the Court,

s/_____
Acting Chief Justice

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed April 2, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS, Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana, Respondent.	)

NOTICE OF RECUSAL

In the above-entitled action the undersigned Judge Kurt Krueger does hereby recuse himself from all the proceedings in this matter.

DATED this 2nd day of April, 2021.

s/ Kurt Krueger
KURT KRUEGER
District Court Judge

APPENDIX J

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed April 7, 2021]

DOROTHY BRADLEY BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,	)
Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana,	)
Respondent.	)

ORDER

Before the Court is Respondent Governor Greg Gianforte's Motion to Disqualify Judge Kurt Krueger and for Other Miscellaneous Relief. Respondent requests to stay further proceedings in the case pending release to the parties of the results of a poll the Court Administrator conducted among the membership of the Montana Judges Association (MJA)

regarding the MJA's position on SB 140, the measure at issue in this case. Respondent requests that any other judge who expressed a position on the bill be disqualified from participating in the case.

In response, Petitioners note that the day after Respondent filed his motion, Judge Krueger filed a Notice of Recusal, and the motion for disqualification is therefore moot. Petitioners oppose the motion for stay and "leave . . . to the sound discretion of the Court" Respondent's motion for release of the MJA poll.

First given Judge Krueger's voluntary recusal the motion to disqualify him is moot, and the Court need not address it.

Second the parties are advised that no member of this Court participated in the aforementioned poll. The Court is advised that the final vote was 34 to 3 to oppose the bill and that the MJA's opposition to the bill was presented to the Legislature and is a matter of public record. Court Administrator Beth McLaughlin's February 1, 2021 e-mail regarding the poll, which she sent to the Chief Justice, MJA President Judge Greg Todd, and MJA lobbyist Ed Bartlett is attached to this Order. It reflects her handwritten note that, although the vote was 31-3 at the time she sent the e-mail, the final vote was 34-3.

Third, the Court has determined that the six undersigned members of this Court will consider the case on the Petition and the responses submitted and—in accordance with M. R. App. P. 14(7) and with our prior Order—determine whether to order more

extensive briefing, order oral argument, or decide the matter upon the initial filings.

Finally, because his motion is 1,986 words, Respondent also requests leave to exceed the 1,200-word count limitation of M. R. App. P. 16(3). The Court has considered the full motion and attachments and accepts the overlength filing.

For the foregoing reasons,

IT IS THEREFORE ORDERED that the Respondent's motions to disqualify and for other miscellaneous relief are DENIED. Pursuant to the Court's April 5 Order, the summary response shall be filed on or before April 14, 2021.

The Clerk is directed to give notice of this Order to all counsel of record.

Dated this 7 day of April, 2021.

s/_____

s/_____

s/_____

s/_____

s/_____

s/_____
Justices

McLaughlin, Beth

From: McLaughlin, Beth
Sent: Monday, February 1, 2021 8:17 AM
To: Todd, Gregory; Ed Bartlett (efbartlett@charter.net); McGrath, Mike
Subject: votes

Good morning,

On SB140 the vote is 31-3 [34-3 (handwritten)] to oppose. Of course, you saw the comments about improvements that could be made to the Commission process. The hearing is schedule for February 9th at 9 a.m.

On the retirement bill and holiday, the vote was 20-2 to support (or not oppose) the bill. The bill hasn't been introduced yet. I don't know in the by-laws if the vote tabulation is based on the members voting or the total membership.

The justices have not voted on either bill and I assume will not.

Thanks,

Beth McLaughlin
Supreme Court Administrator
406-841-2966

APPENDIX K

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed April 11, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,	)
Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana,	)
Respondent.	)

TEMPORARY ORDER

Beth McLaughlin, Office of the Court Administrator, yesterday e-filed and served an emergency motion within this matter "to quash and enjoin legislative subpoena duces tecum." We interpret the motion as both a request to intervene in this matter and to quash or enjoin a subpoena issued by the Legislature.

According to the motion and the subpoena attached as an exhibit thereto, on Thursday, April 8, 2021, the Montana State Legislature issued a subpoena directed to Misty Ann Giles, Director of the Department of Administration, an executive branch agency, requiring her to appear and produce: 1) "All emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files"; and 2) "Any and all recoverable deleted emails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files." The subpoena further required Giles to appear at the Capitol Building "on the 9th day of April, 2021, at 3:00 PM, to produce" the requested documents. According to the motion, "Director Giles reached an agreement whereby the documents would be compiled this weekend and produced, presumably, on Monday or perhaps sooner over the weekend. McLaughlin is informed and believes that Director Giles intends to comply with the Legislature's Subpoena."

McLaughlin argues that the subpoena exceeds the scope of legislative authority, violating the separation of powers, violates judicial privilege, and that, in any event, is overbroad as it, inter alia, "encompasses confidential personnel information."

McLaughlin's motion raises serious procedural questions. Neither the Legislature nor the Department of Administration are parties in this litigation. Although the subpoena is juxtaposed temporally with the litigation pending in this matter, including

Respondent Greg Gianforte's request for production of emails related to a poll conducted by the Montana Judges Association regarding SB 140, the subject of this litigation, and a letter dated April 1, 2020, from the presiding officers of the Montana House of Representative and Montana Senate to McLaughlin referencing production of emails and information related to communications "regarding SB 140," which letter was also sent to the Clerk of Court to forward "with the Justices of the Montana Supreme Court," the subpoena itself does not reference this litigation, or SB 140. Nor does it reference any other litigation. Thus, while the letter to the Clerk of Court referenced an intention by the Legislature to "exercise[e] its power. . . .to request all communications between the court administrator and members of the judicial branch," we cannot be certain, at this juncture, that the subpoena challenged by McLaughlin has anything to do with the pending proceeding in OP 21-0125, or is properly filed herein. Even assuming the motion is properly filed within this proceeding, we cannot, without further proceedings, address the serious issues raised regarding the Legislature's authority to issue such a subpoena.

Nonetheless, the actions commanded by the legislative subpoena are, facially, extremely broad in scope, with a substantial potential of the infliction of great harm if permitted to be executed as stated. The production of all emails sent and received by McLaughlin between January 4, 2021 and April 8, 2021, without substantive limitation of any kind, incorporates all matters addressed by the Court Administrator during that period. As the motion notes,

McLaughlin "receives a wide variety of emails and attachments that implicate the rights and privileges of other parties," including without limitation, "medical information both for employees and elected officials," "disciplinary issues," "ongoing litigation," "Youth Court Case information," and "[r]equests from members of the public for disability accommodations including documentation of the disability." All communications regarding such matters would be caught within the dragnet of the subpoena.

Consequently, to address these various issues, and to prevent the infliction of harm in the meantime, we hereby order as follows:

1. McLaughlin is granted seven (7) days, until Monday, April 19, 2021, to file a supplemental pleading demonstrating the propriety of the filing of the motion in this matter, as opposed to the initiation of an entirely new proceeding before the Court.

2. The Legislature is granted fourteen (14) days thereafter, until Monday, May 3, 2021, in which to respond to McLaughlin's request to quash the subpoena by intervening in this matter. Third Party Department of Administration may, at its option, respond by that time.

3. The Petitioners and Respondent, and/or by the Attorney General, are likewise granted until Monday, May 3, 2021, to respond to McLaughlin's request to intervene in this matter.

4. The subpoena issued by the Legislature on April 8, 2021, is hereby quashed pending further order of the Court.

IT IS SO ORDERED.

The Clerk is directed to provide copies of this Order to counsel for Beth McLaughlin, the Legislature, the Department of Administration, and all counsel of record in this matter.

DATED this 11th day of April, 2021.

s/_____

s/_____

s/_____

s/_____

s/_____

s/_____

Justices

APPENDIX L

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed April 14, 2021]

BOB BROWN, DOROTHY BRADLEY, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,	)
Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana,	)
Respondent.	)

ORDER

The Montana State Legislature has filed a motion wherein it "respectfully requests leave of the Court to intervene as a Respondent in this matter." The motion states the Legislature seeks intervention because "it is specifically vested with the constitutional authority to determine the process by which nominees are selected for gubernatorial appointment to fill judicial vacancies,

it has an interest in defending the constitutionality of the laws it enacts, and the Montana State Senate has a constitutional role in confirming judicial appointments."

Intervention in a proceeding pending before this Court is a discretionary determination. M. R. App. P. 2(1)(f) (defining "Intervenor" as one "who, on motion, is granted leave to enter a proceeding before this court, despite not being named originally as a party"). The Legislature indicates that it will submit its summary response to the Petition by the previously ordered deadline of April 14, 2021. As required by M. R. App. P 16(1), the Legislature states it has contacted opposing counsel to determine whether opposing counsel objects to the motion. The Legislature states it has obtained opposing counsel's consent to the motion upon the Legislature's commitment "to abide by and comply with all orders of the Court."

Upon these assertions by the Legislature, the Court concludes it can properly intervene into this matter and that leave should be granted. Therefore,

IT IS ORDERED that the motion to intervene by the Montana State Legislature is granted. The Intervenor shall file its response by April 14, 2021.

The Clerk is directed to provide copies of this Order to all counsel of record in this matter.

DATED this 14th day of April, 2021.

s/_____

s/_____

s/_____

s/_____

s/_____

s/_____
Justices

APPENDIX M

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125 and OP 21-0173

[Filed April 16, 2021]

BOB BROWN, DOROTHY BRADLEY, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,

Petitioners,

v.

GREG GIANFORTE, Governor of the State of Montana,

Respondent.

BETH MCLAUGHLIN,

Petitioner,

v.

THE MONTANA STATE LEGISLATURE, AND THE MONTANA DEPARTMENT OF ADMINISTRATION,

Respondents.

ORDER

Beth McLaughlin, Office of the Court Administrator, has filed a "Petition for Original Jurisdiction and Emergency Request to Quash/Enjoin Enforcement of Legislative Subpoena," initiating an original proceeding assigned as Cause No. OP 21-0173. In the petition, McLaughlin challenges the legality of a subpoena issued by the Montana State Legislature on April 8, 2021, which demanded production of all emails and documents sent and received by McLaughlin over a three-month period and seeks declaratory and injunctive relief. In response, Respondent Montana State Legislature has filed a motion to dismiss the petition. Finally, McLaughlin has filed a new Emergency Motion to Quash a Revised Subpoena issued yesterday that requires McLaughlin to appear, testify, and provide additional information on Monday, April 19, 2021.

McLaughlin is here challenging the same legislative subpoena she has similarly challenged by requesting to intervene within Cause No. OP 21-0125, a proceeding challenging SB 140, legislation recently enacted by the Legislature, based on her allegation that the subpoena arose from the Legislature's inquiry to her office about a poll of members of the Montana Judges Association "pertaining to SB 140." *Intervenor Beth McLaughlin's*

Emergency Motion to Quash and Enjoin Legislative Subpoena Duces Tecum, 21-0125, p. 4. In response to that emergency motion, this Court entered a Temporary Order on April 11, 2021. The Order acknowledged that McLaughlin had demonstrated "a substantial potential of the infliction of great harm" if the subpoena, which we noted was "extremely broad in scope," was "permitted to be executed as stated." *Temporary Order,* 21-0125, issued April 11, 2021, p. 2. However, the Order also raised questions concerning the procedural propriety of challenging the subpoena within 21-0125, stating that "we cannot be certain, at this juncture, that the subpoena challenged by McLaughlin has anything to do with the pending proceeding in OP 21-0125, or is properly filed herein." *Temporary Order,* 21-0125, issued April 11, 2021, p. 2. Consequently, the Court granted McLaughlin seven days in which to file a supplemental pleading "demonstrating the propriety of the filing of the motion in this matter, as opposed to the initiation of an entirely new proceeding before the Court," granted other parties in the action, and interested parties, the opportunity to respond to McLaughlin's supplemental pleading, and, to preserve the status quo pending resolution of those matters, quashed the subpoena until further order of the Court. *Temporary Order,* 21-0125, issued April 11, 2021, p. 3. Further background of the matter is set forth in the Temporary Order. On April 13, the Respondent in 21-0125 filed a Motion to Strike and Vacate, requesting that McLaughlin's filings therein be stricken and that the Temporary Order be vacated.

McLaughlin alleges in 21-0173 that, on April 8, 2021, the Legislature issued the subpoena to Director Misty Ann Giles of the Montana Department of Administration, not to the Judicial Branch, requiring that Giles appear before the Legislature the next day and produce the subject emails and attachments. McLaughlin was provided only a courtesy copy of the subpoena on the afternoon of Friday, April 9, after which she requested a delay while she sought legal advice. This request went unanswered. On Saturday, April 10, McLaughlin, through counsel, proposed to Giles and Todd Everts of the Legislative Services Division that production be delayed until the parties could address concerns, but Giles declined. McLaughlin immediately sought judicial relief.

McLaughlin contends that the subpoena "commands production of documents that by the breadth requested contain highly confidential, privileged, and sensitive information," and that "over 2,000 documents have already been produced, creating new time-sensitivities and concerns." She contends the documents were produced "without McLaughlin or any other court official being afforded the opportunity to review the production and protect the privacy rights and privileges implicated." She alleges she has now had a brief opportunity to partially review the documents produced by the Department of Administration "and can confirm they contain, as suspected, privileged and confidential information." She alleges the legal and constitutional issues raised are of statewide importance and that emergency factors exist that render litigation in the trial courts and subsequent appeal inadequate, citing M. R. App. P. 14(4). As relief, she seeks a

declaration that the subpoena is illegal and invalid, the temporary quashing and permanent enjoining of the subpoena, the permanent enjoining of the Legislature "from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced" pursuant to the subpoena, and return of those documents.

Central to the petition in this matter are threshold questions of law subject to the exclusive adjudicatory authority of this Court under Article III, Section 1, and Article VII, Sections 1-2(1), of the Montana Constitution regarding the scope and application of the legislative subpoena power. *See Larson v. State By & Through Stapleton,* 2019 MT 28, ¶ 42, 394 Mont. 167, 434 P.3d 241 (noting exclusive constitutional duty and authority of this Court to "adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law and to render appropriate judgments thereon"—citing Mont. Const. arts. III, § 1, and VII, § 1, *inter alia); Best v. City of Billings Police Dep't,* 2000 MT 97, ¶ 16, 299 Mont. 247, 999 P.2d 334 (among the three coordinate branches of a constitutional government "it is the province and duty of the judiciary 'to say what the law is'"—*citing Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *Marbury,* 5 U.S. at 177, 2 L.Ed. at 26 (the constitution is the "fundamental and paramount law" and the fundamental "theory of every such [constitutional] government" is "that an act of the legislature, repugnant to the constitution, is void. . . . It is emphatically the province and duty of the judicial department to say what the law is" and "of necessity [to] expound and interpret that rule" to resolve any

conflict of law). It is clear the Legislature, to exercise its separate and distinct powers of governance effectively, must have the power to acquire information regarding the subject matter of its legislation. However, neither the subpoena power of the Legislature, nor that of the judiciary, is subject to unquestioned enforcement. This Court has not previously considered the extent of any limitations on the Legislature's subpoena power. The scope of the Legislature's inherent legal authority to compel information, and how it applies under particular circumstances, are quintessentially functions for this Court to determine within our exclusive constitutional duty and authority under Article III, Section 1, and Article VII, Sections 1-2(1), of the Montana Constitution. We have not heretofore considered whether that authority is limited when competing rights or privileges exist and are expressed.

In the legislative subpoenas previously issued to the Montana Department of Administration, this Court, and the Court Administrator, the Legislature seeks to obtain a broad swath of internal judicial branch documents and communications, some of which appear to be confidential and privileged as a matter of law from compelled disclosure to the Legislature, but some of which may very well be reachable by legislative subpoena. All those requests, moreover, are directly or indirectly related, and certainly have directly arisen from, the matters now squarely at issue before this Court in the above-captioned *Brown* and *McLaughlin* proceedings, in both of which the Legislature is now a party under the personal jurisdiction of this Court. As a result, the legality of the previously issued legislative

subpoenas, and any similar subpoenas regarding the same subject matter, is currently at issue before this Court in the above-captioned *McLaughlin* proceeding (21-0173) for adjudication, upon participation of the parties thereto under due process of law, under the exclusive constitutional power and authority of this Court under Article III, Section 1, and Article VII, Sections 1-2(1), of the Montana Constitution. Within that legal framework, it is the exclusive constitutional duty of this Court to consider the competing constitutional and other legal interests at issue and adjudicate them accordingly to resolve the dispute matters at issue as a matter of law.

Consequently, to address these issues raised herein in a manner that provides due process and prevents the infliction of harm as the process moves forward in an orderly manner, we hereby order as follows:

1. Respondents Montana State Legislature and Montana Department of Administration are granted fourteen (14) days, until Friday, April 30, 2021, in which to file a summary response to the Petition, to present any arguments not already included within Respondent Montana State Legislature's motion to dismiss.

2. Petitioner Beth McLaughlin is granted fourteen (14) days, until Friday, April 30, 2021, in which to file a response to the Motion to Dismiss.

3. The substance of our prior Temporary Order of enjoinder in 21-0125 is hereby continued unabated within 21-0173. The subpoena issued by the Legislature on April 8, 2021, remains enjoined pending

further order of the Court. Additionally, enforcement of the Revised Subpoena issued April 15, 2021, is temporarily enjoined pending further proceedings in this matter and further Order of this Court.

4. Given the release of documents related to electronic judicial branch communications by the Department of the Administration, as described herein, without legal process or the opportunity for consultation, the Department of Administration is temporarily enjoined from any further release of any judicial communications in response to any request or subpoena, legislative or otherwise, until further order of this Court.

5. Similarly, until the issues raised in this proceeding can be presented and adjudicated in the course of due process, enforcement of any subpoenas issued by the Montana State Legislature for electronic judicial communications, including those served on this Court April 14, 2021, are temporarily stayed, until this Court can establish the scope, limitations, and parameters to be applied by courts when the Legislature exercises its authority to obtain information and competing interests are presented. Justice Jim Rice has requested that his subpoena not be stayed, so he may seek review in the district court, and it is so ordered.

6. McLaughlin's filings within 21-0125 are dismissed.

7. The Motion to Strike and Vacate filed by the Respondent in 21-0125 is denied as moot.

8. McLaughlin's request to file an overlength petition in 21-0173 is granted.

IT IS SO ORDERED.

The Clerk is directed to provide copies of this Order to all counsel of record in this matter.

DATED this 4th day of April, 2021.

s/_____

s/_____

s/_____

s/_____

s/_____

s/_____
Chief Justice (21-0173)

The Chief Justice has signed this order only for purposes of participating in 21-0173.

Justice Beth Baker and Justice Jim Rice joins in Paragraphs 1-4 and Paragraphs 6-8 of the foregoing Order.

s/_____

s/_____
Active Chief Justice (21-0125)

APPENDIX N

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed April 27, 2021]

BOB BROWN, DOROTHY BRADLEY, VERNON FINLEY, MAE NAN ELLINGSON, and the MONTANA LEAGUE OF WOMEN VOTERS,	)
Petitioners	)
v.	)
GREG GIANFORTE, Governor of the State of Montana,	)
Respondent.	)

ORDER

The Petition in this matter was filed March 17, 2021, seeking a declaratory judgment pursuant to M. R. App. P. 14(4) on the alleged unconstitutionality of Montana Senate Bill 140, signed into law by Governor Greg Gianforte on March 16, 2021. In our March 24 Order, we called for a summary response to the Petition in accordance with M. R. App. P. 14(7).

Our Order stated that upon receipt of the summary response, the Court would determine whether to order more extensive briefing order oral argument, or decide the matter upon the initial filings. The Governor's response, along with the response of the Intervenor Montana State Legislature and the briefs of several amicus curiae have now been filed. Having reviewed the comprehensive submissions of all parties and amici, the Court has determined that additional extensive briefing is not necessary. It will limit additional briefing to the filing of a reply brief.

Therefore in accordance with M. R. App. P. 14(7),

IT IS ORDERED that the Petitioners are granted fourteen days within which to prepare, file and serve a reply brief in support of their Petition for Declaratory Judgment. The brief shall not exceed 2,500 words.

IT IS FURTHER ORDERED, pursuant to Section IV, Paragraph 1, of this Court's Internal Operating Rules, that consideration of and decision on the Petition, including the determination whether to accept original jurisdiction, shall be submitted to the full Court sitting en banc. The Hon. Matthew J. Wald, District Judge for the Twenty-Second Judicial District is substituted in this matter for Chief Justice Mike McGrath, who has recused himself.

The Clerk is directed to provide copies of this Order to all counsel of record and to the Hon. Matthew J. Wald.[1]

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[1] While we take no position on whether participation in an MJA poll requires disqualification, Judge Wald did not participate in the

DATED this 27th day of April, 2021.

For the Court,

s/_____
Acting Chief Justice

MJA poll on SB 140.

APPENDIX O

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

2021 MT 149

[Filed June 10, 2021]

BOB BROWN, DOROTHY BRADLEY, VERNON FINLEY, MAE NAN ELLINGSON, and the LEAGUE OF WOMEN VOTERS OF MONTANA,

Petitioners,

v.

GREG GIANFORTE, Governor of Montana,

Respondent,

and

MONTANA STATE LEGISLATURE,

Intervenor and Respondent.

ORIGINAL PROCEEDING: Petition for Original Jurisdiction

COUNSEL OF RECORD:

For Petitioners:

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For Respondent:

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For Intervenor:

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For Amicus Montana Family Foundation:

Jon Metropoulos, Metropoulos Law Firm, Helena, Montana
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Submitted on Briefs: May 12, 2021
Decided: June 10, 2021

Filed:

s/_____
Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 In this original proceeding, Petitioners challenge the constitutionality of Senate Bill 140 ("SB 140"), a bill passed by the 2021 Montana Legislature and signed into law by the Governor. SB 140 abolishes Montana's Judicial Nomination Commission and the process that had previously been in place to screen applicants for vacancies on the Supreme Court and the District Courts and replaced it with a process by which any person who otherwise satisfies the eligibility requirements for a Supreme Court Justice or District Court Judge can be considered for appointment by the Governor provided they obtain letters of support from three Montana adults.

¶2 We address the following issues:

> *Issue One: Do the Petitioners have standing to challenge the constitutionality of SB 140?*
>
> *Issue Two: Whether urgency or emergency factors justify an original proceeding in this Court pursuant to M. R. App. P. 14(4)?*
>
> *Issue Three: Does SB 140 violate Article VII, Section 8(2) of the Montana Constitution?*[1]

¶3 We conclude the Petitioners have standing to challenge the constitutionality of SB 140, and that urgent or emergency factors justify an original proceeding in this Court. We therefore grant the petition for writ and assume original jurisdiction over Petitioners' constitutional challenge. We conclude that SB 140 does not violate Article VII, Section 8(2) of the Montana Constitution.

BACKGROUND

¶4 The original Montana Constitution of 1889 provided that in case of a vacancy on the Supreme Court, or any of the District Courts, the vacancy "shall be filled by appointment, by the governor of the State." Mont. Const. art. VIII, § 34 (1889). This procedure was

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[1] Although Petitioners frame their constitutional challenge as "whether SB 140 is unconstitutional under Article VII of the Montana Constitution," it can more precisely be framed as whether SB 140 is unconstitutional under Article VII, Section 8(2) of the Montana Constitution, which provides that when a vacancy occurs on the Supreme Court or one of the District Courts, "the governor shall appoint a replacement from nominees selected in the manner provided by law."

changed by ratification of the 1972 Constitution, which provided that in case of judicial vacancies, the Governor would appoint a replacement from nominees selected in a manner provided by law. Mont. Const. art. VII, § 8.

¶5 Pursuant to the newly ratified Constitution, the 1973 Legislature passed Senate Bill 28 ("SB 28"), which was codified at § 3-1-1001, MCA, et seq., and provided for the creation of a "Judicial Nomination Commission." The Commission was composed of seven members, appointed to staggered four-year terms: four lay members were appointed by the Governor, two attorney members were appointed by the Supreme Court, and the final member was a sitting district court judge. The procedure enacted by SB 28 provided that when there was a judicial vacancy, any individual who satisfied the constitutional requirements to serve as a Supreme Court Justice or District Court Judge could submit an application to the Commission for that position. After a public comment period, the Commission would then screen the applicants and forward a list of three to five nominees from which the Governor could appoint a replacement to fill the vacancy. The appointee would then stand for election at the next election and, if elected, for all subsequent elections in the regular course. Depending on the timing of the appointment, the appointee may also be subject to Senate confirmation.[2]

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[2] Senate confirmation is required for every interim appointment except in two specific circumstances: (1) if the appointment is made while the Senate is not in session and the term to which the appointee is appointed expires prior to the next legislative session,

¶6 The commission system enacted in 1973 remained the procedure for filling judicial vacancies until this year, when the 2021 Legislature passed SB 140. SB 140 abolished the Judicial Nomination Commission and replaced it with a procedure by which any individual who otherwise satisfies the constitutional requirements to serve as a Supreme Court Justice or District Court Judge may apply directly to the Governor. After a public comment period, the Governor may appoint any applicant who has received a letter of support from at least three Montana adults. As with the previous system, the appointee would then stand for election at the next election and, if elected, for all subsequent elections in the regular course and, depending on the timing of the appointment, the appointee may also be subject to Senate confirmation.

STANDARDS OF REVIEW

¶7 The determination of a party's standing is a question of law that we review de novo. *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶ 18, 396 Mont. 194, 445 P.3d 1195. We exercise plenary review over matters of constitutional interpretation. *Nelson v. City of Billings*, 2018 MT 36, ¶ 8, 390 Mont. 290, 412 P.3d 1058.

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or (2) if a general election will be held prior to the next legislative session and the appointment is made prior to the candidate filing deadline for primary elections, in which case the position is subject to election at the next primary and general elections. Section 3-1-1013(2)(a)–(b), MCA (2019).

DISCUSSION

¶8 *Issue One: Do the Petitioners have standing to challenge the constitutionality of SB 140?*

¶9 "Standing is a threshold jurisdictional requirement that limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing). . . . Case-or-controversy standing limits the courts to deciding actual, redressable controversy, while prudential standing confines the courts to a role consistent with the separation of powers." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187 (citations omitted).

¶10 In order to establish case-or-controversy standing, Petitioners must "clearly allege past, present, or threatened injury to a property or civil right." *Bullock*, ¶ 31. The question is not whether the issue itself is justiciable, but whether the Petitioners are the proper party to seek redress in this controversy. In that regard, the injury Petitioners allege must be "concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Bullock*, ¶ 31.

¶11 The individual Petitioners in this case are all Montana residents, voters, and taxpayers. Petitioners cite a number of cases in which this Court has found standing in cases involving constitutional challenges based on purported violations of Article VII: *Committee for an Effective Judiciary v. State*, 209 Mont. 105, 679 P.2d 1223 (1984); *Jones v. Judge*, 176 Mont. 251, 577

P.2d 846 (1978); *Keller v. Smith*, 170 Mont. 399, 401, 553 P.2d 1002, 1004 (1976); *Yunker v. Murray*, 170 Mont. 427, 554 P.2d 285 (1976); *Reichert v. State ex rel. McCulloch*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455. In all of these cases, Petitioners note, this Court has found standing based on the challenging parties' status as electors, citizens, and/or taxpayers.

¶12 Respondents respond that the individual Petitioners' status as Montana residents, voters, and taxpayers is insufficient to confer standing in this case. The Governor argues that the cases cited by Petitioners are distinguishable from the present case because "SB 140 has nothing to do with judicial elections, unlike those challenges to judicial election laws where this Court has accepted original jurisdiction." Similarly, the Legislature argues that the individual Petitioners' status as Montana residents and voters is insufficient because "[v]oters have no right to select nominees for appointment to judicial vacancies or to determine how nominees are selected."

¶13 Respondents are correct that SB 140 has nothing to do with judicial elections. It does, however, have to do with the process by which judicial vacancies are filled. Critical to the constitutionality of that process is the manner by which the nominees are selected to fill that vacancy. Among other criteria, SB 140 provides that in order to be considered a nominee for a judicial vacancy, an applicant must "receive[] a letter of support from at least three adult Montana residents by the close of the public comment period." While the Legislature may be correct that "*[v]oters* have no right to . . . determine how [judicial] nominees are selected"

(emphasis added), in fact all adult Montana residents, regardless of their voter registration status, are integral to the process of determining how judicial nominees are selected.

¶14 Moreover, if we were to hold SB 140 unconstitutional, a judge appointed pursuant to its provisions would not be vested with judicial power and therefore would not be a judge at all. This Court has addressed judicial appointments in a number of previous cases; our reasoning and analysis of those matters is instructive here. In *Blodgett v. Orzech*, 2012 MT 134, 365 Mont. 290, 280 P.3d 904, we considered whether a substitute justice of the peace was properly appointed according to statute and able to oversee a trial. In *Potter v. Dist. Court of the Sixteenth Judicial Dist.*, 266 Mont. 384, 880 P.2d 1319 (1994), we considered whether a substitute justice of the peace was properly appointed and thus able to issue search warrants. And in *Pinnow v. Mont. State Fund*, 2007 MT 332, 340 Mont. 217, 172 P.3d 1273, we considered the substitution of a district court judge for a Worker's Compensation Court judge. These cases demonstrate important propositions. First, the statutes through which a person is vested with judicial authority set forth intelligible standards and are subject to judicial review. Although *Orzech*, *Potter*, and *Pinnow* considered only the compliance with statutory requirements, it is axiomatic that if a court can interpret a statute, it also can review its constitutionality. *See Driscoll v. Stapleton*, 2020 MT 247, ¶ 11 n.3, 401 Mont. 405, 473 P.3d 386; *see generally Marbury v. Madison*, 5 U.S. 137, 167, 177-78

(1803); *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 515-16, 534 P.2d 859, 862-63 (1975).

¶15 More pertinent to the discussion of an "injury" sufficient to confer standing, these cases illustrate that if an appointing statute is not followed, judicial power never vests in the appointee. Simply put, the appointed person is not a judge and any judicial acts he or she purports to make are void. *Orzech*, ¶ 22 ("[U]nless the procedures required . . . are followed, then no substitute justice is appointed, and the person seeking to exercise the powers of a judge as his substitute has no authority or jurisdiction to do so. That person is, quite simply, not a judge as he has not been vested by law with the power to perform the functions of a judge.") (citing *Pinnow*, ¶ 24; *Potter*, 266 Mont. at 393, 880 P.2d at 1325). Therefore, any party appearing before a judge has standing to argue that the judge was not vested properly with judicial authority and thus cannot perform the functions of a judge.

¶16 Here, we are concerned not with a substitute justice of the peace who may handle a small number of cases or issue a few warrants, nor with a judge overseeing a single workers compensation matter. Rather, the appointed judge will be a district court judge whose rulings will impact hundreds of litigants, criminal defendants, and third parties. If we were to conclude that Petitioners lack standing, once a judge is appointed pursuant to SB 140 any person appearing before that judge or subject to his or her authority would have standing to challenge SB 140's constitutionality. As a practical matter, should SB 140 be found unconstitutional through the normal course of

litigation and appeals after an appointed judge presides in the case, motions, briefs, or hearings in any affected cases would need to be re-heard, and warrants, orders, or sentences the judge issued would be voided. Needless to say, resolving such a situation would come at great expense in time and money to the county, the judicial system, and the individual litigants.

¶17 Even more, the practical aspects of that situation are overshadowed by the constitutional and due process implications. In this nation, both at the federal and state level, all legal authority is derived first and foremost from the constitution and then from the statutes implementing its provisions. A judge's authority is wide and far-reaching: the judge may compel payments of fees and awards, divest litigants of their property, declare a defendant's guilt or innocence, sentence offenders to prison, separate families, and otherwise strip people of the civil and political rights to which they are guaranteed. Judges may perform these acts only so long as they are vested by law—as prescribed by the constitution—with judicial authority.[3]

¶18 As it stands, the only current judicial vacancy is in Cascade County. No Petitioner lives there or claims to have any matter pending in that county. A district court, however, has statewide jurisdiction, §§ 3-5-302, -303, MCA, and its orders in many cases

[3] This authority goes beyond whether or not a judge's rulings are legally correct, biased, or otherwise improper. Even if the rulings are subject to appeal, a person not vested with judicial authority pursuant to the law and the constitution has no authority to compel action or to order a deprivation of liberty or property.

may affect individuals who have no desire of their own to file suit or otherwise appear before the court. Money can be regained, orders overruled, and certain rights restored, but the fundamental violation of a person's rights to due process, individual dignity, and liberty that would occur should a "judge" with no vested judicial authority, acting in the name of the State, compel that person to act or not act, or adjudicate rights regarding property or the law, is irreparable.

¶19 Were Petitioners correct in their argument that SB 140 is unconstitutional, in the near future there would be a person in Cascade County with no vested authority acting—in the literal sense—as a judge. The seriousness of such a "judge" unlawfully wielding authority that may affect the Petitioners is a sufficiently clear threat to Petitioners' property or civil rights to meet the case-or-controversy requirement for standing and one that this Court can resolve by ruling on the merits of Petitioners' claim.

¶20 Having concluded that Petitioners have satisfied case-or-controversy standing, we next consider whether Petitioners' challenge exceeds prudential standing limitations. Prudential standing is a form of "judicial self-governance" that discretionarily limits the exercise of judicial authority consistent with the separation of powers. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 32, 360 Mont. 207, 255 P.3d 80. "[C]ourts generally should not adjudicate matters 'more appropriately' in the domain of the legislative or executive branches or the reserved political power of the people." *Larson v. State*, 2019 MT 28, ¶ 18 n.6, 394 Mont. 167, 434 P.3d 241 (citing *Heffernan*, ¶¶ 32-33).

¶21 The Montana Constitution provides that "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art. III, § 1. An issue is not properly before the judiciary when "there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving" the issue. *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 735 (1993). However, "not every matter touching on politics is a political question." *Japan Whaling Ass'n v. Am. Cetacean Soc'y.*, 478 U.S. 221, 229, 106 S. Ct. 2860, 2865 (1986).

¶22 The Governor argues that we should reject jurisdiction under the doctrine of prudential standing because "the Montana Constitution unambiguously grants authority to the Legislature to determine how nominees for a judicial vacancy are presented to the Governor," citing Article VII, Section 8(2). The Governor argues that it would therefore violate the separation of powers for this Court to second-guess those determinations. We disagree.

¶23 "Both the United States Supreme Court and this Court recognize that non-self-executing clauses of constitutions are non-justiciable political questions." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 15, 326 Mont. 304, 109 P.3d 257 (citing *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962)). "To determine whether a provision is self-executing, we ask whether the Constitution addresses the language to the

courts or to the Legislature." *Columbia Falls Elem. Sch. Dist.*, ¶ 16. Article VII, Section 8(2) directs the Legislature to prescribe a manner by which nominees are selected for appointment by the Governor to a judicial vacancy; it is therefore non-self-executing. However, once the Legislature has acted, or "executed," a provision that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility. *Columbia Falls Elem. Sch. Dist.*, ¶ 17 (citing *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997) (determining, under the First Amendment, that the Religious Freedom Restoration Act of 1993 violates the Constitution despite Congress specifically implementing the Act through Section 5 of the Fourteenth Amendment, that provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")).

> Provisions that directly implicate rights guaranteed to individuals under our Constitution are in a category of their own. That is, although the provision may be non-self-executing, thus requiring initial legislative action, the courts, as final interpreters of the Constitution, have the final "obligation to guard, enforce, and protect every right granted or secured by the Constitution . . . ."

Columbia Falls Elem. Sch. Dist., ¶ 18 (quoting *Robb v. Connolly*, 111 U.S. 624, 637, 4 S. Ct. 544, 551 (1884).

¶24 Although the Governor is correct that the Montana Constitution grants the authority to the Legislature to

determine how nominees for a judicial vacancy are presented to the Governor, that authority must nevertheless be exercised in compliance with the provisions of the Constitution. The very heart of this dispute is whether SB 140 comports with the provisions of Article VII, Section 8(2) of the Montana Constitution. Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial branch. It is circular logic to suggest that a court cannot consider whether a statute complies with a particular constitutional provision because the same constitutional provision forecloses such consideration. We therefore conclude that prudential standing does not bar our consideration of the petition.

¶25 *Issue Two: Whether urgency or emergency factors justify an original proceeding in this Court pursuant to M. R. App. P. 14(4)?*

¶26 This Court accepts original jurisdiction "when urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of state-wide importance." M. R. App. P. 14(4). Original proceedings are appropriate only where: "(1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist making the normal appeal process inadequate." *Hernandez v. Bd. of Cty. Comm'rs*, 2008 MT 251, ¶ 9, 345 Mont. 1, 189 P.3d 638 (citation omitted).

¶27 Petitioners contend that all three factors are satisfied in this case. They note that this is an issue of statewide importance because it impacts the appointment process for Supreme Court Justices and District Court Judges statewide; the case involves purely an interpretation of Article VII, Section 8 of the Montana Constitution and whether the procedure set forth in SB 140 complies; and urgency and emergency factors exist making the normal appeal process inadequate because SB 140 is effective immediately, thus any judicial vacancies will be filled by a process which Petitioners contend is unconstitutional. Petitioners further note that, at the time of filing their Petition, there were three judicial appointments whose confirmations were pending before the Senate.

¶28 Of the three criteria, Respondents address only the final criterion: whether urgency and emergency factors exist making the normal appeal process inadequate. The Governor responds that Petitioners' concerns are speculative because, as of the time the Governor's response brief was filed, there were no judicial vacancies which would be subject to the SB 140 process. Regarding the three judicial appointments that were pending confirmation at the time of the Governor's brief, the Governor noted: "Petitioners' true concerns arise only if the Senate rejects those appointments, and the Governor then appoints individuals who were not among those forwarded by the Judicial Nomination Commission." Similarly, the Legislature responded that Petitioners' fears of a judge being appointed by way of an ostensibly unconstitutional appointment process will never be realized if the three appointees pending before the

Senate at the time of the Legislature's brief are confirmed because "[t]here are no other current vacancies."

¶29 In the time since both Respondents' briefs were filed, the Senate has rejected the appointment of one of the three appointees, thus creating a vacancy in the Eighth Judicial District. The process for filling that vacancy pursuant to SB 140 has begun. To the extent that Petitioners' concerns that a judicial vacancy may be filled via the SB 140 process may have been speculative, they obviously are not speculative any longer.

¶30 As discussed above, if Petitioners' constitutional challenge to SB 140 was ultimately sustained, it would render any rulings by an individual appointed to the current vacancy in the Eighth Judicial District void ab initio. In that event, rulings of life-altering gravity, including criminal sentences, civil judgments, and termination of parental rights, would be ordered by an individual with "no more authority than any other member of the general public," while a challenge filed in district court worked its way to this Court in the normal appeal process. *Pinnow*, ¶ 25. This is a wholly untenable situation. Thus, urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate.

¶31 *Issue Three: Does SB 140 violate Article VII, Section 8(2) of the Montana Constitution?*

¶32 "Statutes are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Hernandez*, ¶ 15 (citing

Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, ¶ 11, 296 Mont. 402, 989 P.2d 800; *State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997)). The party challenging a statute's constitutionality bears the heavy burden of proving the statute is unconstitutional "beyond a reasonable doubt." *Molnar v. Fox*, 2013 MT 132, ¶ 49, 370 Mont. 238, 301 P.3d 824.

¶33 When interpreting constitutional provisions, we apply the same rules as those used in construing statutes. *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. But just as with statutory interpretation, constitutional construction should not "lead to absurd results, if reasonable construction will avoid it." *Nelson*, ¶ 16 (citing *Grossman v. Mont. Dep't of Natural Res.*, 209 Mont. 427, 451, 682 P.2d 1319, 1332 (1984)). "The principle of reasonable construction 'allows courts to fulfill their adjudicatory mandate and preserve the [Framers'] objective.'" *Nelson*, ¶ 16 (citation omitted). Thus:

> Even in the context of clear and unambiguous language . . . we have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.

Nelson, ¶ 14 (citations omitted).

¶34 The constitutional provision at the heart of this dispute, Article VII, Section 8(2), provides in relevant part: "For any vacancy in the office of supreme court justice or district court judge, the governor shall appoint a replacement from nominees selected in the manner provided by law." Petitioners contend that SB 140 violates Article VII, Section 8(2) to the extent that it abolished the Judicial Nomination Commission and replaced it with a different procedure by which judicial nominees may be selected. Petitioners point to the 1972 Constitutional Convention transcripts as evidence that the delegates intended to require a commission-type of selection process. While we also deem it appropriate in this case to consider the Constitutional Convention transcripts to determine the Framers' intent in the drafting of Article VII, Section 8(2), *Nelson*, ¶ 14, our consideration does not lead us to the same conclusion as Petitioners—that the commission process was the *only* agreed-upon method by which judicial nominees could be selected.

¶35 The Convention transcripts reveal drastically divergent views as to how judicial vacancies should be filled. While some delegates envisioned a commission process that would supply a limited number of names from which the Governor's appointment must be made, others advocated for a system that would vest even greater discretion in the Governor in making appointments than that which was prescribed by the 1889 Constitution.

¶36 Most notable of those who would vest essentially unfettered power in the Governor to make judicial appointments was Delegate Joyce. Delegate Joyce

introduced an amendment that not only would have retained the direct appointment system of the 1889 Constitution, but would have eliminated the requirement that the Governor's appointee be confirmed by the senate. Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, p. 1104. Advocating for his amendment, Delegate Joyce stated:

> Mr. Chairman. Getting to the heart of the matter on the commission system, may I submit to the delegates this consideration. In the first place, no matter how astute or how brilliant or how able or how fairly the Legislative Assembly may set up a commission to select these nominees, you cannot take the human element out of the situation. . . . [I]t seems to me that we're just beating around the bush by having a commission and we ought to leave it up to the discretion of whoever is Governor to pick who he wants to fill that vacancy. He can appoint any number of commissions, consult with the bar, consult with anybody he wants as to who he wants to select. And, of course, we are always limited as to who wants the job. And so it will, inevitably, narrow down to some people vying for the job. And I think we can trust the Governor to pick whom he thinks is the best man. . . . [I]t seems to me that the committee system doesn't add anything at all to it and that the Governor, if we elect capable, honest, sincere governors, will make a choice of who he thinks will be a good judge on the bench of either the District or the Supreme Court.

Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, pp. 1104-05. Though not part of his proposed amendment, the only other modification to the direct appointment process that Delegate Joyce advocated for was a requirement that the Governor provide reasonable notice before making the appointment "to see if there wouldn't be a great hullabaloo go up around the state." Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, p. 1105.

¶37 Delegate Joyce's motion that would have retained the direct appointment process and eliminated the senate confirmation requirement was defeated by a vote of 69 to 26. Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, p. 1106. It illustrates, though, that contrary to Petitioners' contention that "all delegates envisioned a judicial nomination commission/committee," this was far from the case. In fact, among the delegates who voted for Delegate Joyce's proposal, some questioned whether a nominating commission could be fair and independent:

> DELEGATE HOLLAND: "How can we guarantee that this commission—the ones that name the candidates—won't be dominated by some special interest group?"
>
> . . .
>
> DELEGATE DAVIS: You can say what you want, any select committee's going to be a committee of the establishment. There's just no other way to get around it . . .
>
> . . .

> DELEGATE MCKEON: I'm afraid, Mr. Chairman, that any committee, whether it be select, blue-ribbon or whatnot, will not be a committee whose interests are the interests of the people.

Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol IV, pp. 1092, 1093, 1096.

¶38 To be sure, there were proponents of a commission system as well. Notable among the committee/ commission proponents was Delegate Berg. Delegate Berg advocated for what he referred to as a "blue-ribbon system," in which a committee or commission would submit a limited number of nominees to the Governor. Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, pp. 1088-95. The Governor then would be required to appoint from the list of nominees. Advocating for his proposal, Delegate Berg stated:

> Now, there's been a good deal of criticism about the so-called blue-ribbon committee that would be created by the Legislature. I suggest to you that that committee, committing two to three or four names to the Governor, is going to give the Governor a fairly wide selection of nominees, and he can select what he wants—whom he wants—from that committee. But, at least, you have the assurance that that nominee has been screened, that he does meet the qualifications of what you want in a good judge. This is a feature you do not have now, and I must recall to you

> that this proposition will be used not only on the selection of district judges, but, more importantly, on the selection of Supreme Court judges. That is, nominees, candidates for the Supreme Court judge—or the Supreme Court justice will have been screened for their qualifications to sit on that bench.

Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, p. 1094.

¶39 What emerged from these diametrically opposed proposals was a compromise, proposed by Delegate Melvin, that neither required the creation of a commission/committee, nor precluded it. The Melvin amendment passed unanimously, and is what ultimately became Article VII, Section 8(2). Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, pp. 1113-14.

¶40 Petitioners argue that "[a]lthough the Constitution left the details to the Legislature, the transcripts leave no doubt that the framers envisioned a separate 'commission' to evaluate and nominate the 'nominees.'" In this case, however, the devil is in the details. Petitioners rely on statements by individual delegates—some of which are statements *criticizing* the idea of a nominating commission—and make the unsupported leap that [i]t was clear . . . that **all** delegates understood that the proposal envisioned a separate 'commission/committee' to be established to select a list of 'nominees.'" (Emphasis in original.) And yet neither the words "commission" nor "committee" appear anywhere in Article VII, Section 8(2).

¶41 Both the language of Article VII, Section 8(2), and the circumstances and objectives evinced from the Constitutional Convention debates, make clear that while some individual delegates supported a committee or commission to screen candidates for a judicial vacancy, others voiced distrust in such a commission and supported a process that would have vested virtually unfettered discretion in the Governor. As is the nature of compromise, the result was a system that was not entirely what either side wanted—a process that neither mandated a commission/committee, nor precluded it, but rather delegated the process for selecting nominees to the Legislature in broad language that the selection of nominees be "in the manner provided by law."

¶42 Although the Constitution delegates the process for selecting judicial nominees to the Legislature, the process itself is not without constitutional bounds. The delegates may have disagreed as to what would be the best process for making judicial appointments, but the clear constitutional intent of Article VII, Section 8(2) was a process that would result in the appointment of good judges. As summed up by Delegate Garlington: "There is clear agreement on the part of all that we do need good judges. . . . The question is how to recruit them." Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1032.

¶43 "We have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the

subject matter they faced, and the objective they sought to achieve." *Nelson*, ¶ 14. The manifest constitutional objective of Article VII, Section 8(2) was the appointment of good judges. The fact that the process does not require a commission to achieve that objective does not mean that any process will be constitutionally sound. We therefore must still consider whether SB 140 achieves the constitutional objective the Framers sought to achieve by the enactment of Article VII, Section 8(2).

¶44 Although there are some key differences between SB 140 and the commission process it replaces, many aspects of the SB 140 process are not appreciably different. Both processes require applicants to be lawyers in good standing who satisfy the qualifications set forth by law for holding judicial office; both processes provide for a period of time for the submission of applications, followed by a public comment period of at least 30 days; both processes allow the Governor no more than 30 days to make the appointment, after which time the appointment shall be made by the Chief Justice; finally, both processes require Senate confirmation for all interim appointments and election for the remainder of the term.

¶45 Where the respective processes diverge is the "selection" process by which an "applicant" for a judicial vacancy becomes a "nominee" who the Governor may consider for appointment to the position. The commission process provided that after screening the applicants for the position, the Commission was required to submit to the governor a list of "not less

than three or more than five nominees for appointment to the vacant position." Section 3-1-1010(1), MCA (2019). The list of nominees must be accompanied by a written report indicating the vote on each nominee, the content of the application submitted by each nominee, letters and public comments received regarding each nominee, and the Commission's reasons for recommending each nominee for appointment. The report must give specific reasons for recommending each nominee. Section 3-1-1010(2), MCA (2019).

¶46 In contrast to the commission process, the selection process of SB 140 requires that an applicant "receives a letter of support from at least three adult Montana residents by the close of the public comment period," in order to be considered a nominee eligible for appointment by the Governor. Petitioners describe this process as "a crude attempt" to replace the commission process that provided "a list of nominees carefully vetted by an independent source." At the end of the day, however, it is not the task of this Court to assess the relative "crudeness" of the process; it is to assess the constitutionality of the process within the requirements of Article VII, Section 8(2).

¶47 Petitioners equate the absence of a commission to screen the candidates with the lack of a vetting process. But this argument ignores the very public vetting to which all applicants for a judicial vacancy are subjected during the public comment period. Indeed, it could be argued that SB 140 meets the Convention delegates' concern about selecting "good judges" by incorporating at least part of Delegate Joyce's objective—allowing the Governor to make a

direct appointment after providing reasonable notice "to see if there wouldn't be a great hullabaloo go up around the state." Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, p. 1105. As any individual who might consider applying for a judicial appointment is no doubt aware, the internet is a hullabaloo-friendly place. Thus, it can hardly be said that the lack of a nominating commission means that applicants for judicial vacancies will not be subject to a vetting process.

¶48 Petitioners' argument also ignores the vetting to which the appointee will be subjected by the Senate in order to be confirmed. Finally, Petitioners' argument ignores the most critical vetting process—the vetting by the voters to which the appointee will ultimately be subjected at the next election.

¶49 As for the requirement that an applicant receive a letter of support from three adult Montana residents in order to be considered a "nominee" eligible for appointment to the bench, Petitioners argue that this is nothing more than "equating an 'applicant' with the term 'nominee' [and] does not salvage constitutionality." Although it could be argued that this lowers the bar for an applicant to be forwarded to the Governor for consideration, it must be noted that under the commission process, an applicant could be forwarded onto the Governor for consideration with *no* public support. And while an applicant in the commission process with no public support would still have to be recommended by at least four members of the Commission, § 3-1-1008, MCA (2019), it is also true that the necessary four votes could come solely from

members who had been appointed by the Governor. Section 3-1-1001(1)(a), MCA (2019).

¶50 This in no way is intended to impugn the hard work and dedicated service that Commission members have put in over the past forty-eight years. As Petitioners correctly point out, the Judicial Nomination Commission has been in place since 1973. During this time, its members have included appointees from all over the State, who have been appointed by governors of both parties and this Court, as well as selected by the district court judges from across the State, seeking to honor the constitutional objective of recruiting good judges to serve the citizens of Montana. During the debate over SB 140, some contended that the Commission should continue unaltered, some contended that it should be modified, and some contended that it should be abolished. In the final analysis, however, it is not the function of this Court to determine which process we think is the better process for making judicial appointments—it is to determine whether the process prescribed by SB 140, which is presumed to be constitutional, complies with the language and constitutional intent of Article VII, Section 8(2). We conclude that it does.

CONCLUSION

¶51 Petitioners have standing to bring this petition. Urgency or emergency factors justify an original proceeding in this Court pursuant to M. R. App. P. 14(4). We therefore grant the petition for writ and assume original jurisdiction over Petitioners' constitutional challenge. For the reasons stated above,

we conclude that SB 140 does not violate Article VII, Section 8(2) of the Montana Constitution.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JIM RICE
/S/ MATTHEW WALD
District Court Judge Matthew Wald
sitting for Chief Justice Mike McGrath

Justice Jim Rice concurring.

¶52 I concur with the Court's decision, but write to address the extraordinary, indeed, extraconstitutional, actions taken by the Legislature and the Department of Justice during the pendency of this proceeding.

¶53 On April 12, 2021, a letter addressed to me as Acting Chief Justice in this proceeding, OP 21-0125, was delivered to the Court by the Department of Justice in its stated role as counsel for the State Legislature, regarding the Temporary Order issued by the Court on April 11, temporarily quashing a legislative subpoena issued to the Court Administrator, pending briefing on the matter. The letter expressed displeasure with the Court's Order, cited the Separation of Powers provision of the Montana Constitution, Art. III, § 1, and advised:

> [t]he Legislature does not recognize this Court's Order as binding and will not abide it. The Legislature will not entertain the Court's interference in the Legislature's investigation of the serious and troubling conduct of members of the Judiciary. The subpoena is valid and will be enforced.

Letter from Montana Department of Justice to Acting Chief Justice, April 12, 2021.

¶54 Obviously contemptuous, the letter was followed by another letter from the Attorney General on behalf of the Legislature on April 18, 2021, addressed to the Justices of this Court, this one disputing the Order entered in this matter by the Court on April 16, 2021, and describing the Court's statement therein that the Court would provide due process in the matter as "ludicrous" and "wholly outside the bounds of rational thought." *Letter from Montana Attorney General to Justices of the Montana Supreme Court*, April 18, 2021. It likewise insisted that, despite the Court's order, "[t]he Legislature has issued valid subpoenas" that would continue to be enforced.

¶55 The Department of Justice's citation in its April 12 letter to the Separation of Powers provision of the Montana Constitution was ironic, given that the citation was offered as justification for the Legislature's improper intrusion upon "the exercise of power properly belonging to" the Judiciary. Mont. Const. art. III, § 1. It falls within the Judiciary's power, not the Legislature's, to resolve "litigation challenging the constitutional authority of one of the three branches." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 11 n.

3, 401 Mont. 405, 473 P.3d 386 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S. Ct. 1421, 1428 (2012)). The April 11, 2021 Temporary Order, with which the Legislature and Department of Justice refused to comply, addressed such a constitutional issue. *See Temporary Order*, p. 2, April 11, 2021, OP 21-0125 (stating that "McLaughlin argues that the subpoena exceeds the scope of legislative authority, violating the separation of powers . . . ."). The Separation of Powers provision is not a grant of power, but a limitation upon power, specifically, upon the inappropriate exercise of power by a branch beyond that respectively granted under Articles V, VI, and VII of the Montana Constitution. *See* Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 89-90 (2001) (stating that "[p]ower granted to one branch of government cannot be exercised by another" and collecting cases, including those addressing legislative "intrusions on judicial powers.").

¶56 The surprising thing about the Department of Justice's letters was the ignorance of history and long-established legal precedent they embodied, because, since the early 1800s, "the idea that the Supreme Court had the power to pass upon constitutional questions and that its decisions were final and binding upon the other two departments of government ha[s] been . . . widely accepted." Alfred H. Kelly & Winfred A. Harbison, *The American Constitution: Its Origins and Development* 317 (5th ed. 1976). Although *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (providing that "[i]t is emphatically the province and duty of the judicial department to say

what the law is") is commonly and correctly cited as the source ruling concerning this judicial authority, *see Driscoll*, ¶ 11 n.3, the principle precedes *Marbury* in our constitutional history. The Judiciary's power to judge the legality of the actions of the other two branches or "departments" was a precept publicly advanced to the country's citizens as explanatory of the system of government contemplated under the proposed Constitution, and in support of its adoption. As explained by Alexander Hamilton in 1788, prior to the adoption of the Constitution:

> the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, *to keep the latter within the limits assigned to their authority*. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It must therefore belong to them to ascertain its meaning, *as well as the meaning of any particular act proceeding from the legislative body*.

The Federalist No. 78, 498 (Robert Scigliano ed., Random House, Inc. 2000) (emphasis added).[1, 2]

¶57 The reason for conferring this weighty power upon an independent judiciary was, simply but significantly, to protect liberty. "[L]iberty of the people can never be endangered" by the courts of justice, Hamilton explained, "so long as the judiciary remains truly distinct from both the legislature and the Executive." Hamilton, *supra*, at 497. Hamilton made this point regarding both other branches, but particularly regarding the legislative branch:

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[1] It is notable that Hamilton was the "big government" proponent of his day, advocating for a strong central government with broadly construed powers. *See* Kelly & Harbison, *supra*, at 169 (stating that "Hamilton presented what was to become the classic exposition of the doctrine of the broad construction of federal powers under the Constitution."). Nevertheless, he urged that the judiciary should have the final say about the validity of actions taken by the other branches of government.

[2] The Federalist Papers are frequently cited as constitutional authority by the U.S. Supreme Court. *See Trump v. Mazars USA, LLP*, ___ U.S. ___, 140 S. Ct. 2019 (2020); *Allen v. Cooper*, ___ U.S. ___, 140 S. Ct. 994 (2020); *Murphy v. National Collegiate Athletic Ass'n*, ___ U.S. ___, 138 S. Ct. 1461 (2018); *National Labor Relations Bd. v. SW Gen., Inc.*, ___ U.S. ___, 137 S. Ct. 929 (2017); *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855 (2017); *Evenwel v. Abbott*, ___ U.S. ___, 136 S. Ct. 1120 (2016); *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542, 135 S. Ct. 1787 (2015); *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 135 S. Ct. 1656 (2015); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 135 S. Ct. 1378 (2015); *National Labor Relations Bd. v. Canning*, 573 U.S. 513, 134 S. Ct. 2550 (2014); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S. Ct. 2024 (2014); and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 S. Ct. 1659 (2013).

> "there is no liberty, if the power of judging be not separated from the legislative and executive powers." It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other two departments . . . .
>
> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. *By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority*; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. *Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing.

Hamilton, *supra* at 497 (emphasis added).

¶58 However, as Hamilton further explained, the Judiciary has only "judgment" to offer, that is, the Judiciary is provided no mechanism to enforce its own decrees, and thus, the Judiciary "must ultimately depend upon the aid of the executive arm for the efficacious exercise" of its power. Hamilton, *supra*, at 496. This reality is what makes the Attorney General's defiance of the Court's orders in this case so disruptive of our constitutional system—the Judicial branch often must rely upon the Executive branch for execution of

its orders and conveyance of the "judgment" the Judiciary has been constitutionally empowered to provide. By repeatedly refusing to comply, the Attorney General engages in actions that are destructive to our democratic system of government. "[T]he executive is as much bound to recognize the Court's decision as any other individual; otherwise the very judicial capacity of the Court itself is virtually destroyed." Kelly & Harbison, *supra*, at 318. Unfortunately, the Attorney General is not the first to choose this dark pathway.

¶59 President Andrew Jackson famously declared, in response to the U.S. Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832), with which he strongly disagreed, "John Marshall has made his decision, now let him enforce it." Kelly & Harbison, *supra*, at 287. So accepted in 1832 was the principle of the Court's power of judicial review and the binding nature of its decisions upon the other branches of government, that leading statesmen of the day, including Henry Clay and Daniel Webster, attacked Jackson's stand as subversive to our constitutional democracy and a violation of "first principles." Kelly & Harbison, *supra*, at 317. But Jackson refused to relent, asserting, "[t]he Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution"—the same position taken by the Department of Justice in its letters of April 12 and April 18. Kelly & Harbison, *supra*, at 317. The results of Jackson's extraconstitutional stand were calamitous.

¶60 In *Worcester*, laws passed by the State of Georgia purporting to govern the lands of the Cherokee Nation of Georgia—attractive lands within the western region

of Georgia desired by governing authorities and citizens alike—were challenged as being unconstitutional. The Supreme Court struck down Georgia's laws, declaring the Cherokee Nation was sovereign and that it occupied its own territory "in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress." *Worcester*, 31 U.S. (6 Peters) at 561. The Court explained that Georgia's laws

> interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.
>
> They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.
>
> They are in equal hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties.

Worcester, 31 U.S. (6 Peters) at 561-62.

¶61 However, despite the Supreme Court's clear directives that Georgia's law violated federal law and

treaties, and that the national government was duty bound to defend against this encroachment upon the Cherokees' land, Jackson refused to honor the decision. Led by his usurpation, the Court's decision was openly flouted, and defiance was popularly applauded. While the decision, if enforced, would have protected the Cherokees and strengthened their efforts to resist the pressure of land-hungry encroachers, Jackson ensured that it was not, instead permitting Georgia to continue its efforts and insisting upon relocation of the Cherokees under the Indian Removal Act of 1830, 21-148 Stat. 411, by which Indian tribes who "surrendered" their ancestral homelands were granted land in the western United States. Thus, the Cherokees were forced into the Treaty of New Echota, *see* 2 Charles J. Kappler, *Indian Affairs Laws and Treaties* 439-49 (2d ed. 1904), which took their Georgia lands and subjected them to immediate forcible relocation to Oklahoma by the U.S. Army, a brutal journey in which thousands of Cherokees lost their lives, and which has become known to history as The Trail of Tears. This tragic suffering was rooted in the arrogance of one man demanding to have his own way, Constitution be damned. While the tears of human suffering fell directly at the feet of Andrew Jackson, what is important for us today is this: "[t]hose who fail to learn from history are condemned to repeat it."[3] And we have seen history repeated in the Attorney General's extralegal actions taken in this case.

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[3] Laurence Geller CBE, Churchill's Shakespeare, at the Folger Library, Washington D.C. (transcript at https://perma.cc/X94L-V55G) (citing a 1948 address to the House of Commons by Winston Churchill, paraphrasing philosopher George Santayana).

¶62 Of course, under our constitutional system of government, there are legally permissible responses to a court decision one disagrees with. The law is a vast body of knowledge, about which there can be fair disagreement over its correct application in a particular case. When judges disagree about the law's application, they publicly state their disagreement and provide the legal reasoning therefor. For interested parties, disagreement with the Court's decisions can be answered by seeking rehearing by the court in the particular case, the passage of responsive legislation, amendment of the constitution, or, in Montana, the selection of different judges during elections. Sending the Court letters in defiance of its orders is not a legally available option under the Montana Constitution.

¶63 Lastly, there is the matter of the Legislature's intervention in this matter and the subsequent statement made in its briefing. Following the letter of April 12, conveying the refusal of the Department of Justice and the Legislature to comply with the Court's Temporary Order, the Legislature, represented by other counsel, filed a motion to intervene in this matter. To obtain opposing counsel's consent to its intervention, the Legislature committed "to abide by and comply with all orders of the Court." *See Order*, p. 2, April 14, 2021, OP 21-0125. Based expressly upon that commitment, this Court exercised its discretion to grant the Legislature's motion to intervene.

¶64 However, after obtaining intervention, the Legislature reneged on its commitment, stating in its filing that what it *really* meant by its promise to

comply with "all orders" of the Court was merely "to abide by orders *that the Court has proper jurisdiction to issue*"—apparently as that would be subjectively determined by someone other than this Court, perhaps by the Legislature itself or by the Department of Justice. *Montana State Legislature's Summary Response to Petition*, p. 1, n.1, April 14, 2021, OP 21-0125 (emphasis added). The Legislature thus clearly demonstrated it had gained intervention into this proceeding by misrepresenting its position to this Court, and to opposing counsel as well. These actions were dishonest and contemptuous. Perhaps individual legislators active in this matter had no knowledge that these actions were taken on their behalf, or on the Legislature's behalf. However, the Legislature's intervention counsel, who are experienced advocates, surely knew. And they know better than to engage in such duplicitous actions.

¶65 The rightful consequence of these actions would be to revoke the Legislature's intervention, strike its brief, and to view with caution any future requests made of this Court by the Legislature. Similar sanctions would likewise be appropriately imposed upon the Department of Justice for its contemptuous actions herein. My initial thought was to ask the Court to impose these sanctions, but a second thought prevailed: until the Legislature and the Department of Justice can demonstrate a proper understanding of the Judiciary's constitutional authority, there is little hope they could comprehend contempt of it.

¶66 I concur.

/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶67 I dissent from the Court's decision that SB 140 is constitutional.

¶68 Before addressing the construction of the constitutional provision at issue and the particulars of the Framers' intent, some preliminary observations for purposes of context are warranted. Article VII, Section 8(2) must be considered in its entirety and consistent with the intent of the Framers. While "in the manner provided by law" gives the Legislature discretion to develop a selection process for interim vacancies, that discretion must be exercised consistent with the constitutional provision as a whole, and with the intent of the Framers to provide a merit selection process for interim vacancies. The merit selection process unanimously agreed upon for interim vacancies was part of a larger conversation amongst the Framers about whether, in general, judges should be elected—the prevailing and majority proposal—or selected based upon merit—the minority proposal known as the "Missouri Plan." While proponents of the merit process lost the war respecting judicial selection as a whole, they won the battle for interim vacancies. However, it is important to place the Framers' debate in proper context. Because of Montana's biennial election cycle, it was *impossible* to fill an interim vacancy by election, the preferred method. As the Framers were united in their position that placing power in the governor to make judicial appointments posed a threat to the independence of Montana's judiciary, a selection process based on merit, the only reasonable type of vetting process, was the best solution short of an

election. As they developed the judiciary article, the Framers repeatedly referred to Montana's history of big business, political corruption, outside influences, and control of Montana's courts by the executive branch.[1] They were united in their conviction that the judiciary must be independent and protected from executive overreach. While the Framers unanimously agreed that a merit selection process was preferable to direct gubernatorial appointments, they likewise understood that commissions were also subject to political influences. *See* Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1027 (". . . you cannot pick a committee in the State of Montana that will be totally free of that kind of influence."). While leaving employment of the merit selection process in the Legislature's hands, the Framers' intent was clear that the nominees from whom the governor could appoint would be vetted based on merit—the only way to protect against a direct gubernatorial appointment. Unfortunately, fifty years after the 1972 Constitutional Convention, this Court reaches a conclusion contrary to the Framers' intent and which enables what the Framers clearly sought to prevent—a direct gubernatorial appointment. SB 140 is not a merit based nomination process and does nothing to prevent direct appointments by the governor—and the Court should call it for what it is. It

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[1] "With statehood, Montana's judiciary transitioned from federal appointees unfamiliar with mining law to elected officials all too familiar with the corporate overreach and corruption that came to be known as the War of the Copper Kings." *A Past and Future of Judicial Elections: The Case of Montana*, Anthony Johnstone, 16 J. App. Prac. & Process 47, 53 (2015).

quite simply allows the governor to make a direct appointment from self-nominated applicants.

¶69 Turning now to rules of construction and the constitutional provision itself, we apply the same rules used in construing statutes as we do when construing a constitutional provision. *Nelson*, ¶ 14. "As with statutory interpretation, constitutional construction should not lead to absurd results, if reasonable construction will avoid it." *Nelson*, ¶ 16 (internal citations omitted). We must look to the entire provision and attempt to give effect to each word contained therein and construe the provision consistently. Section 1-2-101, MCA. Article VII, Section 8(2) provides: "[T]he governor shall appoint a replacement from *nominees selected* in the manner provided by law" (emphasis added). The plain language of this provision requires that "nominees"[2] be "selected" by a process provided by the Legislature. It is clear the Legislature's discretion is not unbridled, rather it is limited by the requirement that there be both a *selection* process and that applicants become *nominees*. The plain language does not permit the governor to consider an entire pool of applicants, as there would not be a "selection" of "nominees" as required by the words or plain language of this constitutional provision. Accordingly, "nominees selected" provides a limitation on the Legislature's

[2] "Nominee" is defined as, "Someone who is proposed for an office, membership, award, or like title or status. An individual seeking nomination, election, or appointment is a *candidate*. A candidate for election becomes a *nominee* after being formally nominated." *Nominee*, *Black's Law Dictionary* (11th ed. 2019) (emphasis in original).

discretion when it exercises its authority to make laws. SB 140 violates the plain language of Article VII, Section 8(2) because it merely establishes an application process, not a selection process for nominees *from* which the governor may appoint. There is no selection of nominees if the governor can consider the entire pool of self-nominating applicants. The requirement that an applicant have three letters from an adult Montana resident does not establish a manner for selecting nominees; it merely establishes an additional requirement for the application, which is customary for any job application process. The entire impetus for changing the judiciary article in the 1972 Constitutional Convention was to replace the governor's sole discretion to fill vacancies set forth in the 1889 Constitution with a system that provided a list of qualified nominees derived through an independent vetting process. To conclude, as the Court does, that these three letters satisfy the constitutional requirement that the governor appoint from "nominees selected," is akin to saying the Emperor is wearing new clothes when the Emperor is not and, as noted by a young boy, the Emperor is really naked.[3]

¶70 While the plain language of the constitutional provision restricts the discretion of the Legislature as described, the intent of the Framers *controls* the Court's interpretation of a constitutional provision. *Nelson*, ¶ 14. "Even in the context of clear and unambiguous language, however, we have long held that we must determine constitutional intent not only

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[3] "The Emperor's New Clothes," Hans Christian Andersen, *Fairy Tales Told for Children* (1837).

from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Nelson*, ¶ 14. Moreover, "[i]n determining the meaning of the constitution, the Court must keep in mind that it is not the beginning of law for the state, but a constitution assumes the existence of a well understood system of law which is still to remain in force and to be administered, but under constitutional limitation." *Nelson*, ¶ 15 (quoting *Grossman v. Mont. Dep't of Natural Res.*, 209 Mont. 427, 451-52, 682 P.2d 1319, 1332). The constitution refers to many terms and concepts that it does not define. *Nelson*, ¶ 15 (quoting *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 326, 137 P. 392, 394). The Court examines these concepts in the context of the "'previous history' of this community [and] 'the well-understood system' then in use." *Nelson*, ¶ 15 (quoting *Hillis*, 48 Mont. at 326, 137 P. at 394).

¶71 To provide context to the Framers' intent when drafting the 1972 judiciary article, it is necessary to trace the development of Montana's judiciary article. As a territory, Montana judges were appointed by the President in Washington D.C. While likely learned and capable jurists, they had federal connections and harbored eastern values. They were unfamiliar with the lives, struggles, and ambitions of the territory's inhabitants. More particularly, they were unfamiliar with mining law and mining interests, which was fast becoming a lucrative business at the "richest hill on earth" in Butte. In Montana's first attempt at a constitution in 1884, Montanans responded to these

outside influences by providing that justices of the Supreme Court would be "elected by the people" for a six-year term and would be required to live in the Territory for two years. The provision for judicial selection by election and the residency requirement were a response to the grievances Montanans held against foreign judges appointed by the executive.

¶72 The proposed 1884 Constitution failed to be ratified and it was not until the 1889 Constitution that Montana acquired statehood and had a judiciary article within its own constitution. The 1889 Constitution remained committed to the election of Montana judges "by the people" and retained the residency requirement. Significant here, the 1889 Constitution provided that in the case of vacancy in the position of Justice of the Supreme Court, the district court, or the clerk of the Supreme Court, the position "shall be filled by appointment, by the governor of the State." Mont. Const. art. VIII, § 34 (1889). Soon after ratification, the wealthy corporate mining interests exerted their influence over government and also threatened the independence of the courts. These corporations were owned by outside stakeholders and benefitted their foreign interests, even though Montana citizens were the ones who worked and died in Butte's mines. Montana's rich resources would always subject Montanans to the needs and demands of large corporations owned, dominated, and run by outside interests, in part because of the extensive amount of capital needed to mine, explore, and develop these resources. Soon these mining interests began a campaign to control state government, including its judiciary, and often advanced agendas inconsistent

with the interests of local Montana farmers, ranchers, miners, and the working class. *See Patrick v. State*, 2011 MT 169, 361 Mont. 204, 257 P.3d 365. The "Copper King" era, as it has been called, and Montana's long history of political corruption, overreach by the branches of government, and control of its government institutions by outside influences plays a significant role in the development of Montana's judiciary. In my opinion, those influences continue to be exerted on the judiciary today and threaten the judiciary's independence.

¶73 The 1965 reapportionment of the State Legislature created the 1967 Legislature, which commissioned a study to ascertain whether the 1889 Constitution was adequately serving the needs of the people. Voters responded and, in a 1970 referendum, elected to convene the 1972 Constitutional Convention. This remarkable event in Montana's history would again bring under scrutiny Montana's judiciary article and, in particular, how judges are selected. As Delegate Jim Garlington explained, "There is clear agreement on the part of all that we do need good judges . . . . The question is how to recruit them." Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1032. Delegate Cedor Aronow spoke of the importance of an independent judiciary:

> [I]t is dreadfully important . . . that the courts be made independent, be made strong, be made unafraid to act for fear of reprisal from one of the other branches of the government. And it is only in that manner that we can guarantee to

> our people the liberties that we wish them to have.
>
> The court should also be made strong enough and independent enough that they have no fear of striking down an unconstitutional legislative act. They should have no fear of saying to the Executive branch of government, "You've gone too far; you've impugned upon the rights of individuals."

Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, pp. 1069-70. Montana's history of political corruption and overreach of the judiciary was aptly described by Delegate John Schiltz,

> As I say, it's not a good system as we have it, but I submit to you that in this State of Montana, where we have different problems from the problems they have in Missouri or any other state; where we have strong corporate influences; where, if I can elect a Governor and, through that office, nominate and appoint the district and the Supreme Court judges, I can run this state. *I can own it*.

Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1026 (emphasis added). This history provides important context to the 1972 Constitutional Convention when, ultimately, the Framers decided to change the 1889 Constitution by removing the appointment power of the governor in the case of judicial interim vacancies.

¶74 At the 1972 Constitutional Convention, the Framers debated whether Montana judges should be popularly elected or selected under a merit based process known as the Missouri Plan. The majority proposal, which supported election of judges, provided that interim vacancies of the Supreme Court would be filled by the governor and district court vacancies would be filled by the county commissioners within the judicial district. However, the minority was dissatisfied by the unlimited gubernatorial appointive power of judges and proposed limiting the governor's power to appointing from nominees selected by a committee, created by and dependent upon the Legislature. It was believed such a system would afford an effective check and balance. The minority plan also envisioned creating a vetting committee. "The object here was to insure as nearly as possible that this committee will not be dominated by one party to the other. Likewise, we were concerned about this committee being dominated by some vested interest . . . ." Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1023.

¶75 In the end, the Framers unanimously agreed to change the 1889 Constitution and limit the governor's appointment power by requiring the governor to appoint "from" "nominees" who were "selected." The Framers, however, left the details of the nomination selection process to the Legislature, expressing concern that there needed to be flexibility to address changing circumstances. There was still distrust among some of the Framers that partisan interests would control a committee or commission. However, there is little doubt that all delegates understood that the proposal

for selection of interim judges envisioned a commission or committee which would "select" and "nominate" individuals to be considered by the governor for appointment. *See, e.g.*, Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1090 (Hanson, expressing concern that a committee could be fair and free of outside influences); Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, pp. 1090-91 (Holland: "How can we guarantee that this commission—the ones that name the candidates—won't be dominated by some special interest group?"); Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1093 (Davis: "You can say what you want, any select committee's going to be a committee of the establishment. There's just no other way to get around it . . . ,"); Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1094 (Berg: "I suggest to you that that committee, committing two to three or four names to the governor, is going to get the governor a fairly wide selection of nominees, and he can select . . . whom he wants—from that committee."); Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1096 (McKeon: "I'm afraid, Mr. Chairman, that any committee, whether it be select, blue ribbon or whatnot, will not be a committee whose interests are the interests of the people . . . ."); Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1104 (Joyce: "[N]o matter how astute or how brilliant or how able or how fairly the Legislative Assembly may set up a commission to select these nominees, you cannot take the human element out of the situation.").

Nonetheless, the foremost concern amongst the delegates was to avoid a system in which one branch of government would attain more power than another. In his opening statements, Delegate Holland indicated that, "When you have a constitutional provision, the reservoir of powers are with the people and, naturally, to have a functioning society, you're going to have to give some powers to the Legislature and some to the court and some to the Executive. But you only want to give them so much power as you need to function . . . ." Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1011.

¶76 The result of the 1972 Constitutional Convention was a revised judiciary article that continued to provide for the election of judges as in the 1889 Constitution, but rejected the 1889 Constitution's provision allowing for the governor to make direct appointments for interim vacancies. Although the process for selecting nominees was not written into the 1972 Constitution and was left to the discretion of the Legislature, there is little doubt that the intent of the Framers was to eliminate the direct appointment power of the governor and provide a selection process based upon merit. In 1973, the Legislature responded and created the Judicial Nomination Commission and established a nonpartisan process to select nominees from which the governor could make an appointment. "Not satisfied with the current process of unlimited gubernatorial appointive power of judges," those who favored the minority report suggested a committee that was "bi-partisan in nature." *See A Past and Future of Judicial Elections: The Case of Montana*, Anthony Johnstone, 16 J. App. Prac. & Process 47, 72. Still

there was concern about the governor having the power to appoint a majority of the nominating commission. *See A Past and Future of Judicial Elections: The Case of Montana*, Anthony Johnstone, 16 J. App. Prac. & Process 47, 73 ("'the Legislature tossed the mechanics of the appointment of judges right into the political kettle' by giving the governor the power to appoint the majority of the nominating commission.").

¶77 This Court held in *Keller v. Smith*, 170 Mont. 399, 553 P.2d 1002, 1007 (1976), that "[p]erhaps the best indication of the intent of the framers is found in the explanatory notes as prepared by the Constitutional Convention." The Convention Notes "express[ ] the intent of the delegates to the Constitutional Convention and the meaning they attached to the new constitution they formed and adopted." *Keller*, 170 Mont. at 406, 553 P.2d at 1007. Here, the Voter Information Pamphlet for the 1972 Constitution, provided:

> When there is a vacancy (such as death or resignation) the governor appoints a replacement but does not have unlimited choice of lawyers as under the 1889 constitution. He must choose his appointee from a list of nominees and the appointment must be confirmed by the senate—a new requirement.

This confirms the Framers' intent that the new provision would no longer allow the governor to have plenary power to fill a vacancy; rather, the governor would make an appointment from "nominees" who were "selected" by an independent process determined by the Legislature. The Convention notes confirm the

Framers intended to change the 1889 Constitution to remove authority from the governor to make direct appointments and to provide a process for vetting applicants—a process that can only reasonably be based on merit and qualifications.

¶78 Constitutional intent was again expressed in 1992 when Article VII, Section 8 was modified by voter initiative. The 1992 Voter Information Pamphlet stated: "The governor is limited to appointments from a list recommended by a Judicial Nominating Committee which is required by the Constitution, and whose membership and rules are established by the legislature." Appointments of justices had increased since 1972 and "commentators described 'justices who resigned before completion of a term so that a politically allied governor could appoint a replacement,' and others who 'endured under personally adverse conditions to prevent a replacement being appointed by an unfriendly governor.'" *A Past and Future of Judicial Elections: The Case of Montana*, Anthony Johnstone, 16 J. App. Prac. & Process 47, 76. The 1992 Voter Information Pamphlet on Constitutional Amendment 22 harkened back to the concern of the 1972 Framers. Proponents and opponents indicated:

> Proponents: This amendment seeks to bolster the constitution in guaranteeing the right of all Montanans to vote and participate in electoral system while maintaining the balance of powers between the three branches of government by eliminating the potential for improper use of the appointment process.

> Opponents: Safeguards addressing proponent concerns are already in place. The Governor is limited to appointments from a list recommended by a Judicial Nominating Committee which is required by the Constitution, and whose membership and rules are established by the legislature.

This Court recognized the significance of voter information pamphlets as an expression of the meaning of a constitutional provision in *State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire*, 227 Mont. 85, 89-90, 738 P.2d 1255, 1257-58 (1987).

¶79 This Court in *Keller* also held that legislative determinations are indicative of constitutional intent. Immediately following ratification of the 1972 Constitution, the Montana Legislature convened in 1973 and enacted legislation, SB 28, to implement Article VII, Section 8, respecting interim vacancies. It established the Judicial Nomination Commission to vet and select nominees for appointment by the governor for interim vacancies. This legislation, which was so temporally close to the Constitutional Convention, is very enlightening as to the Framers' intent. The commission established in 1973 had been in effect for nearly fifty years.

¶80 Finally, this Court, in *State ex rel. Racicot v. District Court*, 243 Mont. 379, 387, 794 P.2d 1180, 1185 (1990), has already expressed what the constitutional intent was of Article VII, Section 8(2):

> The minority proposal [ultimately adopted by the Framers] provided for the selection of justices and judges through a system of appointment. The Judicial Nominating Committee would review the records of candidates and present the governor with a list of the most qualified nominees. From the list, the governor would select a nominee to be confirmed or rejected by the Senate. A confirmed appointee could face a contested election in the first primary following Senate approval. Thereafter, the appointee would run in an approval-or-rejection contest in a general election for each succeeding . . . . The delegates were informed that the appointment method of systematically screening judicial candidates "is more conducive to attaining a qualified, capable judiciary than the elective method whereby candidates are chosen more for political appeal than merit." (quoting Mont. Constitutional Convention Comm'n., Mont. Constitutional Convention Study No. 14: The Judiciary, at 141).

Accordingly, this Court recognized that the Framers' intent underlying the new provision was to establish a screening process for attaining qualified judges.

¶81 Given the well-established and recognized requirement that the intent of the Framers is controlling, *Nelson*, ¶ 14, I cannot ignore rules of construction for interpreting that intent: the Convention notes; the 1973 and 1992 Voter Information Pamphlets; temporally close legislative determinations of intent such as SB 28; our precedent

interpreting the Framers' intent; and the debate that occurred amongst the Framers in 1972. While the Framers did not require that a *commission* be the method for selecting applicants and acknowledged that commissions were equally susceptible to partisan control, it is clear the Legislature was to exercise its discretion to implement a screening process based upon merit to provide qualified nominees to the governor for appointment.

¶82 Instead of applying well-established rules of construction to ascertain legislative intent, the Court relies primarily on Delegate Joyce's comments during the Constitutional Convention to suggest that control of judicial appointments by the executive branch remained a viable option considered by the Framers. However, Delegate Joyce's suggestion that the governor have direct appointment power was rejected by the Framers out of concern for maintaining the separation of power and placing too much power in the executive branch of government. And, ultimately, even Delegate Joyce changed his mind as the vote for the new constitutional provision was 88 in favor, and 0 against. Moreover, in *Keller*, this Court cautioned against selective use of excerpts from the transcripts:

> We remark in passing that we have not relied on the minutes of the Constitutional Convention proceedings as indicative of the intent of the delegates. We have purposely refrained from using this basis of interpretation as excerpts from various portions of the minutes, among other things, can be used to support either position, or even a third position . . . .

Keller, 170 Mont. at 408-9, 553 P.2d at 1008. Instead, the Court in *Keller* relied on rules of construction to ascertain the delegates' intent such as the Voter Information Pamphlets (Convention notes), legislative determination of intent, and precedent.

¶83 The Court equates the public comment period of SB 140 to a vetting process which presumably will expose unqualified candidates. Opinion, ¶ 45. However, while public comment satisfies Montana's constitutional right to know and participate in government, I fail to see how either a public comment period or three letters of reference are a screening process, as contemplated by the Framers, to obtain qualified judicial nominees for appointment by the governor. More importantly, the ability of the public to comment on an applicant does not convert SB 140 into a screening process based on merit and does little to advance the Framers' intent to change the 1889 Constitution and limit the governor's appointment power to appoint "from" "nominees" who are "selected."

¶84 In my opinion, by giving the governor plenary power to select judges, SB 140 poses precisely the threat to the independence of Montana's judiciary that Montana has historically been burdened with and that the 1972 Framers sought to prevent. This Court's failure to call SB 140 for what it is gives a green light to a partisan branch of government to select judges who are charged with the responsibility of providing a check on that power. While perhaps this design exists in other states and federally, the 1972 Framers did not want it to exist in Montana. Obviously, this Court will have to consider the constitutionality of statutes

enacted by the Legislature and signed into law by the governor. Principals of separation of power and our constitutional design provide that the necessary check on partisan power and overreach is through an independent and nonpartisan judiciary. The Court's decision today weakens that balance. There is little question in my mind that the Framers, burdened with a history of political corruption and overreach and committed to a qualified and independent judiciary, were united in their conviction that the governor should no longer have plenary authority to make a direct appointment, as in the 1889 Constitution.[4] Foremost on the Framers' minds was an independent judiciary and ensuring that power was not disproportionately placed in one branch of government. In my opinion, SB 140 is inconsistent with the plain language of Article VII, Section 8, and what was at the core of the Framers' convictions—to preserve the integrity and independence of Montana's judiciary in light of our significant history of political corruption and overreach into the courts.

¶85 I respectfully dissent.

/S/ LAURIE McKINNON

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[4] "Montana's answer reflects a territorial suspicion of outside influence, a progressive-era concern about corporate corruption, and an extraordinary deep deliberation among ordinary citizens about competing models for judicial selection in the formation of its 1972 constitution." *A Past and Future of Judicial Elections: The Case of Montana*, Anthony Johnstone, 16 J. App. Prac. & Process 47, 130.

APPENDIX P

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173

[Filed: April 14, 2021]

BETH McLAUGHLIN,	)
	)
Petitioner,	)
	)
v.	)
	)
The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT OF ADMINISTRATION,	)
	)
Respondents.	)

MOTION TO DISMISS

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PETITIONER

In recognition that her Motion in OP 21-0125 was improperly filed, Beth McLaughlin has now filed an Original Petition requesting that the Court quash the Legislature's April 8, 2021 subpoena. *See Petition for Original Jurisdiction,* April 13, 2021. This Court lacks jurisdiction to interfere with a duly authorized legislative investigation and must dismiss McLaughlin's Petition.

PREDICATE

Original Proceeding 21 -0125 pending in this Court is a matter seeking this Court's opinion on the constitutionality of SB140, recently enacted and signed into law by Governor Gianforte. In response to a

legislative inquiry regarding OP 21-0125, McLaughlin stated that she did not retain responsive emails and that Judicial Branch policy did not require retention of "these ministerial-type e-mails."

These emails are anything but ministerial. And contrary to McLaughlin's response, judicial branch policy *does* require retention of emails and there is no exemption for "ministerial-type" emails. *Exhibit B to Hansen Dec.* Moreover, the Judicial Branch policy provides that: "[p]rivacy of e-mail is not guaranteed; employees should not have the expectation of privacy for any messages. It is the expectation that any message sent is subject to public scrutiny." *Id.* Judicial Branch policy also provides that using the state e-mail system for "non-profit" or professional organizations is misuse of state e-mail resources. *Id.* Leaving no room for interpretation, the Judicial Branch policy states that "[a]ll messages created, sent or retrieved, over the state's systems are the property of the State of Montana." *Id.*

Since McLaughlin's response suggested she had improperly destroyed public records, the Legislature began an investigation and utilized its subpoena powers to compel the production of records from the Department of Administration (DOA). *Exhibit A to Petition,* OP 21-0173. On April 9, 2021, DOA produced over 5,000 emails. *Hansen Dec.,* ¶ 5. Prior to production DOA and the Legislature conducted legal review and redaction of protected information. *Hansen Dec,* ¶ 6 & 7. Currently, these documents are held by the Legislature's counsel and no sensitive or protected information has been disclosed. *Hansen Dec,* ¶ 8. The

emails that are known to have been publicly disclosed by the press are attached to the Hansen Declaration. None of the concerns raised by McLaughlin in this Petition have been implicated by disclosure of these public documents. Public confidence in the due process afforded an impartial judiciary, however, has been jeopardized.

LEGAL AUTHORITY AND ANALYSIS

1. Legislative Power

The Montana Constitution provides that legislative power and control over procedures is vested in the Legislature. Mont. Const. art. V, §§ 1 & 10. The power to "conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." *Watkins v. United States,* 354 U.S. 178, 187 (1957). "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." *McGrain v. Daugherty,* 273 U.S. 135, 175 (1927). Montana codified this inherent power through the legislative subpoena. Mont. Code Ann. § 5-5-101 *et seq*.

McLaughlin concedes that legislative subpoenas are valid so long as they are tied to a legislative purpose. *See Petition* at 17. The questions the Legislature seeks to be informed on through the instant subpoena are certainly tied to a significant legislative purpose: an investigation into whether members of the Judiciary and the Court Administrator have deleted public records and information in violation of state law and policy; whether the Court Administrator has performed tasks for the Montana Judges Association during taxpayer funded worktime in violation of law and policy; and whether current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before courts for decision. Each of these inquiries are firmly grounded in the administration of existing law, policies, and constitutional mandates placed on the Legislature.[1] The Legislature has the power to investigate these matters and this Court cannot hinder the investigation simply because the responsive materials may tend to "disgrace" the Judicial Branch or render it "infamous." Mont. Code Ann. § 5-5-105(2).

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[1] Current law provides for the "efficient and effective management of public records and public information." Mont. Code Ann. § 2-6-1001. Judicial Branch policy prohibits the use of state resources, including staff time, for the benefit of private organizations. *Exhibit B to Hansen Dec.* The Montana Constitution requires the Legislature to create the Judicial Standards Commission. Mont. Const. art. VII, § 13. Statute provides for the organization of the Commission, as well as its mission, policies, and procedures. Mont. Code Ann. § 3-1-1101 *et seq*.

McLaughlin errs by conflating a legislative subpoena issued under Mont. Code Ann. § 5-5-101 with a subpoena issued under § 26-2-101 *et seq*. The differences are clear. A legislative subpoena issued under § 5-5-101 requires the attendance of a witness before either house of the legislature or a committee of either house. Failure to appear or comply with the legislative subpoena, puts the recipients at risk of being held in contempt by the house or senate. Mont. Code Ann. § 5-5-103. By contrast, subpoenas issued under Title 26 compel attendance before a court or judicial officer. Mont. Code Ann. § 26-2-102. Failure to comply with a subpoena under Title 26 risks being held in contempt of court. Mont. Code Ann. § 26-2-104. A legislative subpoena rests on the legislative power and it would violate the inherent authority of the Legislature to force application of the court rules for judicial proceedings to the legislative process.

2. Conflict of Interest

The Office of the Court Administrator is created by Mont. Code Ann. § 3-1-701, and the supreme Court appoints an administrator who serves at the pleasure of the Court to act on its behalf. Original jurisdiction here, if accepted, creates a conflict of interest for the Court in that the Court's employee, though attempting to skirt this fact by styling the suit solely in her personal capacity, is acting in her representative capacity for the Court, and is the Plaintiff. This inherent bias requires recusal of, at minimum, the entire panel of Justices. *See Mont. Code Jud. Conduct,* Rules 1.1, 1.2, 2.2, 2.3, 2.4, 2.9, 2.10, 2.11, 2.12, 2.14,

2.16, 2.17, 3.1, 3.2, 4.1.[2] The Court may not grant the relief requested by the Petitioner, may not accept original jurisdiction, and must refuse to further interfere with a duly authorized legislative investigation. "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others..." Mont. Const. art. III, § 1. Moreover, "no man can be judge in his own case." *Walker v. Birmingham,* 388 U.S. 307, 320 (1967). The Court itself is witness to and has interest in the information sought by the subpoena in question.

3. Failure of Jurisdiction

"If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." Mont. R. Civ. P. 12(h)(3). "It has been said that the principle of the separation of powers is fundamental to the exercise of constitutional government." *National Mut. Ins.* Co. *v. Tidewater Transfer Co.*, 337 U.S. 582, 590 (1949). "Each branch constitutes a check or balance upon the other branches, in order that no one branch has too much power in its hands." *State ex rel. Fletcher v. Dist. Court,* 260 Mont.

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[2] Rule 2.10 permits the Court to engage in scheduling, administrative, or emergency *ex parte* communications with parties, i.e. McLaughlin, so long as the communication does not address substantive matters. However, the Rule only permits such communication if the Court believes McLaughlin will not receive an advantage in the case and the Court promptly notifies all other parties of the content of every *ex parte* communication, whether written or verbal, and gives the parties an opportunity to respond. As the Court's administrator, this is an impossibility.

410, 417, 859 P.2d 992, 996 (1993) (citations omitted). This case is non-justiciable under Article III, § 1, and creates a jurisdictional failure for this Court. *See Larson v. State, 2019 MT 28, P18 (citing Baker v. Carr, 369 U.S. 186, 217-36 (1962)).*

CONCLUSION

The Montana Legislature submitted a letter to the Acting Chief Justice on April 12, 2021, notifying the Court that the April 11, 2021, Order is not binding on the legislative branch and will not be followed. *Exhibit C to Petition.* McLaughlin's current Petition seeks yet another Court order which will not bind the Legislature and will not be followed. The Legislature will continue its investigation, Acting-Director Giles will obey the legislative subpoena or be subject to contempt, and this Court lacks jurisdiction to hinder the Legislature's power to investigate these matters of statewide importance.

The separation of powers fundamental to our form of government, the nature of checks and balances, together with basic jurisdictional constraints, demand dismissal of this matter. The Court does not get to routinely issue Orders authoritatively exercising its checks and balances powers, then shun and deflect the Legislature's power to exercise reciprocal checks on the Judiciary. The Legislature has the power and the obligation to serve as the check and balance for the judicial branch of government, and the Legislature's investigation will not be further disrupted or disturbed. "...[A] court without jurisdiction over a case cannot enter judgment in favor of either party. It can only dismiss the case for want of jurisdiction." *State ex rel.*

Cowan v. District Court, 131 Mont. 502, 507, 312 P.2d 119, 122-23 (1957) (internal citations omitted). The Court has no authority but to dismiss this Petition.

Respectfully submitted this 14th day of April, 2021.

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/s/ Kristin Hansen
KRISTIN HANSEN
Lieutenant General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this pleading is printed in a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,672 words, excluding certificate of service and certificate of compliance.

/s/ Kristin Hansen
KRISTIN HANSEN
Lieutenant General

CERTIFICATE OF SERVICE

I, Kristin N. Hansen, hereby certify that I have served true and accurate copies of the foregoing Motion - Dismiss to the following on 04-14-2021:

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Dated: 04-14-2021

APPENDIX Q

[Filed: April 30, 2021]

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COUNSEL FOR RESPONDENT
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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.	)

RESPONSE TO PETITION FOR ORIGINAL JURISDICTION

I. Jurisdiction and Rules

Members of this Court have taken the extraordinary step of issuing an emergency order concerning subpoenas of which they and their employee are the subject.[1] This is simply impermissible. The Court has made itself party to this matter creating a jurisdictional failure.[2] Even if this Court could hear this case, it may only accept original jurisdiction "when urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of state-wide importance." Mont. R. App. P. 14(4).

McLaughlin claims sweeping privileges covering all public records subject to the legislative subpoenas. Her claims are not purely legal questions. Determining what documents are public records is necessarily fact-

[1] 4/16/21 Order at 5.

[2] *See* Motion for Disqualification filed contemporaneously with this Response.

intensive and alone renders this case inappropriate for an original proceeding. But more than that, McLaughlin and her counsel have had all the documents compiled by the Department of Administration ("DOA") for over two weeks and have not produced a privilege log nor agreed to any negotiations with the Legislature. Upon information and belief, McLaughlin has also refused to negotiate a resolution with DOA, preferring instead the sanctuary of her bosses' conflict of interest. Meanwhile, neither the Legislature nor the DOA have disclosed a single document that contains privileged information. There is no emergency.

This Court must reject jurisdiction under Mont. R. App. P. 14(4).

II. The procedural history of this case raises serious concerns under the Due Process clause of the United States and Montana Constitutions.

Every person is guaranteed the right to an impartial tribunal. *See Clements v. Airport Auth.*, 69 F. 3d 321, 333 (9th Cir. 1995) citing *Ward v. Monroeville,* 409 U.S. 57 (1972) ("At a minimum, Due Process requires a hearing before an impartial tribunal."). The Due Process Clause incorporates the maxim that "no man is allowed to be a judge in his own cause." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) quoting Federalist No. 10. Due Process likewise protects against a judge hearing a case when that judge possesses an interest that presents an objective risk of actual bias or prejudgment "under a realistic appraisal of psychological tendencies and human

weakness." *Id.* at 883-84 citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The Montana Code of Judicial Conduct requires disqualification and recusal when "the judge's impartiality might reasonably be questioned" including when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." Rule 2.12.

The present dispute is the latest entry in a series of numerous procedural irregularities that merit careful and cautious consideration by a substitute panel in how this matter proceeds. *See* Motion to Disqualify (filed contemporaneously herewith); *see also* Draft Committee Report.[3] The Special Joint Select Committee on Judicial Transparency and Accountability ("Select Committee") has released its Draft Committee Report which contains the following findings of procedural irregularity:

- Email records indicate attempted *ex parte* communications by the Goetz Law Firm and Edwards & Culver law firm representing the Petitioners in OP 21-0125.
- Chief Justice McGrath admitted that, though recused, he appointed Judge Kurt Krueger to fill his seat in OP21-0125 and that he called Judge Krueger immediately after the Attorney General filed a motion to disqualify the latter.

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[3] Draft Select Committee Report found here: (https://leg.mt.gov/content/Committees/JointSlctJudical/CommitteeReportDraft4-27.docx) (last accessed April 30, 2021).

- Subsequently, the Court ordered that six panelists would decide the OP 21-0125 constitutional challenge despite the requirement that the Court sit *en banc* to decide constitutional challenges pursuant to Article VII, section 3(2) of the Montana Constitution, and the Court's own internal operating rules.
- The Court appears to have engaged in *ex parte* communications with Administrator McLaughlin's counsel to allow him to file a motion on a Saturday, and then rule on that motion on a Sunday without providing notice or opportunity for argument.
- The Court preliminarily acted on an Original Petition filed by its own appointed Court Administrator to quash a legislative subpoena in a matter in which the Court Administrator was not a party.
- The Court entered an Order providing relief to its own members from Legislative subpoenas issued to the Justices themselves in a case in which the Justices are not parties.
- The Court has not refused to consider or acknowledge that under the Montana Code of Judicial Conduct it cannot hear a case in which the Court's own appointed Administrator is a party.
- Chief Justice McGrath appears to have violated judicial recusal rules by continuing to make

> decisions about how the OP 21-0125 proceedings would be conducted after he recused himself.

See Draft Committee Report, at 19-20, n.3.

At a minimum, no justice should serve as arbiter of their own case. "To hold otherwise would vest unfettered power over the citizenry of this State in a single branch of government, contrary to our well-enshrined system of checks and balances." *Commissioner of Political Practices v. Montana Republican Party*, 2021 MT 99, ¶15.

III. Legislative Subpoena Power

The Montana Constitution provides that legislative power and control over procedures is vested in the Legislature. Mont. Const. art. V, §§ 1, 10. The power to conduct investigations is inherent in the legislative process. As discussed in the Motion to Dismiss, that power is broad.

Since the power is broad, limitations on the legislative subpoena are narrow because the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *See McGahn*, 968 F.3d at 764 (citations omitted). A legislative subpoena must be related to a legitimate task of the Legislature. *See Watkins v. United States*, 354 U.S. 178, 197 (1957). Legislative subpoenas may not be issued to "try" someone "before [a] committee for any crime or wrongdoing." *See McGrain v. Daugherty*, 273 U.S. 135, 179 (1927). Finally, "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*, 354 U.S. at 187. However,

"[w]hen Congress seeks information needed for intelligent legislative action, it unquestionably remains the duty of *all* to cooperate." *Trump v. Mazars USA, L.L.P.*, 140 S. Ct. 2019, 2035 (2020) (emphasis in original) (citations omitted).

The Legislative power to examine the records of state agencies, including agencies in the executive or judicial branch is both long-standing and uncontroversial.[4] The Select Committee, likewise, is noncontroversial. The purpose of the Select Committee is to investigate and determine whether legislation should be enacted concerning: the judicial branch's public information and records retention protocols; members of the judicial branch improperly using government time and resources to lobby on behalf of a private entity; judges' and justices' statements on legislation creating judicial bias; and the courts' conflict of interest in hearing these matters. *See Draft Committee Report*, n.3.

The subjects of the legislative subpoenas are all public officers or employees. *See* Mont. Code Ann. §§ 2-2-102(7), (9) (defining "public employee" and "public officer" respectively). The legislative subpoenas focus

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[4] *See e.g.* Mont. Code Ann. § 5-13-309(2) ("The legislative auditor may examine at any time the books, accounts, activities, and records, confidential or otherwise, of a state agency."), Mont. Code Ann. § 5-11-106 ("The legislative services division on behalf of standing committees, select committees, or interim committees and any subcommittee of those committees, may investigate and examine state governmental activities and may examine and inspect all records, books, and files of any department, agency, commission, board, or institution of the state of Montana.").

on the activities of these public employees and officers as they relate to work with the Montana Judges Association ("MJA"), which is not a state entity and is a private organization. The subpoenas also focus on public records retention laws which protect the individual right to examine public documents and observe public deliberations is enshrined in Article II, section 9 of the Montana Constitution. *See* Mont. Code Ann. §§ 2-6-1002(11), (13) (defining "public information" and "public record" respectively).

The Legislature has a fundamental right to know and understand what entities engage in the legislative process via lobbying legislators to take official action. *See United States v. Harriss*, 347 U.S. 612, 625 (1954) ("full realization of the American idea of government by elected representatives depends to no small extent on their ability to properly evaluate such [lobbying] pressures"). Montana has enacted various statutes regulating the lobbyist industry. *See e.g.* Mont. Code Ann. 5-7-101, et seq. Further, "[a] public officer or employee may not engage in any activity, including lobbying, . . . on behalf of an organization . . . of which the public officer or employee is a member while performing the public officer's or public employee's job duties." Mont. Code Ann. § 2-2-121(6).

The legislative subpoenas have revealed information important to the committee and full compliance with the subpoenas will further aid in these important legislative purposes. For example, the Chief Justice coordinated lobbying efforts on HB 685 as well as coordinated support for pending judicial nominations. *See e.g.* Draft Committee Report, at 10-

11, n.3 (Chief Justice McGrath email stating "[t]hey don't seem to care much for Judicial Standards now that they have found out about it. We will need to pick off some votes here to keep it below 100."); (Chief Justice McGrath email stating "[s]hould we have them start poking around? This would be such a cluster if they aren't confirmed.").

The Legislature intends to fully understand the degree to which MJA lobbying activities are directed by public employees and officers using public resources and whether current law is sufficient to ensure taxpayer resources are not inappropriately used for the benefit of private organizations.

McLaughlin admits to deleting public records claiming a "ministerial" exemption to state policy. Draft Committee Report at 18, n.3. Justice Sandefur stated "it has been [his] routine practice to immediately delete non-essential email traffic." *Id*. Justice Shea and Chief Justice McGrath stated they routinely delete emails deemed non-essential. *Id*., at 19. Finally, Chief Justice McGrath stated "our policy regarding retention is that we're to clear our email boxes periodically because they fill up and our IT people don't have the capacity." *Id*. These statements are surprising admissions, though possibly justifiable, at least if more fully explained. But as it is now, and without willingness by members of the Court and the Court Administrator to produce documents or equipment for review, it simply appears as an assertion by the judicial branch that it can be the sole arbiter of what is a "non-essential" public record and thereby destroy property of the State of Montana. Montana

record retention policies dictate that "routine: non-permanent" emails be retained for three years. *Id*. at 18. The Legislature is entitled to review these contradictions, and if necessary, enact legislation to address them.

IV. Deliberative Privilege

McLaughlin misconstrues and misapplies the judicial deliberative privilege to cover not just the communications and mental processes of a judicial officer leading to a judicial decision, but to *all* communications by *any* judicial branch employee. *See e.g.* Pet. Br. at 26. The deliberative privilege must be narrowly tailored. *See In re Enforcement of a Subpoena*, 463 Mass. 162, 174 (2012). The privilege covers communications made by a judicial officer related to the deliberation and adjudication of a case before the court. *Id.* It does not cover communications by a judicial officer or their staff outside of the deliberative process. *Id.* at 175 (stating that ex parte communications or inquiries into an improper influence on the judge are outside of the scope of the privilege). Neither does the privilege cover communications or acts that "simply happen to have been done by judges." *Id.* citing *State ex rel Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727 (2000); *Leber v. Stretton*, 928 A.2d 262, 270 n.12 (Pa. Super. Ct. 2007).

The legislative subpoenas in this case do not seek any deliberative material from the judicial branch. The subpoenas expressly exclude from the requested information "any emails, documents, and information related to decisions made by Montana justices or judges in the disposition of any final opinion or any

decisional case-related matters." *See* McLaughlin subpoena. Unlike the subjects of cases cited by Petitioner, the legislative subpoenas at issue seek communications and public records that are non-deliberative.[5]

The Legislature seeks information regarding how the judicial branch engaged in the legislative process. *See* Draft Committee Report, n.4. The Legislature has a right to know who is pressuring legislators to take official actions in support or opposition of proposed legislation. *See Harriss*, 347 U.S. at 625. When Chief Justice McGrath stated, "of course the problem here is it allows a citizen's commission to discipline or remove judges," he is engaged in the legislative process not judicial deliberation. Draft Committee Report at 18, n.3. Chief Justice McGrath prefaced these remarks on LC3218 by saying "[w]e should probably get a membership vote on this and ask who can make calls." *Id*. at 10. The judicial branch cannot claim deliberative privilege when it steps outside that lane and crosses over into lobbying the Legislature.

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[5] Petitioner's statement that the documents that reach deliberative privilege have already been produced is likewise without merit. *Declaration of Kris Hansen*, April 14, 2021. Prior to production, the DOA and the Montana Legislature conducted a legal review. *Id*. Currently, these documents are held by the Legislature's counsel and no sensitive or protected or privileged information has been disclosed. *Id*. None of the concerns raised by McLaughlin have been implicated in these public documents. *Id*. None of the communications publicly disclosed by the Montana press have contained any confidential information.

V. Governmental Bodies and the Right to Know

The Montana Constitution provides, "[n]o person shall be deprived the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. Art. II, § 9.

The public right to know and inspect public documents applies to the judicial branch. "First and foremost, is the realization that the Constitution is the supreme law of this State. Its mandate must be followed by each of the three branches of government." *The Associated Press v. Board of Public Education*, 246 Mont. 386, 390 (1991) (stating that Article II, § 9 applies to the judicial branch). Article II, § 9 creates "a constitutional presumption that every document within the possession of public officials is subject to inspection." *Nelson v. City of Billings*, 2018 MT 36, ¶ 17. "The language of [Art. II, § 9] speaks for itself. It applies to all persons and all public bodies of the state and its subdivisions without exception." *Great Falls Tribune v. Dist. Court of the Eighth Judicial Dist*, 186 Mont. 433, 437-38, 608 P.2d 116, 119 (1980). *See also Goldstein v. Commission on Practice of the Supreme Court,* 2000 MT 8, ¶100 (Nelson, J. dissenting) (emphasis in original).

The court has recognized "there is a *constitutional presumption* that all documents of every kind in the hands of public officials are amenable to inspection. . . ." *Great Falls Tribune v. Mont. PSC*, 2003

MT 359, ¶ 54 (emphasis in original) (citations omitted). The fundamental premise is that "people must be able to learn what their institutions are 'up to,' and that the government is not engaged in inappropriate conduct." *Krakauer v. State*, 2019 MT 153, ¶ 54 (Rice, J. dissenting).

Petitioner's attempt to distinguish 'governmental bodies' from 'public bodies' is unavailing. *See* Pet. Br. at 22. As this court has previously stated, "[s]ection 9 applies to both public and governmental bodies. A 'public or governmental body' is a group of individuals organized for a governmental or public purpose." *Willems v. State,* 2014 MT 82, ¶16. While judicial deliberations may be protected from public disclosure, that is not a license to broadly exempt judicial branch employees from the sunshine provisions of the Montana Constitution.

VI. Third-Party Privilege

The Legislature strongly opposes the stunningly overbroad third-party privileges claimed by McLaughlin and will vigorously enforce its constitutional authority to seek responsive information that aids in the development of its legislative objectives.

McLaughlin raises the privacy rights of third parties not before the court to allege the subpoenas violate the rights of those parties. McLaughlin does not raise her own privacy rights. *See* Pet. Br. at 27-29. The Legislature will protect the privacy rights of third parties in accordance with state and federal law. *See* Motion to Dismiss, April 14, 2021. The Legislature is

not seeking health records, or employee discipline files. It is seeking access to state-owned records and equipment to further its aforementioned legislative inquiries. McLaughlin does not have a presumption of privacy in these records. *See* Mont. Const. Art. II, § 9; *see also* 4/14/21 Hansen Declaration, Ex. B. Unless a specific privacy privilege is asserted against a specific record, the presumption is that it is subject to the public's right to know.

This Court should decline to entertain McLaughlin's arguments that despite the plain wording of Article II, § 9, and despite the warnings that judicial branch employees have no expectation of privacy in their email, she should nonetheless be able to deny public access to public records based on vague assertions of the hypothetical privacy interest of unnamed third parties.

VII. Prudential Standing and Separation of Powers.

"Prudential standing is a form of 'judicial self-governance' that discretionarily limits the exercise of judicial authority consistent with the separation of powers." *Bullock v. Fox*, 2019 MT 50, ¶ 43, 395 Mont. 35, 435 P.3d 1187 (citations ommitted). It "embodies the notion that courts generally should not adjudicate matters more appropriately in the domain of the legislative or executive branches or the reserved political power of the people." *Id.* (citation and internal quotation marks omitted). "Each branch constitutes a check or balance upon the other branches, in order that no one branch has too much power in its hands." *State ex rel. Fletcher v. District Court*, 260 Mont. 410, 417,

859 P.2d 992, 996 (1993) (citations omitted). The principles of separation of powers prohibit one branch of government from hearing and arbitrating its own dispute with another branch of government. *See Comm'n of Political Practices v. Montana Republican Party*, 2021 MT 99, ¶ 15 (due process considerations are "necessarily implicated" when one branch of government acts as a tribunal in its own case). The Court should decline to adjudicate this matter based on the principles of prudential standing and separation of powers.

VIII. Negotiation, not Adjudication, is proper to resolve this dispute.

Federal jurisprudence provides a roadmap for how this Court should proceed in this dispute. The first step in resolving any interbranch dispute is good faith negotiation and accommodation. Only after all other avenues have been pursued and the branches arrive at an impasse is the dispute ripe for review by an impartial tribunal.

Federal courts correctly view judicial review of interbranch disputes as a last resort. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982). Negotiation and accommodation have been the historical practice for resolving disputes between the federal legislative and executive branches. *See Trump v. Mazars USA, LLP,* 140 S. Ct. 2019, 2031 (2020) (Congress and the President have a "tradition of negotiation and compromise" in subpoena disputes). Judicial review over a legislative subpoena is proper only after "there is an impasse contrary to traditional

norms," "no practicable alternative to litigation," and a "breakdown in the accommodation process." *Commission on the Judiciary of the United States House of Representatives v. McGahn*, 968 F.3d 755, 772 (D.C. Cir. 2020) (en banc). Absent negotiation, a premature judicial order threatens to "impair another [branch] in the performance of its constitutional duties." *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010).

Even more uniquely, the instant dispute demands negotiation because unlike a dispute between the Legislature and the Executive branch, the Court cannot serve as an impartial tribunal when it is itself party to the case. *See generally Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("no man is allowed to be a judge in his own cause.").

Contrary to McLaughlin's claim, no good faith effort to negotiate with the Legislature over any documents has been made. McLaughlin contacted DOA Director Misty Ann Giles on April 10, 2021, then filed an emergency petition to quash that subpoena in an unrelated case–that the Legislature was not party to at that time–that same day. Pet. Br. at 8-9. McLaughlin does not allege that she had any contact with the Legislature or the Legislature's counsel beyond sending a letter the Code Commissioner. Pet. Br. at 8. Rather than undertake any good faith effort to comply with the revised legislative subpoena served on April 15, 2021, or negotiate with the Legislature as to the demands made in said subpoena, McLaughlin immediately resorted to another emergency motion in front of this Court and has not agreed to negotiate any further

review or production of responsive documents. *See* McLaughlin's Petition.

The premature judicial order issued in this case has created a false hedge of protection around McLaughlin and the Justices, which raises serious separation of powers and due process issues. Just as significantly, it prevents meaningful access to the Court by the Legislature to open good faith negotiations. Negotiation is possible. Indeed, although the seven justices did not obey their subpoenas and produce the requested public records, the justices appeared at a hearing before the Select Committee on April 19, 2021. As Justice Dirk Sandefur stated, the justices' appearance was intended as a "good faith" effort to work with the Legislature. *See* Sandefur Response and Return on Legislative Subpoena, April 19, 2021. These "good faith" efforts should continue in the form of negotiation.

Given what has transpired, the present dispute has not reached that point of "impasse" where "no practicable alternative" exists to resolving any interbranch conflicts. But the only appropriate path forward for this Court is to negotiate with the Legislature in good faith to produce responsive records while continuing to protect confidential information, if any exists, in the emails.

CONCLUSION

This Court should dismiss the petition on prudential standing grounds that the issue raised poses separation of powers issues best resolved through interbranch negotiations, not adjudication. Further, the Petition does not present any urgency or emergency

factors that render the normal adjudication process inadequate.

Respectfully submitted this 30th day of April, 2021.

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APPENDIX R

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed April 30, 2021]

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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*—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. This matter has

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

[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.

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 squarely 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

[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.

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.

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

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[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.

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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APPENDIX S

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: May 26, 2021]

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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."

[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.

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 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

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[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

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[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

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 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

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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.

[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

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 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

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whether its own polling practices are misconduct.

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*

[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

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).

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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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.

[6] "*Sed quis custodiet ipsos custodes*?" Decimus Junius Juvenalis, Satire VI, lines 347-348.

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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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Dated: 05-26-2021

APPENDIX T

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: August 11, 2021]

BETH McLAUGHLIN, Petitioner, v. The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT OF ADMINISTRATION, Respondents.	)

THE MONTANA STATE LEGISLATURE'S PETITION FOR REHEARING

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INTRODUCTION

In a proceeding that began and remains on diaphanous legal footings, the Court's July 14, 2021, Opinion[1] exacerbates inter-branch conflict and upheaves the separation of powers. It is deeply flawed, sets dangerous precedent, and the Legislature therefore, (1) petitions for rehearing, and in so doing (2) implores the Court to disengage from pitched battle and reengage as a necessary party to fruitful negotiation.

After the Opinion issued, the U.S. Department of Justice ("USDOJ") issued its opinion, *Ways and Means Committee's Request for the Former President's Tax Returns*, 45 Op. O.L.C. ___ (July 30, 2021) (hereafter "O.L.C."), in which USDOJ acquiesced to Congressional requests for former-President Trump's tax returns. O.L.C.'s analysis confirms the Legislature's reading of the relevant caselaw and its application to this dispute and it should inform the Court's reconsideration of its Opinion.

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[1] *McLaughlin v. Mont. State Legislature*, 2021 MT 178, __ Mont. __ , __ P.3d __ ("Opinion").

I. The Opinion misapplies *Mazars* and disrupts the separation of powers.

"[T]he essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility." *McLaughlin*, ¶ 65 (McKinnon, J., specially concurring). The Legislature has a well-established right to the information it sought. *See United States v. Harriss*, 347 U.S. 612, 625 (1954). Contrarily, the Opinion violates the separation of powers by devaluing the Legislature's instant investigation and purporting to submit all future legislative subpoenas to state officials to judicial preclearance. *See McLaughlin*, ¶¶ 31, 37, 41, 49, 54. The Court misreads *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). First, the U.S. Supreme Court wasn't party to the case. Second, the High Court didn't invalidate Congressional subpoenas for the President's private documents; it instead ordered further consideration in light of separation of powers issues. *Mazars* can't support the circumstances here, where the Montana Supreme Court is hearing a case in which it is an interested party and in which it has refused any further consideration of production of the Court Administrator's public records.

The Opinion belittles the Legislature's authority unnecessarily. *See McLaughlin*, ¶¶ 8–10. "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees" and unless the Legislature "ha[s] and use[s] every means of acquainting itself with the acts and the disposition of the administrative agents of the

government" the state would "be helpless to learn how it is being served." *Mazars*, 140 S. Ct. at 2033 (quoting *United States v. Rumely*, 345 U.S. 41, 43 (1953)). "It is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws." O.L.C. at 20 (internal citation omitted). Here, the Court acknowledges by word only, that the Legislature's investigation concerns the effectiveness of laws governing judicial branch oversight. *See McLaughlin*, ¶¶ 27–28 (collecting numerous statutes regulating judicial conduct). Yet the Court's conclusion denies the acknowledged ability of the Legislature to seek these records any effect. The Court also recognizes that the Legislature may seek the records at issue through the Legislative Auditor. *See id.* ¶ 50. But the Court fails to acknowledge that the Legislature's delegation of certain judicial oversight functions to a legislative officer does not preclude the Legislature from exercising oversight directly.

A. *Mazars* demands accommodation and negotiation.

O.L.C. properly applied the traditional rules governing interbranch disputes, which reaffirmed the legislative prerogative to diligently examine every affair of government. *See* O.L.C. at Part II–III. This Court did not. When a legislative subpoena implicates core institutional concerns of a sister branch, such as confidentiality, then the branches should engage in "this tradition of negotiation and compromise." *See Mazars*, 140 S. Ct. at 2031; *see also* O.L.C. at 23. Failure to engage in negotiation allows a rivalrous

branch to discount the "significant" legislative interests in inquiring into "every affair of government" and "simply walk away from the bargaining table and compel compliance in court." *Id.* at 2033-34. Here, the Court—as a representative of the Judiciary—is the rivalrous branch. Out of respect for the separation of powers, the Legislature has consistently demanded this matter be resolved through negotiation, not adjudication. *See* Legislature's Response to Petition for Original Jurisdiction at 17–20 (April 30, 2021). The Court's hostility to accommodation and negotiation violates *Mazars*.

B. Administrator McLaughlin is not entitled to the same special considerations as the sitting U.S. President.

Mazars does not "alter the legal framework" for legislative subpoenas directed at other coordinate branches. O.L.C. at 28. But this Court uses *Mazars* to impute that *any* subpoena directed at a coordinate branch triggers the same concerns as one issued to a sitting President. *See McLaughlin*, ¶ 10; *but see Mazars*, 140 S. Ct. at 2036. The sitting President occupies a "unique constitutional position" and congressional subpoenas directed to him raise unique constitutional considerations. *See Mazars* 140 S. Ct. at 2034, 2036. The Court Administrator is not the President and her position is quite different. Her statutorily created position requires her to respond to legislative information requests. *See* Mont. Code Ann. § 3-1-702(2). *Mazars* accordingly offers no justification for this Court's conclusion that the Administrator (or

the judiciary) may spurn the good faith negotiations the Legislature has repeatedly requested.

C. The Legislature may investigate official malfeasance.

The Legislature has broad authority to investigate official malfeasance. *Compare McLaughlin*, ¶¶ 8–9, (arguing the current investigation probes into matters within the judiciary's "exclusive province," seeks "expos[ure] for the sake of exposure," and to aggrandize the investigators and punish the judiciary), *with Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957) ("We are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government."). It is wholly wrong that only the judiciary may investigate the judiciary. *See McLaughlin*, ¶ 41. "It is beyond dispute that" the Legislature may "obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws." O.L.C. at 20. Despite the Opinion's contrary conclusions, the Judiciary is merely a component of State Government and is already administered by numerous *legislative* enactments. *See McLaughlin*, ¶¶ 26–28, 34–35, 40, 50. The Legislature may investigate judicial officers for maladministration, particularly in view of what this investigation has so far uncovered—potential statutory, administrative, and ethical violations by judges and the Administrator that legitimately threaten public confidence in a fair and

impartial judiciary. *See generally* Report.[2] This investigation probes areas the Legislature already regulates (or rightfully could); it doesn't invade the judiciary's exclusive province (deciding cases). Simply ignoring why we're here doesn't change why we're here—questionable judicial conduct. True, the Legislature cannot investigate to self-aggrandize or mete out punishment; but neither may the Court extirpate investigations that reveal misconduct and embarrass judicial officers. *See* O.L.C. at 23 (If the Court "were to deny altogether the good faith of [the Legislature's] assertion of its legitimate interests, it would pretermit the accommodation process" required in these disputes.).

II. The Court lacks prudential standing, violates due process, and worsens an already disqualifying conflict of interest.

"Each branch is subject to an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *See* O.L.C. at 23. But this Court concludes otherwise.

Prudential standing and conflict of interest concerns should have dissuaded the Court from taking this case at all. *See generally* Legislature's Motion to Disqualify Justices (April 30, 2021); *see also* Legislature's

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[2] *See* Montana State Legislature, Special Joint Select Committee on Judicial Accountability and Transparency, *Initial Report to the 67th Montana Legislature* (May 5, 2021) ("Report"), https://leg.mt.gov/content/Committees/JointSlctJudical/CommitteeReportFinal.pdf.

Response to Petition for Original Jurisdiction (April 30, 2021). Once self-imbued, however, the Court never responded to these arguments in either its role as party or its role as tribunal, instead rejecting without explanation the Legislature's petition for rehearing of its motion to disqualify the Court. *See generally*, Order Denying Petition for Rehearing (July 14, 2021). Issuing an expansive, disarming Opinion against this backdrop confirms the Legislature's consistent argument: it cannot obtain due process from this Court under these circumstances.

Purportedly, the Court "carefully scrutinize[s]" a "rival political branch['s]" use of constitutional authority for "institutional advantage," implying that the Legislature is intentionally overreaching. *McLaughlin*, ¶ 13. But the Court is doing precisely what it decries. Here, at the request of its employee whose subpoenaed documents reveal questionable judicial behavior, the Court engineers its own institutional advantage and forever expropriates a legitimate legislative oversight tool. *Id.* ¶ 41 (opining that the judiciary can't remain independent unless the judiciary—solely—oversees judges). Transforming a general truism about judicial self-regulation into an absolute rule that jettisons historic and well-recognized interbranch limitations elevates the judiciary above its sisters and breeds unaccountability. *See State ex rel. Fletcher v. District Court*, 260 Mont. 410, 417, 859 P.2d 992, 996 (1993) ("Each branch constitutes a check or balance upon the other branches, in order that no one branch has too much power in its hands") (citations omitted).

To squelch the Legislature's inherent investigatory power, the Court requisitions caselaw vindicating judicial independence in areas textually committed to the judiciary. *See McLaughlin*, ¶ 17–18. Here though, the dispute centers, in part, on the judiciary's participation in lobbying—a legislative process. The Legislature controls that process, *see* MONT. CONST. ART. V, §§ 1, 10, and judge-made rules cannot the usurp Legislature's authority. *See McLaughlin*, ¶ 36. It may inquire into potential abuses of its lobbying strictures to assess whether those regulations should be strengthened. The Opinion doesn't reclaim lost judicial territory; it snatches ground constitutionally assigned to the Legislature. The subpoenas, while not artful, were not confiscatory of case-based decisional authority. The Opinion, on the other hand, is an unwarranted confiscatory decree.

III. The Court unduly sapped the Legislature's investigatory authority.

The Opinion depletes the Legislature's legitimate, broad investigatory authority. Because neither the Justices nor the Administrator receive the special considerations afforded the U.S. President, *see supra* Part I(B), the Court "must indulge a presumption that the legislative activity has as its object a legitimate goal towards possible legislation." *McLaughlin*, ¶ 8 (quoting *McGrain*, 287 U.S. at 178–79). But the Court didn't extend that presumption. Instead, it raised and then knocked down strawmen enroute to denying any legitimate legislative purpose.

Legislative inquiry into potential wrongdoing is not "law enforcement." *See McLaughlin*, ¶ 24. The Court's

statement that investigating "alleged violations of existing law is an enforcement matter" outside the Legislature's purview, *id.*, doesn't jibe with the settled rule that Legislatures may "look diligently into every affair of government." *Rumely*, 345 U.S. at 43; *see also* O.L.C. at 20. To make informed legislative choices, the Legislature must have access to at least some of the judiciary's information. The Court's statement that judicial lobbying is "critical to informed legislative efforts" ignores the risk such lobbying poses to an impartial judiciary and is not a replacement for independent legislative inquiry. *McLaughlin*, ¶ 43, *see infra* Part III(C). Lobbying is not its constitutionally assigned role, and the Legislature is correct to examine the extent of it. *See Mazars,* 140 S. Ct. at 2031; *see also* O.L.C. at 22–23 (stating that Congress has a legitimate interest in overseeing enforcement of a statute to determine "whether legislative revisions" are necessary).

A. Public Records Retention.

The Legislature's inquiry into judicial branch record-keeping, or deleting, legitimately probes the efficacy of existing laws. *See Mazars* 140 S. Ct. at 2031. "The Legislature unquestionably may seek data from the court administrator" pursuant to Mont. Code Ann. § 3-1-702(2). *McLaughlin*, ¶¶ 26–28 (citing numerous public records retention statutes). The Court Administrator responded to information requests by first claiming she does not retain "ministerial type" records and later "acquiesc[ed] to sloppiness" in deleting public records at which point the Legislature

subpoenaed the records to recover them. *See* Report at 6.

The subpoenaed documents are public records and salient to the underlying inquiry whether the judiciary is fair, impartial, and entitled to the public's trust. Administrator McLaughlin deleted those documents. The Court's dismissive treatment of the Legislature's investigation into the records-retention practices of judicial officers blinks reality. *McLaughlin*, ¶ 30.

B. Lobbying

The Court acknowledges public employee lobbying is a legitimate legislative interest. *See McLaughlin*, ¶ 34.

The Legislature's inquiries were narrowly tailored to probe the extent of the Administrator's lobbying conduct made public by separately unearthed emails. *See McLaughlin*, ¶¶ 32–33. The Legislature may reasonably reconsider the efficacy of current ethics laws when it learns a public official regularly uses public time and resources to benefit a private party and provides and participates in a forum where judges opine on pending legislation. *See McLaughlin*, ¶¶ 35–36. Even if the Court's advisory opinion that the Administrator acted lawfully was binding, it would not preclude a legislative inquiry to determine if changes to current law are needed. *See* O.L.C. at 39.

C. Judicial Misconduct

Judicial misconduct is an area of valid legislative interest. The Constitution instructs the Legislature to establish a Judicial Standards Commission ("JSC"). *See*

Mont. Const. art. VII, § 11(1). But that directive doesn't close the door to other, concurrent legislative oversight. *See, e.g., id.* at § 11(4) ("The proceedings of the commission are confidential except as provided by statute"); *see also McLaughlin*, ¶ 50 (conceding the JSC is subject to the oversight of the Legislative Auditor—and thus the Legislature). Without some textual evidence, a specific constitutional delegation like Article VII, § 11 doesn't preclude other forms of legislative action and oversight, like the current investigation. *See Sheehy v. Comm'r of Political Practices for Montana*, 2020 MT 37, ¶ 43, 399 Mont. 26, 458 P.3d 309 (McKinnon, J., specially concurring) ("Those who seek[] to limit the power of the [legislature] must be able to point out the particular provision of the Constitution which contains the limitation expressed in no uncertain terms") (internal quotations and citation omitted).

The Legislature may investigate to learn whether parties before state courts receive fair, impartial justice, and that inquiry isn't limited to misconduct proceedings. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009).

The Court's actions in *Brown v. Gianforte*, OP 21-0125, make the legitimacy of this legislative inquiry even clearer. There, Acting Chief Justice Jim Rice appointed District Judge Krueger to sit on a case despite receiving Krueger's disqualifying statements via email. *See* Declaration of Derek Oestreicher, OP 21-0125 Exhibit A (April 1, 2021) (Judge Krueger's stated "I am also adamantly oppose this bill"); Kurt Krueger's Notice of Recusal, OP 21-0125 (April 2, 2021). Every

other member of this Court likewise received Kruger's statements but did nothing. These emails, which included several disrespectful and prejudicial statements by the Chief Justice, revealed a judiciary that cavalierly prejudged issues sure to come before them.[3]

Reasonable observers immediately recognize that this behavior suggests partiality and bias. Thus the Court's statement is remarkable; "[n]either has the Legislature explained how the practice of responding to Montana Judges Association polls could suggest partiality for or against any given party or a lack of open-mindedness by district court judges." *McLaughlin*, ¶45. That is a stunning, counterfactual denial. Judge Kreuger's recusal speaks loudly. The emails speak for themselves. And both raise obvious questions about judicial impartiality. The fact that the Administrator and Justices deleted them justified the subpoenas. *See* Report at 12, 19–20. Prejudicial statements located in the deleted emails make the Legislature's basis for inquiry apparent.

Finally, for the reasons set forth in Part I, the Opinion is simply incorrect that the JSC is the one-and-only entity that may investigate and discipline judicial officers. *See McLaughlin*, ¶ 41. The Legislature moreover may impeach and remove judicial officers without regard to the JSC. *See* Mont. Const. art. V, § 13(1).

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[3] *See also* Report at 17–18.

IV. The Opinion contains multiple advisory opinions.

Courts may only decide cases or controversies; they may not issue advisory opinions. *See Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567. But the Opinion includes several advisory opinions issued by way of attacking the Legislature's investigative purposes. *See McLaughlin*, ¶ 27 ("McLaughlin nor any other Judicial Branch member was required by state law or policy to retain access to e-mail messages."); ¶ 35 ("To the extent the court administrator coordinates or facilitates district judges' contacts with legislators, her activity is not lobbying."); ¶ 36 ("[T]he Court Administrator acts within her job duties when she coordinates contacts between district court judges and legislators or conducts a poll …."); ¶ 46 ("More pointedly, the conduct the Legislature alleges does not, as a matter of law, constitute the purported legal violations it uses to support its asserted legislative purposes.").

Additionally, the Court holds that "Legislative subpoenas to a governmental officer reaching information that may be protected by law require that the matter first be submitted to a court for *in camera* review of the affected information and an order for any necessary redactions." *McLaughlin*, ¶ 54. The Court does not apply this holding to this case, only to hypothetical subpoenas in hypothetical cases. The Court's newfound power furthers the mistaken notion that the judiciary is immune to independent inquiry.

These advisory statements must be withdrawn.

V. The Opinion contains multiple inaccuracies, omissions, and insertions of material fact that lack any record basis.

This controversy began with an unnoticed weekend order in a case the present defendant was not party to, facilitated by ex parte communications. That irregularity was followed by a letter that prompted tacit recognition of the situational infirmity by filing of an Original Petition. This was followed by an Order—that the Court sua sponte made itself party to. Basic justiciability and jurisdictional infirmities abound. But the Court's sweeping Opinion atop those irregularities has deprived the Legislature of due process. The Legislature therefore incorporates its prior arguments and encourages the Court to take this last chance to defuse the constitutional tinder box it has kindled. The Court cannot umpire its own dispute, especially when the dispute is no longer—if it ever was—a case or controversy.

Apart from that, the Opinion contains numerous misstatements, or contested statements that have not been developed in a record. The Court declares as fact:

- "Current Judicial Branch policies do not require Judicial Branch members to save e-mails or retain access to their communications." *McLaughlin*, ¶ 27; *but see* Report at 19 (state retention schedules require retention of "routine: non-permanent" email for three years).
- "[T]he Court Administrator acts within her job duties when she coordinates contacts between district court judges and legislators or conducts

a poll to allow district judges, through the Montana Judges Association…" *McLaughlin*, ¶36.

- The Court concludes that Administrator McLaughlin is not a lobbyist under the exemption Mont. Code Ann. § 5-7-102(12)(b)(ii) (which exempts an individual who works for the same principal as a licensed lobbyist in certain circumstances). *See McLaughlin*, ¶ 35.
- The Court finds that the Legislature resorted to subpoenas prior to opening any discussion for records from the Court Administrator. *McLaughlin*, ¶ 51; *but see McLaughlin*, ¶ 3.

This isn't an exhaustive list of the Opinion's contested statements of fact.

VI. The Opinion's Orders violate established laws, rules, and constitutional principles.

The Orders that conclude the Court's Opinion ¶ 57(c)–(d) cannot stand for several reasons.

The plain terms of ¶ 57(c) prohibit any further discussions regarding the emails or their contents between legislators, between legislators and legislative staff, between legislators and their counsel, and among counsel's staff. The Order impermissibly intrudes upon the Legislature's duty to "look diligently into every affair of government *and to talk much about what it sees*." *Rumely*, 345 U.S. at 43 (emphasis added). And any attempt to enforce the Order would violate the Speech or Debate Clause. *See* Mont. Const. art. V, § 8, *see also Cooper v. Glaser*, 2010 MT 55, ¶ 14; *see Gravel*

v. United States, 408 U.S. 606, 616 (1972) (A senator could not be prosecuted for entering the Pentagon Papers in the public record because "[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats."). By so ordering, the Montana Supreme Court claims far greater powers than the U.S. Supreme Court. The immunity afforded by Montana's speech or debate clause operates when the legislature holds documents that justifiably embarrass members of the Montana judiciary. *See* Report at 17–18.

As the Court knows, the Legislature's concerns regarding the judiciary's conduct was inspired by the content of the unprivileged yet inappropriate judicial emails. The Special Joint Select Committee on Judicial Accountability and Transparency published its Initial Report to the 67th Montana Legislature in May. That Report discusses and quotes from those emails *extensively*. *See* Report at 11–15, 17–18. The Court is powerless to prevent the Legislature from discussing these emails.

Paragraph 57(c) also impermissibly disrupts the attorney-client relationship. *See Sweeney v. Mont. Third Judicial Dist. Court*, 2018 MT 95, ¶ 14, 391 Mont. 224, 416 P.3d 187 ("[A]n attorney has a legal duty of undivided loyalty to a client, a duty which we have held to be inviolate and fundamental to the attorney-client relationship and the proper functioning of our adversarial system of justice."). The Court may not prohibit the Legislature and its counsel from discussing the already disclosed public records. *See*

McLaughlin, ¶ 57(c) ("The Montana Legislature and its counsel are permanently ENJOINED from disseminating, publishing, reproducing, or disclosing *in any manner*, *internally or otherwise*, any documents produced pursuant to the subject subpoenas…") (emphasis added).

Paragraph 57(d) poses equally serious enforceability and constitutionality problems. It demands the Legislature "return any copies or reproductions [of the subpoenaed emails] to … Administrator McLaughlin." *Id*. ¶ 57(d). Copies of the subpoenaed emails, however, are now possessed by journalists. The Order dictates that the Legislature should take measures to retrieve those reproduced emails from the recipient journalists and ensure that copies of the subpoenaed emails posted on various press websites be removed, destroyed, and/or returned to the Legislature for turnover. The Court knows this dispute has garnered considerable public interest, and the compliance measures summarized above would necessitate unprecedented, in America, government interference with First Amendment speech and press freedoms. The Court should withdraw this Order.

CONCLUSION

The Court should rehear this matter.[4]

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[4] Due to the gravity of the issues under consideration, the Legislature requests the Court suspend M. R. App. 20(1)(e) and order oral argument on this Petition. If Court is determined to adjudicate this dispute to resolution it should give the Legislature its day in court.

Montanans are sensible and can see plainly what happened here. Judicial misconduct or embarrassing malfeasance was revealed to the public, and this Court seems bent to put Jack back in the box. The only path forward is for the judiciary and Legislature to talk. To facilitate those discussions, the Legislature went so far as to withdraw the subpoenas and reset the conversation. But the Court has steadfastly refused to negotiate over the production of public records in its possession.

When one branch of government throws the balance so violently out of kilter as the Court does here, our institutions—including the Court—are on the brink. *See State ex rel. Hall v. Niewoehner*, 116 Mont. 437, 473 (1944) (Morris, J., dissenting) ("[t]he safety of our government is dependent to a great extent on the confidence and respect which the people have for the courts, and it is the duty of every court to strive by honorable means to merit and preserve that confidence and respect.") The Legislature seeks public records. The Court holds them. Their disclosure does not have to be rife with animosity.

The Legislature respectfully requests that this Court withdraw the Opinion and Orders, dismiss the case, and enter the field of negotiation and accommodation for the good of Montana.

Respectfully submitted this 11th day of August, 2021.

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

Pursuant to Rule 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 3,996 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 08-11-2021:

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Dated: 08-11-2021

APPENDIX U

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. _____

Case Number: OP 21-0125

[Filed: March 17, 2021]

BOB BROWN, DOROTHY BRADLEY, VERNON FINLEY, MAE NAN ELLINGSON, and the LEAGUE OF WOMEN VOTERS OF MONTANA, Petitioners,	)
v.	)
GREG GIANFORTE, Governor of Montana, Respondent.	)

PETITION FOR ORIGINAL JURISDICTION

(Appearances on next page)

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This is an original proceeding challenging the constitutionality of SB 140, recently passed by the Montana Legislature and signed into law by the Governor. This petition seeks a declaratory judgment and a writ of injunction under Rules 14(2) and (4), M.R.App.P. This case involves purely legal questions of constitutional interpretation. Urgency factors exist, making litigation in the trial courts and the normal appeal process inadequate. The issues presented are of statewide importance.[1]

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[1] Because this petition challenges the constitutionality of a State statute, the parties are filing a Notice of Constitutional Question

BACKGROUND

1. The Montana Constitution of 1889 provided that in the case of vacancy in the position of Justice of the Supreme Court, the district court, or the clerk of the Supreme Court "shall be filled by appointment, by the governor of the State." Mont. Const. (1889), art. VIII, § 34.

2. Addressing concerns over too much power with the Governor's office and improper politicization of the courts, Article VII of the 1972 Constitution was adopted. Section 8 provided that the Governor could fill vacancies by selection from a group of nominees through a procedure provided by law.

3. Convening the next year, 1973, the 43rd Legislative Assembly considered numerous measures necessary to implement the newly-adopted Constitution. Among these was SB No. 28, "An Act Providing for the Filling of Vacancies in the Office of District Court Judge and Supreme Court Justice to Comply with Article VII, Section 8 of the 1972 Montana Constitution; Repealing Sections 93-209, 93-220, 93-309, RCM 1947." That measure passed and is codified at § 3-1-1001, MCA, *et seq*.

4. SB 28 provided for the creation, composition, and function of a "Judicial Nomination Commission." The members are appointed for four-year terms on a staggered basis. The Commission is composed of a

---

and serving it on the Montana Attorney General pursuant to 5.1(a), M.R.Civ.P, and Rule 27, M.R.App.P.

diverse group of seven members, four laymen, two attorneys, and a district judge.

5. SB 28 provided that when a judicial vacancy occurs, the Commission publishes a notice of vacancy and establishes a period for receiving applications. The Commission reviews such applications and accepts public comment concerning applicants. The Commission is then required to submit to the Governor or Chief Justice of the Montana Supreme Court a list of three to five nominees for appointment to the vacant position. All such appointments are subject to Senate confirmation. *See* §§ 3-1-1010 and -1011, MCA.

6. This system of filling judicial vacancies, in effect for almost fifty years, has worked effectively to facilitate the independence and competency of the Montana judiciary. Notwithstanding its efficacy, Montana's Judicial Nomination Commission is now purportedly abolished by SB 140 (copy attached as Appendix A), which was signed into law on March 16, 2021. SB 140 provides that any eligible person may apply directly to the Governor for a vacant judicial position and the Governor has the unfettered discretion to appoint after providing at least thirty days for public comment concerning applicants. This threatens to politicize an otherwise-nonpartisan, independent, and effective means of filling judicial vacancies.

PARTIES

7. Respondent Greg Gianforte is the duly elected Governor of the State of Montana and, as such, is Montana's chief executive officer, ultimately responsible for the effectuation of all state laws.

8. Petitioner Bob Brown was elected to the Montana House of Representatives in 1970 and served two terms as a representative from Flathead County. He was a member of the House Judiciary Committee in 1973 when the Montana Legislature enacted SB 28, which established the Judicial Nomination Commission. He later served eighteen years in the Montana Senate, serving in various leadership positions, including President of the Senate. Mr. Brown served on the State Board of Public Education for four years and as Montana Secretary of State for a four-year term beginning in 2004. He was the Republican nominee for Governor in 2004.

9. Petitioner Dorothy Bradley served in the House of Representatives in the Montana Legislature as a representative from Gallatin County from 1971–1978 and 1985–1992, including in 1973 when she voted with the majority to adopt SB 28. She has, over the course of her career, been active in Montana politics and in efforts to ensure good government. In 1991–92, Ms. Bradley was the Democratic nominee for Governor of Montana.

10. Petitioner Vernon Finley was born and raised on the Flathead Indian Reservation in his grandparents' home. He credits his grandparents with teaching him the traditional cultural perspective. His western education consists of a Bachelor's, Master's, and Doctoral degrees in Education from the University of Montana, Oklahoma City University, and the University of Georgia, respectively. Mr. Finley is a former teacher and served on the Confederated Salish and Kootenai Tribes' Tribal Council for four years,

including for three years as Chairman. He is currently the Director of the Kootenai Culture Committee.

11. Petitioner Mae Nan Ellingson, a resident of Missoula, was the youngest delegate to serve in the 1972 Montana Constitutional Convention and is now one of the few surviving delegates. Now retired, Ms. Ellingson previously practiced public finance law, including serving as a bond counsel for State and local governments. She is a long-time advocate for good government and equality under the law.

12. Each of the individual Petitioners (Brown, Bradley, Finley, and Ellingson) are residents of Montana and voters and taxpayers.

13. Petitioner the League of Women Voters of Montana is a nonpartisan political organization that encourages informed and active participation in government, seeks to defend and improve our democracy, works to increase understanding of major public policy issues, and influences public policy through education, advocacy and litigation. It supports an independent judiciary with judges selected on the basis of merit and elections that protect the citizens' right to vote.

THE FACTS WHICH MAKE IT APPROPRIATE THAT THE SUPREME COURT ACCEPT JURISDICTION

The "urgency or emergency factors" required by Rule 14(4), M.R.App.P., exist here because SB 140 purports to go into effect immediately and give the Governor of Montana unfettered discretion to fill judicial vacancies. SB 140 was spirited through the

Legislature at extraordinary speed despite the opposition of many responsible organizations such as the Montana Trial Lawyers Association, the State Bar of Montana, the Montana Defense Trial Lawyers Association, and the League of Women Votes of Montana.

At present, there are three judges—in the First Judicial District (Lewis and Clark and Broadwater Counties), the Eighth Judicial District (Cascade County), and the Eighteenth Judicial District (Gallatin County)—who were appointed by the previous Montana Governor in 2020, after careful compliance with the nominating procedures of § 3-1-1001, MCA, *et seq*. They are subject to the approval of the Montana Senate. The pendency of these three appointments and the fact that the Senate has not yet confirmed makes this Petition all the more urgent.

The passage of SB 140 threatens an imminent disruption of Montana's judicial appointment process. If SB 140 is not immediately overturned, the next judicial replacement, at the whim of Montana's Governor, will be constitutionally suspect, probably political, and inimical to the interest of all Montanans in a competent, independent judiciary. Given the palpable unconstitutionality of SB 140 and the imminent threat to the public's interest in independent judicial selection, the need for this Court's exercise of original jurisdiction is compelling.

THE PARTICULAR LEGAL QUESTIONS EXPECTED TO BE RAISED

Whether SB 140 is unconstitutional under Article VII of the Montana Constitution.

THE ARGUMENTS AND AUTHORITIES FOR ACCEPTING JURISDICTION AND PERTAINING TO THE MERITS

A. THE AUTHORITIES FOR ACCEPTING JURISDICTION.

This Court held in *Hernandez v. Bd. of County Commissioners*, 2008 MT 251, ¶9, 345 Mont. 1, 189 P.3d 630:

> Assumption by this Court of original jurisdiction over a declaratory judgment action is proper when: (1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist making the normal appeal process inadequate. *Montanans for Coal Trust*, ¶ 27 (citing *Butte-Silver Bow Local Govern. v. State*, 235 Mont. 398, 401-402, 768 P.2d 327, 329 (1989); *State ex rel. Greely v. Water Court of State*, 214 Mont. 143, 691 P.2d 833 (1984)…. All of these criteria are met here.

See also White v. State, 233 Mont. 81, 84, 759 P.2d 971, 973 (1988); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Clinch*, 1999 MT 342, ¶¶ 5–9, 297 Mont. 448, 992 P.2d 244; *Mont. Assoc. of*

Counties, et al. v. Montana, 2017 MT 267, ¶ 2, 389 Mont. 183, 404 P.3d 733.

In *Keller v. Smith*, 170 Mont. 399, 401, 553 P.2d 1002 (1976), this Court accepted original jurisdiction over the petition of Robert S. Keller, who alleged that certain statutory sections were unconstitutional under the very constitutional section involved in the present case, Article VII, § 8. Keller was a "voter, resident and taxpayer of Flathead County, Montana." This Court also accepted original jurisdiction regarding voter challenges to judicial election laws in *Jones v. Judge*, 176 Mont. 251, 577 P.2d 846 (1978) and *Yunker v. Murray*, 170 Mont. 427, 554 P.2d 285 (1976), and accepted supervisory control in *State ex rel. Racicot v. Dist. Ct. of the First Jud. Dist.*, 243 Mont. 379, 794 P.2d 1180 (1990).

In *Hernandez*, this Court considered on original jurisdiction the constitutionality of a legislative measure that authorized Montana counties to establish justice courts as justice's courts of record. *Id.* ¶ 2. This Court held that emergency factors "exist in this case that would make the normal appeal process inadequate," stating:

> Before an appeal from a justice court judgment presenting this issue could reach this Court, potentially hundreds of misdemeanor criminal cases would be resolved in the justice's courts of record throughout Montana. If Petitioner's claims were ultimately sustained, any judgments of conviction would be undermined and the prosecutions likely lost due to the running of the statute of limitations….

Id. ¶ 10. This Court held that to require an action to be brought in a county which had created such court "would needlessly spawn litigation and any further delay would create confusion as to the administration of justice." *Id.*

The present case involves issues of statewide importance because the Judicial Nomination Commission reviews all persons who apply to fill vacancies on the Montana Supreme Court as well as all applicants to fill vacancies in the district courts throughout Montana. This case solely involves questions of statutory and constitutional construction.

The normal appeal processes are inadequate. Because SB 140 purports to be effective immediately, any new judicial vacancy may be filled virtually immediately through a process that lacks the vital politically-neutralizing impact of the Judicial Nomination Commission with its procedures to ensure public participation and competence.

Imagine if a Justice of the Montana Supreme Court resigns and the Governor appoints a replacement. There is no viable process for challenging such appointment in the lower courts, nor would there be a viable "normal" appeal process.

Hernandez's holding applies here. Failure by this Court to exercise original jurisdiction would consign the present challenge to a district court, which would be in an impossible position, having to rule on whether a fellow judicial officer had been appointed in a constitutional manner. In the meantime, such judicial officer would presumably serve, consider numerous

cases, and issue rulings which, as in *Hernandez*, might be considered suspect because of the constitutional impropriety of the appointment of such judge. Thus, this case presents an almost identical situation to the one this Court thought appropriate for original jurisdiction in *Hernandez*.

B. THE ARGUMENTS PERTAINING TO THE MERITS.

> *There is clear agreement on the part of all that we do need good judges…. The question is how to recruit them.*
>
> - Delegate Jim Garlington
> Const. Con. Tr. Vol. IV, p. 1032.

1. SB 140 is unconstitutional under the plain language of Montana's Constitution.

Montana's 1889 Constitution provided that judicial vacancies "shall be filled by **appointment**, by the governor of the State." Mont. Const. (1889), art. VIII, § 34 (emphasis added). That was repealed in 1972.

Article VII, § 8(2) now[2] provides: "[T]he governor shall appoint a replacement from **nominees** selected in the manner provided by law." The meaning of the word "nominees" (plural) is obvious. It is clear that the Governor may not make an "appointment" *sua sponte*.

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[2] The 1972 language was slightly different, providing that "the governor shall nominate a replacement from a list of nominees selected…." The 1972 version was modified by constitutional amendment in 1992. Amd. Const. Amend. No. 22 (approved November 3, 1992).

The plain language evinces a clear intent of the framers that the Governor is to receive a list of "nominees" from some other source.

2. The plain language is supported by the Voter Information Pamphlet.

This Court, in *Keller, supra*, cited the "Convention notes" on the very provision here in question, Article VII, § 8, stating: "Perhaps the best indication of the intent of the framers is found in the explanatory notes as prepared by the Constitutional Convention." *Keller*, 170 Mont. at 407.

These "Convention notes" (Appendix B) were used in 1972 to inform the voters on the upcoming vote to ratify the new Constitution. That document describes the judicial vacancy feature of Article II, § 8 as follows:

> When there is a vacancy (such as death or resignation) the governor appoints a replacement but **does not have unlimited choice** of lawyers as under 1889 constitution. **He must choose his appointee from a list of nominees** and the appointment must be confirmed by the senate – a new requirement.

Appendix B, p. 13 (emphasis added).[3] This confirms the intent that the Governor does not have plenary power to fill a vacancy—he must choose his appointee "from a list of nominees[.]"

At a committee hearing on SB 140, opponents pointed out the constitutional defect—absence of a list of nominees carefully vetted by an independent source. The majority then made a crude attempt to address this problem. It added an amendment providing that any applicant for a judicial vacancy who self-nominates will be considered a "nominee" if the applicant "receives a letter of support from at least three adult Montana residents…." SB 140, § 4(2) (Appendix C, "Amendment – 1st Reading").

Such artful wordplay does not cure the constitutional defect. The entire thrust of the Montana Constitution of 1972 was to replace the Governor's sole discretion to fill vacancies with a system that provided a list of qualified nominees derived through an independent vetting process.

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[3] In *State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire*, 227 Mont. 85, 89–90, 738 P.2d 1255, 1257–58 (1987), this Court stressed the importance of the Voter Information Pamphlet in statewide elections, noting: "It is in the voter information pamphlet that a glaring error as to the text of the proposal was committed[,]" and "[i]t is elementary that the voters not be misled to the extent they do not know what they are voting for or against."

3. Legislative implementation in the immediately ensuing Legislative Session of 1973 confirms the plain meaning.

When the Montana Legislature convened in 1973, it enacted legislation (SB 28) to implement Article VII, § 8. That measure created the Judicial Nomination Commission. SB 28's title speaks volumes: "An Act Providing for the Filling of Vacancies in the Office of District Court Judge and Supreme Court Justice to **Comply with Article VII, Section 8 of the 1972 Montana Constitution**, Repealing Sections 93-209, 93-220, 93-309, RCM 1947" (emphasis added).

The actions of the Legislature in implementing the new Constitution were found to be persuasive evidence of the framers' intent in *Keller*, *supra*. The Court said: "Here, the Legislature had no difficulty in determining that the intent of the framers of the 1972 Montana Constitution was that all unopposed incumbent judges and justices were subject to approval or rejection by the voters." 170 Mont. at 407. Noting the implementing legislation, the Court observed:

> It is presumed that the Legislature acted with integrity and an honest purpose to keep within constitutional limits. Sutherland Statutory Construction, 4th Ed., Vol. 2A, Sec. 45.11, p. 33, and cases cited therein.

Id. The Court then noted, and relied on, the "principle of reasonableness in construction of an ambiguous constitutional provision," finding the law "favors rational and sensible construction." *Id.* (citing 2A

Sutherland, *Statutory Construction* § 45.12, p. 37 (4th ed.)).

In the present case, the only reasonable interpretation of the word "nominees" is that it means what it says—and it certainly doesn't mean that any person can self-nominate or that the Governor can make his own "nominees" and then select from his own list of "nominees."

In short, the Commission was specifically designed to limit the choice of the Governor so that the executive would not have unconstrained control of the nomination process. That is consistent with debate at the Convention and the 1972 Voter Information Pamphlet sent as part of the ratification process.

4. The Constitutional Convention debates confirm the plain meaning.

Legislative history may be considered if there is any arguable ambiguity in the language of the constitutional provision. In determining the meaning of provisions of the Montana Constitution of 1972, the framers' intent is controlling. *Keller*, 170 Mont. at 404. Because *Keller* found the term "incumbent" in the text of Article VII, Section 8 arguably ambiguous, it turned to the Constitutional Convention and the legislative history of the provision and the enabling legislation to determine the framers' intent, although advising caution because the framers' intent is not always monolithic. *Id.* at 406, 408-409; *see also Racicot*, 273 Mont. at 386–87.

It is clear from the Constitutional Convention debates on the judiciary article that the framers clearly

envisioned such nominees would be made by a separate, independent "committee" or "commission."

At the 1972 Constitutional Convention, there were serious differences of opinion on whether Montana judges should be popularly elected or selected under what was known as the "Missouri Plan," with a merit-based selection process.[4] What emerged was neither the Missouri Plan's merit-based approach (the minority report) or solely popular election (the majority report), but a hybrid proposal by Delegate Melvin.

The majority proposal supported election of judges. On vacancies, the majority proposal provided that Supreme Court vacancies will be filled by the Governor and district court vacancies by the relevant county commissioners. Const. Con. Tr. Vol. 1, p. 491. Regarding judicial vacancies, the minority disagreed, stating:

> The minority is not satisfied with the current process of unlimited gubernatorial appointive power of judges…. Therefore, we have limited the governor's nomination to those nominees **selected by a committee**, created by and dependent upon the legislature. This system, we believe, accords an effective check and balance.

Id. at 521 (emphasis added).

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[4] *See Racicot*, 243 Mont. at 387–88; *see also* Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. App. Prac. and Process 47, 61, 63–67 (2015); Jean M. Bowman, *The Judicial Article: What Went Wrong*, 51 Mont. L. Rev. 492, 497–502 (1990).

The framers ultimately adopted this minority proposal on filling vacancies.[5] The framers declined to spell out the minutiae of the nomination process because they felt this was a matter better left to the Legislature. For that reason, they used the language "a nomination process as established by law."

Although the Constitution left the details to the Legislature,[6] the transcripts leave no doubt that the framers envisioned a separate "commission" to evaluate and nominate the "nominees." In describing this approach, Delegate Berg described this proposal as one of "merit election," stating:

> That it would create a committee—that is, committee would be created by the Legislature—which would submit nominees, and that means more than one, to the governor, and the governor would then nominate that one from those names.

---

[5] The majority proposal on popular elections was ultimately accepted, although its codification into the Constitution was muddied. That confusion was clarified with the 1992 amendment to adopt Article VII, § 8(1), Mont. Const., which provides: "Supreme court justices and district court judges shall be elected by the qualified electors as provided by law."

[6] When Article VII, § 8 was modified by voter initiative in 1992, the Voter Information Pamphlet stated: "The governor is limited to appointments from a list recommended by a Judicial Nominating Committee which is required by the Constitution, and whose membership and rules are established by the legislature." "Rebuttal of argument supporting Constitutional Amendment 22," at p. 6 (Appendix D).

Const. Con. Tr. Vol. IV, p. 1085. Delegate Melvin summarized his (successful) amendment as follows:

> Actually, the proposal before you would accommodate times when there are vacancies in the office of District Court judges or Supreme Court judges by putting into effect the **nomination by the committee**, then the appointment by the Governor, confirmation by the Senate.

Id. at 1112 (emphasis added).

The debates of the framers are replete with references to a nominating "committee" or "commission." Many delegates opposed the Melvin proposal, and more supported it. It was clear, however, that **all** delegates understood that the proposal envisioned a separate "commission/committee" to be established to select a list of "nominees." *See, e.g.*, *id.* at 1090 (Hanson, expressing concern about whether a fair committee that was free from outside control could be selected); *id*. at 1090–91 (Holland: "How can we guarantee that this commission—the ones that name the candidates—won't be dominated by some special interest group?"); *id*. at 1093 (Davis: "You can say what you want, any select committee's going to be a committee of the establishment. There's just no other way to get around it…," but supporting the Melvin compromise.); *id.* at 1094 (Berg: "I suggest to you that that committee, committing two to three or four names to the Governor, is going to get the Governor a fairly wide selection of nominees, and he can select…whom he wants—from that committee."); *id.* at 1096 (McKeon: "I'm afraid, Mr. Chairman, that any

committee, whether it be select, blue ribbon or whatnot, will not be a committee whose interests are the interests of the people…."); *id.* at 1104 (Joyce: "[N]o matter how astute or how brilliant or how able or how fairly the Legislative Assembly may set up a commission to select these nominees, you cannot take the human element out of the situation.").

In sum, there were delegates who opposed the "commission" approach, preferring some other means of filling vacancies, and delegates who supported that approach—but there can be no doubt that the system under discussion was one whereby a **commission** would supply the lists of nominees to the Governor. That proposal passed and was enacted into law, thus supporting the plain meaning of Article VII, § 8.

Finally, Delegate Aronow spoke passionately about the vital importance of judicial independence:

> [I]t is dreadfully important…that the courts be made independent, be made strong, be made unafraid to act for fear of reprisal from one of the other branches of the government. And it is only in that manner that we can guarantee to our people the liberties that we wish them to have.
>
> ****
>
> The courts should also be made strong enough and independent enough that they have no fear of striking down an unconstitutional legislative act. They should have no fear of saying to the Executive branch of government, "You've gone

> too far: you've impugned upon the rights of individuals."

Const. Con. Tr. Vol. IV, pp. 1069–70.

Because SB 140 is contrary to Article VII of the 1972 Montana Constitution, it must be found unconstitutional.

CONCLUSION

Petitioners request that this Court accept original jurisdiction, enjoin any acts that might be taken in furtherance of SB 140 pending full consideration by this Court, direct such briefing as the Court deems suitable, and, after due consideration, determine SB 140 to be unconstitutional.

Respectfully submitted this 17th day of March, 2021.

EDWARDS & CULVER

/s/ A. Clifford Edwards
A. Clifford Edwards

and

GOETZ, BALDWIN & GEDDES, P.C.

/s/ James H. Goetz
James H. Goetz

Attorneys for Petitioners

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 Equity Text A text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word, excluding the cover page, Certificate of Service, and Certificate of Compliance, is 3,993 words, not in excess of the 4,000-word limit.

By: /s/ James H. Goetz
James H. Goetz

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following parties, by the means designated below, this 17th day of March, 2021.

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Greg Gianforte
Office of the Governor
P.O. Box 200801
Helena, MT 59620

By: /s/ James H. Goetz
James H. Goetz

CERTIFICATE OF SERVICE

I, James H. Goetz, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 03-17-2021:

A. Clifford Edwards (Attorney)
1648 Poly Drive
Bilings MT 59102
Representing: Bob Brown, Dorothy Bradley, Vernon Finley, Mae Nan Ellingson, League of Women Voters of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Greg Gianforte
Service Method: eService

Electronically signed by Luke Nelson on behalf of
James H. Goetz
Dated: 03-17-2021

APPENDIX V

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed: April 1, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and the LEAGUE OF WOMEN VOTERS OF MONTANA, Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana, Respondent.	)

DECLARATION OF DEREK J. OESTREICHER

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
DEREK OESTREICHER
General Counsel
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401
Tel: (406) 444-2026
Fax: (406) 444-3549
derek.oestreicher@mt.gov

ANITA MILANOVICH
General Counsel
Office of the Montana Governor
P.O. Box 200801
Helena, MT 59620
Tel: (406) 444-5554
anita.milanovich@mt.gov

ATTORNEYS FOR RESPONDENT

A. CLIFFORD EDWARDS
Edwards & Culver
1648 Poly Drive, Suite 206
Billings, MT 59102

JAMES H. GOETZ
Goetz, Baldwin & Geddes, P.C.
P.O. Box 6580
35 North Grand A venue
Bozeman, MT 59715

ATTORNEYS FOR PETITIONERS

1. I am a licensed, practicing attorney in the State of Montana, and am currently employed by the Montana Department of Justice, Office of the Attorney General.

2. Attached hereto as *Exhibit A* is a compilation of emails exchanged between Montana Supreme Court Administrator, Beth McLaughlin, and every Montana Supreme Court Justice and District Court Judge, utilizing government email accounts.

3. I am disclosing *Exhibit A* consistent with my ethical obligations under the Montana Rules of Professional Conduct, Rule 8.3(b).

4. Pursuant to Rules 12(10) and 29(1), M. R. App. P., the extraordinary circumstances presented by *Exhibit A* justify the overlength combined motions and supporting argument filed herewith by the Governor.

5. I hereby declare under penalty of perjury under the laws of the United States of America and the State of Montana that the foregoing is true and correct.

Respectfully submitted this 1st day of April, 2021.

By: */s/ Derek J Oestreicher*
Derek J. Oestreicher

DECLARATION OF
DEREK J. OESTREICHER
EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document by email to the following addresses:

A. Clifford Edwards Edwards & Culver
1648 Poly Drive, Suite 206
Billings, MT 59102
Ph: (406) 256-8155
Fax: (406) 256-8159
Email: cliff@edwardslawfirm.org

James H. Goetz
Goetz, Baldwin & Geddes, P.C. PO Box 6580
35 North Grand Avenue Bozeman, MT 59715
Ph: (406) 587-0618
Fax: (406) 587-5144
Email: jim@goetzlawfirm.com

Date: April 1, 2021

/s/ Rochell Standish
ROCHELL STANDISH

From: McLaughlin, Beth
Sent: Friday, January 29, 2021 7:27 AM
To: McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy, Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: SB 140
Attachments: LC1094 (1).pdf

Folks,

Attached is a bill that Judge Todd has asked MJA to review and take a position on. Please take a look at it – sorry to do this to you again but use the voting buttons (accept/reject) on your toolbar. If you can't find the voting button, just shoot me a note.

Thanks,

Beth McLaughlin
Supreme Court Administrator
406-841-2966

From: Halligan, Leslie
Sent: Friday, January 29, 2021 8:04 AM
To: Best, Elizabeth
Cc: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: Re: SB 140

I'm in opposition to the bill.
Judge Halligan

Sent from my iPhone

On Jan 29, 2021, at 7:39 AM, Best, Elizabeth <EBest@mt.gov> wrote:

I can't find the button but I oppose.

Elizabeth A. Best
District Court Judge
415 Second Ave. No., Room 203
Great Falls, MT 59401
Phone: 406.771.3950
Email: ebest@mt.gov
Zoom: https://mt-gov.zoom.us/j/91958457110?pwd=Q2FLUDRvNTdMcnFwVXhYV000dTBTZz09

From: Brown, John
Sent: Friday, January 29, 2021 9:05 AM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

Beth, I definitely oppose this bill.

From: McLaughlin, Beth <bmclaughlin@mt.gov>

Sent: Friday, January 29, 2021 7:27 AM
To: McGrath, Mike <mmcgrath@mt.gov>; Rice, Jim <jrice@mt.gov>; McKinnon, Laurie <LMcKinnon@mt.gov>; Baker, Beth <bbaker@mt.gov>; Shea, Jim <JimShea@mt.gov>; Sandefur, Dirk <dsandefur@mt.gov>; Gustafson, Ingrid <IGustafson@mt.gov>; Abbott, Chris <Chris.Abbott@mt.gov>; Allison, Robert <RAllison@mt.gov>; Berger, Luke <Luke.Berger@mt.gov>; Best, Elizabeth <EBest@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>; Brown, John <JBrown3@mt.gov>; Brown, Stephen <Stephen.Brown@mt.gov>; Christopher, Deborah <dchristopher@mt.gov>; Cuffe, Matthew <Matthew.Cuffe@mt.gov>; Cybulski, David <dcybulski@mt.gov>; Davies, Colette <Colette.Davies@mt.gov>; Dayton, Ray <RDayton@mt.gov>; Deschamps, Dusty <ddeschamps@mt.gov>; Eddy, Amy <AEddy@mt.gov>, Fehr, Jessica <Jessica.Fehr@mt.gov>; Gilbert, Brenda <BGilbert@mt.gov>; Halligan, Leslie <LHalligan@mt.gov>; Harada, Ashley <Ashley.Harada@mt.gov>; Harris, Donald <Donald.Harris@mt.gov>; Hayworth, Michael <MHayworth@mt.gov>; Judge Holly Brown <hbbpc@aspenproof.com>; Judge Mike

Salvagni <msalvagni@aol.com>; Knisely, Mary Jane <MKnisely@mt.gov>; Krueger, Kurt <kkrueger@mt.gov>; Kutzman, John <JKutzman@mt.gov>; Laird, Yvonne <YLaird@mt.gov>; Larson, John <johlarson@mt.gov>; Levine, Michele <Michele.Levine@mt.gov>; Lint, Jennifer <Jennifer.Lint@mt.gov>; Manley, James <JManley@mt.gov>; Marks, Jason <Jason.Marks@mt.gov>; McElyea, Rienne <Rienne.McElyea@mt.gov>; McElyea, Russ <RMcElyea@mt.gov>; McMahon, Michael <Michael.McMahon@mt.gov>; Menahan, Michael <MMenahan@mt.gov>; Moses, Michael <MMoses@mt.gov>; Murnion, Nickolas <NMurnion@mt.gov>; Ohman, Peter <Peter.Ohman@mt.gov>; Oldenburg, Jon <JOldenburg@mt.gov>; Olson, Robert <ROlson3@mt.gov>; Parker, John <John.Parker@mt.gov>; Recht, Howard <Howard.Recht@mt.gov>; Rieger, Olivia <Olivia.Rieger@mt.gov>; Seeley, Kathy <KSeeley@mt.gov>; Snipes Ruiz, Kaydee <KSnipesRuiz@mt.gov>; Souza, Rodney <RSouza@mt.gov>; Spaulding, Randal <rspaulding@mt.gov>; Todd, Gregory <GTodd@mt.gov>; Ulbricht, Heidi <HUlbricht@mt.gov>; Vannatta,

Shane <Shane.Vannatta@mt.gov>; Wald, Matthew <Matt.Wald@mt.gov>; Whelan, Bob <Robert.Whelan@mt.gov>; Wilson, Dan <Daniel.Wilson@mt.gov>

Subject: SB 140

Folks,

Attached is a bill that Judge Todd has asked MJA to review and take a position on. Please take a look at it– sorry to do this to you again but use the voting buttons (accept/reject) on your toolbar. If you can't find the voting button, just shoot me a note.

From: Whelan, Bob
Sent: Friday, January 29, 2021 10:18 AM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Wilson, Dan
Subject: RE: SB 140

Beth

I am opposed.

Hon. Robert J. Whelan
2nd Judicial District, Dept. 2

From: McLaughlin, Beth <bmclaughlin@mt.gov>
Sent: Friday, January 29, 2021 7:27 AM
To: McGrath, Mike <mmcgrath@mt.gov>; Rice, Jim <jrice@mt.gov>; McKinnon, Laurie <LMcKinnon@mt.gov>; Baker, Beth <bbaker@mt.gov>; Shea, Jim <JimShea@mt.gov>; Sandefur, Dirk <dsandefur@mt.gov>; Gustafson, Ingrid <IGustafson@mt.gov>; Abbott, Chris <Chris.Abbott@mt.gov>; Allison, Robert <RAllison@mt.gov>; Berger, Luke <Luke.Berger@mt.gov>; Best, Elizabeth <EBest@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>; Brown, John <JBrown3@mt.gov>; Brown, Stephen <Stephen.Brown@mt.gov>; Christopher, Deborah <dchristopher@mt.gov>; Cuffe, Matthew <Matthew.Cuffe@mt.gov>; Cybulski, David <dcybulski@mt.gov>; Davies, Colette <Colette.Davies@mt.gov>; Dayton, Ray <RDayton@mt.gov>; Deschamps, Dusty <ddeschamps@mt.gov>; Eddy, Amy <AEddy@mt.gov>, Fehr, Jessica <Jessica.Fehr@mt.gov>; Gilbert, Brenda <BGilbert@mt.gov>; Halligan, Leslie <LHalligan@mt.gov>; Harada, Ashley <Ashley.Harada@mt.gov>; Harris, Donald <Donald.Harris@mt.gov>; Hayworth, Michael <MHayworth@mt.gov>; Judge Holly Brown <hbbpc@aspenproof.com>; Judge Mike Salvagni <msalvagni@aol.com>;

Knisely, Mary Jane <MKnisely@mt.gov>; Krueger, Kurt <kkrueger@mt.gov>; Kutzman, John <JKutzman@mt.gov>; Laird, Yvonne <YLaird@mt.gov>; Larson, John <johlarson@mt.gov>; Levine, Michele <Michele.Levine@mt.gov>; Lint, Jennifer <Jennifer.Lint@mt.gov>; Manley, James <JManley@mt.gov>; Marks, Jason <Jason.Marks@mt.gov>; McElyea, Rienne <Rienne.McElyea@mt.gov>; McElyea, Russ <RMcElyea@mt.gov>; McMahon, Michael <Michael.McMahon@mt.gov>; Menahan, Michael <MMenahan@mt.gov>; Moses, Michael <MMoses@mt.gov>; Murnion, Nickolas <NMurnion@mt.gov>; Ohman, Peter <Peter.Ohman@mt.gov>; Oldenburg, Jon <JOldenburg@mt.gov>; Olson, Robert <ROlson3@mt.gov>; Parker, John <John.Parker@mt.gov>; Recht, Howard <Howard.Recht@mt.gov>; Rieger, Olivia <Olivia.Rieger@mt.gov>; Seeley, Kathy <KSeeley@mt.gov>; Snipes Ruiz, Kaydee <KSnipesRuiz@mt.gov>; Souza, Rodney <RSouza@mt.gov>; Spaulding, Randal <rspaulding@mt.gov>; Todd, Gregory <GTodd@mt.gov>; Ulbricht, Heidi <HUlbricht@mt.gov>; Vannatta, Shane <Shane.Vannatta@mt.gov>; Wald, Matthew <Matt.Wald@mt.gov>; Whelan, Bob <Robert.Whelan@mt.gov>; Wilson, Dan <Daniel.Wilson@mt.gov>

Subject: SB 140

From: Cybulski, David
Sent: Friday, January 29, 2021 10:29 AM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I oppose.

Shouldn't this be something that is the product of several years of study and debate?

From: McLaughlin, Beth <bmclaughlin@mt.gov>
Sent: Friday, January 29, 20217:27 AM

To: McGrath, Mike <mmcgrath@mt.gov>; Rice, Jim <jrice@mt.gov>; McKinnon, Laurie <LMcKinnon@mt.gov>; Baker, Beth <bbaker@mt.gov>; Shea, Jim <JimShea@mt.gov>; Sandefur, Dirk <dsandefur@mt.gov>; Gustafson, Ingrid <IGustafson@mt.gov>; Abbott, Chris <Chris.Abbott@mt.gov>; Allison, Robert <RAllison@mt.gov>; Berger, Luke <Luke.Berger@mt.gov>; Best, Elizabeth <EBest@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>; Brown, John <JBrown3@mt.gov>; Brown, Stephen <Stephen.Brown@mt.gov>; Christopher, Deborah <dchristopher@mt.gov>; Cuffe, Matthew <Matthew.Cuffe@mt.gov>; Cybulski, David <dcybulski@mt.gov>; Davies, Colette <Colette.Davies@mt.gov>; Dayton, Ray <RDayton@mt.gov>; Deschamps, Dusty <ddeschamps@mt.gov>; Eddy, Amy <AEddy@mt.gov>, Fehr, Jessica <Jessica.Fehr@mt.gov>; Gilbert, Brenda <BGilbert@mt.gov>; Halligan, Leslie <LHalligan@mt.gov>; Harada, Ashley <Ashley.Harada@mt.gov>; Harris, Donald <Donald.Harris@mt.gov>; Hayworth, Michael <MHayworth@mt.gov>; Judge Holly Brown <hbbpc@aspenproof.com>; Judge Mike Salvagni <msalvagni@aol.com>; Knisely, Mary Jane <MKnisely@mt.gov>; Krueger, Kurt <kkrueger@mt.gov>; Kutzman, John <JKutzman@mt.gov>; Laird, Yvonne <YLaird@mt.gov>; Larson, John <johlarson@mt.gov>; Levine, Michele

<Michele.Levine@mt.gov>; Lint, Jennifer <Jennifer.Lint@mt.gov>; Manley, James <JManley@mt.gov>; Marks, Jason <Jason.Marks@mt.gov>; McElyea, Rienne <Rienne.McElyea@mt.gov>; McElyea, Russ <RMcElyea@mt.gov>; McMahon, Michael <Michael.McMahon@mt.gov>; Menahan, Michael <MMenahan@mt.gov>; Moses, Michael <MMoses@mt.gov>; Murnion, Nickolas <NMurnion@mt.gov>; Ohman, Peter <Peter.Ohman@mt.gov>; Oldenburg, Jon <JOldenburg@mt.gov>; Olson, Robert <ROlson3@mt.gov>; Parker, John <John.Parker@mt.gov>; Recht, Howard <Howard.Recht@mt.gov>; Rieger, Olivia <Olivia.Rieger@mt.gov>; Seeley, Kathy <KSeeley@mt.gov>; Snipes Ruiz, Kaydee <KSnipesRuiz@mt.gov>; Souza, Rodney <RSouza@mt.gov>; Spaulding, Randal <rspaulding@mt.gov>; Todd, Gregory <GTodd@mt.gov>; Ulbricht, Heidi <HUlbricht@mt.gov>; Vannatta, Shane <Shane.Vannatta@mt.gov>; Wald, Matthew <Matt.Wald@mt.gov>; Whelan, Bob <Robert.Whelan@mt.gov>; Wilson, Dan <Daniel.Wilson@mt.gov>

Subject: SB 140

Folks,

From: Recht, Howard
Sent: Friday, January 29, 2021 8:05 AM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I am not sure if this bill is the right fix, but having been through the process of being considered for a judicial appointment twice, in my opinion the current process of screenings by the judicial nomination commission needs to be overhauled.

Ideally you would think the judicial nomination commission would make recommendations based upon objective criteria, ranking candidates by how they score in a matrix of accepted qualifications for a judicial position. You would think the commission would only pass along those candidates who scored above a certain base qualification score, and that the score of those who did score well enough to be recommended would go to the governor. You would also think that each member of the judicial nomination commission would be required to disclose her/his scoring for each candidate.

But that is not how it works. The commission does not conduct an independent investigation into the qualifications of candidates. The commission does not score candidates according to any disclosed objective criteria. No member is required to disclose why she/he votes a candidate up or down. A member of the commission can vote against a candidate based upon race, gender, religion, or perceived political affiliation. In my case (both times) I was grilled by certain commission members about my religion, and little else. Although I was passed on to the governor both times, those commission members who voted against me were the same ones who grilled me about my religion.

In my opinion, this needs to change.

Howard F. Recht

From: Cuffe, Matthew
Sent: Friday, January 29, 2021 7:38 AM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

Has there been any discussion as to why the change?

Cuffe

Matthew J. Cuffe
District Court Judge

From: Best, Elizabeth
Sent: Friday, January 29, 2021 7:39 AM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I can't find the button but I oppose.

Elizabeth A. Best
District Court Judge
415 Second Ave. No., Room 203
Great Falls, MT 59401
Phone: 406.771.3950
Email: ebest@mt.gov
Zoom: https://mt-gov.zoom.us/j/91958457110?pwd=Q2FLUDRvNTdMcnFwVXhYV000dTBTZz09

[seal]

From: Eddy, Amy
Sent: Friday, January 29,2021 10:48 AM
To: Recht, Howard; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: Re: SB 140

All,

For almost 50 years since the Montana Constitution was adopted, the Judicial Nomination Commission has been *the* only method provided by law for filling judicial vacancies. Its composition is balanced to maximize

judicial competence, experience, and temperament. The individual members of the Commission evolve through new appointments by governors from both political parties, and different Supreme Court justices and district court judges.

It is my belief the JNC serves as an important insulating barrier from the Executive Branch that preserves the independence of the judiciary.

I have been through the JNC twice. Similar to Judge Recht, on the first time through I was asked inappropriate, in my mind, questions by the lay members--such as did my husband at the time approve of my application, and did I really think it was in the best interest of my children to move schools. I was also asked many sophisticated and nuanced questions about the law, public service and nonpartisanship. The JNC worked diligently to review applications and public comment, *conducted an independent investigation*, traveled to the local community to interview the candidates in a public forum, and then deliberated to a decision on the names to pass on to the Governor for appointment.

While undoubtedly messy at times, this process is the hallmark of a Constitution for the people. The JNC implements Article VII, Section 8 (2) of the Montana Constitution, as well as other Articles of the Montana Constitution that so clearly value public participation. A direct appointment to the Governor undermines this direct public participation and does not add any transparency to the process. A better way may be to simply approach the JNC about its internal processes.

I do not support this bill.

Amy Eddy

From: Recht, Howard <Howard.Recht@mt.gov>
Sent: Friday, January 29, 2021 8:05 AM
To: McLaughlin, Beth <bmclaughlin@mt.gov>; McGrath, Mike <mmcgrath@mt.gov>; Rice, Jim <jrice@mt.gov>; McKinnon, Laurie <LMcKinnon@mt.gov>; Baker, Beth <bbaker@mt.gov>; Shea, Jim <JimShea@mt.gov>; Sandefur, Dirk <dsandefur@mt.gov>; Gustafson, Ingrid <IGustafson@mt.gov>; Abbott, Chris <Chris.Abbott@mt.gov>; Allison, Robert <RAllison@mt.gov>; Berger, Luke <Luke.Berger@mt.gov>; Best, Elizabeth <EBest@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>; Brown, John <JBrown3@mt.gov>; Brown, Stephen <Stephen.Brown@mt.gov>; Christopher, Deborah <dchristopher@mt.gov>; Cuffe, Matthew <Matthew.Cuffe@mt.gov>; Cybulski, David <dcybulski@mt.gov>; Davies, Colette <Colette.Davies@mt.gov>; Dayton, Ray <RDayton@mt.gov>; Deschamps, Dusty <ddeschamps@mt.gov>; Eddy, Amy <AEddy@mt.gov>, Fehr, Jessica <Jessica.Fehr@mt.gov>; Gilbert, Brenda <BGilbert@mt.gov>; Halligan, Leslie <LHalligan@mt.gov>; Harada, Ashley <Ashley.Harada@mt.gov>; Harris, Donald <Donald.Harris@mt.gov>; Hayworth, Michael <MHayworth@mt.gov>; Judge Holly

Brown <hbbpc@aspenproof.com>; Judge Mike Salvagni <msalvagni@aol.com>; Knisely, Mary Jane <MKnisely@mt.gov>; Krueger, Kurt <kkrueger@mt.gov>; Kutzman, John <JKutzman@mt.gov>; Laird, Yvonne <YLaird@mt.gov>; Larson, John <johlarson@mt.gov>; Levine, Michele <Michele.Levine@mt.gov>; Lint, Jennifer <Jennifer.Lint@mt.gov>; Manley, James <JManley@mt.gov>; Marks, Jason <Jason.Marks@mt.gov>; McElyea, Rienne <Rienne.McElyea@mt.gov>; McElyea, Russ <RMcElyea@mt.gov>; McMahon, Michael <Michael.McMahon@mt.gov>; Menahan, Michael <MMenahan@mt.gov>; Moses, Michael <MMoses@mt.gov>; Murnion, Nickolas <NMurnion@mt.gov>; Ohman, Peter <Peter.Ohman@mt.gov>; Oldenburg, Jon <JOldenburg@mt.gov>; Olson, Robert <ROlson3@mt.gov>; Parker, John <John.Parker@mt.gov>; Rieger, Olivia <Olivia.Rieger@mt.gov>; Seeley, Kathy <KSeeley@mt.gov>; Snipes Ruiz, Kaydee <KSnipesRuiz@mt.gov>; Souza, Rodney <RSouza@mt.gov>; Spaulding, Randal <rspaulding@mt.gov>; Todd, Gregory <GTodd@mt.gov>; Ulbricht, Heidi <HUlbricht@mt.gov>; Vannatta, Shane <Shane.Vannatta@mt.gov>; Wald, Matthew <Matt.Wald@mt.gov>; Whelan, Bob <Robert.Whelan@mt.gov>; Wilson, Dan <Daniel.Wilson@mt.gov>

Subject: RE: SB 140

I am not sure if this bill is the right fix, but having been through the process of being considered for a judicial appointment twice, in my opinion the current process of screenings by the judicial nomination commission needs to be overhauled.

Ideally you would think the judicial nomination commission would make recommendations based upon objective criteria, ranking candidates by how they score in a matrix of accepted qualifications for a judicial position. You would think the commission would only pass along those candidates who scored above a certain base qualification score, and that the score of those who did score well enough to be recommended would go to the governor. You would also think that each member of the judicial nomination commission would be required to disclose her/his scoring for each candidate.

But that is not how it works. The commission does not conduct an independent investigation into the qualifications of candidates. The commission does not score candidates according to any disclosed objective criteria. No member is required to disclose why she/he votes a candidate up or down. A member of the commission can vote against a candidate based upon race, gender, religion, or perceived political affiliation. In my case (both times) I was grilled by certain commission members about my religion, and little else. Although I was passed on to the governor both times, those commission members who voted against me were the same ones who grilled me about my religion.

In my opinion, this needs to change.

Howard F. Recht

From: McLaughlin, Beth <bmclaughlin@mt.gov>
Sent: Friday, January 29, 20217:27 AM
To: McGrath, Mike <mmcgrath@mt.gov>; Rice, Jim <jrice@mt.gov>; McKinnon, Laurie <LMcKinnon@mt.gov>; Baker, Beth <bbaker@mt.gov>; Shea, Jim <JimShea@mt.gov>; Sandefur, Dirk <dsandefur@mt.gov>; Gustafson, Ingrid <IGustafson@mt.gov>; Abbott, Chris <Chris.Abbott@mt.gov>; Allison, Robert <RAllison@mt.gov>; Berger, Luke <Luke.Berger@mt.gov>; Best, Elizabeth <EBest@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>; Brown, John <JBrown3@mt.gov>; Brown, Stephen <Stephen.Brown@mt.gov>; Christopher, Deborah <dchristopher@mt.gov>; Cuffe, Matthew <Matthew.Cuffe@mt.gov>; Cybulski, David <dcybulski@mt.gov>; Davies, Colette <Colette.Davies@mt.gov>; Dayton, Ray <RDayton@mt.gov>; Deschamps, Dusty <ddeschamps@mt.gov>; Eddy, Amy <AEddy@mt.gov>, Fehr, Jessica <Jessica.Fehr@mt.gov>; Gilbert, Brenda <BGilbert@mt.gov>; Halligan, Leslie <LHalligan@mt.gov>; Harada, Ashley <Ashley.Harada@mt.gov>; Harris, Donald <Donald.Harris@mt.gov>; Hayworth, Michael <MHayworth@mt.gov>; Judge Holly Brown <hbbpc@aspenproof.com>; Judge Mike Salvagni <msalvagni@aol.com>; Knisely, Mary Jane <MKnisely@mt.gov>; Krueger, Kurt <kkrueger@mt.gov>; Kutzman, John <JKutzman@mt.gov>; Laird,

Yvonne <YLaird@mt.gov>; Larson, John <johlarson@mt.gov>; Levine, Michele <Michele.Levine@mt.gov>; Lint, Jennifer <Jennifer.Lint@mt.gov>; Manley, James <JManley@mt.gov>; Marks, Jason <Jason.Marks@mt.gov>; McElyea, Rienne <Rienne.McElyea@mt.gov>; McElyea, Russ <RMcElyea@mt.gov>; McMahon, Michael <Michael.McMahon@mt.gov>; Menahan, Michael <MMenahan@mt.gov>; Moses, Michael <MMoses@mt.gov>; Murnion, Nickolas <NMurnion@mt.gov>; Ohman, Peter <Peter.Ohman@mt.gov>; Oldenburg, Jon <JOldenburg@mt.gov>; Olson, Robert <ROlson3@mt.gov>; Parker, John <John.Parker@mt.gov>; Recht, Howard <Howard.Recht@mt.gov>; Rieger, Olivia <Olivia.Rieger@mt.gov>; Seeley, Kathy <KSeeley@mt.gov>; Snipes Ruiz, Kaydee <KSnipesRuiz@mt.gov>; Souza, Rodney <RSouza@mt.gov>; Spaulding, Randal <rspaulding@mt.gov>; Todd, Gregory <GTodd@mt.gov>; Ulbricht, Heidi <HUlbricht@mt.gov>; Vannatta, Shane <Shane.Vannatta@mt.gov>; Wald, Matthew <Matt.Wald@mt.gov>; Whelan, Bob <Robert.Whelan@mt.gov>; Wilson, Dan <Daniel.Wilson@mt.gov>

Subject: SB 140

Folks,

Attached is a bill that Judge Todd has asked MJA to review and take a position on. Please take a look at it–

sorry to do this to you again but use the voting buttons (accept/reject) on your toolbar. If you can't find the voting button, just shoot me a note.

Thanks,

Beth McLaughlin
Supreme Court Administrator
406-841-2966

From: Best, Elizabeth
Sent: Friday, January 29, 2021 11:16 AM
To: Eddy, Amy; Recht, Howard; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew, Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I agree with Judge Eddy. My observation of the Commission has been that each member has worked extremely hard to find well qualified judges. It is a constitutional body which is one of the few that gives voice to the people before politics come into play. This

is in contrast to the federal model, which gives lip service to a citizens' commission and then disregards its recommendations.

Elizabeth A. Best
District Court Judge
415 Second Ave. No., Room 203
Great Falls, MT 59401
Phone: 406.771.3950
Email: ebest@mt.gov
Zoom: https/:/mt-gov.zoom.us/j/91958457110?pwd=Q2FLUDRvNTdMcnFwVXhYV000dTBTZz09

[seal]

From: Laird, Yvonne
Sent: Friday, January 29, 2021 11:03 AM
To: Eddy, Amy; Recht, Howard; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I am not in favor of dissolving the JNC. However, I certainly think it can be overhauled to be less political and more objective. It has been my experience and my observation that the JNC while not tied directly to the executive branch, certainly is political. This has

resulted in very well qualified people not getting their names forwarded to the governor for consideration and names going forward that should not. My bottom line is, the JNC is not working as contemplated by the Montana Constitution and a hard look needs to be taken as to how it should continue to operate.

From: Bidegaray, Katherine
Sent: Friday, January 29, 2021 11:22 AM
To: Laird, Yvonne; Eddy, Amy; Recht, Howard; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: Re: SB 140

I agree with Judges Recht and Laird.

From: Manley, James
Sent: Friday, January 29, 2021 11:49 AM
To: Bidegaray, Katherine; Laird, Yvonne; Eddy, Amy; Recht, Howard; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Larson, John; Levine, Michele; Lint, Jennifer; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew, Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

It sounds like this bill should be studied and reconsidered in two years. It does appear some improvements in the process may be advisable, but if the main concern is politicization, this bill goes the other direction.

From: Bidegaray, Katherine
Sent: Friday, January 29, 2021 11:22AM
To: Laird, Yvonne; Eddy, Amy; Recht, Howard; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: Re: SB 140

I agree with Judges Recht and Laird.

From: Deschamps, Dusty
Sent: Friday, January 29, 2021 1:52 PM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht; Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I oppose this bill. Apart from being unconstitutional in violation of Mont. Const. Art. VII, §8(2) which requires a nomination commission, it requires at least 70 days or more; which is too long in some circumstances, and as others have noted would make the judicial selection process overtly political. As Judges Recht and Laird

have pointed out, the current process may need some reform, but this bill will not accomplish that objective.

From: Lint, Jennifer
Sent: Friday, January 29, 2021 3:57 PM
To: Recht, Howard; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew, Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I oppose the Bill, but do not disagree that the process can be improved. I concur with the comments about the import of citizen input, and loathe to place the power of review of potential judges in one person's hands.

However, as someone who heard some of the questioning of Judge Recht in person, and then also reported to me by completely appalled members of the local bar, who sat in the hearings, many of the questions asked Judge Recht were way out of bounds. Sounds like Judge Eddy suffered the same. While I did not get posed offensive questions, many were smarmy and delivered in a demeaning manner. I also got many excellent, probative questions, and sound advice (Judge John Brown saying, "you have to decide, are you prepared to do that"). Bottom line is the inappropriate, baseless, offensive and argumentative questioning came from the non-attorney and non-judge members. Putting in for a judge position shouldn't be that you've now consented to being a punching bag and insulted, and you just smile and take it.

(stepping off soap box now)

Jennifer

From: Oldenburg, Jon
Sent: Friday, January 29, 2021 6:16 PM
To: Lint, Jennifer; Recht, Howard; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Olson, Robert; Parker, John; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

Having never been through the process, I must agree with those Judges that believe a through study is needed. I am against centering the appointment without public input. I am therefore against this bill. These appointments cannot be political.

Sent from Workspace ONE Boxer

From: Krueger, Kurt
Sent: Sunday, January 31, 2021 3:38 PM
To: Brown, John; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I am also adamantly oppose this bill.

Kurt Krueger
District Court Judge.
Butte, MT

From: Brown, John <JBrown3@mt.gov>
Sent: Friday, January 29, 2021 9:05 AM
To: McLaughlin, Beth<bmclaughlin@mt.gov>; McGrath, Mike <mmcgrath@mt.gov>; Rice, Jim <jrice@mt.gov>; McKinnon, Laurie <LMcKinnon@mt.gov>; Baker, Beth <bbaker@mt.gov>; Shea, Jim <JimShea@mt.gov>; Sandefur, Dirk <dsandefur@mt.gov>; Gustafson, Ingrid <IGustafson@mt.gov>; Abbott, Chris <Chris.Abbott@mt.gov>; Allison, Robert <RAllison@mt.gov>; Berger, Luke <Luke.Berger@mt.gov>; Best, Elizabeth <EBest@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>; Brown, Stephen <Stephen.Brown@mt.gov>; Christopher, Deborah <dchristopher@mt.gov>; Cuffe, Matthew <Matthew.Cuffe@mt.gov>; Cybulski, David <dcybulski@mt.gov>; Davies, Colette <Colette.Davies@mt.gov>; Dayton, Ray <RDayton@mt.gov>; Deschamps, Dusty <ddeschamps@mt.gov>; Eddy, Amy <AEddy@mt.gov>, Fehr, Jessica <Jessica.Fehr@mt.gov>; Gilbert, Brenda <BGilbert@mt.gov>; Halligan, Leslie <LHalligan@mt.gov>; Harada, Ashley <Ashley.Harada@mt.gov>; Harris, Donald <Donald.Harris@mt.gov>; Hayworth, Michael <MHayworth@mt.gov>; Judge Holly Brown <hbbpc@aspenproof.com>; Judge Mike Salvagni <msalvagni@aol.com>; Knisely, Mary Jane <MKnisely@mt.gov>; Krueger, Kurt

<kkrueger@mt.gov>; Kutzman, John <JKutzman@mt.gov>; Laird, Yvonne <YLaird@mt.gov>; Larson, John <Johlarson@mt.gov>; Levine, Michele <Michele.Levine@mt.gov>; Lint, Jennifer <Jennifer.Lint@mt.gov>; Manley, James <JManley@mt.gov>; Marks, Jason <Jason.Marks@mt.gov>; McElyea, Rienne <Rienne.McElyea@mt.gov>; McElyea, Russ <RMcElyea@mt.gov>; McMahon, Michael <Michael.McMahon@mt.gov>; Menahan, Michael <MMenahan@mt.gov>; Moses, Michael <MMoses@mt.gov>; Murnion, Nickolas <NMurnion@mt.gov>; Ohman, Peter <Peter.Ohman@mt.gov>; Oldenburg, Jon <JOldenburg@mt.gov>; Olson, Robert <ROlson3@mt.gov>; Parker, John <John.Parker@mt.gov>; Recht, Howard <Howard.Recht@mt.gov>; Rieger, Olivia <Olivia.Rieger@mt.gov>; Seeley, Kathy <KSeeley@mt.gov>; Snipes Ruiz, Kaydee <KSnipesRuiz@mt.gov>; Souza, Rodney <RSouza@mt.gov>; Spaulding, Randal <rspaulding@mt.gov>; Todd, Gregory <GTodd@mt.gov>; Ulbricht, Heidi <HUlbricht@mt.gov>; Vannatta, Shane <Shane.Vannatta@mt.gov>; Wald; Matthew <Matt.Wald@mt.gov>; Whelan, Bob <Robert.Whelan@mt.gov>; Wilson, Dan <Daniel.Wilson@mt.gov>

Subject: RE: SB 140

Beth, I definitely oppose this bill.

From: McLaughlin, Beth <bmclaughlin@mt.gov>
Sent: Friday, January 29, 2021 7:27 AM
To: McGrath, Mike <mmcgrath@mt.gov>; Rice, Jim <jrice@mt.gov>; McKinnon, Laurie <LMcKinnon@mt.gov>; Baker, Beth <bbaker@mt.gov>; Shea, Jim <JimShea@mt.gov>; Sandefur, Dirk <dsandefur@mt.gov>; Gustafson, Ingrid <IGustafson@mt.gov>; Abbott, Chris <Chris.Abbott@mt.gov>; Allison, Robert <RAllison@mt.gov>; Berger, Luke <Luke.Berger@mt.gov>; Best, Elizabeth <EBest@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>; Brown, John <JBrown3@mt.gov>; Brown, Stephen <Stephen.Brown@mt.gov>; Christopher, Deborah <dchristopher@mt.gov>; Cuffe, Matthew <Matthew.Cuffe@mt.gov>; Cybulski, David <dcybulski@mt.gov>; Davies, Colette <Colette.Davies@mt.gov>; Dayton, Ray <RDayton@mt.gov>; Deschamps, Dusty <ddeschamps@mt.gov>; Eddy, Amy <AEddy@mt.gov>, Fehr, Jessica <Jessica.Fehr@mt.gov>; Gilbert, Brenda <BGilbert@mt.gov>; Halligan, Leslie <LHalligan@mt.gov>; Harada, Ashley <Ashley.Harada@mt.gov>; Harris, Donald <Donald.Harris@mt.gov>; Hayworth, Michael <MHayworth@mt.gov>; Judge

Holly Brown <hbbpc@aspenproof.com>; Judge Mike Salvagni <msalvagni@aol.com>; Knisely, Mary Jane <MKnisely@mt.gov>; Krueger, Kurt <kkrueger@mt.gov>; Kutzman, John <JKutzman@mt.gov>; Laird, Yvonne <YLaird@mt.gov>; Larson, John <Johlarson@mt.gov>; Levine, Michele <Michele.Levine@mt.gov>; Lint, Jennifer <Jennifer.Lint@mt.gov>; Manley, James <JManley@mt.gov>; Marks, Jason <Jason.Marks@mt.gov>; McElyea, Rienne <Rienne.McElyea@mt.gov>; McElyea, Russ <RMcElyea@mt.gov>; McMahon, Michael <Michael.McMahon@mt.gov>; Menahan, Michael <MMenahan@mt.gov>; Moses, Michael <MMoses@mt.gov>; Murnion, Nickolas <NMurnion@mt.gov>; Ohman, Peter <Peter.Ohman@mt.gov>; Oldenburg, Jon <JOldenburg@mt.gov>; Olson, Robert <ROlson3@mt.gov>; Parker, John <John.Parker@mt.gov>; Recht, Howard <Howard.Recht@mt.gov>; Rieger, Olivia <Olivia.Rieger@mt.gov>; Seeley, Kathy <KSeeley@mt.gov>; Snipes Ruiz, Kaydee <KSnipesRuiz@mt.gov>; Souza, Rodney <RSouza@mt.gov>; Spaulding, Randal <rspaulding@mt.gov>; Todd, Gregory

<GTodd@mt.gov>; Ulbricht, Heidi <HUlbricht@mt.gov>; Vannatta, Shane <Shane.Vannatta@mt.gov>; Wald; Matthew <Matt.Wald@mt.gov>; Whelan, Bob <Robert.Whelan@mt.gov>; Wilson, Dan <Daniel.Wilson@mt.gov>

Subject: SB 140

Folks,

Attached is a bill that Judge Todd has asked MJA to review and take a position on. Please take a look at it– sorry to do this to you again but use the voting buttons (accept/reject) on your toolbar. If you can't find the voting button, just shoot me a note.

Thanks,
Beth McLaughlin
Supreme Court Administrator
406-841-2966

From: Dayton, Ray
Sent: Monday, February 1, 2021 7:01 AM
To: Olson, Robert; McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht, Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I oppose.

Ray J. Dayton
District Judge
3rd Judicial District Court
800 S. Main
Anaconda, MT 59711
406-563-4044
[seal]

From: Gilbert, Brenda
Sent: Monday, February 1, 2021 10:35 AM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Murnion, Nickolas; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht; Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

Beth, I am apposed to this bill. Brenda

From: Murnion, Nickolas
Sent: Monday, February 1, 2021 10:39 AM
To: McLaughlin, Beth; McGrath, Mike; Rice, Jim; McKinnon, Laurie; Baker, Beth; Shea, Jim; Sandefur, Dirk; Gustafson, Ingrid; Abbott, Chris; Allison, Robert; Berger, Luke; Best, Elizabeth; Bidegaray, Katherine; Brown, John; Brown, Stephen; Christopher, Deborah; Cuffe, Matthew; Cybulski, David; Davies, Colette; Dayton, Ray; Deschamps, Dusty; Eddy, Amy; Fehr, Jessica; Gilbert, Brenda; Halligan, Leslie; Harada, Ashley; Harris, Donald; Hayworth, Michael; Judge Holly Brown; Judge Mike Salvagni; Knisely, Mary Jane; Krueger, Kurt; Kutzman, John; Laird, Yvonne; Larson, John; Levine, Michele; Lint, Jennifer; Manley, James; Marks, Jason; McElyea, Rienne; McElyea, Russ; McMahon, Michael; Menahan, Michael; Moses, Michael; Ohman, Peter; Oldenburg, Jon; Olson, Robert; Parker, John; Recht; Howard; Rieger, Olivia; Seeley, Kathy; Snipes Ruiz, Kaydee; Souza, Rodney; Spaulding, Randal; Todd, Gregory; Ulbricht, Heidi; Vannatta, Shane; Wald, Matthew; Whelan, Bob; Wilson, Dan
Subject: RE: SB 140

I also adamantly oppose.

APPENDIX W

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed: April 1, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and the LEAGUE OF WOMEN VOTERS OF MONTANA, Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana, Respondent.	)

MOTION TO DISQUALIFY JUDGE KURT KRUEGER AND FOR OTHER MISCELLANEOUS RELIEF

APPEARANCES:

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Montana Attorney General
DEREK OESTREICHER
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P.O. Box 201401
Helena, MT 59620-1401
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Helena, MT 59620
Tel: (406) 444-5554
anita.milanovich@mt.gov

ATTORNEYS FOR RESPONDENT

A. CLIFFORD EDWARDS
Edwards & Culver
1648 Poly Drive, Suite 206
Billings, MT 59102

JAMES H. GOETZ
Goetz, Baldwin & Geddes, P.C.
P.O. Box 6580
35 North Grand A venue
Bozeman, MT 59715

ATTORNEYS FOR PETITIONERS

Pursuant to M. R. App. P., Rule 16, the Governor first respectfully moves for the immediate recusal or disqualification of Judge Kurt Krueger and any Montana judicial officer who "voted" on or expressed public approval or disapproval of Senate Bill 140 (SB 140), as described herein. Second, the Governor respectfully requests disclosure to the parties of the voting results of Montana Supreme Court Administrator McLaughlin's poll regarding SB 140, described below. Third, the Governor respectfully moves for a stay of this proceeding until such time as the Court can seat an impartial and independent judicial panel to decide this case. Given the gravity of the present motions, for good cause shown, and pursuant to Rule 29(1), the Governor finally moves for leave to exceed the word count limitations of Rule 16(3). The word count of these combined Motions, excluding footnotes and attachments, is 1,986 words. Petitioners' Counsel objects to this motion.

INTRODUCTION

The United States 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.")). Montana's Code of Judicial Conduct (MCJC) prohibits judges from making statements on pending or impending cases that would impair or interfere with the fairness of that matter, Mont. R. Jud. Conduct, Rule 2.11, and compels recusal "in any proceeding in which the judge's impartiality might reasonably be questioned." *Id.* at Rule 2.12. Judicial impartiality and fairness are in doubt, here.

On January 29, 2021, Montana Supreme Court Administrator Beth McLaughlin emailed *every* Montana Supreme Court Justice and *every* Montana District Court Judge—using government email accounts—to request that they "review and take a position on [Senate Bill 140] ... us[ing] the voting buttons (accept/reject) on your toolbar. If you can't find the voting button, just shoot me a note." Declaration of Derek J. Oestreicher; Exhibit A (hereinafter "Exhibit A"). In response, the Honorable District Judge Kurt Krueger—the judge the Chief Justice selected to replace him in this case following recusal—emailed: "I am also adamantly oppose [sic] [Senate Bill 140]." Such prejudgment of SB 140 reasonably demonstrates Judge Krueger's partiality and bias, which requires his recusal or disqualification from this case. *See Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 872 (2008) (requiring recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.").[1]

---

[1] While it is currently unknown who among the state judicial officers "voted" in support or opposition to SB 140 using

Public confidence in the integrity of Montana's judiciary relies on judicial impartiality and independence, free from impropriety and the appearance of impropriety. *See Williams-Yulee v. The Florida Bar,* 575 U.S. 433, 445 (2015) (quoting *Caperton,* 556 U.S. 868 at 889, 129 S. Ct. 2252 ("We have recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'"). That confidence has been shaken. To restore public confidence in this adjudicatory process, the voting results of Administrator McLaughlin's poll regarding SB 140 should be disclosed, and the Court should stay this matter until the Court seats an impartial judicial panel to decide this case.

BACKGROUND

On January 29, 2021, Administrator McLaughlin sent an email to every Montana Justice and Judge with the subject line "SB 140." Exhibit A. The email stated:

> Attached is a bill that Judge Todd has asked MJA [Montana Judges Association] to review and take a position on. Please take a look at it – sorry to do this to you *again* but use the voting

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Administrator McLaughlin's email toolbar, the following district court judges responded to Ms. McLaughlin's invitation to take a position on the bill: Judge Elizabeth Best, Judge Katherine Bidegaray, Judge John Brown, Judge Matthew Cuffe, Judge David Cybulski, Judge Ray Dayton, Judge Dusty Deschamps, Judge Amy Eddy, Judge Brenda Gilbert, Judge Leslie Halligan, Judge Kurt Krueger, Judge Yvonne Laird, Judge Jennifer Lint, Judge James Manley, Judge Nickolas Murnion, Judge Jon Oldenburg, Judge Howard Recht, and Judge Robert Whelan.

> buttons (accept/reject) on your toolbar. If you can't find the voting button, just shoot me a note.

Exhibit A (emphasis added). It is unclear from Administrator McLaughlin's email whether Montana's judiciary participated in other polls related to SB 140, or whether it normally participates in similar polls and dialogue related to other proposed laws. The email chain does not reveal the poll results, including whether judges or justices voted using the toolbar. But 18 District Court Judges responded to McLaughlin,[2] using their government email accounts, with opinions regarding SB 140. *See* Exhibit A. That judicial commentary included:

- "I'm in opposition to the bill."
  – **Judge Leslie Halligan**
- "I can't find the button but I oppose."
  – **Judge Elizabeth Best**
- "Beth, I definitely oppose this bill."
  – **Judge John Brown**
- "I am opposed."
  – **Judge Robert Whelan**
- "I oppose."
  – **Judge David Cybulski**
- "I do not support this bill."
  – **Judge Amy Eddy**
- "I am not in favor of dissolving the JNC. However, I certainly think it can be

[2] Judge Matthew Cuffe did not express a position in his emailed response, but rather asked "[h]as there been any discussion as to why the change?"

overhauled to be less political and more objective."
– **Judge Yvonne Laird**

- "I oppose this bill."
– **Judge Dusty Deschamps**
- "I oppose this bill, but do not disagree that the process can be improved."
– **Judge Jennifer Lint**
- "Having never been through the process, I must agree with those Judges that believe a through [sic] study is needed. I am against centering the appointment without public input. I am therefore against this bill. These appointments cannot be political."
– **Judge Jon Oldenburg**
- "It sounds like this bill should be studied and reconsidered in two years. It does appear some improvements in the process may be advisable, but if the main concern is politicization, this bill goes in the other direction."
– **Judge James Manley**
- "I am also adamantly oppose this bill."
– **Judge Kurt Krueger**
- "I oppose."
– **Judge Ray Dayton**
- "Beth, I am apposed [sic] to this bill. Brenda."
– **Judge Brenda Gilbert**
- "I also adamantly oppose."
– **Judge Nickolas Murnion**
- "I am not sure if this bill is the right fix, but having been through the process of being considered for a judicial appointment twice, in my opinion the current process of

screenings by the judicial nomination commission needs to be overhauled."
– **Judge Howard Recht**

- "I agree with Judges Recht and Laird."
– **Judge Katherine Bidegaray**

Exhibit A. Each email was sent using the "reply-all" feature. Thus, every Montana Judge and every Justice presumably observed their colleagues' expressions and comments concerning SB 140.

LEGAL STANDARDS

Montana has declared that an independent, fair, and impartial judiciary is indispensable to its 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. Further, a judge is prohibited from making "any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." MCJC 2.11. When engaging in extrajudicial activities, a judge shall not "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." MCJC 3.1. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." MCJC 2.12.

"It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process" under the Fourteenth Amendment to the U.S. Constitution. *Caperton,* 556 U.S. at 876. Montana's Due Process Clause, *see* MONT. CONST; art. II, § 17, similarly 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 883. v. Josephson,* 2001 MT 133,¶ 35, 305 Mont. 446, 30 P.3d 326. A judge's actual bias clearly violates due process. *See Caperton*, 556 U.S. at 883. But even absent actual bias, Judge Kreuger's actions create a probability of bias that due process cannot tolerate. *See Caperton,* 556 U.S. at 877 (concluding that due process is implicated where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable").

ARGUMENT

Pursuant to MCJC Rules 1.2, 2.11, 2.12, and 3.11, Judge Krueger should recuse himself or be disqualified because he has made a public statement demonstrating actual bias that can reasonably be expected to affect the outcome of, and jeopardize the fairness of, this action. Rule 2.12 requires Judge Krueger's disqualification because his impartiality in this matter can be reasonably questioned. Even if, arguendo, Judge Krueger harbored no actual bias against SB 140 and endeavored to approach the issue fairly and impartially, the probability and appearance of bias created by his public statement would lead to the reasonable conclusion that he has prejudged this case.

I. The MCJC requires Judge Krueger to disqualify himself because of his bias and prejudgment of the issues involved in this case.

The MCJC requires a judge to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. MCJC 1.2. To that end, a judge is expressly prohibited from making "any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." MCJC 2.11. Judges likewise are prohibited from participating "in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." MCJC 3.1(C). In any circumstance in which a judge's impartiality might reasonably be questioned, the judge "shall disqualify himself or herself." MCJC 2.12. A judge's unique authority and role within our constitutional system sometimes delimits her ability to opine publicly on matters likely to come before the judiciary.[3]

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[3] These types of restrictions on judicial speech are ubiquitous throughout the states and obviously satisfy any level of First Amendment scrutiny. See *French v. Jones*, 876 F.3d 1228, 1231 (9th Cir. 2017); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002). The U.S. Supreme Court has held that "protecting the integrity" of the judiciary and "maintaining the public's confidence in an impartial judiciary" are compelling government interests. *Williams-Yulee,* 575 U.S. at 445; *see id.* at 447 ("[N]o one denies that [the concept of public confidence in judicial integrity] is genuine and compelling."). To the extent MCJC Rules 1.2, 2.11, and 3.1 proscribe some judicial speech, those rules are nirrowly tailored to further Montana's compelling interest in preventing both actual and perceived judicial bias.

Judge Krueger's continued participation in this case violates these judicial conduct rules. The same is true for Judge Krueger's judicial colleagues who echoed his sentiments or voted to approve or disapprove SB 140. Judge Krueger's statement that he "adamantly oppose[s] [Senate Bill 140]" can only be characterized as a biased prejudgment of the issues presented in this case. "Adamant" is defined as "utterly unyielding in attitude or opinion in spite of all appeals."[4] In other words, Judge Krueger has publicly stated that, in spite of all argument to the contrary, he is intractably decided on the issue of SB 140. He is biased and prejudiced against SB 140. His opposition is adamantine. This type of prejudgment—expressed a mere two months before he was selected to replace the Chief Justice in this case—erodes public confidence in the impartiality and independence of the judiciary. Judge Krueger's statement and participation in this case directly violates MCJC Rules 1.2, 2.11, and 3.1, and demand his immediate recusal or disqualification.[5]

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[4] *See* Adamant, DICTIONARY.COM, https://www.dictionary.com/browse/adamant.

[5] Judge Krueger's selection as the Chief Justice's replacement raises other troubling questions under the judicial conduct rules. By the time of that selection, presumably every judicial officer in the state was aware of Judge Krueger's strident opposition to SB 140. Respondent presumes that at least some of Judge Krueger's colleagues took action under Rules 2.16(A) and (C) of the Montana Code of Judicial Conduct, but as of this date, any such remedial actions have not succeeded in recusing or disqualifying him from this case.

II. Due process requires Judge Krueger's recusal because of the objective risk of actual bias and prejudgment.

Judge Krueger's public statement demonstrates actual bias, which is sufficient grounds for recusal or disqualification under the U.S. and Montana Constitutions. *See Caperton*, 556 U.S. at 883 ("[A]ctual bias, if disclosed, no doubt would be grounds for appropriate relief."). Yet even without Exhibit A's proof of actual bias, due process would nevertheless require his disqualification here because his actions have created a "probability of bias." *Id.* at 884. Judge Krueger's public statement is tantamount to a *guarantee* of actual bias, so it necessarily poses the *risk* of actual bias. Due process accordingly requires his recusal and disqualification.

CONCLUSION

Pursuant to the MCJC and the due process guarantees of the U.S. and Montana Constitutions, the Governor respectfully requests that Judge Krueger recuse himself or be disqualified from this case. The Governor also requests that any other Montana judicial officers who, like Judge Krueger, expressed approval or disapproval of SB 140 recuse themselves or be disqualified. The Governor requests that the Court produce to the parties the voting results of Administrator McLaughlin's poll regarding SB 140. The Governor moreover requests a stay until all the communications and poll results related to SB 140 are released to the parties and the panel is duly

recomposed.[6] And finally, the Governor requests leave under Rule 29(1), and for good cause shown, to exceed the word count limitations of Rule 16(3).

Respectfully,

Greg Gianforte
GOVERNOR OF MONTANA

/s/ Anita Milanovich
Anita Milanovich
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406.444.5554

Austin Knudsen
ATTORNEY GENERAL OF MONTANA

/s/ Derek Oestreicher
Derek Oestreicher
General Counsel
Montana Department of Justice
215 N Sanders
Helena, MT 59601
Derek.Oestreicher@mt.gov
406.444.1953

---

[6] The undersigned, having learned of the facts disclosed in Exhibit A, hereby aver that they have fulfilled their obligations under Rule 8.3(b) of the Montana Rules of Professional Conduct.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document by email to the following addresses:

A. Clifford Edwards Edwards & Culver
1648 Poly Drive, Suite 206
Billings, MT 59102
Ph: (406) 256-8155
Fax: (406) 256-8159
Email: cliff@edwardslawfirm.org

James H. Goetz
Goetz, Baldwin & Geddes, P.C. PO Box 6580
35 North Grand Avenue Bozeman, MT 59715
Ph: (406) 587-0618
Fax: (406) 587-5144
Email: jim@goetzlawfirm.com

Date: April 1, 2021

/s/ Rochell Standish
ROCHELL STANDISH

APPENDIX X

MONTANA STATE LEGISLATURE

SUBPOENA

Case Number: OP 21-0125

[Filed: April 11, 2021]

WITNESS: Director Misty Ann Giles
MT Dept. of Administration
125 N. Roberts St.
Helena, Montana 59620

THE MONTANA STATE LEGISLATURE, to Director Misty Ann Giles.

You are hereby required to appear at the Montana State Capitol Building, room 303A, in the City of Helena, Montana, on the 9th day of April, 2021, at 3:00 PM, to produce the following documents:

(1) All emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.

(2) Any and all recoverable deleted e-mails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.

(3) This request excludes any emails and attachments related to decisions made by the justices in disposition of final opinion.

For failure to appear and produce the information requested in this subpoena, you may be liable to punishment for contempt pursuant to section 5-5-103, MCA.

Pursuant to section 5-5-105, MCA, a person sworn and examined before either house of the legislature or any committee of the legislature may not be held to answer criminally or be subjected to any penalty or forfeiture for any fact or act relating to the required testimony. A statement made or paper produced by the witness is not contempt evidence in any criminal proceeding against the witness. A witness cannot refuse to testify to any fact or produce any paper concerning which the witness is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, this 8th day of April, 2021.

By:

Sen. Keith Regier, Chairman of the Judiciary Standing Committee of the Montana Senate.

APPENDIX Y

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0125

[Filed: April 11, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS, Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana, Respondent.	)

INTERVENOR BETH McLAUGHLIN'S EMERGENCY MOTION TO QUASH AND ENJOIN LEGISLATIVE SUBPOENA DUCES TECUM

Randy J. Cox
BOONE KARLBERG P.C.
201 West Main, Suite 300
P. O. Box 9199
Missoula, MT 59807-9199
Tel: (406)543-6646
Fax: (406) 549-6804
rcox@boonekarlberg.com

Counsel for Beth McLaughlin

MOTION

This emergency motion seeks an immediate ruling from the Court to quash and enjoin a Subpoena issued by the Montana State Legislature calling for the production of emails and documents sent to or received by the Court Administrator of the Montana Supreme Court that likely contain private medical information, personnel matters including employee disciplinary issues, discussions with judges about ongoing litigation, information regarding Youth Court cases, judicial work product, ADA requests for disability accommodations, confidential matters before the Judicial Standards Commission, and information that could subject the State of Montana to liability were protected information exposed. Court Administrator Beth McLaughlin ("McLaughlin") is informed and believes the Department of Administration is actively working over the weekend to produce this privileged, confidential, and highly sensitive information, as commanded by the Subpoena. This, in turn, would deprive McLaughlin and those persons affected by the Subpoena of any opportunity to seek relief and avoid severe irreparable harm. Thus, McLaughlin

respectfully requests the Court issue an Order on this motion over this weekend, or as soon as reasonably possible. McLaughlin understands this may require the Court to confer outside its normal schedule, but respectfully submits that such relief is warranted by the extenuating circumstances and extreme time-sensitivity of this matter.

Pursuant to Mont. R. App. P. 14(2), (4), Mont. Code Ann. §§ 3-2-205, 26-2-401, and this Court's inherent authority to control original proceedings, McLaughlin[1] moves the Court to issue an immediate order: (1) quashing an April 7, 2021 Subpoena served upon the Montana Department of Administration by the Montana State Legislature, and (2) enjoining the Montana Department of Administration and its Director from complying with, producing, or otherwise disclosing the documents and information requested in the Subpoena. The Subpoena, attached hereto as Exhibit A, demands the production of "[a]ll emails and attachments" and "[a]ny and all recoverable deleted emails sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021." (Ex. A (emphasis added); Declaration of Beth McLaughlin, Exhibit B, ¶¶ 4, 5.) Failure to grant the requested relief will result in severe irreparable harm to individual privacy rights and potentially give rise to a constitutional crisis.

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[1] As one with an asserted interest who has voluntarily appeared in this proceeding, McLaughlin qualifies as an Intervenor under Mont. R. App. 2(1)(f).

This motion is supported by the following brief and proposed order (attached as Exhibit C). Counsel for the Montana Legislature and for the Department of Administration have been contacted with respect to this motion, and have not responded. The letter to counsel is attached as Exhibit D. Counsel for Petitioners has been contacted and does not object.[2]

BACKGROUND

This emergency request arises from discovery efforts to obtain information for use in this original proceeding. Specifically, the Montana State Legislature previously issued a request to McLaughlin for information on a poll of members of the Montana Judges Association ("MJA") pertaining to SB 140. (Ex. B, ¶ 3.) Unsatisfied with her response, Respondent asked the Court to stay these proceedings pending release of further information relating to the MJA poll.

On April 7, 2021, this Court denied the motion. The Order stated, in pertinent part: (1) Judge Krueger, who had participated in the poll, had voluntarily recused himself from this case; (2) "no member of this Court participated in the aforementioned poll"; and (3) "the six undersigned members of this Court will consider the case on the Petition and the responses submitted. . . ." (April 7, 2021 Order at 1, 2.)

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[2] McLaughlin also seeks leave to file an overlength brief. The applicable word limit of 1,500 words, pursuant to Mont. R. App. 16(3), is insufficient under the circumstances of this case. Given the emergency nature of McLaughlin's motion, she had no opportunity to seek the Court's leave in advance.

The very next day, April 8, 2021, the Montana State Legislature issued a Subpoena to Director Misty Ann Giles of the Montana Department of Administration, not to the judicial branch, requiring her to appear the next day and produce:

> (1) All emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.
>
> (2) Any and all recoverable deleted emails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.
>
> (3) This request excludes any emails and attachments related to decisions made by the justices in disposition of final opinion.

(Ex. A.) Although the Subpoena demanded the production of all emails and attachments on Friday, April 9, 2021, a one-day turnaround, Director Giles reached an agreement whereby the documents would be compiled this weekend and produced, presumably, on Monday or perhaps sooner during the weekend. (Ex. B, ¶ 6.) McLaughlin is informed and believes that Director Giles intends to comply with the Legislature's Subpoena. (Ex. B, ¶ 6.)[3]

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[3] The Subpoena seeks records of the judicial branch but only provide a "courtesy copy" to McLaughlin the afternoon of April 9, 2021. McLaughlin has yet to receive any response to her request

In her capacity as Court Administrator, McLaughlin receives a wide variety of emails and attachments that implicate the rights and privileges of other parties. (Ex. B.) These emails and attachments include, but are not limited to:

- Information pertaining to medical information both for employees and elected officials.
- Discussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline.
- Discussions with judges about case processing and ongoing litigation in pending or potential cases.
- Information related to complaints pending before the Judicial Standards Commission.
- Information or documentation of Youth Court Case information in my role as supervisor of the Youth Court bureau chief.
- Information about potential on-going security risks to individual judges including communications with law enforcement.
- Copied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges.
- Copied on exchanges between judges in which information was exchanged about judicial work product.

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to delay the matter while she sought legal advice.

- Requests from members of the public for disability accommodations including documentation of the disability.
- Other unknown items that could expose the state and Judicial Branch to liability if protected information is exposed.

(Ex. B, ¶ 7.)

The Subpoena is broad enough to include the privileged and confidential documents identified above. It deliberately seeks all McLaughlin emails, no matter the subject, with one limited and vague exception. As such, severe and irreparable harm will occur if the Subpoena is not immediately quashed and enforcement enjoined.

ANALYSIS

This Court is authorized under Mont. R. App. 14(2) and (4) to decide requests for injunctive relief in original proceedings. It likewise has broad power in the administration of discovery. *Asencio v. Halligan*, 395 Mont. 522, 437 P.3d 113 (2019). That broad power rests with this Court where, as here, the matter is the subject of an original proceeding. Mont. R. App. P. 14.

The broad discretion to control proceedings includes the power to protect against subpoenas that seek irrelevant, improper, illegal, or impertinent information. Mont. Code Ann. § 26-2-401. If a subpoena seeks "confidential" information, courts generally may "quash or modify"a subpoena "protect a person subject to or affected by a subpoena." Mont. R. Civ. P. 45(d)(3)(B). Most importantly, a court "must" modify or quash a subpoena that "requires disclosure of

privileged or other protected matter, if no exception or waiver applies." Mont. R. Civ. P. 45(d)(3)(A) (emphasis added). The Court also has authority to "reserve the status quo" by issuing immediate injunctive relief ex parte. *See generally* Mont. Code Ann. § 3-2-205; *Boyer v. Karagacin*, 178 Mont. 26, 32, 582 P.2d 1173, 1177 (1978) ("it is well settled that the purpose of a temporary restraining order is to preserve the status quo until a hearing can be held to determine whether an injunction pendente lite should be granted.").[4]

Moreover, a person subject to a subpoena has certain rights under Montana law which this Court has the authority to protect and enforce. Mont. Code Ann. §§ 26-2-101, 26-2-401. Importantly, "[i]t is the right of a witness to be protected from irrelevant, improper" questions and "to be examined only as to matters legal and pertinent to the issue." Mont. Code Ann. § 26-2-401 (emphasis added.) *See also* Mont. R. Civ. P. 45(d)(3)(A) and (B).

Here, the Subpoena's breadth raises numerous issues and compliance would inflict irreparable harm. Given the Court's recent ruling, any additional information that might exist regarding the MJA poll is irrelevant and thus improper under Mont. Code Ann. § 26-2-401. Yet, the Legislature made no attempt to limit the Subpoena's scope to even that topic, perhaps recognizing that doing so would be regarded as an end-

[4] Although the Montana Rules of Appellate Procedure do not contain specific rules regarding subpoenas (like Mont. R. Civ. P. 45), the procedure and protections of Rule 45 are at the very least instructive. After all, the importance of consistency in the handling of—and protections against—subpoenas is self-evident.

around the Court. Instead, the Subpoena demands the production of "all emails and attachments" existing or deleted, "sent and received by Court Administrator Beth McLaughlin"during a three-month time period. (Ex. A (emphasis added).) The only exception, to the extent it can be meaningfully understood and implemented, is narrow, and applies to "decisions made by the justices in disposition of final opinion." (Ex. A.)

1. The Subpoena Violates Separation of Powers and Exceeds Any Proper Scope.

The Legislature's power to issues subpoenas is finite. As recently discussed by the United States Supreme Court in *Trump v. Mazars USA, LLP*, subpoena power is "justified solely as an adjunct to the legislative process," and is therefore subject to several limitations. 140 S. Ct. 2019, 2031-32 (2020). Foremost among those is that "the subpoena must serve a valid legislative purpose." *Id*., *quoting Quinn* v. *United States*, 349 U. S. 155, 161, 75 S. Ct. 668, 99 L. Ed. 964 (1955). It must "concern a subject on which legislation could be had." *Id*. *See also State ex rel. Joint Comm. on Gov't & Fin. v. Bonar*, 230 S.E.2d 629, 629 (W. Va. 1976) (legislature must show: "(1) that a proper legislative purpose exists; (2) that the subpoenaed documents are relevant and material to the accomplishment of such purpose").

Based on the cornerstone constitutional principle of separation of powers into three coordinate branches, s*ee Morrison v. Olson*, 487 U.S. 654, 693-94 (1988), the legislative subpoena power is most limited when directed toward the judicial or executive branches. *Sullivan v. McDonald*, 2006 Conn. Super. LEXIS 2073,

at *20 (Super. Ct. June 30, 2006) ("subpoena power from one governmental branch to another is very limited…"). In *Sullivan*, the Court considered an analogous legislative subpoena that demanded testimony from a judicial officer. The Court deemed the subpoena a dangerous legislative foray into the independent judiciary:

> For the foregoing reasons, the court grants the plaintiff's motion to quash the subpoena and issues a temporary injunction preventing the defendants from compelling the attendance of Justice Sullivan at this hearing in the future. The failure to rule in this manner would allow unbridled power in any legislative committee to compel the attendance of sitting judicial officers. Such a ruling would cast a chilling effect upon the independence of the judiciary

Id., * 20.

Here, the Legislature attempts to use its limited subpoena power to obtain judicial communications—not for a legislative purpose or a "subject upon which legislation could be had," *Trump*, 140 S. Ct. at 2031-32, but for a litigation purpose. Indeed, the Legislature asks for judicial records from the executive branch. The purpose originally offered by the Legislature for the MJA poll information was that it might shed light on how certain justices presiding over this case viewed SB 140. But the Court has already issued an Order stating none of the six justices who will continue presiding over this case participated in the poll. There is, therefore, no arguable "legitimate legislative purpose" for continuing to seek the MJA poll

information. *See id*. The Subpoena should be quashed on this basis alone.

Even if there was a legitimate legislative purpose to seek the MJA poll information, there is no conceivable justification for demanding all of McLaughlin's emails and attachments on any and all topics or for seeking them from the executive branch. Needless to say, one branch of government must have some basis to require another branch to produce its communications. Here, there is none.

2. Judicial Deliberations and Communications Are Not the Publicly Available Information of a "Public Body."

If the Legislature's argument is that the judicial emails are open to the public under the rubric of the right to know, that argument is wrong. The constitutional history and the discussion of the term "public body," this Court has previously noted that while the judiciary is a branch of the government, and thus a "governmental body," it is not a "public body" subject to the open deliberation requirements set forth in article II, section 9. See Order, *In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999 (Leaphart, J., specially concurring) (arguing that framers did not intend to include the judiciary within the term "public body" and that confidentiality of judicial deliberations was essential to operation of independent judiciary).[5]

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[5] The Order was cited and discussed in *Goldstein v. Commission on Practice of the Supreme Court*, 2000 MT 8, ¶ 48, 97, n. 3, 297 Mont. 493, 995 P.2d 923.

See also, e.g., Mont. Code Ann. § 2-3-203(5) ("The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.").

3. Judicial Deliberations and Communications Are Protected by the Judicial Privilege.

The privilege that safeguards judicial communications is well-established across the country. "[T]he need to protect judicial deliberations has been implicit in our view of the nature of the judicial enterprise since the founding." *In re Enf't of a Subpoena*, 972 N.E.2d 1022, 1032 (Mass. 2012). Indeed, one court observed the only reason there is not more authority on the subject is "undoubtedly because its existence and validity has been so universally recognized." *Kosiorek v. Smigelski*, 54 A.3d 564, 578 n.19 (Conn. App. Ct. 2012) (internal quotations and citations omitted). *See also United States v. Daoud*, 755 F.3d 479, 483 (7th Cir. 2014) ("And of course judicial deliberations, though critical to the outcome of a case, are secret.").

As a federal district court recently explained in granting a motion to quash a similar subpoena, the bedrock principles underlying this judicial privilege are compelling:

> The privilege generally serves three underlying purposes: (1) ensuring the finality of legal judgments; (2) protecting the integrity and quality of decision-making "that benefits from the free and honest development of a judge's own thinking ... in resolving cases before them"; and

> (3) protecting independence and impartiality and permitting judges to decide cases without fear or favor.

Taylor v. Grisham, 2020 U.S. Dist. LEXIS 207243, at *6 (D.N.M. Nov. 4, 2020) (citing *Cain v. City of New Orleans*, U.S. Dist. LEXIS 169819, (E.D. La. Dec. 8, 2016)).

The D.C. Circuit similarly explained:

> . . . [P]rivilege against public disclosure or disclosure to other co-equal branches of Government arises from the common sense common law principle that not all public business scan be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without the fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

See also Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. 1971).

For all of these reasons, "other courts, State and Federal . . . when faced with attempts by third parties to extract from judges their deliberative thought processes, have uniformly recognized a judicial deliberative privilege" *In re Enf't of a Subpoena*, 972 N.E.2d at 1032 (listing numerous authorities recognizing judicial deliberative immunity). Here, of course, this Subpoena attempts to extract information

by going to the computers of the executive branch, without even asking the judicial branch.

Consistent with these principles, courts in other jurisdictions have repeatedly rejected attempts to invade the judicial decision-making process through subpoenas or other means. *See, e.g.*, *In re Certain Complaints Under Investigation by an Investigating Comm.*, 783 F.2d 1488, 1517-1520 (11th Cir. 1986) (confidentiality protects judge's independent reasoning from improper outside influences); *United States v. Nixon*, 418 U.S. 683, 705, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."); *Commonwealth v. Vartan*, 733 A.2d 1258, 1264 (Pa. 1999) (protection of judicial communications benefits the public, not the individual judges and staff); *Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. 2005) ("Our analysis leads us to conclude that there exists a judicial deliberation privilege protecting confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties and relating to official court business.").

Although there is little direct Montana authority on the deliberative privilege, there is no authority suggesting Montana would be an outlier and take a different approach than other jurisdictions. To the contrary, Montana law already provides very similar protections. *See, e.g.,* Mont. Code Ann. § 2-6-1002 ("confidential information" includes information related

to judicial deliberations in adversarial proceedings); Mont. Code Ann. § 2-3-203(5) ("The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding."); Order, *In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999 (Leaphart, J., specially concurring) (explaining that confidentiality of judicial deliberations is essential to the operation of independent judiciary).

The judicial privilege and its underlying policies weigh heavily in favor of quashing/enjoining the Subpoena in this case. As McLaughlin's Declaration makes clear, the Subpoena will reach a variety of communications that relate to the judicial deliberative process. (Ex. B, ¶ 7 ("[d]iscussions with judges about case processing and ongoing litigation in pending or potential cases"; "[c]opied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges"; "[c]opied on exchanges between judges in which information was exchanged about judicial work product").) To force the extensive disclosure of such communications rings a bell that cannot be un-rung. Separate and apart from the disclosures specific to this case, the Subpoena would send an unmistakable message to Montana's judiciary: "Your communications are not protected." This has precisely the chilling effect on judges and their staffs that the judicial privilege is designed to prevent.

The Subpoena's exception for communications "related to decisions made by the justices in disposition of final opinion" does nothing to mitigate the violation

of judicial privilege. The exception is incredibly narrow and applies only to justices' decisions in "disposition of final opinion." (Ex. A (emphasis added).) Whether this exception protects communications in the all-important deliberative process that precedes a "disposition of final opinion" is anyone's guess.

4. The Subpoena Violates Multiple Other Rights and Privileges.

Apart from the judicial privilege, the biggest issue is that the Subpoena reaches all of McLaughlin's emails no matter who or what is in the email. This is an egregious disregard of a host of other privileges and rights are implicated by the Subpoena. First and foremost is the fundamental right to privacy of third parties, protected under Article II, Section 10's mandate that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 10; *see also Missoulian v. Board of Regents*, 207 Mont. 513, 522, 675 P.2d 962, 967 (1984).

Similarly, the Subpoena encompasses confidential personnel information (Ex. B, ¶7 ("[d]iscussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline")), despite well-settled law that public employees have a specific right to privacy in non-disclosure of employment personnel records, including those regarding internal disciplinary matters and other personally sensitive information. *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 17, 397 Mont. 134, 447 P.3d 1048; *see also State ex rel. Great Falls Tribune Co. v.*

Eight Judicial Dist. Court, 238 Mont. 310, 319, 777 P.2d 345, 350 (1989) (individual's right of privacy with respect to employment evaluations is "paramount" when compared with the public's right to know).

The Subpoena requires production of medical information the State is precluded from disclosing under state and federal law. (Ex. B, ¶7 ("[i]nformation pertaining to medical information both for employees and elected officials"; "[r]equests from members of the public for disability accommodations including documentation of the disability").) Not only does Article II, § 10 protect private health care information and medical records, the Montana statute specifically provides that "health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interest in privacy and health care or other interests[.]" Mont. Code Ann. §50-16-502. As this Court has explained, "If the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records." *State v. Nelson*, 238 Mont. 231, 242, 941 P.2d 441, 448 (1997). This is consistent with federal health care privacy laws precluding the disclosure of health care information except under limited and carefully specified circumstances. *See* Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 164.102, *et seq*. The demanded information is confidential, and its disclosure will likely subject the State to liability. Medical information is completely irrelevant to this proceeding, or indeed any legitimate legislative purpose.

The Subpoena also encompasses information matters before the Judicial Standards Commission. (Ex. B, ¶7 ("[i]nformation related to complaints pending before the Judicial Standards Commission pertaining to medical information both for employees and elected officials").) Rule 7, Rules of the Judicial Standards Commission provides, "All paper filed herewith and all proceedings before the Commission shall be confidential[.]" *See also* Mont. Code Ann. § 3-1-1105; *Harris v. Smartt*, 2002 MT 239, ¶ 40, 311 Mont. 507, 57 P.3d 58.

The requested information would also encompass "information about potential on-going security risks to individual judges including communications with law enforcement." (Ex. B, ¶ 7.) Security information "necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state" constitutes "confidential information" prohibited from disclosure. Mont. Code Ann. § 2-6-1002.

CONCLUSION

For the reasons stated, McLaughlin requests the Court grant her Motion to Quash and Enjoin Legislative Subpoena Duces Tecum. A proposed Order is attached hereto for the Court's consideration.

Dated this 10th 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 Motion 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 3,734 words. I understand that motions are limited to 1,250 words, excluding certificate of service and certificate of compliance; however, this motion includes a specific request to exceed the word limitation.

BOONE KARLBERG P.C.
\s\ Randy J. Cox
Randy J. Cox

CERTIFICATE OF SERVICE

I, Randy J. Cox, hereby certify that I have served true and accurate copies of the foregoing Motion - Intervene to the following on 04-10-2021:

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APPENDIX Z

Case Number OP 21-0125

[Filed: April 12, 2021]

AUSTIN KNUDSEN [seal] STATE OF MONTANA

April 12, 2021

Dear Acting Chief Justice Rice,

The Department of Justice, acting through the Lieutenant General, undersigned, has been retained by legislative leadership, acting through the Speaker of the House, Wylie Galt, and Senate President, Mark Blasdel, to represent the interests of the Montana State Legislature to resolution of the ex parte Motion of Beth McLaughlin filed in the Montana Supreme Court on Saturday, April 10, 2021, outside of business hours and without opportunity for response.

We have reviewed the Court's Order, issued Sunday, April 11, 2021, presuming to temporarily quash the Legislature's duly authorized subpoena to the Director of the Department of Administration (DOA), and simultaneously, attempting to cure the multiple procedural irregularities presented in the filing through the mechanism of giving the Court Administrator a briefing schedule. As the Court recognizes in its Order, none of the Legislature, DOA, and the Court Administrator, are parties to this action. Further, the Court correctly notes that the Legislature's subpoena has no relation to the pending

proceeding in OP 21-0125 and is not properly filed in that suit. In fact, the Court's discomfort with the procedural posture of this Motion is well taken. The subpoena at issue is wholly unrelated to the pending matter and concerns the ethical conduct of the Court Administrator and members of the Montana State Judiciary. This Court cannot assume the Motion is properly filed in OP 21-0125 because it is not.

Article III, Section 1 of the Montana Constitution, states, in full, as follows:

Separation of Powers. The power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The Legislative power is broad. In fulfilling its constitutional role, the Legislature's subpoena power is similarly broad. The questions the Legislature seeks to be informed on through the instant subpoena directly address whether members of the Judiciary and the Court Administrator have deleted public records and information in violation of state law and policy; whether the Court Administrator has performed tasks for the Montana Judges Association during taxpayer funded worktime in violation of state law and policy; and whether current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before courts for decision.

Every employee of the State of Montana is responsible to protect the constitutional privacy interests of individuals as required by law. Nothing authorizes the public release of confidential information under any circumstance. It is a flailing argument by the Court Administrator to suggest the Legislature, when reviewing documents produced in response to subpoena, would not understand and act on its duty to redact personal or private information, and there is no suggestion that would ever have happened in this matter.

The Legislature does not recognize this Court's Order as binding and will not abide it. The Legislature will not entertain the Court's interference in the Legislature's investigation of the serious and troubling conduct of members of the Judiciary. The subpoena is valid and will be enforced. All sensitive or protected information will be redacted in accordance with law. To the extent there is concern, upon production, the Legislature will discuss redaction and dissemination procedures with the Court Administrator.

Sincerely,
/s/ Kristin Hansen
Kristin Hansen
Lieutenant General
Montana Department of Justice

APPENDIX AA

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed: April 13, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and the LEAGUE OF WOMEN VOTERS OF MONTANA, Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana, Respondent.	)

MOTION TO STRIKE AND VACATE

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ATTORNEYS FOR PETITIONERS

Pursuant to Rule 16, Respondent Governor Gianforte moves to strike the weekend moving papers of Supreme Court Administrator McLaughlin filed in this case. Those filings are procedurally and legally defective and disrupt from the actual issues in this case. First, the Administrator—a nonparty—sought to quash the subpoena of the Legislature—a nonparty—issued to the director of the Department of Administration (DOA)—a nonparty. Second, the subject matter of her motion is unrelated to the issues in this proceeding. And third, justiciability and the separation of powers counsel sharply against requests like Administrator McLaughlin's—a *functionary of this Court* asking *this Court* to quash a subpoena issued by the nonparty Legislature pursuant to its separate investigation *of this Court*.

The Court acknowledged these extraordinary irregularities but nevertheless granted its Administrator's requested relief, on a Sunday, without prior notice to Respondent. The same defects extant in the Administrator's filings necessarily infect the April 11, 2021 Temporary Order (Order). The Court lacks jurisdiction, this lawsuit cannot provide Administrator McLaughlin's desired relief, and the Court, in granting that relief, has now designated itself arbiter of an

inter-branch dispute between itself and the Legislature. Administrator McLaughlin tacitly conceded all this by filing, this morning, a new Petition for Original Jurisdiction under OP 21–0173.

This Court should immediately strike and vacate Administrator McLaughlin's filings and the resulting Order in OP 21–0125.

The undersigned notified opposing counsel about this motion and they object.[1]

I. This Court lacked jurisdiction to grant this relief.

"It is a fundamental principle of our jurisprudence that it is only against a party to the action that a judgment can be taken and that the judgment is not binding against a stranger to the action." *Kessinger v. Matulevich*, 278 Mont. 450, 460, 925 P.2d 864, 870-71 (1996) (citation omitted). *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (superseded on other grounds by statute) ("The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person ….").

Here, the Court recognized "McLaughlin's motion raises serious procedural questions" because "[n]either the Legislature nor the [DOA] are parties to this

[1] Administrator McLaughlin failed to notify or attempt to notify the Governor in advance of her motion. *See* Mot. at 3; *see also* Mont. R. App. P. 16 (denial warranted where notice is un-attempted).

litigation." Order at 2.[2] The Court also noted that the legislative subpoena didn't reference to SB 140 or any other litigation. *Id*. Because nonparty McLaughlin cannot seek relief from two other nonparties about a matter wholly divergent from the issues in this case, this Court lacks jurisdiction to grant her requested relief; her motion should be stricken, and the Order vacated, not least because it is moot.

II. McLaughlin's motion is non-justiciable.

An issue is justiciable only if it is "within the constitutional power of a court to decide, an issue in which the asserting party has an actual, non-theoretical interest, and an issue upon which a judgment can 'effectively operate' and provide meaningful relief." *Larson v. State*, 2019 MT 28, ¶ 18, 394 Mont. 167, 434 P.3d 241 (citations omitted); *see also Clark v. Roosevelt Cnty.*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48 (Justiciability is "a threshold requirement"). McLaughlin's motion is non-justiciable because she lacks standing and her requested relief—now granted—violates the separation of powers.

a. McLaughlin lacks standing.

Where standing is lacking, a court has no "power to resolve a case brought by a party." *Mitchell v. Glacier County*, 2017 MT 258, ¶ 9, 389 Mont. 122, 406 P.3d 427 (citation omitted). "Standing is one of several

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[2] The Governor previously notified the Court that the Legislature intends to intervene and defend SB 140's constitutionality. But at no point during the events addressed herein was the Legislature a party.

justiciability doctrines that limit Montana courts to deciding only cases and controversies." *Id.* ¶ 6 (citation omitted). To have standing, a "plaintiff must show, at an irreducible minimum … that the injury would be alleviated by successfully maintaining the action." *Id.* ¶ 10 (citation and internal quotation marks omitted).

McLaughlin's papers warn of several alleged injuries to the judiciary, but those harms are not redressable through this case because she challenges the actions of nonparties. Without citation, the Administrator contends: "This emergency request arises from discovery efforts to obtain information for use in this original proceeding." Mot. at 4. That is false. The Governor—the only named respondent in this case—did not issue the Legislative subpoena; nor has the Governor issued discovery.[3] The Legislature, the issuer of the subpoena—is not a party in this case.

McLaughlin lacks standing and her alleged injuries are unredressable in this case. Her filings and the Court's Order should be stricken and vacated.

b. McLaughlin's requested relief violates the separation of powers.

The Constitution prohibits the judiciary from exercising roving jurisdiction and enjoining nonparties "to prevent the infliction of harm." Order at 3; *cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495,

[3] Even though there are glaring factual omissions in this case, like the absence of any facts (or allegations) supporting Petitioners' standing to bring this action.

551 (1935) (Cardozo, J., concurring) (critiquing a legislative delegation tantamount to "a roving commission to inquire into evils and upon discovery correct them"). This is doubly anathema when the Court restrains a coordinate branch of government not before it. *See* Mont. Const. art. III, § 1.

McLaughlin's request and the Court's Order also violate one of the oldest and most bedrock legal guarantees of natural justice: *nemo judex in sua causa* (no one is judge in his own cause). The request and the Order both require the Judiciary to unilaterally umpire a conflict between the Legislature *and the Judiciary*. Whatever the dispute between the legislative and judicial branches, designating one of them the arbiter cannot—and will not—foster resolution. The Governor respectfully suggests that the only path forward is for the branches to engage in good faith discussions regarding the subpoena.

III. Administrator McLaughlin's putative intervention is inappropriate and now moot.

Although styling herself an "intervenor," Administrator McLaughlin neither sought to intervene in this action nor explained why intervention was proper. The Court nevertheless set out a lengthy briefing schedule to address questions about, inter alia, intervention. But Administrator McLaughlin's filing of a new action this morning alleging the same harms and requesting the same relief render her filings and the Court's Order in this case moot.

But again, what is now moot was at first misplaced. The legislative investigation and subpoena are entirely separate from this case's operative question: whether SB 140 is constitutional.

CONCLUSION

"Much more than legal niceties are at stake here. The … constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and … permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). The Administrator warns that the legislative subpoena threatens "a constitutional crisis," Mot. at 3, but the Governor respectfully suggests that the Court's April 11, 2021 attempt to stymie that threat may have unintentionally facilitated it.

For these reasons, the Governor respectfully requests that this Court immediately strike Administrator McLaughlin's weekend filings and vacate its April 11, 2021 order.

Respectfully submitted this 13th day of April, 2021.

Greg Gianforte
GOVERNOR OF MONTANA

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Dated: 04-13-2021

APPENDIX BB

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21–0125

[Filed: April, 14, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS, Petitioners,	)
v.	)
GREG GIANFORTE, Respondent,	)
and	)
MONTANA STATE LEGISLATURE, Intervenor-Respondent.	)

MONTANA STATE LEGISLATURE'S SUMMARY RESPONSE TO PETITION

Original Proceeding in the Montana Supreme Court

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[Table of Authorities omitted for printing purposes]

STATEMENT OF FACTS

The Montana State Legislature ("Legislature")[1] – not this Court, and not even the Governor – is vested with the constitutional authority to determine the process by which judicial vacancies are appointed. Mont. Const. Art. VII, § 8(2). With strong bicameral support, the Legislature enacted SB 140 changing the process to nominate judicial candidates for gubernatorial appointment. (SB 140 (2021).) SB 140 eliminates the judicial nomination commission (Mont. Code Ann. §§ 3-1-1001 et seq.), allowing the governor to directly appoint nominees to fill certain judicial vacancies. (SB 140, § 1.) SB 140 defines who may be considered a nominee: a qualified lawyer in good standing whose application is timely submitted to the governor, who goes through an interview, is subject to public comment, and who receives at least three timely letters of support. (*Id.* at §§ 2–4.)

Petitioners challenge the constitutionality of SB 140. (Petition, pp. 10–18.) The individual Petitioners base standing to sue on their status as Montana residents, voters, and taxpayers. (*Id.* at p. 5.) Petitioner Montana League of Women Voters' ("LWV") basis for standing is unstated and unclear. (*Id.*) Petitioners assert exercise of original jurisdiction is appropriate because this case involves constitutional issues of statewide importance, involves purely legal questions

[1] The Court granted the Legislature permission to intervene in this matter with a proviso that the Legislature commit to "abide by and comply with all orders of the Court." The Legislature commits to abide by orders that the Court has proper jurisdiction to issue.

of statutory and constitutional construction, and urgency and emergency factors make the normal appeal process inadequate. (*Id.* at pp. 5–9.) However, original jurisdiction is improper because Petitioners lack standing, and no emergency or urgency factors exist.

LEGAL ISSUES

1. Do the Petitioners have standing to sue?
2. Have the Petitioners shown sufficient urgency or emergency factors?
3. Is SB 140 unconstitutional?

ARGUMENT

I. JURISDICTIONAL REQUIREMENTS ARE NOT MET.

Assumption of original jurisdiction over a declaratory judgment action is only proper when standing is established; constitutional issues of major statewide importance are involved; the case involves purely legal questions of statutory and constitutional construction; and urgency and emergency factors exist making the normal appeal process inadequate. *Mont. for the Coal Trust v. State*, 2000 MT 13, ¶ 25, 298 Mont. 69, 996 P.2d 856.; Mont. R. App. P. 14(4).

A. PETITIONERS LACK STANDING.

Petitioners' standing to bring this action is essential to the Court's acceptance of original jurisdiction. *Butte-Silver Bow Gov. v. State*, 235 Mont. 398, 401, 768 P.2d 327, 329 (1989). Only those to whom a statute applies and who are adversely affected can question its

constitutional validity in a declaratory judgment proceeding. *Chovanak v. Matthews*, 120 Mont. 520, 527, 188 P.2d 582, 585 (1948). Private citizens may not restrain official acts when they fail to allege and prove damages to themselves differing from that sustained by the general public. *Jones v. Judge*, 176 Mont. 251, 253, 577 P.2d 846, 847 (1978). Where a party's only interest is as a resident, citizen, taxpayer, or elector and is the same as other citizens, electors, taxpayers, and residents, that interest is insufficient to invoke juridical power to determine the constitutionality of a legislative act. *Chovanak*, 120 Mont. at 527, 188 P.2d at 585 (citations omitted). Taxpayer standing must involve questions of tax validity or constitutional validity to collect or use the proceeds by the government. *Coal Trust*, ¶ 25 (citation omitted). Stature as an elector will not allow an individual to bring an action unless the elector is denied rights and sufficiently affected to challenge the Act denying him the right. *Jones*, 176 Mont. at 254, 577 P.2d at 848.

Here, the individual Petitioners' only allegations regarding standing to bring this constitutional challenge are that they are Montana residents, voters, and taxpayers. (Petition, p. 5.) LWV alleges no facts supporting its standing to sue. (*Id.*) Petitioners' scant assertion of voter and taxpayer status is insufficient to confer standing. SB 140 is not a tax bill. This case presents no questions of tax validity, expenditure of tax monies, or government's ability to collect or use tax proceeds. Petitioners therefore have no taxpayer standing. Likewise, Petitioners lack voter or resident standing because SB 140 does not deprive them of any constitutional or statutory rights (they have asserted

none) and they have shown no particularized injury. Voters have no right to select nominees for appointment to judicial vacancies or to determine how nominees are selected. Those powers are constitutionally vested in the Legislature, not the voters. Petitioners hint at an interest in preserving "a competent, independent judiciary" but admit this interest is shared by all Montanans. (Petition, p. 6.) Petitioners offer no proof – or even allegations – that SB 140 will affect their rights or cause them particularized injury. Therefore, they lack standing.

B. NO URGENCY OR EMERGENCY FACTORS EXIST.

"Courts do not function, even under the Declaratory Judgments Act, to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions." *In re Mont. Trial Lawyers Assn.*, 2020 Mont. LEXIS 1627, *3–4, 400 Mont. 560, 466 P.3d 494 (2020) (quotation omitted). Petitioners contend that, "If SB 140 is not immediately overturned, the next judicial replacement, at the whim of Montana's Governor, will be constitutionally suspect, probably political, and inimical to the interest of all Montanans in a competent, independent judiciary." (Petition, p. 6.) Petitioners' fears are wholly speculative. A confirmation decision on three of former Governor Bullock's appointees is expected before *sine die*, currently scheduled for May 11, 2021. If confirmed, Petitioners' fears (ostensibly) will never be realized. There are no other current vacancies.

Furthermore, Petitioners submit no proof whatsoever that hypothetical lawyers who may be

appointed are "probably political" or that those theoretical nominees would be "inimical to the interest of all Montanans in a competent, independent judiciary." This is pure conjecture on Petitioners' part. Without knowing who the lawyers are and the facts surrounding their appointment (including their qualifications, background, opinions, experiences, known biases, and many other factors), Petitioners' request is tantamount to seeking an advisory opinion from the Court.

Moreover, Petitioners' speculative fears are ironic given that judges who have undergone the judicial nomination commission process admit it is overtly political, inappropriate, subjective, and borderline abusive. (*See* Decl. Derek J. Oestreicher ¶ 2 and Ex. A (Apr. 1, 2021).) For example, Judge Recht observed:

> "The commission does not conduct an independent investigation into the qualification of candidates. [. . .] A member of the commission can vote against a candidate based upon race, gender, religion, or perceived political affiliation. In my case (both times) I was grilled by certain commission members about my religion and little else."

(*Id.* at Ex. A.) Judge Eddy observed:

> "Similar to Judge Recht, on the first time through I was asked inappropriate, in my mind, questions by the lay members – such as did my husband at the time approve of my application, and did I really think it was in the best interest of my children to move schools."

(*Id.*) Clearly, the commission process is no guarantee of achieving the Petitioners' stated goals.

Additionally, Petitioners have failed to show that litigation and appeal are inadequate. They assert, without support, that there is no viable process to challenge a judicial appointment in lower courts and thus no "normal" appeal process. (Petition, p. 9.) However, district courts have original jurisdiction in all cases at law and equity and in all special actions and proceedings. Mont. Code Ann. §§ 3-5-301(1)(c), (e) (2019). If the current appointees are not confirmed, the SB 140 process will take at least 70 days, and up to 100 days. (Ex. 1 at §§ 1(2), 3, 4.) Petitioners have made no showing that a district court would lack the power to grant relief under § 3-5-101. Simply put, Petitioners have failed to demonstrate that "urgency or emergency factors exist."

C. DUE PROCESS CONCERNS DISFAVOR EXERCISE OF JURISDICTION.

"[A]ny tribunal permitted to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *May v. First Natl. Pawn Brokers, Ltd.*, 269 Mont. 19, 24, 887 P.2d 185, 188 (1994) (quotation omitted). Dealings that might create an impression of possible bias should be disclosed to the parties. *Id.*, 887 P.2d at 188 (citation omitted). A fair and impartial tribunal is a basic guarantee of due process. *Goldstein v. Commn. on Practice*, 2008 MT 8, ¶ 64, 297 Mont. 493, 995 P.2d 923 (Nelson, J. dissenting). Due process violations may be adjudged not only based on actual harm, but also on risk that potential prejudice may occur due to an

inherent flaw in the process itself. *Id*. (citing *Mayberry v. Penn.*, 400 U.S. 455, 469 (1971) (Harlan, J. concurring) ("the appearance of even-handed justice . . . is at the core of due process.")).

When Petitioners filed this case, Chief Justice McGrath recused himself and District Judge Krueger was appointed to participate in his place. (Or. (Mar. 24, 2021).) Shortly thereafter, it was revealed that Judge Krueger had participated in an e-mail poll sent to every Montana district court judge and Supreme Court justice, using government e-mail accounts, requesting that they take a position on SB 140. (Decl. Oestreicher ¶ 2 and Ex. A.) Judge Krueger stated he is "adamantly oppose[d]" to SB 140. (*Id.* at Ex. A.) Only after these e-mails came to light did Judge Krueger recuse himself from the case. (Not. of Recusal (Apr. 2, 2021).)

The Court has advised (without disclosing additional information or documents about the e-mail poll) that no member of the Court participated in the poll. (*Id.*) However, the e-mails show that Judge Krueger's response was sent to Justices McGrath, Rice, McKinnon, Baker, Shea, Sandefur, and Gustafson, as were the responses of every judge who opined or voted to "accept/reject" SB 140. (Decl. Oestreicher ¶ 2 and Ex. A.) Assuming the justices read these e-mails, they were aware Judge Krueger "adamantly oppose[d]" SB 140 when he was appointed to this case. They are also aware of their colleagues' opinions on SB 140. The airing of strong views by nearly all colleagues in a close-knit state cannot help but raise questions of bias.

Moreover, minutes after they were notified, Petitioners' counsel called the Chief Justice *ex parte* to

communicate regarding Respondent's imminent motion to disqualify Judge Krueger.[2] Aaron Flint, *Updated–Documents Obtained: Montana Judges Above The Law?*, NewsTalk95, Apr. 11, 2021 (https://townsquare.media/site/125/files/2021/04/MT-Leg-SupCo-Docs2.pdf); Mike Dennison, *Supreme Court Administrator Asks Again To Block GOP Subpoena On Emails*, MTN News, April 13, 2021. Counsel requested a return call on their personal cell phone numbers. (*Id.*) The Chief Justice's staff commented that communication with counsel is not "a good idea." (*Id.*) This communication raises the following serious questions:

- What, if anything, was discussed *ex parte* between Petitioners' counsel and the Chief Justice?
- Why were Petitioners' counsel alerting the recused Chief Justice before the motion was filed?
- Why do Petitioners' counsel believe that the Chief Justice can influence this case when he has recused himself?
- What influence is the Chief Justice still exerting in this case despite recusal?

For example, the Chief Justice was quoted as saying "court might go with 6 rather than 7 justices on SB 140

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[2] This Court has ultimate regulation of the practice of law in Montana. The Legislature alerts the Court to these issues and leaves to its discretion whether further action is required under the Montana Rules of Professional Conduct.

case[.]" Mike Dennison, Twitter, https://twitter.com/mikedennison/status/1377770666716327936, April 1, 2021. In fact, the Court did suspend its internal operating rules requiring a seven-justice panel to hear this case.[3] (Or. (Apr. 7, 2021)); Mont. Sup. Ct. R. § IV(1) ("The Supreme Court en banc shall consist of seven members. The Court en banc shall hear all cases in which [. . .] a bona fide challenge is made to the constitutionality of a statute[.]"). According to press reports, the Chief Justice is in the know about this case, making *ex parte* communications with a party wholly improper.

The Legislature has undertaken an investigation of these matters, requesting certain documents from the Supreme Court Administrator. The Administrator reluctantly provided limited records after initially stating she did not retain the poll results, in possible violation of state government records retention rules. In fact, the Administrator deleted e-mails related to these issues. Seaborn Larson, *Judges' Emails Deleted, GOP 'Concerned' About Records Policy*, Billings Gazette, Apr. 9, 2021.

Also troubling is the Court's unprecedented efforts to thwart the Legislature's subpoena of, among other things, these deleted e-mails. The Court's own Administrator – appointed by the Court, who serves at the pleasure of the Court, under the direction of the

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[3] This conflicts with Mont. Const. Art. VII, § 3(2), which provides: "A district judge **shall** be substituted for the chief justice or a justice in the event of disqualification or disability[.]" (Emphasis supplied).

Court (Mont. Code Ann. §§ 3-1-701, and -702) – filed an emergency motion in this case to quash the subpoena on a Sunday, which the Court temporarily granted the same day. Seaborn Larson, *MT Supreme Court Halts Legislative Subpoena for Emails*, Helena Independent Record, Apr. 12, 2021. It did so even though the Administrator, the Legislature, and the Department of Administration were not parties to this case, even though the Legislature's subpoena is not at issue in this case, and even though the Governor received no notice of the Motion.

At a minimum, this Court's knowledge that Judge Krueger "adamantly oppose[d]" SB 140 when it appointed him to this case, knowledge of judicial colleagues' opinions, Petitioner's counsel's *ex parte* phone call to the Chief Justice, and the Administrator's deletion of relevant e-mails "create an impression of possible bias" that raises serious due process concerns. Additionally, through its Temporary Order, the Court put itself in the untenable position of ruling on the disclosure of judicial branch e-mails – a clear conflict of interest – purporting to bind persons who were not parties to the case over issues not raised by any party. These actions heighten the appearance of bias and implicate Mont. Code Jud. Cond. R. 1.2, 2.2, 2.3, 2.4, 2.6, 2.11, 2.12, 2.13, and 3.1. On grounds of these serious due process concerns, this Court should decline to accept jurisdiction.

II. SB 140 IS NOT UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT.

Statutes are presumed to be constitutional; it is the Court's duty to avoid an unconstitutional

interpretation if possible. *Hernandez v. Bd. of Cty. Commn.*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638 (citations omitted). Every possible presumption must be indulged in favor of the constitutionality of a legislative act. *Id.* (citations omitted). The party challenging the constitutionality of a statute bears the burden of proving unconstitutionality "beyond a reasonable doubt" and, if any doubt exists, it must be resolved in favor of the statute. *Id.* (citations omitted). Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs. *State v. Lucero*, 214 Mont. 334, 344, 693 P.2d 511, 516 (1984). Under these standards – or even more lenient ones – Petitioners' constitutional argument utterly fails to prove the unconstitutionality of SB 140.

A. SB 140 COMPORTS WITH THE PLAIN LANGUAGE OF THE MONTANA CONSTITUTION.

"[C]onstitutional provisions are interpreted by use of the same rules as those used to interpret statutes." *City of Missoula v. Cox*, 2008 MT 364, ¶ 9, 346 Mont. 422, 196 P.3d 452 (quotation omitted). Whenever the language "is plain, simple, direct and unambiguous, it does not require construction, but construes itself." *Id.* (quotation omitted). The terms must be given the natural and popular meaning in which they are usually understood. *Jones*, 176 Mont. at 254, 577 P.2d at 848 (citation omitted). A judge's office is simply to ascertain and declare what is in terms or substance contained in a statute [or constitutional provision], not to insert what has been omitted or to omit what has been inserted. Mont. Code Ann. § 1-2-101 (2019).

> Art. VII, § 8(2) provides in relevant part:
>
> For any vacancy in the office of supreme court justice or district court judge, the governor shall appoint a replacement from nominees selected in the manner provided by law.

This provision unequivocally authorizes the Legislature to determine how judicial nominees are selected in the event of a vacancy. The plain meaning of the word "nominee" is a person who is proposed for an office, position, or duty. *Nominee*, *Black's Law Dictionary* (2nd. Ed. 2001). Art. VII, § 8(2) does not provide for a nomination commission or any other nominating body. The clear intent of the framers, evidenced by the unambiguous language of Art. VII, § 8(2), was to leave the nominee selection process to the Legislature's discretion. Nothing in SB 140 violates the plain, direct, unambiguous language of Art. VII, § 8(2).

Petitioners admit Art. VII, § 8(2) is unambiguous, asserting the meaning of the word "nominees" is "obvious." However, they then claim the provision says something it obviously does not, that "[t]he plain language evinces a clear intent of the framers that the Governor is to receive a list of 'nominees' from some other source." (Petition, p. 10.) Of course, Art. II, § 8(2) does not say this at all. It does not contain the phrase "list of nominees from some other source," nor does it mandate a source from which nominees must come. Such terms may not be inserted when they were omitted by the framers. § 1-2-101. Nothing in the plain language of Art. VII, § 8(2) prohibits nomination of judicial appointments in the manner provided by SB 140. Petitioners' argument that SB 140 is

unconstitutional because it does not provide for a "list of nominees from some other source" is negated by the plain language of Art. VII, § 8(2), which requires no such thing.

B. ALTERNATIVELY, OUTSIDE SOURCES SUPPORT THE CONSTITUTIONALITY OF SB 140.

Because Art. VII, § 8(2) is unambiguous, reference to other sources is prohibited. The intent of the framers is controlling and "[s]uch intent shall first be determined from the plain meaning of the words used, if possible, and if the intent can be so determined, **the courts may not go further and apply any other means of interpretation**." *Keller v. Smith*, 170 Mont. 399, 405, 553 P.2d 1002, 1006 (1976) (emphasis supplied). Petitioners assert the plain meaning of Art. VII, § 8(2) renders SB 140 unconstitutional, and then erroneously rely on numerous outside sources to support this position. Not only is reliance on outside sources improper because the provision can be interpreted on its plain language, but also outside sources do not support Petitioners' position – quite the opposite.

While the LWV may favor a merit-based judicial selection process (Petition, p. 5), the 1972 Constitutional Convention delegates did not. In fact, the delegates considered and rejected a proposal to require a commission process in favor of deference to the legislature to **allow** the creation of a commission, but not **require** it. The legislative history and convention transcripts support the Legislature's right to determine how judicial nominees are selected and the constitutionality of SB 140.

From 1945 to 1972, five constitutional amendments were proposed, each calling for a nomination commission, all of which were defeated. HB 145 (1945); HB 48 (1957); HB 230 (1959); HB 104 (1963); and SB 153 (1967). At the 1972 Constitutional Convention, the delegates debated a commission process, but ultimately adopted a proposal that largely preserved the status quo. The majority proposal, identical to the 1889 Constitution, provided in relevant part:

> Vacancies in the office of the justice of the supreme court, or judge of the district court, or other appellate court, or clerk of the supreme court, shall be filled by appointment by the governor of the state[.]

I Montana Constitutional Convention, Verbatim Transcript 506 (1979). The minority proposal provided in relevant part:

> In all vacancies in the offices of supreme court justices and district court judges [. . .], the governor of the state shall nominate a supreme court justice or district court judge from nominees selected in the manner provided by law.

Id. at 519. The minority proposal authorized, but did not require, a commission process.

The delegates' final discussion before voting on what is now Art. VII, § 8(2) demonstrates the framers' intent to allow for a judicial nomination commission, but not require one:

DELEGATE SWANBERG: Mr. Berg, I don't wish to seem dense about this, but I fail to find any place in here where there's a merit system mentioned.

DELEGATE BERG: Well, in all vacancies – if you'll read the first paragraph – in all vacancies in the offices of Supreme Court justices and District Court judges, the Governor of the state shall nominate a Supreme Court or District Court judge from nominees selected in the manner provided by law. Now, that means that he must make his selection from nominees in the manner provided by law. It is contemplated that the Legislature will create a committee to select and name those nominees. That's where merit selection comes in.

DELEGATE SWANBERG: But it's not so stated in our Constitution?

DELEGATE BERG: No, because it was not stated for the very reason that if we locked it into the Constitution and the composition of the committee needed changing, it's difficult to do it by amendment. If you leave it to the Legislature and it needs changing, it can readily be done year by year.

DELEGATE SWANBERG: Under the situation that we have in the Constitution, though, if the Legislature decided not to form this commission, then we'd have the same situation we have now, do we not, where the Governor would simply appoint the judge?

> DELEGATE BERG: Yes, but I think this is a pretty clear direction to the Legislature of the intent of this Convention.

Id. at Vol. VI, 1113. Despite any desire the delegates may have had for the legislature to create a nominating commission, they clearly understood it was not constitutionally required and, in the absence of such a body, in the words of Delegate Swanberg, "we'd have the same situation we have now [. . .] where the Governor would simply appoint the judge[.]" The delegates chose not to go so far as constitutionalizing the commission; instead, they clearly and unequivocally placed discretion over the process in the hands of the Legislature, and no one else.

CONCLUSION

The Court should decline to exercise jurisdiction in this case because Petitioners lack standing, no urgency or emergency factors exist, and due process concerns merit restraint under the circumstances of this case. SB 140 is constitutional under the plain language of Art. VII, § 8(2), which does not require a judicial nomination commission or other body to select nominees for judicial vacancies, but leaves that selection process squarely to the discretion of the Legislature. Outside sources support this interpretation. For the reasons stated in this Summary Response, the Montana State Legislature respectfully requests that the Court decline to exercise jurisdiction in this matter; or, if it exercises jurisdiction, that it declare SB 140 constitutional.

Respectfully submitted this 14th day of April, 2021.

By: /s/ *Emily Jones*
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State Legislature

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11 (4)(3) and 14(9)(b), I certify that this Summary Response is printed with proportionately-spaced, size 14 Times New Roman font, is double spaced, and contains 3,862 words, excluding the cover pages, table of contents, table of authorities, certificate of compliance, and certificate of service, as calculated by Microsoft Word.

DATED this 14th day of April, 2021.

/s/ *Emily Jones*
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I, Emily Jones, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition to the following on 04-14-2021:

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Dated: 04-14-2021

APPENDIX CC

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0125

[Filed: April 15, 2021]

BOB BROWN, DOROTHY BRADLEY, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS, Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana, and MONTANA STATE LEGISLATURE,[1] Respondents.	)

EMERGENCY MOTION TO QUASH REVISED LEGISLATIVE SUBPOENA

[1] The caption has been amended to reflect the Court's April 14, 2021 Order granting the Montana State Legislature's Motion to Intervene as Respondent. (April 14, 2021 Order.)

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MOTION

Recognizing the serious problems with the unlawful subpoena quashed by the Court's Temporary Order, today the Legislature served Court Administrator Beth McLaughlin with a new version ("Revised Subpoena"), attached as Exhibit A. The Revised Subpoena still suffers from fundamental deficiencies and must be quashed. This is particularly true given the Legislature's stated position it will not abide by court decisions it does not agree with. McLaughlin is entitled to protection before being compelled to testify and turn over sensitive information to a body which now, apparently, regards itself as unshackled from any check or balance.

The Revised Subpoena requires McLaughlin to appear, testify, and provide information on Monday, April 19, 2021. Pursuant to M.R.App.P. 14, MCA §§ 3-2-205, 26-2-401, and M.R.Civ.P. 45, McLaughlin requests an immediate order temporarily quashing the

Revised Subpoena to maintain the status quo and prevent further irreparable injury, and ordering the Legislature to show cause why the Revised Subpoena should not be permanently quashed. Respondents object.

BACKGROUND

Most of the pertinent background is set forth in McLaughlin's Emergency Motion to Quash, filed April 10, 2021. The new facts are limited but significant.

The Revised Subpoena was served on McLaughlin today, April 15, 2021, and states:

> **THE MONTANA STATE LEGISLATURE**, to Administrator McLaughlin.
>
> You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 9:00 a.m., to produce the following documents and answer questions regarding the same:
>
> (1) All emails and attachments sent and received by your government e-mail account, bmclaughlin@mt.gov, including recoverable deleted emails, between January 4, 2021, and April 12, 2021 delivered as hard copies and .pst digital files.
>
> (2) Any and all laptops, desktops, hard-drives, or telephones owned by the State of Montana which were utilized in facilitating polls or votes with Montana Judges and Justices

> regarding legislation or issues that may come or have come before Montana courts for decision.
>
> This request excludes any emails, documents, and information related to decisions made by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.
>
> This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

(Ex. A.)

The Revised Subpoena is broader than the prior version in key respects. It requires McLaughlin, in two business days, to produce not just "all emails and attachments," but also "[a]ny and all laptops, desktops, hard-drives, or telephones owned by the State" which were used in polling any members of the judiciary. It requires her to "answer questions" about the documents, which will number in the thousands. It also

extends the date range for responsive information to April 12, 2021, despite SB140 being signed into law on March 16, 2021. (Ex. A.)

The Revised Subpoena appears to exclude at least some communications subject to the judicial deliberative privilege, but does not exclude a host of other private and confidential information.

The other change is the addition of a statement of purpose. Rather than help the Legislature's cause, however, it only underscores the lack of a legitimate legislative purpose, laying bare the most fundamental problem with the Revised Subpoena.

ANALYSIS

The legal basis for the Court's original jurisdiction and authority to grant the requested relief is set forth in McLaughlin's April 10, 2021 Emergency Motion, incorporated by reference.

A. Invalid Exercise of Legislative Subpoena Power.

The Legislature's power to issue subpoenas is finite. The U.S. Supreme Court recently addressed this precise issue in connection with a subpoena issued by Congress to President Donald J. Trump, wherein the Chief Justice wrote legislative subpoena power is "justified solely as an adjunct to the legislative process" and "must serve a valid legislative purpose." *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031-32 (2020).

The Montana Constitution similarly provides for limited investigative authority by the Legislature. Mont. Const. Art V, § 1. As advised by the Legislature's own Chief Legal Counsel and its rules, "the power to investigate must be exercised for a proper legislative purpose related to enacting law, and the application and exercise of the legislative investigation power must protect the rights of citizens and adhere to all constitutional protections related to privacy, life, liberty and property." (April 18, 2018 Montana Legislative Services Division Memorandum, Exhibit B (emphasis added).) The Legislature thus recognizes legal limitations on its investigative powers, including

- "It is the general rule that the legislature has no power . . . to make inquiry in the private affairs of a citizen except to accomplish some authorized end."
- "A state legislature, in conducting any investigation, must observe the constitutional provisions relating to the enjoyment of life, liberty and property."
- "An investigation instituted for political purposes and not connected with intended legislation or with any of the matters upon which a house should act is not a proper legislative proceeding and is beyond the authority of the house or the legislature."
- "When a committee is appointed by resolution to make an investigation and the object of the investigation, as shown by the resolution, is not a proper legislative objective but is to establish

> an extraordinary tribunal for the trial of judicial and other officers, the duties imposed on the commission being strictly judicial and not ancillary to legislation, the committee has no legal status."
>
> • "The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action."

(Ex. B at 7).

The limitations are even more pronounced here, because legislative subpoena power is most limited when directed toward the judicial or executive branches. *Trump,* 140 S. Ct. at 2035-36. "[C]ourts should carefully assess whether the asserted legislative purpose warrants the 'significant step' of subpoenaing the documents of a co-equal branch of government" and, "to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Id*.

Here, the Legislature is violating the *Trump* principles. It is attempting to use its limited subpoena power to obtain judicial communications—not for any legitimate legislative purpose, but for a litigation purpose, political purpose, or something tantamount to "an extraordinary tribunal for the trial of judicial and other officers." (Ex. B.)

B. Privileged Information.

With the Revised Subpoena, the Legislature excludes some information subject to the judicial

deliberations privilege, but not all. It only excludes communications "by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters." (Ex. A (emphasis added).) To the extent that language is decipherable, it is insufficient. The privilege extends broadly to "communications between judges and between judges and the court's staff made in the performance of their judicial duties and relating to official court business." *E.g., Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. 2005).

C. Private and Confidential Information.

The Legislature believes privacy rights cannot be violated by disclosure to the Legislature, as long as it promises the information "will be redacted and not subject to public disclosure." (Ex. A.) There is no legal authority for this position. To the contrary, the Montana Constitution is clear: The right to privacy "shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 10.

As set forth in her Petition, McLaughlin receives a wide variety of emails and attachments that implicate the rights and privileges of other parties. These privacy concerns do not vanish simply because the Legislature promises not to further disclose information, or because the Legislature says it will protect the information.

D. Insufficient Time for Compliance.

Montana law provides a court "must quash or modify a subpoena that . . . fails to allow a reasonable time to comply." MRCP 45(3)(A)(i) (emphasis added). Two business days is insufficient to review thousands of emails and "[a]ny and all laptops, desktops, hard-

drives, or telephones owned by the State of Montana," review for privilege, and be prepared to testify regarding the same.

E. End-Around the Court's Temporary Order.

The Court quashed the original subpoena in its Temporary Order on April 11, 2021, and directed the parties to file additional briefing—an approach consistent with Montana law on temporary injunctive relief. *See* MCA §§ 27-19-314 to -319. Pending further order of the Court, the original Subpoena no longer "remains in effect." MCA § 26-2-11. The Revised Subpoena is nothing short of an end-run around the Court's Temporary Order and directives.

CONCLUSION

For the reasons stated, the Revised Subpoena must be quashed.

Dated this 15th 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 Motion 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 1250 words, excluding the caption, Certificate of Compliance and Certificate of Service.

Dated this 15th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

Exhibit Index

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

* * *

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Randy J. Cox
Dated: 04-15-2021

APPENDIX DD

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed: April 16, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,	)
Petitioners,	)
v.	)
GREG GIANFORTE,	)
Respondent.	)

MONTANA STATE LEGISLATURE'S RESPONSE IN OPPOSITION TO NON-PARTY'S SECOND EMERGENCY MOTION TO QUASH

Original Proceeding in the Montana Supreme Court

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ATTORNEYS FOR MONTANA
STATE LEGISLATURE

Non-party Beth McLaughlin's second Emergency Motion to Quash Revised Legislative Subpoena should be immediately denied for the following reasons:

- Ms. McLaughlin is not a party to this case. She has not been granted leave of the Court to participate in this case. She has not made any showing that she has an interest in the outcome of the constitutionality of SB 140,[1] the law being challenged by the Petition. Her continued attempts to interject herself and irrelevant issues in this case are procedurally and substantively infirm.

- Ms. McLaughlin continues to raise complaints about subpoenas that are not at issue in this case.[2] The Legislature has opened an investigation that is separate from, and broader than, the narrow issues before the Court in this

[1] A non-party may only intervene in a case upon a showing of an "asserted interest in the outcome" (Mont. R. App. P. 2(1)(f)), which Ms. McLaughlin has failed to make.

[2] *See* Petitioner's Petition for Original Jurisdiction (Mar. 17, 2021).

matter. The special committee is formed.[3] The hearing is set. Any legal questions regarding that investigation, including the propriety, scope, and purpose of legislative subpoenas, are not at issue here and do not belong here. Ms. McLaughlin admitted this when she filed a separate legal action – OP 21-0173 – specifically raising the subpoena issue. Additionally, such questions raise myriad fact issues, rendering them inappropriate for disposition by this Court's exercise of original jurisdiction.[4]

- The undersigned counsel's scope of representation of the Legislature is limited to the issues raised by the Petition in this case, namely questions involving the Court's exercise of original jurisdiction and the constitutionality of SB 140.[5] This counsel has not been retained to represent the Legislature with regard to any other issues. The Legislature has retained separate counsel to address the subpoena issues.[6] Ms. McLaughlin cannot force this counsel to respond to legal issues that she has

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[3] Seaborn Larson, *Montana GOP Lawmakers Subpoena Supreme Court Justices, Administrator*, Billings Gazette, Apr. 15, 2021.

[4] *See* Mont. R. App. P. 14(4) (Original proceedings for declaratory judgment in this Court are only proper "when the case involves purely legal questions of statutory or constitutional interpretation which are of state-wide importance.") (Emphasis supplied).

[5] *See* Mot. to Intervene (Apr. 13, 2021).

[6] *Id.*; *see also* OP 21-0173 (Mot. to Dismiss (Apr. 14, 2021).)

not been retained to address. Likewise, Ms. McLaughlin cannot force the counsel retained to address the subpoena issues to appear in this case.

- Counsel for Ms. McLaughlin failed to contact or notify counsel for the Legislature in this case before filing her Motion, subjecting it to summary dismissal.[7]

The Legislature joins in the Governor's Motion to Strike and Vacate (Apr. 13, 2021) and requests that the Court apply the same arguments advanced by the Governor to Ms. McLaughlin's second emergency motion. Additionally, the Legislature joins in any response to Ms. McLaughlin's second motion that the Governor may file. Finally, the Legislature requests that the Court direct Ms. McLaughlin and her counsel to cease making any further filings in this case unless and until Ms. McLaughlin can meet her burden of showing an "asserted interest in the outcome"[8] of this case sufficient to allow her proper intervention.

Respectfully submitted this 16th day of April, 20201.

/s/ *Emily Jones*
EMILY JONES

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[7] Mont. R. App. P. 16(1) ("Counsel shall also note therein that opposing counsel has been contacted concerning the motion and whether opposing counsel objects to the motion. Failure to include this statement may result in denial of the motion.") (Emphasis supplied).

[8] Mont. R. App. P. (2)(1)(f).

TALIA G. DAMROW
Attorneys for Montana
State Legislature

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 16(3), I certify that this Motion is printed with proportionately-spaced, size 14 Times New Roman font, is double spaced, and contains 593 words, excluding the cover page, certificate of service, and certificate of compliance, as calculated by Microsoft Word.

DATED this 16th day of April, 2021.

/s/ *Emily Jones*
EMILY JONES
TALIA G. DAMROW
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CERTIFICATE OF SERVICE

I, Emily Jones, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 04-16-2021:

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APPENDIX EE

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed: April 16, 2021]

BOB BROWN, DOROTHY BRADLEY, MAE NAN ELLINGSON, VERNON FINLEY, and the LEAGUE OF WOMEN VOTERS OF MONTANA,	)
Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana,	)
Respondent,	)
and	)
MONTANA STATE LEGISLATURE,	)
Intervenor-Respondent.	)

UPDATED MOTION TO STRIKE

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ATTORNEY FOR BETH McLAUGHLIN

For the same reasons stated in Respondent's April 13, 2021 Motion to Strike and Vacate, the Court should strike McLaughlin's April 15, 2021 motion to quash filed in this case.[1] The Montana State Legislature does

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[1] For brevity's sake, the Governor refers the Court to his previous motion, which has not yet been ruled upon, rather than rehashing these arguments. Additionally, McLaughlin once again failed to

not oppose this motion. Opposing counsel has been contacted with respect to whether they oppose this motion, but the Governor has not yet received a response.

Though the Legislature is now a party in this case *for purposes of defending the constitutionality of SB 140*, this court lacks jurisdiction to grant McLaughlin's requested relief because the subject matter of the legislative subpoena is unrelated to the constitutional challenge at issue here, and court action on this second motion would threaten the separation of powers. If the Court reaches the merits—it should not—the subpoena serves obvious legislative purposes. The Court should safeguard our constitutional structures by striking McLaughlin's motions and the April 11, 2021 Order.

In its temporary order on April 11, 2021—which, as the Governor stated in his previous motion to strike, should be vacated—this Court recognized "serious procedural" issues with McLaughlin's previous motion to quash, including: "the subpoena itself does not reference this litigation, or SB 140." Temp. Or. at 2 (Apr. 11, 2021). The Court further stated: "we cannot be certain, at this juncture, that the subpoena challenged by McLaughlin has anything to do with the pending proceeding in OP 21-0125." *Id.* Now, however, the Court can be certain it does not. The purpose of the subpoena is evident on its face:

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properly notify the parties of her motion. *See* Mot. at 2; Mont. R. App. P. 16. After business hours on the day of filing, McLaughlin's counsel sent an e-mail asking whether the parties objected. However, he did not include Emily Jones or Talia Damrow, the only attorneys who represent the Legislature in this proceeding.

> This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

The subpoena does not mention this proceeding or SB 140 because the information it seeks is unrelated to this litigation.

McLaughlin apparently recognizes these defects. Immediately following the Court's order, she filed a new Petition for Original Jurisdiction under OP 21-0173 and has similarly filed motions to quash in that proceeding. The Legislature's motion to dismiss in that case affirms the subpoena's stated purposes, which are entirely unrelated to the subject matter of this case—the constitutionality of SB 140. OP 21-0173, Mot. to Dismiss at 4 (Apr. 14, 2021).[2]

Agreeable or not, these are *legitimate* legislative purposes, and this Court should refrain, for prudential reasons, from declaring or inferring otherwise, especially when the movant is an appointee and functionary of this Court. *Id*. at 4–7. The legislature is also still considering several judicial reform bills as well as the judiciary's budget, and the information

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[2] Given her new original proceeding, it doesn't even appear McLaughlin will pursue intervention in this case.

gleaned in its investigation will likely aid its legislative purpose related to those bills.[3]

McLaughlin's repeated concerns about the disclosure of private, health, or otherwise-confidential information being released have simply not borne out. And the e-mails DOA has so far produced "are held by the Legislature's counsel and no sensitive or protected information has been disclosed." OP 21-0173, Mot. to Dismiss at 2. In fact, "[n]one of the concerns raised by McLaughlin … have been implicated by disclosure of these public documents." *Id*. at 2–3.

CONCLUSION

McLaughlin is not a party to this case, and her motion to quash is entirely unrelated to the subject matter of this proceeding. These serious questions should strongly dissuade the Court from even

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[3] *See, e.g.*, House Bill 2 (General Appropriations Act); House Bill 380 (Revise appointments process for certain members of the judicial standards commission); House Bill 685 (Revise judicial standards laws); House Joint Resolution 40 (Judicial Standards Commission study and audit request); Senate Bill 252 (Generally revise laws related to judicial review); Senate Bill 318 (Revise laws related to the judiciary); Senate Bill 366 (Revise judicial standards commission complaint process); Senate Bill 402 (Generally revise laws related to the judiciary); LC 0675 (Generally revise laws related to the judicial branch); LC 1138 (Generally revise laws for public officials); LC 1723 (Revise judicial standards commission laws); LC 2003 (Revise judicial branch laws); LC 2004 (Revise judicial branch laws); LC 2043 (Revise judicial procedure laws); LC 2044 (Revise judicial procedure laws); LC 2171 (Generally revise laws related to the judiciary); LC 2524 (Generally revise laws related to state employees); LC 3158 (Generally revise judicial branch laws).

considering her second motion. As with her previous motion to quash, this Court lacks jurisdiction to provide the extraordinary relief requested and attempting to provide such relief in this unrelated case will only ratchet up the current inter-branch tensions. For all these reasons, this Court should strike McLaughlin's second motion.

Respectfully submitted this 16th day of April, 2021.

Greg Gianforte
GOVERNOR OF MONTANA
/s/ Anita Milanovich
Anita Milanovich
General Counsel
Office of the Montana Governor

Austin Knudsen
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/s/ David M.S. Dewhirst
David M.S. Dewhirst
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this pleading is printed in a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 900 words, excluding certificate of service and certificate of compliance.

/s/ David M.S. Dewhirst
David M.S. Dewhirst
Solicitor General

CERTIFICATE OF SERVICE

I, David M.S. Dewhirst, hereby certify that I have served true and accurate copies of the foregoing Motion - Strike to the following on 04-16-2021:

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Electronically signed by Rochell Standish
on behalf of David M.S. Dewhirst

Dated: 04-16-2021

APPENDIX FF

AUSTIN KNUDSEN
[SEAL]
STATE OF MONTANA

OP 21-0125
OP 21-0173

[Filed: April 18, 2021]

April 18, 2021

Dear Justices of the Montana Supreme Court,

As you are aware, the Legislature has subpoenaed each of you to produce documents, narrow in scope, to the Special Joint Select Committee on Judicial Transparency and Accountability on Monday, April 19, 2021, at 3:00 p.m., unless responsive documents are produced sooner.

Last Friday, April 16, 2021, this Court entered an Order, improperly conjoining OP 21-0125 and OP 21-0173, which have always been and remain fundamentally unrelated in substance and in parties. In its Order, the Court goes further and attempts to "temporarily stay" Legislative subpoenas directed at its seven individual members, who are not parties to either Original Petition, have no standing in either matter to seek relief from the Court, and have not sought relief.

On page five, paragraph five of the Order, the Court states, "until the issues raised in this proceeding can be presented and adjudicated *in the course of due process*...." The Court here lays claim to sole authority over provision of due process for all branches of government, which is ludicrous. The statement implies that the Legislature is not capable of providing a forum in which due process may be had by subjects of Legislative inquiry. This statement is wholly outside the bounds of rational thought, given that all branches and levels of government are bound to provide due process to citizens in every action taken, and which the Executive and Legislative branches do every day. The entirety of a legislative session is one giant exercise in due process as citizens are provided the opportunity to weigh in on the making of laws that impact them. Judges are included in this opportunity, but concerning judges, their opportunity is limited by their special duty of impartiality in decision-making. And this is the question the Legislature seeks clarity on.

The Legislature has issued valid subpoenas. The Legislature has provided notice and the opportunity to be heard by those subject to the subpoenas. This is the essence of due process and comports fully with Title 5, Chapter 5, Part 1.

The purpose of this letter is to provide a process for the subpoenaed justices to produce the subpoenaed documents prior to the hearing, if so desired.

The Order signals, though not clearly, that not all of the justices intend to respond in the same manner. It appears that five of you intend to ignore the subpoena. The Order specifically states that Justice Rice's

subpoena is not stayed. Justice Baker has not joined paragraph five, but without indication of an alternative intent.

The undersigned observes that none of you are party to either Original Petition pending. The undersigned also observes that none of you have provided any notice that you are represented by counsel. As individuals subject to subpoena, you are not required or expected to respond or act as a group, and I find no authority that allows such action. Each of you must answer his or her subpoena individually, unless we can come to an agreement otherwise. Therefore, I am authorized by the Legislature to speak to each of you individually regarding whether and/or how you intend to respond to your subpoena, and to facilitate such response.

I may be reached at khansen@mt.gov or at 406-475-5650 (c) or 406-444-5862 (o). Failing these, please call the DOJ main number at 444-2026 and the receptionist will notify me.

Sincerely,
/s/ Kristin Hansen
Kristin Hansen
Lieutenant General
Montana Attorney General

APPENDIX GG

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case Number: OP 21-0173

[Filed: April 12, 2021]

BETH McLAUGHLIN,	)
	)
Petitioner,	)
	)
v.	)
	)
The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT of ADMINISTRATION,	)
	)
Respondents.	)

No: _____

PETITION FOR ORIGINAL JURISDICTION AND EMERGENCY REQUEST TO QUASH/ENJOIN ENFORCEMENT OF LEGISLATIVE SUBPOENA

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INTRODUCTION

This is an original proceeding challenging the legality of an April 8, 2021 Subpoena ("Subpoena") served by the Montana State Legislature on the Department of Administration.[1] The Subpoena demands production of all emails and documents sent to or received by Montana Supreme Court Administrator Beth McLaughlin ("McLaughlin") over a three-month period. The Subpoena encompasses private medical information, personnel matters including employee disciplinary issues, discussions with judges about ongoing litigation, information regarding Youth Court cases, judicial work product, ADA requests for disability accommodations, confidential matters before the Judicial Standards Commission, and information that could subject the State of Montana to liability were protected information exposed.

Despite this Court's issuance of an April 11, 2021 Temporary Order in a related proceeding quashing the Subpoena and setting a briefing schedule, the Montana Attorney General advised the Court this evening that "[t]he Legislature does not recognize this Court's Order as binding and will not abide it." The justification

[1] A true and correct copy of the Subpoena is attached as Exhibit A.

offered for disregarding the Court's Order is alleged procedural irregularities with the manner in which McLaughlin sought relief. While these are not valid reasons for ignoring a court order, McLaughlin is compelled to ask the Court to immediately issue another Order, this time in this original proceeding, quashing and enjoining enforcement of the Subpoena.

Pursuant to Mont. R. App. P. 14(1), (2), (4) and Mont. Code Ann. §§ 3-2-205, 26-2-401, McLaughlin seeks the following declaratory and injunctive relief:

(1) an immediate order temporarily quashing the Subpoena and enjoining enforcement of the Subpoena to maintain the status quo and prevent further irreparable injury;

(2) an order declaring the Subpoena illegal and invalid;

(3) an order permanently quashing the Subpoena;

(4) an injunction prohibiting any further compliance with the Subpoena—by the Montana Department of Administration or anyone else—and prohibiting the production, re-production or disclosure of any documents or information sought under the Subpoena;

(5) an injunction prohibiting the Montana Legislature from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the Subpoena; and

(6) an injunction directing the Montana Legislature to immediately return any documents produced pursuant to the Subpoena, or any copies or reproductions thereof, to Beth McLaughlin.[2]

PARTIES

1. Petitioner Beth McLaughlin is Court Administrator for the Montana judiciary, a co-equal branch of government. By statute, she is "the administrative officer of the court." Mont. Code Ann. § 3-1-702.

2. Respondent the Montana Legislature is the legislative branch of government in the State of Montana. Mont. Constitution, Art. III § 1; Art. V § 1. The Montana Legislature includes the Montana Senate and the Senate's Judiciary Standing Committee, which issued the Subpoena in question.

3. Respondent the Montana Department of Administration is a department of the executive branch of government in the State of Montana. Mont. Code Ann. § 2-15-104(a). The Montana Department of Administration is named here not as an adverse party and solely in its capacity as an interested party, records custodian, and recipient of the Subpoena at

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[2] McLaughlin also seeks leave to file an overlength petition. The applicable word limit of 4,000 words is insufficient under the circumstances of this case, particularly given the expedited nature in which the petition was, by necessity, drafted. Given the emergency nature of McLaughlin's request for injunctive relief, she had no opportunity to seek the Court's leave in advance.

issue. Without its inclusion, the Court may be unable to afford effective relief.

BACKGROUND

4. In her role as Court Administrator, McLaughlin has a wide range of statutorily-assigned duties:

> (1) prepare and present judicial budget requests to the legislature, including the costs of the state-funded district court program;
>
> (2) collect, compile, and report statistical and other data relating to the business transacted by the courts and provide the information to the legislature on request;
>
> (3) to the extent possible, provide that current and future information technology applications are coordinated and compatible with the standards and goals of the executive branch as expressed in the state strategic information technology plan provided for in 2-17-521;
>
> (4) recommend to the supreme court improvements in the judiciary;
>
> (5) administer legal assistance for indigent victims of domestic violence, as provided in 3-2-714;
>
> (6) administer state funding for district courts, as provided in chapter 5, part 9;
>
> (7) administer the pretrial program provided for in 3-1-708;

(8) administer the treatment court support account provided for in 46-1-1115;

(9) administer the judicial branch personnel plan; and

(10) perform other duties that the supreme court may assign.

Mont. Code Ann. § 3-1-702.

5. In her capacity as Court Administrator, and given her many diverse duties, McLaughlin receives a wide variety of emails and attachments that implicate the rights and privileges of other parties. These emails and attachments include, but are not limited to:

a) Information pertaining to medical information both for employees and elected officials.

b) Discussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline.

c) Discussions with judges about case processing and ongoing litigation in pending or potential cases.

d) Information related to complaints pending before the Judicial Standards Commission.

e) Information or documentation of Youth Court Case information in her role as supervisor of the Youth Court bureau chief.

f) Information about potential on-going security risks to individual judges including communications with law enforcement.

g) Copied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges.

h) Copied on exchanges between judges in which information was exchanged about judicial work product.

i) Requests from members of the public for disability accommodations including documentation of the disability.

j) Other unknown items that could expose the state and Judicial Branch to liability if protected information is exposed.

(Declaration of Beth McLaughlin, Exhibit B.)

6. As is common in today's electronic world, McLaughlin receives hundreds of emails each week, some directed only to her and others in which she is copied as the Court's administrative officer. McLaughlin saves some emails and deletes others, all in the normal course of business. She knows, as does everyone, that "deleted" does not mean "gone forever."

7. On March 17, 2021, an original proceeding was filed in this Court challenging the constitutionality of SB 140, *Brown, et al. v. Gianforte*, OP 21-0125 ("*Brown* Proceeding")).[3]

[3] The action was filed with Bob Brown as the lead petitioner. For unknown reasons, petitioner Dorothy Bradley is listed as lead petitioner in later filings.

8. In the *Brown* Proceeding, Respondent raised the issue of a poll conducted of the members of the Montana Judges Association ("MJA") pertaining to SB 140.

9. It is unclear how Respondent obtained information and documents relating to the MJA poll.

10. The Montana Legislature, through the House speaker and Senate president, requested McLaughlin, who helped coordinate and tally the results of the MJA poll, provide any additional information in her possession about the poll.

11. McLaughlin complied with the request, producing the information in her possession but informing the Montana Legislature that some emails relating the poll had been deleted in the normal course of business, and that some of the votes were made by telephone.

12. Unsatisfied with her response, Respondent in the *Brown* Proceeding asked the Court to stay these proceedings pending release of further information relating to the MJA poll.

13. On April 7, 2021, this Court denied the motion. The Order stated, in pertinent part: (1) Judge Krueger, who had participated in the MJA poll, had voluntarily recused himself from this case; (2) "no member of this Court participated in the aforementioned poll"; and (3) "the six undersigned members of this Court will consider the case on the Petition and the responses submitted. . . ."

14. The very next day, April 8, 2021, the Montana State Legislature issued a Subpoena to Director Misty Ann Giles of the Montana Department of Administration, not to the judicial branch, requiring her to appear the following day, April 9, 2021, and produce:

> (1) All emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.
>
> (2) Any and all recoverable deleted e-mails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.
>
> (3) This request excludes any emails and attachments related to decisions made by the justices in disposition of final opinion.

(Ex. A.)

15. On, Friday, April 9, 2021, Giles compiled and produced 2,450 of McLaughlin's documents.

16. On information and belief, no effort was made prior to the production to coordinate with McLaughlin, or any other court official, to identify, withhold, or redact any private, privileged and confidential information.

17. Director Giles informed the Legislature that the remaining documents would be produced on Monday, April 12, 2021.

18. Although the Subpoena seeks records of the judicial branch and McLaughlin specifically, McLaughlin was only provided a "courtesy copy" of the Subpoena the afternoon of April 9, 2021—the same day Director Giles produced thousands of McLaughlin's documents to the Montana Legislature.

19. McLaughlin asked to delay any production while she sought legal advice, but her request went unanswered.

20. On Saturday, April 10, 2021, McLaughlin's counsel reached out to Director Giles, Deputy Director Mike Manion, and Todd Everts of the Legislative Services Division. McLaughlin's counsel proposed delaying production until the parties could address and resolve concerns relating to the breadth of the Subpoena, writing, in pertinent part:

> We firmly take the position that judicial records are not subject to legislative subpoena. We further take the position that the Department of Administration has no authority over judicial branch records. Nevertheless, in the interest of avoiding litigation of constitutional dimension, I write to propose at least a temporary solution that avoids irreparable harm wrought by executive branch production of judicial records containing private and privileged information.

> I suggest an orderly process by which the legislative subpoena of April 8 be withdrawn, revised to be more narrowly tailored to information regarding discussions of SB 140 and then served on the branch of government whose records are being sought – specifically, the Supreme Court Administrator. The Court Administrator will respond through an orderly process that protects existing privacy interests.

21. Upon receipt of the letter, Director Giles informed McLaughlin's counsel that "DOA is complying with the scope of the subpoena as written."

22. That same day, unable to reach a temporary agreement, McLaughlin filed an Emergency Motion to Quash and Enjoin Legislative Subpoena Duces Tecum in the *Brown* Proceeding.

23. On Sunday, April 11, 2021, this Court issued a Temporary Order in the *Brown* Proceeding. The Court quashed the Subpoena "pending further order of the Court." At the same time, the Court noted McLaughlin's motion "raises serious procedural questions" and that it could not "be certain, at this juncture, that the subpoena challenged by McLaughlin has anything to do with the pending proceeding in OP 21-0125, or is properly filed herein." The Court ordered briefing on "the propriety of the filing of the motion in this matter, as opposed to the initiation of an entirely new proceeding before the Court."

24. On April 12, 2021, the Attorney General's Office advised the Court by letter to Acting Chief Justice Rice that "[t]he Legislature does not recognize

this Court's Order as binding and will not abide by it." The letter relies on the Court's questions about the procedural propriety of McLaughlin's motion as the basis for disregarding the Court's order. A true and correct copy of the letter is attached hereto as Exhibit C.

25. McLaughlin is informed and believes her emails have already been disclosed by the Montana Legislature and are already appearing on publicly accessible websites.

26. McLaughlin has now had a brief period to partially review some of the 2,450 documents produced by the Montana Department of Administration and can confirm they contain, as suspected, privileged and confidential information.

THE PARTICULAR LEGAL QUESTIONS EXPECTED TO BE RAISED

27. Whether the Court should issue an immediate order in this original proceeding temporarily quashing the Subpoena and enjoining enforcement of the Subpoena to maintain the status quo and prevent further irreparable injury.

28. Whether the Montana Legislature may lawfully subpoena "all emails and attachments" of the Court Administrator, when no legitimate legislative purpose exists, and when the Court Administrator was not afforded an opportunity to review the materials in advance of the production or to protect the privileges, privacy and confidentiality rights implicated.

29. Whether the Subpoena should be permanently quashed, and whether a writ of injunction should be issued preventing production and disclosure (or further production and disclosure) of the privileged, private, and confidential information encompassed by the Subpoena.

ORIGINAL JURISDICTION

A. The Legal Authority for Accepting Jurisdiction.

30. The Court's exercise of original jurisdiction is warranted, first, under Mont. R. App. P. 14(1), which provides the Court "is empowered by Article VII, Sections 1 and 2 of the Constitution to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction."

31. The Court's exercise of original jurisdiction is warranted, second, under Mont. R. App. P. 14(2), which provides for the Court's ability to issue extraordinary writs. That rule states, in relevant part:

> **Extraordinary Writs.** Proceedings commenced in the supreme court originally to obtain writes of . . . injunction . . . or other remedial writs and orders, shall be commenced and conducted in the manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these rules.

32. The Court's exercise of original jurisdiction is warranted, third, under Mont. R. App. P. 14(4), which states:

> **Original Proceedings.** An original proceeding in the form of a declaratory judgment action may be commenced in the supreme court when urgency or emergency factors exists making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of statewide importance.

33. The Court's exercise of original jurisdiction is warranted, fourth, by Mont. Code Ann. § 3-2-205, which provides, in pertinent part, that an "action to obtain an injunction may be commenced in the supreme court," if "the state is a party, the public is interested, or the rights of the public are involved." *See also Barrus v. Mont. First Judicial Dist. Court*, 2020 MT 13, ¶ 22, 398 Mont. 353, 456 P.3d 777 (granting writ of injunction where "the State is a party, the public has an interest in establishing and maintaining the validity of the State's actions, and Barrus would have no adequate remedy of appeal if this Court were to allow him to be involuntarily medicated prior to review of that decision.").

B. The Facts Which Make It Appropriate That The Court Exercise Jurisdiction.

34. The injunctive and declaratory relief sought by McLaughlin is suitable to this Court's original jurisdiction because it involves "urgency or emergency

factors" which would make litigation in the trial courts and the normal appeal process inadequate. It also involves legal and constitutional questions of statewide importance. Further, the government is a party, the public is interested, and the rights of the public are involved.

35. The "urgency or emergency factors" at issue are evident. The Montana Legislature demanded all of McLaughlin's emails and documents within just one day. Over 2,000 documents were produced the next day, without McLaughlin or any other court official being afforded the opportunity to review the production and protect the privacy rights and privileges implicated. The remainder of the documents were being gathered over the weekend for production on Monday. Although the Court's Temporary Order in the *Brown* Proceeding halted further production for the time being, the Montana Legislature is already in possession of certain documents, which are in danger of being disseminated or disclosed, and the Court's Order is specifically designated as temporary. Furthermore, the Lieutenant General of the Montana Department of Justice has written that "[t]he legislature does not recognize this Court's order as binding and will not abide it." (Ex. C.) In other words, the Attorney General's Office is expressly refusing to comply with the Court's Order. Under these circumstances, there is simply no time for "litigation in the trial courts and the normal appeal process." Mont. R. App. 14(4).

36. Furthermore, the statewide importance of the legal and constitutional issues raised in this case could not be clearer. The case involves nothing less than the

constitutional order of our system of government and an attack on separation of powers, not to mention fundamental constitutional rights to privacy.

37. Additionally, while legislative subpoenas are recognized by statute, Mont. Code Ann. § 5-5-101, Montana law also provides protections from irrelevant, improper, and privileged matters. Mont. Code Ann. § 26-2-401; *see also* Mont. R. Civ. P. 45(d)(3)(B).

38. Here, the Subpoena commands production of documents that by the breadth requested contain highly confidential, privileged, and sensitive information; the time frame for compliance with the Subpoena was extremely short, affording McLaughlin essentially no time to assert objections, claim privilege, and intervene to stop the Subpoena; over 2,000 documents have already been produced, creating new time-sensitivities and concerns; and the party issuing the subpoena (the Chairman of the Judiciary Standing Committee of the Montana Senate) is part of a Legislature set to adjourn on May 1, 2021.

39. Ultimate judicial review of a legislative subpoena rests with the highest court in the jurisdiction, be it the U.S. Supreme Court or the State Supreme Court. *See, e.g., Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031-32 (2020). Here, ultimate judicial review of the Subpoena in question rests with this Court and "urgency or emergency factors exist" to justify an original proceeding. Mont. R. App. P. 14(4).

DECLARATORY AND INJUNCTIVE RELIEF

40. Pursuant to Mont. R. App. 14(2), original proceedings commenced in the supreme court originally

to obtain writs of injunction or other remedial writs and orders "shall be commenced and conducted in the manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these rules."

41. Montana law provides a court as authority to "preserve the status quo" by issuing immediate injunctive relief ex parte. *See generally* Mont. Code Ann. § 3-2-205; *Boyer v. Karagacin*, 178 Mont. 26, 32, 582 P.2d 1173, 1177 (1978) ("It is well settled that the purpose of a temporary restraining order is to preserve the status quo until a hearing can be held to determine whether an injunction pendente lite should be granted.").

42. Montana law provides a preliminary injunction order may be granted, inter alia, in the following cases: when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; or when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant. Mont. Code Ann. § 27-19-201.

43. Montana law provides "a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant where: (1) pecuniary compensation would not afford adequate relief; (2) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (3) the restraint is necessary to prevent a multiplicity

of judicial proceedings; or (4) the obligation arises from a trust." Mont. Code Ann. § 27-19-102.

44. Montana law provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code Ann. § 27-8-201; see also Mont. Code Ann. §§ 27-8-202, 205.

45. The Montana Code Annotated explicitly provides "[i]t is the right of a witness to be protected from irrelevant, improper" questions and "to be examined only as to matters legal and pertinent to the issue." Mont. Code Ann. § 26-2-401 (emphasis added.) *See also* Mont. R. Civ. P. 45(d)(3)(A) and (B).

46. If a subpoena seeks "confidential" information, courts generally may "quash or modify" a subpoena "protect a person subject to or affected by a subpoena." Mont. R. Civ. P. 45(d)(3)(B).

47. A court "must" modify or quash a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Mont. R. Civ. P. 45(d)(3)(A) (emphasis added).

A. The Subpoena Seeks Irrelevant, Improper Information Unrelated to Matters Legal and Pertinent to the Issue.

48. Given the Court's April 7 Order in the *Brown* Proceeding, any additional information that might exist regarding the MJA poll is irrelevant and thus improper under Mont. Code Ann. § 26-2-401. The Court has already confirmed that the six justices who will preside

over the *Brown* Proceeding did not participate in the poll.

49. Yet, the Legislature made no attempt to limit the Subpoena's scope to even the MJA poll, perhaps recognizing that doing so would be regarded as an end-around the Court. Instead, the Subpoena demands the production of "all emails and attachments," existing or deleted, "sent and received by Court Administrator Beth McLaughlin" during a three-month time period. The only exception, to the extent it can be meaningfully understood and implemented, is narrow, and applies to "decisions made by the justices in disposition of final opinion."

50. In this way, the Subpoena violates the threshold requirement of seeking information that is legal and pertinent to the issue and not irrelevant or improper. Mont. Code Ann. § 26-2-401.

B. The Subpoena Violates Separation of Powers.

51. The Legislature's power to issue subpoenas is finite. As recently discussed by the United States Supreme Court in *Trump*, subpoena power is "justified solely as an adjunct to the legislative process," and is therefore subject to several limitations. 140 S. Ct. at 2031-32.

52. Foremost among these limitations is that "the subpoena must serve a valid legislative purpose." *Id*., *quoting Quinn* v. *United States*, 349 U. S. 155, 161, 75 S. Ct. 668, 99 L. Ed. 964 (1955). It must "concern a subject on which legislation could be had." *Id*. *See also State ex rel. Joint Comm. on Gov't & Fin. v. Bonar*, 230

S.E.2d 629, 629 (W. Va. 1976) (legislature must show: "(1) that a proper legislative purpose exists; (2) that the subpoenaed documents are relevant and material to the accomplishment of such purpose").

53. Based on the cornerstone constitutional principle of separation of powers into three coordinate branches, s*ee Morrison v. Olson*, 487 U.S. 654, 693-94 (1988), the legislative subpoena power is most limited when directed toward the judicial or executive branches. *Sullivan v. McDonald*, 2006 Conn. Super. LEXIS 2073, at *20 (Super. Ct. June 30, 2006) ("a subpoena power from one governmental branch to another is very limited…").

54. In *Sullivan*, the Court considered an analogous legislative subpoena that demanded testimony from a judicial officer. The Court deemed the subpoena a dangerous legislative foray into the independent judiciary:

> For the foregoing reasons, the court grants the plaintiff's motion to quash the subpoena and issues a temporary injunction preventing the defendants from compelling the attendance of Justice Sullivan at this hearing in the future. The failure to rule in this manner would allow unbridled power in any legislative committee to compel the attendance of sitting judicial officers. Such a ruling would cast a chilling effect upon the independence of the judiciary.

Id., * 20.

55. In *Trump*, the U.S. Supreme Court evaluated the "special concerns regarding the separation of

powers" which arise from one branch of government's subpoena of information on another, noting that "[f]or more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal." 140 S. Ct. at 2035-36. The Court held a "balanced approach" and "careful analysis that takes adequate account of the separation of powers principles at stake" is necessary, taking into account several factors. *Id*.

56. First, "courts should carefully assess whether the asserted legislative purpose warrants the significant step" of subpoenaing the documents of a co-equal branch of government, as "'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Id*. (emphasis added) (internal citations and quotation marks omitted). In this regard, the Court differentiated criminal proceedings, "where the very integrity of the judicial system would be undermined without full disclosure of all the facts," to legislative efforts that "involve predictive policy judgments that are not hampered in quite the same way when every scrap of potentially relevant evidence is not available." *Id*. (internal citations and quotation marks omitted). In this way, legislative interests in obtaining information through appropriate inquiries "are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs." *Id*.

57. Second, "to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to

support Congress's legislative objective." *Id*. This "serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id*. (internal citations and quotation marks omitted).

58. Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better." *Id*. "[I]t is impossible to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation." *Id*. (internal citations and quotation marks omitted).

59. Fourth, courts should be careful to assess the burdens imposed. "[B]urdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Id*.

60. The Court made clear that these considerations are not an exhaustive list: "Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list." *Id*.

61. Here, the Legislature attempts to use its limited subpoena power to obtain judicial communications—not for a legislative purpose or a "subject upon which legislation could be had," *Trump*,

140 S. Ct. at 2031-32, but for a litigation purpose. Indeed, the Legislature's Subpoena attempts to command production of judicial records from the executive branch.

62. The purpose originally offered by the Legislature for the MJA poll information was that it might shed light on how certain justices presiding over this case viewed SB 140. But the Court has already issued an Order stating none of the six justices who will continue presiding over this case participated in the poll. There is, consequently, no arguable "legitimate legislative purpose" for continuing to seek the MJA poll information. *See id*. The Subpoena should be quashed on this basis alone.

63. Even if there was a legitimate legislative purpose to seek the MJA poll information, or some other legitimate purpose unstated in the Subpoena, there is no conceivable justification for demanding all of McLaughlin's emails and attachments on any and all topics or for seeking them from the executive branch, particularly without affording her or another Court official with the opportunity to review the document and assert privilege or protections for the confidential materials.

64. In other words, the asserted legislative objective does not warrant the significant step of subpoenaing documents of a co-equal branch of government (through a back-channel); the Subpoena is far broader than reasonably necessary to support any reasonable legislative objective; there is a lack of evidence, much less "detailed and substantial evidence," to support any reasonable legislative

objective; and the burdens imposed on the incredibly broad subpoena, including the myriad privacy rights and confidentiality concerns implicated, demonstrate the Subpoena is not a legitimate use of legislative power. *See Trump*, 140 S. Ct. at 2031-32.

C. Judicial Deliberations and Communications Are Not the Publicly Available Information of a "Public Body."

65. If the Legislature's argument is that the judicial emails are open to the public under the rubric of the right to know, that argument is incorrect.

66. The constitutional history and this Court's prior precedent shows that while the judiciary is a branch of the government, and thus a "governmental body," it is not a "public body" subject to the open deliberation requirements set forth in article II, section 9. *See* Order, *In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999 (Leaphart, J., specially concurring) (arguing that framers did not intend to include the judiciary within the term "public body" and that confidentiality of judicial deliberations was essential to operation of independent judiciary); *see also Goldstein v. Commission on Practice of the Supreme Court*, 2000 MT 8, ¶ 48, 97, n. 3, 297 Mont. 493, 995 P.2d 923. *See also, e.g.,* Mont. Code Ann. § 2-3-203(5).

D. Judicial Deliberations and Communications Are Protected by the Judicial Privilege.

67. The privilege that safeguards judicial communications is well established across the country.

"[T]he need to protect judicial deliberations has been implicit in our view of the nature of the judicial enterprise since the founding." *In re Enf't of a Subpoena*, 972 N.E.2d 1022, 1032 (Mass. 2012). Indeed, one court observed the only reason there is not more authority on the subject is "undoubtedly because its existence and validity has been so universally recognized." *Kosiorek v. Smigelski*, 54 A.3d 564, 578 n.19 (Conn. App. Ct. 2012) (internal quotations and citations omitted). *See also United States v. Daoud*, 755 F.3d 479, 483 (7th Cir. 2014) ("And of course judicial deliberations, though critical to the outcome of a case, are secret.").

68. As a federal district court recently explained in granting a motion to quash a similar subpoena, the bedrock principles underlying this judicial privilege are compelling:

> The privilege generally serves three underlying purposes: (1) ensuring the finality of legal judgments; (2) protecting the integrity and quality of decision-making "that benefits from the free and honest development of a judge's own thinking ... in resolving cases before them"; and (3) protecting independence and impartiality and permitting judges to decide cases without fear or favor.

Taylor v. Grisham, 2020 U.S. Dist. LEXIS 207243, at *6 (D.N.M. Nov. 4, 2020) (citing *Cain v. City of New Orleans*, U.S. Dist. LEXIS 169819, (E.D. La. Dec. 8, 2016)).

69. The D.C. Circuit similarly explained:

> . . . [P]rivilege against public disclosure or disclosure to other co-equal branches of Government arises from the common sense common law principle that not all public business scan be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without the fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

See also Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. 1971).

70. For all of these reasons, "other courts, State and Federal . . . when faced with attempts by third parties to extract from judges their deliberative thought processes, have uniformly recognized a judicial deliberative privilege." *In re Enf't of a Subpoena*, 972 N.E.2d at 1032 (listing numerous authorities recognizing judicial deliberative immunity).

71. Consistent with these principles, courts in other jurisdictions have repeatedly rejected attempts to invade the judicial decision-making process through subpoenas or other means. *See, e.g.*, *In re Certain Complaints Under Investigation by an Investigating Comm.*, 783 F.2d 1488, 1517-1520 (11th Cir. 1986) (confidentiality protects judge's independent reasoning from improper outside influences); *United States v. Nixon*, 418 U.S. 683, 705, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) ("those who expect public dissemination of their remarks may well temper candor with a concern

for appearances and for their own interests to the detriment of the decision making process."); *Commonwealth v. Vartan*, 733 A.2d 1258, 1264 (Pa. 1999) (protection of judicial communications benefits the public, not the individual judges and staff); *Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. 2005) ("Our analysis leads us to conclude that there exists a judicial deliberation privilege protecting confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties and relating to official court business.").

72. Although there is little direct Montana authority on the deliberative privilege, there is no authority suggesting Montana would be an outlier and take a different approach than other jurisdictions. To the contrary, Montana law already provides very similar protections. *See, e.g.,* Mont. Code Ann. § 2-6-1002 ("Confidential information" includes information related to judicial deliberations in adversarial proceedings); Mont. Code Ann. § 2-3-203(5) ("The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding."); Order, *In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999 (Leaphart, J., specially concurring) (explaining that confidentiality of judicial deliberations is essential to the operation of independent judiciary).

73. The judicial privilege and its underlying policies weigh heavily in favor of quashing/enjoining the Subpoena in this case, particularly where the Subpoena attempts to extract information by going to

the computers of the executive branch, without even asking the judicial branch or affording an opportunity for review.

74. The Subpoena will reach a variety of communications that relate to the judicial deliberative process. (Ex. B, ¶ 7 ("[d]iscussions with judges about case processing and ongoing litigation in pending or potential cases"; "[c]opied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges"; "[c]opied on exchanges between judges in which information was exchanged about judicial work product").) Some of those documents have already been produced. To force the extensive disclosure of such communications rings a bell that cannot be un-rung.

75. Separate and apart from the disclosures specific to this case, the Subpoena would send an unmistakable message to Montana's judiciary: "Your communications are not protected." This has precisely the chilling effect on judges and their staffs that the judicial privilege is designed to prevent.

76. The Subpoena's exception for communications "related to decisions made by the justices in disposition of final opinion" does nothing to mitigate the violation of judicial privilege. The exception is incredibly narrow and applies only to justices' decisions in "disposition of final opinion." Whether this exception protects communications in the all-important deliberative process that precedes a "disposition of final opinion" is anyone's guess.

E. The Subpoena Violates Multiple Other Rights and Privileges.

77. Apart from the judicial privilege, the biggest issue is that the Subpoena reaches all of McLaughlin's emails no matter who or what is in the email. This is an egregious disregard of a host of other privileges and rights are implicated by the Subpoena. First and foremost is the fundamental right to privacy of third parties, protected under Article II, Section 10's mandate that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 10; *see also Missoulian v. Board of Regents*, 207 Mont. 513, 522, 675 P.2d 962, 967 (1984).

78. Similarly, the Subpoena encompasses confidential personnel information (Ex. B, ¶ 7 ("[d]iscussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline")), despite well-settled law that public employees have a specific right to privacy in non-disclosure of employment personnel records, including those regarding internal disciplinary matters and other personally sensitive information. *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 17, 397 Mont. 134, 447 P.3d 1048; *see also State ex rel. Great Falls Tribune Co. v. Eight Judicial Dist. Court*, 238 Mont. 310, 319, 777 P.2d 345, 350 (1989) (individual's right of privacy with respect to employment evaluations is "paramount" when compared with the public's right to know).

79. The Subpoena also requires production of medical information the State is precluded from disclosing under state and federal law. (Ex. B, ¶ 7 ("[i]nformation pertaining to medical information both for employees and elected officials"; "[r]equests from members of the public for disability accommodations including documentation of the disability").)

80. Not only does Article II, § 10 protect private health care information and medical records, the Montana statute specifically provides that "health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interest in privacy and health care or other interests[.]" Mont. Code Ann. § 50-16-502. As this Court has explained, "If the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records." *State v. Nelson*, 238 Mont. 231, 242, 941 P.2d 441, 448 (1997). This is consistent with federal health care privacy laws precluding the disclosure of health care information except under limited and carefully specified circumstances. *See* Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 164.102, *et seq*. The demanded information is confidential, and its disclosure will likely subject the State to liability. Medical information is completely irrelevant to this proceeding, or indeed any legitimate legislative purpose.

81. The Subpoena also encompasses information matters before the Judicial Standards Commission. (Ex. B, ¶ 7 ("[i]nformation related to complaints pending before the Judicial Standards Commission

pertaining to medical information both for employees and elected officials").) Rule 7, Rules of the Judicial Standards Commission provides, "All paper filed herewith and all proceedings before the Commission shall be confidential[.]" *See also* Mont. Code Ann. § 3-1-1105; *Harris v. Smartt*, 2002 MT 239, ¶ 40, 311 Mont. 507, 57 P.3d 58.

82. The requested information also encompasses "information about potential on-going security risks to individual judges including communications with law enforcement." (Ex. B, ¶ 7.) Security information "necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state" constitutes "confidential information" prohibited from disclosure. Mont. Code Ann. § 2-6-1002.

F. The Elements for Declaratory and Injunctive Relief Are Met.

83. Under the facts set forth in the preceding paragraphs, the requirements for immediate temporary injunctive relief are met as the relief is necessary to preserve the status quo and prevent further irreparable harm.

84. Under the facts set forth in the preceding paragraphs, McLaughlin is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; and it appears that the commission or continuance of the act during the litigation would produce a great or irreparable injury to McLaughlin.

For either or both of these reasons, a preliminary injunction should issue. Mont. Code Ann. § 27-19-201.

85. Under the facts set forth in the preceding paragraphs, the need for final injunctive relief is met—namely, pecuniary compensation would not afford adequate relief, it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief, and the restraint is necessary to prevent a multiplicity of judicial proceedings. For any one or all of these reasons, a final injunction should issue. Mont. Code Ann. § 27-19-102.

86. Under the facts set forth in the preceding paragraphs, McLaughlin is entitled to a declaration of the parties' rights, status, and legal relations relating to the Subpoena. Mont. Code Ann. § 27-8-201.

87. Under the facts set forth in the preceding paragraphs, the Subpoena seeks irrelevant, improper information not directed to matters legal and pertinent to the issue, seeks confidential information and "requires disclosure of privileged or other protected matter, with no applicable exception or waiver. For these reasons, McLaughlin is entitled to an order permanently quashing the Subpoena. Mont. Code Ann. §§ 3-2-2-5, 26-2-401 and Mont. R. Civ. P. 45(d)(3)(A) and (B).

WHEREFORE, McLaughlin prays this Court:

1. Issue an immediate order temporarily quashing the Subpoena and enjoining enforcement of the Subpoena;

2. Declare the Subpoena illegal and invalid;

3. Permanently quash the Subpoena;

4. Permanently enjoin further compliance with the Subpoena, by the Montana Department of Administration or anyone else, and prohibit the production, re-production, or disclosure of any documents or information sought under the Subpoena;

5. Permanently enjoin the Montana Legislature from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the Subpoena;

6. Direct the Montana Legislature to immediately return any documents produced pursuant to the Subpoena, or any copies or reproductions thereof, to Beth McLaughlin; and

7. Grant further relief as the Court deems just and proper.

A proposed order granting the emergency request for injunctive relief is attached.

Dated this 12th 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 Motion 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 6,600 words. I understand that petitions are limited to 4,000 words, excluding certificate of service and certificate of compliance; however, this petition includes a specific request to exceed the word limitation.

Dated this 12th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

CERTIFICATE OF SERVICE

I, Randy J. Cox, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 04-12-2021:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: MONTANA STATE LEGISLATURE
Service Method: eService

Michael P. Manion (Attorney)
Department of Administration
P.O. Box 200101
Helena MT 59620-0101

Representing: MONTANA DEPARTMENT OF ADMINISTRATION
Service Method: Conventional

Electronically Signed By: Randy J. Cox
Dated: 04-12-2021

APPENDIX HH

EXHIBIT A

Case Number: OP 21-0173

[Filed: April 12, 2021]

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Director Misty Ann Giles
MT Dept. of Administration
125 N. Roberts St.
Helena, Montana 59620

THE MONTANA STATE LEGISLATURE, to Director Misty Ann Giles.

You are hereby required to appear at the Montana State Capitol Building, room 303A, in the City of Helena, Montana, on the 9th day of April, 2021, at 3:00 PM, to produce the following documents:

(1) All emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.

(2) Any and all recoverable deleted e-mails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.

(3) This request excludes any emails and attachments related to decisions made by the justices in disposition of final opinion.

For failure to appear and produce the information requested in this subpoena, you may be liable to punishment for contempt pursuant to section 5-5-103, MCA.

Pursuant to section 5-5-105, MCA, a person sworn and examined before either house of the legislature or any committee of the legislature may not be held to answer criminally or be subjected to any penalty or forfeiture for any fact or act relating to the required testimony. A statement made or paper produced by the witness is not contempt evidence in any criminal proceeding against the witness. A witness cannot refuse to testify to any fact or produce any paper concerning which the witness is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, this 8th day of April, 2021.

By:

Sen. Keith Regier, Chairman of the Judiciary Standing Committee of the Montana Senate.

APPENDIX II

EXHIBIT B

Case Number: OP 21-0173

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 21-0125

[Filed: April 12, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,	)
Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana,	)
Respondent.	)

DECLARATION OF BETH McLAUGHLIN

Randy J. Cox
BOONE KARLBERG P.C.
201 West Main, Suite 300
P. O. Box 9199
Missoula, MT 59807-9199

Tel: (406)543-6646
Fax: (406) 549-6804
rcox@boonekarlberg.com

Counsel for Beth McLaughlin

1. The statements made herein are based on my personal knowledge, and I am competent to testify regarding the same.

2. I am the Court Administrator for the Montana Supreme Court.

3. I was asked by the Montana Legislature to provide information on a poll of the Montana Judges Association ("MJA") pertaining to SB 140. I complied with the request to the best of my abilities.

4. Subsequently, the Montana Department of Administration was served with a Subpoena from the Montana State Legislature, demanding production of "all emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021." The Subpoena also requests my deleted emails during the same time period. The only exception is for "emails and attachments related to decisions made by the justices in disposition of final opinion." I was given a "courtesy copy" of the subpoena late afternoon April 9, 2021.

5. A true and correct copy of the Subpoena has been provided to the Court with the motion filed on my behalf.

6. Although the Subpoena demanded the Department of Administration produce all of my emails

and attachments on Friday, April 9, 2021, I was informed that Director Giles reached an agreement whereby documents would be compiled this weekend and produced, presumably, Monday or later this weekend. I am informed and believe that Director Giles intends to comply with the Legislature's Subpoena.

7. In my capacity as Court Administrator, I receive a wide variety of emails and attachments that implicate the rights and privileges of other parties. These emails and attachments include, but are not limited to:

- Information pertaining to medical information both for employees and elected officials.
- Discussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline.
- Discussions with judges about case processing and ongoing litigation in pending or potential cases.
- Information related to complaints pending before the Judicial Standards Commission.
- Information or documentation of Youth Court Case case information in my role as supervisor of the Youth Court bureau chief.
- Information about potential on-going security risks to individual judges including communications with law enforcement.

- Copied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges.
- Copied on exchanges between judges in which information was exchanged about judicial work product.
- Requests from members of the public for disability accommodations including documentation of the disability.
- Other unknown items that could expose the state and Judicial Branch to liability if protected information is exposed.

8. If the emails and attachments are produced as requested in the Subpoena, the privileged, confidential, private, sensitive and protected information set forth above will be disclosed.

9. Severe or irreparable harm will occur if the Subpoena is not quashed or temporarily restrained—namely, the improper and illegal disclosure of privileged, private, sensitive and protected information and documents.

10. In accordance with Montana law, Mont. Code Ann. § 1-6-105, I declare under penalty of perjury and under the laws of the state of Montana that the foregoing is true and correct.

DATED this *10* day of April, 2021 .

Signed in *Helena* (city), Montana.

By: *<u>/s/ Beth McLaughlin</u>*
Beth McLaughlin

APPENDIX JJ

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: April 15, 2021]

BETH McLAUGHLIN,	)
	)
Petitioner,	)
	)
v.	)
	)
The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT of ADMINISTRATION,	)
	)
Respondents.	)

EMERGENCY MOTION TO QUASH REVISED LEGISLATIVE SUBPOENA

APPEARANCES:

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Counsel Department of Administration

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khansen@mt.gov
derek.oestreicher@mt.gov

Counsel for Respondent Montana State Legislature

MOTION

Recognizing the serious problems with the unlawful subpoena quashed by the Court's Temporary Order in OP 21-0125, today the Legislature served Court Administrator Beth McLaughlin with a new version ("Revised Subpoena"), attached as Exhibit A. The

Revised Subpoena still suffers from fundamental deficiencies and must be quashed. This is particularly true given the Legislature's stated position it will not abide by court decisions it does not agree with. McLaughlin is entitled to protection before being compelled to testify and turn over sensitive information to a body which now, apparently, regards itself as unshackled from any check or balance.

The Revised Subpoena requires McLaughlin to appear, testify, and provide information on Monday, April 19, 2021. Pursuant to M.R.App.P. 14, MCA §§ 3-2-205, 26-2-401, and M.R.Civ.P. 45, McLaughlin requests an immediate order temporarily quashing the Revised Subpoena to maintain the status quo and prevent further irreparable injury, and ordering the Legislature to show cause why the Revised Subpoena should not be permanently quashed. Respondents object.

BACKGROUND

Most of the pertinent background is set forth in McLaughlin's Petition for Original Jurisdiction, filed April 12, 2021. The new facts are limited but significant.

The Revised Subpoena was served on McLaughlin today, April 15, 2021, and states:

> THE MONTANA STATE LEGISLATURE, to Administrator McLaughlin.
>
> You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of

April, 2021, at 9:00 a.m., to produce the following documents and answer questions regarding the same:

(1) All emails and attachments sent and received by your government e-mail account, bmclaughlin@mt.gov, including recoverable deleted emails, between January 4, 2021, and April 12, 2021 delivered as hard copies and .pst digital files.

(2) Any and all laptops, desktops, hard-drives, or telephones owned by the State of Montana which were utilized in facilitating polls or votes with Montana Judges and Justices regarding legislation or issues that may come or have come before Montana courts for decision.

This request excludes any emails, documents, and information related to decisions made by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether

> the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

(Ex. A.)

The Revised Subpoena is broader than the prior version in key respects. It requires McLaughlin, in two business days, to produce not just "all emails and attachments," but also "[a]ny and all laptops, desktops, hard-drives, or telephones owned by the State" which were used in polling any members of the judiciary. It requires her to "answer questions" about the documents, which will number in the thousands. It also extends the date range for responsive information to April 12, 2021, despite SB140 being signed into law on March 16, 2021. (Ex. A.)

The Revised Subpoena appears to exclude at least some communications subject to the judicial deliberative privilege, but does not exclude a host of other private and confidential information.

The other change is the addition of a statement of purpose. Rather than help the Legislature's cause, however, it only underscores the lack of a legitimate legislative purpose, laying bare the most fundamental problem with the Revised Subpoena.

ANALYSIS

The legal basis for the Court's original jurisdiction and authority to grant the requested relief is set forth

in McLaughlin's Petition for Original Jurisdiction, incorporated by reference.

A. Invalid Exercise of Legislative Subpoena Power.

The Legislature's power to issue subpoenas is finite. The U.S. Supreme Court recently addressed this precise issue in connection with a subpoena issued by Congress to President Donald J. Trump, wherein the Chief Justice wrote legislative subpoena power is "justified solely as an adjunct to the legislative process" and "must serve a valid legislative purpose." *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031-32 (2020).

The Montana Constitution similarly provides for limited investigative authority by the Legislature. Mont. Const. Art V, § 1. As advised by the Legislature's own Chief Legal Counsel and its rules, "the power to investigate must be exercised for a proper legislative purpose related to enacting law, and the application and exercise of the legislative investigation power must protect the rights of citizens and adhere to all constitutional protections related to privacy, life, liberty and property." (April 18, 2018 Montana Legislative Services Division Memorandum, Exhibit B (emphasis added).) The Legislature thus recognizes legal limitations on its investigative powers, including:

- "It is the general rule that the legislature has no power . . . to make inquiry in the private affairs of a citizen except to accomplish some authorized end."

- "A state legislature, in conducting any investigation, must observe the constitutional provisions relating to the enjoyment of life, liberty and property."
- "An investigation instituted for political purposes and not connected with intended legislation or with any of the matters upon which a house should act is not a proper legislative proceeding and is beyond the authority of the house or the legislature."
- "When a committee is appointed by resolution to make an investigation and the object of the investigation, as shown by the resolution, is not a proper legislative objective but is to establish an extraordinary tribunal for the trial of judicial and other officers, the duties imposed on the commission being strictly judicial and not ancillary to legislation, the committee has no legal status."
- "The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action."

(Ex. B at 7).

The limitations are even more pronounced here, because legislative subpoena power is most limited when directed toward the judicial or executive branches. *Trump,* 140 S. Ct. at 2035-36. "[C]ourts should carefully assess whether the asserted legislative purpose warrants the 'significant step' of subpoenaing the documents of a co-equal branch of government" and, "to narrow the scope of possible conflict between

the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Id*.

Here, the Legislature is violating the *Trump* principles. It is attempting to use its limited subpoena power to obtain judicial communications—not for any legitimate legislative purpose, but for a litigation purpose, political purpose, or something tantamount to "an extraordinary tribunal for the trial of judicial and other officers." (Ex. B.)

B. Privileged Information.

With the Revised Subpoena, the Legislature excludes some information subject to the judicial deliberations privilege, but not all. It only excludes communications "by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters." (Ex. A (emphasis added).) To the extent that language is decipherable, it is insufficient. The privilege extends broadly to "communications between judges and between judges and the court's staff made in the performance of their judicial duties and relating to official court business." *E.g., Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. 2005).

C. Private and Confidential Information.

The Legislature believes privacy rights cannot be violated by disclosure to the Legislature, as long as it promises the information "will be redacted and not subject to public disclosure." (Ex. A.) There is no legal authority for this position. To the contrary, the Montana Constitution is clear: The right to privacy

"shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 10.

As set forth in her Petition, McLaughlin receives a wide variety of emails and attachments that implicate the rights and privileges of other parties. These privacy concerns do not vanish simply because the Legislature promises not to further disclose information, or because the Legislature says it will protect the information.

D. Insufficient Time for Compliance.

Montana law provides a court "must quash or modify a subpoena that . . . fails to allow a reasonable time to comply." MRCP 45(3)(A)(i) (emphasis added). Two business days is insufficient to review thousands of emails and "[a]ny and all laptops, desktops, hard-drives, or telephones owned by the State of Montana," review for privilege, and be prepared to testify regarding the same.

E. End-Around the Court's Temporary Order.

The Court quashed the original subpoena in its Temporary Order on April 11, 2021, and directed the parties to file additional briefing—an approach consistent with Montana law on temporary injunctive relief. *See* MCA §§ 27-19-314 to -319. Pending further order of the Court, the original Subpoena no longer "remains in effect." MCA § 26-2-11. The Revised Subpoena is nothing short of an end-run around the Court's Temporary Order and directives.

CONCLUSION

For the reasons stated, the Revised Subpoena must be quashed.

Dated this 15th 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 Motion 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 1250 words, excluding the caption, Certificate of Compliance and Certificate of Service.

Dated this 15th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

Exhibit Index

- Exhibit A – Revised Subpoena
- Exhibit B – 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 Motion - Other to the following on 04-15-2021:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Montana State Legislature
Service Method: eService

Michael P. Manion (Attorney)
Department of Administration
P.O. Box 200101
Helena MT 59620-0101
Representing: Administration, Department of
Service Method: E-mail Delivery

Electronically signed by Tina Sunderland
on behalf of Randy J. Cox
Dated: 04-15-2021

APPENDIX KK

AUSTIN KNUDSEN
[SEAL]
STATE OF MONTANA

Case Number: OP 21-0173

[Filed: May 19, 2021]

May 19, 2021

Chief Justice Mike McGrath
Justice Beth Baker
Justice Ingrid Gustafson
Justice Laurie McKinnon
Justice Dirk Sandefur
Justice James Shea
Montana Supreme Court
215 N Sanders
Helena, MT 59601

District Judge Donald Harris
13th Judicial District
Yellowstone County District Court
217 N. 27th Street, Rm. 507
P.O. Box 35029
Billings, MT 59107

Delivered via E-mail and to the Clerk of the Supreme Court

Dear Mr. Chief Justice, Associate Justices, and Judge Harris:

I write personally today regarding your May 15, 2021 Order Denying the Legislature's Motion to Disqualify in OP 21-0173. My understanding is that the Legislature will be responding formally to that Order.

My purpose here is not to respond to the substance of your Order but to object to some of the Court's statements, which appear to me nothing more than thinly veiled threats and attacks on the professional integrity of attorneys in my office.

Page 4 of your Order recites statements made by Lieutenant General Kris Hansen and Derek Oestreicher, both from my office, who together represent the Legislature. In the course of that representation, they have delivered strong statements from the Legislature regarding the Court's lack of jurisdiction, the invalidity of resultant orders, and the impropriety of this Court presuming to "settle" its dispute with a coordinate branch of government. The Court obviously takes exception to those statements, and stated as follows:

> These representations from counsel that the Court's orders would not be followed were disruptive to the Court's functioning as a tribunal and the administration of justice, particularly because the Court was dealing with the unrestrained and ongoing dissemination of thousands of Judicial Branch e-mails.

Underlying the Court's cool remark is a menacing warning—that Lieutenant General Hansen and Mr. Oestreicher stating the unvarnished position of a coordinate branch of government, their client, in an unprecedented and contentious separation of powers dispute, may constitute professional misconduct. *See* Rule of Professional Conduct 8.4(d). Much can be said about the impropriety of the Court, the State's highest disciplinary authority, bandying such warnings under circumstances like this.

But I will limit my comments to what follows. Lawyers obviously must not engage in behavior prejudicial to the administration of justice. But lawyers also have affirmative obligations to report judicial misconduct, *see* Rule 8.3(b), to always pursue the truth, *see* Preamble § 1, and to safeguard "the integrity of the of the [legal] system and those who operate it as a basic necessity of the rule of law." Preamble § 14. *That* is what Lieutenant General Hansen and Mr. Oestreicher have done and will continue to do. They must zealously represent their client with integrity and honesty. I demand the same from every attorney in my office, regardless of whether doing so vaults them into a political thicket like this or even exposes them to a tribunal's misplaced admonitions.[1]

---

[1] On Page 10 of the Order, you remark: "The Legislature's blanket request to disqualify all members of this Court appears directed to disrupt the normal process of a tribunal whose function is to adjudicate the underlying dispute consistent with the law, the constitution, and due process." That statement is inaccurate almost to a word. It assumes facts and ascribes malintent so brazenly, it betrays a self-admission that the Court's posture in this matter is adversarial—not adjudicatory. But for purposes of

There is also some irony in accusing these fine attorneys of disrupting the administration of justice when their client's argument is that it is constitutionally, legally, and ethically improper for this Court to attempt to administer justice *in this matter*.

All this to say, while this dispute is extraordinary and troubling, please refrain from threatening or maligning the integrity of my attorneys who are assiduously living up to their ethical obligations under unusual circumstances. If you wish to vent any further frustrations about the conduct of attorneys in my office, I invite you to contact me directly.

Respectfully,

/s/ Austin Knudsen
Austin Knudsen
Attorney General

---

this letter, to the extent you are again attributing allegedly unethical behavior to my attorneys, that is incorrect and inappropriate.

APPENDIX LL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: June 22, 2021]

BETH McLAUGHLIN,	)
	)
Petitioner,	)
	)
v.	)
	)
The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT OF ADMINISTRATION,	)
	)
Respondents.	)

THE MONTANA STATE LEGISLATURE'S MOTION TO DISMISS AS MOOT

APPEARANCES:

KRISTIN HANSEN
Lieutenant General
DEREK J. OESTREICHER
General Counsel
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

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ATTORNEYS FOR RESPONDENT
MONTANA STATE LEGISLATURE

RANDY J. COX
BOONE KARLBERG P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807-9199

ATTORNEY FOR PETITIONER

Pursuant to Rule 16 of the Montana Rules of Appellate Procedure, the Legislature respectfully moves to dismiss this proceeding because it is now moot. The Legislature hereby provides notice that the subpoenas issued to the Department of Administration ("DOA"), Supreme Court Administrator Beth McLaughlin, and the Supreme Court Justices have been rescinded and withdrawn. Accordingly, the Legislature will not seek enforcement of these subpoenas. Letters have been sent to the aforementioned parties formally rescinding and withdrawing these subpoenas, and copies of these letters are attached as Appendix A.

In various filings before this Court, the Legislature has consistently maintained that the only appropriate path to resolution in this dispute between co-equal branches of government is for the branches to negotiate

and make accommodations in good faith. That path has been foreclosed because the Court has used this action—initiated by its appointed employee—to spurn any such negotiations. The Legislature also rescinds its subpoenas as a measure of good faith that will hopefully encourage the judiciary to interact in good faith with its sister branch of government.

To be clear, the Legislature's justified interests in the underlying matters, and in pursing negotiations, remain. But to the extent the pending subpoenas may have contributed to a stalemate between the parties, the Legislature is pleased to take the first step and remove that obstacle. This first step will lay a foundation for amicable discussions between the Judicial and Legislative branches.

By rescinding and withdrawing the subpoenas at issue, this proceeding is moot. To the extent this matter was ever properly before the Court, it can be no longer. There is accordingly no justiciable case or controversy, and this matter should be dismissed.

CONCLUSION

Based on the foregoing, the Legislature respectfully moves to dismiss this proceeding.

Counsel for the Legislature has contacted counsel for the Department of Administration and counsel for Beth McLaughlin. The Department of Administration does not object to this motion. Ms. McLaughlin's counsel has not yet determined if Ms. McLaughlin will object.

Respectfully submitted this 22nd day of June, 2021.

AUSTIN KNUDSEN
Montana Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Kristin Hansen*
Kristin Hansen
Lieutenant General

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 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 340 words, excluding certificate of service and certificate of compliance.

By: */s/ Kristin Hansen*
Kristin Hansen
Lieutenant General

CERTIFICATE OF SERVICE

I, Kristin N. Hansen, hereby certify that I have served true and accurate copies of the foregoing Motion - Dismiss to the following on 06-22-2021:

Randy J. Cox (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: Beth McLaughlin

Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Montana State Legislature
Service Method: eService

Dale Schowengerdt (Attorney)
900 N. Last Chance Gulch
Suite 200
Helena MT 59624
Representing: Administration, Department of
Service Method: eService

Michael P. Manion (Attorney)
Department of Administration
P.O. Box 200101
Helena MT 59620-0101
Representing: Administration, Department of
Service Method: E-mail Delivery

Electronically signed by Rochell Standish on behalf of
Kristin N. Hansen
Dated: 06-22-2021

APPENDIX MM

APPENDIX A

Case Number: OP 21-0173

[Filed: June 22, 2021]

AUSTIN KNUDSEN [Seal] STATE OF MONTANA

June 22, 2021

Justice Beth Baker
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Baker:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*

Representative Wylie Galt, Speaker of the Montana House of Representatives

AUSTIN KNUDSEN [SEAL] STATE OF MONTANA

June 22, 2021

Director Misty Ann Giles
Department of Administration
State of Montana
Mitchell Building, 125 N. Roberts St.
Helena, MT 59620

Director Giles:

Please take notice that the Subpoena issued to you on the 8th of April, 2021, is hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of this Subpoena extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives

AUSTIN KNUDSEN [SEAL] STATE OF MONTANA

June 22, 2021

Justice Ingrid Gustafson
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Gustafson:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives

AUSTIN KNUDSEN [SEAL] STATE OF MONTANA

June 22, 2021

Chief Justice Mike McGrath
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Chief Justice McGrath:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives

AUSTIN KNUDSEN [SEAL] STATE OF MONTANA

June 22, 2021

Justice Laurie McKinnon
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice McKinnon:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives

AUSTIN KNUDSEN [SEAL] STATE OF MONTANA

June 22, 2021

Beth McLaughlin
Supreme Court Administrator
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Ms. McLaughlin:

Please take notice that the Subpoena issued to you on the 14th of April, 2021, is hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of this Subpoena extinguishes any obligation for you to comply with the Subpoena and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives

AUSTIN KNUDSEN [SEAL] STATE OF MONTANA

June 22, 2021

Justice James Rice
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Rice:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives

AUSTIN KNUDSEN [SEAL] STATE OF MONTANA

June 22, 2021

Justice Dirk Sandefur
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Sandefur:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives

AUSTIN KNUDSEN [SEAL] STATE OF MONTANA

June 22, 2021

Justice James Jeremiah Shea
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, MT 59601

Justice Shea:

Please take notice that the Subpoenas issued to you on the 14th and 15th of April, 2021, are hereby withdrawn by the Montana State Legislature. The Legislature's withdrawal of these Subpoenas extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information.

Sincerely,

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives

APPENDIX NN

[SEAL]

STATE OF MONTANA
AUSTIN KNUDSEN
ATTORNEY GENERAL

PRESERVATION REQUEST

DEPARTMENT OF JUSTICE
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

April 14, 2021

To Whom It Concerns:

The Department of Justice has been retained by legislative leadership, acting through the Speaker of the House, Wylie Galt, and Senate President, Mark Blasdel, to represent the interests of the Montana State Legislature in an action concerning a duly authorized legislative subpoena issued to the Montana Department of Administration. The action was filed by the Administrator of the Montana Supreme Court to quash that legislative subpoena and remains unresolved.

The Legislature previously sought information from Court Administrator Beth McLaughlin but received an unsatisfactory response. The Legislature therefore

issued a subpoena to the Montana Department of Administration seeking the production of emails and documents sent or received by Ms. McLaughlin in her official capacity between the dates of January 4, 2021 and April 8, 2021, including emails to or from members of the Montana Judges Association. You are either: a member of the MJA; a staff member of a member of the MJA; or an employee or contracted employee of the MJA who might have received emails from or sent emails to Ms. McLaughlin during the requisite time period.

Please segregate any emails, documents, notes, or other records that fit the description above, stored on any source, into a litigation hold. Specifically, please preserve all existing materials relevant to this dispute whether stored in hard copy or electronic form. This hold overrides what might be your normal retention policy so these documents and data should not be deleted even if otherwise allowed.

"Source" includes all hard copy files, computer hard drives, removable media (such as CDs and DVDs), laptop computers, and any other locations where hard copy or electronic information is stored.

It is important that you immediately preserve all existing materials and data relevant to the above-referenced matter and to suspend any deletion, overwriting or destruction of such documents or data whether stored in hard copy or electronic form, even if your normal records retention policy allows deletion. Further, any responsive emails that have been recently deleted or removed that can be recovered are subject to this hold.

Thank you for your prompt attention to this request.

Sincerely,

/s/Kristin Hansen
KRISTIN HANSEN
Lieutenant Attorney General

APPENDIX OO

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY

INITIAL REPORT TO THE 67TH MONTANA LEGISLATURE

[May 2021]

INITIAL REPORT ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY

[Table of Contents has been ommitted for Purposes of Printing]

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY

COMMITTEE MEMBERS

The President of the Senate and the Speaker of the House created the Special Joint Select Committee on Judicial Transparency and Accountability on April 14, 2021.

Senate Members

Senator Greg Hertz, Chair
Polson, MT
Ph: (406) 253-9505
Email: greg.hertz@mtleg.gov

Senator Tom McGillvray
Billings, MT
Ph: (406) 698-4428
Email: tom.mcgillvray@mtleg.gov

Senator Diane Sands
Missoula, MT
Ph: (406) 251-2001
Email: senatorsands@gmail.com

House Members

Representative Sue Vinton, Vice Chair
Billings, MT
Ph: (406) 855-2625
Email: sue.vinton@mtleg.gov

Representative Amy Regier
Kalispell, MT
Ph: (406) 253-8421
Email: amy.regier@mtleg.gov

Representative Kim Abbott
Helena, MT
Ph: (406) 439-8721
Email: kim.k.abbott@gmail.com

Introduction. This report is a summary of the work of the Special Joint Select Committee on Judicial Accountability and Transparency. Members received additional information and testimony during their investigation, and this report is an effort to highlight key information and the processes followed by the Select Committee in reaching its conclusions. To review

additional information, including audio minutes, and exhibits, visit the Select Committee website: https://leg.mt.gov/committees/other-groups/specialselect-committee-jat/.

Chronology of Events

SB 140 TIMELINE

JANUARY 25
Senate Bill 140, modifying the nominations process for judicial vacancies is introduced.

JANUARY 29
Supreme Court Admin. Beth McLaughlin emails a poll to every judge and justice asking whether the Montana Judges Assoc. lobby in support or opposition of SB140.

JANUARY 29-FEBRUARY 1
38 Judges respond to the poll by phone/email

EARLY MARCH
Chief Justice Mike McGrath meets with the Governor Gianforte to lobby against SB140

MARCH 16
Governor Gianforte signs SB140 into law.

MARCH 17
A petition for Original Jurisdiction challenging the constitutionality of SB140 is filed by Edwards/Goetz as *Bradley* v. *Gianforte,* the Legislature is not a party.

MARCH 24
Chief Justice Mike McGrath recuses himself from *Bradley due* to his lobbying on SB140.

MARCH 24
Chief Justice McGrath chooses District Court Judge Kurt Krueger to replace him on *Bradley* panel.

MARCH 30
The Attorney General files a motion to disqualify Judge Krueger based on his response to the SB140 poll that he "adamantly" opposed the legislation at issue.

MARCH31
Judge Krueger recuses himself from the *Bradley* panel after speaking with the Chief Justice.

APRIL 20
The Legislature's counsel informs the Supreme Court that the counsel for the petitioners in *Bradley* requested all communications related to SB140 and the then un-passed SB 402 from Legislative Services Division without informing the Legislature's counsel.

APRIL 27
The Supreme Court announces that they are rescinding their previous order to hear *Bradley* with six justices, and appointing Judge Wald from Big Horn County to be the seventh justice on the case.

INVESTIGATION TIMELINE

APRIL 2
The Legislature sends a letter to Administrator McLaughlin asking for public records re: the SB140 poll.

APRIL 6
Administrator McLaughlin seeks an extension; the Legislature agrees to a 4/9 deadline via email.

APRIL 7

Administrator McLaughlin provides the Legislature with two e-mails, and tells staff that the judicial branch policy did not require her to retain the SB140 poll emails since they were "ministerial type" records.

APRIL 8
Legislative staff asks Administrator McLaughlin if she deleted emails, and ask her to provide the judicial branch retention policy that allows for email deletion.

APRIL 8
Administrator McLaughlin tells staff vie email that she has to "acquiescence to sloppiness" but that she did delete the SB140 emails in violation of law and policy.

APRIL 8
Senate Judiciary Chairman Keith Regier subpoenas Dept. of Administration in an effort to obtain Admin. McLaughlin's deleted emails from the server.

APRIL 9
The Department partially complies with the subpoena providing 2,450 pages of emails related to SB140, the Montana Judges Assoc. and judicial branch lobbying.

APRIL 10
Admin. McLaughlin hires an attorney, who files a Saturday "emergency" motion in *Bradley* to stop production of the emails. Neither Dept. of Admin. nor the Legislature is a party to that case.

APRIL 11
On a Sunday, before any of the actual parties con respond, the Montana Supreme Court issues an order quashing the Legislature's subpoena.

APRIL12
The Legislature retains the Dept. of Justice to represent its interests. DOJ notifies the Supreme Court via letter that it does not recognize the Sunday order as valid.

APRIL 12
Admin. Beth McLaughlin's attorney files a new emergency petition for Original Jurisdiction, *McLaughlin,* attempting to re-quash the subpoena.

APRIL 14
The Legislature forms the Special Joint Select Committee on Judicial Accountability and Transparency to investigate document retention, legislative lobbying, and potential judicial impropriety.

APRIL 14
DOJ files a motion to dismiss McLaughlin on the grounds that the Supreme Court has a conflict of interest, and cannot rule on its Administrator's case.

APRIL 14
The Legislature revises Admin. McLaughlin's subpoena requiring her to produce her state owned computer to retrieve deleted emails and testify at a hearing.

APRIL 15
The Legislature subpoenas the Supreme Court Justices seeking production of documents.

APRIL 16
Chief Justice McGrath sends a letter to the Legislature stating that the emails requested by the Legislature are privileged and that the Court will not produce them.

APRIL 16
The Supreme Court issues another order in *McLaughlin* purporting to quash the Administrator's subpoena and stay the subpoenas issued to the Justices even though they are not a party to the case.

APRIL 16
The Select Committee adopts draft rules and schedules a hearing for April 19th.

APRIL 18
DOJ sends letter to the Justices informing them that their *McLaughlin* order does not cover their subpoenas because they are not a party to the case, and advising

them that the Select Committee expects them to produce the subpoenaed emails and documents.

APRIL 19
The Select Committee meets at 9:00AM; Admin. McLaughlin does not appear.

APRIL 19
Justice Jim Rice, who refused to rule on his own subpoena, files a petition in District Court asking his subpoena be quashed.

APRIL 19
Justice Dirk Sandefur produces of the requested documents, but not all. In a letter, he stated that he routinely deletes email to conserve space and that he was unaware of law or policy that required their retention. He also stated that he did not respond to legislative polls or read other judge's responses.

APRIL 19
The Select Committee holds its 3:00PM hearing; all seven Justices appear to make statements and respond to some of the Committee's questions. None produces additional subpoenaed documents.

APRIL 22
The Select Committee meets to discuss information revealed during the investigation, formulate additional questions for the Justices and Administrator, and begin drafting the initial Committee report.

APRIL 26
The Select Committee poses questions to Chief Justice McGrath via letter asking him to address potential inconsistencies between the record and his testimony.

APRIL 29
The Select Committee submits its Initial Findings and Committee Report. The Committee will continue its investigation through the remainder of the session.

LEGISLATIVE AUTHORITY

It has been consistently recognized by the courts and uniformly reflected in constitutional and parliamentary law that a legislative body has the clear and very broad authority to conduct legislative investigations to gather and evaluate information to make wise and timely policy judgments inherent and indispensable in the power of enacting law.[12] A legislative body's inherent power to investigate may be exercised directly or through a duly authorized committee.[3] The presumption of constitutionality of legislative actions applies to legislative investigations.[4]

According to Mason's Manual:

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[1] Text borrowed from a memo by Mr. Todd Everts for the Select Committee on Settlement Accountability.

[2] *Mason's Manual of Legislative Procedure* (2010), p. 561; *Sutherland Statutory Construction* (2010), p. 596.

[3] Mason's Manual, p. 569; Sutherland, p. 570.

[4] Sutherland, p. 578.

"The legislature has the power to investigate any subject regarding which it may desire information in connection with the proper discharge of its function to enact, amend, or repeal statutes or to perform any other act delegated to it by the constitution.[5]"

The power to investigate must be exercised for a proper legislative purpose. The exercise of the legislative investigation power must protect the rights of citizens and adhere to all constitutional protections related to privacy, life, liberty, and property.[6]

An investigation into the management of state institutions and the departments of state government is at all times a legitimate function of a legislative body.[7]

Here, the Special Joint Select Committee on Judicial Transparency and Accountability (the Committee), as a duly authorized legislative committee, is conducting an investigation of the judicial branch's public information and records retention protocols; whether members of the branch have made improper use of government time and resources by lobbying on behalf of a private entity; whether judges' and justices' statements on legislation have created judicial bias; and whether the courts have a conflict of interest in

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[5] Mason's Manual, p. 561.

[6] Mason's Manual, p. 566; Article II, section 10, of the Montana Constitution.

[7] Mason's Manual, p. 563.

hearing these matters. These matters are within the Legislature's investigative authority.

RESPONSE TO SUBPOENAS

On April 14 and 15, 2021, Senate President Mark Blasdel and Speaker of the House Wylie Galt, issued subpoenas to appear and produce documents, pursuant to M.C.A. § 5-5-101, *et seq*., to Supreme Court Administrator Beth McLaughlin, Supreme Court Chief Justice Mike McGrath, Justice Beth Baker, Justice Laurie McKinnon, Justice Ingrid Gustafson, Justice Jim Rice, Justice Dirk Sandefur, and Justice Jim Shea.

Other than the subpoena to Ms. McLaughlin, the subpoenas issued to the Supreme Court Justices did not request their appearance to answer questions of the Committee.[8]

The subpoenas asked for three items delivered as hard copies and .pst files:

1. Communications regarding polls during the 2021 legislative session;

2. Communications regarding 2021 legislation; and

3. Communications indicating use of state time and resources on behalf of the Montana Judges Association, a private non-profit education and lobbying organization.

The subpoenas expressly excluded "any emails, documents, and information related to decisional case-

[8] Attached Committee Exhibit A – 4/15 Legislative Subpoenas

related matters made by Montana justices or judges in the disposition of such matters." Additionally, the subpoenas clarified that "[a]ny personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure."

The subpoenaed witnesses responded as follows:

- Administrator McLaughlin failed to appear and refused to produce the requested information and her state-owned computers and hard drives for analysis.
- Justice Rice appeared at the April 19, 2021, hearing to notify the Committee that he had obtained a District Court order temporarily enjoining the Legislature's subpoena. Justice Rice, at his own request, was not subject to the improper stay entered by the Court over itself. Recognizing the Legislature's inherent subpoena power in his petition, Justice Rice sought relief from a possibly more independent tribunal as a typical recipient of a subpoena would be expected to do.
- Justice Sandefur appeared at the April 19, 2021, and provided a written response to his subpoena containing five responsive documents, but further explaining that "it has been [his] routine practice to immediately delete non-essential email traffic" presuming that Department of Administration (DOA) is retaining his emails in accordance with state law and policy. Justice

Sandefur was temporarily excused based on his attempt to comply with the subpoena.[9]

- Justice Baker appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with her subpoena.
- Justice McKinnon appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with her subpoena.
- Justice Gustafson appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with her subpoena.
- Justice Shea appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with his subpoena.
- Chief Justice McGrath appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with his subpoena.

[9] Attached Committee Exhibit B – Justice Sandefur production to Committee

LOBBYING ON STATE TIME USING STATE RESOURCES

A. State Officers and Employees

Pursuant to M.C.A. § 3-1-701 et seq., the Court Administrator is appointed by the Supreme Court and holds the position at the pleasure of the court. The duties of the Court Administrator include preparing and presenting judicial budget requests to the legislature, providing information to the legislature upon request, recommending to the Supreme Court improvements to the judiciary, administering the judicial branch personnel plan, and performing other duties that the Supreme Court may assign.

The Court Administrator is a "public employee" as defined in M.C.A. § 2-2-102(7). Supreme Court Justices and District Court Judges are "public officers" as defined in M.C.A. § 2-2-102(9).

"A public officer or employee may not engage in any activity, including lobbying, … on behalf of an organization… of which the public officer or employee is a member while performing the public officer's or public employee's job duties.[10]" Further, Judicial Branch e-mail policy prohibits judicial officers and employees from using state e-mail for the benefit of a non-profit entity.

B. Lobbying by The Montana Judges Association (MJA)

The Montana Judges Association (MJA) is not a state entity. It is not part of the Supreme Court or the

[10] MCA 2-2-121(6)

Judicial Branch. The MJA is registered with the Secretary of State's Office as a non-profit corporation with its registered agent recently changed from the District Judge in Dept. 1 of the Helena, MT Courthouse to Judge Leslie Halligan at the District Court, Missoula, MT.[11] Its original registration paperwork from 1991 lists former Supreme Court Administrator Jim Oppedahl as its registered agent, and the Supreme Court address on Sanders as its address.[12]

The MJA Board of Directors and its membership are known to include Montana judges and justices whose membership dues are deducted from their state paychecks.

The MJA has no known employees but, as Chief Justice McGrath stated in his April 16th letter, the organization pools member dues to hire a "part-time lobbyist" to represent its interests.[13] The MJA's founding documents state that it often coordinates with the Montana Bar Association, Montana Trial Lawyers Association, and the American Bar Association as organizations in "common cause."

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[11] Attached Committee Exhibit C – Current MJA registration documents

[12] Attached Committee Exhibit D – Original MJA registration documents

[13] Attached Committee Exhibit E – Chief Justice McGrath's 4/16 Letter

Dozens of publicly available e-mails sent by the Court Administrator[14] from her state email show the Administrator in regular contact with lobbyists and MJA officers to discuss lobbying work. These emails and the April 16th letter from the Chief Justice confirm that Judicial Branch public officers and employees improperly utilized state resources and time for the benefit of the MJA. The depth and breadth of the entanglement effectively turned Administrator McLaughlin into a de facto MJA employee.

It is worth noting, that there is a procedure by which state entities may lobby the Legislature. The Office of Public Instruction, the Public Service Commission, and many other state entities are registered with the Commissioner of Political Practices (COPP) as "registered principals." Properly registered state employees may lobby on behalf of their department for policy changes, funding requests, and other legislative measures. The Montana Judges Association, its lobbyist Ed Bartlett, and its President Judge Greg Todd are all registered with COPP. Neither Administrator Beth McLaughlin nor the Montana Supreme Court are listed on the COPP's registration page.[15]

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[14] The publicly available emails can be found here: https ://bit.ly/2R5Pk7n

[15] The COPP registration database can be found here: https://lobbyist-ext.mt.gov/LobbyistRegistration/

C. Lobbying Directed by Chief Justice McGrath

In his April 16, 2021 letter, Chief Justice McGrath stated that the Court Administrator conducts polls "by e-mail" on behalf the MJA President Judge Todd. These polls and the resulting replies were sent from McLaughlin's state e-mail account to the state e-mail accounts of Montana's judges and justices presumably on state computers on state time.

In his April 19th testimony before the Committee, Chief Justice McGrath stated that MJA conducts polls on pending legislation to determine whether "the organization [will] support, oppose or stay neutral on [a] particular bill."[16] Thus, the results of the polls guide the MJA, its Legislative Committee and its lobbyist in their efforts throughout the Legislative Session.

When asked at the April 19th Committee hearing who authorized Administrator McLaughlin to conduct the MJA's e-mail polls and coordinate related lobbying efforts on behalf of the MJA, Supreme Court Justice Beth Baker replied that "the Chief Justice works with [Beth Mclaughlin] day in and day out" and that "on legislative matters, the Chief is the direct contact for the Court Administrator."[17]

1. The Poll on HB 685

E-mails confirm that Chief Justice McGrath directed Administrator McLaughlin to coordinate lobbying

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[16] April 19th Committee Hearing 16:25:51-58 can be found here: https ://bit.ly/3gLu4hU

[17] Committee Hearing 15:20:13-18

efforts on behalf of the MJA on at least one, and potentially multiple occasions.

- On March 24th, Chief Justice McGrath e-mailed the Court Administrator, MJA President Judge Todd, MJA lobbyist Ed Bartlett, and two District Court Judges regarding a forthcoming hearing on House Bill 685. In the e-mail McGrath wrote, *"[w]e should probably get a membership vote on this and ask who can make calls."*[18]

- Shortly after, Administrator McLaughlin responded, *"I can send it out to the membership for a vote, but people need to not do the 'reply to all.' Can the legislative committee give a thumbs up or down instead given timeliness?"*

- Within minutes of the Chief Justice's request, Administrator McLaughlin e-mailed the members of MJA's Legislative Committee polling them for opposition or support to HB685. All members voted in opposition. Chief Justice McGrath and the MJA lobbyist were copied on the e-mail chain.

- After HB685 failed to pass, Chief Justice McGrath used his personal email to send a message to Administrator McLaughlin, and lobbyists Ed Bartlett and Bruce Spencer, stating "*This could not have ended any better. Great effort. Thanks again for your hard work these last few months. What a challenge this session*

[18] Publicly available emails can be viewed via this link: https://bit.ly/32YeEi0

> *has been. I think it is fair to say we have been able to protect nothing less than the independence of the judicial branch and uphold the basic principles of our state democracy. No small accomplishment in these difficult times. Congratulations.*"

2. Committee Testimony by the Justices

During Committee testimony, Chief Justice McGrath repeatedly conflated the work of the Judicial Branch with the work of the Montana Judges Association. In response to questioning, he stated that the MJA *"polls are conducted by email, which is the primary manner that the Judicial Branch conducts its internal business and communications."*

Chief Justice McGrath defended the use of state e-mail and state time for MJA lobbying efforts. In testimony, he stated that *"as statewide elected officials, [judges and justices] are always on the clock."* The Chief testified that because the MJA only comments on bills related to *"the judiciary and judicial business"* conducting MJA lobbying efforts utilizing state time and resources was *"entirely proper*." Quite to the contrary, no other state elected official, or state employee, would be permitted to use state resources in this manner as it is a direct violation of the law.[19]

Despite being the sender of several of MJA-related e-mails and being copied on several more, Chief Justice McGrath repeatedly professed ignorance to the content of the e-mails at the hearing. Despite being copied on

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[19] MCA § 2-2-121, et seq.

the SB 140 e-mail, Chief Justice McGrath stated that he was unaware of Judge Krueger's reply stating his adamant opposition to the bill prior to appointing him to fill a vacancy on the Court.[20]

Chief Justice McGrath also testified that he had not seen many of the *"colorful"* comments other e-mails contained, despite being copied on them, and making several comments himself as seen below:

- On March 24, 2021, Administrator McLaughlin used her state email to send a message to Chief Justice McGrath, Judge Menahan, Judge Spaulding, and lobbyist Ed Bartlett with the subject line "fyi." The message contained as an attachment LC 3213 (HB685), a proposed Constitutional Amendment regarding the composition of the Judicial Standards Commission.
    - McLaughlin's original message stated "*[w]ell this is goofy*."
    - In response directly to McLaughlin, Judge Spaulding stated "*[w]ow, likely unconstitutional in its inception. Has this been introduced? Isn't there a transmittal deadline or something*?"
    - McLaughlin responded to Judge Spaulding and stated "*[i]t's a proposed constitutional amendment so it would*

[20] Attached Committee Exhibit F – The Attorney General's filing in *Bradley*.

need 2/3 of both Houses and to be approved by the voters. I've never seen an unconstitutional constitutional amendment but it sure seems to conflict with the Supreme Court's ultimate authority in statute. It will be a doozy."

- In response to McLaughlin's original message, Chief Justice McGrath stated "*[t]hey don't seem to care much for Judicial Standards now that they have found out about it. We will need to pick off some votes here to keep it below 100. Might be easier in the House. Are there rules regarding timelines that apply*?"

- Chief Justice McGrath responded to McLaughlin's original message "*[w]e should probably get a membership vote on this and ask who can make calls. Probably need the bar to do the same. Of course the problem here is it allows a citizen's commission to discipline or remove judges. Not clear who appoints them but God forbid they put any judges on it or more than one atty. Then there is the problem that it would be entirely inconsistent with other provisions of the constitution…*"

- Chief Justice McGrath responded yet again "*[j]ust noticed the new name will be 'The Judicial Inquiry Commission'. Think*

> *this straight out of the book 'Where Democracies Go To Die.*'"[21]

D. Lobbying Directed by MJA President Judge Todd

E-mails also reveal that Administrator McLaughlin coordinated lobbying efforts with MJA President Todd, MJA lobbyist Ed Bartlett, Montana Bar Association lobbyist Bruce Spencer, and Montana Magistrates Association lobbyist Rebecca Meyers. McLaughlin's communications include her opinions and personal comments about legislation, legislators, and the legislature's work.[22]

- On February 5, 2021, Administrator McLaughlin used her state email to send a message regarding HB 325 to all Montana Supreme Court Justices and District Court Judges stating "*[j]udge Todd would like a MJA vote on supporting or opposing HB325 (attached), which would elect the Supreme Court by districts. Judge Todd is recommending the MJA oppose the bill. It is schedule [sic] for a hearing on Wednesday, February 10th so you could review and vote by Tuesday that would be great.*"
- On February 8, 2021, Administrator McLaughlin used her state email to send a message regarding HB342 to all Montana Supreme Court

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[21] These publicly available emails can be viewed via this link: https://bit.ly/32YeEi0

[22] These publicly available emails can be viewed via this link: https://bit.ly/3aICIK4

Justices and District Court Judges stating "*[j]udge Todd is asking for a vote on HB342, which would make Supreme Court and District Court elections partisan. The bill is attached. Again, vote using the buttons or send an e-mail to me. Please either vote to Approve or Reject the bill.*"

- On March 4, 2021, Judge Todd used his state email to send a message to Chief Justice McGrath, Administrator McLaughlin, and lobbyist Ed Bartlett with the subject line "Status Report of MJA Bills at the Legislature." Judge Todd's message stated "*[s]o is the partisan judge bill dead or will there be some Zombie like resurrection in the Senate*." In response to Judge Todd's message, Chief Justice McGrath used his state email to send a reply-all message stating "*[n]o resurrection this session.*"

- On March 26, 2021, lobbyist Rebecca Meyers emailed Administrator McLaughlin and Judge Mantooth at their state email addresses to discuss an amendment brought by Senator Manzella. The message stated "*Ok sounds good. I'll plan on speaking and we'll work out what the specifics are later. I swear this session will NEVER end. Though, in all seriousness, I heard from legislators last night that the goal is to take a 1 week recess after Easter to deal with budget stuff and then come back, power through and wrap up by May 1. The farmers/ranchers are starting to flip out about pushing the session*

back and have basically said they won't be coming back over the summer."

- Administrator McLaughlin responded using her state email stating "*I'm thrilled you're hearing the same rumor about May 1 – maybe that will make it true*."

- On March 31, 2021, Judge Mike Menahan used his state email to send a message to Judge Greg Todd, Administrator McLaughlin, and lobbyist Ed Bartlett regarding HB 685 stating "*I'm happy that a few Republicans voted against the bill. As a constitutional amendment, the bill will need two-thirds of the legislature to pass and be placed on the ballot for voter approval. I think we should ask judges to contact their representatives to oppose the bill when it is heard on second reading before the entire House. I'm unsure how that happened when judges contacted legislators regarding the partisan elected bills, but I think we should employ a similar strategy. The district court judges need to know about this bill. If enacted, an appointed citizen commission with no knowledge of the law will have absolute power to remove judges for any reason.*"

  - Judge Greg Todd used his state email to respond stating "*You are right. We are mobilizing judges to call their representatives. Thanks Greg.*"

Though it appears the emails have been deleted, poll tally sheets indicate that at least Judge Elizabeth Best, Judge Katherine Bidegaray, Judge John Brown, Judge

Matthew Cuffe, Judge David Cybulski, Judge Ray Dayton, Judge Dusty Deschamps, Judge Amy Eddy, Judge Brenda Gilbert, Judge Leslie Halligan, Judge Kurt Krueger, Judge Yvonne Laird, Judge Jennifer Lint, Judge James Manley, Judge Nickolas Murnion, Judge Jon Oldenburg, Judge Howard Recht, and Judge Robert Whelan all responded to Administrator McLaughlin's request for a vote regarding Senate Bill 140, which is now before the Supreme Court for decision. It is unknown whether the tally was taken by email or telephone.[23]

It is unclear how many other judges and justices weighed in on how many other legislative actions pending before the legislature because the Court Administrator and the Justices have refused to cooperate with the legislative subpoenas seeking further documents and Ms. McLaughlin's computer equipment. It is also unclear how many responsive documents have been deleted by other members of the judicial branch.

E. Coordinating Support for Judicial Nominees

In addition to the prohibition on lobbying on state time, the law also prohibits lobbying for nominees. "A public officer or employee may not use or permit the use of public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to the nomination…of any person to public office…."[24]"

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[23] Attached Committee Exhibit G – Email contained in the Supreme Court's Order Denying Relief on 4/7

[24] MCA 2-2-121(3)

The following emails show that Administrator McLaughlin and several judges, including the nominees themselves, used their state email, and presumably their state-owned computers, to coordinate testimony and support for yet-unconfirmed judicial nominees.

- On January 21, 2021, Administrator McLaughlin used her state email to send a message to yet-unconfirmed Judge Ohman, Judge Levine, and Judge Abbott, with Chief Justice McGrath carbon-copied, stating "*I'm going to defer to the Chief about his thoughts but I don't think it would hurt to make sure you have support from your local Bar. All three of the districts would be harmed if these positions were vacated again because of the caseloads so local Bars should have a vested interest [sic] the confirmations. I suspect it might be more important this session to have that support articulated at the [sic] conformation hearings, which have been pretty dull in the past. I will keep you posted as I learn more. The Chief may have additional thoughts as well.*"

- On January 22, 2021, Chief Justice McGrath used his state email to send a message to Administrator McLaughlin and, referencing the yet-unconfirmed judicial nominees, stated "*[s]hould we have them start poking around? This would be such a cluster if they aren't confirmed – entire dockets would essentially be stranded including pending cases. Ed is close*

with the lt. governor so maybe it's time for him to ask directly if they are opposing them."

- On February 16, 2021, yet-unconfirmed Judge Abbott used his state email to send a message to Administrator McLaughlin, Judge Ohman, and Judge Levine stating "*[t]hanks for the update. I think we're all plugging away at trying to line up support.*"

- On February 24, 2021, Administrator McLaughlin used her state email to send a message to Judges Abbott, Levine, and Ohman stating "*Yes, we were too but the Chair wants to push it through – he tried to ram it through yesterday. MJA and the Bar will be there in opposition as well as Judge Brown on behalf of the Commission. Ed continues to work the governor's office on the appointments. Continuing to gather local support is importana [sic].*"

- On March 8, 2021, Judge McElyea used her state email to send a message to Administrator McLaughlin stating "*Thanks, Beth. Any strategic problem with me reaching out to encourage our local paper to do a piece on our new judge – Peter Ohman.*"

- On March 12, 2021, yet-unconfirmed Judge Abbott used his personal email to send a message to Administrator McLaughlin, Chief Justice McGrath, and lobbyist Ed Bartlett, stating "*[f]or when the time is right, here are the letters of support I've collected to date. There*

have been a few that were sent independently to Regier or the committee, and a few that haven't come in yet, but here's what I have to date. I'll supplement as more come in. Thanks again for all you do."

- On March 17, 2021, Administrator McLaughlin used her state email to send a message to yet-unconfirmed Judges Abbott, Levine, and Ohman, with lobbyist Ed Bartlett carbon-copied, stating "*As you have probably seen, the Governor signed SB 140 yesterday. I am assuming the confirmation hearings will be set in the near future. Either Ed or I will talk with the chairman about his timeline. It's crucial to start thinking about who you want to testify on your behalf (or have letters of support in hand). It's also crucial to have calls going to your local Senators from your supporters or directly from you. Please be aware, to accommodate the new federal dollars, the end date of the session is now May 11th. This does provide a few extra weeks but we should still assume the confirmation hearings will happen in the next few weeks. I'll keep you posted with any additional information.*"

- Several emails also show Administrator McLaughlin working with judicial nominees Michelle Reinhart and Chris Abbott to coordinate lobbying efforts and testimony for their nomination hearings. Mr. Abbott utilized his personal email for the communications; Ms. Reinhart used both her state account and personal account.

F. Emails Indicating Judicial Bias

Montana has recognized that an independent, fair, and impartial judiciary is indispensable to our system of justice. Consistent with this recognition, Montana has adopted a Code of Judicial Conduct.[25] The Code of Conduct prescribes the behavior of judges to protect the integrity of the judiciary. These canons of conduct discuss when judges should recuse themselves, limit their statements on pending and impending matters, and provide guidance for their interactions with other government officials, and govern their conduct as they go about their work and their personal lives.

Four important Rules regarding bias appear to have been violated through communications amongst the judges and the Court Administrator.

1. Rule 2.11 Judicial Statements on Pending and Impending Cases

Rule 2.11 of the Code provides that "[a] judge shall not make any public statements that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."

Email statements referenced throughout this report indicate numerous judges and justices of the judiciary have made comments highly likely to interfere with a trial or hearing.

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[25] Attached Committee Exhibit H – Code of Judicial Conduct

2. Rule 1.2 Promoting Confidence in the Judiciary

Rule 1.2 of the Code provides that "[a] judge shall 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."

The judiciary's routine engagement in polls and email discussions regarding legislation, legislators, and the citizens of Montana, while using state email and presumably state computers on state work time, does not instill confidence in the independence, integrity, and impartiality of the judiciary. To the contrary, this conduct creates an appearance of bias and potentially disqualifies judicial officers from presiding over cases involving certain issues, certain legislators, or potentially certain citizens.

During the April 19, 2021, hearing Chief Justice McGrath offered a statement regarding the Judicial Branch's use of email and stated *"[t]here has been no improper use of the state email system."*[26] To the contrary, the state email system has been repeatedly misused by members of the judiciary—including Chief Justice McGrath – in violation of both law, state rule, and judicial branch policy.

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[26] Committee Hearing, April 19, 2021 at 16:01:34-38 viewed here https://bit.ly/3gLu4hU

3. Rule 2.2 Impartiality and Fairness

Rule 2.2 of the Code provides that "[a] judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially."

An illustration of a likely violation of this Rule comes from the Chief Justice. Chief Justice McGrath recused himself from a matter concerning the constitutionality of SB 140 because he had discussed the legislation with the Governor and Lt. Governor. This was appropriate under the Rules. However, after his recusal, the Chief Justice selected Judge Krueger as his replacement on the panel presiding over the case even though recusal means you will have no further involvement.

At the committee hearing the Chief stated, "I contacted Judge Krueger to sit in my place. I didn't ask him if he'd participated in any poll. I forgot there was a poll. Didn't even consider that. I just asked him if he would be available to sit in that case, and he said he would. That was the extent of our discussion."[27] The Chief still named his own replacement even after he had recused himself from the case, and after he was copied on the email from Judge Krueger on February 1, 2021 which stated Judge Krueger's "adamant" opposition to SB 140.

It is also problematic that Judge Krueger accepted appointment to preside over the case despite having made his "adamant" opposition to SB 140 known to all Montana judicial officers by broadcasting his position via the state email system.

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[27] Committee Hearing, 16:27:48 viewed here https://bit.ly/3gLu4hU

4. Rule 2.3 Bias, Prejudice, and Harassment

Rule 2.3 of the Code provides that "[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice."

a. Six of the Supreme Court Justices have violated a fundamental principle of law which states that "no man should be a judge in his own case." The Justices have issued an Order that "stays" enforcement of the subpoenas until they can give themselves "due process."

b. On March 12, 2021, Administrator McLaughlin sent an email to the Chief Justice, Justice Shea, and Judge Krueger. The email contained a link to an article that made condescending comments about anti-vaxxers and legislators while opposing a judicial reform bill. McLaughlin's email was titled "Thought you might enjoy this."

c. On January 25, 2021, Administrator McLaughlin used her state email to send a message to Chief Justice McGrath, and lobbyists Ed Bartlett and Bruce Spencer, with the subject line "Judicial Nomination." Attached to the message was LC1094, which later became Senate Bill 140. McLaughlin's message stated "*[w]ell, this is certainly a change*."

Other emails may have existed as part of this string of emails or regarding MJA's lobbying efforts on SB 140, but the Court

Administrator and the Justices have refused to produce any additional records to that effect and have admitted deleting them. Senate Bill 140 is currently pending in front of the Supreme Court as a constitutional challenge.

d. On March 30, 2021, lobbyist Bruce Spencer sent a message to the state email addresses for Chief Justice McGrath, Judge Mike Menahan, and Administrator McLaughlin, with the subject line "HB380." The message stated "*[o]ne more for the great unconstitutional void. (sigh). How's the budget*?"

e. On March 24, 2021, Administrator McLaughlin used her state email to send a message regarding LC 3213 to all Montana Justices and District Court Judges stating "*[w]e need the legislative committee to weigh in on this on behalf of the MJA. It will come up for a hearing quickly so MJA will need to act quickly. Please let me know if you oppose the attached bill. I've added Judge Spaulding to this list because he is on the JSC.*"

- Judge Dan Wilson used his state email to respond stating "*Oppose.*"
- Judge Luke Berger used his state email to respond stating "*Oppose.*"
- Retired Judge Mike Salvagni used his state email to respond stating "*Oppose.*"

- Judge Kelly Mantooth used his state email to respond stating "*The [sic] just keep popping back up like the 'Whack a Mole' game … I'm going to need a bigger gavel.*"
- Judge Gregory Todd used his state email to respond stating "*I oppose*." McLaughlin responded to Judge Todd stating "*Weird – I thought you'd be in favor*."
- Judge John Larson used his state email to respond stating "*I also oppose this bill*."
- Judge Mary Jane Knisely used her state email to respond stating "*I oppose*."
- Judge Kelly Mantooth used his state email to respond again stating *"[a]fter killing an earlier bill that is similar, this bill pops in out of the blue … **YOU** do need to contact your representative to vote no on this and kill the bill. We have got to get ahead of this bill and start working on it now*." In response, Administrator McLaughlin stated "*[t]hanks Kelly. I can't imagine a large citizen committee deciding whether a judge violated a canon [sic] – yikes*." Judge Mantooth responded again stating "*Agreed! It will be a trial of a judge with a jury*."
- Judge Kathy Seeley used her state email to respond stating "*Oppose*."

f. On March 24, 2021, Administrator McLaughlin used her state email to send a message to Chief Justice McGrath, Judge

Menahan, Judge Spaulding, and lobbyist Ed Bartlett with the subject line "fyi." The message contained as an attachment LC 3213, a proposed change to the composition of the Judicial Standards Commission.

- McLaughlin's original message stated "*[w]ell this is goofy*."
- In response directly to McLaughlin, Judge Spaulding stated "*[w]ow, likely unconstitutional in its inception. Has this been introduced? Isn't there a transmittal deadline or something*?"
- McLaughlin responded to Judge Spaulding and stated "*[i]t's a proposed constitutional amendment so it would need 2/3 of both Houses and to be approved by the voters. I've never seen an unconstitutional constitutional amendment but it sure seems to conflict with the Supreme Court's ultimate authority in statute. It will be a doozy*."
- Chief Justice McGrath responded to McLaughlin's original message again stating "*[w]e should probably get a membership vote on this and ask who can make calls. Probably need the bar to do the same. Of course the problem here is it allows a citizen's commission to discipline or remove judges. Not clear who appoints them but God forbid they put any judges on it or more than one atty. Then there is the problem that it would*

be entirely inconsistent with other provisions of the constitution…"

- Chief Justice McGrath responded yet again stating "*[j]ust noticed the new name will be 'The Judicial Inquiry Commission'. Think this straight out of the book 'Where Democracies Go To Die*.'"

PUBLIC INFORMATION AND RECORDS RETENTION

The individual right to examine public documents and observe public deliberations is enshrined in Article II, Section 9 of the Montana Constitution and is defined and protected by state law and policy.

"Public information" is "information prepared, owned, used, or retained by any public agency related to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law."[28] A "public record" is "public information that is: (a) fixed in any medium and is retrievable in usable form for future reference; and (b) designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee."[29]

Montana's records retention schedules, which are available on the Secretary of State's website and are provided to all state office, require "Routine: non-

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[28] M.C.A. § 2-6-1002(11)

[29] M.C.A. § 2-6-1002(13)

permanent" email correspondence to be retained by public officers and employees for 3 years.[30]

Judicial Branch policy[31]:

- creates no exemption for "ministerial-type" emails;
- state that privacy of e-mail is not guaranteed;
- informs employees they should not have the expectation of privacy for any messages;
- states that there is the expectation that any message sent is subject to public scrutiny;
- explains that using the state email system for "non-profit" or professional organizations is misuse of state email resources;
- and reiterates that all messages created, sent or retrieved, over the state's systems are the property of the State of Montana.

Administrator McLaughlin stated that she did not retain her emails related to SB 140 and other judicial branch polls and records.[32] Administrator McLaughlin confessed to "sloppiness" and claimed that these public

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[30] Attached Committee Exhibit I – Sec'y of State Records Retention Schedule

[31] Attached Committee Exhibit J – Judicial Branch Email Policy provided to a legislative drafter in March 2021

[32] Attached Committee Exhibit K – McLaughlin email to Senate Staff.

records were "ministerial" in nature to her, and on that basis, she deleted them.[33]

Justice Sandefur attempted to comply with the public records production request in his subpoena.[34] However, Justice Sandefur stated in hearing testimony that "it has been [his] routine practice to immediately delete non-essential email traffic"[35] presuming that DOA is retaining his emails in accordance with state law and policy. Initial conversations with State IT personnel conducted by Senate staff suggest that judicial branch emails are not automatically archived and only temporarily retained once deleted by the recipient/sender.

Five of the remaining Supreme Court Justices—McKinnon, Baker, Shea, Gustafson, and McGrath— failed to produce any documents requested in their subpoenas. However, during testimony at the hearing, several Justices stated that they deleted emails which they deemed "unsolicited" or "non-essential."

During testimony at the April 19, 2021, hearing, Chief Justice McGrath stated "our policy regarding retention is that we're to clear our email boxes periodically because they fill up and our IT people don't have the

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[33] Attached Committee Exhibit K – McLaughlin email to Senate Staff.

[34] Attached Committee Exhibit B – Justice Sandefur production to Committee

[35] A link to the April 19th Hearing can be found here: https://bit.ly/3gLu4hU

capacity."[36] Staff conversations with Jerry Marks, an SITSD employee, indicate that judicial branch email has the same storage limits as legislative and executive email.

CONFLICT OF INTEREST

Throughout the course of the legal proceeding arising from the passage of SB 140 (which terminated use of the Judicial Nomination Commission), and the subsequent Original Petitions filed by the Court Administrator, the Court has engaged in a number of procedural irregularities that merit mentioning.

These irregularities appear to stem from the potential conflict of interest that the Court has in hearing and deciding a matter in which its own appointed Administrator is the Plaintiff, and the Court's own email communications and practices are at issue. It is important for the Committee to be apprised of how these irregularities may impact how the constitutionality of legislative subpoenas and SB 140 are ultimately addressed by the Court. The known procedural irregularities are as follows:

1. Email indicates attempted *ex parte* communications by the Goetz Law Firm and the Edwards and Culver law firm representing the Petitioners in the SB140 matter;

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[36] *Committee Hearing, April 19, 2021* at 16:08:48-16:09:03 viewed here: https://bit.ly/3gLu4hU

2. Chief Justice McGrath admitted in testimony that, though recused, he appointed Judge Krueger to fill his seat on the *Bradley* panel and that he called Judge Krueger immediately after the Attorney General filed a motion to disqualify the latter;

3. The Constitution, Article VII, Section 3(2) and the Court's operating rules require seven members of the Court to hear an Original Petition. The Court initially stated only six members will sit in the SB 140 matter due to the Chief Justice's conflict.[37] However, on April 27, 2021, the Court reversed itself appointing Judge Wald to fill the vacancy.[38];

4. The Court appears to have engaged in *ex parte* communication with Administrator McLaughlin's attorney, Randy Cox, to allow him to file a motion when the Court was closed on Saturday and then schedule a Sunday hearing where the Court decided Cox's motion on McLaughlin's behalf;

5. The Court entered an order outside of business hours on a Sunday afternoon without notice or opportunity for argument, favoring Administrator McLaughlin when

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[37] Link to AP Article detailing that the *Bradley* petition will be heard with six judges. https://bit.ly/3xv0Aeg

[38] Attached Committee Exhibit L – 4/27 Order in *Bradley* Limiting Briefing

McLaughlin was not a party to the case under which the motion was filed;

6. The Court has preliminarily acted upon an Original Petition from the Court Administrator to quash a legislative subpoena when McLaughlin could and should have filed her motion in district court like any other litigant;

7. The Court has issued Joint Orders in both Original Petitions when the cases aren't related;

8. The Court has issued an Order effectively claiming the Legislature is unable to provide due process to witnesses subpoenaed to appear before it;

9. The Court has issued an Order that gives members of the Court relief from the legislative subpoenas issued to the Justices themselves in a case to which the Justices are not parties;

10. The Court has refused to consider or acknowledge that under the Judicial Code of Conduct it cannot hear a case in which their Administrator is a party, specifically acting on their behalf or act on subpoenas issued to the Justices directly.

11. Chief Justice McGrath appears to have violated recusal rules in continuing to make decisions about how the SB 140 proceedings would be conducted after he recused himself.

These substantial deviations from standard litigation procedure should give any court observer reason to question the integrity of the process and the motivation for the consistently irregularities.

CONCLUSION

The testimony and information collected by the Committee over the past weeks raise serious concerns about the practices of the judicial branch concerning the topics highlighted above.

The use of state time and resources by multiple branch employees, including judges, to facilitate a complex lobbying effort on behalf of the Montana Judges Association, a private non-profit educational and lobbying entity, is a serious violation of Montana's laws. These violations have not been acknowledged by judicial branch officials or employees as violations at all. Improper use of state time and resources is a serious issue. State law and policy regarding proper use of state time and resources applies to all state employees and public officials, including judges and justices.

The Judicial Code of Conduct provides strong rules defining acceptable conduct for judges and employees supervised by judges. In an email from Chief Justice McGrath, he openly states his disrespect for Montana citizens' ability to understand and apply the law, and in another email openly states his disdain for the idea that Montana citizens could read the Code of Conduct and apply it. He also was copied on emails by other judges that contained potential violations of the Code

yet, he expressed no concerns about their "colorful" comments or remarks that indicated potential bias.

At the same time, it appears that multiple canons of the Code of Conduct have been violated by judges and court employees who either directly or indirectly report to the Chief Justice. Yet, in his statement to the Committee, the Chief Justice attempted to distance himself from these responsibilities by stating that the court administrator is "independent" of his supervision or the supervision of the court. Whether this is abdication of responsibility or intentional distancing on the part of the Chief Justice, failure to supervise Court employees or remind other Judges of the responsibilities under the Code of Conduct are concerning.

The branch's failure to comply with its own email and public records policies has not been adequately or consistently explained by either the Court Administrator or the Chief Justice. What is clear is that the justices themselves are grossly misinformed about their personal responsibilities for maintenance of records versus what the branch's IT staff is responsible for. Emails are routinely deleted by court employees and judges in violation of state law and policy, and the IT department does not appear to be retaining these emails in an archived format once they are deleted.

RECOMMENDATIONS

1. That this Committee continue into the interim, with proper funding, in order for the Committee to complete its investigation.

2. That the Committee complete its work on the same schedule as that of regular interim committees and produce a final report to the 68th Legislature.

3. That the Committee examine whether legislation is necessary to address Committee findings.

4. That the Committee determine whether evidence indicates that the conduct of state employees or officials should be referred to the appropriate authorities for further investigation.

5. That the Committee submit complaints to disciplinary bodies of the judicial or legal profession if facts and evidence indicate such complaints are warranted.

6. That the Committee, through Counsel, work with the Justices to resolve their non-compliance with document production on the original subpoenas.

7. That the Committee issue further subpoenas deemed necessary to complete its investigation.

8. That the Committee consider whether the current lobbying practices of the Montana Judges Association negatively impact public confidence in the branch or compromise the integrity of the judicial branch by creating the appearance of bias for or against legislation that may later be challenged in the courts.

9. That the Committee consider whether the Montana Judges Association should remain the primary education and ethics provider to the Montana judiciary, or whether a third-party would be better suited to provide such services to the branch.

PUBLIC TESTIMONY

On April 29, 2021, the Committee heard public testimony on the final report. All Committee members were present. They took testimony from four members of the public and one member of the House of Representatives; all testified in support of the Committee's report and its continued investigation.

Bart Crabtree (Montana State Council on Judicial Accountability) Would like to see the Legislature change the makeup of the Judicial Standards Commission (JSC) to provide greater accountability for the judiciary. The testifier found that 98% of grievances against judges are dismissed. They would like to see more citizens added to the JSC to oversee the conduct of members of the judicial branch.

Keith and Rae Newmeyer were grateful for the work of the Committee and believed it should continue its investigation into the potential for judicial bias. They also encouraged the Committee to revisit the legislation to add citizens to the Judicial Standards Commission.

Rep. Derek Skees (House District 11) shared the opinion of many of his constituents that the work of the Committee was important to investigate the actions of

the judicial branch and offered his assistance to the Committee should they need it.

Patrick Gould (A Professor of Law Teaching in South Korea) expressed his belief that the Montana Legislature was the only body capable of holding the State Supreme Court accountable under the tenets of the Montana Constitution. He asked the committee to look into The Conference of Chief Justices and the "interconnected series" of organizations of judges and justices as they vote on "resolutions" to advance their objectives.

APPENDIX PP

Exhibit A

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Court Administrator Beth McLaughlin
Office of the Court Administrator
215 N. Sanders St.
Helena; Montana 5960

THE MONTANA STATE LEGISLATURE, to Administrator McLaughlin.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 9:00 a.m., to produce the following documents and answer questions regarding the same:

(1) All emails and attachments sent and received by your government e-mail account, bmclaughlin@mt.gov, including recoverable deleted emails, between January 4, 2021, and April 12, 2021 delivered as hard copies and . pst digital files.

(2) Any and all laptops, desktops, hard-drives, or telephones owned by the State of Montana which were utilized in facilitating polls or votes with Montana Judges and Justices regarding legislation or issues that may come

> or have come before Montana courts for decision.

This request excludes any emails, documents, and information related to decisions made by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Pursuant to section 5-5-101, MCA; *et seq.,* a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, this 14th day of April, 2021.

By: */s/ Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Chief Justice Mike McGrath
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Chief Justice McGrath.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.*, a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, This 14th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice Beth Baker
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice Baker.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.*, a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, This 14th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice Dirk Sandefur
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice Sandefur.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.*, a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined · for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, This 14th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice Ingrid Gustafson
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice Gustafson.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.*, a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, This 14th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice James A. Rice
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice Rice.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.*, a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, This 14th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice James Jeremiah Shea
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice Shea.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.,* a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined · for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the Witness during the examination.

DATED in Helena, Montana, This 14th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice Laurie McKinnon
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice McKinnon.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.,* a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined · for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the Witness during the examination.

DATED in Helena, Montana, This 14th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

Exhibit B

BEFORE THE LEGISLATURE OF THE STATE OF MONTANA

In Re Legislative Subpoena,	)
	)
MONTANA LEGISLATURE,	)
	)
vs.	)
	)
DIRK M. SANDEFUR, Associate Justice, Montana Supreme Court.	)
	)

RESPONSE AND RETURN ON LEGISLATIVE SUBPOENA

Comes Now, Dirk M. Sandefur, Associate Justice of the Montana Supreme Court and hereby respectfully submits this response and return in good faith voluntary compliance with the undated subpoena(s) duces tecum issued by the Legislature, through the President of the Senate (Mark Blasdel) and Speaker of the Montana House of Representatives (Wylie Galt), for the production of specified documents. I hereby respond and make this return on subpoena in my capacity as an individual Associate Justice only–not as a representative or agent of the Montana Supreme Court as a whole.

1. Subject Matter Jurisdiction.

The Legislature has implied subpoena power and authority under Article III, Section I, and Article V, Section 1, of the Montana Constitution. *State ex rel. James v. Aronson,* 132 Mont. 120, 314 P.2d 849 (1957); 43 Mont. Op. Att'y Gen. 220 (1990) (Racicot, M.). As a matter of law, the legislative subpoena power is generally broad, but limited in scope to the discovery of information reasonably related to and in furtherance of its exclusive constitutional duty to enact laws within its constitutional police power including "inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the [legislature] to remedy them." *Trump v. Mazars USA, LLP,* __ U.S. __, __, 140 S. Ct. 2019, 2031–32 (2020) (internal citation and punctuation omitted). Law enforcement and other functions allocated to the coordinate Executive and Judicial branches of government are not legitimate purposes and uses of the legislative subpoena power. *Trump,* __ U.S. at __, 140 S. Ct. at 2031-32. The legislative subpoena power is further subject to all individual constitutional and legal rights and privileges applicable under the circumstances. *Trump,* __ U.S. at __, 140 S. Ct. at 2031- 32.

2. Procedural Service Requirement-Objection to Personal Jurisdiction.

Legislative subpoenas "may be served by any elector of the state," with service proven "by the elector's affidavit that the elector delivered a copy to the

witness." Section 5-5-102, MCA.[1] Here, based on email transmittal from Supreme Court staff, I am aware that, on or about April 12-16, 2021, the Legislature issue two different subpoena duces tecum in my name compelling production of specified documentary information—the first incorrectly referenced the email address of mmcgrath@mt.gov over which l have no control, and the second correctly references my state email, dsandefur@mt.gov. Neither subpoena duces tecum was personally served on me, or anyone authorized to receive service on my behalf, as expressly required by § 5-5-102, MCA. Accordingly, I hereby object to the subject subpoenas on the ground of defective service, and resulting lack of personal jurisdiction over me. However, in due respect to the Legislature and without waiver of my objection, I will and do hereby voluntarily comply with the subject subpoenas duces tecum in good faith.

3. Response and Return on Subject Matter (1) – MJA Poll Records.

Command: Produce "[a]ny and all communications. results, or responses, related to any and all polls sent to members of the Judiciary by the Court Administrator . . . between January 4, 2021, and April 14, 2021, including emails and attachments sent and received by your government email account,

[1] While the constitutional subpoena power of the Legislature necessarily includes the power and authority to issue legislative subpoenas duces tecum, the statutory provisions currently governing legislative subpoenas expressly apply only to subpoenas compelling the attendance and testimony of witnesses. *See* §§ 5-5-101 and -103 through -105, MCA.

dsandefur@mt.gov . . . as well as text messages, phone messages, and phone logs sent or received by your personal work phones, and any notes or record of conferences of the Justices regarding the same."

Response and Return: To the best of my recollection, I am aware that, at some point in the specified time period, a quantum of state email system traffic occurred between the Court Administrator and various individual judges of the MJA regarding a poll of the membership as to whether the MJA should support or oppose 2021 Senate Bill 140 (regarding the proposed abolishment of the Montana Judicial Nominating Commission in favor of direct gubernatorial appointment of judicial vacancies pending election) *before the Legislature as a matter of public policy*. To the best of my recollection, some of that email traffic was sent unsolicited to my state email account via a large group email list and similar respond-to-all responses of others. I have no documentary record of any of those email communications because: (1) I did not respond or otherwise participate in the poll or related communications; (2) the email traffic was unsolicited and which I immediately deleted; (3) the Montana Department of Administration (MDOA) is the system administrator of the state email system and any state email server repository; (4) MDOA allocates only a small amount of individual email account space and regulates that limitation by lock-out at maximum capacity and system directive for user deletion of old emails to free-up space for new emails; and (5) I have always presumed that MDOA complies with all state law and policies regarding judicial branch email communications as applicable. I have been a duly

elected Montana district court judge or supreme court justice since taking office in 2003. For the past 18 years to date, it has been my routine practice to immediately delete non-essential email traffic in accordance the above-referenced MDOA regulation.

My personal cell phone communications are protected and privileged from access or disclosure under Article II, Section 10 of the Montana Constitution. Except for occasional communications with my staff or other members of the Court regarding constitutionally protected and privileged deliberative matters pending before the Supreme Court, I generally do not use my personal cell phone for work-related communications. To the best of my recollection and without waiving any individual constitutional or other legal privilege or right, I have no personal texl messages, phone messages, or phone log records regarding the above-referenced MJA poll.

4. **Response and Return on Subject Matter (2) – Pending/Potential 2021 Legislation**.

Command: Produce "[a]ny and all emails or other communications between January 4, 2021, and April 14, 2021, regarding legislation pending before. or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, dsandefur@mt.gov . . . as well as text messages, phone messages, and phone logs sent or received by your personal work phones, and any notes or record of conferences of the Justices regarding the same."

Response and Return: On January 14, 2021, I submitted the final report of the Montana Supreme Court Standing Master Advisory Committee to the Chief Justice. It tangentially relates to potential 2021 legislation to the extent that the purpose of the Committee was to explore potential solutions to certain State Bar membership concerns regarding District Court Standing Masters through a set of Court-promulgated uniform procedural rules, potential legislation, or otherwise. Reference attached.

To the best of my recollection, in or about January 2021 , I engaged in 2-3 related email communications with the Court Administrator, who was also a member of the Committee, regarding the final report of the Standing Master Committee. In accordance with the above-referenced MDOA regulation of my state email account, I immediately deleted those email communications as non-essential and have no record of them.

To the best of my recollection, at some point in the approximate first half of the specified period, I was copied via a group email list with other members of the Supreme Court with an unsolicited copy of an email communication from the Court Administrator to another member of' the Court in regard to: (1) the status of SB 140 in the legislative process; (2) one or more identified concerns with the mechanics of the proposed legislation; (3) a statement that the parties to the email should not attempt to suggest an corrective revision to the Legislature. To the best of my recollection, the email made passing reference to a lobbyist retained by the MJA to monitor proposed

legislation of interest or concern to the operation of the judicial branch. In accordance with the above-referenced MDOA regulation of my state email account, I immediately deleted those email communications as non-essential and have no record of them.

To the best of my recollection, other than as referenced herein and except as at issue in constitutionally privileged deliberative proceedings pending before the Supreme Court, I neither have, nor have I ever had, any documentary information regarding any other pending or potential 2021 legislation in the specified period of time. Nor do I have any recollection or record of any poll other than as referenced above. In the event that my state email address may have been included in an unsolicited group email list that I do not recall, I was not a voluntary party to any such email and to the best of my recollection would have immediately deleted them in accordance with the above referenced MDOA regulation of my state email account.

My personal cell phone communications are protected and privileged from access or disclosure under Article II, Section 10 of the Montana Constitution. Except for occasional communications with my staff or other members of the Court regarding constitutionally protected and privileged deliberative matters pending before the Supreme Court, I generally do not use my personal cell phone for work-related communications. To the best of my recollection and without waiving any individual constitutional privilege or right, I have no personal text messages, phone

messages, or phone log records regarding any pending or potential 2021 legislation in the specified period.

5. Response and Return on Subject Matter (3) – MJA Business Using State Resources.

Command: Produce "[a]ny and all emails or other communications between January 4, 2021 , and April 14, 2021, regarding business conducted by the Montana Judges Association using state resources: including emails and attachments sent and received by your government email account, dsandefur@mt.gov . . . as well as text messages, phone messages, and phone logs sent or received by your personal work phones, and any notes or record of conferences of the Justices regarding the same."

Response and Return: On January 5, 2021, I was involved in an email string communication with one of my staff and a member of the Court Administrator's staff regarding my 2020 Continuing Legal Education (CLE) status and carry-over credits in relation to my upcoming 2021 CLE report to the Court Administrator. Reference attached.

On or about March 22, 2021, I received a group email from a member of the Court Administrator's staff to the members of the Supreme Court regarding the registration documents and miscellaneous conference materials regarding the annual Spring 2021 MJA CLE Conference in Lewistown, MT. Reference attached.

Sometime in the specified period, I received a group email from a member of the Court Administrator's staff regarding the interest and participation of conference attendees in a dinner on the Charlie Russell Choo-Choo

in Lewistown, Montana, incident to the Spring 2021 MJA CLE. To the best of my recollection, I responded and confirmed that my wife and I planned on attending and participating in the dinner. To the best of my recollection, I also received a multitude of unsolicited group email responses from other potential conference attendees to each other and the initially-involved Court Administrator staff member. To the best of my recollection, I was not involved in those communications other than as stated here. In accordance with the above-referenced MDOA regulation of my state email account, I immediately deleted those email communications as have no record of them.

To the best of my recollection, sometime in or about late April or early May 2021, l received a group email from a member of the Court Administrator's staff notifying conference attendees of the cancellation of the planned Charlie Russell Choo-Choo dinner at the Spring 2021 MJA CLE Conference. To the best of my recollection, I did not respond but received a multitude of unsolicited group email responses from other potential conference attendees to each other and the initially-involved Court Administrator staff member. In accordance with the above-referenced MDOA regulation of my state email account, I immediately deleted those email communications as have no record of them.

My personal cell phone communications are protected and privileged from access or disclosure under Article II, Section 10 of the Montana Constitution. Except for occasional communications

with my staff or other members of the Court regarding constitutionally protected and privileged deliberative matters pending before the Supreme Court, I generally do not use my personal cell phone for work-related communications. Nonetheless, to the best of my recollection and without waiving any individual constitutional privilege or right, I have no personal text messages, phone messages, or phone log records regarding any MJA business using state resources in the specified period.

6. Compliance bv Personal Appearance or Sooner Production.

The subject subpoenas duces tecum expressly command me to "appear . . . to produce the following . . . unless the documents are produced sooner." (Emphasis added.) Upon email submittal with referenced documents prior to the specified date and time, this Response and Return is intended to fully voluntarily comply with the subject subpoenas without need for personal appearance. However, in my discretion, I will also personally appear via videoconferencing at the appointed date and time.

DATED this 19th day of April, 2019

/s/Dirk M. Sandefur
DIRK M. SANDEFUR, Associate Justice
Montana Supreme Court

Montana Supreme Court Standing Master Advisory Committee

To: Hon. Mike McGrath, Chief Justice, Montana Supreme Court

From: Dirk M. Sandefur, Associate Justice & MSCSMAC Chair

Date: January 14, 2021

Re: MSCSMAC Committee Report -- Uniform Rules of Procedure Proposals

By prior order (AF 19-0314), the Court appointed the MSCSMAC to discuss and explore potential solutions to various concerns raised by one or more members of the State Bar of Montana, *i.e.,* P. Mars Scott, *et al,* incident to the 2019 Session of the Montana Legislature regarding the function and procedure of District Court Standing Masters currently operating in various Montana Judicial Districts'[1] within the overarching framework of §§ 3-5-124 through -126, MCA (2019), and various local district charter orders. In addition to a member of this Court as chair, the committee included three family law practitioner/Bar Members from Missoula, Bozeman, and Billings (Mr. Scott, Christopher J. Gillette, and Jill D. LaRance), a district judge in a Standing Master District (Hon. Rienne McElyea, Mont. 18th Jud. Dist.), a District Standing Master (Amy Rubin, Mont. 4th Jud. Dist.),

[1] District Standing Masters are currently functioning under local rules charters in five judicial districts—the 4th (Missoula County), 8th (Cascade County), 9th (Glacier, Pondera, and Toole Counties), 18th (Gallatin County), and 13th (Yellowstone County).

and the Supreme Court Administrator (Beth McLaughlin).

The primary concerns considered by the Committee were the stated desires of the Bar Members for litigant rights to opt-out of standing master referrals, substitute Masters, and directly appeal Master decisions to the Montana Supreme Court. At the outset, the Chair suggested that the Committee temporarily the set the direct appeal issue aside and attempt to address the Bar Member concerns through a set of uniform of rules of procedure, modeled in form on the existing uniform rules of procedure governing courts of limited jurisdiction.[2]

The Committee proceeded down that avenue but, after considerable discussion and debate over the course of multiple meetings, was ultimately unable to reach consensus on a particular rule set due to controversy over whether the proposed uniform rules should include a right to substitute district standing masters, a right to direct appeal to this Court, the applicability/non-applicability of M. R. Civ. P. 52(b) and 59-60 to standing master proceedings, and the retained supervisory authority of referring district courts. The Standing Master member separately raised various other issues as to the format and substance of any propose uniform rules. Based on this irreconcilable impasse, the Committee resolved to shutter itself and

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[2] The Committee was sharply divided from the outset on the question of the need or desirability of a right of direct appeal to this Court and thus did not reach a consensus or take a formal vote thereon.

forward to the Court the following alternative rules proposals considered by the Committee:

(1) Proposal A. Justice Sandefur drafted this proposed uniform rules set modeled-on and as a largely a common amalgam of the existing charter orders currently in place in the Montana 8th, 13th, and 18th Judicial Districts, tailored for uniformity and conformance to §§ 3-5-124 through-126, MCA, and governing Montana case law. This proposal accordingly provides no right to direct appeal to this Court, no right to substitute standing masters, and expressly clarifies consistent with currently governing statutory procedure that M. R. Civ. P. 52(b) and 59-60 do not apply to standing master proceedings. This proposal particularly provides for and specifies the retained supervisory authority of the referring district court to except a case from standing master referral, exercise supervisory control along the way, or re-assume primary administration of a case to address particular needs or exigencies in individual cases.

(2) Proposal B. This proposal is a variation of Proposal A, modified by Bar Members Scott, Gillette, and LaRance to expressly provide for substitution of standing master by reference to the existing judicial substitution rule, direct appeal ofright to the Montana Supreme Court, application of M. R. Civ. P. 52(b) and 59-60 to standing master

proceedings, and excision of the above-referenced retained district court authority provisions.

(3) Proposal C. This proposal set is a variation of Proposal A, modified by Standing Master Member Rubin to address various other issues as to format and substance from the perspective of a Standing Master.

Respectfully submitted,

Justice Dirk M. Sandefur
MSCSMAC Chair

Sandefur, Dirk

From: Sandefur, Dirk
Sent: Tuesday, January 5, 2021 11:54 AM
To: Gregor, Gwyn
Subject: 2020 DMS Cle Report
Attachments: Sandefur 2020CJE letter.pdf; 2020 CJE Form to report hours.doc

Looks good. Please proceed and advise. Thanks.

Dirk

From: Gregor, Gwyn <GGregor2@mt.gov>
Sent: Tuesday; January 5, 2021 8:56 AM
To: Sandefur, Dirk <dsandefur@mt,gov>
Subject: RE: 2020 DMS Cle Report

Here's the final one for 2020. I got the corrected letter from Shauna and this is the final. Let me know if it's good and I'll get your signature stamped and sent off.

Thanks

Gwyn Gregor
Montana Supreme Court
Judicial Assistant to Justices Rice, Sandefur, and Gustafson
444-5573
ggregor2@mt.gov

From: Sandefur, Dirk <dsandefur@mt.gov>
Sent: Tuesday, January 5, 2021 8:21 AM
To: Gregor, Gwyn <GGregor2@mt.gov>
Subject: RE: 2020 DMS Cle Report

Good Morning —

Is this the first one or the corrected one?

Dirk

From: Gregor, Gwyn <GGregor2@mt.gov>
Sent: Monday, January 4, 2021 8:08 AM
To: Sandefur, Dirk <dsandefur@mt.gov>
Subject: RE: 2020 DMS Cle Report

Here you go.

Gwyn Gregor
Montana Supreme Court
Judicial Assistant to Justices Rice, Sandefur, and Gustafson
444-5573
ggregor2@mt.gov

From: Sandefur, Dirk <dsandefur@mt.gov>
Sent: Monday, January 4, 2021 7:48 AM
To: Gregor, Gwyn <GGregor2@mt.gov>
Subject: RE: 2020 DMS Cle Report

No, that's not correct. I attended the 2020 Fall MJA CLE in its entirety. Please make sure my report reflects that. Thanks.

Dirk

From: Gregor, Gwyn <GGregor2@mt.gov>
Sent: Tuesday, December 29, 2020 10:02 AM
To: Sandefur, Dirk <dsandefur@mt.gov>
Subject: RE: 2020 DMS Cle Report

Sounds good. We'll just use the carryover since I don't think you did any CLE's this year, correct?

I'm almost done in asking questions!

Gwyn Gregor
Montana Supreme Court
Judicial Assistant to Justices Rice, Sandefur, and Gustafson
444-5573
ggregor2@mt.gov

From: Sandefur, Dirk <dsandefur@mt.gov>
Sent: Tuesday, December 29, 2020 9:56 AM
To: Gregor, Gwyn <GGregor2@mt.gov>
Subject: 2020 DMS Cle Report

Here this is. Please proceed. Thanks.

Dirk

From: Ryan, Shauna <shryan@mtgov>
Sent: Tuesday, December 29, 2020 9:47 AM
To: Sandefur, Dirk <dsandefur@mt.gov>
Subject: FW: 2020 CJE Form

Here you go. Happy New Year!

From: Ryan, Shauna
Sent: Monday, December 7, 2020 12:24 PM
To: Sandefur, Dirk <dsandefur@mt.gov>
Subject: 2020 CJE Form

Please complete the attached form and return it to me by February 1st.

Thanks much.

Shauna Ryan
Montana Supreme Court
Judicial Education Coordinator
PO Box 203005
Helena, MT 59620-3005
(406) 841-2967
shryan@mt.gov

Sandefur, Dirk

From: Gregor, Gwyn
Sent: Tuesday, January 5, 2021 12:20 PM
To: Ryan, Shauna
Cc: Sandefur, Dirk
Subject: CLE Credits for Justice Sandefur
Attachments: doc00804020210105121645.pdf; Sandefur 2020CJE letter.pdf

Shauna, attached is Justice Sandefur's CJE Activities form for 2020 along with the letter that you sent.

If you need anything else, please let me know.

Thanks and Happy New Year!

Gwyn Gregor
Montana Supreme Court
Judicial Assistant to Justices Rice, Sandefur, and Gustafson
444-5573
ggregor2@mt.gov

Sandefur, Dirk

From: Ryan, Shauna
Sent: Monday, March 22, 2021 12:03 PM
To: Baker, Beth; Gustafson, Ingrid; McGrath, Mike; McKinnon, Laurie; Rice, Jim; Sandefur, Dirk; Shea, Jim
Subject: Spring MJA Conference - Lewistown
Attachments: Memo to Judge RE Motel Registration.doc; Registration Form.doc; MENU.docx; Proposed Spring Agenda.doc

Importance: High

Good morning,

Attached please find the necessary information (4 documents) for the spring MJA conference in Lewistown.

This will be the only conference information you will receive.

If you have any questions, please contact me.

Have a great week!

Shauna Ryan
Montana Supreme Court
Judicial Education Coordinator
PO Box 203005
Helena, MT 59620-3005
(406) 841-2967
shryan@mt.gov

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice Dirk Sandefur
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice Sandefur.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, dsandefur@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, dsandefur@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, dsandefur@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.,* a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined · for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, This 15th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Justice Dirk Sandefur
Montana Supreme Court
Justice Building
215 N. Sanders St.
Helena, Montana 59601

THE MONTANA STATE LEGISLATURE, to Justice Sandefur.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 3:00 p.m., to produce the following documents, unless the documents are produced sooner:

(1) Any and all communications, results, or responses, related to any and all polls sent to members of the Judiciary by Court Administrator Beth McLaughlin between January 4, 2021, and April 14, 2021; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages; phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(2) Any and all emails or other communications between January 4, 2021 and April 14, 2021

regarding legislation pending before, or potentially pending before, the 2021 Montana Legislature; including emails and attachments sent and received by your government email account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your personal or work phones; and any notes or records of conferences of the Justices regarding the same.

(3) Any and all emails or other communications between January 4, 2021 and April 14, 2021 regarding business conducted by the Montana Judges Association using state resources; including emails and attachments sent and received by your government e-mail account, mmcgrath@mt.gov, delivered as hard copies and .pst digital files; as well as text messages, phone messages, and phone logs sent or received by your work phone; and any notes or records of conferences of the Justices regarding the same.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the

Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

Please note this request excludes any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

Pursuant to section 5-5-101, MCA, *et seq.*, a person cannot refuse to testify to any fact or produce any paper concerning which the person is examined · for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous. Section 5-5-105, MCA, does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

DATED in Helena, Montana, This 14th day of April, 2021.

By: */s/Mark Blasdel*
Senator Mark Blasdel, President of the Montana Senate.

By: */s/ E. Wylie Galt*
Representative Wylie Galt, Speaker of the Montana House of Representatives.

APPENDIX QQ

EXHIBIT E

THE SUPREME COURT OF MONTANA

[SEAL]

[Dated: April 16, 2021]

MIKE McGRATH
CHIEF JUSTICE

JUSTICE BUILDING
215 NORTH SANDERS
PO BOX 203001
HELENA, MONTANA 59620-3001
TELEPHONE (406) 444-5490
FAX (406) 444-3271

April 16, 2021

Senator Mark Blasdel
President of the Senate
Representative Wylie Galt
Speaker of the House
Montana State Capitol
Helena, MT 59620

Dear President Blasdel and Speaker Galt:

On behalf of the Montana Supreme Court, I am responding to the subpoenas addressed to each member of the Court and delivered on Wednesday afternoon. Although not the way I would have preferred to open a dialogue between our coordinate branches of government, I welcome the opportunity to provide you

with information about how and under what circumstances the Judicial Branch engages with the legislative process on matters involving court operations.

The Judicial Branch does not involve itself in the mine run of legislation—only those matters that directly impact the manner in which our court system serves the people of Montana who elect each of us. On such matters, it is appropriate for judicial officers—those who sit on cases every day and manage the courts' ever-growing caseloads—to apprise the Legislature of how its decisions may affect the functionality of the judicial system and impact Montanans. For many years, the elected members of the Judicial Branch have worked through the Montana Judges Association (MJA) to give the legislative body information important to the Legislature's consideration.[1] The MJA, funded entirely by dues contributed personally from its judicial members, hires a part-time lobbyist for this purpose and occasionally judges themselves have testified before various committees regarding the impact of legislation on Judicial Branch operations. Other than the occasional bill impacting the Judges' Retirement System, however, none of the legislative activities of the MJA affect a judge's personal interest. They instead focus on policy matters regarding court operations and management.

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[1] The MJA is primarily an educational organization that conducts seminars twice each year. It is the primary vehicle judges use to complete their mandatory continuing educational requirements.

On the rare occasion when l have, in my role as Chief, needed to advocate on behalf of a policy matter directly impacting the Judicial Branch, I have recused myself from any case involving the bill, as I did with SB 140. Aside from the Chief Justice, the involvement of other Court members in legislation is infrequent. Justice Baker occasionally has been engaged with the Legislature in her capacity as Chair of the Supreme Court's Access to Justice Commission, a body that includes members of the Legislature, representatives from the executive branch, other judges, and community leaders. This session, for example, she has had discussions with legislators about allocation of federal relief funds to support court operations impacted by the pandemic by streamlining the resolution of family law cases. At times, the Legislature has solicited input and information from the Judiciary. As example, input was sought from the legislative committee regarding HB 90 from Justice Gustafson and others because of her expertise in child dependency.

The MJA has created a legislative committee that has authority to determine if a proposed bill should be given judicial input. Most sessions, the judiciary takes positions on a very limited number of bills outside of the budget process.

If a proposed bill has major impact on the judiciary, the association, through its president, may conduct a poll of the members. On those rare occasions, the members are asked whether MJA should support, oppose, or remain neutral toward the proposed legislation. MJA's position is not a secret. Indeed, the very purpose of the

poll is to inform the Legislature of the judiciary's policy position on how the bill impacts the branch.

Members of the Supreme Court do not participate in the poll[2] for the reason that, if passed, a statute may come before the Court at a later time. These polls are conducted by email, which is the primary manner the Judicial Branch conducts its internal business and communications, including discussions related to cases, schedules, or personnel matters. There has been no improper use of State email.

It would be irresponsible for the Judicial Branch not to inform the Legislature on proposals that directly affect the court system and how it functions. Those policy decisions and the adjudication of a legal dispute occupy completely separate spheres. Judges come before you as witnesses, precisely because they know you are the policymakers; it has been our experience that the Legislature appreciates having information from those involved in the subject.

A judge's view of whether to support or oppose a bill as a matter of public policy is by no means the same as an indication of how a judge may construe the statute in subsequent litigation, or even whether the judge must decide its constitutionality. Like all citizens, a judge may hold personal views and opinions on any variety of subjects. The obligation of every judge, however, is to set aside those personal views and render decisions

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[2] The only exception to that policy I can recall was when I inappropriately indicated a personal preference to oppose HB 685 this session.

based solely on the law and the facts of a particular case. That is an obligation we all take very seriously.

The Judicial Branch operates to serve the people of Montana in a manner that complies with our judicial code of ethics. We resolve disputes that are brought before us in a straightforward manner consistent with our rules of procedure and providing due process to all sides. It is unfortunate that we have not had the opportunity thus far to discuss our procedures in a more congenial fashion. In other years, if the Legislature desired an in-depth investigation, a referral would be made to the Legislative Auditor for a perfomance audit. The Judicial Brach would gladly cooperate with the Legislative Auditor process.

Incidentally, it has been suggested that after my recusal I had ex parte communications with the attorneys in OP 21-0125, *Brown, et al. v. Gianforte,* the SB 140 case. Other than the Lieutenant General, I have had no communication with any of the attorneys in months, if not years.

Unfortunately, the subpoenas issued this week broadly seek confidential judicial communications that we cannot divulge. I invite you, however, to engage with us in a civil conversation about these matters should you have additional questions.

Thank you for this opportunity to respond for the Court.

Respectfully,

/s/ Mike McGrath

Mike McGrath
Chief Justice

Attachment

c: Sen. Greg Hertz
Rep. Sue Vinton
Rep. Kim Abbott
Rep. Tom McGillvray
Rep. Amy Regier
Sen. Diane Sands
Beth McLaughlin
Supreme Court Justices
District Court Judges

Below is a list of the bills MJA polled this session on whether to support, oppose, or remain neutral.

SB 175 (regarding removing principal from the judges' retirement system)
SUPPORTED

HB 342 and HB 355 (regarding partisan election of judges)
OPPOSED

HB 325 (regarding the election of Supreme Court justices by district)
OPPOSED

HB 685 (regarding replacing the Judicial Standards Commission with a 9 member citizens committee of inquiry with the power to investigate, sanction, or remove elected judges)
OPPOSED

SB 140 (replacing the judicial nominating commission)
OPPOSED

In addition, the MJA also is supporting HJ 40, Representative Mercer's proposal to study the Judicial Standards Commission.

EXHIBIT G

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

[Filed: April 7, 2021]

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,	)
Petitioners,	)
v.	)
GREG GIANFORTE, Governor of the State of Montana,	)
Respondent.	)

ORDER

Before the Court is Respondent Governor Greg Gianforte's Motion to Disqualify Judge Kurt Krueger and for Other Miscellaneous Relief. Respondent requests to stay further proceedings in the case pending release to the parties of the results of a poll the Court Administrator conducted among the membership of the Montana Judges Association (MJA) regarding the MJA's position on SB 140, the measure at issue in this case. Respondent requests that any

other judge who expressed a position on the bill be disqualified from participating in the case.

In response, Petitioners note that the day after Respondent filed his motion, Judge Krueger filed a Notice of Recusal, and the motion for disqualification is therefore moot. Petitioners oppose the motion for stay and "leave . . . to the sound discretion of the Court" Respondent's motion for release of the MJA poll.

First, given Judge Krueger's voluntary recusal, the motion to disqualify him is moot, and the Court need not address it.

Second, the parties are advised that no member of this Court participated in the aforementioned poll. The Court is advised that the final vote was 34 to 3 to oppose the bill and that the MJA's opposition to the bill was presented to the Legislature and is a matter of public record. Court Administrator Beth McLaughlin's February 1, 2021 e-mail regarding the poll, which she sent to the Chief Justice, MJA President Judge Greg Todd, and MJA lobbyist Ed Bartlett is attached to this Order. It reflects her handwritten note that, although the vote was 31-3 at the time she sent the e-mail, the final vote was 34-3.

Third, the Court has determined that the six undersigned members of this Court will consider the case on the Petition and the responses submitted and—in accordance with M. R. App. P. 14(7) and with our prior Order—determine whether to order more extensive briefing, order oral argument, or decide the matter upon the initial filings.

Finally, because his motion is 1,986 words; Respondent also requests leave to exceed the 1,200-word count limitation of M. R. App. P. 16(3). The Court has considered the full motion and attachments and accepts the overlength filing.

For the foregoing reasons,

IT IS THEREFORE ORDERED that the Respondent's motions to disqualify and for other miscellaneous relief are DENIED. Pursuant to the Court's April 5 Order, the summary response shall be filed on or before April 14, 2021.

The Clerk is directed to give notice of this Order to all counsel of record.

Dated this 7 day of April, 2021.

/s/ _____

/s/ _____

/s/ _____

/s/ _____

/s/ _____

/s/ _____

Justices

McLaughlin, Beth

From: McLaughlin, Beth
Sent: Monday, February 1, 2021 8:17 AM
To: Todd, Gregory; Ed Bartlett (efbartlett@charter.net); McGrath, Mike
Subject: votes

Good morning,

34-3

On SB140 the vote is 31-3 to oppose. Of course, you saw the comments about improvements that could be made to the Commission process. The hearing is schedule for February 9th at 9 a.m.

On the retirement bill and holiday, the vote was 20-2 to support (or not oppose) the bill. The bill hasn't been introduced yet. I don't know in the by-laws if the vote tabulation is based on the members voting or the total membership.

The justices have not voted on either bill and I assume will not.

Thanks,

Beth McLaughlin
Supreme Court Administrator
406-841-2966

APPENDIX RR

Exhibit K

Zimbra **abra.belke@mtleg.gov**

RE: Follow-Up for Information Contained in Today's Order

From: McLaughlin, Beth <bmclaughlin@mt.gov>
Subject: RE: Follow-Up for Information Contained in Today's Order
To: Abra Belke <abra.belke@mtleg.gov>
Cc: mark blasdel <mark.blasdel@mtleg.gov>, wyliegalt
Wed, Apr 07, 2021 04:56 PM
2 attachments

Ms. Belke,

Attached are the two items I can identify in my records related to SB140. The first is the e-mail attached to the Supreme Court's order of today noting the six associate justices would be sitting on the case without a District Court judge to replace Chief Justice McGrath. I did not retain records of the vote by judges other than the total. As I recall several judges called with their responses as well but again, I did not maintain a list by name or the individual e-mails. Please note Judicial Branch policy does not require retention of these ministerial-type e-mails.

The second attachment related to SB140 is an internal planning document outlining the upcoming appointment of the Chief Water Court Judge.

As I said, I will make every effort to search for and get the other requested information to the President and the Speaker on Friday.

Take care,

Beth McLaughlin
Supreme Court Administrator

-----Original Message-----

From: Abra Belke <abra.belke@myleg.gov>
Sent: Wednesday, April 7, 2021 10:19 AM
To: McLaughlin, Beth <bmclaughlin@mt.gov>
Cc: mark blasdel <mark.blasdel@mtleg.gov>; wyliegalt; Katie Wenetta; Court, Scclerk <clerkofsupremecourt@mt.gov>
Subject: [EXTERNAL] Follow-Up for Information Contained in Today's Order

Hello, Ms. McLaughlin:

The President received a copy of the attached order, filed today with the Clerk of the Supreme Court.

On page 2, the order describes the vote total on MJA's poll re: SB 140 as being 34-3. The order includes no breakdown of which judges voted which way.

While the President is comfortable waiting until Friday to receive the bulk of the requested information, we are specifically requesting the breakdown for this 34-3

count by close of business today. You may reply-all to this e-mail with the requested information.

We appreciate your attention to this matter. Sincerely. Abra Belke

--

Chief of Staff to the Republican Leadership Montana State Senate abra.belke@mtleg.gov Office 410 -- Montana State Capitol (406)444-2779

Legislators are publicly elected officials. Legislator emails sent or received involving legislative business may be subject to the Right to Know provisions of the Montana Constitution and may be considered a "public record" pursuant to Montana law. As such, email, sent or received, its sender and receiver, and the email contents, may be subject to public disclosure, except as otherwise provided by Montana law.

doc00741520210407162304.pdf
71 KB

doc00741620210407162310.pdf
886 KB

Zimbra **abra.belke@mtleg.gov**

RE: Follow Up to your 4/7 Email

From: McLaughlin, Beth <bmclaughlin@mt.gov>
Subject: RE: Follow Up to your 4/7 Email
To: Abra Belke <abra.belke@mtleg.gov>
Cc: wyliegalt, mark blasdel <mark.blasdel@mtleg.gov>

Thu, Apr 08, 2021 04:17 PM
1 attachment

Ms. Belke,

Thanks for your note. I provided the information that I have in my possession for SB140. I did not retain the e-mails or any paper notes other than what I have produced. As this occurred more than two months ago, I have no recollection of who called me with a vote. If I had the documents, I would have sent them yesterday. They were ministerial in nature to me, collected as an administrative courtesy to the judges, and I did not keep them.

I have copied the President and Speaker so I can be clear that I have no nefarious intent; instead I have to acquiescence to sloppiness. Nobody is more dismayed than I, that I do not have the documents related to SB140 as I always promptly respond to inquiries. Clearly, it appears the Judicial Branch should consider policy changes to provide specifics around retention of e-mail and other administrative documents but it is not something I can do retroactively. I have not completed the search for other information but will do so and have

it delivered tomorrow. I have attached the Branch's e-mail policy.

Take care,

Beth McLaughlin
Supreme Court Administrator
406-841-2966

From: Abra Belke <abra.belke@mtleg.gov>
Sent: Thursday, April 8, 20211:53 PM
To: McLaughlin, Beth <bmclaughlin@mt.gov>
Subject: [EXTERNAL] Follow Up to your 4/7 Email

Ms. McLaughlin:

We have additional questions. Please clarify the following:

1. Will you be producing the documents requested by the Legislature in accordance with MCA 3-1-702 or are you providing notice that you will produce nothing further?
2. Did you delete emails and records related to the MJA judge's poll on SB 140?
3. Identify the judges who called you to vote on the SB 140 poll.
4. Identify the judges who responded to the SB 140 poll who did not use the 'reply all' feature.
5. Produce the Judicial Branch policy re: retention of records today.

We expect the response to the above inquiries today.

We continue to expect your production of the requested documents, no later than COB tomorrow, 4/8.

Sincerely, Abra Belke

--
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