No. 21-859

In the
Supreme Court of the United States

THE MONTANA STATE LEGISLATURE, ET AL.,

Petitioners,

v.

BETH MCLAUGHLIN,

Respondent.

On Petition for A Writ of Certiorari to the Montana Supreme Court

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether this Court should review an interbranch state government dispute involving the Montana Supreme Court's application of Montana law on judicial recusal and the legislature's investigative powers, where the legislature issued overly broad subpoenas for judicial branch emails with no legitimate legislative purpose.

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INTRODUCTION

This case presents an interbranch conflict involving the legislative and judicial branches of Montana state government decided under state law. It is not, and never was, a Fourteenth Amendment case.

The Montana Legislature issued a subpoena for "all emails and attachments sent and received by" Montana Court Administrator Beth McLaughlin. The subpoena was not served on McLaughlin but instead on Misty Ann Giles, a third-party records custodian in the executive branch of government and political ally appointed by Montana's newly-elected governor, Greg Gianforte. No notice was given to McLaughlin or any member of the judiciary. No legislative purpose was expressed in the subpoena, which demanded compliance within 24 hours.

By the time McLaughlin learned of the subpoena—late on a Friday afternoon— Giles had already produced over 2,000 internal judicial records from McLaughlin's email account. None of the records were reviewed for privileged or confidential information, such as private medical information, personnel and disciplinary issues, judicial work product, Youth Court case information, and confidential matters before the Judicial Standards Commission,[1] just to name a few. McLaughlin immediately retained counsel and pleaded with the

[1] The Judicial Standards Commission is a constitutionally-created body whose proceedings are confidential. *See* Mont. Const. Art. VII, § 11.

Legislature to allow for an orderly production of documents that would afford an opportunity to review for private and privileged information. The Legislature refused to respond.

McLaughlin sought emergency relief from the Montana Supreme Court. The court issued an order temporarily quashing the subpoena. In response, the Legislature openly declared it would "not recognize this Court's Order as binding and will not abide it."

The Legislature then issued additional subpoenas for McLaughlin's records, including revised subpoenas to the executive branch records custodian and, this time, to McLaughlin. The revised subpoenas suffered the same general deficiencies as the first. McLaughlin challenged the validity of the new subpoenas as well. While the subpoena challenge was pending, the Legislature chose to subpoena each and every Justice of the court. The Justices responded to the subpoenas, including by letter and by appearance before a legislative committee.

The Justices' own subpoenas were never at issue in the litigation. The Legislature later voluntarily withdrew all subpoenas, including those to the Justices. Now, seeking review before this Court, the Legislature misstates the facts, cries foul, and claims the entire Montana Supreme Court should have recused itself from adjudicating McLaughlin's challenge.

The Montana Supreme Court ultimately held that while the Legislature possesses subpoena power, the

subpoenas for McLaughlin's judicial branch records were overly broad and failed to protect potentially private or privileged information swept up in the subpoenas' breadth. The court's decision was based on state law, though consistent with this Court's own response to overbroad legislative subpoenas. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). The Legislature's attempt to rewrite the history of this litigation and the issues presented to obtain review should be rejected.

STATEMENT OF THE CASE

The Legislature's central argument—that the Montana Supreme Court judged its own case—hinges on the claim that "the Justices quashed *all* the subpoenas—including those issued to them." Pet. for Cert. 2. The claim is incorrect. The Montana Supreme Court quashed only the subpoenas directed to or seeking McLaughlin's judicial branch records, not those directed to the Justices themselves.

The following facts are correct.

1. The interaction between Montana's legislative and judicial branches on proposals affecting the court system.

When the legislative branch "expresses concern" about the court system and considers whether "a change in the law is necessary," the practice of the judiciary in providing input of "judges from the front lines" and "work[ing] in partnership" with the legislative branch on potential legislation is not only

commonplace, but encouraged. *See, e.g.*, Chief Justice John G. Roberts, Jr., *2021 Year-End Report on the Federal Judiciary,* 5 (2021). This is true in the federal system, *id.,* and in Montana as well.[2]

Montana's citizen Legislature meets for 90 days on alternating years. Mont. Const. Art. V, § 6. When legislation might affect the court system, the Montana Legislature often seeks the views of Montana's judiciary. The Chief Justice of the Montana Supreme Court explained this longstanding process:

> 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

[2] Examples abound of state court judge associations involved with legislative and executive branches on issues of concern to the courts. The Conference of Chief Justices is directly active on multiple court-related issues. www.https://ncsc.org. The same is true of the Washington State Judges Association, see https://www.wascja.com/legislative-committee, the Texas Association of District Judges, https://texasdistrictjudges.org/, and others. These organizations cannot function without communications among member judges.

> 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. 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.

Pet. App. 628 (footnote omitted).

The MJA's involvement in Montana's legislative process is unremarkable and routine. It is also consistent with the Montana Code of Judicial Conduct, which provides a judge may "appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body" when "in connection with matters concerning the law, the legal system, or the administration of justice." Mont. Code Jud. Conduct, Rule 3.2. Participation is appropriate because "[j]udges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share

that expertise with governmental bodies and executive or legislative branch officials." *Id.*, cmt. 1.

As part of this process, the MJA sometimes polls its trial court members so the judiciary's expressed views on matters affecting the legal system accurately reflect the views of its members. Again, Montana's Chief Justice explains:

> 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 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. ...

Pet. App. 629-30 (footnote omitted).

MJA polls are administered by the Court Administrator, Beth McLaughlin. Her job has broad duties regarding administration of Montana courts, including human resources, juvenile probation, budget and finance, and court services. Mont. Code Ann. § 3-1-702. *See generally* https://courts.mt.gov/cao/.

2. The Legislature obtains judicial-branch documents by subpoena, indirectly from a third-party records custodian, without notice to the judiciary.

This case arose from an original jurisdiction proceeding in the Montana Supreme Court titled *Brown v. Gianforte*, OP 21-0125 (Mont. 2021). *Brown* was a direct constitutional challenge to Senate Bill (SB) 140 which, when enacted, replaced the appointment of state judges to vacant seats after screening by Montana's Judicial Nomination Commission with direct gubernatorial appointments.

When SB 140 was first introduced in the 2021 Montana Legislature, certain trial court members of the MJA responded to an informal email poll administered by McLaughlin. That poll later became a flashpoint when the Respondent in *Brown*, Governor Gianforte, moved to disqualify District Court Judge Kurt Krueger, appointed to sit in place of Chief Justice Michael McGrath in the SB 140 litigation,[3] based on Judge Krueger's participation in the poll. *See* App. to Pet. for Cert. 342-55 [hereinafter

[3] Chief Justice McGrath recused himself due to earlier discussions regarding SB 140. Pet. App. 629.

Pet. App.]. On April 7, 2021, the Montana Supreme Court denied the motion as moot because Judge Krueger had recused himself. *See* Pet. App. 111-13. The Court specifically noted that "no member of this Court participated" in the MJA poll of district court judges regarding SB 140. Pet. App. 112.

Unwilling to take the Montana Supreme Court at its word, the Legislature issued a subpoena for judicial branch emails the following day. App. to Brief in Opp. 19a-20a [hereinafter Resp. App.]. The subpoena was not directed to the judiciary or Court Administrator McLaughlin but instead to Director Giles of the Montana Department of Administration (DOA) which has administrative control of the state's computer servers. Resp. App. 19a. The DOA Director is a political appointee of, and reports to, the Governor.

The subpoena to DOA sought production of "[a]ll emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021," along with "[a]ny and all recoverable deleted e-mails" from McLaughlin's account in the same date range. *Id.* The subpoena contained no statement of its purpose, legislative or otherwise. *Id.* It demanded production of the materials the next day by 3 p.m. *Id.* The DOO Director accessed the judiciary's computer systems, without notifying any judicial employee or court official, and dutifully produced over 2,000 internal judicial branch emails to the Legislature without review for privilege or confidentiality. Resp. App. 21a-24a.

3. The Legislature ignores pleas to negotiate a process for production of records after review for privilege and confidentiality.

McLaughlin first learned of the subpoena for judicial branch emails in the late afternoon of Friday, April 9. Resp. App. 22a. Concerned that mass production of emails by a third party would release confidential information, McLaughlin retained counsel and immediately commenced efforts to reach agreement with the Legislature and the DOA to allow time to review the requested records, and to then produce responsive documents "through an orderly process that protects existing privacy interests." Resp. App. 21a-24a, 27a-30a. The request was not only prudent, but constitutionally required. Montanans enjoy an express state constitutional right to privacy, a right enforceable against the government when the government produces records in its possession. Mont. Const. Art. VII, §§ 9-10. McLaughlin advised that if an agreement could not be reached "staying response . . . until the important Constitutional and personal privacy issues can be resolved in a legally appropriate way," she would file an emergency petition directly with the Montana Supreme Court. Resp. App. 30a.

4. McLaughlin moves to quash the subpoena.

Receiving no response, McLaughlin filed an emergency petition with the Montana Supreme Court late Saturday, April 10. Resp. App. 1a-31a. The

petition was filed in *Brown*, the original proceeding challenging constitutionality of SB 140, the genesis of the subpoena. Petitioners concede the "underlying dispute" in this case arose from passage of SB 140. Pet. for Cert. 4.[4]

Shortly after the emergency petition was emailed for filing, the DOA brushed aside McLaughlin's concerns, stating they should be "addressed to the Speaker [of the House] and President [of the Senate], as they are the issuers of the subpoena." Resp. App. 38a. McLaughlin pressed DOA to disclose plans regarding production from her email account, and whether there was any mechanism in place for reviewing documents "for the presence of personal or private information or information that is otherwise protected by law." Resp. App. 37a.

The next day, Sunday, April 11, the DOA revealed that documents responsive to the subpoena had been delivered to the Legislature two days before, and acknowledged release without review, stating:

> DOA is complying with the scope of the subpoena as written. As the third party holder of the documents, DOA is not well suited to ascertain which fall within the concerns you raise. I am happy to provide copies of the .pst file of what we turned over on Friday and then

[4] The Montana Supreme Court ultimately ruled in the Legislature's favor in *Brown*, OP 20-0125, upholding the constitutionality of the SB 140. 2021 MT 149, 404 Mont. 269, 488 P.3d 658.

> do the same on Monday with the remaining documents.

Resp. App. 36a. Only then did McLaughlin learn that judicial emails—over 2,000 of them—had been turned over wholesale to the Legislature.

Upon learning of the DOA's production, McLaughlin supplemented her earlier filing. Resp. App. 31a-40a. McLaughlin again asked the Legislature and DOA to simply "stand down" to allow a process protecting privileged and private information, noting the "risk of serious and irreparable harm if events continue to spin out in a political process." Resp. App. 34a.[5]

The Montana Supreme Court issued a Temporary Order on Sunday, April 11. Pet. App. 115-19. The court acknowledged the need to "address the serious issues raised regarding the Legislature's authority to issue" the contested subpoena, in light of it being "facially, extremely broad in scope, with a substantial potential of the infliction of great harm if permitted to be executed as stated." Pet. App. 117. The court set a briefing schedule and ordered that the "subpoena issued by the Legislature on April 8, 2021, is hereby quashed pending further order of the Court." Pet. App. 118.

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[5] McLaughlin consistently maintained she sought only to protect privileged documents and made clear that "[d]ocuments not privileged are subject to production if properly requested." Resp. App. 179a n.2. *See also* Resp. App. 189a, 203a n.1, and 208a ("The Legislature can get unprivileged and otherwise properly obtainable records, it just has to do it correctly.").

5. The Legislature proclaims itself unbound by law, declaring it "will not abide" the Montana Supreme Court.

Within hours of the Court's Temporary Order, the Montana Attorney General, newly retained as counsel for party leadership in the Legislature, delivered a letter to the Acting Chief Justice of the Montana Supreme Court, Jim Rice. The Attorney General stated:

> *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.

Pet. App. 381 (emphasis added).

Having unilaterally declared itself unbound by any order of Montana's highest court, the Legislature served a second subpoena April 13, again on the DOA and again without notice to McLaughlin or the judiciary. This subpoena sought the same emails as before, plus "any emails and attachments responsive to the Legislature's April 7th subpoena which have not yet been delivered." Resp. App. 41a. The subpoena commanded a response *the same day* at 3 p.m. *Id.*

The next day the Legislature, in its motion to dismiss McLaughlin's emergency petition, stated:

> 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 . . . 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, [the DOA] 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.

Pet. App. 199 (emphasis added).

6. The Legislature serves subpoenas on each individual Justice of the Montana Supreme Court.

Unlike the Legislature, the DOA heeded the Montana Supreme Court's April 11 order and declined to produce additional documents demanded in the revised subpoena. Undeterred, the Legislature repackaged the quashed subpoena, and on April 15 served subpoenas not only on McLaughlin, but on each individual Justice of the court. Pet. App. 577-626. The subpoenas demanded production of the same emails as the quashed April 7 subpoena along

with "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." Resp. App. 53a. The subpoenas commanded compliance and an appearance before a legislative committee four days later, April 19. *Id.*

McLaughlin promptly filed an Emergency Motion to Quash Revised Legislative Subpoena. Resp. App. 43a-68a. On April 16, the Court issued an order temporarily enjoining the Revised Subpoena to McLaughlin. Pet. App. 7. The Court also "temporarily stayed" the subpoenas to the Justices "until this Court can establish the scope, limitations, and parameters to be applied by courts when the Legislature exercises its authority to obtain and competing interests are presented." Pet. App. 8.

While the Court's April 16 Order relieved McLaughlin of her obligation to comply or appear at the April 19 Legislative Hearing, the Supreme Court Justices appeared and answered questions.[6] In advance of the hearing, Chief Justice McGrath sent a letter explaining how and why Montana's judiciary provides policy input on proposed legislation, including the role and purpose of the MJA and its limited involvement with legislative activities. Pet. App. 627-33.

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[6] Video of the hearing is found at http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210416/-1/43381.

After hearing from the Justices, the Legislature took no further action regarding the judicial subpoenas. The committee simply issued a Majority Report. Pet. App. 531-76. Petitioners chose not to furnish this Court with the Minority Report but Respondent does so here. Resp. App. 104a-09a. The report highlights the political nature of the subpoenas, describing the actions of the Legislature and Attorney General as "part of a coordinated effort to attack and smear the independent judiciary by Republicans in the Legislature and the Executive Branch." *Id.* at 104a. The Minority Report also notes it is "unprecedented for the executive branch to essentially hack into the judicial branch's records, without consent or providing any opportunity to review the records for privileged or confidential information affecting the constitutionally-protected privacy rights of third parties." *Id.* at 107a.

7. The district court quashes the subpoena to Justice Jim Rice.

As Petitioners note, one member of the Montana Supreme Court (Justice Rice) recused himself from participation in the *McLaughlin* proceeding and separately challenged, in state district court, the April 15 subpoena served on him. Petitioners lauded Justice Rice for following a "more proper process" (Pet. App. 225), but neglected to provide the resulting orders from the district court. McLaughlin includes as Respondent's Appendix 16, 211a – 234a, the district court's orders enjoining enforcement of the April 15 subpoena and later declaring the subpoena invalid.as it "exceeded the Legislature's limited

legislative investigative subpoena authority." Resp. App. 232a-33aa.

The Legislature did not appeal either order.

8. The Legislature's motion to disqualify all Justices on the Montana Supreme Court is rejected as a "unilateral attempt to manufacture a conflict."

The Legislature subpoenaed the Court Administrator and the Justices on April 15. Two weeks later, the Legislature moved to disqualify the Justices from the case. Pet. App. 222-29.

It is apparent the subpoenas issued to the Justices were to lay the groundwork for the later disqualification motion. The subpoenas to the Justices sought information McLaughlin would have had anyway. Pet. App. 23.

Though they take a different position in seeking review before this Court, Petitioners conceded below that the subpoenas to each Justice were *not* at issue before the Montana Supreme Court and were in fact *irrelevant* to the validity of the subpoenas served on McLaughlin and the DOA. Indeed, the subpoenas to the Justices were repeatedly brushed aside by the Legislature as not germane:

- "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*." Pet. App. 233(emphasis added).

- "For purposes of this case, the individual subpoenas to the Justices don't alter the conflict calculus at all." Pet. App. 232.

- "And it doesn't matter that the Justices have been individually subpoenaed. For even if only Administrator McLaughlin's subpoena was at issue, the basis underlying the motion to disqualify would remain the same." Pet. App. 232.

Petitioners now assert the Montana Supreme Court quashed its own subpoenas and impermissibly acted as "judges in their own case." Pet. for Cert. 2-3. But there was never a case involving the Justices' subpoenas. The Justices responded to the subpoenas by way of Chief Justice McGrath's letter to legislative leadership and by appearing at a legislative hearing on April 19. The Legislature took no further action regarding the subpoenas to the Justices and no party brought their validity to any court for consideration, other than Justice Rice who took the Legislature to state district court and prevailed. Resp. App. 145a-70a and 211a-34a.

The Montana Supreme Court's orders reflect the lack of adjudication of the individual Justice's subpoenas. The April 11 Temporary Order quashed the subpoena on the DOA "pending further order of the Court." Pet. App. 118. That ruling had nothing to

do with the Justices' subpoenas because they had not yet been issued.

The April 16 Order held the April 15 Revised Subpoena to McLaughlin was "temporarily enjoined pending further proceedings . . . ." Pet. App. 7. The Court also "temporarily stayed" the subpoenas served on the Justices "until this Court can establish the scope, limitations, and parameters to be applied by courts when the Legislature exercises its authority to obtain and competing interests are presented." Pet. App. 8. Absent this order, the Legislature would have been able to end-run the court's orders temporarily enjoining the McLaughlin subpoenas, which were directly at issue in the already-pending case.

In its next order—the May 12 Order unanimously denying the Legislature's Motion to Disqualify Justices (Pet. App. 222-29)—the court specifically emphasized that "this case does not involve adjudication of any subpoena issued to a member of this Court." Pet. App. 21. Instead, the Justices noted that:

> 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.

Pet. App. 23.

9. The Legislature withdraws all subpoenas.

The Legislature petitioned for rehearing on May 26 from the court's order denying the disqualification motion. Pet. App. 230. McLaughlin opposed the petition. Pet. App. 40-41. The court denied the petition and also issued an opinion on the merits: (1) quashing the McLaughlin subpoenas or, if withdrawn, declaring them not available for reissue; (2) permanently enjoining the DOA from further compliance with the subject subpoenas; (3) enjoining the Legislature from using the documents it had illegally obtained under invalid subpoenas; and (4) ordering the "immediate" return of the

subpoenaed materials to McLaughlin.[7] Pet. App. 81-82. The court's order did not address or even discuss the subpoenas served on individual Justices.

Having unsuccessfully argued that the issue before the court had no "judicial solution," (Pet.App. 231), the Legislature then unilaterally advised that all of the previously issued subpoenas were "withdrawn." Pet. App. 513-27. As to each subpoena, the Legislature stated its withdrawal "extinguishes any obligation for you to comply with the Subpoenas and produce the requested documentation and information." *See* Pet. App. 520, 524. The Legislature then filed a Motion to Dismiss for Mootness on July 22. Pet. App. 513-17. Seeking again to avoid judicial review, the Legislature claimed its withdrawal of the subpoenas rendered McLaughlin's petition moot. The court denied the motion. Pet. App. 31-39.

10. The Legislature's professed good faith.

The Legislature insists it made "repeated invitations to resolve" issues "via negotiation and accommodation." Pet. for Cert. 2. It did not. At Resp. App. 36a-40a, the Court will find entreaties to the Montana Legislature, DOA, and the Attorney General's office in which McLaughlin's counsel unsuccessfully tried to "negotiate for a pause amidst the ongoing release of thousands of unredacted

[7] Notwithstanding the order to immediately return the improperly obtained documents, neither the Legislature nor the Attorney General's office has complied. No motion for stay of the order was made to the Montana Supreme Court or this Court.

Judicial Branch emails with which to implement legal and procedural protections." Pet. App. 33. Each request was met with silence and, ultimately, the Attorney General's declaration that the Legislature would not follow orders of the Montana Supreme Court.

The Montana courts addressed, as a factual matter, the Legislature's professed interest in "negotiation and accommodation." The state district judge who quashed the subpoenas to Justice Rice found "no evidence that the Legislature would or could negotiate in good faith with Justice Rice," especially in light of the Attorney General's "caustic express representations" regarding the Legislature's refusal to comply with Supreme Court orders. Resp. App. 167a.

Likewise, the Montana Supreme Court addressed the Legislature's negotiation ploy:

> 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 by

> McLaughlin's counsel to seek a good faith resolution to implement a process to protect citizens' privacy rights went unrequited.

Pet. App. 35-36.

REASONS FOR DENYING THE PETITION

The Petition satisfies not a single requirement of Rule 10 of the Rules of the Supreme Court of the United States. Petitioners do not cite or even try to fit the Petition to the requirements of Rule 10. Instead, the Petition is a strained effort to refashion a state law decision as a matter of federal due process. If Petitioners are correct, there is no limit to this Court's jurisdiction to hear and decide issues of state law, particularly issues touching sensitive state interbranch political questions.

There are at least five independent reasons the Legislature's Petition should be denied.

First, the issue raised by the Legislature is one of state law. No federal question is presented.

Second, the Legislature may not invoke the Due Process Clause because the Fourteenth Amendment is limited—by its plain terms and by an extensive body of case law—to *persons*. Political subdivisions of a state may not wield the Fourteenth Amendment as a cudgel to settle political scores in federal court.

Third, the Montana Supreme Court's holding is constrained to the unique facts of this case and in line with this Court's precedent. Any decision by this Court would be of limited precedential value.

Fourth, the Montana Supreme Court's decision was consistent with *Trump v. Mazars*, recognizing the limited nature of legislative subpoena power—albeit in the federal system.

Finally, the issue presented is moot because the Legislature's subpoenas to the Justices were voluntarily withdrawn and were never at issue before the Montana Supreme Court.

For any one or all these reasons, it is appropriate for this Court to deny the Legislature's Petition.

I. There is no federal question. The issue before the Court deals exclusively with state law and state ethics rules.

Whether state supreme court justices should recuse is a question of state law and state ethics rules, not federal due process. *See* Mont. Const. Art. III, § 1, and VII, § 1; Mont. Code Ann. §§ 3-1-803, -805; M. C. Jud. Cond. 1.2, 2.12. The Montana Supreme Court's opinion, legal authority, and detailed analysis of the recusal issue makes this abundantly clear. Pet. App. 12-30.

The Petitioner's own arguments cut against its litigation position that a federal question exists. The Legislature now argues the Montana Supreme Court

improperly invoked its original jurisdiction to hear the case below, but that question is premised on an issue of state law—namely, an interpretation of Article VII, § 2(1) of the Montana Constitution and Rule 14, Montana Rules of Appellate Procedure. The Legislature argues the Montana Supreme Court improperly invoked the Rule of Necessity to avoid recusal, and should have called in retired judges, mediators or special masters to hear the case under Mont. Code Ann. § 19-5-103(1)(a)-(b), Mont. Const. Art. VII, § (3)(2), and M. R. App. P. 7. Pet. for Cert. 28-29. But this argument is based entirely on an interpretation of state law—state statutes, the state constitution, and state rules of appellate procedure governing the recusal and substitution of state court judges.[8]

The Legislature's attempt to frame the question under the Due Process Clause is wholly inconsistent with this Court's precedent. "'[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level….'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1927)). Accordingly, "[r]ather than constitutionalize every judicial disqualification rule, the Court has left such rules to

[8] While the issue of retired judges acting as supreme court justices was not raised below, it is clear neither Mont. Code Ann. § 19-5-103(1)(a)-(b) nor Mont. R. App. P. 7 applies under these facts. The former allows for a retired judge or justice who has voluntarily retired after at least 8 years of service "to aid and assist any district court or any water court"—not to sit on the Supreme Court. The latter is a rule imposing mandatory alternative dispute resolution in certain types of appeals.

legislatures, bar associations, and the judgment of individual adjudicators." *Williams v. Pennsylvania*, 579 U.S. 1, 24 (2016) (Thomas, J., dissenting). Indeed, until recently, this Court recognized just two situations in which the Federal Due Process Clause requires disqualification of a judge. The first arises when the judge has a financial interest in the outcome of the case. *See Tumey v. Ohio*, 273 U.S. 510, 527 (1927); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). The second arises when the judge is trying a defendant for certain criminal contempts. *In re Murchison*, 349 U.S. 133 (1955); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). Neither applies here.

The Legislature relies on *Caperton* and the Court's determination that recusal is necessary where "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." 556 U.S. at 872 But *Caperton* involved an "extraordinary situation" in which a defendant spent millions of dollars to replace a judge on a case involving a $50 million verdict against the defendant's company. *Id.* at 886-87. The Court found "a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 884. The Court expressly advised that "[a]pplication of the

constitutional standard implicated in this case will thus be confined to rare instances." *Id.* at 890.

The present case does not involve judicial elections or campaign contributions. Nor does it involve the same kind of personal stake or financial influence over a presiding judge. This case is far more akin to *United States v. Will*, 449 U.S. 200 (1980) and *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004). Those decisions counsel against the Legislature's Petition.

In *Will*, this Court held that under the Rule of Necessity, the federal judiciary could hear a case involving increases in its own compensation. 449 U.S. at 214-16. Judicial recusal was not required even though all Article III judges had an interest in the outcome, because "the case cannot be heard otherwise." *Id.* at 213 (citing F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929)). The Court endorsed the "well established" principle 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 a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *Id.* at 214. Neither due process nor the Fourteenth Amendment was mentioned.

The same is true of *Cheney*. There, the Sierra Club demanded Justice Antonin Scalia's recusal based on his friendship with then-Vice President Richard Cheney, named in his official capacity in the lawsuit. Justice Scalia denied the recusal motion. He

explained why the Sierra Club's arguments lacked merit, yet never mentioned the Fourteenth Amendment nor due process. Rather, he explained that "[s]ince I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse . . . That alone is conclusive[.]" *Cheney*, 541 U.S. at 926-27. Justice Scalia further explained that recusal would "harm the Court" and encourage future litigants to suggest improprieties and demand recusals for "other inappropriate (and increasingly silly) reasons." *Id.* at 927. That warning is particularly apt when applied to the actions of the Legislature in this case.

Cheney was briefed extensively below (Resp. App. 119a, 140a-41a) but the Legislature now fails to even cite it. The omission is telling, especially because the potential prejudice here is far greater than in *Cheney*. The recusal target in *Cheney* was a single Justice, whereas here the Legislature deliberately manufactured a conflict after the underlying case was already underway and then claimed the conflict required disqualification of every single Justice. If allowed, future litigants will be encouraged to create conflicts, suggest improprieties, and demand recusals for purely tactical reasons. Countenancing these tactics would paralyze Montana's judiciary, in which a single court—the Montana Supreme Court—possesses original and appellate jurisdiction and authority to issue writs. Mont. Const. Art. VII, § 2.

Whether the purported interest in this case requires recusal should be left to the State of Montana. In areas traditionally reserved for state

regulation, such as state judicial elections and state recusal policy, this Court has always been reluctant to invade. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (rejecting a due process challenge to a state statute in an area traditionally regarded as in the "province of the States"). This case has always been centered on questions of state law. Nothing in the Legislature's rhetoric changes this.

II. The Legislature does not have Fourteenth Amendment due process rights against another branch of state government.

The Petition proclaims the Legislature "possesses the same due process protections as any other litigant," and posits "[t]his must be, for no court could exercise jurisdiction over a government party to resolve a substantial legal question while depriving the same party of the process due any disputant." Pet. for Cert. 19-20. But the Fourteenth Amendment provides no State shall "deprive any *person* of life, liberty, or property, without due process of law." U.S. Const. amend. XIV (emphasis added). The Due Process Clause does not apply to the Legislature, a co-equal branch of the constitutional government of the State of Montana. *See* Mont. Const. Art. III, § 1. The Legislature disregards the well-developed body of law that such protections are for *people*, not governments. There is no conflict of authority on this issue.

This Court recognized that "like its forebear in the Magna Carta" the Fourteenth Amendment Due Process Clause was intended to "secure the

individual" from arbitrary government action. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citations omitted); *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (Fourteenth Amendment Privileges and Immunities and Equal Protection Clauses "protect people, not States"). In *South Carolina v. Katzenbach*, the Court ruled that a state is not a "person" entitled to due process under the Fifth Amendment. 383 U.S. 301, 323-24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."). Similarly, "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are *personal rights*." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (emphasis added).

A long line of Fifth Amendment due process cases demonstrate that the Fourteenth Amendment's due process protections are likewise limited to people, not states or those acting under the color of state authority. *See United States v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012) (recognizing the government has no constitutional right to due process); *South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 990-91 (8th Cir. 2012) (recognizing a "State is not a 'person' within the meaning of the Fifth Amendment's Due Process Clause"); *Oklahoma ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1113-14 (10th Cir. 2006) (noting "Oklahoma concedes that, as a State, it is not protected by the

Due Process Clause of the Fifth Amendment"); *Premo v. Martin*, 119 F.3d 764, 771 (9th Cir. 1997) (rejecting claim that federal "arbitral proceedings violated due process[,] . . . [b]ecause the State is not a 'person' for the purposes of the Fifth Amendment"); *United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1089-90 (6th Cir. 1990) (noting the IRS "appropriately concedes that it has no right to due process"); *Alabama v. U.S. E.P.A.*, 871 F.2d 1548, 1554-56 (11th Cir. 1989) (holding States have no Fifth Amendment due process rights).

Numerous circuit and state courts have held the definition of a "person" is the same under the Fifth and Fourteenth Amendments. *See, e.g.*, *Creek v. Westhaven*, 1987 U.S. Dist. LEXIS 191, *21 (N.D. Ill., Jan. 15, 1987) ("The due process clause provisions protect natural persons and private corporations, not government, from arbitrary actions by the sovereign."); *Appeal of New Hampshire Dep't of Empl. Sec.*, 672 A.2d 697, 702 (N.H. 1996) ("[T]he federal due process clause protects "persons," not governments."); *Appling Cty. v. Mun. Elec. Auth.*, 621 F.2d 1301, 1308 (5th Cir. 1980) (holding a county is not a "person" within the meaning of the Fourteenth Amendment); *Missouri ex. rel. Brentwood Sch. Dist. v. State Tax Crt.*, 589 S.W.2d 613, 615 (Mo. 1979) (school districts, as creatures of the state, are not entitled to Due Process Clause protections); *see also Kelley v. Metro. Cty. Bd. of Educ.*, 836 F.2d 986, 998 (6th Cir. 1987) ("Federal courts may not be called up, in the first instance, 'to adjudicate what is essentially an internal dispute between two local governmental

entities, one of which is asserting unconstitutional conduct on the part of the other.'").

There is no split of circuit court authority on this question. As a co-equal branch of the State of Montana and an entity that acts under the authority of the State, the Legislature is not a "person" entitled to seek due process protection from this Court, much less wield the Fourteenth Amendment as a political weapon against another branch of government. This case is easily distinguishable from *Williams* and *Caperton*, both of which involved due process claims asserted by private individuals against state supreme courts. *See Williams*, 579 U.S. at 4-8; *Caperton*, 556 U.S. at 872-90.

III. The Montana Supreme Court's holding was constrained to its unique facts, making any decision by this Court of limited precedential value.

The Montana Supreme Court aptly described this as a case involving "highly unusual circumstances." Pet. App. 25. There is no compelling reason to accept the Legislature's Petition because the highly unique and discrete facts limit the precedential value of any decision. Given the fact-intensive inquiry attending the question of judicial recusal, and given the Court's opinion articulating the relevant disqualification standard in *Caperton*, additional authority from this Court is unnecessary.

The uniquely factual nature of this case is illustrated by the parties' many factual disputes. For

example, the Legislature claims it made "repeated invitations to resolve" issues involving the subpoenas "via negotiation and accommodation." Pet. for Cert. 2. The record refutes this. It establishes that McLaughlin attempted to negotiate from day one, yet the Legislature and Attorney General demurred. McLaughlin appealed to the DOA, the Legislative leadership, and the Attorney General's office to "negotiate for a pause amidst the ongoing release of thousands of unredacted Judicial Branch emails with which to implement legal and procedural protections." Pet. App. 33; *see* Resp. App. 36a-40a. Her pleas fell on deaf ears.

Instead of working toward "negotiation and accommodation," the Legislature manufactured a conflict by sending subpoenas to the individual Montana Supreme Court Justices. In this way, "the Legislature itself [had] created the conflict by issuing a subpoena to each justice during a pending proceeding involving the same issues raised in the Legislative subpoena." Pet. App. 29.

Additionally, the Legislature and *amicus* base their bias and disqualification arguments on the premise that the Supreme Court Justices participated in the poll of district judges regarding SB 140 and, thus, were guilty of prejudging the challenged legislation. The record is uncontroverted—no Justice participated in the poll. Pet. App. 23, 112, 629-30. Any contrary argument is speculation. Indeed, the Montana Supreme Court's later decision in *Brown*, OP 20-0125, upholding the constitutionality of the SB 140

litigation, belies any supposition that having a personal opinion disqualifies a judge from the job of judging.

Just as *Caperton* provided guidance on disqualification standards, this Court has likewise provided recent guidance on legislative subpoenas. Any legislative body intent on issuing interbranch subpoenas knows full well they can be no broader or burdensome than necessary to advance a valid legislative purpose. That very issue was squarely addressed by this Court less than two years ago in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), a decision carefully followed by the Montana Supreme Court in this case, as explained below. Nothing in the present case would add to the teachings of *Mazars* or *Caperton*.

IV. Alternatively, the Montana Supreme Court's decision is entirely consistent with this Court's precedent.

While the Montana Supreme Court's decision rested entirely on state law, its analysis and conclusion are consistent with this Court's own precedent regarding interbranch legislative subpoena power in the federal context.

The Court dealt with a similar issue in *Mazars*, evaluating the "special concerns regarding the separation of powers" which arise from one branch of government's subpoena of information from another, and 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.

In *Mazars* the Court articulated the appropriate scope of a legislative subpoena under federal law. The Court explained that Congress's power to issue subpoenas is finite, "justified solely as an adjunct to the legislative process," and therefore subject to several limitations. *Id.*, 140 S. Ct. at 2031-32. Foremost among those is that "[t]he subpoena must serve a 'valid legislative purpose.'" *Id.* at 2031 (quoting *Quinn v. United States*, 349 U. S. 155, 161 (1955)). It must "concern a subject on which legislation could be had." *Id.* (internal citations and quotation marks omitted); *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"). Ultimately, this Court held that 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* at 2035.

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.* (internal citations and quotation marks omitted).

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*.

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).

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*.

In this case, the Montana Supreme Court's analysis of the Legislature's subpoena power, though based on state law, was entirely consistent with *Mazars*. After analyzing the *Mazars* opinion at length, the court held the Legislature has authority to issue subpoenas, but, as in *Mazars*, those subpoena powers are limited. *McLaughlin v. Montana State Legislature*, 493 P.3d 980, 984-85 (Mont. 2021).

The Montana Supreme Court carefully assessed whether the asserted legislative purpose for the subpoena warranted the significant step of subpoenaing material of a co-equal branch of government. Pet. App. 50-52, 55-80. The April 8, 2021 subpoena to the DOA, the subpoena that beget this entire action, was completely silent as to legislative purpose. Resp. App. 19a-20a. The Legislature belatedly attempted differing statements of purpose in its April 14, 2021 subpoena to McLaughlin, its Response to Petition for Original Jurisdiction, and finally in its Motion to Dismiss. Analyzing each attempted justification, the Montana Supreme Court stated its central holding encapsulating the principles of *Mazars*:

> 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.

Pet. App. 44.

This result should not have surprised the Legislature. Compelling "all" of McLaughlin's emails

exceeded the legislative power to "obtain[] information on matters that fall within its proper field of legislative action." Pet. App. 75, citing Mason's Manual of Legislative Procedure (2010 ed.), § 797.7 at 567).

The first subpoena to the DOA demanded production within a 24-hour period, in direct contrast to Rule 45 of the Montana Rules of Civil Procedure and its limitations regarding timing, burden on the recipient and the protection of privileged or other protected materials. Pet. App. 75-76. Importantly, the court emphasized, "[t]hese basic safeguards guarantee minimum standards of due process and should have been understood and respected by both the legislative and executive branch officials involved." *Id.* at 76.

The Legislature did not abide by *any* of these safeguards. This was unfortunate though not surprising, since the Legislature proclaimed itself unbound by judicial review of any kind. The proclamations reflected not only a lack of respect for a co-equal branch, but also a fundamental misunderstanding of separation of powers since "Montana, for anyone who does not know, follows *Marbury v. Madison*." Pet. App. 86 (McKinnon, J., concurring).

Although *Mazars* was cited throughout the Montana Supreme Court's opinion, it is curiously absent from the Legislature's Petition. But *Mazars* provides lower courts with an invaluable roadmap for examining legislative subpoenas to a co-equal branch

of government under federal law. The Montana Supreme Court followed this Court's guidance — the same guidance the Legislature ignored when it issued overbroad subpoenas with no articulated legislative purpose and then proclaimed itself impervious to judicial review.

Nothing in the decision at issue "conflicts with relevant decisions of this Court," U.S. Sup. Ct. R. 10, and this weighs against the Petition.

V. The issue presented by the Legislature is moot because it withdrew its subpoenas.

The Legislature's fundamental complaint is that the Montana Supreme Court opted to "judge its own case," Pet. for Cert. 18, and "quashed *all* the subpoenas—including those issued to them." *Id.* at 2, (emphasis in original). This theory fails, of course, because the subpoenas to the Justices themselves were never challenged in the case below and the Legislature withdrew them of its own accord.

Only Justice Rice litigated his subpoena. He recused himself from this case and obtained an order from the trial court quashing his subpoena. The Legislature never appealed. Neither Justice Rice's subpoena nor the individual Justice subpoenas were before Montana's highest court, which means it never "judged its own case." This is confirmed by the court's opinion on the merits—it assesses and then quashes subpoenas to the DOA and McLaughlin, without even mentioning (much less quashing) the subpoenas to the individual justices. Pet. App. 81-82. This is also

confirmed by the opinion on the disqualification issue—it specifically emphasizes that "this case does not involve adjudication of any subpoena issued to a member of this Court," (Pet. App. 21), a statement with which the Legislature specifically agreed. Pet. App. 233.

Finally, all subpoenas—including those to the Justices themselves—were withdrawn by the Legislature, though it now wishes to rely on the same subpoenas to obtain certiorari. Pet. for Cert. 16, 24. To the extent the issue could have been a viable basis to seek certiorari, it is now moot.

CONCLUSION

There is no federal issue and, regardless, the record refutes the Legislature's central claim that the Montana Supreme Court judged its own case. In the final analysis, the Legislature's Petition is heavy on rhetoric but light on factual and legal support. "[T]he air is shattered by the force of [its] blow." Ernest L. Thayer, *Casey at the Bat: A Ballad of the Republic, Sung in the Year 1888* (1888). Not one of the requirements of Rule 10 is satisfied. The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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