APPENDIX

APPENDIX

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APPENDIX 1

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

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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.

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

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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, 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.)

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,

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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.

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 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.) 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]

In her capacity as Court Administrator, McLaughlin receives a wide variety of emails and attachments that

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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 to delay the matter while she sought legal advice.

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.
- 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 "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.").[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-around the Court. Instead, the Subpoena demands the production of "all emails and attachments," existing

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[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.

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, *see 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…"). 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] *See also, e.g.*, Mont. Code Ann. § 2-3-203(5) ("The

[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.

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 though 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

*[*** Certificates omitted for printing purposes ***]*

EXHIBIT A

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, 2021delivered 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.

EXHIBIT B

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.	)

DECLARATION OF BETH McLAUGHLIN

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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: /s/ Beth McLaughlin
Beth McLaughlin

EXHIBIT C

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.	)

PROPOSED ORDER

Having reviewed *Intervenor's Beth McLaughlin's Emergency Motion for Temporary Restraining Order and to Quash Legislative Subpoena Duces Tecum*, and for good cause shown, the Motion is GRANTED. The Subpoena issued by the Montana State Legislature to Director Misty Ann Griles of the Montana Department of Administration dated April 8, 2021 ("the Subpoena") is QUASHED. The Montana Department of Administration and its Director are ENJOINED and RESTRAINED from complying with, producing, or

otherwise disclosing the documents and information set forth in the Subpoena. This Order and its restrictions shall remain in FULL FORCE AND EFFECT absent further order from this Court.

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

Dated this __ day of April, 2021.

_____

EXHIBIT D

BOONE KARLBERG P.C. ATTORNEYS AT LAW

April 10, 2021

Misty Ann Giles, Director
Montana Department of Administration
c/o Michael Manion, Legal Counsel
Email delivery: MManion@mt.gov

Todd Everts, Esq.
Legislature Legal Services Division
Email delivery: teverts@mt.gov

Re: Legislative Subpoena dated April 8, 2021

Dear Director Giles, Mr. Manion, Mr. Everts:

I write this letter in my capacity as legal counsel for Beth McLaughlin, the Montana Supreme Court Administrator. This letter pertains to the Legislative Subpoena served April 8 on the Department of

Administration. We write to request that the Department temporarily but immediately stay action on that subpoena for reasons noted below. If the Department of Administration, instead, chooses to proceed, we respectfully ask that you advise us of your intentions so we may file an emergency motion with the Montana Supreme Court.

The Legislature, by its subpoena, seeks communications that reside within the Judicial Branch of Montana government. It is our position that legislative subpoenas for internal judicial documents are categorically invalid as in violation of fundamental separation of powers principles, among other things. Regardless, it is our intention to propose a means of resolving the issues raised by the subpoena in an orderly way.

The most troublesome aspect of the Legislative Subpoena is its breadth. Legislative subpoenas must be specific and narrowly drawn. Yet, this subpoena seeks "all emails and attachments" sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021.

The Legislature's subpoena relates to the petition pending before the Supreme Court regarding SB 140 and its elimination of the Judicial Nomination Commission. Yet there is no such limitation in the subpoena. The subpoena asks for every email with one minor exception relating to "decisions made by the justices in disposition of final opinion." Because of her position and broad responsibilities, the Court Administrator's emails contain personal and private information. For example, the requested emails 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 to liability were protected information exposed. Without a mechanism to review every email in that three-month period and screen them for privileged or private information, the Department could easily disclose sensitive, private information and create serious liability problems for the State.

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.

We understand the Department of Administration is actively working this weekend to produce documents

in response to the subpoena. Given the extreme time sensitivities and irreparable harm that will result, please advise immediately if you agree to stay response to the legislative subpoena until the issues are resolved by agreement or through court process. If you are unwilling to agree to our proposal, we will file an emergency petition asking for a temporary restraining order and an order quashing the subpoena and staying response by the Department of Administration until the important Constitutional and personal privacy issues can be resolved in a legally appropriate way. If you choose for us to proceed in that fashion, we will advise the Court that our motion is opposed.

You may reach me directly via my cell phone at 406 370-3926 or by email at rcox@boonekarlberg.com. Thank you for your consideration. I look forward to hearing from you.

Sincerely,

/s/ Randy J. Cox

Randy J. Cox

cc: Beth McLaughlin

APPENDIX 2

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. OP 21-0125

[Filed: April 11, 2021]

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

INTERVENOR BETH McLAUGHLIN'S EMERGENCY SUPPLEMENTATION OF 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 FOR LEAVE TO SUPPLEMENT

Intervenor Beth Mclaughlin, Supreme Court Administrator, brings this motion for leave to supplement, on an emergency basis, the Emergency Motion to Quash and Enjoin Legislative Subpoena Duces Tecum sent for filing Saturday, April 10. The supplementation is necessary to bring recent events and future intentions to the Court's attention because of their possible effects on people well beyond the parties involved in this case and well beyond the Montana Legislature and the Department of Administration.[1]

BRIEF

On Saturday, April 10, 2021, Intervenor Beth McLaughlin filed an Emergency Motion to Quash and Enjoin Legislative Subpoena Duces Tecum. The

[1] The correct caption is on this motion and brief. On April 10, the Intervenor inadvertently used the wrong caption listing Dorothy Bradley as the lead Petitioner. Bob Brown is the lead Petitioner. Counsel for Intervenor regrets the error. Somewhere along the line one of the participants in these proceedings changed the caption.

document was received for filing at 6:55 p.m. Subsequently, that motion and brief was delivered via e-mail to the Director of the Department of Administration, Misty Ann Giles.

The major reason for seeking emergency action by the Montana Supreme Court was the concern of the Supreme Court Administrator, Beth McLaughlin, that her emails are likely to contain private personnel and medical issues as well as information regarding Youth Court cases and Judicial Standards Commission discussions and information. (Emergency Motion, p. 2.) Those concerns are fully stated in her Declaration (Ex. B to Emergency Motion.)

An email string of communications between Director Giles and the undersigned, as counsel for Intervenor McLaughlin, reveals that the Department of Administration turned over a portion of the subpoenaed documents on Friday, April 10, and apparently plans to turn over remaining documents on Monday, April 12. See attached Exhibit 1.

If the Court Administrator's concerns over disclosure of private and personal information in judicial department emails are correct, then the Department of Administration and now the Montana Legislature are on the cusp – or beyond – of revealing information that is not only harmful to people and institutions but could create serious liability issues for the State of Montana. There is no reason for that. Everyone should just stop and wait for this Court's determination regarding the legitimacy of the Legislative Subpoena and whether production should

be enjoined. That is the gist of Intervenor McLaughlin's emergency motion.

In Order to protect against inadvertent (or even deliberate) disclosures of information, we respectfully ask the Court do three things: 1) Order that the Director of the Department of Administration take no further steps to comply with the subpoena and segregate and hold the information being processed for delivery to the Legislature; and 2) Order Keith Regier, Chairman of the Judiciary Standing Committee who issued the Legislative Subpoena, to capture and return all copies of documents produced Friday by Director Giles, those documents are to be held by Director Giles until further order of this Court; and 3) order Directors Giles to produce a copy in .pst form to counsel for Court Administrator McLaughlin immediately so that the Administrator knows what has been produced and can properly provide further advice regarding her concerns to this Court.

Intervenor respectfully submits that there is no risk of any kind of harm to anyone's legal position or even political position if everyone is simply ordered to stand down and take no further action until the Court has time to do a thorough and careful analysis of the situation. There is, however, a risk of serious and irreparable harm if events continue to spin out in a political process.

Dated this 11th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

*[*** Certificates omitted for printing purposes ***]*

EXHIBIT 1

From: Giles, Misty Ann
Sent: Sunday, April 11, 2021 11:23 AM
To: Randy Cox
Cc: Manion, Michael; Matt Hayhurst; Thomas Leonard
Subject: Re: Legislative subpoena for judicial branch records

Mr. Cox,

Thank you for your email. DOA is complying with the scope of the subpoena as written. As the third party holder of these 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 do the same on Monday with the remaining documents.

Again, I encourage you to reach out to the Legislature to resolve your concerns as they are the issuers of the subpoena.

MAG

Misty Ann Giles
Director of Administration
C: 404-319-5817

From: Randy Cox
Sent: Saturday, April 10, 2021 8:57:08 PM
To: Giles, Misty Ann
Cc: Manion, Michael; Matt Hayhurst; Thomas Leonard
Subject: [EXTERNAL] RE: Legislative subpoena for judicial branch records

Director Giles:

I attempted to send an email to you with our motion filed with the Supreme Court earlier this evening. The email was rejected. I respectfully ask that you obtain copies of the information I sent including my email from Mr. Manion. I do not know why the email did not go through.

I did, however, ask some important questions in the email and to make certain those get through to you I include that portion of the email below.

May I please know the Department's intentions with respect to compliance with the Legislative Subpoena. Specifically, is it your intention to comply without limitation? Have you put into place any mechanism for reviewing subpoenaed judicial branch documents for the presence of personal or private information or information that is otherwise protected by law? What is your timetable for delivery of documents to the Legislature if, in fact, that is what you intend to do? Will you please be so kind as to allow the Supreme Court Administrator the opportunity to review judicial branch documents prior to their being turned over to the Legislature and placed in the public realm so we may assert appropriate objections on behalf of those whose interests are affected or allow them that opportunity?

Thank you.

Randy J Cox
Boone Karlberg PC
Missoula, MT
Counsel for intervenor/petition Beth McLaughlin

From: Giles, Misty Ann
Sent: Saturday, April 10, 2021 8:20 PM
To: Randy Cox
Cc: Thomas Leonard; Matt Hayhurst; Manion, Michael
Subject: Fwd: Legislative subpoena for judicial branch records

Mr. Cox,

Thank you for your letter, my Deputy Mike Manion provided it to me. Thank you for your concerns but this should be addressed to the Speaker, Wylie Galt and President, Mark Blasedale as they are the issuers of the subpoena.

Going forward, please be sure to include me directly in your communication and copy Mike Manion.

Best Regards,

MAG

Misty Ann Giles
Director of Administration
C: 404-319-5817

From: Manion, Michael <MManion@mt.gov>
Sent: Saturday, April 10, 2021 8:04 PM
To: Giles, Misty Ann
Subject: FW: Legislative subpoena for judicial branch records

[Seal] MIKE MANION **Deputy Director/Chief Legal Counsel**

Montana Department of Administration
DESK 406.444.3310

From: Randy Cox <rcox@boonekarlberg.com>
Sent: Saturday, April 10, 2021 3:19 PM
To: Manion, Michael <MManion@mt.gov>; Everts, Todd <teverts@mt.gov>
Cc: Matt Hayhurst <mhayhurst@boonekarlberg.com>; Thomas Leonard <tleonard@boonekarlberg.com>
Subject: [EXTERNAL] Legislative subpoena for judicial branch records

Gentlemen:

Please see the attached letter written and sent to you. I am counsel for the Court Administrator, Beth McLaughlin. Please review the letter and call me to discuss if you wish.

We are within a short time period of filing an emergency motion with the Montana Supreme Court to at least temporarily halt the process of the Department of Administration's work to comply with the Legislative Subpoena served recently, a copy of which Beth McLaughlin was given after 5 pm yesterday.

Thank you for your consideration. I urge you to call and talk with me.

Randy J. Cox
Shareholder
BOONE KARLBERG P.C. ATTORNEYS AT LAW
201 West Main St., Suite 300
P.O. Box 9199
Missoula, MT 59807
Phone: (406) 543-6646
Fax: (406) 549-6804

APPENDIX 3

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.

The Montana Legislature is conducting an investigation of state records retention protocols, improper use of government time and resources, and the application of the judicial standards commission's enforcement authority.

You are hereby required to appear at the Montana State Capitol Building, room [president's office], in the City of Helena, Montana, on the 13th day of April, 2021, at 3:00 p.m., to produce the following documents:

(1) Any emails and attachments responsive to the Legislature's April 7th subpoena which have not yet been delivered.
(2) All emails and attachments sent and received by Court Administrator Beth McLaughlin between April 8, 2021, and April 12, 2021 delivered as hard copies and .pst digital files.
(3) Any and all recoverable deleted e-mails sent or received by Court Administrator Beth

McLaughlin between April 8, 2021, and April 12, 2021 delivered as hard copies and .pst digital files.

Please note, as with the Legislature's April 7, 2021, subpoena to you, this request excludes any emails and attachments related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Please redact, as necessary, any personal, confidential, or protected documents or information responsive to this request.

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 13th day of April, 2021.

By: /s/ Mark Blasdel

Senator Mark Blasdel, President of the Montana Senate.

APPENDIX 4

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:

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	Mike Manion Chief Legal Counsel Mont. Dept. of Administration Mitchell Building, 125 N Roberts St. PO Box 20010 Helena, MT 59620 mmanion@mt.gov	Kristin Hansen Derek J. Oestreicher 215 N. Sanders P.O. Box 201401 Helena, MT 59620-1401 Tel: (406) 444-2026 Fax: (406) 444-3549 khansen@mt.gov derek.oestreicher@mt.gov
Counsel for Petitioner	*Counsel Department of Administration*	*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 <u>legitimate</u>

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 <u>further</u> disclose information, or because the Legislature says it will protect the information.

D. Insufficient Time for Compliance.

Montana law provides a court "<u>must</u> 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

*[*** Certificates omitted for printing purposes ***]*

Exhibit Index

- Exhibit A – Revised Subpoena
- Exhibit B – April 18, 2018 Montana Legislative Services Division Memorandum

EXHIBIT A

MONTANA STATE LEGISLATURE

SUBPOENA

WITNESS: Court Administrator Beth McLaughlin
Office of the Court Administrator
215 N. Sanders St.
Helena, Montana 59601

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

EXHIBIT B

[THE GREAT SEAL OF THE STATE OF MONTANA]

Montana Legislative Services Division
Legal Services Office

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

April 18, 2018

TO: Representative Ron Ehli, Vice Chair, Special Select Committee on State Settlement Accountability

FR: Todd Everts, Chief Legal Counsel

RE: Information Request Regarding the Montana Legislature's Investigative Authority

In anticipation of the organizational meeting on April 25, 2018, of the Special Select Committee on State Settlement Accountability, you requested information regarding the investigative authority of the Montana Legislature and its legislative committees and staff. This memorandum is in response to that request.

MEMORANDUM

I. Background

On March 16, 2018, pursuant to House Rules 30-20(7) and (8) and Senate Rule 30-10(4), the Speaker of the House and the President of the Senate jointly appointed the Special Select Committee on State Settlement Accountability to investigate executive branch confidential settlements paid out to public

employees. The Special Select Committee is comprised of six Republicans and four Democrats. Leadership appointed Senator Nels Swandal as chair and appointed Representative Ron Ehli as vice chair of the Special Select Committee.

II. Investigative Authority of the Montana Legislature and Its Legislative Committees and Staff

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 judgements inherent and indispensable in the power of enacting law.[1] A legislative body's inherent power to investigate may be exercised directly or through a duly authorized committee.[2] A legislative body's investigative power is not absolute and there are limitations. The presumption of constitutionality of legislative actions applies to legislative investigations.[3]

However, 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

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[1] *Mason's Manual of Legislative Procedure* (2010), p. 561; *Sutherland Statutory Construction* (2010), p. 596.

[2] Mason's Manual, p. 569; Sutherland, p. 570.

[3] Sutherland, p. 578.

and adhere to all constitutional protections related to privacy, life, liberty, and property.[4] The power to investigate the private affairs of a citizen only exists when the investigative authority exercised is directly related to a legitimate legislative purpose.[5]

A. *Source of Legislative Investigative Authority*

The organic source of the Montana Legislature's investigative powers can be found in Article V, section 1, of the Montana Constitution, which provides: "The legislative power is vested in a legislature consisting of a senate and a house of representatives." The Montana Constitution further provides that:

> Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections. Each house shall choose its officers from among its members, keep a journal, and make rules for its proceedings. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members.[6]

With Montana's constitutional advent of a bicameral Legislature, the power to investigate resides as a separate and distinct power in each house of the

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[4] Mason's Manual, p. 566; Article II, section 10, of the Montana Constitution.

[5] Mason's Manual, p. 566; Sutherland, pp. 578-583.

[6] Article V, section 10(1), of the Montana Constitution.

Legislature.[7] However, both the Montana Senate and the House of Representatives may jointly appoint an investigative committee.[8]

Constitutional investigative powers also reside in specific administrative committees and interim committees. Article V, section 10(4), of the Montana Constitution provides that the Legislature may establish a Legislative Council and other interim committees and that the Legislature shall establish a legislative post-audit committee that shall supervise post-auditing duties as provided by law.

Other provisions of the Montana Constitution that buttress the Legislature's investigative authority include Article II, sections 8 and 9, the public's constitutional right to participate in the decision-making process of state government and the public's right to examine documents and observe the deliberations of all public bodies or agencies of state government. Synchronized with the public's right to know and participate is the constitutional requirement that all committee meetings and hearings of the Legislature be open to the public.[9]

In addition to the Constitution, the bulk of the Montana Legislature's investigative authority resides

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[7] Article V, sections 1 and 10, of the Montana Constitution; Mason's Manual, p. 562.

[8] Rules of the Montana Legislature, Joint Rules 30-10 and 30-20; House Rules 30-20(7) and (8); and Senate Rule 30-10(4).

[9] Article V, section 10 (3), of the Montana Constitution.

in statute with respect to subpoenas, contempt, compelling attendance of a witness, immunity of a witness, administering oaths, powers of statutory and interim committees related to legislative hearings, authority of the Legislative Services Division on behalf of committees to investigate state government activities, and authority of the legislative auditor and the legislative fiscal analyst to access confidential information.[10]

The Rules of the Montana Legislature offer little detail regarding the Legislature's investigative authority other than describing the authority of the Speaker and the President to issue subpoenas and referencing that *Mason's Manual of Legislature Procedure* (2010) governs the proceedings of the Senate and the House in all cases not governed by the rules.[11] Mason's Manual devotes an entire chapter on the source, scope, exercise, and limitations of legislative bodies' investigative powers.[12]

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[10] Subpoenas (5-5-101 and 5-5-102, MCA), contempt (5-5-103, MCA), compelling attendance of witness (5-5-104, MCA), immunity of a witness (5-5-105, MCA), administering oaths (5-5-201, MCA), authority of the Legislative Services Division on behalf of committees to investigate state governmental activities (5-11-106, MCA), powers of statutory and interim committees related to legislative hearings (5-11-107, MCA), and authority of the legislative auditor and the legislative fiscal analyst to access confidential information (5-12-303 and 5-13-309, MCA).

[11] Rules of the Montana Legislature, Joint Rule 60-20; Senate Rule 10-50(5); and House Rule 10-20(4).

[12] Mason's Manual, Chapter 73, pp. 561-577.

B. *Scope of Legislative Investigative Authority*

The scope of a Legislature's investigative power broadly extends to any subject related to enacting law. According to Mason's Manual:

> 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.[13]
>
> The legislature has power to investigate any subject where there is a legitimate use that the legislature can make of the information sought, and an ulterior purpose in the investigation or an improper use of the information cannot be imputed.[14]

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.[15]

It has been noted by courts and legal experts that:

> Investigation may be made concerning the administration of existing laws, proposed laws, or potentially necessary laws. Inquiry may be

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[13] Mason's Manual, p. 561.

[14] Mason's Manual, p. 563.

[15] Mason's Manual, p. 563.

> made as to defects in any social, political or economic system to the end of devising remedies for any such defects. Investigation may be made of any subject and any matter that related to the need of legislation on the subject matter, and what kind and the extent of any legislation needed.[16]

C. *Exercise of Legislative Investigative Authority*

Where a legislative body has the constitutional power to institute an investigation, the manner of how the investigation is conducted rests with the sound discretion of the legislative body.[17]

There are a number of investigation tools that the Montana Legislature has to exercise its investigative powers. The Legislative Services Division, on behalf of standing committees, select committees, or interim committees and any subcommittees of those committees, may investigate and examine state government activities and may examine and inspect all records, books, and files of any department, agency, commission, board, or institution of the state of Montana.[18]

Montana statutes require all state agencies to aid and assist the legislative auditor in auditing of books,

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[16] C. Quilter, "Primer on the Investigative Authority of Legislative Committees", *Legislative Lawyer*, Vol. 12, No. 1 (Winter 1998), p. 87.

[17] Mason's Manual, p. 568.

[18] 5-11-106, MCA.

accounts, activities, and records, and the legislative auditor may examine at any time the books, accounts, activities, and records, confidential or otherwise, of a state agency.[19] These statutory provisions regarding the legislative auditor's investigative power may not be construed as authorizing the publication of information prohibited by law.[20]

The legislative fiscal analyst has the statutory authority to investigate and examine the costs and revenue of state government activities and may examine and obtain copies of the records, books, and files of any state agency, including confidential records.[21] When confidential records and information are obtained from a state agency, the legislative fiscal analyst and staff must be subject to the same penalties for unauthorized disclosure of the confidential records and information provided for under the laws administered by the state agency. The legislative fiscal analyst shall develop policies to prevent the unauthorized disclosure of confidential records and information obtained from state agencies.[22] These statutory provisions regarding the legislative fiscal analyst do not authorize publication or public disclosure of information if the law prohibits publication or disclosure or if the Department of Revenue notifies the fiscal analyst that specified

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[19] 5-13-309, MCA.

[20] 5-13-309, MCA.

[21] 5-12-303(1), MCA.

[22] 5-12-303(2), MCA.

records or information may contain confidential information.[23]

All duly authorized committees of the Legislature may hold hearings, administer oaths, issue subpoenas, and compel the attendance of witnesses and the production of records and testimony.[24] As noted previously, the Rules of the Montana Legislature authorize the Speaker and the President to individually issue subpoenas.[25]

A person sworn and examined before the Legislature or any committee may not be held criminally liable or be subject to any penalty or forfeiture for any fact or act relating to the required testimony.[26] Common law and judicial rules of evidence applicable in court proceedings, do not apply to legislative investigations.[27]

When a summoned witness refuses to obey a subpoena or refuses to testify, the Senate or the House may, by

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[23] 5-12-303(3), MCA.

[24] Subpoenas (5-5-101 and 5-5-102, MCA), contempt (5-5-103, MCA), compelling attendance of witness (5-5-104, MCA), immunity of a witness (5-5-105, MCA), administering oaths (5-5-201, MCA), powers of statutory and interim committees related to legislative hearings (5-11-107, MCA), and Mason's Manual, Chapter 73, pp. 561-577.

[25] Rules of the Montana Legislature, Senate Rule 10-50(5) and House Rule 10-20(4).

[26] 5-5-105(1), MCA.

[27] Mason's Manual, p. 567; Sutherland, p. 586.

resolution, commit the witness for contempt.[28] A witness refusing to attend in obedience to a subpoena may be arrested by the sergeant at arms and brought before the Senate or the House. A copy of a resolution of the Senate or the House, signed by the President or the Speaker and countersigned by the secretary or the clerk, is necessary to authorize the arrest.[29]

Although the appointed Special Select Committee is neither a statutory committee nor an interim committee, those types of committees are statutorily authorized to 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.[30] If a person disobeys a subpoena issued by a statutory committee or an interim committee or if a witness refuses to testify on any matters regarding which the witness may be lawfully interrogated, the district court of any county shall, on application of the committee, compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from a district court or a refusal to testify in the district court.[31]

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[28] 5-5-103, MCA.

[29] 5-5-104, MCA.

[30] 5-11-107(1), MCA.

[31] 5-11-107(2), MCA.

D. *Limitations on Legislative Investigative Authority*

A legislative body's investigative power is not absolute, and there are constitutional and common law limitations placed on that power. The presumption of constitutionality of legislative actions applies to legislative investigations.[32] However, 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.[33] The power to investigate the private affairs of a citizen only exists when the investigative authority exercised is directly related to a legitimate legislative purpose.[34]

With the Rules of the Montana Legislature defaulting to Mason's Manual to govern the proceedings of the Senate and the House in all cases not governed by the rules,[35] Mason's Manual lists the following limitations that would apply to the Montana Legislature's investigation powers

in addition to the Montana Constitution and statutory limitations:

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[32] Sutherland, p. 578.

[33] Mason's Manual, p. 566; Article II, section 10, of the Montana Constitution.

[34] Mason's Manual, p. 566; Sutherland, pp. 578-583.

[35] Rules of the Montana Legislature, Joint Rule 60-20; Senate Rule 10-50(5); and House Rule 10-20(4).

1. It is the general rule that the legislature has no power through itself or any committee or any agency to make inquiry into the private affairs of a citizen except to accomplish some authorized end.

2. The legislature has no right to conduct an investigation for the purpose of laying a foundation for the institution of criminal proceedings, for the aid and benefit of grand juries in planning indictments, for the purpose of intentionally injuring such persons or for any ulterior purpose.

3. A state legislature, in conducting any investigation, must observe the constitutional provisions relating to the enjoyment of life, liberty and property.

4. 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 legislature.

5. 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 object 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.

6. A governmental investigation into the papers of a private corporation on the possibility that they may disclose evidence of crime is contrary to the

first principles of justice and an intention to grant the power must be expressed in explicit language.

7. The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action.[36]

III. Conclusion

The Montana Legislature and its duly authorized committees have the clear and very broad authority to conduct legislative investigations. The Legislature's investigation into the management of state institutions and the departments of state government is a legitimate function of a legislative body. The Legislature's investigative power is not absolute and there are limitations. The presumption of constitutionality of legislative actions applies to legislative investigations. However, the power to investigate must be exercised for a proper legislative purpose related to enacting law. The Legislature's investigative power must protect the rights of citizens and adhere to all constitutional protections.

*[*** Certificates omitted for printing purposes***]*

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[36] Mason's Manual, pp. 566-567.

APPENDIX 5

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

Cause No. ADV 2021 451

[Filed: April 19, 2021]

JUSTICE JIM RICE,	)
	)
Petitioner,	)
	)
v.	)
	)
THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Representative Wylie Galt, Speaker of the House of Representatives,	)
	)
Respondents.	)
	)

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF; AND EMERGENCY REQUEST TO QUASH OR ENJOIN LEGISLATIVE SUBPOENA PENDING PROCEEDINGS

Petitioner has been served a Subpoena by the Montana State Legislature, requiring him to appear at the Montana State Capitol on Monday, April 19, 2021, at 3:00 p.m., to produce documents relating to "any and all emails and other communications" sent and received from his government e-mail account, "text messages, phone messages, and phone logs sent or received by [his] personal" phone, and "notes or records of conferences of the Justices," between January 4, 2021, and April 14, 2021, with regard to polls sent to members of the Judiciary, business conducted by the Montana Judges Association, and "legislation pending before, or potentially pending before, the 2021 Legislature." *Subpoena*, attached hereto as Exhibit A. Petitioner submits that the Subpoena has been issued beyond the Legislature's lawful subpoena authority, and is an impermissible encroachment into the Judiciary. In support of the petition, Petitioner respectfully states and alleges as follows:[1]

PARTIES

1. Petitioner is a Justice on the Montana Supreme Court. The position of Justice is of constitutional creation. Mont. Const., Art VII, § 3(1). Petitioner has served on the Supreme Court since he

[1] Petitioner's statements herein are made for purposes of this proceeding, to address the subpoena issued to him individually.

was appointed by Gov. Judy Martz and was sworn in following a unanimous 50-0 confirmation vote by the State Senate on March 15, 2001, over 20 years ago. Petitioner has since stood for election three times, in both contested and retention elections. Prior to serving on the Montana Supreme Court, Petitioner practiced law for nineteen years and was elected to three terms in the Montana Legislature, including the 51st or Centennial Session in 1989, serving as a Republican Representative from then-House District 43 in Lewis and Clark County, and was selected to be the Majority Whip of the House of Representatives in 1993. Petitioner has an affinity for the legislative process, holds legislators in high regard, and greatly respects the critical service rendered by legislators to the State and People of Montana.

2. Respondent Montana State Legislature, acting herein by Mark Blasdel, President of the Senate, and Wylie Galt, Speaker of the House of Representatives, is the legislative branch of government for the State of Montana. Mont. Const., Art. III, § 1. President Blasdel and Speaker Galt issued the subpoena that is challenged herein. The 67th Regular Session of the Montana Legislature is scheduled to conclude next week.

BACKGROUND

3. In an original proceeding filed before the Montana Supreme Court on March 17, 2021, *Brown, et. al. v. Gianforte*, OP 21-0125, in which SB 140, a bill recently passed by the Montana Legislature, is challenged, Respondent Greg Gianforte, represented by the Department of Justice, raised concerns about an

email-based membership poll conducted by the Montana Judges Association concerning SB 140 when it was legislatively considered. Outside of OP 21-0125, on April 8, Respondent State Legislature issued a subpoena to the Department of Administration, which administers the state computer system, including the system used by the Judiciary, requiring production of, *inter alia*, "[a]ll emails and attachments sent and received" by the Court Administrator for the judicial branch, between January 4, 2021 and April 8, 2021. Such subpoena was issued without notice to the judicial branch, and required production of the emails in approximately 24 hours, on April 9, 2021. Court Administrator McLaughlin was provided a courtesy copy of the subpoena on the afternoon of April 9, 2021. However, despite her request for delay and consultation prior to production of the emails, particularly regarding potential private and confidential information therein, the Department of Administration complied with the request and provided thousands of emails to the Legislature.[2]

4. McLaughlin immediately filed an emergency motion to quash or enjoin the subpoena with the Supreme Court, which issued a Temporary Order on April 11, 2021. The Supreme Court noted that the Legislature's subpoena was "facially, extremely broad

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[2] Recent filings with the Supreme Court by Respondent State Legislature states that the number of emails produced by the Department of Administration in response to the McLaughlin subpoena exceeded 5,000. *Motion to Dismiss*, p. 2, *Declaration of Kristin Hansen*, p. 1, filed April 14, 2021, *McLaughlin v. The Montana State Legislature and the Montana Department of Administration*, OP 21-0173.

in scope," and that McLaughlin's filings had demonstrated "a substantial potential of the infliction of great harm if permitted to be executed as stated." *Temporary Order*, p.2, April 11, 2021, *Bradley*, OP 21-0125. McLaughlin has asserted that the Legislature's subpoena of the judiciary's emails "commands production of documents that by the breadth requested contain highly confidential, privileged, and sensitive information." *Petition for Original Jurisdiction*, p. 13, April 12, 2021, *McLaughlin*, OP 21-0173.

5. However, on April 12, 2021, Petitioner, who is serving as Acting Chief Justice in OP 21-0125, wherein the Temporary Order was entered, received a letter from Kristen Hansen, Lieutenant General of the Montana Department of Justice, filed with the Supreme Court's Clerk of Court, stating that the Department of Justice has been "retained by the 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"—Respondent herein—regarding McLaughlin's request for emergency relief. Citing the Separation of Powers provision of the Montana Constitution, Art. III, § 1, 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. . . . 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. . . .
>
> The Legislature does not recognize this Court's Order as binding and will not abide by it; The Legislature will not entertain this Court's interference in the Legislature's investigation of the serious and troubling conduct of the members of the judiciary.

Hansen Letter, April 12, 2021, attached hereto as Exhibit B.

6. Two days later, the statements in the Hansen Letter were furthered by Respondent State Legislature's Motion to Dismiss, filed in OP 21-0173, wherein Respondent stated the Supreme Court "lacks jurisdiction to hinder the Legislature's power to investigate these matters of statewide importance," and that the order of protection sought by McLaughlin therein "will not bind the Legislature and will not be followed." *Motion to Dismiss*, p. 8, April 14, 2021, *McLaughlin*, OP 21-0173. Respondent State Legislature stated therein it would pursue this course even if the subpoenaed materials would "tend to 'disgrace' the Judicial Branch or render it 'infamous,'" citing § 5-5-105(2), MCA. What was being insinuated by this comment in Respondent's briefing concerning

potential "disgrace" to the Judiciary is unknown to Petitioner.[3]

7. On that same day, April 14, 2021, the Supreme Court received a telephone call from the Montana Department of Justice advising that Subpoenas would be served upon the Justices individually. Petitioner agreed to accept service of the Subpoenas on behalf of the Justices, and did so that afternoon, receiving the Legislative Subpoena that is challenged herein from a Department of Justice employee. Due to a technical error in the Subpoenas, a new or corrected Subpoena, Exhibit A, was served upon Petitioner by a Department of Justice employee on April 15, 2021. As noted, it requires the production of extensive documentation related to Petitioner's work as a Justice, as further described in Exhibit A, on Monday, April 19, 2021, at 3:00 p.m.

THE SUBJECT EMAILS AND COMMUNICATIONS

8. The COVID-19 pandemic judicial branch protocols prompted many branch employees, both judicial staff and Justices, to work remotely, including

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[3] The Department of Justice has made similar recent out-of-court statements attacking the Supreme Court. Following the Court's order in OP 21-0125, stating the case would be heard by the remaining six justices who had neither recused themselves nor participated in the MJA poll about SB 140, so that the objectionable issue would be removed from the litigation, the Department of Justice publicly stated, "The Supreme Court is trying to put the cash back in the vault after they got caught robbing the bank." *Independent Record*, April 8, 2021, Justices will hear challenge to law.

during the period of time covered by the Subpoena. Consequently, the use of email to conduct all aspects of the business of the Supreme Court multiplied dramatically from pre-pandemic levels. Transmission by email of administrative, human resource, case management, court scheduling, work product, and other matters became the primarily mode of communication, often times with overlapping or multiple topics within a single email.

9. All emails and communications from Petitioner's work accounts or devices demanded by the Subpoena have been preserved by Petitioner. Further, since service of the Subpoena, Petitioner has not deleted any messages or communications on his personal phone or devices that could conceivably fall within the demands of the Subpoena, although not all of these messages and communications have yet been retrieved. Every effort will be made by Petitioner to preserve all of these communications for purposes of this proceeding, including, if necessary, an in camera review by this Court.

10. Petitioner believes and therefore alleges that not a single communication subject to the Subpoena is or would be a basis for judicial discipline, claims of bias, including, in the words of the Subpoena, "to prejudge legislation and issues which have come and will come before the courts for decision," disqualification from any case, a "disgrace" to Petitioner's service, as cited by the Subpoena and the Department of Justice, or that would even be "off-color" or inappropriate in any way. In short, Petitioner has nothing to hide. But Petitioner does have something to

fear, that being a potentially inappropriate intrusion into the communications of the Judiciary and into a Justice's private affairs, and what Petitioner believes is a recent disturbing pattern of overreaching by the Department of Justice, sometimes in concert with Respondent State Legislature, as described above, which has led inexorably to Respondent's issuance of subpoenas to the Justices, including the Subpoena Petitioner is challenging herein. Because of threatened harm and injury, both personally and judicially, Petitioner objects to the Subpoena and seeks the protection of this Honorable Court.

LEGAL AUTHORITIES AND ARGUMENT

A legislatively initiated subpoena to a member of the judiciary inherently raises, directly and indirectly, multiple constitutional issues. Below is a briefing of the legal principles that govern this dispute and, Petitioner submits, compel the issuance of declaratory and injunctive relief. Because the Legislature granted only several days to react to the Subpoena, Petitioner can provide only this summary. Should the Court desire to make further inquiry on any issue, Petitioner would welcome the opportunity to file supplemental briefing.

I. THE LEGISLATURE'S SUBPOENA POWER IS NARROWED WHEN DIRECTED TO THE JUDICIARY.

A. The Legislature has broad subpoena power within the confines of pursuing a valid legislative purpose.

Petitioner acknowledges the Legislature's subpoena power, which is inherent within the constitutional

establishment of the legislative branch of government. Mont. Const., Art. V, § 1; § 5-5-101, MCA, et. seq. When Congress "seeks information 'needed for intelligent legislative action,'" it is the general duty of all citizens to cooperate. *Trump v. Mazars USA, LLP*, _U.S. _, 140 S. Ct. 2019, 2036, 207 L. Ed. 2d 951,970 (2020). However, "[i]t is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance ofa legislative purpose." *Watkins v. United States*, 354 U.S. 178, 201, 77 S. Ct. 1173, 1186, 1 L. Ed. 2d 1273, 1294 (1957).

In this proceeding, the legal question will narrow to whether the Legislature's Subpoena to Petitioner satisfies the furtherance of a valid legislative purpose, or "intelligent legislative action," by the State Legislature. *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970. Petitioner will argue herein that the challenged Subpoena fails to do so. But first, there are considerations which necessarily limit the range and nature of permissible legislative purposes when the target of a legislative subpoena is another branch of government.

B. Constitutional separation of powers must be considered and requires a heightened assessment of a legislature's purpose.

In *Coate v. Omholt*, 203 Mont. 488, 662 P.2d 591 (1983), the Montana Supreme Court declared unconstitutional legislation enacted by the State Legislature intended to hasten case decisions by sanctioning judges who failed to meet stated timeframes. *Coate*, 203 Mont. 488, 490, 662 P.2d 591,

592. Addressing separation of powers, the Court explained the independence of the judiciary generally:

> Courts are an integral part of the government, and entirely independent, deriving their powers directly from the Constitution, in so far as such powers are not inherent in the very nature of the judiciary. 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 the safety of free institutions require the absolute integrity and freedom of action of courts.

Coate, 203 Mont. 488, 490, 662 P .2d 591, 592 (citing *State ex rel. Kostas v. Johnson* (Ind. 1946), 69 N.E.2d 592, 595) (emphasis added) (quotations omitted).

In *Sullivan v. McDonald*, 2006 Conn. Super. LEXIS 2073, the Judiciary Committee of the Connecticut General Assembly subpoenaed the recently retired Chief Justice Sullivan of the Connecticut Supreme Court, commanding him to appear and give testimony concerning—not a court decision—but the circumstances surrounding the issuance of the court decision. Sullivan petitioned a general jurisdiction court to quash the subpoena. In granting Sullivan's request, the court held:

> In the absence of express constitutional authority, the legal authority of the Legislative Branch to subpoena members of the judiciary

> *cannot be coterminous with the broad scope of the legislature's constitutional authority to enact legislation*. . . . Otherwise, the legislature's authority to compel the testimony of a judicial officer would be virtually limitless.
>
> . . . .
>
> *There must be a constitutional separation of powers* by recognizing that the legislature may not subpoena a judicial official to give testimony relating to his official duties or the performance of judicial functions, except where the Constitution expressly contemplates such a direct legislative encroachment into judicial affairs.

Sullivan, 2006 Conn. Super. LEXIS 2073, * 17-18 (emphasis added). This case is notable here, in light of the Montana Department of Justice's statements, noted above, which equate the State Legislature's authority to enact legislation with its authority to issue subpoenas, without distinction.

The U.S. Supreme Court has required a careful consideration of separation of powers when reviewing legislatively initiated subpoenas. In *Trump*, the Supreme Court provided a framework to be applied to inter-branch subpoena disputes. *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 968-69 (noting "an approach that accounts for these concerns" was lacking). The framework begins with the directive that "*courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake*," including both the legislative interests of Congress and

the unique position of, at issue there, the President. *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 969 (emphasis added). "*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." *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 969 (citation, internal quotations omitted) (emphasis added). "A balanced approach is necessary," the Supreme Court explained, that "'resist[s]' the 'pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 969 (citation omitted).

II. THE PURPOSES ASSERTED BY THE LEGISLATURE DO NOT CONSTITUTE A "LEGISLATIVE PURPOSE" AS DEFINED BY LAW, AND THEREFORE DO NOT WARRANT OR JUSTIFY ISSUANCE OF A SUBPOENA TO PETITIONER.

The Legislature's Subpoena served upon Petitioner sets forth its purposes as follows:

> 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.

Exhibit A, p. 1.

A. Under the circumstances here, the "Deletion Investigation" is not a valid legislative purpose for Petitioner's Subpoena.

The Legislature's first proffered purpose for the Subpoena is to investigate "whether members of the Judiciary or employees deleted public records and information." However, about this concern there is no mystery. The deletion of information has been widely reported in numerous news reports and declared in many court filings. As stated in the Court Administrator's petition initiating OP 21-0173, filed April 12, 2021, "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.'" And, McLaughlin "inform[ed] the Montana Legislature that some emails relating [to] the poll had been deleted in the normal course of business. . ." *Petitio*n, p. 5-6, April 12, 2021, *McLaughlin*, OP 21-0173. On April 14, 2021, Respondent State Legislature filed a motion to dismiss in OP 21-0173, to which it attached hundreds of emails from the Judiciary. The accompanying Declaration from the Legislature's counsel declared that "over 5,000 emails" have already been produced in response to the Legislature's subpoena to DOA Director Giles for the Judiciary's emails. *Declaration of Kristen Hansen*, p.1, filed April 14, 2021, OP 21-0173. Similarly, in OP 21-0125, the Declaration and exhibits attached to the

Respondent State Legislature's motion to disqualify included many judicial emails.

Consequently, there has already been a mass disclosure of the information the Legislature claims it needs to engage in lawmaking. The Legislature has already been provided extensive information about the practices of the Judiciary necessary to satisfy any need and purpose for enacting public policy—that is, a lawful "legislative purpose." How many more thousands of emails does the Legislature need before it is prepared to engage in lawmaking? Given this wide disclosure, any additional information that can be gleaned from the documentation Petitioner can produce is negligible and can do nothing to further the Legislature's ability to undertake "intelligent legislative action." *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970. Notably, and counter to the stated purpose to investigate "whether members of the Judiciary. . . .*deleted* public records and information," the subpoena seeks not information about Petitioner's deletion of documents, but, rather, ostensibly commands that he produce information he necessarily did not delete. Production of "undeleted" information by Petitioner offers little support for an investigation into deleted records, particularly under the strict constitutional standards that must be applied here.[4]

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[4] The confidentiality of judicial deliberations, discussed below, and the exclusion of the Supreme Court as an agency or public body, further illustrates that the Legislature does not have a legitimate interest in the deletion of judicial records.

Indeed, on this point, courts are to serve as gatekeepers to ensure legislative subpoenas are permitted only for clearly demonstrated legislative purposes. "[C]ourts 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." *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970 (emphasis added). In contrast, "vague" and "loosely worded" evidence of a legislative purposes are disfavored. *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970. "[T]he *mere semblance of legislative purpose would not justify* an inquiry. . . ." *Watkins*, 354 U.S. at 198, 77 S. Ct. at 1185, 1 L. Ed. 2d at 1290 (emphasis added). Here, the Legislature's proffered purpose provides no "detailed and substantial" evidence of legislative purpose and is a loosely worded and vague attempt to state a valid legislative purpose. Rather, it constitutes the "mere semblance" of a legislative purpose, and should fail. *Watkins*, 354 U.S. 178, 198, 77 S. Ct. 1173, 1185, 1 L. Ed. 2d 1273, 1290.

Courts are also to consider whether "*other sources* could provide [the Legislature] the information it needs," so that the constitutional conflict can be avoided. *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970 (emphasis added). As explained above, the Legislature has already obtained from sources other than Petitioner "the information it needs" for any valid legislative purpose.

B. The second proffered purpose, to investigate the processes of the Judicial Standards Commission for addressing the "polling controversy," fails to state a valid legislative purpose for Petitioner's Subpoena.

The Legislature's second proffered purpose within the Subpoena to Petitioner is to investigate "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." Essentially, the proffered purpose is to investigate whether the Judicial Standards Commission (JSC) can adequately address the "polling controversy" discussed above.

The JSC is of constitutional creation, within Article VII of the Montana Constitution, *The Judiciary*. Mont. Const. Art. VII, § 11. The Constitution directs the Legislature "to create a judicial standards commission," and sets the membership of the JSC. Mont. Const. Art. VII, § 11(1). The Constitution directs the JSC to "investigate complaints," "make rules implementing this section" of the Constitution, and authorizes the JSC to "subpoena witnesses and documents." Mont. Const. Art. VII, § 11(2). Upon recommendation of the JSC, the Montana Supreme Court may discipline, including removal, "any justice or judge" for the reasons stated in the Constitution. Mont. Const. Art. VII, § 11(3). The Constitution makes proceedings before the JSC confidential, "except as provided by statute." Mont. Const. Art. VII, § 11(4). Pursuant to the Constitution, the Legislature has created the JSC and

enacted statutes governing its administration. Section 3-1-1101, et. seq.

Petitioner concedes the Legislature has a constitutional role to play in the creation of the JSC and in the issue of confidentiality, as provided in the Constitution. While the Legislature has enacted several related statutes, *see* § 3-1-1101, MCA, the JSC functions, consistent with its placement within Article VII of the Constitution, as part of the Judicial Branch. Issues of bias, prejudice, misconduct, malfeasance, ethics, and disability fall squarely within the Judiciary's purview.

Whatever role the Legislature may validly play in the JSC's operation, that role and the proffered purpose to investigate the sufficiency of the JSC's processes to address the pulling controversy does not state a valid legislative purpose necessary to support Petitioner's Subpoena, for the following reasons. And, to repeat, a legitimate legislative purpose for this inter-branch controversy is one for which the Legislature has proffered sufficient evidence to demonstrate the Subpoena will further the Legislature's pursuit of lawmaking.

First, the Subpoena does not command production of Petitioner's communications with the JSC or its members, or of any documentation related to Petitioner's prior experience or work on administrative issues related to the JSC. Rather, the Subpoena commands production of Petitioner's official and personal communications regarding the polling controversy, legislation that pended before the 2021

Montana Legislature, and the Montana Judges Association (MJA).

Petitioner recognizes that legislation regarding the JSC pended before the 2021 Legislature, including HB 685, and that an MJA poll was conducted regarding that bill. In OP 21-0125, involving SB 140, the Montana Supreme Court recently entered an order stating that none of the six justices sitting on that case, including Petitioner, participated in the SB 140 poll during the session. *Order*, p. 1., April 7, 2021, *Brown*, OP 21-0125 ("the parties are advised that no member of this Court participated in the [SB 140] poll.") Petitioner signed the Order because this was the truth, but further, it is also the truth that Petitioner did not participate in *any* of the MJA polls during the session. This has already been unequivocally demonstrated by the thousands of judicial emails the Legislature has seized and included in filings before the Supreme Court, which contain the email responses to the polls. Thus, the Subpoena's stated purpose of obtaining documentation of Petitioner's poll participation has already been accomplished, and is moot. While it is theoretically possible that Petitioner could have *orally* communicated a vote on the polls, the emails already produced would appear to eliminate that possibility, as the vast majority of votes are accounted for in the emails. Further, the Subpoena to Petitioner does not expressly command production of oral messages and, in any event, Petitioner cannot provide orally transmitted messages in response to this particular Subpoena.

It is also theoretically possible that Petitioner could have exchanged official and private written or electronic communications about pending legislation outside of the MJA polling process, which would also be covered by the Subpoena. However, at some point we must stop to consider: What possible connection to the legitimate function of enacting legislation regarding the JSC is served by a further search of Petitioner's communications to determine these details, in the framework of an inter-branch constitutional dispute? The U.S. Supreme Court has explained that "efforts to craft legislation involve predictive policy judgments" that are "not hamper[ed] . . . when every scrap of potentially relevant evidence is not available." *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970 (citing *Cheney v. United States District Court*, 542 U. S. 367, 384, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)). Petitioner's additional "scraps" of information will have no bearing on the Legislature's ability to legislate. Under the gatekeeping duty of the courts to consider "the nature of the evidence offered" by the Legislature "to establish that a subpoena advances a valid legislative purpose," *Trump*, 140 S.Ct. at 2036, 207 L. Ed. 2d at 970, the Subpoena to Petitioner must justify the intrusion, but, again, woefully fails. The Court should conclude that this "asserted legislative purpose" fails to "warrant[ ] the significant step" of issuing a subpoena, and avoid "the constitutional confrontation." *Trump*, 140 S.Ct. at 2035, 207 L. Ed. 2d at 969.

Lastly, the failure of the Subpoena to identify any specific legislation, any lawful legislative function for which the information is needed, or even a scheduled hearing or meeting for which the commanded

information is relevant, underscores that there is no identified legislative purpose at all. This raises the following, disconcerting, point.

III. THE COURT SHOULD CONSIDER WHETHER THE SUBJECT SUBPOENA WAS ACTUALLY ISSUED FOR AN IMPROPER PURPOSE.

Generally, the Legislature's subpoena power is for pursuing policy, not people. The power is "'justified solely as an adjunct to the legislative process.'" *Trump*, 140 S.Ct. at 2031, 207 L. Ed. 2d at 964 (citation omitted). The Legislature "may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'" *Trump*, 140 S.Ct. at 2032, 207 L. Ed. 2d at 964 (citation omitted). There is "no 'general' power to inquire into private affairs and compel disclosures," and there is "no congressional power to expose for the sake of exposure." *Trump*, 140 S.Ct. at 2032, 207 L. Ed. 2d at 964 (internal quotations omitted). "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Trump*, 140 S.Ct. at 2032, 207 L. Ed. 2d at 964 (internal quotations omitted).

A legislative subpoena must "concern a subject on which legislation *could be had*." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491,506, 95 S.Ct. 1813, 44 L.Ed. 2d 324 (1975) (emphasis added). The 2021 legislative session is scheduled to end next week. The transmittal deadlines have passed. There appears to be insufficient time remaining for the Legislature to

consider, process, and enact new legislation, and thus, legislation regarding the purposes expressed in the Subpoena cannot "be had" this session. If the Legislature would offer that the information sought is for the purposes of future sessions, then why was Petitioner given only days in which to appear and produced the commanded material?

The Background section of this Petition sets forth what Petition believes to inappropriate overreach by the Department of Justice and the State Legislature. Given that overreach, the Legislature's failure to demonstrate a valid legislative purpose, and the inability for valid lawmaking to now occur, the Court should conclude that the record proves the Subpoena has been pursued inappropriately, particularly regarding the pursuit of the Petitioner's private communications. In other words, not only does the Subpoena fail for lack of legitimate legislative purpose, it also fails as an abuse of subpoena authority.

IV. THERE ARE ADDITIONAL REASONS TO QUASH THE LEGISLATIVE SUBPOENA ISSUED TO PETITIONER.

"[R]ecipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation," and "recipients have long been understood to retain common law and constitutional privileges" related to the production of materials. *Trump*, 140 S.Ct. at 2032, 207 L. Ed. 2d at 965. Petitioner asserts all of his privileges and immunities related to his work and the work of the Montana Supreme Court. The Supreme Court is not a government or public body, its communications are not

subject to the open deliberation requirements of the Montana Constitution, and the justices' communications must be privileged and confidential. *See generally*, *Order, In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999. Judges are immune for actions taken during the lawful discharge of their public duties. *Hartsoe v. McNeil*, 2012 MT 221, ¶ 5, 366 Mont. 335, 286 P.3d 1211 ("Judicial immunity is a public policy designed to safeguard principles of independent decision making. The principles of judicial immunity are well established in the United States."). Petitioner asserts his constitutional right to privacy, particularly regarding the Subpoena's command to produce all messages "sent or received by your personal" phone. For example, a comment in a text message received on Petitioner's private phone from his daughter, asking, "Where will people be able to carry now under that bill?", will suddenly make his daughter's words a subject for legislative oversight.

WHEREUPON, Petitioner requests the following relief:

1. In light of the threatened great injury to Petitioner, and the appearance that he is entitled to relief, Petitioner requests that the Court immediately quash or stay the Subpoena, or preliminarily enjoin Respondent from pursuing the Subpoena or issuing further subpoenas, pending a hearing and pending this proceeding pursuant to § 27-19-201, MCA. By the time judgment could be entered in Petitioner's favor, the harm would have already been done. Petitioner's Declaration is submitted herewith.

2. That the Court set a hearing on the temporary order.

3. That the Court declare the Subpoena invalid pursuant to § 27-8-202, MCA, and permanently enjoin it pursuant to § 27-19-102, MCA.

4. For such other relief as the Court deems appropriate.

DATED this 19th day of April, 2021.

/s/ Jim Rice

EXHIBIT A

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, jrice@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, jrice@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, jrice@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.

EXHIBIT B

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 6

Jim Rice
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PO Box 203001
Helena, MT 59620-300101
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Fax: 1-406-444-3274
Email: jrice@mt.gov

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

Cause No. ADV 2021 451

[Filed: April 19, 2021]

JUSTICE JIM RICE,	)
	)
Petitioner,	)
	)
vs.	)
	)
THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Representative Wylie Galt, Speaker of the House of Representatives,	)
	)
Respondents.	)

DECLARATION OF JIM RICE

1. The statements made herein are based on my personal knowledge, and I am competent to testify regarding the same.

2. I am a Justice on the Montana Supreme Court.

3. I am serving as Acting Chief Justice in the matter of *Brown, et. al. v. Gianforte*, OP 21-0125, currently pending before the Montana Supreme Court.

4. On April 14, 2021, I was served, by an individual who advised me he worked for the Department of Justice, with a Subpoena issued by the Montana State Legislature. Due to a technical error in the Subpoena, I was served a new or corrected Subpoena by the same Department of Justice individual on April 15, 2021.

5. The Legislative Subpoena requires that I appear at the State Capitol Building and produce certain documentation, as described therein, on Monday, April 19, 2021, at 3 p.m. The Subpoena commands that I produce communications from both my "personal and work phones."

6. A true and correct copy of the Subpoena has been provided to the court with the Petition I have filed herein.

7. In my capacity as a Justice of the Montana Supreme Court, I send and receive a large number of emails related to my duties as a Justice on my government email account.

8. Emails sent to my government email account are not received on my personal email accounts or devices, and I cannot send emails on my government account from those devices.

9. I believe that great or irreparable harm to me and my judicial office is likely to occur if the Subpoena is not temporarily quashed, enjoined or stayed. This includes the improper intrusion into the province of the Judiciary, my work product as a Justice, and the private communications on my personal phone. By the time judgment could be entered in Petitioner's favor, the harm would already have been done.

10. In accordance with Section 1-6-105, MCA, I declare under penalty of perjury and under the laws of the State of Montana that the foregoing is true and correct.

DATED this 19 day of April, 2021

Signed in Helena, Montana.

By: /s/ Jim Rice
Jim Rice

APPENDIX 7

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

Cause No. ADV 2021 451

[Filed: April 19, 2021]

JUSTICE JIM RICE,	)
	)
Petitioner,	)
	)
v.	)
	)
THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Representative Wylie Galt, Speaker of the House of Representatives,	)
	)
Respondents.	)

O R D E R

Having considered the Petition for Declaratory and Injunctive Relief filed herein, and the Emergency Request to Quash or Enjoin Legislative Subpoena pending further proceedings before this Court, which Subpoena commands Petitioner to appear today, April 19, 2021, at 3:00 p.m., before the Montana State Legislature, the Court concludes an appropriate basis for temporary relief has been demonstrated. Therefore,

the Legislative [M[3]] Subpoena is [quashed] (enjoined) [stayed] pending further proceedings.

Dated this 19th day of April, 2021.

/s/ Michael T. Menahan
District Court Judge

[* A hearing on Justice Rice's emergency request shall be heard on April 29, 2021 at 2:30 p.m. before Judge McMahon. /s/ Michael T. Menahan]

APPENDIX 8

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL TRANSPARENCY AND ACCOUNTABILITY

THE MINORITY REPORT TO THE 67TH MONTANA LEGISLATURE

THE MINORITY REPORT ON JUDICIAL TRANSPARENCY AND ACCOUNTABILITY

[April 2021]

This select committee, and subsequent committee report, are part of a coordinated effort to attack and smear the independent judiciary by Republicans in the Legislature and the Executive Branch.

Throughout the 67th Legislative Session, Republican leaders have been told by legislative attorneys the legislation they're trying to pass violates our Montana Constitution. Republicans know full well these bills will likely be held unconstitutional in the court, so the Republicans in the Legislature conspired with the Governor's Office to hack the judiciary's records in an effort to smear and delegitimize the courts.

We believe this is an attack on our system of checks and balances, and an attack on the very rule of law itself. We struggle to understand the purpose of this committee and its report. Mason's Manual lists the following limitations that apply to the Legislature's investigation powers:

> **"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 legislature."** (Mason's Manual, pp 566-567)

The Montana Constitution clearly outlines the constitutional process within the judicial branch to discipline or remove judges through the independent Judicial Standards Commission, not through the legislative branch. Article VII, Section 11 states upon the recommendations of the Commission, the Montana 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.**

The Montana Constitution takes precedence over any other statute the legislative and executive branch can enact. We believe this committee, and its actions, were set up for political purposes to further undermine our independent courts, and is therefore an illegitimate legislative proceeding.

All questions the committee wanted answered by the Montana Supreme Court were sent to Chairman Hertz and committee members in a letter from Chief Justice McGrath on Friday, April 16, 2021 before the committee met.

The court provided answers on the work of the Montana Judges Association (MJA) to inform the legislature on bills relating to the judiciary. The letter explained the use of polls to district court judges on rare occasions to determine whether MJA should support, oppose, or remain neutral towards proposed legislation relating to the judiciary. Montana Supreme Court Justices do not participate in these polls. The practice of MJA contacting judicial members using state resources is a common practice that occurs every session and is the practice of other associations who represent government organizations, such as law enforcement officers. Their participation in the legislative process on these limited matters benefits the legislature and is consistent with Rule 3.2 of the Montana Canons of Judicial Conduct.

Furthermore, the letter states these polls relate only to matters of public policy to inform the legislature and by no means indicates how a judge will rule on possible litigation or the constitutionality of a law. Our independent judiciary's role is to set aside personal views and make decisions solely on the law and its constitutionality. There is zero evidence of any misconduct.

Instead, the actions by the executive branch raise serious questions regarding that branch's own conduct, the conduct of Department of Administration Acting

Director (DOA) Misty Ann Giles and her superiors that failed to safeguard confidential and private information unrelated to this matter–exposing the state to significant legal liability.

On Friday April 9, 2021, Acting Director Giles was served with a purported subpoena by Senate Judiciary Chairman Keith Regier to appear before the legislature with documents from the judicial branch by the end of the day. The subpoena in question asked for records from a separate branch of government by using the executive branch to go through the back door of the state email servers to produce these records. Emails and phone records obtained by Senate Minority Leader Cohenour show Giles was aware of the subpoena well before it was issued on Friday and was in constant communication with the Governor's Office about completing the request. Records show Acting Director Giles' eagerness to produce these records as soon as possible, with no privacy review, in what can only be presumed as an attempt to outrun a court order by the Montana Supreme Court to quash a legislative subpoena to prevent private and sensitive case information from being released. While the executive branch may hold these records on the state servers, they are not the owners of these records but rather the custodians. 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.

The contents of the records, as described in Ms. McLaughlin's court filings, included private personal and medical information, private information regarding Youth Court Cases, information on active security threats to judges and exchanges with law enforcement, and Judicial Standards Commission information. In releasing this information to Legislative Republicans and their staff, Acting Director Giles has created immense legal liability for the State of Montana and potentially violated the constitutionally-protected privacy rights of third parties who have absolutely nothing to do with MJA or the SB140 poll. Her rush to outrun an impending Court order on the improper subpoena could cost Montana taxpayers dearly when lawsuits inevitably follow.

In conclusion, the minority does not support the creation of committees for political theater. This is a waste of public resources and an embarrassment to the dignity of the Legislature. The only purpose of this select committee is to undermine and smear the judicial branch, and delegitimize any future decisions that may strike down unconstitutional actions of this body. Our own lawyers in the Legislature have warned us this is a likely consequence of passing laws that violate Montana's constitutional protections for liberty.

Republican legislators and their staff have had their questions answered by the Montana Supreme Court and there is no evidence of misconduct by the judiciary as it relates to the work of MJA or the use of public resources to contact members. Any further work by this committee is purely political theater. If this episode has any lessons for our system of checks and balances, it is

that the executive branch and the Department of Administration must be held accountable for using their position as custodians for the records of a separate branch of government, to exploit that position for political gain. DOA must work with the separate branches of government to develop a responsible process for the release of any confidential records in its possession. This is essential to reduce costly legal liability for taxpayers when DOA's releases violate the constitutional rights of Montanans and to ensure our system of checks and balances is protected.

/s/ Diane Sands	/s/ Kim Abbott
SENATOR DIANE SANDS	REPRESENTATIVE
Senate District 49	KIM ABBOTT
	House Minority Leader

APPENDIX 9

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: April 26, 2021]

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

PETITIONER'S NOTICE OF ADDITIONAL LEGISLATIVE SUBPOENA

APPEARANCES:

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fleck.com

Attorneys for Respondent Montana Department of Administration

Petitioner Beth McLaughlin submits this notice to advise the Court of yet another Subpoena served by Respondent Montana State Legislature seeking her documents. The Subpoena is attached hereto as Exhibit A.[1]

The Subpoena originally at issue in this case, dated April 8, 2021, was served on Respondent Montana Department of Administration. That Subpoena was temporarily quashed by this Court's Temporary Order on April 11, 2021.

The Legislature advised the Court the next day that it "does not recognize this Court's order as binding and will not abide it." (Letter from Kristin Hansen to Justice Rice, April 12, 2021.) True to its word, the Legislature reissued what was essentially the same Subpoena to the Department of Administration on April 13, 2021–and it commanded production of those same documents at 3:00 p.m. that day. Despite seeking, once again, McLaughlin's emails and attachments, neither she nor the Court (to her knowledge) was provided a copy of the Subpoena or even informed of its existence, thereby depriving her of any opportunity to object. She and her counsel only learned of the new

[1] McLaughlin's Petition for Original Jurisdiction was based on a legislative subpoena dated April 8, 2021. She was then served with a revised legislative subpoena on April 19, 2021, prompting her Emergency Motion to Quash Revised Legislative Subpoena. The subpoena attached to this Notice, therefore, is the third subpoena seeking McLaughlin's documents of which she is aware (not including the subpoenas issued to the justices of the Montana Supreme Court, which seek her documents as well).

Subpoena by chance, on April 21, 2021, and submit it herewith for the Court's consideration.

Thankfully the Department of Administration abided by the Court's Temporary Order and did not, to McLaughlin's knowledge, comply with the April 13, 2021 Subpoena. The Court has made clear, in its April 16, 2021 Order, that "any subpoenas issued by the Montana State Legislature for electronic judicial communications" are temporarily stayed. (Emphasis added.)

McLaughlin submits this notice so the Court has a complete record in which to evaluate the important issues in this case. This, in turn, will ensure the Court's ultimate decision encompasses and considers all Subpoenas and all conduct.

Dated this 26th day of April, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

*[*** Certificate of Service omitted for printing purposes***]*

EXHIBIT A

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.

The Montana Legislature is conducting an investigation of state records retention protocols, improper use of government time and resources, and the application of the judicial standards commission's enforcement authority.

You are hereby required to appear at the Montana State Capitol Building, room [president's office], in the City of Helena, Montana, on the 13th day of April, 2021, at 3:00 p.m., to produce the following documents:

(1) Any emails and attachments responsive to the Legislature's April 7th subpoena which have not yet been delivered.

(2) All emails and attachments sent and received by Court Administrator Beth McLaughlin between April 8, 2021, and April 12, 2021 delivered as hard copies and .pst digital files.

(3) Any and all recoverable deleted e-mails sent or received by Court Administrator Beth McLaughlin between April 8, 2021, and April

12, 2021 delivered as hard copies and .pst digital files.

Please note, as with the Legislature's April 7, 2021, subpoena to you, this request excludes any emails and attachments related to decisional case-related matters made by Montana justices or judges in the disposition of such matters. Please redact, as necessary, any personal, confidential, or protected documents or information responsive to this request.

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 13th day of April, 2021.

By: /s/ Mark Blasdel

Senator Mark Blasdel, President of the Montana Senate.

APPENDIX 10

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: April 28, 2021]

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

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

APPEARANCES:

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Counsel for Respondent Montana Department of Administration

Respondent Montana State Legislature does not dispute Petitioner Beth McLaughlin has met the requirements for original jurisdiction under M.R.App.P. 14. Instead, it argues:

(1) legislative subpoenas are immune from judicial review, and

(2) a conflict of interest precludes the Court from ruling.

Both arguments are wrong.

A. Jurisdiction.

The Court has recognized its "exclusive adjudicatory authority" under the Montana Constitution "regarding the scope and application of the legislative subpoena power." (4/16/21 Order.) "Unlike the English practice," ripe with "the evil effects of absolute power," in America "from the very outset the use of contempt power by the legislature was deemed subject to judicial review." *Watkins v. U.S.*, 354 U.S. 178, 192 (1957).

The Court's authority is also expressed in very laws passed by the Legislature. These define "subpoena" to include one seeking testimony or documents before a "judge, justice, or other officer authorized to administer oaths or take testimony," MCA §§ 26-2-101, 102(2), which includes the Legislature, MCA § 5-5-201. Thus, legislative subpoenas are limited by MCA § 26-2-401. Moreover, to the extent a legislative statutory/interim committee subpoena is disobeyed, Title 5 ("Legislative Branch") expressly provides for enforcement by the judiciary. MCA § 5-11-107(2). (Ex. A, 6.)

The Legislature claims unfettered authority to investigate perceived impropriety "as the check and balance for the judicial branch," but it misunderstands its role. The Legislature does not sit in judgment of other branches, and has no subpoena power "for the sake of exposure." *Watkins*, 354 U.S. at 200. Its own rules recognize it "has no legal status . . . to establish an extraordinary tribunal for the trial of judicial and other officers. . . ." (Legislative Memorandum, Ex. A.) Its check and balance comes through the enactment of legislation, and its subpoena power is "justified solely as an adjunct to the legislative process." *Id.*

B. Conflict of Interest.

The Legislature posits that because this case is brought by an individual whom the Justices know and work with, there is a "conflict of interest" which "requires recusal of, at minimum, the entire panel of Justices." Not so. Courts commonly address conflicts of interest without recusal.

A compelling example is *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004), where Justice Scalia's impartiality was challenged after he was on a hunting trip with Vice President Cheney, a named party. Justice Scalia denied the recusal motion himself, explaining:

> . . . While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the

> slightest friendship or favor, and in an atmosphere where the press will be eager to find foot faults.

Id. at 928.

The Legislature assumes this Court is "corruptible" because it knows McLaughlin and judicial communications might be disclosed. This falls far short of demonstrating the Court cannot be impartial in evaluating the appropriate scope of legislative subpoena power in Montana.

The Legislature cites the Code of Judicial Conduct, yet tellingly declines to discuss or apply those rules. Rule 2.12, M.C.Jud.Cond., lists the circumstances requiring disqualification. None exist here.

Even if they did, "wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be." *Reichert v. State*, 2012 MT 111, ¶ 36 n.5, 365 Mont. 92, 278 P.3d 455. In *Reichert*, the justices declined to recuse themselves from reviewing an initiative to change judicial selection procedures, even though the law "could possibly" affect their own re-election:

> . . . Like sitting Supreme Court justices, district court judges have "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 Legislators' theory) have an "interest" in the outcome of this case. That being so, the rule of necessity would apply and none of

> the justices would be disqualified. *See* ¶37, *supra*; *see also* Mont. Code of Jud. Conduct, Rule 2.12 cmt.[3] ("The rule of necessity may override the rule of disqualification.").

Reichert, ¶ 44.

Here too, it is "highly speculative" a potential "interest" in the outcome of McLaughlin's case renders the justices incapable of impartiality, and the rule of necessity applies nevertheless.

The Legislature's only other authority on this point is *Walker v. Birmingham*, 388 U.S. 307 (1967). *Walker* had nothing to do with judicial disqualification, but its holding is instructive: A party who has been temporarily enjoined cannot "bypass orderly judicial review of the injunction before disobeying it." *Id.* at 320. Because "no man can be judge in his own case," an enjoined party is not "free to ignore all the procedures of law." *Id.* at 320-21. Despite an "impatient commitment to [one's] cause . . . respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Id.* at 321. Here, by declaring its subpoena power free from any judicial process, the Legislature is acting as its own judge.

C. Scope.

The key issue is "the scope, limitations, and parameters to be applied by courts when the Legislature exercises its authority to obtain information and competing interests are presented." (4/16/21 Order.) The Legislature's own rules recognize "the power to investigate must be exercised for a proper

legislative purpose related to enacting law. . . ." (Ex. A.) That power is most limited when directed to another government branch, and must be articulated with "undisputed clarity." *Watkins,* 354 U.S. at 214.

The Legislature claims investigation is necessary to expose "violation of state law and policy." That, by definition, is not a legitimate legislative purpose, as it does not relate to "proposed or possibly needed statutes" or "the administration of existing laws." *Id.* at 187 (distinguishing "administration" from "violation" of laws, as the latter invokes "the functions of the executive and judicial departments of government").

The Legislature also claims a need to investigate the Judicial Standards Commission, but exclusive jurisdiction over judicial standards is vested with the Commission. Mont. Const. Art. VII, § 11. The Legislature's role is limited to "creat[ing]" the Commission and "providing for the appointment" of its members. *Id.*

Nor is there evidence, much less "detailed and substantial evidence," that the stated legislative purpose is real. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2025 (2020). While McLaughlin deleted some emails she regarded as ministerial from her computer, she knew the emails would be retained on the State server. And they were. No law or policy prohibited this practice, and there is zero evidence any email was "destroyed." To the contrary, the Legislature has collected over 5,000 of McLaughlin's emails.

Lastly, despite the requirement that a subpoena directed to a co-equal branch be "no broader than

reasonably necessary," *Trump*, 140 S. Ct. at 2025, the subpoenas at issue encompass materials with no nexus to the stated legislative objective and which are protected by the judicial privilege and myriad privacy rights.

CONCLUSION

The Court has jurisdiction to review the legislative subpoenas, which are no more valid than if legislators wanted to wander around a judge's chambers, turning over pieces of paper to see what they said. The Motion to Dismiss must be denied.

Dated this 28th day of April, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

*[*** Certificates omitted for printing purposes***]*

Exhibit Index

- Exhibit A – April 18, 2018 Montana Legislative Services Division Memorandum

Exhibit A

[THE GREAT SEAL OF THE STATE OF MONTANA]

Montana Legislative Services Division
Legal Services Office

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

April 18, 2018

TO: Representative Ron Ehli, Vice Chair, Special Select Committee on State Settlement Accountability

FR: Todd Everts, Chief Legal Counsel

RE: Information Request Regarding the Montana Legislature's Investigative Authority

In anticipation of the organizational meeting on April 25, 2018, of the Special Select Committee on State Settlement Accountability, you requested information regarding the investigative authority of the Montana Legislature and its legislative committees and staff. This memorandum is in response to that request.

MEMORANDUM

I. Background

On March 16, 2018, pursuant to House Rules 30-20(7) and (8) and Senate Rule 30-10(4), the Speaker of the House and the President of the Senate jointly appointed the Special Select Committee on State Settlement Accountability to investigate executive branch confidential settlements paid out to public

employees. The Special Select Committee is comprised of six Republicans and four Democrats. Leadership appointed Senator Nels Swandal as chair and appointed Representative Ron Ehli as vice chair of the Special Select Committee.

II. Investigative Authority of the Montana Legislature and Its Legislative Committees and Staff

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 judgements inherent and indispensable in the power of enacting law.[1] A legislative body's inherent power to investigate may be exercised directly or through a duly authorized committee.[2] A legislative body's investigative power is not absolute and there are limitations. The presumption of constitutionality of legislative actions applies to legislative investigations.[3]

However, 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

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[1] *Mason's Manual of Legislative Procedure* (2010), p. 561; *Sutherland Statutory Construction* (2010), p. 596.

[2] Mason's Manual, p. 569; Sutherland, p. 570.

[3] Sutherland, p. 578.

privacy, life, liberty, and property.[4] The power to investigate the private affairs of a citizen only exists when the investigative authority exercised is directly related to a legitimate legislative purpose.[5]

A. *Source of Legislative Investigative Authority*

The organic source of the Montana Legislature's investigative powers can be found in Article V, section 1, of the Montana Constitution, which provides: "The legislative power is vested in a legislature consisting of a senate and a house of representatives." The Montana Constitution further provides that:

> Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections. Each house shall choose its officers from among its members, keep a journal, and make rules for its proceedings. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members.[6]

With Montana's constitutional advent of a bicameral Legislature, the power to investigate resides as a separate and distinct power in each house of the

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[4] Mason's Manual, p. 566; Article II, section 10, of the Montana Constitution.

[5] Mason's Manual, p. 566; Sutherland, pp. 578-583.

[6] Article V, section 10(1), of the Montana Constitution.

Legislature.[7] However, both the Montana Senate and the House of Representatives may jointly appoint an investigative committee.[8]

Constitutional investigative powers also reside in specific administrative committees and interim committees. Article V, section 10(4), of the Montana Constitution provides that the Legislature may establish a Legislative Council and other interim committees and that the Legislature shall establish a legislative post-audit committee that shall supervise post-auditing duties as provided by law.

Other provisions of the Montana Constitution that buttress the Legislature's investigative authority include Article II, sections 8 and 9, the public's constitutional right to participate in the decision-making process of state government and the public's right to examine documents and observe the deliberations of all public bodies or agencies of state government. Synchronized with the public's right to know and participate is the constitutional requirement that all committee meetings and hearings of the Legislature be open to the public.[9]

In addition to the Constitution, the bulk of the Montana Legislature's investigative authority resides

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[7] Article V, sections 1 and 10, of the Montana Constitution; Mason's Manual, p. 562.

[8] Rules of the Montana Legislature, Joint Rules 30-10 and 30-20; House Rules 30-20(7) and (8); and Senate Rule 30-10(4).

[9] Article V, section 10 (3), of the Montana Constitution.

in statute with respect to subpoenas, contempt, compelling attendance of a witness, immunity of a witness, administering oaths, powers of statutory and interim committees related to legislative hearings, authority of the Legislative Services Division on behalf of committees to investigate state government activities, and authority of the legislative auditor and the legislative fiscal analyst to access confidential information.[10]

The Rules of the Montana Legislature offer little detail regarding the Legislature's investigative authority other than describing the authority of the Speaker and the President to issue subpoenas and referencing that *Mason's Manual of Legislature Procedure* (2010) governs the proceedings of the Senate and the House in all cases not governed by the rules.[11] Mason's Manual devotes an entire chapter on the source, scope, exercise, and limitations of legislative bodies' investigative powers.[12]

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[10] Subpoenas (5-5-101 and 5-5-102, MCA), contempt (5-5-103, MCA), compelling attendance of witness (5-5-104, MCA), immunity of a witness (5-5-105, MCA), administering oaths (5-5-201, MCA), authority of the Legislative Services Division on behalf of committees to investigate state governmental activities (5-11-106, MCA), powers of statutory and interim committees related to legislative hearings (5-11-107, MCA), and authority of the legislative auditor and the legislative fiscal analyst to access confidential information (5-12-303 and 5-13-309, MCA).

[11] Rules of the Montana Legislature, Joint Rule 60-20; Senate Rule 10-50(5); and House Rule 10-20(4).

[12] Mason's Manual, Chapter 73, pp. 561-577.

B. *Scope of Legislative Investigative Authority*

The scope of a Legislature's investigative power broadly extends to any subject related to enacting law. According to Mason's Manual:

> 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.[13]
>
> The legislature has power to investigate any subject where there is a legitimate use that the legislature can make of the information sought, and an ulterior purpose in the investigation or an improper use of the information cannot be imputed.[14]

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.[15]

It has been noted by courts and legal experts that:

> Investigation may be made concerning the administration of existing laws, proposed laws, or potentially necessary laws. Inquiry may be

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[13] Mason's Manual, p. 561.

[14] Mason's Manual, p. 563.

[15] Mason's Manual, p. 563.

> made as to defects in any social, political or economic system to the end of devising remedies for any such defects. Investigation may be made of any subject and any matter that related to the need of legislation on the subject matter, and what kind and the extent of any legislation needed.[16]

C. *Exercise of Legislative Investigative Authority*

Where a legislative body has the constitutional power to institute an investigation, the manner of how the investigation is conducted rests with the sound discretion of the legislative body.[17]

There are a number of investigation tools that the Montana Legislature has to exercise its investigative powers. The Legislative Services Division, on behalf of standing committees, select committees, or interim committees and any subcommittees of those committees, may investigate and examine state government activities and may examine and inspect all records, books, and files of any department, agency, commission, board, or institution of the state of Montana.[18]

Montana statutes require all state agencies to aid and assist the legislative auditor in auditing of books,

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[16] C. Quilter, "Primer on the Investigative Authority of Legislative Committees", *Legislative Lawyer*, Vol. 12, No. 1 (Winter 1998), p. 87.

[17] Mason's Manual, p. 568.

[18] 5-11-106, MCA.

accounts, activities, and records, and the legislative auditor may examine at any time the books, accounts, activities, and records, confidential or otherwise, of a state agency.[19] These statutory provisions regarding the legislative auditor's investigative power may not be construed as authorizing the publication of information prohibited by law.[20]

The legislative fiscal analyst has the statutory authority to investigate and examine the costs and revenue of state government activities and may examine and obtain copies of the records, books, and files of any state agency, including confidential records.[21] When confidential records and information are obtained from a state agency, the legislative fiscal analyst and staff must be subject to the same penalties for unauthorized disclosure of the confidential records and information provided for under the laws administered by the state agency. The legislative fiscal analyst shall develop policies to prevent the unauthorized disclosure of confidential records and information obtained from state agencies.[22] These statutory provisions regarding the legislative fiscal analyst do not authorize publication or public disclosure of information if the law prohibits publication or disclosure or if the Department of Revenue notifies the fiscal analyst that specified

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[19] 5-13-309, MCA.

[20] 5-13-309, MCA.

[21] 5-12-303(1), MCA.

[22] 5-12-303(2), MCA.

records or information may contain confidential information.[23]

All duly authorized committees of the Legislature may hold hearings, administer oaths, issue subpoenas, and compel the attendance of witnesses and the production of records and testimony.[24] As noted previously, the Rules of the Montana Legislature authorize the Speaker and the President to individually issue subpoenas.[25]

A person sworn and examined before the Legislature or any committee may not be held criminally liable or be subject to any penalty or forfeiture for any fact or act relating to the required testimony.[26] Common law and judicial rules of evidence applicable in court proceedings, do not apply to legislative investigations.[27]

When a summoned witness refuses to obey a subpoena or refuses to testify, the Senate or the House may, by

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[23] 5-12-303(3), MCA.

[24] Subpoenas (5-5-101 and 5-5-102, MCA), contempt (5-5-103, MCA), compelling attendance of witness (5-5-104, MCA), immunity of a witness (5-5-105, MCA), administering oaths (5-5-201, MCA), powers of statutory and interim committees related to legislative hearings (5-11-107, MCA), and Mason's Manual, Chapter 73, pp. 561-577.

[25] Rules of the Montana Legislature, Senate Rule 10-50(5) and House Rule 10-20(4).

[26] 5-5-105(1), MCA.

[27] Mason's Manual, p. 567; Sutherland, p. 586.

resolution, commit the witness for contempt.[28] A witness refusing to attend in obedience to a subpoena may be arrested by the sergeant at arms and brought before the Senate or the House. A copy of a resolution of the Senate or the House, signed by the President or the Speaker and countersigned by the secretary or the clerk, is necessary to authorize the arrest.[29]

Although the appointed Special Select Committee is neither a statutory committee nor an interim committee, those types of committees are statutorily authorized to 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.[30] If a person disobeys a subpoena issued by a statutory committee or an interim committee or if a witness refuses to testify on any matters regarding which the witness may be lawfully interrogated, the district court of any county shall, on application of the committee, compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from a district court or a refusal to testify in the district court.[31]

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[28] 5-5-103, MCA.

[29] 5-5-104, MCA.

[30] 5-11-107(1), MCA.

[31] 5-11-107(2), MCA.

D. *Limitations on Legislative Investigative Authority*

A legislative body's investigative power is not absolute, and there are constitutional and common law limitations placed on that power. The presumption of constitutionality of legislative actions applies to legislative investigations.[32] However, 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.[33] The power to investigate the private affairs of a citizen only exists when the investigative authority exercised is directly related to a legitimate legislative purpose.[34]

With the Rules of the Montana Legislature defaulting to Mason's Manual to govern the proceedings of the Senate and the House in all cases not governed by the rules,[35] Mason's Manual lists the following limitations that would apply to the Montana Legislature's investigation powers

in addition to the Montana Constitution and statutory limitations:

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[32] Sutherland, p. 578.

[33] Mason's Manual, p. 566; Article II, section 10, of the Montana Constitution.

[34] Mason's Manual, p. 566; Sutherland, pp. 578-583.

[35] Rules of the Montana Legislature, Joint Rule 60-20; Senate Rule 10-50(5); and House Rule 10-20(4).

1. It is the general rule that the legislature has no power through itself or any committee or any agency to make inquiry into the private affairs of a citizen except to accomplish some authorized end.

2. The legislature has no right to conduct an investigation for the purpose of laying a foundation for the institution of criminal proceedings, for the aid and benefit of grand juries in planning indictments, for the purpose of intentionally injuring such persons or for any ulterior purpose.

3. A state legislature, in conducting any investigation, must observe the constitutional provisions relating to the enjoyment of life, liberty and property.

4. 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 legislature.

5. 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 object 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.

6. A governmental investigation into the papers of a private corporation on the possibility that they may disclose evidence of crime is contrary to the

first principles of justice and an intention to grant the power must be expressed in explicit language.

7. The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action.[36]

III. Conclusion

The Montana Legislature and its duly authorized committees have the clear and very broad authority to conduct legislative investigations. The Legislature's investigation into the management of state institutions and the departments of state government is a legitimate function of a legislative body. The Legislature's investigative power is not absolute and there are limitations. The presumption of constitutionality of legislative actions applies to legislative investigations. However, the power to investigate must be exercised for a proper legislative purpose related to enacting law. The Legislature's investigative power must protect the rights of citizens and adhere to all constitutional protections.

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[36] Mason's Manual, pp. 566-567.

APPENDIX 11

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: May 10, 2021]

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

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

APPEARANCES:

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Counsel for Respondent Montana Department of Administration

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

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

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

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[1] The other cases cited by the Legislature are even further off the mark and did not involve the disqualification of judges. *Clements v. Airport Auth.*, 69 F.3d 321, 325 (9th Cir. 1995) (questions of fact

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

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

Also, recusal in the face of baseless allegations would "harm the Court" by encouraging others to attempt to exercise veto power over judges and "to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons." *Id*. at 927. Confidence in the justices' integrity "cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor." *Id*. at 928. The Legislature simply assumes the Court is corruptible in this case because it has a relationship with McLaughlin. Not only is that untrue, the mischief lies

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as to whether post-termination administrative board harbored malice stemming from the plaintiff's prior whistleblowing activities); *Lopez v. Josephson*, 2001 MT 133, ¶ 48, 305 Mont. 446, 30 P.3d 326 (misconduct of counsel prevented fair trial).

in the making of bogus allegations, no matter how far-fetched, in an attempt to manipulate judges off of cases.

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

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

More important, the Legislature does not identify a single rule, standard or law that prohibits deletion of judicial emails. No argument is made that any deleted email was an "essential record" under MCA § 2-6-1014. In fact, employees are specifically directed to regularly delete or archive emails to keep their email operative. There are some 13,000 state employees. Even if each creates a modest 20 emails a day, that totals 67 million emails a year. Who would manage or pay for duplicative storage of emails on state employee computers? To characterize the deletion of emails as "misconduct," much less misconduct demonstrating a high probability of actual bias, is silly.

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

When McLaughlin filed her emergency motion, thousands of emails had already been produced without review. The DOA was working over the weekend to produce remaining emails on Monday, and McLaughlin's pleas to temporarily suspend production were falling on deaf ears. Given the circumstances, it was eminently appropriate to seek temporary relief in the very case (*Brown*) where the Court just days earlier denied a stay of proceedings to allow Respondent to seek the same information. (April 7, 2021 Order at 2.)

Tellingly, the Legislature does not even refer to the Code of Judicial Conduct as a source for its claim of disqualification. Rule 2.12, M.C.Jud.Cond., lists the

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

specific circumstances requiring disqualification. None exist here.

Even if they did, the rule of necessity would apply: "[W]herever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be." *Reichert v. State*, 2012 MT 111, ¶ 36 n.5, 365 Mont. 92, 278 P.3d 455. In *Reichert*, the justices declined to recuse themselves from reviewing an initiative to change judicial selection procedures, even though the law could affect their own re-election. *Id*. Because the same conflict could be ascribed to any judge, "the rule of necessity would apply and none of the justices would be disqualified." *Reichert*, ¶ 44 (citing Mont. Code of Jud. Conduct, Rule 2.12 cmt.[3] ("The rule of necessity may override the rule of disqualification.")).

Here, too, the same conflict asserted against the justices could be asserted against every Montana judge who knows or works with McLaughlin (presumably all of them). It simply cannot be that McLaughlin is left with no avenue to seek protection.

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

Dated this 10th day of May, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

*[*** Certificates omitted for printing purposes ***]*

APPENDIX 12

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No.: BDV-2021-451

[Filed: May 18, 2021]

JUSTICE JIM RICE,	)
	)
Petitioner,	)
	)
v.	)
	)
THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Representative Wylie Galt, Speaker of the House of Representatives,	)
	)
Respondents.	)

PRELIMINARY INJUNCTION ORDER

On May 10, 2021, a Show Cause hearing was held to determine whether this Court's April 19, 2021 Order temporarily enjoining the Montana State Legislature's (Legislature) April 15, 2021 Subpoena issued to Justice James A. Rice (Justice Rice) should be modified to a preliminary injunction or vacated. At the hearing, Justice Rice appeared with his counsel, Curt Drake. Senator Mark Blasdel and Representative Wylie Galt

appeared via their Department of Justice attorney, Derek Oestreicher.

Justice Rice was sworn, testified, and was cross-examined. In addition, Exhibits 1-8 were admitted. Thereafter, counsel made summation arguments.

MATERIAL FACTUAL BACKGROUND[1]

The Honorable Jim Rice has been a Montana Supreme Court Justice for over twenty years.

On March 16, 2021, Governor Gianforte signed SB 140. It provided, among other things, the governor direct judicial appointment power and abolished the Montana Judicial Nomination Commission.

On March 17, 2021, *Brown et al. v. Gianforte*, OP 21-0125, was filed as an original proceeding with the Montana Supreme Court challenging SB 140. In that proceeding, Governor Gianforte, represented by the Justice Department, raised concerns about a Montana Judges Association email-based poll relative to SB 140 before the Legislature passed the bill and sent it to Governor Gianforte.

On April 8, 2021, the Legislature, outside of the *Brown* proceeding, issued a subpoena to the Montana Department of Administration (DOA) requiring production on April 9, 2021 of "[a]ll emails and attachments sent and received" by the Court Administration for the Judicial Branch, between

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[1] For additional background, please see *McLaughlin v. The Montana Legislature et al.*, 2021 MT 120-1, ¶¶ 2-7.

January 4, 2021 and April 8, 2021. The Judicial Branch was not notified of the subpoena. In response, the DOA timely produced "over 5,000 emails to the Legislature. (Hearing Ex. 7, K. Hansen Declaration.) Thereafter, the Court Administrator sought judicial relief from the Montana Supreme Court in the *Brown* proceeding.

On April 11, 2021, the Montana Supreme Court temporarily quashed the Legislature's subpoena issued to the DOA.

On April 12, 2021, Ms. Hansen, in her capacity as Montana Department of Justice Lieutenant General and on behalf of the Legislature, wrote to Justice Rice and indicated, in relevant part, that:

> 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 addresses 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 court for decision.
>
> • • •

> 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. All sensitive or protected information will be redacted in accordance with the law. To the extent there is concern, upon production, the Legislature will discuss redaction and dissemination procedures with the Court Administrator.

On April 15, 2021, Senator Blasdel and Representative Galt signed a Subpoena for Justice Rice to 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, [redacted email address], 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 e-mail account, [redacted email address], 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, [redacted email address], 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.

The Subpoena indicated, in relevant part, that:

> 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.

On April 15, 2021, Justice Rice was personally served with the Subpoena.[2]

On April 19, 2021, Justice Rice, *pro se*, commenced this proceeding against the Legislature. In his "Petition for Declaratory and Injunctive Relief; and Emergency Request to Quash or Enjoin Legislative Subpoena Pending Proceedings," he requested this Court, among other things:

> 1. .... [I]mmediately quash or stay the Subpoena, or preliminarily enjoin [the Legislature] from pursuing the Subpoena or issuing further subpoenas, pending a hearing and pending this proceeding pursuant to § 27-19-201, MCA; and
>
> • • •
>
> 3. .... [D]eclare the Subpoena invalid pursuant to § 27-8-202, MCA, and permanently enjoin it pursuant to § 27-19-102, MCA.

On April 19, 2021, this Court temporarily enjoined the Subpoena pending further proceedings. On the same day, a hearing was scheduled for April 29, 2021 before the Honorable Mike Menahan, and the Legislature was served with Justice Rice's Petition.

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[2] Justice Rice testified that this was the second subpoena issued to him. The first subpoena had technical deficiencies which were corrected and then served on him.

Later that day, Justice Rice appeared before the Legislature in accordance with the Subpoena.

On April 20, 2021, Judge Menahan recused himself and this Court assumed jurisdiction. On the same day, the April 29, 2021 hearing was rescheduled for April 26, 2021.

On April 22, 2021, Justice Rice and the Legislature stipulated to continue the April 26, 2021 hearing. Based upon their stipulation, this Court continued the hearing until May 10, 2021.

On April 23, 2021, Montana Attorney General Knudsen issued a "general statement" that indicated, in relevant part:

> The Department of Justice will continue to represent the legislature as it carries out its necessary investigation of potential judicial misconduct. The Supreme Court justices must also act to restore the public's confidence. Fully cooperating with the investigation instead of taking extraordinary measures to hide public documents would be (sic) good place for them to start.
>
> What has been happening behind closed doors at the Supreme Court is ugly: Violations of our judicial codes of conduct, potential violations of the law, and a pattern of corruption. The Supreme Court justices and staff are scrambling to cover this up. The first step toward cleaning up our legal and judicial culture is more transparency and less of the self-policing that

has enabled the current system to spiral out of control.

(Hearing Ex. 8.)

DISCUSSION

A. Preliminary Injunction Standard

A district court may issue a preliminary injunction in any of the following cases:

> (1) 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;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
>
> (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition; [or]
>
> (5) when it appears that the applicant has applied for an order under the provisions of

> [Section] 40-4-121 or an order of protection under Title 40, chapter 15.

Mont. Code Ann. § 27-19-201 (2019).

Justice Rice only needs to meet the criteria in one of these subsections for a preliminary injunction order. *Sweet Grass Farms, Ltd. v. Bd. of Co. Comm'rs*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825. A preliminary injunction does not resolve the merits of the case, but rather prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending adjudication on its merits. *See Four Rivers Seed Co. v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342 (citing *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995)). When considering an application for a preliminary injunction, a district court has the duty to balance the equities and minimize potential damage. *Id*. It is error for a district court to determine the ultimate merits of the case at the preliminary injunction stage.

> In determining the merits of a preliminary injunction, it is not the province of either the District Court or this Court on appeal to determine finally matters that may arise upon a trial on the merits. The limited function of a preliminary injunction is to preserve the *status quo* and to minimize the harm to all parties pending full trial; findings and conclusions directed toward the resolution of the ultimate issues are properly reserved for trial on the merits. In determining whether to grant a preliminary injunction, a court should not anticipate the ultimate determination of the

> issues involved, but should decide merely whether a sufficient case has been made out to warrant the preservation of the *status quo* until trial. A preliminary injunction does not determine the merits of the case, but rather, prevents further injury or irreparable harm by preserving the *status quo* of the subject in controversy pending an adjudication on the merits.

Yockey v. Kearns Props., LLC, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185. (citations omitted).

"Section 27-19-201(1), MCA, provides that a preliminary injunction may issue when an applicant has demonstrated that he is entitled to the injunctive relief he has requested. To prevail under Section 27-19-201(1), MCA, an applicant must establish that he has a legitimate cause of action, and that he is likely to succeed on the merits of that claim." *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 15, 348 Mont. 68, 72, 199 P.3d 810, 814 (citing *Benefits Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 22, 334 Mont. 86, 146 P.3d 714; *M.H. v. Mont. High Sch. Assn.*, 280 Mont. 123, 135, 929 P.2d 239 (1996)).

B. Justice Rice is Entitled to a Preliminary Injunction

Legislature's Subpoena Power

> (1) A subpoena requiring the attendance of any witness before either house of the legislature or a committee of either house may be issued by the president of the senate, the speaker of the house, or the presiding officer of any committee

before whom the attendance of the witness is desired.
(2) A subpoena is sufficient if:
(a) it states whether the proceeding is before the house of representatives, the senate, or a committee;
(b) it is addressed to the witness;
(c) it requires the attendance of the witness at a time and place certain;
(d) it is signed by the president of the senate, speaker of the house, or presiding officer of a committee.

Mont. Code Ann. § 5-5-101 (2019).

(1) 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 subject 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 competent evidence in any criminal proceeding against the witness.
(2) A witness 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.
(3) This section does not exempt a witness from prosecution and punishment for perjury

> committed by the witness during the examination.

Mont. Code Ann. § 5-5-105 (2019).

"In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101 (2019). "It is not [a court's] prerogative to read into a statute what is not there." *Bates v. Neva*, 2014 MT 336, ¶ 13, 377 Mont. 350, 339 P.3d 1265. "We construe statutes 'according to the plain meaning' of their language." *Comm'r of Political Practices for Mont. v. Montana Republican Party*, 2021 MT 99, ¶ 7, 404 Mont. 80, ___ P.3d ____ (citing *Comm'r of Political Practices for Mont. v. Wittich*, 2017 MT 210, ¶ 19, 388 Mont. 347, 400 P.3d 735 (quoting *Fellows v. Saylor*, 2016 MT 45, ¶ 21, 382 Mont. 298, 367 P.3d 732)). "[A] court may not create an ambiguity where none exists, [or] ignor[e] clear and unambiguous language to accomplish a 'good purpose.'" *Heggem v. Capitol Indem. Corp.*, 2007 MT 74, ¶ 22, 336 Mont. 429, 154 P.3d 1189. "'Law' is a solemn expression of the will of the supreme power of the state." Mont. Code Ann. § 1-1-101 (2019). "The will of the supreme power is expressed by: (1) the constitution; (2) statutes." Mont. Code Ann. § 1-1-102 (2019).

The Legislature's April 15, 2021 Subpoena to Justice Rice does not, as its counsel conceded, state "whether the proceeding is before the house of representatives, the senate, or a committee." Mont. Code Ann. § 5-5-101 (2)(a) (2019). Moreover, it appears that the Legislature may not have the power to

subpoena documents under Mont. Code Ann. § 5-5-101 (1) (2019). While it certainly has the power to subpoena Judge Rice's attendance "before either house of the legislature or a committee of either house," it appears there is no such corresponding Legislative statutory document subpoena power. See, e.g., *Republican Party*, ¶ 9.

At the hearing, the Legislature argued such power is found in Mont. Code Ann. § 5-5-105 (2). In this regard, it appears the Legislature wants this Court to insert what the Legislature omitted in section 5-5-101(1) to broaden its investigatory authority. Respectfully, this Court declines the Legislature's apparent improper statutory construction invitation. The word "subpoena" does not appear in Mont. Code Ann. § 5-5-105. Moreover, the Legislature's authority is not boundless. It is subject to judicial oversight, particularly when those it investigates are potentially subjected to unlawful document subpoena oppression. Such judicial oversight involves the balance of powers between the judicial branch and the legislative branch as well as the executive branch. The Legislature should not be allowed to circumvent its own implemented legislative safeguards by possible overreaching conduct not statutorily authorized.

For purposes of Justice Rice's preliminary injunction request, this Court shall not insert Mont. Code Ann. §§ 5-5-105(1) or 5-5-105(2)'s "paper produced" or "produce any paper" into Mont. Code Ann. § 5-5-105(1). The same is true in that this Court will not insert the word "subpoena" found in section 5-5-101(1) into either section 5-5-105(1) or section

5-5-105(2). At this juncture in the proceeding, the Court has found no constitutional or statutory support for the Legislature's power to subpoena documents directed at those it subpoenas to appear before either house or a committee.

Legislature's Investigatory Power

The Montana Constitution provides for a Legislature consisting of a Senate and House of Representatives and invests it with "legislative power." Art. V, sec. 1, Mont. Const. Since 1876, Montana legislative power has encompassed "all rightful subjects of legislation." *United States v. Ensign*, 2 Mont. 396, 400 (1876). Approximately fifty years later, the United States Supreme Court considered whether legislative power included investigative authority. *McGrain v. Daugherty*, 213 U.S. 135 (1927). The *McGrain* Court stated:

> [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 . . .
>
> • • •
>
> 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 . . .
>
> • • •

> Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended we must conclude that investigations by legislative committees, as such, are not a recent innovation; that many functions and activities are proper, and that, when acting within the scope of their authority concerning matters reasonably germane to potential legislation, judicial supervision or review is inappropriate.

Id., at 174-75.

Thirty years later, the United States Supreme Court declared:

> 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. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.

Watkins v. United States, 354 U.S. 178, 187 (1957). Two years later, it stated, in relevant part,

> The scope of the power of inquiry, in short, is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution.
>
> Broad as it is, the power is not, however, without limitations. Since 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 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. And the Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case the relevant limitations of the Bill of Rights.

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

Most recently, the United States Supreme Court recognized that Congress does not have an enumerated constitutional power to subpoena, but it has held that "each House has power 'to secure needed information' in order to legislate." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain*, at 161.) Even though the power is "broad" and "indispensable," *Id*. (quoting *Watkins*, at. P. 187), it is "justified solely as an adjunct to the legislative process," and is therefore limited. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." The subpoena must serve a "valid legislative purpose," ...; it must "concern[ ] a subject on which legislation 'could be had.'" *Id.*, at 2031-32 (citations omitted).

> Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.

Id., at 2032. The *Trump* Court also indicated that legislative subpoena powers may not be used for law enforcement, general inquiry into private affairs, exposure for the sake of exposure, and that "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.* Moreover, the *Trump* Court held that if other sources could reasonably provide the information, the Legislature may not rely on an inter-branch subpoena which implicates weighty separation of powers concerns. *Id.*, at 2035.

Based on the United Supreme Court's guidance cited above, the following appear to be legislative investigative power limitations:

> 1. the legislative action must be within the scope of the Legislature's authority; and
>
> 2. the investigation must focus on issues connected to future lawful legislation.

Here, the Subpoena issued to Justice Rice provided, in relevant part, that:

> 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.

While the Legislature argues it has the power to conduct this judicial investigation, it cites no authority for the argument that the Subpoena issued to Justice Rice supersedes existing and valid statutory provisions governing the processes and procedures of the constitutionally created Montana Judicial Standards Commission (MJSC).

In accordance with a constitutional mandate and the Legislature's statutory directive therein, the MJSC was created. Mont. Const., Art. VII § 11(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."). As such, the Legislature's only MJSC constitutional role is its constitutionally mandated creation.

The MJSC's purpose . . .

> 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.

MJSC R. 1(a).

The MJSC is confined to investigating and making recommendations to the Montana Supreme Court. Mont. Const., Art. VII § 11(2) ("The commission shall investigate complaints, and make rules implementing this section.") It has explicit power to "subpoena witnesses and documents." *Id.*

MJSC's proceedings "are confidential except as provided by statute." Mont. Const., Art. VII, § 11(4).

> (1) Except as provided in 3-1-1101 and 3-1-1121 through 3-1-1126, all papers filed with and proceedings before the commission or masters are confidential and the filing of papers with and the testimony given before the commission or masters is privileged communication.
> (2) The commission shall make rules for the conduct of its affairs and the enforcement of confidentiality consistent with this part.

Mont. Code Ann. 3-1-1105 (2019).

> (a) All papers filed herewith and all proceedings before the [MJSC] shall be confidential while pending before the [MJSC]. A Complaint dismissed by the [MJSC] under Rule 10(e)-(f) is no longer confidential, and a complainant may

> disclose the complaint and the [MJSC's] response. If and investigation results in formal proceedings, then the record filed by the [MJSC] with the Supreme Court loses its confidential character upon its filing. Further, a proceeding loses its confidentiality if §§ 3-1-1121 through 1126, MCA, are invoked in accordance with the terms thereof.
>
> • • •
>
> (c) Every witness in every proceeding under these Rules shall be sworn to the tell the truth and not to disclose the existence of the proceedings or the identity of the judge until the proceedings are no longer confidential under these rules. Violation of the confidentiality proceedings may result in summary dismissal of the complaint.

MJSC R. 7(a) and (c). Here it appears that the Legislature is demanding that Justice Rice ignore, waive and/or violate his constitutional and statutory confidential nature of MJSC proceedings.

The Montana Supreme Court has the ultimate judicial supervision power, which under recommendation of the MJSC may retire, censure, suspend, or remove any justice or judge for wrongdoing or incapacity. Mont. Const., Art. VII § 11(3); Mont. Code Ann. § 3-1-1107(1) (2019) ("The supreme court shall review the record of the [MJSC] proceedings and shall make such determination as it finds just and proper and may: (a) order censure, suspension, removal, or retirement of a judicial officer; or (b) wholly

reject the recommendation."); *Hicks v. Judicial Standards Comm'n*, No. OP 08-0376, 2008 Mont. LEXIS 518, at *3 (Aug. 13, 2008) ("the [MJSC] makes requests of and recommendations to this Court, and we act upon those recommendations."); *State ex rel. Smartt v. Judicial Standards Comm'n*, 2002 MT 148, ¶ 21, 310 Mont. 295, 302, 50 P.3d 150, 155 ("Article VII, Section 11 of the Montana Constitution grants the [MJSC] jurisdiction to investigate misconduct on behalf of the judiciary").

Here, it appears the Legislature's Subpoena to Justice Rice exceeds its investigatory authority because its stated purpose interferes with the MJSC's constitutional authority. The MJSC, not the Legislature, investigates alleged judicial misconduct. The MJSC, not the Legislature, has the constitutional authority to subpoena witnesses and documents in alleged judicial misconduct matters. The MJSC, not the Legislature, has the constitutional authority to make rules implementing Mont. Const. Art. VII. §11(2). Here, the Legislature is not above the law. At this juncture, it appears the Legislature's Subpoena to Justice Rice exceeds its legislative investigatory authority. Moreover, the information it seeks from Justice Rice may be directly available to it from the MJSC under controlling MJSC law already created by the Legislature. See Mont. Code Ann. § 3-1-1126 (2019). As the *Trump* Court indicated, a subpoena should not be allowed if there are other sources for the information sought. *Trump*, at 2035. Section 3-1-1126 provides:

> (1) The commission shall, as provided in 5-11-210, submit to the legislature a report containing the following information:
> (a) identification of each complaint, whether or not verified, received by the commission during the preceding biennium by a separate number that in no way reveals the identity of the judge complained against;
> (b) the date each complaint was filed;
> (c) the general nature of each complaint;
> (d) whether there have been previous complaints against the same judge and, if so, the general nature of the previous complaints;
> (e) the present status of all complaints filed with or pending before the commission during the preceding biennium; and
> (f) whenever a final disposition of a complaint has been made during the preceding biennium, the nature of the disposition, the commission's recommendation, if any, to the supreme court, and the action taken by the supreme court.
> (2) The commission must observe the confidentiality provisions of this part in fulfilling the requirements of this section.

Mont. Code Ann. § 3-1-1126 (2019)

For purposes of Justice Rice's preliminary injunction request, this Court shall neither condone governmental action that appears to ignore existing constitutional and statutory mandates, nor ignore the Legislature's apparent lack of legislative investigatory authority. At this juncture in the proceeding, the Court has found no constitutional or statutory support for the

Legislature's investigatory power that usurps the MJSC's constitutional and statutory investigatory authority.

Legislature's Stay Request

At the hearing, the Legislature argued this Court should stay this proceeding so it could negotiate with Justice Rice as suggested by the *Trump* Court. While that may be true, the *Trump* Court's judicial insight equally applies in this proceeding because this Court would have to be "blind" not to see what "[a]ll others can see and understand" that the Justice Rice Subpoena does not represent a run-of-the-mill legislative effort but rather a clash between separate government branches over records of intense Legislative political interest. *Trump*, at 2034. This Legislative political interest is evident in Ms. Hansen and Mr. Knudson's caustic express representations set forth in Exhibits 3 and 8. Based on these exhibits, there is no evidence that the Legislature would or could negotiate in good faith with Justice Rice.

In addition, this Court would be remiss in not pointing out the United States Supreme Court's view regarding judicial impartiality in light of Exhibits 3 and 8:

> 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. See Webster's New International Dictionary 1247 (2d ed. 1950) (defining "impartial" as "not partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just"). It is also the sense in which it is used in the cases cited by respondents and amici for the proposition that an impartial judge is essential to due process. *Tumey v. Ohio*, 273 U.S. 510, 523, 531-534, 71 L. Ed. 749, 47 S. Ct. 437, 5 Ohio L. Abs. 839, 25 Ohio L. Rep. 236 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-825, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58-62, 34 L. Ed. 2d 267, 93 S. Ct. 80, 61 Ohio Op. 2d 292 (1972) (same); Johnson v. Mississippi, 403 U.S. 212, 215-216, 29 L. Ed. 2d 423, 91 S. Ct. 1778 (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997) (would violate due process if a judge was disposed to rule . . .

• • •

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. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case.
>
> • • •
>
> A third possible meaning of "impartiality" (again not a common one) might be described as open mindedness. 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 the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance of doing so.

Republican Party v. White, 536 U.S. 765, 776-778 (2002).

Nonetheless, while this Court will not interfere with any negotiations between the parties, it will certainly not mandate that Justice Rice negotiate with the Legislature. Especially since, at this juncture, Justice Rice has established "he has a legitimate cause of action, and that he is likely to succeed on the merits of that claim." *Cole*, ¶ 15.

ORDER

Based on the above, the Court hereby **ORDERS, ADJUDGES AND DECREES** as follows:

1. Justice Rice's preliminary injunction request is **GRANTED**;

and

2. This Court's April 19, 2021 Order that temporarily enjoined the Legislature's April 15, 2021 Subpoena issued to Justice Rice is converted to a Preliminary Injunction until further order of this Court in all respects.

DATED this 18th day of May 2021.

/s/ Michael F. McMahon
MICHAEL F. McMAHON
District Court Judge

cc: Curt Drake, 111 North Last Chance Gulch, Suite 3J, Arcade Building, Helena, MT 59601(via email to: curt@drakemt.com)
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APPENDIX 13

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: June 4, 2021]

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

PETITIONER'S RESPONSE TO RESPONDENT'S PETITION FOR REHEARING

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Speaking for the Legislature, the Attorney General continues a campaign to disqualify the entire Supreme Court from judging legal validity of legislative subpoenas, arguing against the very notion of judicial review of legislative actions. The purpose of the petition for rehearing can only be political because, as a legal matter, it completely fails to satisfy the requirements of Rule 20, Mont. R. App. P.

While the petition complains about the Court's May 12, 2021 Order, it raises no "fact material to the decision" that was overlooked, no "question presented by counsel that would have proven decisive to the case," and no "conflict[] with a statute or controlling decision not addressed by the supreme court." Mont. R. App. P. 20(1)(a).

Just as "[t]he Legislature's unilateral attempt to manufacture a conflict by issuing subpoenas to the entire Montana Supreme Court must be seen for what it is," *McLaughlin v. Mont. State Legislature*, 2021 MT 120, 404 Mont. 166, 173, the petition for rehearing, too, must be seen for what it is – an improper retread of previous arguments squarely and unanimously rejected. "A petition for rehearing is not a forum in which to rehash arguments made in the briefs and considered by the Court." *State ex rel. Bullock v. Philip Morris, Inc.*, 217 P.3d 475, 486 (Mont. 2009). Far from the required "clearly demonstrated exceptional circumstances," Mont. R. App. P. 20(1)(d), the petition merely disagrees with the Court's rationale and takes a new swing with the same bat. Its arguments should be rejected, yet again, for the reasons in Petitioner's prior briefing and in the Court's May 12, 2021 Order.

Dated this 4th day of June, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

*[*** Certificates omitted for printing purposes ***]*

APPENDIX 14

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: June 24, 2021]

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

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS AS MOOT

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Counsel for Respondent Montana Department of Administration

Petitioner Beth McLaughlin filed an emergency motion in this Court April 10, 2021, when the Legislature sought judicial branch emails from the executive branch. The subpoenas sought a range of information untethered to legislation and with no procedure for screening materials that may be privileged. Having had all subpoenas quashed by both a district court and this Court, the Legislature, through the Attorney General, has withdrawn all subpoenas and claims the case is moot. While she would love to see this case in the rearview mirror, Petitioner opposes its dismissal.

The Attorney General paints withdrawal of the subpoenas as a "measure of good faith," so the parties can "negotiate and make accommodations in good faith."[1] Thus, it claims the subpoena issues should be moot. If withdrawal closed the books, we would agree. But the same day the subpoenas were withdrawn, Sen. Greg Hertz made clear the Legislature will continue pursuit of judicial branch records. See Exhibit B attached. For that reason, we respectfully seek a ruling to guide whatever further proceedings the Legislature has in mind. The Court has authority and should rule because exceptions to the mootness doctrine apply.

---

[1] Petitioner takes the Legislature at its word, but the subpoena was served on the Dept. of Administration, not her, and contains no invitation to negotiate or accommodate. Attached as Exhibit A are representative letters and emails regarding attempts to resolve the issue. In an April 10 letter to Director Giles Petitioner suggested "an orderly process" for handling the subpoenaed materials. When that entreaty was ignored did Petitioner file her emergency motion.

This Court recognizes several mootness exceptions, including "public interest," "voluntary cessation," and "capable of repetition, but evading review." *E.g., Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 1-48, 333 Mont. 331, 142 P.3d 864. All apply here.

A. Public Interest

This Court "reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law." *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872. The public interest exception applies where: (1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer will guide public officers in the performance of their duties. *Gateway Opencut Mining Action Grp. v. Bd. of Cnty. Comm'rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133.

The Court most recently applied this exception in *Ramon v. Short*, 2020 MT 69, ¶ 24, 399 Mont. 254, 460 P.3d 867, when called upon to decide whether a state law enforcement officer had authority to grant a federal civil immigration detainer. *Id.*, ¶ 22. The Court noted it has "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." *Id.* (citing cases).

The public interest exception applied because (1) a state officer's authority to detain an individual based on a federal civil immigration detainer "obviously presents a question of public importance"; (2) the issue was likely to recur because the defendants continued to

argue their actions were lawful, indicating a "plan to continue operating under the same terms leading to this very same issue recurring," and (3) an answer would benefit state officers "by providing authoritative guidance on an unsettled issue regarding their authority . . . particularly given that there is no Montana Supreme Court ruling addressing this issue." *Id.*, ¶¶ 22-25.

Ramon applies here. The scope of the Legislature's authority to issue legislative subpoenas to a co-equal branch of government is a matter of obvious public importance. It implicates the very foundations of Montana's constitutional separation of powers doctrine. *See Brown v. Gianforte*, 2021 MT 149, ¶¶ 52-66, 404 Mont. 269 (Rice, J., concurring).

Next, like the defendants in *Ramon*, the Legislature continues to insist its conduct was lawful while it blames the Court for the morass the subpoenas created. The Legislature clearly intends to continue seeking judicial records.[2] The issues before this Court are highly likely to recur.

Lastly, Montana has almost no case law addressing the scope of legislative subpoena power. An answer to the pending legal questions will benefit state officials by providing authoritative guidance on an unsettled issue.

---

[2] McLaughlin seeks only to protect privileged documents. Documents not privileged are public and subject to production if properly requested.

B. Voluntary Cessation

The "voluntary cessation" exception applies when "a defendant's challenged conduct is of indefinite duration, but is voluntarily terminated by the defendant prior to completion of appellate review. . . ." *Havre*, ¶ 34. Accordingly, a defendant's voluntary conduct never moots a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*, ¶ 38.

In adopting this exception, this Court stressed, "[d]ue to concern that a defendant 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." *Id.*, ¶ 34 (internal quotations omitted). *See also Heisler v. Hines Motor Co.*, 282 Mont. 270, 937 P.2d 45 (1997) (the legality of defendant's refusal to pay medical expenses was not mooted when defendant subsequently made payment); *Montana-Dakota Util. Co. v. City of Billings*, 2003 MT 332 ¶ 8, 318 Mont. 407, 80 P.3d 1247 (the legality of city ordinance incorporating franchise fees was not mooted when the city voters overturned the ordinance).

Voluntary withdrawal of the subpoenas before a decision can be rendered does not moot the issue of their legality. Far from demonstrating its behavior "cannot reasonably be expected to recur," evidence shows it will recur. *Havre*, ¶ 34. A final adjudication would therefore "provide useful guidance that may obviate future violations." *Id.*, ¶ 39.

C. Capable of Repetition, Yet Evading Review

A related exception is for wrongs "capable of repetition, yet evading review." *See Common Cause v. Statutory Committee*, 263 Mont. 324, 328, 868 P.2d 604, 607 (1994). This exception applies where: (1) the challenged action is too short in duration to be fully litigated prior to cessation; and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. *Skinner Enters, Inc. v. Lewis & Clark City-County Health Dep't.*, 1999 MT 106, ¶ 18, 294 Mont. 310, 980 P.2d 1049; *see also Common Cause*, 263 Mont. at 328, 868 P.2d at 606 (exception applied because the alleged violation of open meeting statutes was capable of recurring in future selections of nominees for advisory entities). Here too, the Legislature's authority to issue subpoenas that exceed the limits of its constitutionally designated role is a matter of first impression and surely capable of recurring.

CONCLUSION

Petitioner respectfully asks the Court to deny the motion to dismiss and rule on the merits.

Dated this 24th day of June, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

*[*** Certificate omitted for printing purposes ***]*

EXHIBIT A

BOONE KARLBERG P.C. ATTORNEYS AT LAW

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KARL R. KARLBERG (1923-1988)
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THOMAS H. BOONE, of Counsel
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DEAN A. STENSLAND
CYNTHIA K. THIEL
ROSS D. TILLMAN
JAMES A. BOWDITCH
MATTHEW B. HAYHURST
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JULIE R. SIRRS
TRACEY NEIGHBOR JOHNSON
CHRISTOPHER L. DECKER
ZACHARY A. FRANZ
TYLER M. STOCKTON
EVAN B. COREN
ALISON R. POTTS
WILLIAM T. CASEY
REBECCA L. STURSBERG

April 10,2021

Misty Ann Giles, Director
Montana Department of Administration
c / o Michael Manion, Legal Counsel
Email delivery: MManion@mt.gov

Todd Everts, Esq.
Legislature Legal Services Division
Email delivery: teverts@mt.gov

Re: Legislative Subpoena dated April 8, 2021

Dear Director Giles, Mr. Manion, Mr. Everts:

I write this letter in my capacity as legal counsel for Beth McLaughlin, the Montana Supreme Court Administrator. This letter pertains to the Legislative Subpoena served April 8 on the Department of Administration. We write to request that the Department temporarily but immediately stay action on that subpoena for reasons noted below. If the Department of Administration, instead, chooses to proceed, we respectfully ask that you advise us of your intentions so we may file an emergency motion with the Montana Supreme Court.

The Legislature, by its subpoena, seeks communications that reside within the Judicial Branch of Montana government. It is our position that legislative subpoenas for internal judicial documents are categorically invalid as in violation of fundamental separation of powers principles, among other things. Regardless, it is our intention to propose a means of resolving the issues raised by the subpoena in an orderly way.

The most troublesome aspect of the Legislative Subpoena is its breadth. Legislative subpoenas must be specific and narrowly drawn. Yet, this subpoena seeks "all emails and attachments" sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021.

The Legislature's subpoena relates to the petition pending before the Supreme Court regarding SB 140 and its elimination of the Judicial Nomination Commission. Yet there is no such limitation in the

subpoena. The subpoena asks for every email with one minor exception relating to "decisions made by the justices in disposition of final opinion." Because of her position and broad responsibilities, the Court Administrator's emails contain personal and private information. For example, the requested emails 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 to liability were protected information exposed. Without a mechanism to review every email in that three-month period and screen them for privileged or private information, the Department could easily disclose sensitive, private information and create serious liability problems for the State.

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.

We understand the Department of Administration is actively working this weekend to produce documents in response to the subpoena. Given the extreme time sensitivities and irreparable harm that will result, please advise immediately if you agree to stay response to the legislative subpoena until the issues are resolved by agreement or through court process. If you are unwilling to agree to our proposal, we will file an emergency petition asking for a temporary restraining order and an order quashing the subpoena and staying response by the Department of Administration until the important Constitutional and personal privacy issues can be resolved in a legally appropriate way. If you choose for us to proceed in that fashion, we will advise the Court that our motion is opposed.

You may reach me directly via my cell phone at 406 370-3926 or by email at rcox@boonekarlberg.com. Thank you for your consideration. I look forward to hearing from you.

Sincerely,

/s/ Randy J. Cox
Randy J. Cox

cc: Beth McLaughlin

Randy Cox

From: Randy Cox
Sent: Sunday, April 11, 2021 2:23 PM
To: 'Giles, Misty Ann'
Cc: 'mmanion@mt.gov'; 'teverts@mt.gov'; Matt Hayhurst; Thomas Leonard
Subject: Supplementation of Emergency motion
Attachments: Emergency Supplementation of Emergency Motion to Quash Enjoin Legislative SDT (00821134).pdf

Director Giles:

I appreciate you advising me of the fact that some documents have already been produced. I respectfully ask that you immediately provide a .pst file of those documents directly to me, as counsel for the Court Administrator. To the extent that personal or private information has been unlawfully released, the Administrator may have an obligation to notify the affected individuals.

I attach a copy of what was sent to the Supreme Court moments ago for filing. I respectfully suggest that it would be prudent to simply stand still and produce no further documents or information until such time as the Montana Supreme Court has had an opportunity to examine the issue of the legality of the subpoena and whether steps must be taken to protect information from being unlawfully released. If we are wrong, and there is no private information in the emails, then nothing has been lost. If we are, however, right and the Department is simply going forward with the

production of information it knows is contested, I am concerned about potential liability. If am uncertain how that bell can be un-rung.

I am happy to discuss this matter with your counsel or anyone you designate.

Randy J. Cox
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Missoula, MT 59807
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Fax: (406) 549-6804

Randy Cox

From:	Randy Cox
Sent:	Sunday, April 11, 2021 9:16 PM
To:	mark.blasdel@mt.gov; wylie.galt@mt.gov; keith.regier@mt.gov; abra.belke@mt.gov; Todd Everts
Cc:	bmclaughlin@mt.gov
Subject:	Legislative Subpoena and Supreme Court Order

President Blasdel, Speaker Galt, Senator Regier, Miss Belke, Mr. Everts:

As you are undoubtedly aware by now, early this evening the Montana Supreme Court issued an order quashing the Legislative Subpoena served on the Director of the Department of Administration seeking judicial branch documents, specifically, three months worth of emails to and from Beth McLaughlin, the Supreme Court Administrator. What that means is that any document from Beth McLaughlin's emails in the possession of anyone is unlawfully held. None of those emails may be leaked or used for any purpose.

I represent Beth McLaughlin, the Supreme Court Administrator. Our concern right now, in light of the Court's determination that the subpoena was overbroad and invalid, is what individuals or entities have seen those records and whether any of the confidential, personal or private information contained therein has been compromised. If it has, we will do an analysis that may lead us to the conclusion that the individuals whose personal information has been breached must be notified of who saw the information

and why and what has happened to it. Unlike anyone else in this process, we have been concerned about the State's potential legal liability for disclosing personal information.

Our view right now is simple. We know that a batch of documents were delivered on Friday to Abra Belke, COS for President Blasedale and to Senator Regier. According to Misty Ann Giles, "no other documents have been provided to the Legislature." We take her at her word. What we do not know, but need to find out, is where else the documents or copies of them have gone.

We need to know every individual who had access to and in fact saw any of the emails produced pursuant to this subpoena. We need to know where the documents are now and we need to have them returned to me as Ms. McLaughlin's counsel. They are not validly in anyone's possession (other than Ms. McLaughlin) as they were obtained pursuant to an unlawful subpoena.

We are not interested in creating problems, leaking documents to newspaper reporters or scoring ridiculous political points. The world has too much of that foolishness right now. We are interested in safeguarding the private, personal and legally protected information in those emails. Respectfully, you all do NOT know what of that information is private, personal or otherwise legally protected because you were not parties to the emails.

The only way we can know what has to be done is to get everything back and know where it has been to decide if there are legal obligations to let people know their

information has been compromised. Please advise as to the truth of the situation. I repeat - we are not interested in recriminations. We need every single document returned from every single person who has any of them. If we do not know where they have been and who has seen them, and if we learn that documents illegally obtained have been released, we will take the matter to the Supreme Court. You should know we have already advised the Court, in a supplemental filing today, that documents were delivered by the Department of Administration to the Legislature on Friday. We now know who they went to at the Legislature and we need to know where they went after that.

I look forward to hearing from someone about this situation. My cell number is 406 370-3926. My office number is 406 543-6646. You have my email.

Randy J Cox

Randy Cox

From: Randy Cox
Sent: Monday, April 12, 2021 3:25 PM
To: 'derek.ostreicher@mt.gov'
Subject: McLaughlin emails

Derek

I wrote you last night. I am now wondering if the Supreme Court Administrator's emails went from the Legislature to the AG's office. I now specifically ask the question – did the AG's office receive and has it retained any copies of the over 2,000 Beth McLaughlin emails turned over by the Department of Administration to Senate President Blasedale, Senator Regier and Abra Belke.

I have written legislative leadership to demand a return of documents and have received no response. I do not understand that. Why is this situation being ignored?

By the way, I am writing specifically to you because of your position, because I know you and because the Lieutenant Governor said yesterday when we spoke that she would see about having you or the Solicitor General call me. As yet, nothing.

Is there anyone around who would like to try to solve these problems instead of maneuvering for political cover? I'm all ears.

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EXHIBIT B

https://helenair.com/news/state-and-regional/govt-and-politics/lawmakers-abandon-investigative-subpoenas-for-judges-records/article_87b2fb25-0f1a-5e51-a83c-6a0c160d3199.html

Lawmakers abandon investigative subpoenas for judges' records

By SEABORN LARSON Lee Newspapers
Jun 22, 2021

Sen. Greg Hertz, R-Polson, speaks on the Senate floor in the state Capitol.
THOM BRIDGE, Independent Record

A GOP-led legislative committee investigating the judicial branch has withdrawn its embattled subpoenas

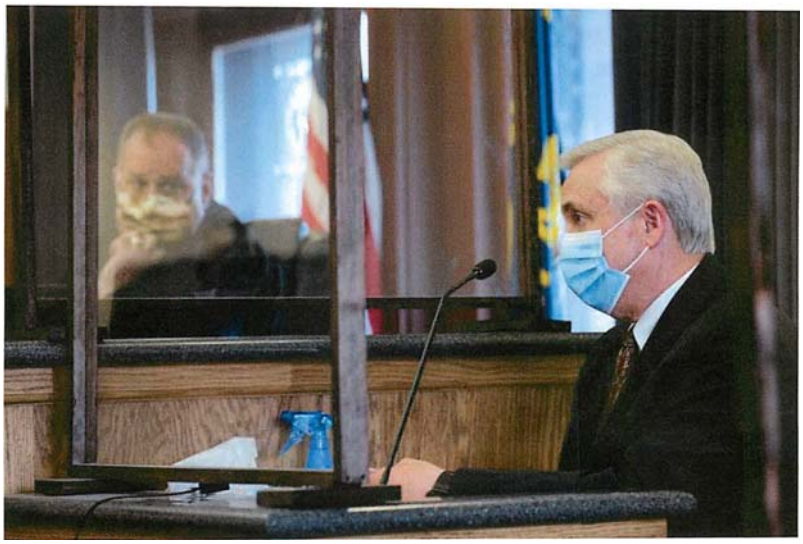
for Montana Supreme Court records, a spokesperson said late Tuesday.

Sen. Greg Hertz, a Polson Republican chairing the investigative committee, said in an emailed statement the decision to pull back the subpoenas came after consultation with the state Department of Justice. That Republican-led agency has represented the committee during the escalating confrontation with the judiciary over claims of improper use of state resources, lobbying efforts by judges and failure to retain public records.

The subpoenas had been challenged in court as an overreach of the Legislature's constitutional authority by Supreme Court Administrator Beth McLaughlin, whose own emails had been subpoenaed by the committee.

Supreme Court Justice Jim Rice, a former Republican lawmaker, also challenged the subpoena for his own records in state District Court. Rice testified in Lewis and Clark County District Court in May that he believed the mounting investigation led by Republican lawmakers was a "campaign to discredit and undermine the integrity of the court."

A District Court judge subsequently blocked the subpoena for Rice's records until the case concluded, noting he would have to be "blind" not to see that the subpoena was not a legislative effort but a clash over records of political interests.



Montana Supreme Court Justice Jim Rice, right, takes the witness stand as Judge Mike McMahon watches in the Lewis and Clark County Courthouse in May.
THOM BRIDGE, Independent Record

Lawmakers hatched the investigation and the Select Committee on Judicial Transparency and Accountability after court filings in a lawsuit over new laws passed by the Legislature showed McLaughlin had deleted an internal email poll of judges offering approve-or-oppose opinions on pending legislation that would affect judicial functions. The Supreme Court justices told lawmakers in a committee hearing in April that they had not participated in the polling as state District Court judges had, but lawmakers pursued their records in light of the deleted email poll results.

The committee had produced a preliminary report by the end of that month outlining its concerns with the

judicial branch following a month of investigation. That included a subpoena that successfully cached more than 5,000 of McLaughlin's emails that were turned over by the Department of Administration, a department of the executive branch.

Hertz said in Tuesday's announcement the committee's position "all along" has been that the dispute should have been handled outside of the courts.

"To be clear, we expect the judicial branch to release public records, the same as they have ruled the legislative and executive branches must do in numerous court rulings over the years," Hertz said.

Hertz also said withdrawing the subpoenas meant the litigation over the Legislature's subpoena power likewise ended Tuesday.

Sen. Greg Hertz, R-Polson
Photo Courtesy of the Montana Legislature

Earlier on Tuesday, the Montana Supreme Court met for a conference meeting on a recent motion by lawmakers asking for the justices to recuse themselves because they, too, were under subpoena. It was the second such motion; the first request for recusal was heartily denied, with Justice Laurie McKinnon writing in the unanimous decision that lawmakers had attempted to "manufacture a conflict" in an effort to

evade the judicial branch getting the final say on the Legislature's subpoena power.

Montana Supreme Court Justice Laurie McKinnon asks a question during arguments in the Jon Krakauer records request hearing at the Strand Union Building at Montana State University in April 2016.
Casey Page, Billings Gazette

Randy Cox, McLaughlin's attorney, said late Tuesday he would likely file a motion to see the challenge out in the coming days, citing a need to have the matter settled by the courts.

"We are going to oppose the dismissal because we think this is an important issue," Cox said.

Rep. Kim Abbott of Helena, one of two Democrats on the committee who have repeatedly criticized the subpoenas as having no legislative purpose, said she hoped the move signaled a downturn in the committee's investigation.

"This Select Committee was always an overreach that threatened the separation of powers and checks and balances that Montanans expect and that our system of government depends on," Abbott, the House minority leader, said in an email Tuesday. "We hope this puts an end to expending resources on partisan attacks against a co-equal and independent branch of government."

Hertz, however, gave no indication that the investigation was winding down.

Kim Abbott
Provided photo

"We're still seeking documents and information that will provide more clarity on the issues identified in our

committee's initial report and inform legislative fixes to problems within our judicial system," Hertz said. "I look forward to working with committee members and the judicial branch as we continue this legislative investigation."

The committee's website does not list the next date the investigative committee is expected to meet.

*[*** Certificate omitted for printing purposes ***]*

APPENDIX 15

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0173

[Filed: September 2, 2021]

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

PETITIONER'S RESPONSE TO THE MONTANA STATE LEGISLATURE'S PETITION FOR REHEARING

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Counsel for Respondent Montana Department of Administration

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

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

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

Despite having been clearly directed to Rule 20 and its limited criteria for rehearing, the petition simply reruns earlier arguments, though now louder and with a threatening tone.[1] Though Rule 20 sets forth the only three limited criteria for rehearing, the Legislature

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

does not even try to show how its petition comports with the rule. Indeed, the only mention of Rule 20 in the entirety of the Legislature's petition is in a footnote on page 21 in which the Legislature asks the Court to waive a portion of the rule.

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

Likewise, while Rule 20 allows the Court to rehear a case if the decision "conflicts with a statute or controlling decision," the petition does not make that argument or even use those words. There is no claim that the decision conflicts with a Montana statute. The Legislature inexplicably ignores the Rule 20 criteria for rehearing, even though the criteria were called to its attention the day before the petition was filed. Though the Legislature complains about and repeatedly mocks the Court's opinion, the petition raises no "fact material to the decision" that was overlooked, no "question presented by counsel that would have proven decisive to the case," and no "conflict[] with a statute or controlling decision not addressed by the supreme court." Mont. R. App. P. 20(1)(a). Once again, the

petition is a second swing with the same bat – an approach clearly prohibited by Montana law.[2]

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

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

The OLC Memo does not warrant reconsideration because it is not a "controlling decision" under Mont. R. App. P. 20(1)(a)(iii). To start, it is not a "decision" issued by a court. It is well-settled that OLC opinions

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

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

Because the OLC Memo is not a controlling decision within the meaning of Mont. R. App. P. 20(1)(a)(iii), it does not support reconsideration. Even setting that aside, the substantive analysis and opinions of the OLC Memo neither change nor undermine the Court's analysis. The Memo's specific and narrow focus addresses the "unambiguous" statutory authority of the Ways and Means Committee of the House of Representatives to request former President Trump's tax returns from the Secretary of the Treasury, and the Secretary's attendant obligation to furnish the requested information. The OLC's analysis of federal tax-related laws has no relationship to Montana law as analyzed and decided by the Court in this case. Of note, however, is the OLC Memo's consistency with this

Court's analysis, including its determination that the subpoenas at issue do not serve a valid legislative purpose. The OLC Memo makes clear that the legislature's investigatory authority, though "broad and indispensable," is not unlimited, does not extend to matters which are within the exclusive province of one of the other branches of the government, and is subject to constitutional limitations on government action, including in the Bill of Rights. OLC Memo at 20-21, 26. Thus, the OLC Memo provides no support for the Legislature's petition.

Similarly, the federal district court's decision on remand in *Donald J. Trump, et al. v. Mazars USA LLP*, 19-cv-01136, ___ F. Supp. 3d___ (D.D.C. Aug. 11, 2021) is not controlling and does not alter the Court's analysis or conclusions.[3] Federal district court decisions may serve as guidance to Montana courts, but do not constitute controlling precedent. *Miners & Merchants Bank v. Dowdall*, 158 Mont. 142, 152, 489 P.2d 1274, 1279 (1971); *see also Bullock v. Fox*, 2019 MT 50, ¶ 30, 395 Mont. 35, 435 P.3d 1187 (federal court's interpretation of federal law is persuasive—not binding—authority on Montana courts). Since state courts are not bound by the decisions of any federal court other than the United States Supreme Court, this federal district court decision is not "controlling" as required to satisfy Rule 20.

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

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

The Legislature repeatedly argues it has authority to obtain email records from the Judiciary and claims the Court has held to the contrary. That the Legislature has authority to obtain records is not and never has been disputed – not by McLaughlin and certainly not by the Court. The Legislature can get unprivileged and otherwise properly obtainable records, it just has to do it correctly. Here, the Legislature went about its task with a wrecking ball instead of a scalpel, leaving no room for protection of potentially privileged or private information prior to its production. McLaughlin, through counsel, repeatedly asked the Legislature to slow down and allow an opportunity for review. *McLaughlin v. The Montana State Legislature, et al., OP 21-0173, Order Denying Respondents' Motion to Dismiss*, p. 4 (June 29, 2021). It is now more than a little ironic that the Legislature begs for "negotiation and accommodation" when in its rush to obtain the judiciary's records from a custodian in the executive branch, it ignored every procedural suggestion made by McLaughlin. (*See* Exh. A to Petitioner's Response to Respondent's Motion to Dismiss as Moot in which counsel beseeched the DOA and the Legislature to establish a process whereby the records being sought could be produced after a review to protect privileged and private information. Each request was ignored.)

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

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

CONCLUSION

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

Dated this 2nd day of September, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

*[*** Certificates omitted for printing purposes ***]*

APPENDIX 16

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No.: BDV-2021-451

[Filed: October 6, 2021]

JUSTICE JIM RICE,	)
	)
Petitioner,	)
	)
v.	)
	)
THE MONTANA STATE LEGISLATURE, by Senator Mark Blasdel, President of the Senate, and Representative Wylie Galt, Speaker of the House of Representatives,	)
	)
Respondents.	)

DECLARATORY JUDGMENT PETITION ORDER

Justice James A. Rice's (Justice Rice) April 19, 2021 Declaratory Judgment Petition (Petition) has been fully briefed by the parties. Neither he nor the Montana State Legislature (Legislature) requested oral arguments.

For the reasons stated below, Justice Rice's Petition is **GRANTED** in part, and **DENIED** in part.

MATERIAL FACTUAL BACKGROUND[1]

Justice Rice has been a Montana Supreme Court Justice for over twenty years.

On March 16, 2021, Governor Gianforte signed SB 140. It provided, among other things, the governor with direct judicial appointment power and abolished the Montana Judicial Nomination Commission.

On March 17, 2021, *Brown et al. v. Gianforte*, OP 21-0125 was filed as an original proceeding with the Montana Supreme Court challenging SB 140. In that proceeding, Governor Gianforte, represented by the Justice Department, raised concerns about a Montana Judges Association email-based poll relative to SB 140 before the Montana Legislature (Legislature) passed the bill and sent it to Governor Gianforte.

On April 8, 2021, the Legislature, outside of the *Brown* proceeding, issued a subpoena to the Montana Department of Administration (DOA) requiring production on April 9, 2021 of "[a]ll emails and attachments sent and received" by the Court Administration for the Judicial Branch, between January 4, 2021 and April 8, 2021. The Judicial Branch was not notified of the subpoena. In response, the DOA timely produced "over 5,000 emails to the Legislature. (Hearing Ex. 7, K. Hansen Declaration.) Thereafter,

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[1] For additional background, please see *McLaughlin v. The Montana Legislature et al.*, 2021 MT 120-1, ¶¶ 2-7, 404 Mont. 166, 489 P.3d. 482; and *McLaughlin v. The Montana Legislature et al.*, 2021 MT 178, ¶¶ 3-4.

the Court Administrator sought judicial relief from the Montana Supreme Court in the *Brown* proceeding.

On April 11, 2021, the Montana Supreme Court temporarily quashed the Legislature's subpoena issued to the DOA.

On April 12, 2021, Ms. Hansen, in her capacity as Montana Department of Justice Lieutenant General and on behalf of the Legislature, wrote to Justice Rice and indicated, in relevant part, that:

> 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 addresses 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 court for decision.
>
> • • •
>
> 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. All sensitive or protected information will be redacted in accordance with the law. To the extent there is concern, upon production, the Legislature will discuss redaction and dissemination procedures with the Court Administrator.

On April 15, 2021, Senator Blasdel and Representative Galt signed a Subpoena for Justice Rice to appear 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, [redacted email address], 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 e-mail account, [redacted email address], 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, [redacted email address], 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.

The Subpoena indicated, in relevant part, that:

> 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.

On April 15, 2021, Justice Rice was personally served with the Subpoena.[2]

On April 19, 2021, Justice Rice, *pro se*, commenced this proceeding against the Legislature. In his "Petition for Declaratory and Injunctive Relief; and Emergency Request to Quash or Enjoin Legislative Subpoena Pending Proceedings," he requested this Court, among other things:

> 1. .... [I]mmediately quash or stay the Subpoena, or preliminarily enjoin [the Legislature] from pursuing the Subpoena or issuing further subpoenas, pending a hearing and pending this proceeding pursuant to § 27-19-201, MCA; and
>
> • • •
>
> 3. .... [D]eclare the Subpoena invalid pursuant to § 27-8-202, MCA, and permanently enjoin it pursuant to § 27-19-102, MCA.

On April 19, 2021, this Court temporarily enjoined the Subpoena pending further proceedings.

On April 23, 2021, Montana Attorney General Knudsen issued a "general statement" that indicated, in relevant part:

> The Department of Justice will continue to represent the legislature as it carries out its necessary investigation of potential judicial

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[2] On May 10, 2021, Justice Rice testified that this was the second subpoena issued to him. The first subpoena had technical deficiencies which were corrected and then served on him.

> misconduct. The Supreme Court justices must also act to restore the public's confidence. Fully cooperating with the investigation instead of taking extraordinary measures to hide public documents would be (sic) good place for them to start.
>
> What has been happening behind closed doors at the Supreme Court is ugly: Violations of our judicial codes of conduct, potential violations of the law, and a pattern of corruption. The Supreme Court justices and staff are scrambling to cover this up. The first step toward cleaning up our legal and judicial culture is more transparency and less of the self-policing that has enabled the current system to spiral out of control.

(Hearing Ex. 8.)

On or about May 5, 2021, the Special Select Committee on Judicial Accountability and Transparency (Committee) issued its Final Committee Report (Report). The Committee concluded that:

> 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.

Report, p. 21.

The Committee made nine 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.

Report, p.22.

On May 10, 2021, a Show Cause hearing was held in this proceeding.

On May 18, 2021, this Court granted Justice Rice's preliminary injunction request, and converted the April 19, 2021 temporary order "to a Preliminary Injunction until further order of this Court in all respects."

On June 22, 2021, Senator Blasdel and Representative Galt wrote Justice Rice informing him that:

> Please take notice that the Subpoenas issued to you on 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.

On the same day, the Legislature filed a dismissal motion in OP 21-0173 claiming that proceeding was moot because it withdrew similar subpoenas issued to Beth McLaughlin. In addition, on or about June 22, 2021, Senator Hertz, the Committee's chair, informed the press that:

> To be clear, we expect the judicial branch to release public records . . . . We're still seeking documents and information that will provide more clarity on the issues identified in our committee's initial report and inform legislative fixes to problems within our judicial system.

Larson, *Lawmakers Abandon Investigative Subpoenas for Judges' Records*, Independent Record, June 22, 2021.

On June 23, 2021, the Legislature moved to dismiss this proceeding as moot since it withdrew the subpoenas issued to Justice Rice.

On June 29, 2021, the Montana Supreme Court denied the Legislature's dismissal motion concluding that:

> 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.

McLaughlin v. Mont. State Legislature et al., OP 21-0173, Order (Denying Dismissal Motion) (June 29, 2021) ("*McLaughlin Dismissal Order*").

On July 6, 2021, this Court summarily denied the Legislature's dismissal request because it:

> admitted that its ... motion is without merit by failing to file a supporting brief. Mont. Unif. Dist. Ct. R. 2(b). Consequently, its motion should be **DENIED**. In the event the Legislature files another dismissal motion, the Court respectfully requests the parties also address whether, based upon the withdrawn subpoena, Justice Rice is now seeking an

> advisory opinion from this Court relative to his April 19, 2021 Declaratory and Injunctive Relief Petition.[3] See *Arnone v. City of Bozeman*, 2016 MT 184, ¶ 10, 384 Mont. 250, 376 P.3d 786 (citing authority) (the Uniform Declaratory Judgment Act "does not license litigants to fish in judicial ponds for legal advice").

On July 14, 2021, the *McLaughlin* Court, among other things, permanently enjoined the Legislature and its counsel "from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the subject subpoenas." *McLaughlin*, 2021 Mont. 178, ¶57(c). In summary, it concluded:

> 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

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[3] Justice Rice specifically requested, in relevant part, that this Court "declare the Subpoena invalid pursuant to § 27-8-202, MCA, and permanently enjoin it pursuant to § 27-19-102, MCA."

> 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.

McLaughlin, ¶ 2.

In response to the *McLaughlin* Court's July 14, 2021 decision, Senator Hertz stated:

> Montanans demand accountability and transparency from their elected officials. Today, the Montana State Supreme Court told Montanans they will not uphold those values, and will instead continue to delete emails, use state resources for their private lobbying efforts, and bend the law to protect their personal interests.
>
> This ruling is exactly what you'd expect to get from people acting as judges in their own case, protecting their own interests. Not only did the Montana Supreme Court rule in their own favor on the subpoena question, they have gone way beyond that and ruled in their own favor on a wide variety of other issues that weren't before the Court. This ruling is poisoned by a massive conflict of interest and it's judicial activism at its worst.
>
> We are deeply troubled by this ruling. The Court appears to be saying that only people chosen by the Court can police their conduct. They also appear to be claiming that they don't

> have to follow public records laws and retain emails for public inspection. Today, the Montana Supreme Court declared itself above reproach, and, potentially, above the law.
>
> The Legislature and our attorneys will continue to review this astounding ruling in more detail. We have even more work to do than we thought to ensure that Montana's Judicial Branch is subject to the same transparency and accountability that governs the Executive and Legislative branches.

On July 26, 2021, the Legislature moved, with a supporting brief, to dismiss Justice Rice's Declaratory Relief Petition. Similar to *McLaughlin*, it claimed this proceeding was moot since the subpoenas issued to Justice Rice were withdrawn.

On August 11, 2021, the Legislature petitioned the *McLaughlin* Court for rehearing. In its conclusion, the Legislature argued:

> 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.

On August 23, 2021, this Court denied the Legislature's second dismissal motion, without prejudice.[4] In doing so, this Court indicated that "[f]or purposes of this proceeding, this Court will determine whether the Legislature's subpoena to Justice Rice was

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[4] "The Legislature could have simply expressly represented to Justice Rice and this Court that it will not issue another subpoena to him because it will proceed with its complaints against Justice Rice before the constitutionally created Montana Judicial Standards Commission. Such a representation, in this Court's view, would have satisfied the *Havre Daily News* Court's 'absolutely clear' mootness requirement."

valid despite it being withdrawn since there is still a dispute over the subpoena's legality."

On September 7, 2021, the Montana Supreme Court denied the Legislature's rehearing request. It held, in relevant part, that:

> 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, 207 L. Ed. 2d 951 (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 not hold in any fashion that the Legislature cannot issue a subpoena to or otherwise obtain appropriate information from a government official.

McLaughlin v. Mont. State Legislature, OP 21-0173, 2021 Mont. LEXIS 696.

Since April 19, 2021, the Legislature has not issued another subpoena to Justice Rice.

DISCUSSION

Declaratory Judgment Standard

The Montana Supreme Court has held that "[t]he purpose of the Montana Declaratory Judgment Act is remedial and is meant 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.'" *Brisendine v. Department of Commerce, Bd. of Dentistry*, 253 Mont. 361, 363-64, 833 P.2d 1019 (1992).

> Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Mont. Code Ann. § 27-8-202 (2021).

Notwithstanding, however, Montana district courts are precluded from issuing advisory opinions in declaratory judgment proceedings. See *Lee v. State*, 195 Mont. 1, 6, 635 P.2d 1282, 1284 (1981) (UDJA "does not license litigants to fish in judicial ponds for legal advice."); *Mont. Dep't of Natural Res. & Conservation v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 1123 (1976) (citation omitted). In *Northfield Ins. Co. v. Mont. Ass'n of Counties*, 2000 MT 256, ¶ 18, 301 Mont. 472, 10 P.3d 813, the Montana Supreme Court held

that a judicial determination of secondary insurers' declaratory judgment request as to their contractual duty to indemnify a primary insurer, even though the primary insurer had not yet sought indemnification "would constitute an advisory opinion and courts have no jurisdiction to issue such opinions." Consequently, as this Court understands, if the declaratory relief or question is based upon abstract, hypothetical, or contingent events, a Montana district court must dismiss the claim for lack of jurisdiction.

Future Montana Legislative Subpoenas Issued to Justice Rice

Justice Rice petitioned, in relevant part, that this Court "preliminarily enjoin [the Legislature] from . . . **issuing further subpoenas**, pending a hearing and pending this proceeding pursuant to § 27-19-201." He argues, in relevant part, that "the Legislature has announced and repeated its intention to continue pursuing documents from the judicial branch, and has not forsworn serving future subpoenas upon Supreme Court Justices as part of that process, notwithstanding the withdrawal of the earlier subpoenas, Mot. to Dismiss at 2; Ex. H at 22." Now, Justice Rice requests, in relevant part, that this Court declare:

> • That, pursuant to *McLaughlin II*, the Legislature may not issue a subpoena seeking the communications of a Supreme Court Justice for the stated purpose of "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;"

- That, pursuant to *McLaughlin II*, the Legislature may not issue a subpoena seeking the communications of a Supreme Court Justice for the stated purpose of investigating "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";

- That the Legislature may not issue a subpoena for personal communications without demonstrating that production is necessitated by a legitimate legislative interest, and not for purposes of political exposure or to serve an investigative interest that is the purview of the executive branch; and

- That the Legislature may not issue a subpoena for the purpose identified in its Brief in Support of Motion to Dismiss of investigating alleged judicial misconduct.

In this regard, this Court finds that Justice Rice has "put the cart before the horse" in requesting such "hypothetical" declaratory relief. Especially since the *McLaughlin* Court "did not hold in any fashion that the Legislature cannot issue a subpoena to or otherwise obtain appropriate information from a government official." *McLaughlin*, OP 21-0173, 2021 Mont. LEXIS 696. Justice Rice is not entitled to a declaratory ruling from this Court relative to as-yet unissued and unserved subpoenas until a subpoena is actually issued by the Montana Legislature, served on him, and resisted by him on *McLaughlin II* or any other legal

basis. None of these hypothetical things have occurred or may ever occur.

Consequently, this Court must, and shall, **DENY**, Justice Rice's requested declaratory relief relative to future subpoenas because any such declaratory determination would constitute an improper advisory opinion as to both the hypothetical subpoena issue and the hypothetical subpoena's legality. This Court has no jurisdiction to issue a declaratory ruling based on contingent, hypothetical or abstract future Legislative subpoenas that may never be issued to Justice Rice.

The April 15, 2021 Subpoena Issued to Justice Rice was Invalid

Legislature's Documentary Subpoena Power

The Legislature had no statutory authority on April 15, 2021 to subpoena documents from Justice Rice. Neither Mont. Code Ann. § 5-5-101(1), Mont. Code Ann. § 5-5-102, nor Mont. Code Ann. § 5-5-105 granted the Legislature to issue the April 15, 2021 subpoena relative to the identified and demanded documents from him. While the Legislature certainly had the statutory power to subpoena Judge Rice's attendance "before either house of the legislature or a committee of either house," there was no such corresponding Legislative statutory document subpoena power. See, e.g., *Comm'r of Political Practices for Mont. v. Mont. Republican Party*, 2021 MT 99, ¶ 9, 404 Mont. 80, 485 P.3d 741.

On May 10, 2021, the Legislature argued such power is found in Mont. Code Ann. § 5-5-105 (2). In this regard, this Court will not insert what the Legislature

omitted in section 5-5-101(1) to broaden its investigatory authority. The word "subpoena" does not appear in Mont. Code Ann. § 5-5-105. This Court shall not insert Mont. Code Ann. §§ 5-5-105(1) or 5-5-105(2)'s "paper produced" or "produce any paper" into Mont. Code Ann. § 5-5-105(1). The same is true in that this Court will not insert the word "subpoena" found in section 5-5-101(1) into either section 5-5-105(1) or section 5-5-105(2).

Furthermore, as previously indicated, the Legislature's authority remains subject to judicial oversight, particularly when those it "investigates" are subjected to unlawful document subpoenas. Such judicial oversight involves the balance of powers between the judicial branch and the legislative branch as well as the executive branch. This Court will not judicially condone or ignore the Legislature circumventing statutory due process safeguards by overreaching conduct not statutorily authorized.

Accordingly, this Court hereby **GRANTS** Justice Rice's Petition as to the April 15, 2021 subpoena documentary requests and declares the subpoena invalid in that respect since the Legislature had no statutory authority to subpoena documents from Justice Rice.

Legislature's Investigatory Subpoena Power

In reliance upon the *McLaughlin* Court's extensive analysis, this Court finds that the Legislature's April 15, 2021 subpoena issued to Justice Rice relative to the identified and requested documents exceeded the Legislature's limited legislative investigative subpoena

authority. Specifically, the April 15, 2021 subpoena issued to Justice Rice was "impermissibly overbroad and [exceeded] the scope of legislative authority because [it] seeks information not related to a valid legislative purpose, information that is confidential by law, and information in which [Justice Rice had] a constitutionally protected individual privacy interest." *McLaughlin*, ¶ 2.

Furthermore, the April 15, 2021 subpoena interferes with the Montana Judicial Standards Commission (MJSC) constitutional authority and exceeds the Legislature's investigatory authority as to alleged judicial misconduct. The MJSC, not the Legislature, investigates alleged judicial misconduct. The MJSC, not the Legislature, has the constitutional authority to subpoena witnesses and documents in alleged judicial misconduct matters. The MJSC, not the Legislature, has the constitutional authority to make rules implementing Mont. Const. Art. VII. § 11(2).

Accordingly, this Court hereby **GRANTS** Justice Rice's Petition as to the April 15, 2021 subpoena documentary requests and declares the subpoena invalid and void in that respect since the Legislature exceeded its limited Montana legislative investigative authority as determined by the *McLaughlin* Court.

ORDER

Based on the above, the Court hereby **DECLARES, ADJUDGES, AND DECREES** as follows:

1. Justice Rice's Petition is **GRANTED** as to the April 15, 2021 Subpoena issued to him by the Montana

Legislature relative to the documents identified, requested and/or demanded in that Subpoena;

2. The Legislature's April 15, 2021 Subpoena issued to Justice Rice is invalid, void, and not enforceable against Justice Rice relative to the documents identified, requested and/or demanded in that Subpoena;

3. This Court's April 19, 2021 temporary order is converted to a Permanent Injunction against the Legislature relative to the documents identified, requested and/or demanded in the April 15, 2021 Subpoena; and

4. Justice Rice's Petition as to future Legislative subpoenas issued to him is **DENIED**.

DATED this 6th day of October 2021.

Michael F. McMahon

Digitally signed by Michael McMahon
Date: 2021.10.06 15:43:01-06'00'

MICHAEL F. McMAHON
District Court Judge

cc: Curt Drake / Patricia Klanke, (via email to: curt@drakemt.com)
Austin Knudsen / Derek Oestreicher, (via email to: derek.oestreicher@mt.gov)