No. 21-859

In The

Supreme Court of the United States

THE MONTANA LEGISLATURE, et al., *Petitioners,*

v.

BETH MCLAUGHLIN, *Respondent.*

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

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Brief of Amicus Curiae Governor Gianforte Supporting Petitioners

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QUESTION PRESENTED

Whether the failure of the Justices of the Montana Supreme Court to recuse from a case in which they have a direct and substantial interest violates this Court's rule under the Due Process Clause of the Fourteenth Amendment that no man may be a judge in his own cause.

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STATEMENT OF INTEREST[1]

Amicus the Honorable Greg Gianforte is the Governor of Montana. As Governor, he is "vested with [t]he executive power" and "shall see that the laws are faithfully executed." Mont. Const., Art. VI, Sec. 4(1). He is "the chief executive of the state," tasked with "formulat[ing] and administer[ing] the policies of the executive branch of state government." Mont. Code Ann. § 2-15-103. He "has full power [to] supervis[e], approv[e], direct[ ], and appoint" all unelected departments and their units, *id.*, and "shall…supervise the official conduct of all executive and ministerial officers," *id.* at § 2-15-201(a).

As the CEO of the State of Montana, Governor Gianforte represents one co-equal branch of its government:

> 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.

Mont. Const., Art. III, Sec. 1. It is respect for these distinct branches that motivates his participation in this matter.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person made a monetary contribution to its preparation or submission. The parties received timely notice of and have consented to the filing of this brief.

For American governments to properly function, all branches must faithfully execute their respective purposes. The Rule of Law transcends and applies to all branches of government. While the Governor recognizes a "presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), lack of clarity in federal law has allowed the Montana judiciary to lose sight of its obligations by engaging in prejudgment of proposed legislation, violating fundamental due process protections. Public confidence in an independent and impartial judiciary was further eroded when Montana justices chose to adjudicate subpoenas to investigate this prejudgment practice. To preserve the independence and impartiality of the judiciary and restore the proper balance of power under the Montana Constitution, the Governor respectfully urges the Court to grant certiorari.

SUMMARY OF ARGUMENT

Due process requires an independent and impartial judiciary, and the appearance thereof. Judges must diligently ensure they meet this obligation to ensure public faith in the institution. By prejudging proposed legislation, Montana's judiciary has not.

The Court has recognized a compelling state interest in preserving public confidence in the judiciary. The Court has not clearly defined this interest, which has resulted in its inconsistent application. Following *Williams-Yulee v. Fla. State Bar*, 575 U.S. 433 (2015), which recognized this interest to uphold a ban on personal solicitations, the Ninth and Sixth Circuits expanded *Yulee*'s application to uphold restrictions on various forms of judicial candidate speech. Yet the court below concluded that this interest does not prohibit sitting judges from opining on the legal merit of proposed legislation. This Court should grant the petition for a writ of certiorari to clarify the meaning and scope of this important question.

The Court has also recognized a compelling state interest in an impartial judiciary. While under *Repub. Party of Minn. v. White,* 536 U.S. 765 (2002), this interest does not mean a judge must be a blank slate or prohibit her from announcing her views, it does prohibit prejudgment of matters likely to come before the judge. Contrary to the decision below, impartiality considerations are not limited to actual bias, but, under *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009) and *White,* include the appearance of impartiality as well. The Court should grant the petition for a writ of certiorari to clarify that impartiality and its appearance prohibits judges from prejudging proposed legislation.

ARGUMENT

I. This Case Presents the Important Question of Whether Due Process Prohibits Judges from Prejudging Proposed Legislation.

Montana's Code of Judicial Conduct begins: "An independent, fair, and impartial judiciary is indispensable to our system of justice." Mont. Code Jud. Cond., Preamble (2009). Montana is not alone in recognizing this fundamental principle.

While "legislative and executive officials act on behalf of the voters who placed them in office[,] 'judges represent the Law.'" *Repub. Party of Minn. v. White,* 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) (quoting *Chisom v. Roemer,* 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)). Indeed:

> "[u]nlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide 'individual cases and controversies' on individual records, neutrally applying legal principles, and, when necessary, 'standing up to what is generally supreme in a democracy: the popular will, …"

White, 536 U.S. at 803-04 (Ginsburg, J., dissenting) (quoting *Plaut v. Spendthrift Farm., Inc.*, 514 U.S. 211, 266 (1995) (Stevens, J., dissenting), and Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989)). "Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe." *White*, 536 U.S. at 817-18.

Here, by engaging in the practice of prejudging proposed legislation, Montana's judiciary has failed

to properly attend to its role as an independent and impartial arbiter. In early 2021, it came to light that internal polls and email exchanges among all Montana judges regularly occur discussing the legal merit of pending legislation. Commentary in these exchanges included generic opposition to the bill, *see, e.g.,* App. 294, 296, and express opinion on the proposed laws' lawfulness, *see, e.g.,* App. 311-12 (asserting the lawfulness of the current law); *id.* at 326 (asserting the unconstitutionality of the bill revising the law).

When confronted with the propriety of such exchanges, the Montana Chief Justice, on behalf of the Montana Supreme Court, asserted that:

> [t]he Judicial Branch does not involve itself in the mine run of legislation—only those matters that directly impact the manner in which our court system serves the people of Montana who elect each of us. … to apprise the Legislature of how its decisions may affect the functionality of the judicial system and impact Montanans.

App. 628. *See also* App. 65 (stating that it is within Respondent's job duties to "coordinate[ ] contacts between district court judges and legislators or conduct[ ] a poll to all district judges, through the Montana Judges Association, to provide the Legislature with relevant information regarding how proposed legislation will affect Judicial Branch functions."). Yet at the same time, the Montana Chief Justice advised that "[m]embers of the Supreme Court do not participate in the poll for the reason that, if passed, a statute may come before the Court at a later time." App. 630.

The discovery of this practice triggered a furor of subpoena litigation, concluding in the Montana Supreme Court quashing legislative subpoenas

issued against Respondent and all but one of its own justices. App. 8.[2]

The Governor does not ask this Court to "right all wrongs and repair all imperfections through the Constitution," but rather to clarify the law. *Caperton v. A.T. Massey Coal Co.,* 556 U.S 868, 903 (2009) (Scalia, J., dissenting). As shown below, the practice of prejudging proposed legislation violates the Court's due process principles of impartiality and public confidence in the judiciary, and conflicts with the jurisprudence of the Court and other circuits. This Court should grant certiorari to clarify the law around this important question.

A. Prejudging Proposed Legislation Undermines Public Confidence in the Judiciary and Conflicts with the Jurisprudence of the Court and Other Circuits.

The Court has recognized a compelling state interest in "public confidence in judicial integrity." *Williams-Yulee v. Fla. State Bar,* 575 U.S. 433, 445 (2015). Like many states, this compelling interest is expressly stated in Montana's Code of Judicial Conduct: "A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety* and the appearance of impropriety." Mont. Code Jud. Cond. Rule 1.2, *Promoting Confidence in the Judiciary* (2009), *available at* https://courts.mt.gov/external/supreme/newrules/rules/jud-canons.pdf.

In *Yulee*, the Court stated that "public confidence in judicial integrity does not easily reduce to precise

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[2] Justices Baker and Rice did not support the stay of the subpoenas against Court members. App. 9.

definition," *Yulee,* 575 U.S. at 447.[3] This lack of definition has now resulted, perhaps inevitably, in conflicting application. *See id.* at 465 (Scalia, J., dissenting).

In *Wolfson v. Concannon,* 811 F.3d 1176 (9th Cir. 2016), the Ninth Circuit concluded that judicial candidates could be constitutionally prohibited from a variety of political speech to preserve public confidence in the judiciary. In reaching its conclusion, the court declined to establish a clear meaning for that interest, stating only that "[t]here are no magic words required for a state to invoke an interest in preserving public confidence in the integrity of the state's sitting judges." *Id.* at 1182.

That circuit court again recognized public confidence in the judiciary to resolve *French v. Jones,* 876 F.3d 1228 (9th Cir. 2017), concluding that "Montana has reasonably determined that both candidates and their committees pose a threat to its judiciary when they seek, accept, or use political endorsements in their campaigns." *Id.* at 1241. *See also Platt v. Bd. of Comm'rs on Grievs. & Discipline of the Ohio Supreme Ct.,* 894 F.3d 235 (6th Cir. 2018) (upholding a variety of judicial candidate fundraising, solicitation, and endorsement restrictions under *Yulee*).

Whatever the legal merit of these decisions, they all suggest that the state's interest in protecting "public confidence in the judiciary" ought to be implicated in at least equal measure if not more so where judges opine on proposed legislation, whether publicly or in internal emails between, and polls of, judges. After all, such activities raise the public's

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[3] The court also declined to apply traditional underinclusive and overinclusive analysis to assess the tailoring of that interest. *Id.* at 448-49.

suspicion as to the court's ability to fairly resolve litigation disputes involving that legislation, both as an initial matter and on appeal. *Yulee,* 575 U.S. at 447 ("A judge … must 'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or controul[sic] him but God and his conscience.'") (quoting Address of John Marshall, in *Proceedings and Debates of the Virginia State Convention of 1829–1830*, p. 616 (1830)).

By engaging in discourse about proposed legislation, the Montana judiciary has created an untenable situation: nearly every sitting judge in the state that rules on the lawfulness of legislation can now be viewed with suspicion. Any district court decision involving new legislation may cause a litigant to wonder if the outcome was independently arrived at, or if the supreme court signaled its position in an email or poll,[4] or whether de novo review on appeal is in fact de novo at all.

That the court below even needed to invoke the Rule of Necessity—whatever the merit of that reasoning[5]—is the result of a due process problem of its own making. App. 25. *See* Mont. Code Jud. Cond. 2.1, Comment 1 (2009) ("To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to

[4] While the Supreme Court members assert that they do not participate in the polls, *see* App. 630, they are all included on email exchanges. *See, e.g.,* App. 292-341.

[5] Governor Gianforte has appointed several judges since the adoption of SB 140 who would presumably have no direct interest in the subject of the legislative subpoenas at issue as they could not have been part of the polling and email exchange in question.

minimize the risk of conflicts that would result in frequent disqualification.").

The resulting public suspicion manifested itself below with legislative subpoenas of the Montana Supreme Court justices, who invoked the very same amorphous public confidence interest to justify *not* recusing themselves from adjudicating those subpoenas: public confidence in the judiciary would be compromised, they said, if the subpoenaed justices recused because they would be "succumb[ing] to the Legislature's request and evad[ing judicial] responsibilities and obligations as a Court." App. 29.

That Montana judicial candidates cannot personally solicit contributions under *Yulee* or receive political endorsements under *French*, but can, as elected judges, pronounce proposed legislation unconstitutional, all under the guise of "public confidence in judicial integrity," is a legal conflict in need of resolution. This Court should grant certiorari to clarify that preservation of public confidence in the judiciary prohibits prejudging proposed legislation.

B. Prejudging Proposed Legislation Undermines Impartiality and Conflicts with the Jurisprudence of this Court and Other Circuits.

Due process requires judges to be impartial: they must "lack [ ] bias for or against either party to the proceeding." *White,* 536 U.S. at 775 (emphasis omitted). Impartiality "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," thereby "assur[ing] equal application of the law." *Id.* at 775-76 (citing Webster's New Int'l Dictionary 1247 (2d ed. 1950) (defining "impartial" as "not partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just")). The judicial

obligation under the due process clause is to avoid prejudgment. *Id.* at 813 (Ginsburg, J., dissenting); *see also In re Murchison*, 349 U.S. 133, 136 (1955) ("No man is permitted to try cases where he has an interest in the outcome"); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (this concept ensures that a litigant "may present his case with assurance that the arbiter is not predisposed to find against him.").

Due process does not require a blank slate, however: "'Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.'" *White,* 536 U.S. at 778 (quoting *Laird v. Tatum,* 409 U.S. 824, 835 (1972)).

Nor does a judge's mere statement announcing her views on disputed legal issues trigger due process concerns. *Id.* at 780-81; *see, e.g., Buckley v. Illinois Judicial Inquiry Bd.,* 997 F.2d 224, 228 (7th Cir. 1993) (providing as examples of announced views a judicial candidate who discusses his judicial philosophy, or criticizes *Roe v. Wade*); *Republican Party of Minn. v. White,* 416 F.3d 738 (8th Cir. 2005) (protecting the speech rights of judicial candidates to state their party affiliation as a form of announcing their views). *See also In the Matter of the 2008 Mont. Code of Judicial Cond.,* No. AF 08-0203 at *5 (Mont. Dec. 12, 2008) (Rice, J., concurring in part and dissenting in part), *available at* https://courts.mt.gov/External/supreme/boards/jud_standards/Montana%20Code%20of%20Judicial%20Conduct%20Effective%202009.pdf (accepting "as a good faith effort" judicial Rule 2.11 proscribing pledges, promises, or commitments that are inconsistent with impartiality to be "a rule which conforms with *White*.").

Aware of this legal framework, App. 71-73, the court below nevertheless concluded that its practice of supporting or opposing proposed legislation was proper, reasoning that the Legislature had not made any claim "that a member of this Court has an actual bias, prejudice, or is otherwise unable to adjudicate these proceedings fairly and impartially." App. 25.

But Montana judges are not merely announcing their personal views, as the Montana Supreme Court asserts. App. 628. Nor are they commenting "on how the proposed measure will impact operation of the courts." App. 70. Rather, they participate in internal polls and email discussions in their official capacity using state email accounts to prejudge the merit of proposed legislation. As discussed above, such a practice undermines the decisional independence of Montana judges, a harm that is exacerbated by the willingness of nearly all Montana justices to then adjudicate subpoenas issued against them as part of a legislative effort to further investigate this polling practice.[6]

Moreover, the decision below conflicts with the Court's holding in *Caperton*, 556 U.S. 868, which held that recusal is required not only for actual partiality but for its appearance. *Id.* at 879 (a court is "'not required to decide whether in fact [the justice] was influenced'.") (quoting *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825 (1986)). While *Caperton* represents an "extreme case"[7] that raises more questions than

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[6] Justices Baker and Rice did not support a stay of the subpoenas issued against the justices, App. 9, and Justice Rice recused himself, App. 10, and challenged his subpoena in district court. App. 8.

[7] In *Caperton,* the Court found that independent political expenditures of $3 million supporting a judicial candidate

solutions in its "probability of bias" framework, *see* 556 U.S. at 899 (Roberts, C.J., dissenting), it also reinforces this Court's jurisprudence that it is not only actual bias that courts must be mindful of, but its appearance, as well. *Id.* at 890 (Roberts, C.J., dissenting) ("I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such."). *See also White,* 536 U.S. at 776 ("We think it plain that the announce clause is not narrowly tailored to serve impartiality (*or the appearance of impartiality*) in this sense.") (emphasis added). The court below misunderstands its impartiality obligations under due process and this Court's precedents.

Like the executive branch and the legislature, the judiciary must hew to its purpose. The judiciary is not tasked with crafting legislation—that is the province of the legislature. The judiciary is not tasked with effectuating legislation or enforcing the law—that is the province of the executive. Instead, the judiciary is tasked with independently and impartially interpreting and applying the law. It is true that Montana has chosen to hold its judges directly accountable to this purpose through elections. *See generally* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 First Am. L. Rev. 180 (2006).[8] Nevertheless, this Court should grant

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who would hear the spender's appeal if elected warranted recusal of that judicial candidate as judge. *Caperton v. Massey*, 556 U.S. 868.

[8] Montana's judicial elections were partisan from its founding in 1889 until 1935. 1935 Mont. Laws 389, ch. 182 (Mont. 24th Leg. Assembly, 1935).

certiorari to clarify that prejudging proposed legislation violates due process impartiality principles, requiring recusal.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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