IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

BETH McLAUGHLIN,

Petitioner,

v.

The MONTANA STATE LEGISLATURE, and the MONTANA DEPARTMENT of ADMINISTRATION,

Respondents.

PETITION FOR ORIGINAL JURISDICTION AND EMERGENCY REQUEST TO QUASH/ENJOIN ENFORCEMENT OF LEGISLATIVE SUBPOENA

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INTRODUCTION

This is an original proceeding challenging the legality of an April 8, 2021 Subpoena ("Subpoena") served by the Montana State Legislature on the Department of Administration.[1] The Subpoena demands production of all emails and documents sent to or received by Montana Supreme Court Administrator Beth McLaughlin ("McLaughlin") over a three-month period. The Subpoena encompasses private medical information, personnel matters including employee disciplinary issues, discussions with judges about ongoing litigation, information regarding Youth Court cases, judicial work product, ADA requests for disability accommodations, confidential matters before the Judicial Standards Commission, and information that could subject the State of Montana to liability were protected information exposed.

Despite this Court's issuance of an April 11, 2021 Temporary Order in a related proceeding quashing the Subpoena and setting a briefing schedule, the Montana Attorney General advised the Court this evening that "[t]he Legislature does not recognize this Court's Order as binding and will not abide it." The justification offered for disregarding the Court's Order is alleged procedural irregularities with the manner in which McLaughlin sought relief. While these are not valid reasons for ignoring a court order, McLaughlin is compelled to ask the

[1] A true and correct copy of the Subpoena is attached as Exhibit A.

Court to immediately issue another Order, this time in this original proceeding, quashing and enjoining enforcement of the Subpoena.

Pursuant to Mont. R. App. P. 14(1), (2), (4) and Mont. Code Ann. §§ 3-2-205, 26-2-401, McLaughlin seeks the following declaratory and injunctive relief:

(1) an immediate order temporarily quashing the Subpoena and enjoining enforcement of the Subpoena to maintain the status quo and prevent further irreparable injury;

(2) an order declaring the Subpoena illegal and invalid;

(3) an order permanently quashing the Subpoena;

(4) an injunction prohibiting any further compliance with the Subpoena—by the Montana Department of Administration or anyone else—and prohibiting the production, re-production or disclosure of any documents or information sought under the Subpoena;

(5) an injunction prohibiting the Montana Legislature from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the Subpoena; and

(6) an injunction directing the Montana Legislature to immediately return any documents produced pursuant to the Subpoena, or any copies or reproductions thereof, to Beth McLaughlin.[2]

[2] McLaughlin also seeks leave to file an overlength petition. The applicable word limit of 4,000 words is insufficient under the circumstances of this case, particularly given the expedited nature in which the petition was, by necessity, drafted. Given the emergency nature of McLaughlin's request for injunctive relief, she had no opportunity to seek the Court's leave in advance.

PARTIES

1. Petitioner Beth McLaughlin is Court Administrator for the Montana judiciary, a co-equal branch of government. By statute, she is "the administrative officer of the court." Mont. Code Ann. § 3-1-702.

2. Respondent the Montana Legislature is the legislative branch of government in the State of Montana. Mont. Constitution, Art. III § 1; Art. V § 1. The Montana Legislature includes the Montana Senate and the Senate's Judiciary Standing Committee, which issued the Subpoena in question.

3. Respondent the Montana Department of Administration is a department of the executive branch of government in the State of Montana. Mont. Code Ann. § 2-15-104(a). The Montana Department of Administration is named here not as an adverse party and solely in its capacity as an interested party, records custodian, and recipient of the Subpoena at issue. Without its inclusion, the Court may be unable to afford effective relief.

BACKGROUND

4. In her role as Court Administrator, McLaughlin has a wide range of statutorily-assigned duties:

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

(3) to the extent possible, provide that current and future information technology applications are coordinated and compatible with the standards and goals of the executive branch as expressed in the state strategic information technology plan provided for in 2-17-521;

(4) recommend to the supreme court improvements in the judiciary;

(5) administer legal assistance for indigent victims of domestic violence, as provided in 3-2-714;

(6) administer state funding for district courts, as provided in chapter 5, part 9;

(7) administer the pretrial program provided for in 3-1-708;

(8) administer the treatment court support account provided for in 46-1-1115;

(9) administer the judicial branch personnel plan; and

(10) perform other duties that the supreme court may assign.

Mont. Code Ann. § 3-1-702.

5. In her capacity as Court Administrator, and given her many diverse duties, McLaughlin receives a wide variety of emails and attachments that implicate the rights and privileges of other parties. These emails and attachments include, but are not limited to:

a) Information pertaining to medical information both for employees and elected officials.

b) Discussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline.

c) Discussions with judges about case processing and ongoing litigation in pending or potential cases.

d) Information related to complaints pending before the Judicial Standards Commission.

e) Information or documentation of Youth Court Case information in her role as supervisor of the Youth Court bureau chief.

f) Information about potential on-going security risks to individual judges including communications with law enforcement.

g) Copied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges.

h) Copied on exchanges between judges in which information was exchanged about judicial work product.

i) Requests from members of the public for disability accommodations including documentation of the disability.

j) Other unknown items that could expose the state and Judicial Branch to liability if protected information is exposed.

(Declaration of Beth McLaughlin, Exhibit B.)

6. As is common in today's electronic world, McLaughlin receives hundreds of emails each week, some directed only to her and others in which she is copied as the Court's administrative officer. McLaughlin saves some emails and deletes others, all in the normal course of business. She knows, as does everyone, that "deleted" does not mean "gone forever."

7. On March 17, 2021, an original proceeding was filed in this Court challenging the constitutionality of SB 140, *Brown, et al. v. Gianforte*, OP 21-0125 ("*Brown* Proceeding")).[3]

8. In the *Brown* Proceeding, Respondent raised the issue of a poll conducted of the members of the Montana Judges Association ("MJA") pertaining to SB 140.

9. It is unclear how Respondent obtained information and documents relating to the MJA poll.

10. The Montana Legislature, through the House speaker and Senate president, requested McLaughlin, who helped coordinate and tally the results of the MJA poll, provide any additional information in her possession about the poll.

11. McLaughlin complied with the request, producing the information in her possession but informing the Montana Legislature that some emails relating the poll had been deleted in the normal course of business, and that some of the votes were made by telephone.

12. Unsatisfied with her response, Respondent in the *Brown* Proceeding asked the Court to stay these proceedings pending release of further information relating to the MJA poll.

[3] The action was filed with Bob Brown as the lead petitioner. For unknown reasons, petitioner Dorothy Bradley is listed as lead petitioner in later filings.

13. On April 7, 2021, this Court denied the motion. The Order stated, in pertinent part: (1) Judge Krueger, who had participated in the MJA poll, had voluntarily recused himself from this case; (2) "no member of this Court participated in the aforementioned poll"; and (3) "the six undersigned members of this Court will consider the case on the Petition and the responses submitted. . . ."

14. The very next day, April 8, 2021, the Montana State Legislature issued a Subpoena to Director Misty Ann Giles of the Montana Department of Administration, not to the judicial branch, requiring her to appear the following day, April 9, 2021, and produce:

> (1) All emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.
>
> (2) Any and all recoverable deleted e-mails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.
>
> (3) This request excludes any emails and attachments related to decisions made by the justices in disposition of final opinion.

(Ex. A.)

15. On, Friday, April 9, 2021, Giles compiled and produced 2,450 of McLaughlin's documents.

16. On information and belief, no effort was made prior to the production to coordinate with McLaughlin, or any other court official, to identify, withhold, or redact any private, privileged and confidential information.

17. Director Giles informed the Legislature that the remaining documents would be produced on Monday, April 12, 2021.

18. Although the Subpoena seeks records of the judicial branch and McLaughlin specifically, McLaughlin was only provided a "courtesy copy" of the Subpoena the afternoon of April 9, 2021—the same day Director Giles produced thousands of McLaughlin's documents to the Montana Legislature.

19. McLaughlin asked to delay any production while she sought legal advice, but her request went unanswered.

20. On Saturday, April 10, 2021, McLaughlin's counsel reached out to Director Giles, Deputy Director Mike Manion, and Todd Everts of the Legislative Services Division. McLaughlin's counsel proposed delaying production until the parties could address and resolve concerns relating to the breadth of the Subpoena, writing, in pertinent part:

> We firmly take the position that judicial records are not subject to legislative subpoena. We further take the position that the Department of Administration has no authority over judicial branch records. Nevertheless, in the interest of avoiding litigation of constitutional dimension, I write to propose at least a temporary solution that avoids irreparable harm wrought by executive branch production of judicial records containing private and privileged information.
>
> I suggest an orderly process by which the legislative subpoena of April 8 be withdrawn, revised to be more narrowly tailored to information regarding discussions of SB 140 and then served on the branch of government whose records are being sought – specifically, the Supreme Court Administrator. The Court Administrator will respond through an orderly process that protects existing privacy interests.

21. Upon receipt of the letter, Director Giles informed McLaughlin's counsel that "DOA is complying with the scope of the subpoena as written."

22. That same day, unable to reach a temporary agreement, McLaughlin filed an Emergency Motion to Quash and Enjoin Legislative Subpoena Duces Tecum in the *Brown* Proceeding.

23. On Sunday, April 11, 2021, this Court issued a Temporary Order in the *Brown* Proceeding. The Court quashed the Subpoena "pending further order of the Court." At the same time, the Court noted McLaughlin's motion "raises serious procedural questions" and that it could not "be certain, at this juncture, that the subpoena challenged by McLaughlin has anything to do with the pending proceeding in OP 21-0125, or is properly filed herein." The Court ordered briefing on "the propriety of the filing of the motion in this matter, as opposed to the initiation of an entirely new proceeding before the Court."

24. On April 12, 2021, the Attorney General's Office advised the Court by letter to Acting Chief Justice Rice that "[t]he Legislature does not recognize this Court's Order as binding and will not abide by it." The letter relies on the Court's questions about the procedural propriety of McLaughlin's motion as the basis for disregarding the Court's order. A true and correct copy of the letter is attached hereto as Exhibit C.

25. McLaughlin is informed and believes her emails have already been disclosed by the Montana Legislature and are already appearing on publicly accessible websites.

26. McLaughlin has now had a brief period to partially review some of the 2,450 documents produced by the Montana Department of Administration and can confirm they contain, as suspected, privileged and confidential information.

THE PARTICULAR LEGAL QUESTIONS EXPECTED TO BE RAISED

27. Whether the Court should issue an immediate order in this original proceeding temporarily quashing the Subpoena and enjoining enforcement of the Subpoena to maintain the status quo and prevent further irreparable injury.

28. Whether the Montana Legislature may lawfully subpoena "all emails and attachments" of the Court Administrator, when no legitimate legislative purpose exists, and when the Court Administrator was not afforded an opportunity to review the materials in advance of the production or to protect the privileges, privacy and confidentiality rights implicated.

29. Whether the Subpoena should be permanently quashed, and whether a writ of injunction should be issued preventing production and disclosure (or further production and disclosure) of the privileged, private, and confidential information encompassed by the Subpoena.

ORIGINAL JURISDICTION

A. The Legal Authority for Accepting Jurisdiction.

30. The Court's exercise of original jurisdiction is warranted, first, under Mont. R. App. P. 14(1), which provides the Court "is empowered by Article VII,

Sections 1 and 2 of the Constitution to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction."

31. The Court's exercise of original jurisdiction is warranted, second, under Mont. R. App. P. 14(2), which provides for the Court's ability to issue extraordinary writs. That rule states, in relevant part:

> **Extraordinary Writs.** Proceedings commenced in the supreme court originally to obtain writes of . . . injunction . . . or other remedial writs and orders, shall be commenced and conducted in the manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these rules.

32. The Court's exercise of original jurisdiction is warranted, third, under Mont. R. App. P. 14(4), which states:

> **Original Proceedings.** An original proceeding in the form of a declaratory judgment action may be commenced in the supreme court when urgency or emergency factors exists making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of statewide importance.

33. The Court's exercise of original jurisdiction is warranted, fourth, by Mont. Code Ann. § 3-2-205, which provides, in pertinent part, that an "action to obtain an injunction may be commenced in the supreme court," if "the state is a party, the public is interested, or the rights of the public are involved." *See also Barrus v. Mont. First Judicial Dist. Court*, 2020 MT 13, ¶ 22, 398 Mont. 353, 456 P.3d 777 (granting writ of injunction where "the State is a party, the public has an

interest in establishing and maintaining the validity of the State's actions, and Barrus would have no adequate remedy of appeal if this Court were to allow him to be involuntarily medicated prior to review of that decision.").

B. The Facts Which Make It Appropriate That The Court Exercise Jurisdiction.

34. The injunctive and declaratory relief sought by McLaughlin is suitable to this Court's original jurisdiction because it involves "urgency or emergency factors" which would make litigation in the trial courts and the normal appeal process inadequate. It also involves legal and constitutional questions of statewide importance. Further, the government is a party, the public is interested, and the rights of the public are involved.

35. The "urgency or emergency factors" at issue are evident. The Montana Legislature demanded all of McLaughlin's emails and documents within just one day. Over 2,000 documents were produced the next day, without McLaughlin or any other court official being afforded the opportunity to review the production and protect the privacy rights and privileges implicated. The remainder of the documents were being gathered over the weekend for production on Monday. Although the Court's Temporary Order in the *Brown* Proceeding halted further production for the time being, the Montana Legislature is already in possession of certain documents, which are in danger of being disseminated or disclosed, and the Court's Order is specifically designated as temporary.

Furthermore, the Lieutenant General of the Montana Department of Justice has written that "[t]he legislature does not recognize this Court's order as binding and will not abide it." (Ex. C.) In other words, the Attorney General's Office is expressly refusing to comply with the Court's Order. Under these circumstances, there is simply no time for "litigation in the trial courts and the normal appeal process." Mont. R. App. 14(4).

36. Furthermore, the statewide importance of the legal and constitutional issues raised in this case could not be clearer. The case involves nothing less than the constitutional order of our system of government and an attack on separation of powers, not to mention fundamental constitutional rights to privacy.

37. Additionally, while legislative subpoenas are recognized by statute, Mont. Code Ann. § 5-5-101, Montana law also provides protections from irrelevant, improper, and privileged matters. Mont. Code Ann. § 26-2-401; *see also* Mont. R. Civ. P. 45(d)(3)(B).

38. Here, the Subpoena commands production of documents that by the breadth requested contain highly confidential, privileged, and sensitive information; the time frame for compliance with the Subpoena was extremely short, affording McLaughlin essentially no time to assert objections, claim privilege, and intervene to stop the Subpoena; over 2,000 documents have already been produced, creating new time-sensitivities and concerns; and the party issuing

the subpoena (the Chairman of the Judiciary Standing Committee of the Montana Senate) is part of a Legislature set to adjourn on May 1, 2021.

39. Ultimate judicial review of a legislative subpoena rests with the highest court in the jurisdiction, be it the U.S. Supreme Court or the State Supreme Court. *See, e.g., Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031-32 (2020). Here, ultimate judicial review of the Subpoena in question rests with this Court and "urgency or emergency factors exist" to justify an original proceeding. Mont. R. App. P. 14(4).

DECLARATORY AND INJUNCTIVE RELIEF

40. Pursuant to Mont. R. App. 14(2), original proceedings commenced in the supreme court originally to obtain writs of injunction or other remedial writs and orders "shall be commenced and conducted in the manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these rules."

41. Montana law provides a court as authority to "preserve the status quo" by issuing immediate injunctive relief ex parte. *See generally* Mont. Code Ann. § 3-2-205; *Boyer v. Karagacin*, 178 Mont. 26, 32, 582 P.2d 1173, 1177 (1978) ("It is well settled that the purpose of a temporary restraining order is to preserve the status quo until a hearing can be held to determine whether an injunction pendente lite should be granted.").

42. Montana law provides a preliminary injunction order may be granted, inter alia, in the following cases: when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; or when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant. Mont. Code Ann. § 27-19-201.

43. Montana law provides "a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant where: (1) pecuniary compensation would not afford adequate relief; (2) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (3) the restraint is necessary to prevent a multiplicity of judicial proceedings; or (4) the obligation arises from a trust." Mont. Code Ann. § 27-19-102.

44. Montana law provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code Ann. § 27-8-201; see also Mont. Code Ann. §§ 27-8-202, 205.

45. The Montana Code Annotated explicitly provides "[i]t is the right of a witness to be protected from irrelevant, improper" questions and "to be examined

only as to matters legal and pertinent to the issue." Mont. Code Ann. § 26-2-401 (emphasis added.) *See also* Mont. R. Civ. P. 45(d)(3)(A) and (B).

46. If a subpoena seeks "confidential" information, courts generally may "quash or modify" a subpoena "protect a person subject to or affected by a subpoena." Mont. R. Civ. P. 45(d)(3)(B).

47. A court "must" modify or quash a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Mont. R. Civ. P. 45(d)(3)(A) (emphasis added).

A. The Subpoena Seeks Irrelevant, Improper Information Unrelated to Matters Legal and Pertinent to the Issue.

48. Given the Court's April 7 Order in the *Brown* Proceeding, any additional information that might exist regarding the MJA poll is irrelevant and thus improper under Mont. Code Ann. § 26-2-401. The Court has already confirmed that the six justices who will preside over the *Brown* Proceeding did not participate in the poll.

49. Yet, the Legislature made no attempt to limit the Subpoena's scope to even the MJA poll, perhaps recognizing that doing so would be regarded as an end-around the Court. Instead, the Subpoena demands the production of "all emails and attachments," existing or deleted, "sent and received by Court Administrator Beth McLaughlin" during a three-month time period. The only exception, to the extent it

can be meaningfully understood and implemented, is narrow, and applies to "decisions made by the justices in disposition of final opinion."

50. In this way, the Subpoena violates the threshold requirement of seeking information that is legal and pertinent to the issue and not irrelevant or improper. Mont. Code Ann. § 26-2-401.

B. The Subpoena Violates Separation of Powers.

51. The Legislature's power to issue subpoenas is finite. As recently discussed by the United States Supreme Court in *Trump*, subpoena power is "justified solely as an adjunct to the legislative process," and is therefore subject to several limitations. 140 S. Ct. at 2031-32.

52. Foremost among these limitations is that "the subpoena must serve a valid legislative purpose." *Id*., *quoting Quinn* v. *United States*, 349 U. S. 155, 161, 75 S. Ct. 668, 99 L. Ed. 964 (1955). It must "concern a subject on which legislation could be had." *Id*. *See also State ex rel. Joint Comm. on Gov't & Fin. v. Bonar*, 230 S.E.2d 629, 629 (W. Va. 1976) (legislature must show: "(1) that a proper legislative purpose exists; (2) that the subpoenaed documents are relevant and material to the accomplishment of such purpose").

53. Based on the cornerstone constitutional principle of separation of powers into three coordinate branches, s*ee Morrison v. Olson*, 487 U.S. 654, 693-94 (1988), the legislative subpoena power is most limited when directed toward the

judicial or executive branches. *Sullivan v. McDonald*, 2006 Conn. Super. LEXIS 2073, at *20 (Super. Ct. June 30, 2006) ("a subpoena power from one governmental branch to another is very limited…").

54. In *Sullivan*, the Court considered an analogous legislative subpoena that demanded testimony from a judicial officer. The Court deemed the subpoena a dangerous legislative foray into the independent judiciary:

> For the foregoing reasons, the court grants the plaintiff's motion to quash the subpoena and issues a temporary injunction preventing the defendants from compelling the attendance of Justice Sullivan at this hearing in the future. The failure to rule in this manner would allow unbridled power in any legislative committee to compel the attendance of sitting judicial officers. Such a ruling would cast a chilling effect upon the independence of the judiciary.

Id., * 20.

55. In *Trump*, the U.S. Supreme Court evaluated the "special concerns regarding the separation of powers" which arise from one branch of government's subpoena of information on another, noting that "[f]or more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal." 140 S. Ct. at 2035-36. The Court held a "balanced approach" and "careful analysis that takes adequate account of the separation of powers principles at stake" is necessary, taking into account several factors. *Id*.

56. First, "courts should carefully assess whether the asserted legislative purpose warrants the significant step" of subpoenaing the documents of a co-equal branch of government, as "'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Id*. (emphasis added) (internal citations and quotation marks omitted). In this regard, the Court differentiated criminal proceedings, "where the very integrity of the judicial system would be undermined without full disclosure of all the facts," to legislative efforts that "involve predictive policy judgments that are not hampered in quite the same way when every scrap of potentially relevant evidence is not available." *Id*. (internal citations and quotation marks omitted). In this way, legislative interests in obtaining information through appropriate inquiries "are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs." *Id*.

57. Second, "to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Id*. This "serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id*. (internal citations and quotation marks omitted).

58. Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative

purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better." *Id*. "[I]t is impossible to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation." *Id*. (internal citations and quotation marks omitted).

59. Fourth, courts should be careful to assess the burdens imposed. "[B]urdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Id*.

60. The Court made clear that these considerations are not an exhaustive list: "Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list." *Id*.

61. Here, the Legislature attempts to use its limited subpoena power to obtain judicial communications—not for a legislative purpose or a "subject upon which legislation could be had," *Trump*, 140 S. Ct. at 2031-32, but for a litigation purpose. Indeed, the Legislature's Subpoena attempts to command production of judicial records from the executive branch.

62. The purpose originally offered by the Legislature for the MJA poll information was that it might shed light on how certain justices presiding over this case viewed SB 140. But the Court has already issued an Order stating none of the six justices who will continue presiding over this case participated in the poll. There is, consequently, no arguable "legitimate legislative purpose" for continuing to seek the MJA poll information. *See id*. The Subpoena should be quashed on this basis alone.

63. Even if there was a legitimate legislative purpose to seek the MJA poll information, or some other legitimate purpose unstated in the Subpoena, there is no conceivable justification for demanding all of McLaughlin's emails and attachments on any and all topics or for seeking them from the executive branch, particularly without affording her or another Court official with the opportunity to review the document and assert privilege or protections for the confidential materials.

64. In other words, the asserted legislative objective does not warrant the significant step of subpoenaing documents of a co-equal branch of government (through a back-channel); the Subpoena is far broader than reasonably necessary to support any reasonable legislative objective; there is a lack of evidence, much less "detailed and substantial evidence," to support any reasonable legislative objective; and the burdens imposed on the incredibly broad subpoena, including the myriad

privacy rights and confidentiality concerns implicated, demonstrate the Subpoena is not a legitimate use of legislative power. *See Trump*, 140 S. Ct. at 2031-32.

C. Judicial Deliberations and Communications Are Not the Publicly Available Information of a "Public Body."

65. If the Legislature's argument is that the judicial emails are open to the public under the rubric of the right to know, that argument is incorrect.

66. The constitutional history and this Court's prior precedent shows that while the judiciary is a branch of the government, and thus a "governmental body," it is not a "public body" subject to the open deliberation requirements set forth in article II, section 9. *See* Order, *In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999 (Leaphart, J., specially concurring) (arguing that framers did not intend to include the judiciary within the term "public body" and that confidentiality of judicial deliberations was essential to operation of independent judiciary); *see also Goldstein v. Commission on Practice of the Supreme Court*, 2000 MT 8, ¶ 48, 97, n. 3, 297 Mont. 493, 995 P.2d 923. *See also, e.g.,* Mont. Code Ann. § 2-3-203(5).

D. Judicial Deliberations and Communications Are Protected by the Judicial Privilege.

67. The privilege that safeguards judicial communications is well-established across the country. "[T]he need to protect judicial deliberations has been implicit in our view of the nature of the judicial enterprise since the

founding." *In re Enf't of a Subpoena*, 972 N.E.2d 1022, 1032 (Mass. 2012). Indeed, one court observed the only reason there is not more authority on the subject is "undoubtedly because its existence and validity has been so universally recognized." *Kosiorek v. Smigelski*, 54 A.3d 564, 578 n.19 (Conn. App. Ct. 2012) (internal quotations and citations omitted). *See also United States v. Daoud*, 755 F.3d 479, 483 (7th Cir. 2014) ("And of course judicial deliberations, though critical to the outcome of a case, are secret.").

68. As a federal district court recently explained in granting a motion to quash a similar subpoena, the bedrock principles underlying this judicial privilege are compelling:

> The privilege generally serves three underlying purposes: (1) ensuring the finality of legal judgments; (2) protecting the integrity and quality of decision-making "that benefits from the free and honest development of a judge's own thinking ... in resolving cases before them"; and (3) protecting independence and impartiality and permitting judges to decide cases without fear or favor.

Taylor v. Grisham, 2020 U.S. Dist. LEXIS 207243, at *6 (D.N.M. Nov. 4, 2020) (citing *Cain v. City of New Orleans*, U.S. Dist. LEXIS 169819, (E.D. La. Dec. 8, 2016)).

69. The D.C. Circuit similarly explained:

> . . . [P]rivilege against public disclosure or disclosure to other co-equal branches of Government arises from the common sense common law principle that not all public business scan be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely

> and frankly, without the fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

See also Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. 1971).

70. For all of these reasons, "other courts, State and Federal . . . when faced with attempts by third parties to extract from judges their deliberative thought processes, have uniformly recognized a judicial deliberative privilege." *In re Enf't of a Subpoena*, 972 N.E.2d at 1032 (listing numerous authorities recognizing judicial deliberative immunity).

71. Consistent with these principles, courts in other jurisdictions have repeatedly rejected attempts to invade the judicial decision-making process through subpoenas or other means. *See, e.g.*, *In re Certain Complaints Under Investigation by an Investigating Comm.*, 783 F.2d 1488, 1517-1520 (11th Cir. 1986) (confidentiality protects judge's independent reasoning from improper outside influences); *United States v. Nixon*, 418 U.S. 683, 705, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."); *Commonwealth v. Vartan*, 733 A.2d 1258, 1264 (Pa. 1999) (protection of judicial communications benefits the public, not the individual judges and staff); *Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. 2005) ("Our analysis leads us to conclude that there exists a judicial

deliberation privilege protecting confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties and relating to official court business.").

72. Although there is little direct Montana authority on the deliberative privilege, there is no authority suggesting Montana would be an outlier and take a different approach than other jurisdictions. To the contrary, Montana law already provides very similar protections. *See, e.g.,* Mont. Code Ann. § 2-6-1002 ("Confidential information" includes information related to judicial deliberations in adversarial proceedings); Mont. Code Ann. § 2-3-203(5) ("The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding."); Order, *In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999 (Leaphart, J., specially concurring) (explaining that confidentiality of judicial deliberations is essential to the operation of independent judiciary).

73. The judicial privilege and its underlying policies weigh heavily in favor of quashing/enjoining the Subpoena in this case, particularly where the Subpoena attempts to extract information by going to the computers of the executive branch, without even asking the judicial branch or affording an opportunity for review.

74. The Subpoena will reach a variety of communications that relate to the judicial deliberative process. (Ex. B, ¶ 7 ("[d]iscussions with judges about case processing and ongoing litigation in pending or potential cases"; "[c]opied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges"; "[c]opied on exchanges between judges in which information was exchanged about judicial work product").) Some of those documents have already been produced. To force the extensive disclosure of such communications rings a bell that cannot be un-rung.

75. Separate and apart from the disclosures specific to this case, the Subpoena would send an unmistakable message to Montana's judiciary: "Your communications are not protected." This has precisely the chilling effect on judges and their staffs that the judicial privilege is designed to prevent.

76. The Subpoena's exception for communications "related to decisions made by the justices in disposition of final opinion" does nothing to mitigate the violation of judicial privilege. The exception is incredibly narrow and applies only to justices' decisions in "disposition of final opinion." Whether this exception protects communications in the all-important deliberative process that precedes a "disposition of final opinion" is anyone's guess.

E. The Subpoena Violates Multiple Other Rights and Privileges.

77. Apart from the judicial privilege, the biggest issue is that the Subpoena reaches all of McLaughlin's emails no matter who or what is in the email. This is an egregious disregard of a host of other privileges and rights are implicated by the Subpoena. First and foremost is the fundamental right to privacy of third parties, protected under Article II, Section 10's mandate that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 10; *see also Missoulian v. Board of Regents*, 207 Mont. 513, 522, 675 P.2d 962, 967 (1984).

78. Similarly, the Subpoena encompasses confidential personnel information (Ex. B, ¶ 7 ("[d]iscussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline")), despite well-settled law that public employees have a specific right to privacy in non-disclosure of employment personnel records, including those regarding internal disciplinary matters and other personally sensitive information. *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 17, 397 Mont. 134, 447 P.3d 1048; *see also State ex rel. Great Falls Tribune Co. v. Eight Judicial Dist. Court*, 238 Mont. 310, 319, 777 P.2d 345, 350 (1989) (individual's right of privacy with respect to

employment evaluations is "paramount" when compared with the public's right to know).

79. The Subpoena also requires production of medical information the State is precluded from disclosing under state and federal law. (Ex. B, ¶ 7 ("[i]nformation pertaining to medical information both for employees and elected officials"; "[r]equests from members of the public for disability accommodations including documentation of the disability").)

80. Not only does Article II, § 10 protect private health care information and medical records, the Montana statute specifically provides that "health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interest in privacy and health care or other interests[.]" Mont. Code Ann. § 50-16-502. As this Court has explained, "If the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records." *State v. Nelson*, 238 Mont. 231, 242, 941 P.2d 441, 448 (1997). This is consistent with federal health care privacy laws precluding the disclosure of health care information except under limited and carefully specified circumstances. *See* Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 164.102, *et seq*. The demanded information is confidential, and its disclosure will likely subject the State to

liability. Medical information is completely irrelevant to this proceeding, or indeed any legitimate legislative purpose.

81. The Subpoena also encompasses information matters before the Judicial Standards Commission. (Ex. B, ¶ 7 ("[i]nformation related to complaints pending before the Judicial Standards Commission pertaining to medical information both for employees and elected officials").) Rule 7, Rules of the Judicial Standards Commission provides, "All paper filed herewith and all proceedings before the Commission shall be confidential[.]" *See also* Mont. Code Ann. § 3-1-1105; *Harris v. Smartt*, 2002 MT 239, ¶ 40, 311 Mont. 507, 57 P.3d 58.

82. The requested information also encompasses "information about potential on-going security risks to individual judges including communications with law enforcement." (Ex. B, ¶ 7.) Security information "necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state" constitutes "confidential information" prohibited from disclosure. Mont. Code Ann. § 2-6-1002.

F. The Elements for Declaratory and Injunctive Relief Are Met.

83. Under the facts set forth in the preceding paragraphs, the requirements for immediate temporary injunctive relief are met as the relief is necessary to preserve the status quo and prevent further irreparable harm.

84. Under the facts set forth in the preceding paragraphs, McLaughlin is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; and it appears that the commission or continuance of the act during the litigation would produce a great or irreparable injury to McLaughlin. For either or both of these reasons, a preliminary injunction should issue. Mont. Code Ann. § 27-19-201.

85. Under the facts set forth in the preceding paragraphs, the need for final injunctive relief is met—namely, pecuniary compensation would not afford adequate relief, it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief, and the restraint is necessary to prevent a multiplicity of judicial proceedings. For any one or all of these reasons, a final injunction should issue. Mont. Code Ann. § 27-19-102.

86. Under the facts set forth in the preceding paragraphs, McLaughlin is entitled to a declaration of the parties' rights, status, and legal relations relating to the Subpoena. Mont. Code Ann. § 27-8-201.

87. Under the facts set forth in the preceding paragraphs, the Subpoena seeks irrelevant, improper information not directed to matters legal and pertinent to the issue, seeks confidential information and "requires disclosure of privileged or other protected matter, with no applicable exception or waiver. For these reasons,

McLaughlin is entitled to an order permanently quashing the Subpoena. Mont. Code Ann. §§ 3-2-2-5, 26-2-401 and Mont. R. Civ. P. 45(d)(3)(A) and (B).

WHEREFORE, McLaughlin prays this Court:

1. Issue an immediate order temporarily quashing the Subpoena and enjoining enforcement of the Subpoena;
2. Declare the Subpoena illegal and invalid;
3. Permanently quash the Subpoena;
4. Permanently enjoin further compliance with the Subpoena, by the Montana Department of Administration or anyone else, and prohibit the production, re-production, or disclosure of any documents or information sought under the Subpoena;
5. Permanently enjoin the Montana Legislature from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the Subpoena;
6. Direct the Montana Legislature to immediately return any documents produced pursuant to the Subpoena, or any copies or reproductions thereof, to Beth McLaughlin; and
7. Grant further relief as the Court deems just and proper.

A proposed order granting the emergency request for injunctive relief is attached.

Dated this 12th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 6,600 words. I understand that petitions are limited to 4,000 words, excluding certificate of service and certificate of compliance; however, this petition includes a specific request to exceed the word limitation.

Dated this 12th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

CERTIFICATE OF SERVICE

I, Randy J. Cox, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 04-12-2021:

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Electronically Signed By: Randy J. Cox
Dated: 04-12-2021