No. _____

In the Supreme Court of the United States

THE MONTANA STATE LEGISLATURE, ET AL.,
Petitioners,

v.

BETH MCLAUGHLIN,
Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When emails surfaced showing numerous Montana judges engaged in unethical and prejudicial behavior, the Montana State Legislature began investigating and ultimately issued subpoenas to the Court Administrator and the Justices of the Montana Supreme Court. The Court Administrator sued in the Montana Supreme Court to quash the subpoenas. After a flurry of procedural irregularities, the Montana Supreme Court quashed the legislative subpoenas—including those issued to themselves. The Legislature moved to disqualify the Justices on due process grounds. The court denied that motion, and then issued a wide-ranging opinion clearing itself of any wrongdoing and eviscerating the Legislature's investigative powers.

The question presented is:

Whether the refusal by the Justices of the Montana Supreme Court to recuse from a case in which they harbored direct, substantial, and admittedly disqualifying interests 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.

PARTIES TO THE PROCEEDING

Petitioners are the Montana State Legislature; Representative Wylie Galt, Speaker of the Montana House of Representatives; Senator Mark Blasdel, President of the Montana Senate; Senator Keith Regier, Chairman of the Senate Judiciary Standing Committee.

Respondent is Beth McLaughlin, Montana's Court Administrator. She is appointed by the Montana Supreme Court and holds her position at the court's pleasure. *See* MCA §3-1-701.

The Montana Department of Administration—an executive branch agency organized under the Governor—was a nominal respondent below, but the Department is not participating in this petition.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the Montana Supreme Court:

McLaughlin v. Montana State Legislature (*McLaughlin I*), OP 21-0173, 489 P.3d 482 (Mont. 2021).

McLaughlin v. Montana State Legislature (*McLaughlin II*), OP 21-0173, 493 P.3d 980 (Mont. 2021).

Brown, et al. v. Gianforte, OP 21-0125, 488 P.3d 548 (Mont. 2021).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 493 P.3d 980. *See* App.42–103. The Montana Supreme Court's order assuming jurisdiction is not reported but is available at 2021 WL 1526432. *See* App.1–9. The Montana Supreme Court's order denying the State's motion to disqualify the justices is reported at 489 P.3d 482. *See* App.12–30.

JURISDICTION

The Montana Supreme Court denied rehearing on September 7, 2021. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in the relevant part:

> No State shall … deprive any person of life, liberty, or property, without due process of law ….

U.S. Const. amend. XIV, § 1.

PETITION FOR A WRIT OF CERTIORARI

For some years now, Montana's state judges have shared lengthy email chains on government email servers where they opine on the legality, prudence, or agreeability of proposed legislation—much of which is sure to be challenged in their courts. Learning of this, the Montana State Legislature launched an investigation and ultimately subpoenaed the emails of Beth McLaughlin, the Court Administrator, who facilitated those email discussions. More records were disclosed that revealed more inappropriate conduct.

So McLaughlin responded by filing an emergency motion to quash the subpoena in a Montana Supreme Court case to which neither she nor the Legislature were parties. Despite the jurisdictional obstacles, the Court granted her motion.

Days later, McLaughlin filed a new original action against the Legislature, challenging the limits of the Legislature's subpoena power. The Legislature issued more subpoenas—a renewed version to McLaughlin and seven more to each individual Supreme Court Justice. And in that new case, the Justices quashed *all* the subpoenas—including the ones issued to them.

Those actions justified the Legislature's concerns from the beginning: its view that settling this dispute in the courts is improper because the state judiciary is itself a disputant. The Supreme Court should have accepted the repeated invitations to resolve their differences via negotiation and accommodation. But the Justices refused to negotiate on the ground that it would be inappropriate to discuss matters relating to a case pending before them—a case involving *their* appointee who was shielding *their* improper communications over which *they* were accepting jurisdiction.

So the Legislature moved to disqualify each Justice, noting that both institutional and personal conflicts would prevent the Justices from rendering fair and equal justice. The Court refused. The Legislature asked again to no avail. Instead, the Court issued an opinion eviscerating the Legislature's investigative powers.

Judicial self-dealing on this scale might be unprecedented in the Nation's history. It violates the

core due process tenet that "no man can be judge in his own case." *Walker v. Birmingham*, 388 U.S. 307, 320 (1967). "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). Fundamentally, due process protections recognize the frailties of human nature. Judges—like everyone else—aren't angels. *See generally* THE FEDERALIST No. 51, p. 331 (R. Scigliano ed. 2000) (Madison). Due process guards against the perilous proclivities of human power that would deprive parties of the substantial justice Americans expect from their judges. For our system to endure, parties must be guaranteed a fair shake in court.

The Montana Supreme Court nevertheless believes itself unbound by these strictures. Below, the Montana Legislature was dragooned into court under dubious circumstances. Once it arrived, though, it had the fundamental right to due process—to adjudication by judges free from disqualifying interests. Instead, the Montana Supreme Court trounced nearly every principle of due process this Court has ever enunciated. But due process rules ensure that no party is left to the gentle mercies of a judge he's fighting against—particularly when the dispute arises from the judge's alleged misconduct.

This Court should grant the petition and reaffirm that due process forbids even the Justices of the Montana Supreme Court to be the judges in their own case.

STATEMENT OF THE CASE

1. The underlying dispute here arises from a statutory change to the way Montana's Governor fills mid-term judicial vacancies. For decades, Montana's Judicial Nomination Commission vetted candidates and recommended names to the Governor when mid-term judicial vacancies arose. This year, however, the Montana State Legislature introduced Senate Bill 140, which abolished the Commission and allowed the Governor—with public input—to make direct judicial appointments. Among those who unsuccessfully lobbied against the bill was Montana's Chief Justice, Mike McGrath. On March 16, 2021, the Governor signed SB 140 into law. One day later, challengers filed suit directly in the Montana Supreme Court to declare it unconstitutional. App.265–87; *Brown v. Gianforte*, OP 21-0125 (Mont. 2021).

Due to his public lobbying, the Chief Justice recused and selected District Court Judge Kurt Krueger to hear the case in his stead. App.108, 561 Per court rules, Associate Justice James Rice was appointed Acting Chief Justice for the *Brown* case. In a rare move, the court accepted original jurisdiction, and the parties began preparing their briefs.

But *Brown* was interrupted when—on March 30, 2021—emails publicly surfaced that revealed a troubling pattern of judicial misbehavior. Here's the story.

On January 29, 2021—when the Legislature was still considering SB 140—Court Administrator Beth McLaughlin emailed *every* Montana Supreme Court Justice and *every* Montana district court judge—that is, *every* Montana state judge (since Montana has no

intermediate court of appeals)—using government email accounts, asking that they "review and take a position on" SB 140. She apologized for doing this "again." App.293. The email included a click-poll, to which many state judges responded. The Court never disclosed which judges or justices voted in the poll. App.111–114. Even so, some judges' individual views became public when they chimed in on the long chain of "reply-alls." App.288–341. Every single judge who sounded off in writing opposed SB 140. Many simply declared their opposition. Others offered more fulsome explanations. Still others went further, explicitly stating their view that SB 140 was unconstitutional. App.326–27.

Those communications all violate Rule 2.11 of the Montana Code of Judicial Conduct, which prohibits judges from making public or nonpublic statements that would prejudice an impending case. And because Administrator McLaughlin emailed *every* judge in Montana, *every* judge in Montana received the entire, prejudicial correspondence from their colleagues.

Judge Krueger, the Chief Justice's replacement in *Brown*, specifically offered his views: "I am also adamantly oppose [sic] this bill." App.332.

Learning this, the State quickly moved in *Brown*—on due process and ethics grounds—to disqualify Judge Krueger and any other judicial officers who took a position on SB 140 before it was enacted. App.342–55. Judge Krueger recused within hours; the Montana Supreme Court followed soon after with an order denying that any Supreme Court Justice had participated in the poll or inappropriate corre-

spondence. App.111–14.[1] It disclosed that 37 judicial officers had participated in the click-poll but declined to identify the participants.

2. In response, the Legislature opened an investigation to learn the extent of the judiciary's prejudicial behavior—and whether statutory changes could put an end to it. So on April 2, 2021, the Legislature requested that Administrator McLaughlin produce all public records in her possession related to the SB 140 poll she facilitated. App.535. McLaughlin agreed to produce the public records by April 9, 2021. App.535. She responded a day early, on April 8, but with only two emails. She explained: "Judicial Branch policy does not require retention of these ministerial-type e-mails." App.638. Later on April 8, the Legislature asked McLaughlin to provide the judicial branch record retention policy and asked McLaughlin if she deleted records. App.642. McLaughlin sent an immediate response, admitting that she collected the poll results "as an administrative courtesy to the judges" and—apologizing for "sloppiness"—that she didn't retain the emails. App.641. Sensing the unsatisfactory nature of her response, McLaughlin offered, "the Judicial Branch

[1] During an April 19 hearing of the Montana Legislature's Select Committee on Judicial Accountability and Transparency, Chief Justice McGrath admitted that he directed the appointment of Judge Krueger, even though Acting Chief Justice Rice signed the appointment order: "I contacted Judge Krueger to sit in my place. I didn't ask him if he'd participated in any poll. I forgot there was a poll. Didn't even consider that. I just asked him if he would be available to sit in that case, and he said he would. That was the extent of our discussion." App.561. But both McGrath and Rice received Krueger's "adamantly oppose" email, so both should have known better.

should consider policy changes to provide specifics around retention of e-mail and other administrative documents." App.641.[2]

Learning that the judiciary failed to retain these inappropriate emails (and perhaps others), Senate Judiciary Chairman Keith Regier on April 8, 2021, issued legislative subpoenas to the Director of the Department of Administration ("DOA") for McLaughlin's emails during the 2021 Legislative session. App.356–57. The hope was that DOA's email archives would still house copies of emails McLaughlin had not preserved. App.535. Chairman Regier's subpoena was issued under M.C.A. § 5-5-101, *et seq*., which, contemplates the Legislature's power to compel testimony and the production of documents. App.357. The Chairman's subpoena importantly "exclude[d] any emails and attachments related to decisions made by the justices in disposition of final opinion." App.357. On Friday, April 9, 2021, DOA partially complied with the subpoena, providing a 2,450-page installment of documents that showed more inappropriate emails related to SB 140 and other proposed legislation. App.463, 536.[3]

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[2] These emails are clearly "public records" by law, *see* MCA, § 2-6-1002(13), and should have been retained for at least three years under applicable policy. App.566–67.

[3] The Montana Judges Association ("MJA"), a Montana nonprofit organization, appears throughout the e-mails. App.544–66. Its membership includes all of Montana's judicial officers. App.545. According to its incorporation papers, the MJA exists to provide education services to the Montana Judiciary. App.628. But the emails show that it also engaged in extensive lobbying and facilitated the illicit communications that caught the Legislature's attention. App.544–66. The Legislature took

These newer emails validated and deepened the Legislature's well-founded concerns. On March 12, 2021, for example, McLaughlin sent Chief Justice McGrath, Justice Jim Shea, and Judge Kreuger an email entitled, "thought you might enjoy this." App.562. In it, she linked to an article that levied ad hominem attacks against legislators who supported a judicial reform bill. App.562. On March 24, 2021, Chief Justice McGrath emailed McLaughlin, Judge Menahan, and Judge Spaulding opining that "[o]f course the problem here [with a proposed judicial reform bill] is it allows a citizen's commission to discipline or remove judges. Not clear who appoints them but God forbid they put any judges on it or more than one atty. Then there is the problem that it would be entirely inconsistent with other provisions of the constitution…." App.565–66. Not content to leave it at that, Chief Justice McGrath followed-up with, "[j]ust noticed the new name will be 'The Judicial Inquiry Commission'. Think this straight out of the book 'Where Democracies Go To Die.'" App.566. On March 30, 2021, lobbyist Bruce Spencer emailed Chief Justice McGrath, Judge Menahan, and McLaughlin, stating another bill—HB 380—was "[o]ne more for the great unconstitutional void." App.563. After another bill failed to pass, Chief Justice McGrath, using his personal email, ebulliently proclaimed: "This could not have ended any better. Great effort. Thanks again for your hard work these last few months. What a challenge this session has

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special interest in the amount of private lobbying McLaughlin and others were conducting on behalf of the MJA using public time and resources. App.544–66.

been. I think it is fair to say we have been able to protect nothing less than the independence of the judicial branch and uphold the basic principles of our state democracy. No small accomplishment in these difficult times. Congratulations." App.548–49.

Then things truly went sideways.

3. On Sunday, April 11, 2021, McLaughlin filed an emergency motion to quash the subpoena directly with her bosses, the Montana Supreme Court. But she filed this motion in *Brown v. Gianforte*, a case in which neither she nor the Legislature nor DOA were parties. App.358–78. Both McLaughlin and the court failed to provide notice or an opportunity to respond to the Legislature or the *actual* parties in *Brown*. App.385. Yet hours later on Sunday, the court temporarily quashed the subpoena that had been issued to DOA to recover McLaughlin's lost public records. App.115–19.

The Court recognized the procedural improprieties but nevertheless entertained its appointee's motion. "McLaughlin's motion raises serious procedural questions. Neither the Legislature nor the Department of Administration are parties in this litigation." App.116. "[T]he subpoena itself does not reference this litigation, or SB 140. Nor does it reference any other litigation …. we cannot be certain, at this juncture, that the subpoena challenged by McLaughlin has anything to do with the pending proceeding in [*Brown*], or is properly filed herein." App.117. The Legislature agreed with that assessment entirely. But unfortunately, the order kept going.

"Nonetheless, the actions commanded by the legislative subpoena are, facially, extremely broad in scope, with a substantial potential of the infliction of great harm if permitted to be executed as stated." App.117. "Consequently, to address these various issues, and to prevent the infliction of harm in the meantime …. The subpoena issued by the Legislature on April 8, 2021, is hereby quashed pending further order of the Court." App.118.

On Monday, April 12, 2021, the Montana Legislature retained the Attorney General as counsel. That same day, Lieutenant General Kristin Hansen penned a letter to the court, relaying the Legislature's position on its unnoticed weekend order. The letter focused on the order's procedural irregularities and the Legislature's view that the court lacked jurisdiction to quash—even temporarily—a nonparty's duly authorized subpoena issued to a different nonparty. App.379–81.

In response, Administrator McLaughlin took the hint and filed her own lawsuit to quash the Legislature's subpoena. That lawsuit was an original petition with her bosses at the Montana Supreme Court. *See McLaughlin v. Montana State Legislature*, OP 21-0173 (Mont.); App.455–489. While recused in *Brown*, Chief Justice McGrath didn't recuse from *McLaughlin*.

Two days later, the Legislature moved to dismiss the *McLaughlin* case. App.192–202. Beyond jurisdictional arguments, the Legislature argued dismissal was required by the separation of powers, due process, and judicial ethics rules. The Legislature

reiterated that the subpoena sought to recover the inappropriate, unethical, and potentially unlawful judicial communications McLaughlin failed to retain—not any case-related and decisional documents. App.193–95. Not only was McLaughlin the court's appointee, her case was intended to protect *them*. App.197–98. So from the start, the court's maintenance of the action was entirely inappropriate. App.198–200. The motion further noted that the court had failed to comply with ethics rules requiring it to disclose its *ex parte* communications with McLaughlin.[4] App.198.

4. The same day—April 14—the Legislature formed the Special Joint Select Committee on Judicial Accountability and Transparency to investigate judicial document retention, judicial lobbying, and other potential judicial impropriety. App.536. The next day, legislative leadership issued an additional subpoena to McLaughlin and subpoenas to each Supreme Court Justice.[5] App.577–600. The subpoenas ordered appearance before the Special Select Committee on April 19, 2021, and the production of specific public records: (1) communications regarding judicial branch polls during the 2021 legislative session; (2) communications regarding judicial branch lobbying during the 2021 legislative session; and (3) communications indicating use of state time and resources on behalf of the Montana Judges Associa-

[4] To date, the court has failed to disclose its *ex parte* communications with McLaughlin and never gave the Legislature the opportunity to respond to those communications.

[5] The Legislature first issued the second round of subpoenas on April 14, 2021, but reissued them on April 15, 2021, to correct a typographical error.

tion, a private, non-profit organization. App.580–81. McLaughlin's new subpoena also ordered her to produce her computer, with the aim of preserving or recovering public records she failed to retain. App.577–78. But the subpoenas were careful to note that the Legislature wasn't interested in case-related deliberations, drafts, and other decisional materials; nor was it seeking personal and confidential documents. App.582.

5. After a second emergency motion from their appointee, McLaughlin, the Supreme Court on April 16, 2021, issued a combined order in both the *Brown* and *McLaughlin* cases. App.1–9. The court requashed the April 8 legislative subpoena. It proceeded to temporarily enjoin McLaughlin's second subpoena, and then—astonishingly—it stayed its own subpoenas. App.7–8. So the day after receiving their subpoenas, six Montana Supreme Court justices ruled—*in their own favor, on their own subpoenas, in a case to which they were not party*—to put those subpoenas on ice. App.1–9.

Alone, Justice Rice recused from *McLaughlin* and requested that the Montana Supreme Court not stay his subpoena so that he could seek relief in a district court. App.8, 10–11.[6]

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[6] Chief Justice McGrath acted less scrupulously. Though still recused in *Brown*, he signed the April 16 order entered in both *Brown* and *McLaughlin*. App.9. (Stating "[t]he Chief Justice has signed this order only for purposes of participating in 21-0173" (*McLaughlin*)); *but see* App.6. (According to the Court, the legislative subpoenas "are directly or indirectly related, and certainly have directly arisen from" *Brown*).

Also on April 16, Chief Justice McGrath sent a letter to the Legislature stating that the emails requested by the Legislature were categorically privileged and that the Court would not produce them. App.631 ("the subpoenas issued this week broadly seek confidential judicial communications that we cannot divulge."). Before even preliminary briefing concluded in that case, the Chief Justice broadcasted that the court had already decided to rule against the Legislature on the merits—in its case against the court. So much for the "further proceedings" the court mentioned the same day in its order. App.7.

6. On April 19, 2021, the Select Committee conducted its hearing. App.538. McLaughlin failed to appear or produce any materials. App.542. All the Supreme Court Justices appeared. App.542–43. But only Justice Sandefur produced *some* of the requested public records. App.601–20.

During the hearing, Justice Baker testified that "the Chief Justice works with [McLaughlin] day in and day out" and that "on legislative matters, the Chief is the direct contact for the Court Administrator." App.547. The recovered emails corroborate Justice Baker's testimony. App.547–49. On March 24th, Chief Justice McGrath emailed McLaughlin regarding a pending bill, HB 685, requesting "[w]e should probably get a membership vote on this and ask who can make calls." App.548. McLaughlin responded that day saying, "I can send it out to the membership for a vote, but people need to not do the 'reply to all.'" App.548.

7. On April 30, 2021, the Legislature filed a Motion to Disqualify the Justices in *McLaughlin*.

App.222–29. The Motion argued again that due process, and judicial ethics rules couldn't tolerate the institutional and personal conflicts this case triggered for each of the Justices: "Administrator McLaughlin—who was appointed by *this Court*, who performs duties assigned by this Court, and who serves at the pleasure of *this Court*—filed this Petition to prevent production of *this Court's* public records." App.224–25. And even absent their disqualifying connection to McLaughlin, the Legislature argued the Justices were now personally conflicted because they stayed their own subpoenas. App.226–27.

The Legislature echoed these points in other *McLaughlin* filings: "the instant dispute demands negotiation because … the Court cannot serve as an impartial tribunal when it is itself party to the case." App.218.

On May 12, 2021, the Montana Supreme Court denied the Legislature's Motion to Disqualify the Justices. *McLaughlin v. Mont. State Legislature*, 489 P.3d 482 (Mont. 2021) (hereafter "*McLaughlin I*"); App.12–30. The Opinion entirely dismissed the Legislature's legitimate investigatory concerns, and instead chalked the disqualification controversy up to legislative bad faith. App.23 ("The Legislature's unilateral attempt to manufacture a conflict by issuing subpoenas to the entire Montana Supreme Court must be seen for what it is."); App.23 ("The Legislature's blanket request to disqualify all members of this Court appears directed to disrupt the normal process of a tribunal whose function is to adjudicate the underlying dispute consistent with the law, the constitution, and due process."); App.28–29 ("Fi-

nally, and perhaps most importantly, we would be remiss in our analysis of the Legislature's disqualification request, if we did not consider the context in which it has been made. The Legislature has unilaterally attempted to create a disqualifying conflict for every duly constituted and elected member of this Court.").

The Court didn't disagree that it bore disqualifying interests. "Because of the expansive and overarching nature of the Legislature's investigation into the Judicial Branch of government, *no Montana judge is free of a disqualifying interest*." App.27 (emphasis added). But instead of recusing, the Justices leaned into those acknowledged disqualifying interests—invoking the Rule of Necessity and refusing to withdraw. App.26–29.

8. On June 10, 2021, the court, 6-1, affirmed the constitutionality of SB 140 in *Brown*. 488 P.3d 548, 561; App.135–191. This is notable for two reasons: first, it shows how off-base so many Montana district judges were on the question of SB 140's legality. But second, Justice Rice authored a fiery concurrence that indicated the Justices were now taking this personally. His *Brown* concurrence focuses on the subject matter in *McLaughlin*, where he had recused. But at any rate, he used the occasion to "address the extraordinary, indeed extraconstitutional, actions taken by the Legislature and the Department of Justice." App.163 (Rice, J. concurring). He mused that perhaps the Legislature should in future be barred from participating in any lawsuits before the court. But he reserved special reprobation for the attorneys at the Montana Department of Justice, who—for rep-

resenting their client—he labeled "contemptuous." Justice Rice even compared the Attorney General and his conduct to Andrew Jackson and the Trail of Tears. App.168–73

9. Back in *McLaughlin*, the court refused to discuss the investigation or the subpoenaed documents with the Legislature, allegedly because of the pending suit. So on June 22, 2021, the Legislature withdrew its subpoenas issued to DOA, McLaughlin, and the Supreme Court Justices. App.518–27. And then the Montana Legislature moved to dismiss *McLaughlin* as moot. App.513–17. In that motion, the Legislature repeated its position, "the only appropriate path to resolution in this dispute between co-equal branches of government is for the branches to negotiate and make accommodations in good faith." App.514–15. "That path has been foreclosed because the Court has used this action—initiated by its appointed employee—to spurn any such negotiations." App.515. The Legislature withdrew the subpoenas in "good faith" to spur negotiation. App.515. It will not surprise the reader that the court denied that motion, too. It blamed the Legislature for its "unilateral attempt to manufacture a conflict" by subpoenaing the Justices, a move the court felt "directed to disrupt the normal process of a tribunal." App.31–39. Now trapped in a case it never wanted to enter, the Legislature waited for the inevitable decision.

On July 14, 2021, the Montana Supreme Court issued its opinion quashing the withdrawn subpoenas. *McLaughlin v. Mont. State Legislature*, 493 P.3d 980, 997 (Mont. 2021) ("*McLaughlin II*"); App.42–103. The court found that the Legislature's investigation

into judicial branch lobbying, record retention, and judicial standards lacked *any* legitimate legislative purpose. *See* App.58–74. It also preemptively ruled that, in future, judicial pre-clearance is required before any public officials produce records responsive to a legislative subpoena. App.80.

And by its plain terms, the opinion prohibited any further discussions regarding the emails or their contents between legislators, between legislators and legislative staff, between legislators and their counsel, and among counsel's staff. App.81. It also ordered the Legislature to take measures to retrieve any of the judicial emails that had been disseminated to third parties—like the media. App.81–82. So, a gag order and an order to gag.

The concurring opinions in *McLaughlin* picked up where Justice Rice left off in *Brown*. Justice McKinnon called the Legislature's actions a "blemish upon Montana's history[.]" App.99 (McKinnon, J. concurring). Justice Sandefur characterized the Legislature as engaging in "irresponsible rhetoric that has and will likely continue to spew forth from those intoxicated with their long-sought unitary control over the political branches of government." App.100 (Sandefur, J. concurring). He persisted by saying this case was "an unscrupulously calculated and coordinated partisan campaign." App.100. He closed by calling the Legislature's investigation an "irresponsibl[e] attack and attempt to undermine the only non-partisan branch in an effort to attain unitary, unfettered—in effect, authoritarian—power, unconstrained by constitutional limits." App.102.

The Legislature petitioned for rehearing based upon the court's misapplication of relevant law, new persuasive authority, and on prudential grounds. App.243–64. And it again raised its due process objections: "Issuing an expansive, disarming Opinion against this backdrop confirms the Legislature's consistent argument: it cannot obtain due process from this Court under these circumstances." App.251.

On September 7, 2021, the court denied rehearing. App.104–07. Throughout this tangle, neither the Legislature nor its counsel ever disobeyed any order of the Montana Supreme Court. The Montana Supreme Court, meanwhile, has flagrantly disobeyed the due process teachings of this Court.

REASONS FOR GRANTING THE PETITION

I. The Montana Supreme Court's decision to judge its own case conflicts with this Court's due process precedents.

The decisions below made a mockery of this Court's well-settled proscription that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). In fact, the Montana Supreme Court did both. It reached out to facilitate a case brought by its appointee to conceal its misbehavior. It even *sua sponte* ruled to quash the legislative subpoenas issued to the court's members. Manifold conflicts arose at every step of litigation, and the court ignored them all. Due process protections exist to prevent the very judicial behavior displayed below.

This petition challenges the Montana Supreme Court's unconstitutionally biased actions in a Montana state case. But its ramifications extend nationwide. In recent years, this Court has reminded state judiciaries that they, too, are bound by the strictures of the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–81 (2009); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1907–10 (2016). That's largely because due process failures by state courts—and particularly state courts of last resort—undermine "the public legitimacy of judicial pronouncements and thus … the rule of law itself." *Williams*, 136 S. Ct. at 1909. If state high courts can—by fiat—commandeer state disputes, breeze past disqualifying conflicts, and rule in their own favor, then there is no guarantee to a fair state tribunal.

The Fourteenth Amendment says otherwise. This Court should grant the petition and reaffirm its basic guarantees of due process.

A. The Fourteenth Amendment's Due Process Clause guarantees the Montana Legislature's right to a fair and impartial state tribunal.

The Montana Legislature was party to the lawsuit below. Its rights, powers, and actions were adjudicated. It therefore possesses the same due process protections as any other litigant. This must be, for no court could exercise jurisdiction over a government party to resolve a substantive legal question

while depriving that same party of the process due any disputant. The Legislature, moreover, may appeal to the Fourteenth Amendment because it is not the State of Montana. S*ee South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) (States are not persons under the Fifth Amendment's Due Process Clause); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (same). And the Legislature is unaware of any authority that excludes it from the fair tribunal guarantees of the Fourteenth Amendment.

Constitutionally ensured due process was born in 1215. And it was achieved by a proto-legislative English baronage pursuing lasting protections from the capricious abuses of the King *and his courts*. Magna Carta, ch. 39 (1215); *Chambers v. Florida*, 309 U.S. 227, 235-237 (1940). The Due Process Clause "was intended to guarantee procedural standards adequate and appropriate" to ensure fair tribunals "free of prejudice, passion, excitement, and tyrannical power." *Id.* at 237; *see also id.* at n.10 (noting Magna Carta's influence on the eventual abolition of the Court of Star Chamber). This Court's decisions make clear that these ancient protections extend to *all* parties in litigation. *See Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997). From the beginning, due process was closely connected to the separation of powers. The barons—and later, Parliament—understood due process to protect *their* right to fair, unbiased tribunals. The same must be true for American legislatures, today.

B. The Court violated due process by assuming jurisdiction and ruling in a case over which its members had direct institutional and personal interests.

Due process principles are first principles. "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time." FEDERALIST No. 10, p. 56 (R. Scigliano ed. 2000) (Madison). A "fair trial in a fair tribunal," *In re Murchison*, 349 U.S. at 136, "requires an absence of actual bias in the trial of cases." *Id.* The Due Process Clause originally incorporated the common law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest in a case." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009).

"The Due Process Clause of the Fourteenth Amendment establishes a constitutional floor." *Bracy*, 520 U.S. at 904. And while most judicial disqualification claims are resolved "by common law, statute, or the professional standards of the bench and bar," the "floor established by the Due Process Clause clearly requires a … a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Id.* at 904–05 (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). The Constitution requires recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47.

This Court applies objective standards to determine whether the average person in the judge's position is likely to be neutral or whether there exists an unconstitutional potential for bias. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009). "Every procedure which … might lead him not to hold the balance nice, clear and true between the State and the accused, denies the [accused] due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Applying these objective standards, it's hard to imagine a clearer exhibition of bias than the one displayed by the Montana Supreme Court below. Most obviously, in the April 16, 2021 order, the court stayed the legislative subpoenas issued to the non-party Justices themselves. App.8. The very Justices signing the order directly benefited from it. They granted themselves relief. In one stroke, the court both revealed "a direct, personal, substantial … interest in [the] case," *Caperton*, 556 U.S. at 876, and acted to advance it. That's "actual bias," plain and simple. *See Gramley*, 520 U.S. at 904. The Justices' refusal to disqualify unequivocally violated due process.[7]

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[7] In the court's opinion refusing to self-disqualify, it faulted the Legislature for failing to allege "a member of this Court has an actual bias, prejudice, or is otherwise unable to adjudicate these proceedings fairly and impartially" in violation of this Court's precedents. *McLaughlin I*, App.23. It continued: "There are no cases in which any of the justices sitting on this case are *parties*; nor has there been established, with respect to any justice, any *interest* in the outcome of this litigation." App.21. In addition to being untrue, these statements—a panegyric to insincer-

Quashing Administrator McLaughlin's subpoenas reveals the same actual bias at work. After all, the various subpoenas were all targeting the same documents—illicit *judicial* communications. In fact, the entire legislative inquiry began after learning of troubling and inappropriate judicial emails that McLaughlin merely facilitated. And to the extent the Legislature specifically investigated McLaughlin's individual conduct, that too implicates the Montana Supreme Court. *See e.g.* App.223–26 (Montana Legislature's Motion to Disqualify Justices in the Supreme Court in the State of Montana). By law, the Justices define McLaughlin's duties and direct her work. MCA, § 3-1-702(10); *see also* App.547 (Justice Baker's testimony that "the Chief Justice works with [McLaughlin] day in and day out" and that "on legislative matters, the Chief is the direct contact for the Court Administrator."). Any ruling by the Montana Supreme Court, therefore, involves judgment over the Court's own actions. Adjudicating the dispute arising from an investigation into McLaughlin's conduct necessarily requires the Justices to pass judgment on their own (non-judicial) conduct and (non-judicial) decisions. And that of course preys upon the weakness of human nature in a way this Court has warned against: "there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result …. [T]hat his or her own earlier, critical decision may have set in motion." *Williams*, 136 S. Ct. at 1907.

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ity—came *after* the nonparty Justices stayed their own subpoenas.

But the due process violations don't stop with the orders slapping down legislative subpoenas directed to themselves and McLaughlin. Look how the *McLaughlin* case started—with an unnoticed, weekend motion and court order, facilitated by still-undisclosed *ex parte* communications, in a case to which neither McLaughlin nor the Legislature were parties. *See* App.358–78; App.115–19; App.379–81. Atop that, the court accepted original jurisdiction—which may only be invoked to resolve purely legal questions—and presumed to settle sharply contested factual disputes. *McLaughlin II*, App.64–65, 74–75 (absolving themselves and McLaughlin of any wrongdoing; for example, concluding that McLaughlin's actions were not prohibited lobbying and that the subpoenaed public records contained confidential information); *see Hernandez v. Bd. of County Comm'rs*, 189 P.3d 638, 641 (Mont. 2008) (the Montana Supreme Court will accept original jurisdiction when, among other things, "the case involves purely legal questions of statutory and constitutional construction"). And then, the court refused to relinquish the case after the Legislature withdrew the subpoenas. App.31–39. Perhaps that's why Justice Rice—to his credit—recused when *McLaughlin* was filed, and challenged his subpoena in a different court. App.8.[8]

From the first, the six *McLaughlin* Justices determined to pilot this dispute to their desired outcome. The Chief Justice's communications showed that the fix was in. In its April 16 order, the court stated some of the subpoenaed documents "may very

[8] In that case, the Montana Legislature did not seek to disqualify any judge on the grounds of impermissible bias.

well be reachable by legislative subpoena." App.6. But in a letter *that same day*, the Chief Justice informed the Montana Legislature that "the subpoenas issued this week broadly seek confidential judicial communications that we cannot divulge." App.631.

And the six *McLaughlin* Justices acknowledged that they faced disqualifying interests. *McLaughlin I*, App.27. Undeterred however, they invoked the Rule of Necessity: "no Montana judge is free of a disqualifying interest and, thus, this Court is required to invoke the Rule of Necessity; where all judges are disqualified, none are disqualified." App.27. (internal quotation marks and citation omitted). That the Montana Supreme Court accepted the premise of the Rule of Necessity—that "all judges are disqualified"—says it all. App.27.

The Justices below harbored direct interests in the outcome of *McLaughlin*. Under any objective standard, the court's actions presented not only an unconstitutional potential, but a guarantee, of bias. *See Caperton*, 556 U.S. at 881.

C. The *McLaughlin* Justices violated due process by refusing to withdraw where their interests created the appearance of bias and a probability of unfairness.

Yet due process will not tolerate "even the probability of unfairness." *In re Murchison*, 349 U.S. at 136; *cf. Mistretta v. United States*, 488 U.S. 361, 407, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *Williams*, 136 S. Ct. at 1909 ("A multimember court must not have its guarantee of neutrality un-

dermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.").

"[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias." *Caperton*, 556 U.S. at 883 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971); *Tumey*, 273 U.S. at 532). This Court's test is "whether 'under a realistic appraisal of psychological tendencies and human weakness,' the [judge's] interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883–84 (quoting *Withrow*, 421 U.S. at 47). So if there exists a "probability of unfairness," due process mandates a "stringent rule" that requires the recusal of judges "who have no actual bias and who would do their very best to weigh the scales of justice equally." *In re Murchison*, 349 U.S. at 136.

This probability of unfairness "cannot be defined with precision," because "[c]ircumstances and relationships must be considered." *Id.* But non-pecuniary conflicts "that tempt adjudicators to disregard neutrality" offend due process. *Caperton*, 556 U.S. at 878. A judge must withdraw where she participates in the accusatory process, *see In re Murchison*, 349 U.S. at 137, "becomes embroiled in a running, bitter controversy" with one of the litigants, *Mayberry*, 400 U.S. at 465, or becomes "so enmeshed in matters involving [a litigant] as to make it appropriate for another judge to sit." *Johnson v. Mississippi*, 403 U.S. 212, 215–16 (1971).

For the reasons set forth above, Petitioners respectfully submit that after a review of "all the circumstances of this case, due process requires recusal." *Caperton*, 556 U.S. at 872. But additionally, the nature and heated rhetoric of this interbranch dispute created an intolerable "risk of actual bias and prejudgment." *Caperton*, 556 U.S. at 883–84; *see* App.381 ("The Legislature will not entertain the Court's interference" into the Legislature's investigation); App.226 ("The Justices are [] umpiring their own game"); App.230–40; *McLaughlin I,* App.22; *McLaughlin II*, App.99 (McKinnon, J., concurring); App.100–02 (Sandefur, J., concurring); *Brown*, App.163,173 (Rice, J., concurring). This is a "running, bitter controversy" if there ever was one. *Mayberry*, 400 U.S. at 465. The six *McLaughlin* Justices should have done what Justice Rice did: withdraw.

In sum, the Montana Supreme Court acted with actual bias and prejudice; *a fortiori*, the court's behavior and surrounding circumstances created a "probability of unfairness" so strong, recusal was mandatory. *In re Murchison*, 349 U.S. at 136. But the six *McLaughlin* Justices refused to withdraw. They charged ahead, ensuring a result that bailed themselves out of an investigation prompted by their own inappropriate behavior. App.630 (Chief Justice McGrath admitting he "inappropriately indicated a personal preference to oppose" pending legislation). And that violated the rights of the Montana Legislature guaranteed by the Due Process Clause and this Court's precedents. This Court should grant the petition and reaffirm that—even in Montana—"no man can be judge in his own case." *Walker*, 388 U.S. at 320.

II. Montana's Supreme Court Justices improperly invoked the Rule of Necessity to justify retaining jurisdiction in a case where they had disqualifying conflicts.

The Montana Supreme Court admitted to its disqualifying conflicts but invoked the Rule of Necessity to avoid recusal. App.27. But as a matter of law, the Rule doesn't apply to a situation like this; and as a matter of fact, there was no necessity.

The court's invocation of the Rule of Necessity conflicts with this Court's decision in *United States v. Will*, 449 U.S. 200 (1980). There, this Court invoked the Rule to hear a case involving whether the Compensation Clause, Art. III, § 1, prohibited Congress from modifying the annual cost-of-living increases for federal judges. *Id.* at 217. This Court applied the Rule—and all the parties agreed it applied—because the case necessarily implicated the financial interests of every federal judge and Supreme Court Justice. *Id.* at 212. Without overcoming that inherent disqualification, no federal court could have heard the case, and the litigants "would be denied their right to a forum." *Id.* at 217. *Will* differs markedly from this case.

First, the case below didn't involve the interpretation of a provision affecting judicial compensation, it involved potential judicial branch misconduct. If the conflict truly implicated the entire judiciary—and judicial review was the only feasible path to resolution—the Montana Supreme Court could have selected impartial retired judges to hear and decide the case. *See* MCA § 19-5-103(1)(a)–(b); MONT. CONST. art VII, § 3(2). The Montana Supreme Court has also

routinely appointed mediators and special masters. *See* Mont. R. App. P. 7 ("Mandatory appellate alternative dispute resolution").

Second, the parties below did not agree that the Rule of Necessity applied. And this is especially important because the case arose from a high-stakes and acrimonious interbranch dispute. App.203–21. The court's insistence on skipping negotiation and immediately coopting that dispute into the judicial process—over the Legislature's objections—presents separation-of-powers problems not extant in *Will*. App.236–39. Unlike *Will*, a nonjudicial forum was (and remains) available to resolve this dispute between Montana's Legislature and Judiciary—negotiation and accommodation—but the Montana Supreme Court flatly refused to pursue it. *Will*, 449 U.S. at 217 (invoking the Rule where there was no other forum). App.55.

Third, the Court in *Will* interpreted the Compensation Clause—which was intended to protect "the public interest in a competent and independent judiciary." *Will*, 449 U.S. at 217. Here by contrast, refusing to relinquish the case primarily served the unique interests of the Justices. It permitted *them* to resolve the legal question of legislative subpoena power, and by emasculating that power, to conceal judicial branch misbehavior from the light of day. The Justices proved it over and over again: when they initially acted on their appointees' motion in the wrong case, when they quashed their own subpoenas, when they refused to recuse, and when they issued an ultimate decision "aggrandizing [the judicial branch's] power at the expense of [the legislative]

branch." *Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012) (internal quotation marks and citation omitted); App.8; App.27–29; App.42–82.

The Montana Supreme Court's application of the Rule of Necessity adulterates the Rule as *Will* described and applied it.

The Rule also could not apply below because the Montana Legislature is not a vexatious litigant who seeks to manipulate the normal processes of judicial review. Again, the Legislature was dragged reluctantly into the case below as a respondent. So the cases principally relied upon by the Montana Supreme Court to invoke the Rule don't apply. *See Ignacio v. Judges of the United States Court of Appeals for the Ninth Circuit*, 453 F.3d 1160 (2006); *Haase v. Countrywide Home Loans, Inc.,* 838 F.3d 665, 666–79 (5th Cir. 2016); *Bolin v. Story*, 225 F.3d 1234, 1238 (11th Cir. 2000); *Switzer v. Berry,* 198 F.3d 1255, 1257 (10th Cir. 2000); *Tapia-Ortiz v. Winter et al.*, 185 F.3d 8, 10 (2d Cir. 1999). In *Ignacio*, for instance, the plaintiff transparently named every Ninth Circuit Judge in an attempt to obtain judicial review outside that circuit. *Ignacio*, 453 F.3d at 1165. The Ninth Circuit felt the Rule necessary to prevent Ignacio from "destroy[ing] the only tribunal with power" and exercising "a veto right over sitting judges." *Id.* It was both erroneous and disingenuous for the court to compare the Legislature to litigants employing these dodgy tactics. *McLaughlin I*, App.26–28.

It bears repeating: the Montana Supreme Court's own actions—not the Legislature's—created and deepened the Justices' disqualifying interests.

The Montana Supreme Court improperly invoked the Rule of Necessity to sidestep their obligation to recuse. What's left then? Only the court's premise that all the Justices possessed disqualifying interests. And absent the Rule of Necessity, the Justices' only choice under this Court's precedents was to withdraw. Failing to do so violated due process.

CONCLUSION

What was axiomatic for James Madison must today be reaffirmed in Montana. The Court should grant the petition and reassert the basic promise of due process—that no one can be the judge in his own case.

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