IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0555

JAYSON O'NEILL,

Plaintiff and Appellee,

vs.

GREG GIANFORTE, in his official capacity as GOVERNOR OF MONTANA,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana First Judicial District, Lewis and Clark County,
Cause No. CDV-2021-951, Honorable Judge Kathy Seeley

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I. O'Neill's primary argument that the "clear text" of Article II, § 9 is controlling ignores the plain language of Montana's Constitution, the Delegates' framework for recognizing exceptions, and this Court's precedent.

O'Neill's primary legal argument is that this Court should bluntly apply the "clear text" of Article II, § 9 and reject any executive privilege for advice and deliberations about whether to sign or veto legislation because the Constitution references "deliberations." Resp. Br., 24–27. That argument ignores the plain text, the Delegates' framework for recognizing exceptions, and this Court's precedent applying that framework.

First, O'Neill's textual argument does not seriously analyze the Constitution's text. The Constitution requires that citizens be permitted to "observe the deliberations of all public bodies." Mont. Const. Art. II, § 9. Citizens "observe" public meetings, not documents. The previous clause applies to the "right to *examine* documents." *Id.* (emphasis added).

Second, when drafting Article II, § 9 the Delegates clearly "intend[ed]" that the "right to know *not* be absolute." *Nelson v. City of Billings*, 2018 MT 36, ¶ 18, 390 Mont. 290, 412 P.3d 1058 (quoting Montana Const. Convention, Committee Proposals, February 22, 1972, p.632) (emphasis in original). Under O'Neill's rubric, no governmental privilege—whether judicial, attorney-client, investigative material, or executive—could survive. But that is plainly not what the Framers

intended, or what this Court has held. *See* Gov. Opening Br., 17-20. The Delegates instructed this Court to define the exceptions "over time in the context of particular factual situations." *Nelson*, ¶¶ 18-19. The Delegates established a framework for this Court's evaluation to ask whether the privilege has deep roots in the American legal tradition, including the common law, and is "necessary for the integrity of government." *Nelson*, ¶¶ 20, 23. O'Neill barely acknowledges this framework, nor does he meaningfully address the many court decisions applying a similar framework to recognize executive privilege.

There can be no doubt that uniformly applying O'Neill's absolutist position would obliterate privilege of even this Court's deliberations. *See McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 30 n.6, 405 Mont. 1, 493 P.3d 980 (recognizing "judicial privilege"). O'Neill has no answer. He merely tries to sidestep the implication by noting that *McLaughlin* involved a legislative subpoena, not a right to know request. Resp. Br. 32. That is true, but irrelevant. No one can seriously contend that this Court's deliberations are privileged only if the Legislature is asking for them. If the Court's internal conferences, draft opinions, memos, emails, or other deliberations were public, it would affect decisionmaking. And those deliberations remain privileged after a case is decided even though, like here, the Court's ultimate decision is public.

As Justice Burger noted, executive privilege rests on the same rationale as the privilege for judicial deliberations. Confidentiality of executive deliberations, "like the claim of confidentiality of judicial deliberations," is important because of "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions." *U.S. v. Nixon*, 418 U.S. 683, 708 (1974). And accepting O'Neill's absolutist argument—already rejected by this Court in other contexts—would eviscerate both. There is no logical way to square O'Neill's assertion that the "clear text" of Article II, § 9 broadly guarantees access to all deliberations of public bodies with this Court's recognition of "judicial privilege." Nor did the Framers intend the provision's "clear text" to abolish all governmental privileges. *Nelson*, ¶¶ 14, 20. O'Neill does not—and cannot—dispute that the Framers expected "that, like other fundamental rights protected in the federal and state constitutions, the parameters of the right to know would be interpreted over time in the context of particular factual situations," *Nelson*, ¶ 19, and exceptions would be acknowledged "when 'necessary for the integrity of government.'" *Id.* ¶ 20 (quoting Montana Const. Convention, Verbatim Transcript, March 7, 1972, p. 1678). There is simply no fair way to disentangle the judicial deliberations privilege and the executive privilege.

O'Neill's selective interpretation of the right to know also runs headlong into Article III, § 1's separation of powers principles—the textual foundation for executive privilege—and the need to balance those principles against the right to know. *Nelson*, ¶ 19; *Nixon*, 418 U.S. at 708 (executive privilege "inextricably rooted in the separation of powers under the Constitution"). Montana's Constitution contains the same provision that other courts have relied upon to recognize executive privilege. Moreover, the Framers intended to create a stronger Executive, *Bullock v. Fox*, 2019 MT 50, ¶¶ 33–34, 395 Mont. 35, 435 P.3d 1187, yet O'Neill asks this Court to shield *all* judicial deliberations from the public while stripping the Governor of *any* ability to receive confidential advice from executive agency staff about proposed legislation. O'Neill's insistence that this Court recognize a broad privilege for itself while rejecting a narrower privilege for the Governor is more political commentary than legal argument.

O'Neill's invocation of the British Crown, Resp. Br. 34, ignores executive privilege's undisputed, longstanding place in the *American* legal tradition dating to this country's founding. *See* Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 Minn. Law Rev. 1069, 1070 (1999) (noting that executive privilege is "now a well-established constitutional power—one with a longstanding history in American government, going back to the George

Washington administration" and that "*every President since Washington* has exercised some form of what we today call executive privilege.") (emphasis added). The best historical evidence O'Neill can muster is a half-hearted assertion, toward the end of his brief, that "scholars reject claims that executive privilege is based on historical fact." Resp. Br., 30. He is wrong. The first commentator O'Neill referenced identifies the "preeminent authority on executive privilege" as concluding, based on historical evidence, that "[e]xecutive privilege is an accepted doctrine when appropriately applied to two circumstances: (1) certain national security needs and (2) protecting the privacy of [executive] deliberations when it is in the public interest to do so." Jonathan David Shaub, *The Executive's Privilege*, 70 Duke Law J. 1, 5, n. 6 (2020). The other commentator O'Neill cites noted that "[f]rom the earliest days of the Republic, American Presidents have asserted a right to conceal executive communications." Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 Minn. L. Rev. 1143, 1145 (1999). Somehow O'Neill reads these scholars to reject that "executive privilege is based in historical fact." Resp. Br. 30.[1]

[1] The Washington Post article cited by O'Neill is not legal scholarship, but it similarly notes that Presidents Washington, Adams, Jefferson, and Jackson exercised some form of executive privilege.

That history is not undermined simply because the U.S. Supreme Court first explicitly recognized executive privilege in *U.S. v. Nixon*. As the *Nixon* Court acknowledged, the privilege did not pop out of thin air in 1974. The privilege had a pedigree tracing back to the nation's founding, rooted in common law. *Nixon*, 418 U.S. at 708 (recognizing historic basis for right); Gov. Op. Br., 21-22 (citing cases recounting Chief Justice Marshall's recognition of the privilege in the 1800s). Similarly, the attorney-client privilege has a long history, yet this Court did not explicitly recognize it as an exception to Article II, § 9 until 2018. Just because a court does not articulate a privilege until a later date does not mean that the right was not grounded in a historical understanding of the common law and American legal tradition. *Nelson*, ¶ 24 (noting the "attorney-work product privilege, although articulated as such only in the twentieth century, has a long history in this country"); *see also McLaughlin*, ¶ 30 n.6 (recognizing "judicial privilege" in 2021). And there can be no reasonable debate that executive privilege has roots as old as our legal system, as recognized by state and federal courts across the country. *See* Gov. Op. Br., 21-22 (citing *In re Sealed Case*, 121 F.3d 729, 738 tracing common law roots.) O'Neill asks this Court to be the first to depart from that history.[2]

[2] O'Neill is wrong that Massachusetts has rejected any form of executive privilege. *See infra* § II.

O'Neill also stumbles when he downplays the reasons for the privilege as mere "policy arguments." Resp. Br., 25. All long-recognized privileges serve important public purposes, which is why they find enduring acceptance in our constitutional order. *Nixon*, 418 U.S. 683 (describing necessity of privilege to separation of powers); *Freedom Found. v. Gregoire*, 178 Wash. 2d 686, 696-97 (2013) (same). Executive privilege exists to "prevent injury to the quality" of decisions, *In re Sealed Case*, 121 F.3d at 737, and "plays a critical part in preserving the integrity of the executive branch." *Gregoire*, 178 Wash. 2d at 696-97. Similar concerns justify providing Montana courts with the privacy needed to engage in candid judicial deliberations, *McLaughlin*, ¶ 47 n.6, and preserving "full and frank communication between attorneys and their clients" to "promote broader public interests in the observance of law and administration of justice." *Nelson,* ¶ 23; *see also Nelson*, ¶ 24 (describing policy considerations underlying attorney-work product privilege). Like these privileges, executive privilege is "fundamental to the operation of Government" because it "protect[s] the public interest in candid, objective, and even blunt or harsh opinions in" the Governor's "decisionmaking" *Nixon*, 418 U.S. at 708.

Executive privilege is "inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708. It is precisely the kind of privilege the

Delegates sought to preserve when it charged this Court to recognize privileges "necessary for the integrity of government." *Nelson*, ¶ 20. Courts have uniformly and *en masse* recognized that critical purpose, which O'Neill disregards. Gov. Op. Br., 22-23; *see also New England Coal. For Energy Efficiency & Env't v. Off. Of Governor*, 164 Vt. 337, 345 (1995) ("By promoting the effectiveness of the governing process, the privilege protects the welfare of the public, not the government official."); *State ex rel. Dann v. Taft II*, 2006-Ohio-3677, ¶ 31, 110 Ohio St. 3d 252 (executive privilege "protects the public by allowing the state's chief executive the freedom that is required to make decisions" and "advances the public's interest in sound executive decisionmaking."). A privilege with constitutional foundations cannot be reduced to a simple policy disagreement.

Nor does O'Neill ever seriously dispute the value of protecting fully informed decisionmaking exists "for the benefit of the public, not the executive who asserts it." *Killington, Ltd. v. Lash*, 153 Vt. 628, 637, 572 A.2d, 1368 (Vt. 1990). Were executive privilege "an anti-democratic rule created in service" of a monarch, Resp. Br. 35, that would be news to the other states that have unanimously recognized it and acknowledge that it benefits the public by allowing the executive to "receive information, advice, and recommendations unhampered

by the possibility of compelled disclosure." *State ex. rel. Dann v. Taft*, 2006-Ohio-1825, ¶¶ 56-57, 109 Ohio St. 3d 364, 848 N.E.2d 472.

The exceptions to Article II, § 9 that this Court has recognized rest on human experience—that meaningful consultation, deliberation, and decisionmaking require space to receive private, candid advice. A qualified privilege for pre-decisional deliberations and advice about whether the Governor should sign or veto legislation has the same historic pedigree justified by the same concerns. It is rooted in longstanding legal tradition, is necessary for a well-functioning system, is to the public's benefit, and, most importantly, aligns with the Delegates' framework for recognizing exceptions to the right to know. Gov. Op. Br., at 17-20.

II. O'Neill makes no real effort to distinguish the unanimous view of other courts, which recognize the privilege—whether called "executive" or "deliberative process"— is essential for a functioning government and provides an exception to similar right to know laws.

The Governor cited numerous cases recognizing executive privilege in other jurisdictions (whether called executive privilege or deliberative process privilege). *See* Gov. Op. Br., 22, n. 5.[3] O'Neill's only answer is to assume, without analysis,

[3] That list was not exhaustive. The Governor found two additional states to add to the list: **Delaware:** *Guy v. Jud. Nominating Comm'n*, 659 A.2d 777, 783 (Del.

that Montana is different. Resp. Br., 17, 20–21. O'Neill's assumption is wrong. The other jurisdictions that have recognized executive or deliberative process privilege have similar rigorous protections of the right to know and examine public documents.

For example, Alaska—like Montana—recognizes "public access to government information [as] a fundamental right that operates to check and balance actions of elected and appointed officials and to maintain citizen control of government." *Gwich'in Steering Committee v. State, Off. of the Governor*, 10 P.3d 572, 578, n.12 (Alaska 2000) (quoting Ch. 200, § 1, SLA 1990). Yet Alaska also recognizes executive privilege as important "to protect the executive's decisionmaking process, its consultative functions, and the quality of its decisions." *Gwichi'n Steering Committee,* 10 P.3d at 578.

Similarly, in California, "public access to governmental records [is] a fundamental right of citizenship." *Wilson v. Superior Ct.*, 51 Cal. App. 4th 1136, 1141, 59 Cal. Rtr. 2d 537, 540 (1996). Yet the California Supreme Court recognized executive privilege, noting that to deny the privilege and "expect the decisionmaking process to function effectively, is to deny human nature and [is]

Super. Ct. 1995); **New Hampshire:** *ATV Watch v. New Hampshire Dep't of Transp.*, 161 N.H. 746, 749, 20 A.3d 919, 925 (2011).

contrary to common sense and experience." *Times Mirror Co. v. Superior Ct.*, 53 Cal. 3d 1325, 1345–46, 813 P.2d 240, 252–53 (1991); *see also* Cal. Const. art. I, § 3(b) (2004) (constitutional right to know retained executive privilege). That California's constitutional right to know expressly bakes in established exceptions makes no difference. *See* Resp. Br. 27. Montana's Framers drafted Article II, Section 9 in "broad and general terms" but expected that the Court would interpret its exceptions over time. *Nelson*, ¶¶ 17–22. The other states cited by the Governor that recognize executive or deliberative process privilege also rigorously protect the right to know and narrowly construe exceptions, just like Montana.[4]

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[4] *See* **Delaware:** *Guy v. Jud. Nominating Comm'n*, 659 A.2d 777, 783 (Del. Super. Ct. 1995); *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021) (right to public access "aims to ensure that 'society remains free and democratic through easy access to public records'"); **Illinois:** *Chicago Trib. Co. v. Cook Cnty. Assessor's Off.*, 2018 IL App (1st) 170455, ¶ 34, 109 N.E.3d 872, 881 ("the public has a strong right to know"); **Kentucky:** *Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 62 (Ky. 2021) (requiring exceptions to be strictly construed); **Maryland:** *Hamilton v. Verdow*, 414 A.2d 914, 923 (Md. 1980); *Immanuel v. Comtroller of Md.*, 449 Md. 76, 81, 141 A.3d 181, 184 (2016) ("We construe the [Maryland Public Information Act] liberally to effectuate the Act's broad remedial purpose"); **New Hampshire:** *ATV Watch v. New Hampshire Dep't of Transp.*, 161 N.H. 746, 749, 20 A.3d 919, 925 (2011) ("We resolve questions regarding the Right-to-Know law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents"); **New Jersey:** *Kovalcik v. Somerset Cnty. Prosecutor's Office*, 206 N.J. 581, 590, 21 A.3d 1142, 1147 (2011) (New Jersey's Open Public Records Act has a "broad purpose and sweeping language"); **New Mexico:** *Jones v. City of*

O'Neill urges this Court to ignore "law from other forums in interpreting" Article II, § 9. Resp. Br. 17–18 (quoting *Associated Press v. Bd. of Pub. Educ.*, 246 Mont. 386, 389, 804 P.2d 376, 378 (1991)). But in *Nelson*, this Court looked to federal and other-state precedents to determine that "the attorney-client privilege has deep roots in the American legal system." *Nelson*, ¶¶ 23–27, 34. The same analysis should apply here. *See also Wadsworth v. State,* 275 Mont. 287, 299–301, 911 P.2d 1165, 1172–73 (1996) (justifying Court's "interpretation of Montana's constitution," in part, because it "is supported by the decisions of other jurisdictions"). The point is not that these other jurisdictions are interpreting

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Albuquerque Police Dep't, 2020-NMSC-013, ¶ 18, 470 P.3d 252, 258 ("The citizen's right to know is the rule and secrecy is the exception"); **Ohio:** *Taft*, 2006 Ohio 1825, ¶ 20 (Ohio's Public Records Act "is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records"); **Oklahoma:** *Okla. Ass'n of Broads. v. City of Norman*, 2016 OK 119, ¶ 15, 390 P.3d 689, 694 ("Because of the strong public policy allowing public access to governmental records, we must construe the [Open Records Act's] provisions to allow access unless an exception clearly applies…"); **Vermont:** *McVeigh v. Vt. Sch. Bds. Ass'n*, 2021 VT 86, ¶ 21, 266 A.3d 763, 768; **Virginia:** *Berry v. Bd. of Supervisors*, 302 Va. 114, 134, 884 S.E.2d 515, 524 (2023) ("the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government"); **Washington:** *Gregoire*, 178 Wash. 2d 686, 694-95, 310 P.3d 1252, 1257 (2013) (the Washington Public Records Act has a "broad mandate for disclosure" and the Washington Supreme Court "construes its provisions liberally and its exemptions narrowly"); **Federal Government**: *EPA v. Mink*, 410 U.S. 73, 80 (1973) (federal Freedom of Information Act "broadly conceived.").

Montana's Constitution; the point is that they conclusively establish that executive privilege, like attorney-client privilege, has "deep roots in the American legal system." *Nelson*, ¶ 23. The Framers of *our* Constitution intended such privileges to survive the adoption of Article II, § 9. *Nelson*, ¶¶ 22, 23–30 (citing Mont. Const. Transition Schedule § 6.).

O'Neill's complaint that the Governor did not specifically name whether he is seeking an "executive privilege" or "deliberative process privilege" misses that any distinction between the two privileges is irrelevant here, as the District Court correctly concluded. MSJ Order, 8. Courts and commentators regularly use the terms interchangeably. *See Cap. Info. Group v. State, Off. of the Governor*, 923 P.2d 29, 33-34, n.3 (Alaska 1996) (citing lengthy list of authorities using terms interchangeably, and noting that deliberative process privilege is a "form of executive privilege"); *see also In re Sealed Case*, 121 F.3d 729, 736, n. 2 (D.C. Cir. 1997) (noting that executive privilege and deliberative process privilege used interchangeably and "'executive privilege' is generally used to refer to a wide variety of evidentiary and substantive privileges that courts accord the executive branch"). It is true that the "deliberative process privilege" can be construed more broadly and may apply to more general agency decisions, not just advice to the executive. That broader privilege is not at issue here and is not what the Governor

is seeking. This case deals solely with whether the executive has a limited privilege to keep confidential deliberations and agency advice to the Governor about whether to sign or veto legislation. The question is not what label applies to that privilege. O'Neill makes no argument why the distinction would make any difference.

But the distinction does undercut the *only* case O'Neill cites to try to undermine the unanimous state and federal authority recognizing a limited privilege for executive deliberations, *Babets v. Sec'y of Exec. Office of Human Servs.*, 526 N.E. 2d 1261, 1263 (Mass 1988). Unlike here, *Babets* did not consider whether executive privilege protected the Massachusetts Governor from disclosing documents memorializing constitutionally required deliberations. Rather, *Babets* involved a state agency attempting to avoid production of documents related to its promulgation of administrative regulations by invoking a broad "governmental privilege" in response to a lawsuit that argued the regulations were unconstitutional. *Babets*, 403 Mass. at 231-32. The global "governmental privilege" *Babets* rejected is not the privilege the Governor is asserting, and he in fact specifically disclaimed it before the District Court. *See* Gov.'s MSJ Reply Br., p. 10 (Doc. 12).

A later Massachusetts opinion, however, is on point, and further affirms the unanimity of courts on whether executive deliberations are privileged. In *Lambert v.*

Exec. Dir. Of Jud. Nominating Council, 425 Mass. 406, 407-08, 410, 681 N.E.2d 285, 288 (Mass. 1997), the Massachusetts high court held that the Governor's questionnaire for judicial candidates was protected from public production, because to conclude otherwise "would interfere impermissibly with the Governor's constitutional power" in violation of the separation of powers. *Id.* at 407-08.[5] In asking this Court to reject any form of executive privilege, O'Neill asks this Court to stand alone.

III. The privilege is qualified and limited, as the Governor has maintained throughout this case.

O'Neill asserts that the Governor has "shifted legal theories" and asserted "for the first time on appeal" that the Governor recognized the privilege is limited. That is false. In both his opening summary judgment brief and his summary judgment reply, the Governor was clear that the privilege is limited, qualified, and subject to judicial review. Gov. MSJ Br., pp.8, 13 (Doc. 8) (describing privilege as "not absolute" and "presumptive," subject to judicial review and still available "by a showing that the requester has a need for the documents that outweighs the

[5] In *Republican Party of N.M. v. N.M. Taxation and Rev. Dep't*, the New Mexico Supreme Court cited *Babets* in support of the claim that "Massachusetts … does not recognize *any* form of executive privilege," but overlooked *Lambert.* 283 P.3d 853, 865 (N.M. 2012).

interest in confidentiality."); Gov. MSJ Reply, p.14 (Doc. 12); Gov. Opening Br., pp.11-12, 33.

O'Neill distorts the Governor's Office's initial response to his document request to claim that the Governor is asserting the privilege is "categorical." What the Governor's chief legal counsel stated was that the "privilege *surrounding the requested documents* is categorical," meaning that the privilege protected each of the documents O'Neill requested—not every document the Governor possesses. App. 032-33 (analogizing the privilege to judicial deliberations and citing the Washington Supreme Court's executive privilege case, *Gregoire*, ¶¶ 17, 18.). In the same paragraph that O'Neill cites, the Governor recognized that "the burden of proving **the application and scope** of the asserted privilege lies with the government in any court proceeding seeking to compel disclosure." App. 033 (emphasis added) (citing *Nelson*, ¶ 36.). O'Neill cannot seriously contend that the Governor was claiming an absolute, unchecked privilege.[6]

[6] O'Neill complains, for the first time in this case, that the Governor denied the public records request and did not provide a blank Agency Bill Monitoring form in response to the public records request or in the underlying litigation. Resp. Br., 5, 7. But O'Neill never requested a blank form—not in his public records request, nor in discovery. Had O'Neill asked for a blank form, he would have received one. And in any event, the Governor's chief legal counsel described the format and content of the form in detail. App. 020, ¶ 5.

O'Neill repeats the District Court's unfounded claim that recognizing executive privilege "would effectively gut the right to know as it applies to the Executive Branch." MSJ Op. 15. That parade of horribles has not materialized in any of the many jurisdictions recognizing a privilege. As they all recognize, and the Governor has been clear, the privilege is narrow and qualified, but critical to the integrity of executive decisions. The Governor has not asked this Court to pronounce a broad executive privilege or define all its applications. He has asked it to decide this case alone: whether executive privilege protects the Governor's pre-decisional advice and deliberations on whether to sign or veto legislation.

IV. The record supports that previous Montana Governors consistently used agency bill monitoring forms to receive advice when deliberating about whether to sign or veto legislation.

O'Neill spills much ink to claim that the Governor "smuggled" in a paragraph to the proposed Rule 54(b) certification order acknowledging that past Montana Governors have used agency bill monitoring forms to receive advice about whether to sign or veto legislation. Resp. Br. 38–44. He also argues that the Court should not consider the Rule 60(b) declaration of Cort Jensen describing past practices and his understanding that the forms were privileged. And he claims that the Governor somehow delayed in seeking a Rule 60(b) motion and Rule 54(b)

certification. The Governor agrees with O'Neill that none of these claims control the legal issues in this appeal. *See* Resp. Br. 42–43. But they are also wrong.

The Governor did not "smuggle" the following paragraph into the District Court's signed Rule 54(b) order:

> The Court acknowledges Defendant's position that Montana Governors dating back to Judy Martz have used some form of ABM to evaluate pending and proposed legislation. Past Montana Governors have used those forms to receive frank assessments of legislation by agency staff to determine whether to support or oppose legislation, including whether to sign or veto it. As Defendant has established, some Montana Executive Branch staff have assumed the forms would not be subject to public disclosure and, on that basis, have delivered more frank assessments than they otherwise would have.

Rule 54(b) Order, p. 5. The Governor drafted the Rule 54(b) certification proposed order, as is customary with an agreed motion. But counsel for the Governor sent the draft motion *and* the proposed order to counsel for O'Neill before filing. O'Neill's counsel did not object to that paragraph before or after it was filed. The District Court reviewed the order and signed it— without modifying that paragraph—because it accurately reflected the evidence submitted in the case. O'Neill's insinuation that the District Court blindly signed an incorrect order is baseless. The District Court would not have signed the proposed order (and O'Neill would have objected to it) if it was not accurate.

The paragraph O'Neill only now complains about also reflected the unrebutted testimony, not only from Cort Jensen, but also Anita Milanovich's declaration supporting summary judgment. Milanovich stated that the forms are used to advise the Governor in his constitutional deliberations about proposed legislation and whether to exercise his veto power under Article VI, § 10. App 020, ¶ 6. That is the type of information that the Governor may request from agencies under Article VI, § 15. *Id.* ¶ 7. Past governors have consistently used the forms, (App. 021, ¶ 8), so that advice "can be given frankly and in confidence" (App. 021, ¶ 8). Those facts were unrebutted. That is also how the District Court understood the Governor's arguments on summary judgment, acknowledging the Governor's point that recognizing executive privilege for the Agency Bill Monitoring forms would allow "the Governor and agency staff to have frank discussions, allowing them to 'freely exchange facts, (sometimes conflicting) analysis, and criticisms with each other while debating proposed government actions.'" MSJ Order, 14 (quoting Doc. 10, Gov. MSJ Br., at 12).

Even the declaration submitted by O'Neill's attorney, Raph Graybill, supported the important points. Graybill was Governor Bullock's chief legal counsel, and he acknowledged that Bullock used the forms to evaluate legislation, allow agencies to identify problems with bills, and to "facilitate an early policy and

fiscal discussion." App. 046-47, ¶¶ 20, 27. Graybill—who could walk down the hall and privately discuss proposed legislation with the Governor—did not consider the forms privileged. App. 046. ¶24. But for agencies advising the Governor, that is not practical. Gov. Op. Br., 3-5. The forms allow agency staff to provide the Governor with valuable, candid, and unfiltered information on potential pitfalls with legislation otherwise unavailable. App. 20-21. As courts have roundly concluded, those conversations cannot happen without a limited privilege providing space for confidential discussions. And while the issue of confidentiality did not arise to Graybill's memory in his tenure, there is also no evidence that the forms were subject to a public records request where the issue would be raised. But no one disputes that the forms from past governors were destroyed. App. 035, ¶ 4.

Jensen's Declaration gave additional historical context supporting what Milanovich already testified to. The District Court should have granted relief from the judgment under Rule 60(b) based on that additional testimony. It was newly discovered evidence that the Governor's Office did not learn of until Jensen came forward with his testimony after reading the District Court's summary judgment order. App. 034-35; 041. The Rule 60 motion was filed before the Rule 54(b) motion, and the scope of the appeal included that motion. *See* Notice of Appeal.

The Jensen Declaration is part of the record, and the Court may consider it in its "plenary review over matters of constitutional interpretation." *Nelson*, ¶ 8.[7]

But while the Court *may* consider the Jensen Declaration, it does not need to. The undisputed bottom line is that the Agency Bill Monitoring forms have allowed agency staff to provide the Governor with candid advice that staff would not give if always subject to public disclosure. That is precisely why other courts—none of which O'Neill meaningfully addresses—have uniformly recognized a form of executive privilege as a matter of law. Gov. Op. Br., 22-23. And that is why a form of executive privilege has endured since the Nation's earliest days.

CONCLUSION

For these reasons, this Court should reverse the District Court and conclude that the Agency Bill Monitoring Forms advising the Governor about whether to sign or veto legislation are protected from public disclosure by executive privilege.

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[7] O'Neill also insinuates that the Governor delayed in submitting documents to the District Court after the summary judgment order and Rule 60(b) motion. Resp. Br., 9-10. O'Neill leaves out that the parties were negotiating next steps in the case—including issues surrounding the Jensen Declaration and the Rule 54(b) certification motion. Indeed, O'Neill did not file a motion to set a production schedule for in camera review until *after* the Governor filed his Rule 60(b) motion nearly seven months after the court's summary judgment order. *See* Doc. 23, Motion to Set Production Schedule (filed July 5, 2023). There was no expectation that the Governor would submit documents for in camera review until this Court resolved the legal issue of whether executive privilege is recognized in Montana.

Dated: April 25, 2024.

Landmark Law PLLC

By: */s/ Dale Schowengerdt*
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CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 4,977 words including footnotes. Rule 11(4).

/s/Dale Schowengerdt

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-25-2024:

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Representing: Jayson O'Neill
Service Method: eService

Electronically Signed By: Dale Schowengerdt
Dated: 04-25-2024