

1 BEFORE THE COMMISSION ON PRACTICE
2 OF THE SUPREME COURT OF THE STATE OF MONTANA
3
4

5 IN THE MATTER OF AUSTIN KNUDSEN) ODC File No.
6 An Attorney at Law,) 21-094
7 Respondent.) Supreme Court
8) No. PR 23-0496
9

10 TRANSCRIPT OF PROCEEDINGS - DAY TWO
11
12
13

14 BE IT REMEMBERED, that the proceedings
15 in the above-captioned matter were heard before
16 the Commission on Practice of the Supreme Court of
17 Montana in the Courtroom of the Montana Supreme
18 Court, 215 North Sanders, Helena, Montana, on the
19 10th day of October, 2024, beginning at the hour of
20 9:00 a.m., before Laurie Crutcher, Court Reporter,
21 Notary Public.
22
23
24
25

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A P P E A R A N C E S:

THE COMMISSION ON PRACTICE OF THE SUPREME COURT OF
THE STATE OF MONTANA:
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MR. TROY MCGEE
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MS. CAREY MATOVICH, ESQ.
MR. MIKE LAMB, ESQ.

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E X H I B I T S

Exhibit No.	Admitted
Exhibits A, B, C, D, E, F, G, H, I, J, L, M, O, Q, R, T, W, X, Z, AA, BB, DD, EE, FF, GG, and HH	260
Respondent's Exhibit K (refused)	414
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WHEREUPON, the following proceedings were

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1 had and testimony taken, to-wit:
* * * * *

CHAIR OGLE: Are you ready to proceed?
MR. GREEN: Ready, Mr. Chairman.
CHAIR OGLE: You're ready to proceed,
Mr. Strauch?
MR. STRAUCH: Yes, Mr. Chairman.
CHAIR OGLE: Before we get started,
there are a couple of housekeeping items.
No. 1, yesterday we had some problems
with noise in the gallery, people watching the
proceeding. We would like to ask everyone to
please be quiet so everyone can hear, in
particular that we can hear the questions that are
asked and the responses from the witnesses. In
particular, it's going to be a little more
difficult with the remote testimony here this
morning, so we ask that everyone please be quiet.
Secondly, we had some reports that
people were taking photographs yesterday with
their phones. We'd ask people to shut off your
phone and/or if you're going to take photographs
of the proceeding, step to the back of the room,
and do it from the back of the room, so as it's
not disruptive.

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One of the reports we received is some
people were trying to take photographs of the
documents at the Counsel table, and of course,
that's inappropriate. So we'd ask that you shut
off your phone, and/or if you're going to take
photographs, to step to the back of the room.
The first item I'd like to deal with, at
the conclusion of yesterday's proceeding, the
Respondent filed a point brief requesting to
submit post-trial findings and conclusions. Did
you have an opportunity to review that brief, Mr.
Strauch?
MR. STRAUCH: Yes, Mr. Chairman.
CHAIR OGLE: Do you have a response?
MR. STRAUCH: Not a written one. I
didn't have time. But yes, sir. May I?
CHAIR OGLE: Yes, please do.
MR. STRAUCH: Just a few points, and
then I want to address a few of the cases that
they cited.
First, the Rules of Lawyer Disciplinary
Enforcement, in particular Rule 12, states
explicitly that the Adjudicatory Panel shall make
findings of fact, conclusions of law, and
recommendation to the Court.

<p style="text-align: right;">Page 252</p> <p>1 It is clear from that language that the 2 Commission on Practice doesn't sit as the ultimate 3 Court. It's not the ultimate arbiter here. The 4 Supreme Court is, and the Supreme Court is a 5 Court. And further, that rule makes it clear that 6 the Respondent has the opportunity to object to 7 the recommendations of this Commission. 8 The second point is it appears to me 9 that the Respondent relies nearly exclusively, 10 with the exception of the cases that I mentioned 11 and we'll discuss, on Civil Procedure Rule 8. 12 And as Respondent notes, the Rules of 13 Civil Procedure do apply to disciplinary 14 proceedings, except to the extent that they're not 15 consistent, in which case the Rules for Lawyer 16 Disciplinary Enforcement control. And here they 17 are inconsistent because Rule 8 is inconsistent 18 with RLDE 12, No. 1. 19 But Rule 8 more specifically starts with 20 this language, so even if it does apply -- which I 21 would disagree with -- even if does apply, Rule 8 22 starts with "unless ordered otherwise," quote 23 unquote. 24 Well, this Commission did not order the 25 submission of proposed findings. We've been under</p>	<p style="text-align: right;">Page 254</p> <p>1 Supreme Court, and the AG did that a couple days 2 ago here. And the Supreme Court denied it here, 3 and the Supreme Court determined it in Morin. 4 And in Morin, one of the things noted by 5 the Supreme Court was that it didn't understand, 6 and questioned whether the procedure for a writ of 7 supervisory control could even be used in a 8 situation like this, questioning whether this 9 Commission is a Court, and specifically citing the 10 fact that under Rule 12 of the MRLDE, that the 11 Respondent has an opportunity to object to the 12 recommendations. 13 And so I would submit that that case is 14 also instructive, that if push came to shove, the 15 Supreme Court probably would not endorse this 16 unless the Commission ordered otherwise. 17 Frankly if Rule 8 applies, their 18 submission would not be timely, because it 19 requires the submission of findings seven days 20 prior to the hearing, not after. 21 But as I said, in all the experience 22 that I've had as the Disciplinary Counsel, and 23 since then -- I did that in 2003 to 2005, and 24 handled my recollection is roughly 1500 cases in 25 that time frame, and then I've been defending</p>
<p style="text-align: right;">Page 253</p> <p>1 a scheduling order in this case for the better 2 part of a year, I believe -- maybe more, maybe 3 less -- but attached to that is the standing order 4 of this Commission which has the required 5 procedures for leading up to trial, and it does 6 not provide for the submission of proposed 7 findings. 8 The second thing I would note about Rule 9 8 is that it pertains to all matters where the 10 Court, quote unquote, "must enter findings of fact 11 pursuant to Rule 52," and Rule 52 again speaks 12 about District Courts. 13 And as I mentioned, this Commission 14 doesn't sit as the ultimate arbiter. Should there 15 be any question about it, in terms of whether the 16 Supreme Court believes that this Commission sits 17 as the ultimate arbiter, in the Morin case, 18 M-O-R-I-N, and it was an original proceeding 19 OP-20-0007, the decision for the Supreme Court 20 denying a petition for a writ in that case, 21 January 6th, 2020. 22 For background purposes, Ms. Morin was 23 undergoing a disciplinary proceeding, and much 24 like the Attorney General here, filed a petition 25 for a writ of supervisory control to the Montana</p>	<p style="text-align: right;">Page 255</p> <p>1 lawyers ever since -- I've not been involved in a 2 case where there had been a submission of proposed 3 findings. 4 And I would submit the Commission knows 5 its rules better than anyone. My understanding of 6 that always was that the Commission wants to be as 7 expedient as possible. The Commission has, ever 8 since the creation of ODC, made it a point of 9 moving things along. That's consistent with Rule 10 1, which requires the speedy and expedient 11 efficient resolution of all matters, and 12 submission of proposed findings and conclusions of 13 law will only delay the results here. 14 And I think if the Commission wanted to, 15 it could simply say no, it's not going to allow 16 it, and that would be consistent with Rule 8, but 17 I'm not going to tell you your business. 18 Last but not least, they cite a few 19 cases, and frankly I don't know what to make of 20 them, except they cite the Brackman case, 851 P.2d 21 1055, as standing for the proposition that 22 proposed findings were allowed. I have read the 23 case last night briefly, and my reading of the 24 case is that the Court actually held that the 25 Board of Nursing in that case went beyond its</p>

<p style="text-align: right;">Page 256</p> <p>1 authority by allowing the prosecuting attorney to 2 file proposed findings of fact. So I'm not sure 3 what they're getting at with that cite, but if 4 anything, it probably is contrary to their 5 position. 6 They cite the Connell (phonetic) case, 7 and that was a child support hearing, and in that 8 case, the CSED Hearing Officer established a 9 schedule which included the submission of proposed 10 findings. Again, this Commission did not do that. 11 Core-Mark is another case they cite. 12 There the Board of Livestock hired an independent 13 Hearing Examiner to conduct the hearing, and there 14 again, the Hearing Examiner specifically had 15 ordered the submission of proposed findings ahead 16 of time; again, not done here. 17 And last but not least, in Mayer, again, 18 the Board of Psychologists ordered the submission 19 of proposed findings. 20 So in sum, I disagree that proposed 21 findings are neither appropriate or necessary. I 22 think what is necessary is an end to this 23 litigation. Thank you. 24 CHAIR OGLE: Your response. 25 MR. GREEN: Sure. If I may, Mr.</p>	<p style="text-align: right;">Page 258</p> <p>1 hearing, the number of counts involved, I think 2 there's good cause here for us to do it. We don't 3 read the rules as precluding an order from this 4 body to do it. 5 So I think based on all those things, 6 this Panel certainly has the power to do it, I 7 think there's good cause for it, and we think in 8 the interests of justice and in fairness giving us 9 a handful, 30 days, 45 days, to put together some 10 proposed findings and conclusions of law for this 11 Panel to consider, as not the ultimate arbiter to 12 be sure, but preparing its decision for review by 13 the Supreme Court, I think it would be a useful 14 exercise. 15 CHAIR OGLE: Very well. I would just 16 say for the record, in the time period that I've 17 been on the Commission, none of the parties have 18 submitted proposed findings and conclusions either 19 before or after the hearing. 20 Mr. Strauch does make some good points, 21 and you agree, I guess, that this Commission's 22 determinations are simply a recommendation to the 23 Montana Supreme Court, who is the final decision 24 maker in the matter. 25 And in addition to that, the parties are</p>
<p style="text-align: right;">Page 257</p> <p>1 Chairman, just briefly. A couple of quick points. 2 I think, first I think there's actually 3 some agreement between our side and Mr. Strauch. 4 We don't disagree that this Court -- excuse me -- 5 that this Panel is not the ultimate arbiter. We 6 understand the Supreme Court is. So that's I 7 think not disputed. 8 I think maybe where we have an important 9 difference is our view of what's happened here in 10 the state of this evidentiary record. By the time 11 we're finished, we will have heard from a number 12 of witnesses, and this panel has heard a 13 significant quantity of evidence on a case that I 14 think -- I don't have a distinct memory of Mr. 15 Strauch's experience in ODC, citing I think 1300 16 or 1500 cases. 17 I don't know how many of those involved 18 40 different counts where I think we've gone 19 through and looked at all the subparts of those 20 counts. I think all told, if you count the 21 subparts, there are 127 different charges at issue 22 in this case. 23 So I think our view, based on all that 24 and the status of the record that will be finished 25 after what it looks like will be a two day</p>	<p style="text-align: right;">Page 259</p> <p>1 going to have an opportunity to summarize their 2 positions in the closing arguments this morning, 3 later. So with that, we'll take this under 4 advisement. And we do also like to make 5 decisions, get recommendations out, as 6 expeditiously as possible, but we'll take this 7 under advisement and get a decision on this motion 8 at the conclusion of the hearing. 9 Was there something else you wanted to 10 bring up? 11 MR. GREEN: There was, Mr. Chairman. 12 Thank you. Just I think while we're still in our 13 case, before we turn it back to Mr. Strauch, we 14 wanted to make, for the record move the admission 15 of our exhibits that were either not objected to 16 or that Mr. Strauch has since withdrawn his 17 objections to. 18 For the record -- and Mr. Strauch, 19 please correct me if this list isn't correct -- 20 but I believe that Respondent's Exhibits A, B, C, 21 D, E, F, G, H, I, J, L, M, O, Q, R, T, W, X, Z, 22 AA, BB, DD, EE, FF, GG, and HH. 23 CHAIR OGLE: Any objection, Mr. Strauch? 24 MR. STRAUCH: No. I'm just checking my 25 notes here. That's correct. Thank you.</p>

<p style="text-align: right;">Page 260</p> <p>1 CHAIR OGLE: Those exhibits are admitted 2 into the record. 3 MR. GREEN: Thank you Mr. Chairman. 4 (Whereupon, Respondent's Exhibits A, B, C, D, E, 5 F, G, H, I, J, L, M, O, Q, R, T, W, X, Z, AA, BB, 6 DD, EE, FF, GG, and HH were received in evidence) 7 CHAIR OGLE: Mr. Strauch, are you 8 prepared to call your next witness then? 9 MR. STRAUCH: Yes, Mr. Chairman. 10 CHAIR OGLE: Would you do so. 11 MR. STRAUCH: Formally reopening ODC's 12 case, ODC calls Beth McLaughlin, and she is 13 appearing remotely without objection by the 14 Respondent. 15 CHAIR OGLE: You may proceed. Good 16 morning, Ms. McLaughlin. 17 THE WITNESS: Good morning. 18 19 BETH McLAUGHLIN, 20 Having been first duly sworn, was examined and 21 testified as follows: (via Zoom) 22 23 24 25 DIRECT EXAMINATION</p>	<p style="text-align: right;">Page 262</p> <p>1 Q. Where did you grow up? 2 A. In Butte. 3 Q. Where did you go to school? 4 A. I went to the University of Montana. I 5 have a bachelors degree in journalism, and a 6 masters in public administration. 7 Q. What is your job as Court Administrator? 8 A. I'm responsible for the overall 9 administrative functions in the Judicial Branch, 10 so it's fairly broad based. I'm responsible for 11 all human resources management activities, 12 payroll, contracting, fiscal management. 13 My office provides all IT services to 14 Courts across the state, including Courts of 15 Limited Jurisdiction and District Courts. My 16 office manages the Youth Court Program, which is 17 the juvenile probation system in the State of 18 Montana. 19 We manage a program that provides 20 services to families involved in child abuse and 21 neglect cases, specifically mediation program. I 22 manage the State Law Library. Within the State 23 Law Library, we have a large program for people 24 representing themselves in courts. That includes 25 self-help law centers across the state of Montana,</p>
<p style="text-align: right;">Page 261</p> <p>1 BY MR. STRAUCH: 2 Q. What is your name? 3 A. My name is Beth McLaughlin. 4 Q. And who are you? 5 A. I am the Supreme Court Administrator. 6 Q. And where are you this morning, Ms. 7 McLaughlin? 8 A. I am in my hotel room in Missoula, 9 Montana. 10 Q. Is anybody in the room with you? 11 A. No. 12 Q. Do you have access to the ODC's exhibits 13 in front of you? 14 A. I do. 15 Q. Do you have access to the Attorney 16 General's exhibits in front of you? 17 A. I do. 18 Q. What is -- just tell us, please, a 19 little bit about your personal background. 20 A. I have been the Supreme Court 21 Administrator since July of 2012. Prior to that I 22 was the Human Resources Director at the Department 23 of Public Health and Human Services. I have 24 worked for State government for about 31 and a 25 half years.</p>	<p style="text-align: right;">Page 263</p> <p>1 and a mediation program associated with that. 2 I also represent the branch before 3 legislative hearings, including managing and 4 delivering our budget proposal during legislative 5 sessions, as well as providing responses during 6 the interim. 7 Finally I'm responsible for making sure 8 that all of our data requests are responded to, 9 that information requests are responded to, and 10 then any other duties that might be assigned to me 11 by the Court or the District Court. I did miss 12 also that we have administrative responsibility 13 for the Water Court as well. 14 Q. Thank you. And I want to pick up on 15 something you just said, I believe I heard you 16 say. Are you familiar with your statutory duties 17 under the Montana Code? 18 A. I am. 19 Q. In 2021, at the time of events that are 20 the subject of this proceeding, was one of your 21 duties under the MCA then in effect -- not 22 today's, but the one back then, which I submit to 23 you as a matter of law is the 2019 version, and 24 that's specifically for the record 3-1-702(10). 25 Was one of your functions then to perform other</p>

<p style="text-align: right;">Page 264</p> <p>1 duties, quote, "perform other duties that the 2 Supreme Court may assign," end quote? 3 A. Yes. 4 Q. And sometime after 2021, was that 5 provision No. 10 removed from that statute? 6 A. That provision was removed during the 7 2023 legislative session. 8 Q. So a couple years after the events here? 9 A. Correct. 10 Q. And you've looked through the 11 Respondent's exhibits, and Exhibit H in 12 particular? 13 A. I'm sorry, Mr. Strauch. Did you say 14 your exhibits or -- 15 Q. Mine are numbered, so "H" is a 16 Respondent exhibit. 17 A. Just one moment, please. I have that 18 pulled up. 19 Q. And what version of the code Section 20 3-1-702 is on that exhibit? 21 A. This is the section of the code from 22 2023. 23 Q. So this code section that they've got 24 here in their exhibits is not the one that 25 controlled your actions in 2021, correct?</p>	<p style="text-align: right;">Page 266</p> <p>1 I'll use the term -- party certainly in the 2 McLaughlin case, but also had your lawyer file 3 some documents for you in the Brown case, correct? 4 A. Correct. 5 Q. When did you first learn that the 6 Legislature had subpoenaed Judicial Branch emails 7 from the Department of Administration? 8 A. I first learned about it on Friday. I 9 had left my office for a personal appointment. 10 I'm not sure I have the exact date. It was either 11 April 8th or 9th. And I came back to my office 12 close to 5:00, just to clean up the information, 13 and found that there was a courtesy copy of a 14 document from Ms. Belke notifying me that a 15 subpoena had been issued to the Department of 16 Administration to produce Judicial Branch 17 documents. 18 Q. And for the record, Friday was April 19 9th. Okay? 20 A. Thank you. 21 Q. And at what time of the day did you 22 receive the courtesy copy of the subpoena directed 23 to the Department of Administration? 24 A. I received the document when I returned 25 to my office after a personal appointment, and it</p>
<p style="text-align: right;">Page 265</p> <p>1 A. Correct. 2 Q. And this one in 2023 actually doesn't 3 have that No. 10 that you just talked about, 4 right? 5 A. Correct. 6 Q. Were you subpoenaed to testify here? 7 A. I was. 8 Q. And did you, once you were subpoenaed, 9 did you contact my office to work out a time to 10 accommodate your professional obligations? 11 A. I did. 12 Q. And you understood that -- or excuse me. 13 Did you understand that if I didn't work that out 14 with you, you had a right to apply to this 15 Commission for relief or protective relief so that 16 you could meet your professional obligations? 17 A. I did. 18 Q. But I worked it out with you, right? 19 A. Correct. 20 Q. And Respondent has professionally 21 accommodated you as well; you understand that, 22 right? 23 A. Correct. 24 Q. We know you were involved not as a 25 lawyer, but you were involved somewhat as a --</p>	<p style="text-align: right;">Page 267</p> <p>1 was either close to or shortly after 5:00 on a 2 Friday. 3 Q. In the ODC's Exhibit No. 6, can you just 4 look at that, and affirm that that's a copy, a 5 courtesy copy of that subpoena. 6 A. Yes. Just one minute. That is correct. 7 Q. And that subpoena is directed to -- it's 8 signed by Senator Regier; is that right? 9 A. Regier. 10 Q. I mispronounced his name. I apologize. 11 And it's directed to Misty Giles, Director of 12 Administration, the Department of Administration? 13 A. Correct. 14 Q. Who is Ms. Giles? 15 A. Ms. Giles is an Executive Branch 16 appointed official, who is the head of the 17 Executive Department of Administration. 18 Q. What's your understanding of her job as 19 the Director? 20 A. I believe she has responsibility over 21 what I would say are administrative functions in 22 the Executive Branch, so the management of 23 buildings, the management of the state health 24 insurance system; and then attached to her office 25 is the State Information Technology Division.</p>

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1 Q. What was your understanding of how Ms.
2 Giles had access to Judicial Branch emails?
3 **A. The Judicial Branch resides on the**
4 **Executive Branch network. We do not have funding**
5 **that would allow us to have our own network system**
6 **with all of the things that are required in the**
7 **modern age to prevent cyber security attacks, so**
8 **we procure network services from the Department of**
9 **Administration.**
10 **That would include the suite of office**
11 **products that are generally used in a work**
12 **environment, so email, Word, PDF's, I mean all of**
13 **those things that people use on their daily work.**
14 **It would be a relationship -- or excuse me --**
15 **ITSD's relationship to the branch would be akin to**
16 **a law firm's relationship to a private internet**
17 **provider.**
18 Q. And that saves the taxpayers of the
19 state money?
20 **A. It does. It would be I think cost**
21 **prohibitive, and probably not something we would**
22 **ever want to have a completely separate Judicial**
23 **Branch network. I don't think that would be an**
24 **appropriate use of funds.**
25 Q. And is the Judicial Branch network still

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1 part of or lodged in the Executive Branch network
2 as of today?
3 **A. It is.**
4 Q. For the same reason?
5 **A. Yes.**
6 Q. What is your understanding of -- Let's
7 start with this way. What is your understanding
8 of the authority of the Executive Branch Director
9 of Administration to reach into the Judicial
10 Branch's network?
11 **A. I believe she has zero authority to**
12 **reach into the Judicial Branch network; she has**
13 **zero authority to reach into the Legislative**
14 **Branch network as well; and probably zero**
15 **authority as it relates to other statewide elected**
16 **officials within the Executive Branch.**
17 Q. What is your ability, as the Court
18 Administrator, to reach into the Executive
19 Branch's network?
20 **A. I have no authority to do that.**
21 Q. Have you had occasions in your position
22 where individuals have made requests for Judicial
23 Branch records?
24 **A. I have.**
25 Q. And how are they usually processed?

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1 **A. There's generally two ways in which they**
2 **are processed. The first is the one I will**
3 **explain is the easiest.**
4 **We do receive on occasion requests for**
5 **Court records. All of the Courts in the State of**
6 **Montana reside on our network, reside on our case**
7 **management system. I am not the keeper of the**
8 **record in that case, and in the case where court**
9 **records are requested, the requesting party is**
10 **directed to the appropriate Clerk of Court.**
11 **So if you request from my office case**
12 **files in the Yellowstone County District Court,**
13 **I'm going to refer you to the Clerk of Court in**
14 **Yellowstone County, even though in theory my IT**
15 **staff could reach in and get those files. We are**
16 **not the custodian of those records. So that's one**
17 **type of record request that is referred to the**
18 **custodial record keeper. The second --**
19 Q. I'm sorry. Did you say that's a public
20 records request? Is that what you said?
21 **A. I said that was a public records request**
22 **for court records, so case specific court records.**
23 **In the event that we receive a request**
24 **for public records that are lodged or associated**
25 **in my office, we generally have a period of time**

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1 **in which to respond to that. I would ask my IT**
2 **staff that works within the branch to secure the**
3 **requested documents if they were electronic.**
4 **Sometimes people request a document that**
5 **is not electronic, so I would physically secure**
6 **those.**
7 **I would go through those, and make sure**
8 **that everything that was requested was actually**
9 **something that we could release as a public**
10 **document. If there were portions of the request**
11 **in which a document contained some confidential**
12 **information, but not all confidential information,**
13 **I would redact the information that was**
14 **confidential before providing the document.**
15 **If there were documents that were not**
16 **going to be released because they contain**
17 **confidential information, unless the requesting**
18 **party waived what I would call a privilege log, I**
19 **would also attach a privilege log that explains**
20 **what documents were not produced.**
21 Q. Why would you undergo that review
22 process, that redaction process, and that
23 privilege log process? Why would you do that?
24 **A. There are a myriad of items contained**
25 **within the Judicial Branch that contain**

<p style="text-align: right;">Page 272</p> <p>1 information that is either confidential because it 2 relates to someone's personal privacy, or it's 3 specifically confidential in statute. So I cannot 4 just turn over documents without reviewing them, 5 or I would risk releasing information that's 6 either statutorily confidential or protected as 7 it's related to somebody's personal privacy 8 interests. 9 Q. For example, like what? 10 A. For example, six months ago I received a 11 public information request for a number of 12 invoices that were related to payments made by the 13 Judicial Branch through my office. On its face 14 you might assume invoices are publicly, public 15 information that we would turn over without any 16 review. However, you have to go through every 17 invoice to ensure that we're not releasing the 18 name of a client that is associated with that 19 invoice. 20 So for instance, I received a request 21 for a number of fiscal documents. Those documents 22 were all associated with Drug Treatment Courts 23 that my office manages, so we had to go through 24 and redact the name of all of the Drug Court 25 participants as it related to those invoices to</p>	<p style="text-align: right;">Page 274</p> <p>1 A. This is not correct. I did not receive 2 a subpoena. 3 Q. (BY MR. STRAUCH) When you got the 4 courtesy copy of the subpoena to Ms. Giles, what 5 did you make of the fact that the subpoena was 6 directed to her and not someone associated with 7 the Judicial Branch? 8 A. As I mentioned, I'd never seen that 9 before in all of the years I had worked for State 10 government, so I was extremely concerned. And my 11 primary concern was related to the volume of 12 emails that I have in my Outlook box that deal 13 with highly confidential matters, matters that are 14 either statutorily confidential or confidential 15 based on someone's right to privacy. I didn't 16 want those released. 17 Q. Specifically if you would look at 18 Exhibit 6, the subpoena to Ms. Giles. 19 A. Yes. 20 Q. There's a few things I'd like to ask you 21 about. First of all, the subpoena itself is dated 22 April 8th, which would be Thursday; is that right? 23 A. Correct. 24 Q. And it called for Ms. Giles to produce 25 emails on Friday the 9th; is that right?</p>
<p style="text-align: right;">Page 273</p> <p>1 protect their personal privacy. 2 Q. In this matter, you received a courtesy 3 copy of a subpoena directed to Ms. Giles. Was 4 anything different about that circumstance based 5 on your experience? 6 A. At that point I had been in State 7 government for 29 years, 28 years, 29 years, and 8 I've never experienced something -- I'd been with 9 the Judicial Branch for twenty years at that 10 point. I had never seen a subpoena for 11 information from, for a Judicial Branch document 12 from -- or served on an Executive Branch official. 13 Q. Where would you expect the subpoena for 14 Judicial Branch emails to be directed? 15 A. I would have expected it to be directed 16 to me. It's a possibility it might have been 17 served on someone else in the branch as well, but 18 within the Judicial Branch. 19 Q. Before I get there, I have a question 20 for you. Yesterday the suggestion had been made 21 that prior to Friday the 9th, that you had 22 received a subpoena from one or more individuals 23 associated with the Legislature for polling 24 emails; is that correct? 25 MR. GREEN: Objection, Mr. Chair.</p>	<p style="text-align: right;">Page 275</p> <p>1 A. Correct. 2 Q. So before you had even received it? 3 A. Correct. 4 Q. And the emails that are requested here 5 include, No. 1, all emails and attachments that 6 you received between January 4th and April 8th, 7 both either in paper or digital, correct? 8 A. Correct. 9 Q. And any and all recoverable deleted 10 emails sent or received by you for that same 11 period of time, correct? 12 A. Correct. 13 Q. And the only exclusion is No. 3, which 14 is an exclusion for emails related to decisions 15 made by the Justices in disposition of a final 16 opinion, right? 17 A. Correct. 18 Q. So the scope of this subpoena is 19 virtually unlimited by subject matter except for 20 emails related to decisions made by the Justices; 21 is that right? 22 MR. GREEN: Objection, leading. 23 CHAIR OGLE: Sustained. 24 Q. (BY MR. STRAUCH) What is the only 25 exclusion?</p>

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1 A. The only exclusion was emails and
2 attachments related to decisions made by the
3 Justices, which would not exist within my email
4 box. I would never have a copy of discussions
5 about decisions made by Justices.
6 Q. Beyond that, and putting aside that
7 issue, are there any other restrictions on the
8 scope -- other than the time restriction -- but
9 are there any subject matter restrictions other
10 than that?
11 A. No. There is no mention of emails that
12 contain information that may be personally private
13 for somebody or statutorily non-disclosable.
14 Q. So Friday the 9th when you got this, was
15 there anything fresh in your mind about particular
16 concerns that you may have of any recent emails
17 just prior that would be within the scope of the
18 time frame here?
19 A. Yes. There were actually three things
20 that were fresh in my mind, and caused me a great
21 deal of distress. I, like I said, am responsible
22 for the oversight of human resource management in
23 my office, and I have a fairly small office.
24 So I had a series of emails over the
25 past week and a half in which an employee, whose

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1 wife was seeking pretty significant medical
2 treatment, had been communicating with me back and
3 forth about how to secure leave, what it would
4 look like for him to take a chunk of time off; and
5 contained within those emails was very personal
6 information about what was happening with him and
7 his family. And that was clearly something that I
8 had an obligation to protect from disclosure to
9 anyone outside of the branch.
10 I also had, either the same week or the
11 previous week, a back and forth discussion with a
12 District Court Judge who was handling a child
13 abuse and neglect case, and as I recall, the case
14 involved a mother who was a minor, and her child
15 was the subject of the child abuse and neglect
16 case.
17 But the District Court Judge was trying
18 to figure out within the statute how they could
19 appoint and pay for a Guardian ad Litem for the
20 mother, even though she wasn't the subject of the
21 case.
22 So within those emails I had several
23 Court orders from the Judge that we worked
24 through, so we could make that payment, but the
25 names of both the young mother and her child who

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1 were the subject of child abuse and neglect
2 proceedings were in my email, and those are
3 statutorily confidential. So I was very concerned
4 about that.
5 And then there was also information
6 about a specific Judicial Standards Commission
7 matter in which the Chairman of the Judicial
8 Standards was seeking assistance in I believe
9 putting a contract together for investigating a
10 matter that was before JSC, and JSC matters are
11 specifically in statute confidential.
12 So I was quite alarmed by a lot of
13 things that are in my email that are confidential,
14 but those three on that Friday afternoon, Friday
15 evening, were fresh in my head.
16 Q. And please explain how Ms. Giles would
17 have access to emails like that, Judicial Branch
18 emails.
19 A. In the normal course of business she
20 should not have access to emails like that. As I
21 mentioned earlier, we procure network services
22 from the Executive Branch, and I assume, as has
23 been borne out throughout this process, that they
24 reached in inappropriately, secured emails that
25 were not within her chain of custody.

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1 Q. What's your understanding of the reason
2 for the segregation of the Executive Branch's
3 access to Judicial Branch emails and vice versa?
4 What's your understanding of the reason for that
5 wall?
6 A. Well, I think it goes even further than
7 a branch. In my case, I know the laws related to
8 Judicial Branch documents. I understand what I
9 can and cannot release. And as I mentioned with
10 the example with an invoice, I don't think if
11 you're not part of the branch that you would
12 understand that there are things within the
13 invoice that need to be redacted to protect the
14 privacy interests of a Drug Court client.
15 So we understand what our obligations
16 and laws are. I think the Legislature, if someone
17 requests emails from them, understands what their
18 obligation and laws are that they need to follow
19 related to confidentiality. The same would be
20 true of an Executive Branch official as well.
21 If someone requests documents from the
22 State Auditor, the State Auditor's Office is going
23 to be experts in what is confidential within their
24 emails and what is releasable to the public. So
25 the custodian of the record is responsible for

<p style="text-align: right;">Page 280</p> <p>1 knowing what can and cannot be released.</p> <p>2 Q. Are there potential liability issues if</p> <p>3 emails that should not be released outside of your</p> <p>4 control are released to someone?</p> <p>5 A. Absolutely. There's -- I would think if</p> <p>6 someone had their personal privacy violated, they</p> <p>7 could certainly take action against the Court for</p> <p>8 doing that. I mean there's specific statutes in</p> <p>9 the child abuse world that make it a misdemeanor</p> <p>10 if you inadvertently or purposely release</p> <p>11 documents and names associated with child abuse</p> <p>12 and neglect cases.</p> <p>13 So there's not only the risk to the</p> <p>14 State of financial liability, but there are</p> <p>15 certain case types in which it is a crime to</p> <p>16 release the documents inappropriately.</p> <p>17 Q. And the risk to the State means</p> <p>18 ultimately the taxpayers would bear that expense;</p> <p>19 is that right?</p> <p>20 A. Correct.</p> <p>21 Q. So having these concerns fresh on your</p> <p>22 mind Friday the 9th, the evening of Friday the</p> <p>23 9th, what did you do next?</p> <p>24 A. Well, I'm not an attorney, and because</p> <p>25 this clearly is a subpoena that involves legal</p>	<p style="text-align: right;">Page 282</p> <p>1 produced by Monday, if I recall.</p> <p>2 Q. And is that ODC Exhibit 7, that email,</p> <p>3 at the top?</p> <p>4 A. Give me just a second. Yes.</p> <p>5 Q. And for the record, Exhibit 7 Page 1 at</p> <p>6 the top is an email from Ms. Giles, Sunday, April</p> <p>7 11th at 11:23 a.m. to your lawyer Randy Cox and</p> <p>8 other folks; is that right?</p> <p>9 A. Correct.</p> <p>10 Q. And in that email, Ms. Giles states</p> <p>11 that, first of all, as the third party holder of</p> <p>12 these documents, the Department is not well suited</p> <p>13 to ascertain which fall within the concerns that</p> <p>14 your lawyer raised with them, right?</p> <p>15 A. Correct.</p> <p>16 Q. And then she indicates she's happy to</p> <p>17 give Mr. Cox a copy, the electronic copy of what</p> <p>18 she turned over on Friday, right?</p> <p>19 A. Correct.</p> <p>20 Q. And then she says she'll do the same on</p> <p>21 Monday when she produces the rest of the</p> <p>22 documents; is that right?</p> <p>23 A. Correct.</p> <p>24 Q. And there's a reference at the bottom to</p> <p>25 reaching out to the Legislature to resolve</p>
<p style="text-align: right;">Page 281</p> <p>1 action, I knew that I had to hire an attorney. I</p> <p>2 don't have Staff Counsel within my office. We</p> <p>3 have a Supreme Court attorney who works with us on</p> <p>4 things like rules, but she's not someone who would</p> <p>5 represent my office in a matter like this.</p> <p>6 So I contacted Randy Cox, and secured</p> <p>7 his services Friday evening, I think probably</p> <p>8 around 6:00 or 7:00.</p> <p>9 Q. Did you know as of Friday evening, April</p> <p>10 9th, when you received the courtesy copy of the</p> <p>11 subpoena to Ms. Giles, whether she had already</p> <p>12 produced some emails?</p> <p>13 A. I received the courtesy copy of the</p> <p>14 subpoena from Ms. Belke, not from Ms. Giles, and I</p> <p>15 assumed in reading it -- because it directs the</p> <p>16 documents to be produced by 3:00 -- that they may</p> <p>17 have already been produced. I didn't know.</p> <p>18 Q. When did you learn for the first time</p> <p>19 for sure that Ms. Giles had produced emails</p> <p>20 pursuant to the subpoena? When did you find that</p> <p>21 out?</p> <p>22 A. It was over the weekend. I think it was</p> <p>23 on Sunday when Ms. Giles responded to outreach</p> <p>24 from Mr. Cox who was representing me, and said</p> <p>25 that some had been produced, and all would be</p>	<p style="text-align: right;">Page 283</p> <p>1 concerns. In the email below, in the letter that</p> <p>2 Mr. Cox sent, did he attempt to try to resolve</p> <p>3 concerns?</p> <p>4 A. Yes.</p> <p>5 Q. So on Sunday morning -- excuse me --</p> <p>6 Sunday around noon, Sunday the 11th, you found out</p> <p>7 that they've already produced emails. Did that</p> <p>8 raise any concerns in your mind beyond those you</p> <p>9 already had on Friday?</p> <p>10 A. It certainly amplified them, and the</p> <p>11 email back from Ms. Giles said that they complied</p> <p>12 with the scope of the subpoena as written, which</p> <p>13 means everything was turned over to the</p> <p>14 Legislature.</p> <p>15 And I don't know that I knew what the</p> <p>16 Legislature meant. Did that mean it was housed</p> <p>17 with an attorney at the Legislature? Did that</p> <p>18 mean it was my emails were just circulating widely</p> <p>19 among legislators and legislative staff? It was</p> <p>20 impossible to know what had happened with them,</p> <p>21 and I was extremely concerned given the types of</p> <p>22 documents that reside within my email, as I</p> <p>23 pointed out earlier, with things that are both</p> <p>24 confidential and statutorily confidential. So I</p> <p>25 was very concerned. There was no indication there</p>

<p style="text-align: right;">Page 284</p> <p>1 had been any attempt even to deal with items that 2 may have even been clearly confidential to any 3 person. 4 Q. Well, let me ask you this. The 5 suggestion has been made that there's no 6 information that emails were disclosed publicly 7 outside of the legislators and/or the 8 Legislature's attorneys. And does that solve your 9 concern? 10 MR. GREEN: Objection, hearsay. 11 CHAIR OGLE: Sustained. 12 Q. (BY MR. STRAUCH) Let me ask you this 13 way then. If the only people that had access to 14 the emails that Ms. Giles produced were the 15 Legislature and/or its attorneys, would that solve 16 your concerns? 17 A. Absolutely not. Even if Ms. Giles and 18 her staff and whatever legislators and their staff 19 viewed the emails, they have no authority to see 20 confidential emails; they have no authority to see 21 a discussion with a staff person about a medical 22 event with his family; there's no authority to see 23 a discussion about a child abuse and neglect case, 24 and how we were going to make payments on certain 25 obligations that we had.</p>	<p style="text-align: right;">Page 286</p> <p>1 General's Office intent was with respect to that 2 Sunday order? 3 A. I'm sorry. Would you repeat that? I 4 didn't hear you clearly. 5 Q. Sorry. Did you learn what the AG's 6 Office intent was with respect to the Sunday 7 order? 8 A. My recollection is they were not going 9 to comply with it. 10 Q. Did they in fact send a letter to the 11 Court to that effect? 12 A. Yes. 13 Q. When they sent that letter, what did 14 that mean to you as the Court Administrator in 15 attempting to perform your duties to the Court? 16 A. It meant that documents that I had an 17 obligation to protect were not protected, and 18 there was outstanding liability to the State. 19 Beyond that just the potential that people's 20 personal privacy around things that were contained 21 in my email were out and about physically 22 personally made me ill because I had not protected 23 those. 24 Q. After the Sunday order, April 11th, did 25 you receive additional legislative subpoenas?</p>
<p style="text-align: right;">Page 285</p> <p>1 So they have no authority to see them. 2 There were certainly emails that should, that 3 would have been public, but the emails that were 4 private, there's no authority for Ms. Giles, or 5 anyone in her staff, or any legislator, or anyone 6 on the legislative staff to view those. That 7 alone is a disclosure. It's inappropriate. 8 Q. You know that the Court, or do you know 9 that the Court on Sunday the 11th issued a 10 temporary order quashing the subpoena to Ms. 11 Giles? 12 A. Yes. 13 Q. Do you know by the time that order came 14 out how many emails she had already produced to 15 the Department of Justice before that? 16 A. It was upwards of 5,000, I believe. 17 Q. Do you know what the Department of 18 Justice did with those emails? 19 A. I have no idea. 20 Q. So did the Sunday order solve your 21 problems? 22 A. No. At that point, the emails had 23 already been disclosed to people who did not have 24 the authority to see those emails. 25 Q. Did you learn what the Attorney</p>	<p style="text-align: right;">Page 287</p> <p>1 A. I believe so. 2 Q. And do you recall what the subpoena 3 directed to you was for? 4 A. I'm sorry. One more time. 5 Q. Do you recall what the subpoena directed 6 to you was for? 7 A. As I recall, it directed me to appear, I 8 think. 9 Q. Did it ask for documents? 10 A. And for documents, produce documents. 11 Q. Do you recall what documents or 12 materials you had been subpoenaed to produce? 13 A. I don't. I would have to look at the 14 subpoena to recall it. 15 Q. Do you recall if it asked for the same 16 emails? 17 A. Can you repeat that? I'm sorry. The 18 air conditioner came on in my room. 19 Q. It's getting hot over there? 20 A. I know. 21 MR. STRAUCH: I'm sorry. Don't answer 22 that. Withdraw that question. 23 Q. (BY MR. STRAUCH) Do you recall if that 24 subpoena that came after the order, the subpoena 25 directed to you, included the emails that had been</p>

<p style="text-align: right;">Page 288</p> <p>1 sought in the prior subpoena to Ms. Giles?</p> <p>2 A. Yes.</p> <p>3 Q. And in addition, did it ask for Judicial</p> <p>4 Branch phones, and laptops, and electronic drives,</p> <p>5 etc., that may house emails?</p> <p>6 A. Yes, requested emails, and then I think</p> <p>7 that I was supposed to deliver phones and</p> <p>8 computers as well.</p> <p>9 Q. Would you please look at Exhibit 14 in</p> <p>10 the ODC exhibits.</p> <p>11 A. Yes, I have it.</p> <p>12 Q. I'm going to direct you -- This is a</p> <p>13 declaration of Lieutenant General Hansen dated</p> <p>14 April 14th, and I'm going to direct your attention</p> <p>15 to a few things here.</p> <p>16 First of all, specifically Paragraph 2,</p> <p>17 Ms. Hansen affirms under oath that a compilation</p> <p>18 of emails were publicly disclosed by members of</p> <p>19 the press, and then it gives a link; is that</p> <p>20 right?</p> <p>21 A. Correct.</p> <p>22 Q. And at Paragraph 5, the Lieutenant</p> <p>23 General confirms and swears that the Legislature</p> <p>24 received over 5,000 emails on April 9th; that</p> <p>25 would be the Friday, correct?</p>	<p style="text-align: right;">Page 290</p> <p>1 meaning the Attorney General's Office, and states</p> <p>2 no sensitive or protected information has been</p> <p>3 disclosed; did I read that correctly?</p> <p>4 A. Correct.</p> <p>5 Q. Now, starting with the last bit, do you</p> <p>6 agree with the claim there that no sensitive or</p> <p>7 protected information has been disclosed at this</p> <p>8 point?</p> <p>9 A. The emails had been viewed by the</p> <p>10 Department of Administration staff, which is a</p> <p>11 disclosure; the emails had been viewed by I don't</p> <p>12 know who within the Legislature or their staff,</p> <p>13 which was a disclosure; and the emails had been</p> <p>14 viewed by the Department of Justice, and I don't</p> <p>15 know by whom, and that was a disclosure.</p> <p>16 So the documents that were confidential,</p> <p>17 either because of personal privacy rights or</p> <p>18 statute, had already been disclosed</p> <p>19 inappropriately to the Executive Branch officials</p> <p>20 that I just outlined.</p> <p>21 Q. And are you aware that on -- I'm sorry.</p> <p>22 Did the Court, Supreme Court, Montana Supreme</p> <p>23 Court, ultimately rule in your favor, and quash</p> <p>24 the subpoena that had been served on you and</p> <p>25 directed to you, and ordered return of all</p>
<p style="text-align: right;">Page 289</p> <p>1 A. Correct.</p> <p>2 Q. And Paragraphs 5 and 6 -- excuse me -- 6</p> <p>3 and 7 confirm, first of all, that the Department</p> <p>4 itself conducted a review of the materials; is</p> <p>5 that right?</p> <p>6 A. That is right, and that was contrary to</p> <p>7 what had been relayed to Mr. Cox from Ms. Giles in</p> <p>8 her email on the Sunday she had said that</p> <p>9 everything had been turned over pursuant to the</p> <p>10 subpoena. The subpoena didn't require or even</p> <p>11 suggest any redaction --</p> <p>12 Q. Well --</p> <p>13 A. -- except for decisional case matters.</p> <p>14 Q. In the email to Ms. Giles, did she, on</p> <p>15 Sunday morning, did she actually tell Mr. Cox that</p> <p>16 the Department wasn't equipped to conduct that</p> <p>17 kind of review?</p> <p>18 A. Yes.</p> <p>19 Q. And then on Paragraph 7, Lieutenant</p> <p>20 Hansen states that the Legislature also conducted</p> <p>21 its own review; did I read that correctly?</p> <p>22 A. Yes.</p> <p>23 Q. In Paragraph 8, the Lieutenant General</p> <p>24 confirms under oath that currently the emails</p> <p>25 produced are held by the Legislature's Counsel,</p>	<p style="text-align: right;">Page 291</p> <p>1 Judicial Branch emails?</p> <p>2 A. Yes.</p> <p>3 Q. And you don't need to look at it, Ms.</p> <p>4 McLaughlin. It's in the record. It's Exhibit 24.</p> <p>5 And it's the order that states the emails shall be</p> <p>6 immediately returned. Did they do as ordered?</p> <p>7 A. No.</p> <p>8 Q. Do you recall when you received emails</p> <p>9 from the Attorney General's Office?</p> <p>10 A. I received a portion of -- I received</p> <p>11 documents -- I don't know if they were all emails</p> <p>12 that had been secured -- in April of 2022. And</p> <p>13 then I received a second batch of emails that they</p> <p>14 had discovered maybe a week later in April of</p> <p>15 2022.</p> <p>16 Q. But who delivered the emails to you?</p> <p>17 A. The first batch that I received were</p> <p>18 delivered by two attorneys from the Attorney</p> <p>19 General's Office; and the second group came</p> <p>20 through a Fed Ex mailing.</p> <p>21 Q. Who from the Attorney General's Office</p> <p>22 delivered the first batch?</p> <p>23 A. It was Derek Oestreicher who was an</p> <p>24 attorney with the office, and then David Dewhirst</p> <p>25 who was the I think Solicitor at that point.</p>

<p style="text-align: right;">Page 292</p> <p>1 Q. In the ODC Exhibit 33, please.</p> <p>2 A. Okay.</p> <p>3 Q. Now, is that a certificate of delivery</p> <p>4 that Mr. Oestreicher signed on March 22 of 2022,</p> <p>5 and that you acknowledged receipt of in March 22</p> <p>6 of 2022?</p> <p>7 A. That is correct. It was March of '22.</p> <p>8 Q. So when you've testified earlier you</p> <p>9 thought both batches came in April, were you</p> <p>10 mistaken?</p> <p>11 A. I was mistaken. I had the month wrong.</p> <p>12 Q. The first batch came on March 22nd?</p> <p>13 A. Yes.</p> <p>14 Q. And in the certificate of delivery, Mr.</p> <p>15 Oestreicher indicates that the Department of</p> <p>16 Justice has no additional documents or copies</p> <p>17 thereof that were produced pursuant to the</p> <p>18 legislative subpoena quashed by the Montana</p> <p>19 Supreme Court's July 14th order. Did that turn</p> <p>20 out to be accurate?</p> <p>21 A. No.</p> <p>22 Q. Because you got a second batch a couple</p> <p>23 weeks later?</p> <p>24 A. I did.</p> <p>25 Q. And Exhibit 8.</p>	<p style="text-align: right;">Page 294</p> <p>1 signed for delivery and receipt of something on</p> <p>2 March 22nd; do you see that?</p> <p>3 A. Correct.</p> <p>4 Q. So what was the something? Was it just</p> <p>5 two USB drives, or did you get more than that?</p> <p>6 A. It was two USB drives, and then two</p> <p>7 cardboard boxes with paper copies of the emails.</p> <p>8 Q. And I think you said you received a</p> <p>9 second batch of emails from the Department of</p> <p>10 Justice, the Attorney General's Office in April of</p> <p>11 2022?</p> <p>12 A. I did. I received those via Fed Ex.</p> <p>13 Q. And Exhibit 34.</p> <p>14 A. Okay.</p> <p>15 Q. On April 15th, Mr. Oestreicher sent you</p> <p>16 a letter with the second batch; is that right?</p> <p>17 A. Correct.</p> <p>18 Q. Now, in the letter, Mr. Oestreicher</p> <p>19 indicates that the Department of Justice received</p> <p>20 additional possibly duplicative documents from</p> <p>21 legislative staff; do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. So what did you understand that to mean</p> <p>24 in terms of who had access to the emails that had</p> <p>25 been returned to you in addition to the Attorney</p>
<p style="text-align: right;">Page 293</p> <p>1 A. Okay.</p> <p>2 Q. And that's in evidence. It's a chain of</p> <p>3 custody form of the Montana Department of Justice,</p> <p>4 and I just have a few questions for you. At the</p> <p>5 top there, it indicates that two USB drives were</p> <p>6 received; do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And on April 12th of 2021, there's a</p> <p>9 notation signed by -- indicating that the USB</p> <p>10 drives were released by Mr. Oestreicher to someone</p> <p>11 named Zach Tielking; do you see that?</p> <p>12 A. I do.</p> <p>13 Q. And then the reason for that release and</p> <p>14 transfer to Mr. Tielking is listed as process and</p> <p>15 copy files; did I read that correctly?</p> <p>16 A. Yes.</p> <p>17 Q. Now, do you know who Mr. Tielking is?</p> <p>18 A. I have no idea who he is.</p> <p>19 Q. And then below that on April 12th, it</p> <p>20 indicates, business record indicates that Mr.</p> <p>21 Tielking returned the drives to Mr. Oestreicher on</p> <p>22 the 12th; do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. And then last but not least, on March</p> <p>25 22nd, Mr. Oestreicher indicates, and then you</p>	<p style="text-align: right;">Page 295</p> <p>1 General's Office?</p> <p>2 A. What that says to me is that the emails</p> <p>3 were not all in the custody of the Department of</p> <p>4 Justice, but in fact still were with legislative</p> <p>5 staff. I don't know who those staff people were.</p> <p>6 Q. And on Tab 35, or Exhibit 35.</p> <p>7 A. Okay.</p> <p>8 Q. This is a certificate of delivery, and</p> <p>9 your signature on it for the second batch; is that</p> <p>10 right?</p> <p>11 A. Yes.</p> <p>12 Q. And it looks like Mr. Oestreicher</p> <p>13 delivered those to you on April 15th, and you</p> <p>14 signed for them on April 26th; is that correct?</p> <p>15 A. As I recall, this set of documents was</p> <p>16 actually delivered via Fed Ex.</p> <p>17 Q. Does that account for the eleven day</p> <p>18 time difference?</p> <p>19 A. I'm assuming so.</p> <p>20 Q. Mr. Oestreicher notes in his certificate</p> <p>21 of delivery that, "The Department of Justice has</p> <p>22 no additional documents or copies thereof that</p> <p>23 were produced pursuant to the legislative subpoena</p> <p>24 quashed by the Montana Supreme Court;" did I read</p> <p>25 that correctly?</p>

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1 **A. Yes.**
2 Q. Sitting on the table here -- and you
3 can't see it -- but sitting on the table is what's
4 been marked for identification purposes and
5 demonstrative purposes only as Exhibit 9, and it's
6 two boxes of documents of various materials. Are
7 you familiar with -- have you seen those two
8 boxes?
9 **A. I have.**
10 Q. And what are those two boxes?
11 **A. Where are they?**
12 Q. What are they? Sorry.
13 **A. They are paper copies of emails, and**
14 **then there are additional things that had been**
15 **added. There's file folders; there were a couple**
16 **of newspapers, as I recall, that were in the boxes**
17 **as well. It was fairly mashed together, and I**
18 **don't know that there was any organization to it.**
19 Q. Are the two USB drives in there?
20 **A. The two USB drives were on top of the**
21 **boxes in plastic.**
22 Q. And you mentioned there's also paper
23 copies of emails within there as well?
24 **A. Correct.**
25 Q. And I think you mentioned that there's

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1 some folders, and it was apparent that they'd been
2 reviewed. How did you reach that conclusion?
3 **A. I looked at the documents, and saw the**
4 **folders, and saw that other information that was**
5 **in the box.**
6 Q. Were there notes, and tabs, and things
7 like that in there making it apparent that they'd
8 been reviewed?
9 **A. Yes.**
10 Q. Did you or your lawyer do that?
11 **A. No.**
12 Q. Do you have any information to suggest
13 that it was someone with the authority from the
14 Judicial Branch who first printed paper copies,
15 and then reviewed them, and put notes and stuff in
16 them like that?
17 **A. No.**
18 Q. Do you know whether all copies of
19 Judicial Branch emails were eventually returned?
20 **A. I don't know. I don't know how many**
21 **were printed. The two boxes did not appear to**
22 **contain 5,000 emails, so I'm not sure what was**
23 **printed. I have to assume that Mr. Oestreicher is**
24 **sincere in saying that they were returned, but I**
25 **don't know that for a fact.**

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1 Q. And just to be clear, we have the April
2 6 -- excuse me -- April 8th subpoena, which is
3 Exhibit 6, directed to Ms. Giles for Judicial
4 Branch emails. Are you aware of any subpoena
5 directed to you prior to that date?
6 **A. Prior to the April 8th date of Ms.**
7 **Giles' subpoena?**
8 Q. Correct.
9 **A. No.**
10 Q. Did you receive such a subpoena?
11 **A. No.**
12 **MR. STRAUCH:** Mr. Chairman, may I have
13 the Commission's indulgence for a moment?
14 **CHAIR OGLE:** Yes, you may.
15 **MR. STRAUCH:** Mr. Chairman, members of
16 the Commission, no further questions. Thank you.
17 **CHAIR OGLE:** Very well. Care to
18 cross-examine?
19 **MR. GREEN:** We do, Mr. Chairman. Would
20 it be appropriate if we took maybe a 15 minute
21 bathroom break before we started cross?
22 **CHAIR OGLE:** Why don't we do that.
23 We'll take a 15 minute break. We'll reconvene --
24 the clock up there is a little fast.
25 **MR. STRAUCH:** Mr. Chairman, Ms.

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1 McLaughlin, do you have a hard stop here this
2 morning?
3 **THE WITNESS:** I'm fine until noon, and
4 then --
5 **CHAIR OGLE:** Is that going to work?
6 **MR. GREEN:** I think that will be fine,
7 sir.
8 **CHAIR OGLE:** So just so everybody knows,
9 this clock up here is little bit fast. According
10 to my phone, it's about 10:11. And so let's
11 reconvene at 10:30. Thank you. We will be in
12 recess until 10:30.
13 (Recess taken)
14 **CHAIR OGLE:** All right. Ready to
15 proceed?
16 **MR. GREEN:** We're ready.
17 **CHAIR OGLE:** Are you ready, Ms.
18 McLaughlin? Can you hear us? We can't hear you.
19 **THE WITNESS:** Can you hear me now?
20 **CHAIR OGLE:** We can hear you now. Ready
21 to proceed, Mr. Strauch?
22 **MR. STRAUCH:** Yes, Mr. Chairman.
23 **CHAIR OGLE:** You can proceed with your
24 cross-examination. Before you get started, would
25 you mind stating your name.

<p style="text-align: right;">Page 300</p> <p>1 MR. GREEN: Sure. Of course. Mr. 2 Chairman, Tyler Green for the Attorney General. 3 CHAIR OGLE: Very well. Thanks, Mr. 4 Green. You may proceed. 5 6 CROSS-EXAMINATION 7 BY MR. GREEN: 8 Q. Good morning, Ms. McLaughlin. 9 A. Good morning. I'm sorry. I didn't hear 10 your name. Could you repeat it? 11 Q. Yes. My name is Tyler Green. 12 A. Thank you. 13 Q. And I represent the Attorney General in 14 this matter. Can you hear me okay? I don't want 15 to -- 16 A. I can. 17 Q. I don't want to shout at you, but I want 18 to make sure we can hear each other. Okay. We've 19 never met before today, have we? 20 A. No. 21 Q. So just to make sure I'm pronouncing 22 your name correctly, is it McLaughlin with an "F" 23 sound or McLaughlin, or maybe something else? 24 A. It's McLaughlin. 25 Q. Okay. Great. Thank you. Ms.</p>	<p style="text-align: right;">Page 302</p> <p>1 A. I turned it off. 2 Q. Can I ask you one more logistics 3 question? Our exhibits, do you have them in 4 electronic format? 5 A. I do. I have them pulled up in front of 6 me right now. 7 Q. There are a couple of them that we'll 8 get to later on where -- this was our mistake -- 9 we did not put Bates numbering on them, so the 10 numbers at the bottom of the document or each page 11 sometimes are not sequential because they're email 12 printouts. So when we get to those, I'll ask you 13 I think to look at the PDF page number, and we'll 14 make sure we're looking at the same page, instead 15 of maybe looking at the number at the bottom of 16 the page, if that's okay. 17 A. Okay. 18 Q. All right. Before we get there, I want 19 to start with some questions about the Judicial 20 Branch's email policy in 2021. I guess I should 21 just ask you. The Judicial Branch had a policy 22 governing email use in 2021; is that right? 23 A. That's correct. 24 Q. Would you please pull up Respondent's 25 Exhibit A.</p>
<p style="text-align: right;">Page 301</p> <p>1 McLaughlin, did you watch or listen to any of 2 yesterday's proceedings in this matter? 3 A. I did not. 4 Q. You're a State employee, correct? 5 A. I am. 6 Q. And you were appointed to your current 7 position by the full Court? 8 A. I was. 9 Q. And the member of the Court that you're 10 most in contact with is the Chief Justice? 11 A. I would say that's correct. 12 Q. And Ms. McLaughlin, the events in this 13 case began in 2021; is that right? 14 A. Correct. 15 Q. And the underlying dispute here was 16 about Judicial Branch emails; is that right? 17 A. I assume so, yes. 18 THE WITNESS: Mr. Green, would you mind 19 if I get up just to close my blinds. I'm getting 20 a glare. 21 MR. GREEN: No problem. Sure. 22 THE WITNESS: Thank you. My apologies. 23 Q. (BY MR. GREEN) No problem. And if the 24 air conditioner kicks on, and you need me to speak 25 up, please just let me know.</p>	<p style="text-align: right;">Page 303</p> <p>1 A. And you said "A," correct? 2 Q. Yes, ma'am, "A" as in apple. 3 A. I have that pulled up. 4 Q. Thank you. Was this the Montana 5 Judicial Branch's policy in effect in 2021? 6 A. It was. 7 Q. We're looking at the document that says 8 it's Policy No. 1530, right? 9 A. Correct. 10 Q. And its effective date was July 1, 2002? 11 A. Yes, and it was revised on June 6th, 12 2017. 13 Q. And that 2017 revision, or I guess maybe 14 set of revisions, that was about four years before 15 the events we're talking about here; is that 16 right? 17 A. Correct. 18 Q. And were you the one who made those 19 revisions in 2017? 20 A. I don't recall if I made those, or if 21 they were made by someone else in my office. 22 Q. Let's look at the policy itself, the 23 first paragraph. Do you see that header there 1.0 24 Policy, the first paragraph underneath that? 25 A. Yes.</p>

<p style="text-align: right;">Page 304</p> <p>1 Q. It says, "This policy applies to all 2 Judicial Branch employees, contractors, and local 3 government employees using a State-owned 4 computer;" did I read that correctly? 5 A. Yes. 6 Q. And you're a Judicial Branch employee? 7 A. Yes. 8 Q. And to do your job, you use a 9 State-owned computer? 10 A. Yes. 11 Q. So this policy would apply to you, 12 right? 13 A. Yes. 14 Q. And it would apply also to Montana 15 Judges? 16 A. Yes. Let me clarify that. When you say 17 Montana Judges, there are Judges in the Courts of 18 Limited Jurisdiction that do not use a State-owned 19 computer, so there are Judges that it would not 20 apply to in the State of Montana. 21 Q. Thank you. So for clarification, I 22 guess to be clear for the record, then it would 23 apply to members of the Supreme Court, for 24 instance? 25 A. It would apply to members of the Supreme</p>	<p style="text-align: right;">Page 306</p> <p>1 A. Yes. 2 Q. And this, as Mr. Strauch noted, is the 3 2023 version, right? 4 A. Correct. 5 Q. And so it does not include that 6 catch-all that you talked about earlier, correct? 7 A. Correct. That was removed. 8 Q. That used to be Section No. 10? 9 A. Yes. 10 Q. So your duties as the Supreme Court 11 Administrator include things like preparing and 12 presenting the judicial budget to the Legislature? 13 A. Correct. 14 Q. And ensuring that the judiciary IT 15 conforms with the State strategic information 16 technology plan, right? 17 A. To the extent possible. 18 Q. To the extent possible, right. And 19 administering State funding for District Courts? 20 A. Correct. 21 Q. Ms. McLaughlin, if we could switch gears 22 for just a minute, and talk about the Montana 23 Judges Association. The Montana Judges 24 Association is not a State agency, is it? 25 A. No. It is made up of State Judges, but</p>
<p style="text-align: right;">Page 305</p> <p>1 Court; it would apply to District Court Judges; 2 Water Court Judges; and then Judges within the 3 Courts of Limited Jurisdiction who use State-owned 4 computers. 5 Q. Thank you. And this policy is presented 6 to all Judicial Branch employees when they're 7 hired? 8 A. Yes. 9 Q. And they're expected to know this 10 policy? 11 A. Yes. 12 Q. And to follow it? 13 A. Yes. 14 Q. Now, Ms. McLaughlin, could you please 15 turn to Respondent's Exhibit H. 16 A. Did you say "H"? 17 Q. Yes, "H" as in Henry. 18 A. Just one second. Yes, sir. 19 Q. This I believe is a copy of the statute 20 that Mr. Strauch asked you about earlier. This is 21 the statute that lists your duties as the Court 22 Administrator, right? 23 A. Correct. 24 Q. And that's for the record Code number, 25 or Code Section 3-1-702; is that right?</p>	<p style="text-align: right;">Page 307</p> <p>1 it is not a State agency. 2 Q. It's a private association? 3 A. I believe so. 4 Q. And in fact, it's a lobbying 5 organization, right? 6 A. I don't know that I would characterize 7 it as a lobbying organization. I think they have 8 a broader responsibility than that. 9 Q. If you could with me open, please, 10 Respondent's Exhibit F, "F" as in Frank. 11 A. Yes. 12 Q. If you could, go with me, please -- let 13 me find you the right page. This is one of those 14 exhibits I mentioned earlier. I'll point you to 15 the PDF page number of the exhibit. If I could 16 point you to PDF Page 10 of this exhibit. There 17 is an email at the bottom of that page on the 18 printout -- 19 A. Just one second, Mr. Green. I'm not 20 there yet. So I think I'm on the correct page. 21 Maybe you could -- 22 Q. Sure. So this is an email from you. 23 It's dated Wednesday, March 24th, 2021 at 4:43 24 p.m. 25 A. Yes.</p>

<p style="text-align: right;">Page 308</p> <p>1 Q. And let me just read that first</p> <p>2 paragraph of that email from you. It says, "It's</p> <p>3 been introduced HB 685. I can send it out to the</p> <p>4 membership for a vote." Did I read that</p> <p>5 correctly?</p> <p>6 A. Yes.</p> <p>7 Q. So you were sending out to a vote -- You</p> <p>8 were sending this out to the membership of the</p> <p>9 Montana Judges Association; is that right?</p> <p>10 A. (Inaudible)</p> <p>11 Q. The membership that you're referring to,</p> <p>12 was it the membership of the Montana Judges</p> <p>13 Association?</p> <p>14 A. I was sending it out to the District</p> <p>15 Court Judges, correct.</p> <p>16 Q. I'm sorry. Is that the members of the</p> <p>17 Montana Judges Association?</p> <p>18 A. Yes, but there are also, as I</p> <p>19 understand, retired Judges who are members of the</p> <p>20 association as well.</p> <p>21 Q. And you were soliciting their vote on</p> <p>22 views of -- about HB 685; is that right?</p> <p>23 A. Repeat that again. I was talking over</p> <p>24 the top of you.</p> <p>25 Q. The information that you were collecting</p>	<p style="text-align: right;">Page 310</p> <p>1 They are governed by the Judicial Standards</p> <p>2 Commission, which I think is referenced in this</p> <p>3 email.</p> <p>4 Q. Great. Thank you. If you could please</p> <p>5 turn to Page 15 of this exhibit. This is an email</p> <p>6 from you March 24th.</p> <p>7 A. Could you just hold on for a second.</p> <p>8 I'm not there yet. I'm a little slower than you</p> <p>9 are.</p> <p>10 Q. No, sorry. I was trying to give you</p> <p>11 some information to make sure we're on the same</p> <p>12 page.</p> <p>13 A. Okay.</p> <p>14 Q. This is your email March 24th, 5:02 p.m.</p> <p>15 A. Yes.</p> <p>16 Q. It says, "Folks, we need the legislative</p> <p>17 committee to weigh in on this on behalf of MJA.</p> <p>18 It will come up for a hearing quickly, so MJA will</p> <p>19 need to act quickly;" did I read that correctly?</p> <p>20 A. Yes.</p> <p>21 Q. If you could please turn with me next to</p> <p>22 Page 25 of this exhibit, PDF Page 25.</p> <p>23 A. Okay. I think I'm there. Could you</p> <p>24 confirm what you're seeing?</p> <p>25 Q. Sure. This is an email from you</p>
<p style="text-align: right;">Page 309</p> <p>1 when you asked, or said you would send it out to</p> <p>2 the membership for a vote, the vote you were</p> <p>3 trying to solicit -- or the votes you were</p> <p>4 gathering was your means to gather information</p> <p>5 about 685 from the Montana Judges Association; is</p> <p>6 that right?</p> <p>7 A. Correct.</p> <p>8 Q. Would you look with me, please, on the</p> <p>9 next page in the PDF Page 11. This is an email</p> <p>10 from you March 24th, 2021, 4:47 p.m.</p> <p>11 A. Correct.</p> <p>12 Q. In this first paragraph it says -- I</p> <p>13 think you wrote, "Hi. HB 685 was introduced.</p> <p>14 Obviously it has a lot of problems, but the</p> <p>15 largest is probably allowing a citizen commission</p> <p>16 to oversee the compliance by Judges with the Rules</p> <p>17 of Judicial Conduct. The District Court will</p> <p>18 start working on it, but would ask the MMA to do</p> <p>19 the same." Did I read that correctly?</p> <p>20 A. Yes.</p> <p>21 Q. Is the MMA there a reference to the MJA?</p> <p>22 A. No. That is incorrect. The MMA is the</p> <p>23 Magistrate organization, and that is the Judges in</p> <p>24 the Courts of Limited Jurisdiction, so in Montana,</p> <p>25 that would be City Courts and Justice Courts.</p>	<p style="text-align: right;">Page 311</p> <p>1 Thursday, March 25, 8:03 a.m.</p> <p>2 A. Yes. Correct.</p> <p>3 Q. Okay. Great. So I want to look at the</p> <p>4 second email down in that string, where it says,</p> <p>5 "Beth, do we know what committee will hear this</p> <p>6 and who the members are, so that we can write</p> <p>7 them?" Did I read that correctly?</p> <p>8 A. Yes.</p> <p>9 Q. That was an inquiry from the Judge to</p> <p>10 you on March 24, 2021?</p> <p>11 A. Correct.</p> <p>12 Q. And then you responded at the top of</p> <p>13 that email chain, "It will likely go to House</p> <p>14 Judiciary. Rep. Usher is the Chairman, your rep.</p> <p>15 It might be that we need you to testify via Zoom.</p> <p>16 I'll try to figure out what they are doing with it</p> <p>17 today and let you know." Did I read that</p> <p>18 correctly?</p> <p>19 A. You did.</p> <p>20 MR. STRAUCH: Mr. Chairman.</p> <p>21 CHAIR OGLE: Yes.</p> <p>22 MR. STRAUCH: I have an objection to</p> <p>23 this entire line of questioning. May I be heard,</p> <p>24 please?</p> <p>25 CHAIR OGLE: Yes.</p>

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<p>1 MR. STRAUCH: Mr. Chairman, there are --</p> <p>2 this is one of several exhibits that consist of</p> <p>3 copies of lobbying, quote unquote, lobbying</p> <p>4 emails, and this is an improper collateral attack</p> <p>5 of the decision of the Montana Supreme Court in</p> <p>6 the McLaughlin case. And specifically, Mr.</p> <p>7 Chairman, it can't be relitigated here. The Morin</p> <p>8 case stands for that.</p> <p>9 But McLaughlin, in the Supreme Court</p> <p>10 decision in McLaughlin, 2021 Montana 178</p> <p>11 Paragraphs 33 to 37, the Supreme Court decided</p> <p>12 this issue of whether there was improper use by</p> <p>13 Ms. McLaughlin of emails for polling purposes, and</p> <p>14 also misuse of Supreme Court systems.</p> <p>15 And specifically I quote, "To the extent</p> <p>16 the Court Administrator coordinates or facilitates</p> <p>17 District Judges contacts with legislators, her</p> <p>18 activity is not lobbying." Quote, "As the liaison</p> <p>19 between the Judicial Branch and the Legislature,</p> <p>20 the Court Administrator acts within her job duties</p> <p>21 when she coordinates contacts between District</p> <p>22 Court Judges and legislators, or conducts a poll</p> <p>23 to allow District Court Judges through the Montana</p> <p>24 Judges Association to provide the Legislature with</p> <p>25 relevant information regarding how proposed</p>	<p>1 was Ms. McLaughlin's duty to do such, and it's not</p> <p>2 an issue in this case any further, and it cannot</p> <p>3 be an issue in this case because it amounts to a</p> <p>4 collateral attack on a Montana Supreme Court</p> <p>5 decision that was petitioned for cert to the US</p> <p>6 Supreme Court, and they denied that petition.</p> <p>7 And the case that I cited, the Morin</p> <p>8 case, is at PR-17-0448. It's a decision rendered</p> <p>9 October 17th of 2018. In fact we used this</p> <p>10 decision for a different proposition, and attached</p> <p>11 it to our brief on the motion in limine adopted</p> <p>12 before.</p> <p>13 I quote the Morin decision, the Montana</p> <p>14 Supreme Court, quote, "But it is well settled that</p> <p>15 judgments of Courts which are general</p> <p>16 jurisdiction, and whose prima facie authority</p> <p>17 therefore extends to questions of the kind</p> <p>18 purported to have been adjudicated, are entitled</p> <p>19 to every presumption of validity, and that they</p> <p>20 are not open to collateral attack."</p> <p>21 So I would submit, Mr. Chairman, that</p> <p>22 going through lobbying emails that the Supreme</p> <p>23 Court has already -- I'm using quotes, air quotes</p> <p>24 around lobbying -- going through emails, lobbying</p> <p>25 emails, the Montana Supreme Court has already</p>
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<p>1 legislation will affect Judicial Branch</p> <p>2 functions," citing 3-1-702(10), the 2019 version</p> <p>3 of the statute, providing, parentheses, "providing</p> <p>4 that Court Administrator duties include those,"</p> <p>5 quote, "that the Supreme Court may assign," end</p> <p>6 quote.</p> <p>7 Quote, "It is undisputed that members of</p> <p>8 coordinate branches, including elected officials,</p> <p>9 department heads, and other appointed officials</p> <p>10 routinely respond to legislative requests on</p> <p>11 matters related to the department or branch. In</p> <p>12 that same vein, Rule 3.1 of the Montana Code of</p> <p>13 Judicial Conduct allows Judges to use Court,"</p> <p>14 quote, "premises, staff, stationery, equipment, or</p> <p>15 other resources for incidental use for activities</p> <p>16 that concern the law, the legal system, or the</p> <p>17 administration of justice," end quote, because</p> <p>18 quote, "Judges are uniquely qualified to engage in</p> <p>19 the extra-judicial activities that concern such</p> <p>20 matters," and there's an end quote there, and they</p> <p>21 cite the Code of Judicial Conduct 3.1 and Comment</p> <p>22 1.</p> <p>23 So the Montana Supreme Court has decided</p> <p>24 this entire issue of these emails, that it was an</p> <p>25 appropriate use of Court equipment, and that it</p>	<p>1 determined, fully determined, and a binding</p> <p>2 decision, is not an improper use of judicial</p> <p>3 resources, and not misuse by Ms. McLaughlin of her</p> <p>4 duties.</p> <p>5 So I would submit this entire line of</p> <p>6 questioning is irrelevant, and it's an improper</p> <p>7 collateral attack on the Supreme Court decision.</p> <p>8 CHAIR OGLE: Do you care to respond, Mr.</p> <p>9 Green?</p> <p>10 MR. GREEN: I would, Mr. Chairman.</p> <p>11 Thank you. I think our first response is we're</p> <p>12 not actually attacking collaterally the Montana</p> <p>13 Supreme Court's holding. As I understand it, I</p> <p>14 don't see anywhere in the Rules of Evidence that</p> <p>15 collateral attack is an appropriate evidentiary</p> <p>16 objection.</p> <p>17 I think Mr. Strauch objected to it on</p> <p>18 relevance, but I think yesterday this panel heard</p> <p>19 -- lost track of the total time -- but five or six</p> <p>20 or seven hours of testimony getting to the point</p> <p>21 of what the Attorney General's Office did, and why</p> <p>22 it did it, and in particular what was its state of</p> <p>23 mind and its client's state of mind at the time</p> <p>24 these actions occurred.</p> <p>25 And I think this information here is</p>

<p style="text-align: right;">Page 316</p> <p>1 directly relevant to what the Legislature knew, 2 and what the Attorney General's Office knew, and 3 lays the foundation for the very actions that are 4 at issue here. It's the reason my client and his 5 office did what he did under these set of 6 underlying facts, and I think it's directly and 7 highly relevant. 8 CHAIR OGLE: Mr. Strauch. 9 MR. STRAUCH: That relates -- What 10 Counsel is speaking of relates to other Judicial 11 Branch emails. They have nothing whatsoever to do 12 with polling, quote unquote, on various 13 legislative matters. 14 These emails, the polling emails, are 15 obviously still in the possession of the Attorney 16 General, having been produced here as an exhibit 17 that has no Bates numbers on it; and nor was there 18 any argument below regarding the entitlement to 19 emails specifically on various legislation pending 20 at the time. 21 And so I'm back to my objection which is 22 relevance. That's not a concern in this case. 23 This case is about statements made in the course 24 of litigation concerning emails that aren't 25 properly in the public domain, and concerning</p>	<p style="text-align: right;">Page 318</p> <p>1 ruling is that that is irrelevant to those 2 statements? 3 CHAIR OGLE: The questioning and 4 testimony with regard to the use of government 5 computers by the Court Administrator's office is 6 irrelevant, and the objection is sustained. 7 MR. GREEN: Thank you, Mr. Chairman. 8 Q. (BY MR. GREEN) Let me ask you about 9 this then, Ms. McLaughlin. If you could turn with 10 me to Exhibit I. 11 A. Yes, sir. 12 Q. Exhibit I. This is the -- to make sure 13 we're looking at the same page, this is an email 14 from you dated Friday, January 29th, 2021? 15 A. Yes, sir. 16 Q. And the subject line of that email is SB 17 140? 18 A. Yes, sir. 19 Q. And it looks like this was sent to a 20 number of recipients. 21 A. Correct. 22 Q. And that would include it looks like all 23 seven members of the Montana Supreme Court? 24 A. It appears they were on the list, yes. 25 Q. And if I could read this email, it says,</p>
<p style="text-align: right;">Page 317</p> <p>1 specifically statements made by the Attorney 2 General in briefing on that issue -- not that 3 motions were filed, not that petitions were filed 4 -- but in light of the inflammatory and derogatory 5 language used there. 6 There is virtually no relevance, and I 7 did in fact object on relevance, which is 8 obviously in the rules at 401 and 402, that speaks 9 to the requirement that evidence needs to shed 10 light on, at least be probative as to a claim or 11 issue in dispute. And there cannot be a claim or 12 issue in this dispute in this case about the 13 propriety of these emails because the Montana 14 Supreme Court said so. 15 CHAIR OGLE: Very well. In response, 16 Mr. Green, certainly testimony about the Attorney 17 General's comments and comments from his office 18 aren't directly related to the allegations in this 19 Complaint that are relevant to this proceeding, so 20 the objection is sustained. 21 MR. GREEN: Just to make sure I 22 understand, Mr. Chairman, the Complaint is 23 alleging intemperate statements and related 24 issues, and this evidence we're offering to 25 explain why those statements were made, and the</p>	<p style="text-align: right;">Page 319</p> <p>1 "Folks, attached is a bill that Judge Todd has 2 asked MJA to review and take a position on. 3 Please take a look at it. Sorry to do this to you 4 again, but use the voting buttons accept/reject on 5 your tool bar. If you can't find the voting 6 button, just shoot me a note." Did I read that 7 correctly? 8 A. Yes. 9 Q. And the statement in your email, "Sorry 10 to do this to you again," does that imply that 11 this was not the first poll that had been taken in 12 January of 2021? 13 A. I don't know that. I can't recall. 14 Q. And the Attorney General's Office did 15 not disclose these emails, right? 16 A. I'm sorry. Say that again. 17 Q. I said the Attorney General's Office did 18 not disclose these emails; is that correct? 19 A. I have no idea who disclosed the emails. 20 Q. And Ms. McLaughlin, if you could please 21 turn with me to Page 6 of the PDF. Actually I'm 22 sorry. Wrong number. Page 9 of the PDF. 23 A. Sure. 24 Q. This is an email from Judge Krueger. 25 A. Correct.</p>

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<p>1 Q. It's dated Sunday, January 31 at, it 2 looks like 3:38 p.m.? 3 A. Correct. 4 Q. And this email says, "I am also 5 adamantly opposed to this bill;" is that right? 6 A. Yes. 7 Q. Was Judge Krueger later appointed to sit 8 on the Montana Supreme Court to decide the Brown 9 versus Gianforte case? 10 A. I don't think he was part of the panel 11 that decided it in the final decision. I don't 12 recall whether he was on it originally or not. 13 Q. Thank you. Could you turn to the last 14 page of this exhibit, please. I think it's Page 15 12. 16 A. Correct. I think I have it. 17 Q. I'm probably going to mispronounce this 18 name. It looks like it's an email from Nicholas 19 Murnion; is that right? 20 A. Correct. 21 Q. And was he a Judge? 22 A. Yes. 23 Q. And this email says, "I also adamantly 24 oppose;" is that right? 25 A. Correct.</p>	<p>1 Conduct Rule 2.11(a). 2 And the Supreme Court concluded that the 3 Legislature did not have authority, constitutional 4 or otherwise, to investigate or make findings 5 regarding the alleged judicial misconduct, 6 specifically the polling emails that we're looking 7 at. 8 It's a matter that was decided. It is 9 not relevant to this case. This case is not about 10 the propriety of any judicial conduct, that is, 11 the Supreme Court said, "The exclusive authority 12 of the Judicial Standards Commission." 13 So again, I would raise an objection to 14 this line of questioning as well, because it is 15 entirely irrelevant to any claim or issue in this 16 case. 17 CHAIR OGLE: Mr. Green. 18 MR. GREEN: Mr. Chairman, if I could 19 respond to that. I think a couple responses. I 20 would note that these emails are also in the 21 record as part of ODC's exhibits. This is ODC 22 Exhibit No. 5 also has these emails in. 23 But I think again this gets to my point 24 about the impetus for all of the actions. This 25 was really the start of everything that happened,</p>
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<p>1 Q. And if you could go back to the page 2 before Page 11. This was an email dated Monday, 3 February 1st, 2021. 4 A. Correct. 5 Q. And this email says, "Beth, I'm opposed 6 to this bill;" did I read that correctly? 7 A. Yes. 8 MR. STRAUCH: Mr. Chairman. 9 CHAIR OGLE: Yes. 10 MR. STRAUCH: I have an objection. May 11 I -- to this line of questioning as well. 12 CHAIR OGLE: Yes. 13 MR. STRAUCH: The emails that Counsel is 14 going through in detail are emails concerning SB 15 140, which was the subject of the Brown 16 litigation. And here again, this is an issue that 17 the Montana Supreme Court decided in McLaughlin. 18 It's McLaughlin 2021 Montana 178. It's at 19 Paragraphs 38 to 54. 20 Quote, "Any concern about a Judge or 21 Justice prejudging a case, or making statements 22 about matters pending, or that could come before 23 the Courts, would be within the exclusive 24 authority of the Judicial Standards Commission and 25 the Supreme Court," citing the Code of Judicial</p>	<p>1 why we're here today. And if I could be granted a 2 little bit of leeway to connect what I've just 3 been talking about to my next exhibit, if I could 4 ask the Chair to hold on ruling on this objection 5 until I get to the next couple of exhibits to try 6 to tie it together. 7 CHAIR OGLE: Okay. 8 Q. (BY MR. GREEN) If you could, Ms. 9 McLaughlin, turn with me to exhibit, Respondent's 10 Exhibit C, Charlie. 11 A. Yes, sir. 12 Q. You remember Ms. Abra Belke; is that 13 right? 14 A. I don't know Ms. Belke. I remember her 15 name from emails. 16 Q. And in 2021, she was the Chief of Staff 17 to the Montana State Senate Republican leadership; 18 is that correct? 19 A. I have no idea what her job was. 20 Q. If you could look with me on the second 21 page of Exhibit C. 22 A. Yes, sir. 23 Q. Under the signature block there, "Chief 24 of Staff to the Republican leadership, Montana 25 State Senate;" did I read that correctly?</p>

<p style="text-align: right;">Page 324</p> <p>1 A. Yes.</p> <p>2 Q. If we could take a look at her email.</p> <p>3 She says, "Hello, Ms. McLaughlin. The President</p> <p>4 received a copy of the attached order filed today</p> <p>5 with the Clerk of the Supreme Court. On Page 2,</p> <p>6 the order describes the vote total on MJA's poll</p> <p>7 re: SB 140 as being 34 to three. The order</p> <p>8 includes no breakdown of which judges voted which</p> <p>9 way." Did I read that correctly?</p> <p>10 A. Yes.</p> <p>11 Q. Then the next paragraph, "While the</p> <p>12 President is comfortable waiting until Friday to</p> <p>13 receive the bulk of the requested information, we</p> <p>14 are specifically requesting the breakdown for this</p> <p>15 34 to three count by close of business today."</p> <p>16 Did I read that correctly?</p> <p>17 A. Yes.</p> <p>18 Q. And if you look back at Page 1 of this</p> <p>19 exhibit. This email from Ms. Belke is dated</p> <p>20 Wednesday, April 7th, 2021 at 10:19 a.m.; is that</p> <p>21 right?</p> <p>22 A. Mr. Green, I'm sorry. You lost me.</p> <p>23 What is dated ten nineteen?</p> <p>24 Q. The email, if you look at the -- not ten</p> <p>25 nineteen. That's the time. Sorry. The date of</p>	<p style="text-align: right;">Page 326</p> <p>1 Supreme Court's order of today noting the six</p> <p>2 Associate Justices would be sitting on the case</p> <p>3 without a District Judge to replace Chief Justice</p> <p>4 McGrath;" did I read that right?</p> <p>5 A. Yes.</p> <p>6 Q. And then the next sentence, "I did not</p> <p>7 retain records of the vote by Judges other than</p> <p>8 the total;" is that right?</p> <p>9 A. Yes.</p> <p>10 Q. This email is also dated Wednesday, or</p> <p>11 to be more precise, your response to Ms. Belke was</p> <p>12 dated Wednesday, April 7th at 4:56 p.m.; is that</p> <p>13 right?</p> <p>14 A. That is correct.</p> <p>15 Q. And then the last paragraph in your</p> <p>16 email, Ms. McLaughlin, "As I said, I will make</p> <p>17 every effort to search for and get the other</p> <p>18 requested information to the President and the</p> <p>19 speaker on Friday;" did I read that correctly?</p> <p>20 A. You did.</p> <p>21 Q. Thank you. If you can also turn with me</p> <p>22 next to Exhibit D, please, "D" as in David.</p> <p>23 A. Yes, sir.</p> <p>24 Q. This is another two part email chain,</p> <p>25 and the first email at the bottom again comes from</p>
<p style="text-align: right;">Page 325</p> <p>1 the email. Sorry about that. The date of the</p> <p>2 email, Wednesday, April 7th.</p> <p>3 A. Yes. I see that. I got confused.</p> <p>4 Q. Great. Okay. Thank you. No problem.</p> <p>5 So this email was sent from the State Senate Chief</p> <p>6 of Staff to you on Wednesday, April 7th?</p> <p>7 A. On Wednesday, April 7th.</p> <p>8 Q. Is that right?</p> <p>9 A. Yes. I thought you said Monday.</p> <p>10 Q. Sorry. Maybe I did. If I misspoke, I</p> <p>11 apologize. Wednesday, April 7th. And that was</p> <p>12 the day before the April 8th subpoena we've been</p> <p>13 talking about?</p> <p>14 A. Correct.</p> <p>15 Q. And this is a request from the State</p> <p>16 Senate to get information from you relating to the</p> <p>17 poll on SB 140; is that right?</p> <p>18 A. Correct.</p> <p>19 Q. And if we could look at the top of</p> <p>20 Exhibit C, your email response. I think it says,</p> <p>21 "Ms. Belke, attached are the two items I can</p> <p>22 identify in my records related to SB 140." Did I</p> <p>23 read that right?</p> <p>24 A. Correct.</p> <p>25 Q. "The first is the email attached to the</p>	<p style="text-align: right;">Page 327</p> <p>1 Abra Belke; is that right?</p> <p>2 A. Tell me what exhibit. You said Exhibit</p> <p>3 E?</p> <p>4 Q. Sorry, "D" as in David.</p> <p>5 A. Sorry. Just one second. "D."</p> <p>6 Q. Correct.</p> <p>7 A. Okay. At the top it has the name</p> <p>8 Zimbira?</p> <p>9 Q. Correct. And the regarding line is</p> <p>10 "Follow up to your 4/7 email."</p> <p>11 A. Yes, sir.</p> <p>12 Q. So if we look at the first email in this</p> <p>13 chain, this is another email from Abra Belke; is</p> <p>14 that right?</p> <p>15 A. Correct.</p> <p>16 Q. And this one is dated Thursday, April</p> <p>17 8th?</p> <p>18 A. Correct.</p> <p>19 Q. And it says, "Ms. McLaughlin, we have</p> <p>20 additional questions. Please clarify the</p> <p>21 following: Number one, will you be producing the</p> <p>22 documents requested by the Legislature in</p> <p>23 accordance with MCA 3-1-702, or are you providing</p> <p>24 notice that you will produce nothing further?"</p> <p>25 Did I read that correctly?</p>

<p style="text-align: right;">Page 328</p> <p>1 A. You did. 2 Q. And then it has a No. 2, "Did you delete 3 emails and records related to the MJA Judges poll 4 on SB 140?" Did I read that correctly? 5 A. Yes. 6 Q. And then No. 3, "Identify the Judges who 7 called you to vote on the SB 140 poll." Did I 8 read that correctly? 9 A. Yes. 10 Q. And then No. 5, "Identify the Judges who 11 responded to the SB 140 poll who did not use the 12 'reply all' feature." Did I read that correctly? 13 A. Yes. 14 Q. Then last the two paragraphs from Ms. 15 Belke, "We expect a response to the above 16 inquiries today. We continue to expect your 17 production of the requested documents no later 18 than COB tomorrow April 8th." Did I read that 19 correctly? 20 A. You did. 21 Q. And I think that might have been a typo, 22 because she said "tomorrow April 8th," but in fact 23 she sent it on the 8th, right? 24 A. Yes. 25 Q. And if we could take a look, too, at the</p>	<p style="text-align: right;">Page 330</p> <p>1 we've just been talking about, these are efforts 2 by the State Legislative Branch to request 3 information from you related to the SB 140 poll; 4 is that right? 5 A. Yes, sir. 6 Q. And those requests came before April 7 8th; is that correct? 8 A. The request came on April 8th. 9 Q. Exhibit C, could you look with me at 10 Exhibit C again. The date on the email from 11 Exhibit C is April 7th; is that right? 12 A. Just one sec, sir. Yes, April 7th at 13 10:19. 14 Q. Great. Thank you. If you can turn with 15 me please back to Exhibit A for a few moments. 16 CHAIR OGLE: Are you finished with that 17 line of questioning, Mr. Green? 18 MR. GREEN: For now I am, Mr. Chairman. 19 CHAIR OGLE: I'm going to sustain the 20 objection. It looks clear to me from these emails 21 that she turned over what information she had, and 22 she hadn't kept a record of verbal communications 23 from Judges. So the objection is sustained. It's 24 already been dealt with by the Supreme Court. 25 MR. GREEN: Thank you, Mr. Chairman.</p>
<p style="text-align: right;">Page 329</p> <p>1 top, your response, the first email in this chain 2 on that same exhibit, Exhibit David. You wrote, 3 "Ms. Belke, thanks for your note. I provided the 4 information that I have in my possession for SB 5 140. I did not retain the emails or any paper 6 notes other than what I have produced." Did I 7 read that correctly? 8 A. Yes. 9 Q. And then the next paragraph down, "I 10 have copied the President and Speaker so I can be 11 clear that I have no nefarious intent. Instead I 12 have to acquiesce to sloppiness." Did I read that 13 correctly? 14 A. You did. 15 Q. The next sentence, "Nobody is more 16 dismayed than I that I do not have the documents 17 related to SB 140, as I always promptly respond to 18 inquiries. Clearly it appears the Judicial Branch 19 should consider policy changes to provide 20 specifics around retention of email and other 21 administrative documents, but it is not something 22 I can do retroactively." Did I read that 23 correctly? 24 A. You did. 25 Q. So Ms. McLaughlin, Exhibits D and C that</p>	<p style="text-align: right;">Page 331</p> <p>1 Q. (BY MR. GREEN) Let's go back to Exhibit 2 A, please, Ms. McLaughlin. 3 A. Did you say "A" or "H," sir? 4 Q. I'm sorry. I said "A" as in apple. 5 A. All right. I have it. 6 Q. I want to talk for just a few minutes 7 about some of the specifics of this Judicial 8 Branch email use policy that was in effect in 9 2021. If you could turn with me please to the 10 second page of this policy, Page 2 of Exhibit A. 11 A. Yes, sir. 12 Q. Do you see that entered there that says 13 2.0, "Misuse of email"? 14 A. Yes, sir. 15 Q. And the paragraph -- excuse me -- the 16 first sentence under that header, "The following 17 items represent but do not constitute either an 18 exhaustive or exclusive listing of the misuse of 19 State email resources;" did I read that correctly? 20 A. Yes. 21 Q. And then Subpart 2.3, "Sending messages 22 with personal identifiable information (PII), or 23 protected health information (PHI) in an unsecured 24 manner;" did I read that correctly? 25 A. Yes, sir.</p>

<p style="text-align: right;">Page 332</p> <p>1 Q. Let's go back to the first page of this 2 policy, please. If we could start with the second 3 paragraph of that policy. "The State-provided 4 electronic email, email system is to be used for 5 the conduct of State and local government business 6 and delivery of government services." Did I read 7 that correctly? 8 A. Yes, sir. 9 Q. And then the fourth paragraph starts, 10 "All messages," "All messages created, sent, or 11 retrieved over the State's systems are the 12 property of the State of Montana." Did I read 13 that correctly? 14 A. You did. 15 Q. "Privacy of email is not guaranteed. 16 Employees should not have the expectation of 17 privacy for any messages." Did I read that 18 correctly? 19 A. You did. 20 Q. "It is the expectation that any message 21 sent that's subject to public scrutiny. Employees 22 should never send any messages with personally 23 identifying information (PII), or protected health 24 information (PHI) over the email system." Did I 25 read that correctly?</p>	<p style="text-align: right;">Page 334</p> <p>1 MR. STRAUCH: This was the heart of the 2 issue decided by the Montana Supreme Court in 3 McLaughlin. The legislative position advanced by 4 the Attorney General was that the Legislature had 5 proper authority to investigate these emails, and 6 they offered three reasons. 7 No. 1, that there was supposed improper 8 deletion of emails; the Supreme Court rejected 9 that in Paragraph 23 to 31, noting that the 10 Judicial Branch, which was part of, which is who 11 Ms. McLaughlin works for, does not have at the 12 time a retention policy requiring the production 13 of emails. 14 No. 2, the second reason the legislators 15 said that they had the authority to do this was 16 the use of State resources. I've already covered 17 that with the Commission, and you sustained that 18 objection. 19 And No. 3, the legislators suggested 20 that it had the proper authority to undertake this 21 investigation because of supposed improper 22 statements by the Judges, and the Supreme Court 23 said no, that is solely within the exclusive 24 province of the Judicial Standards Commission, not 25 the legislative body.</p>
<p style="text-align: right;">Page 333</p> <p>1 A. You did. 2 Q. And if we could go back to the second 3 page, Header 3.0, "Guidelines and 4 recommendations." 5 A. Yes, sir. 6 Q. The fourth paragraph down under that 7 header, ma'am? 8 A. The fourth paragraph? 9 Q. Fourth, correct. "In drafting email and 10 sending email messages, employees are reminded 11 that they should not include anything they are not 12 prepared for the public to read." Did I read that 13 correctly? 14 A. You did. 15 Q. Ms. McLaughlin, the Legislature had a 16 right to rely on the plain language of this 17 policy, didn't it? 18 MR. STRAUCH: Mr. Chairman, objection. 19 The Supreme Court specifically said it did not. 20 That's the McLaughlin case. That's the entire 21 decision of the McLaughlin case from Paragraphs 23 22 all the way to 54. The Supreme Court looked at if 23 all the purposes -- excuse me. May I approach so 24 I can use the microphone? 25 MR. GREEN: Certainly.</p>	<p style="text-align: right;">Page 335</p> <p>1 That question is entirely a challenge to 2 McLaughlin, a matter that the Supreme Court 3 decided and clearly stated without doubt that the 4 Legislature did not have authority. 5 So I object to the question, and I 6 believe this is a violation of you earlier 7 sustaining the objection. 8 CHAIR OGLE: This objection is sustained 9 also. I thought we had previously dealt with 10 these issues on the prior ruling sustaining an 11 objection. So please refrain from further 12 questioning along these lines, Mr. Green. 13 MR. GREEN: Thank you, Mr. Chairman. I 14 understand Mr. Strauch's point, and we don't 15 dispute that the Montana Supreme Court decided 16 these issues, and my questioning is simply trying 17 to get to the Legislature's state of mind 18 pre-decision, and while this was still an open 19 question and being litigated. So this was a 20 question specifically about the Legislature's 21 belief or the reasonableness of it in April, not 22 in June -- or excuse me -- July after the decision 23 had been rendered. 24 CHAIR OGLE: All right. Your position 25 is noted for the record.</p>

<p style="text-align: right;">Page 336</p> <p>1 MR. GREEN: All right. Thank you, Mr. 2 Chairman. 3 Q. (BY MR. GREEN) All right, Ms. 4 McLaughlin, if I could ask you a couple of 5 questions about the original petition you filed in 6 the Montana Supreme Court over the weekend after 7 you received this subpoena. 8 A. Yes, sir. 9 Q. I believe you testified earlier that you 10 filed that original action because you didn't want 11 the Department of Administration to disclose 12 emails in response to the Legislature's subpoena 13 that contained confidential information; is that 14 correct? 15 A. That is correct. 16 Q. I think you said your position was that 17 there were three kinds of confidential information 18 you worried would become public; is that right? 19 A. I gave examples using three kinds of 20 confidential information, correct. 21 Q. And the first example was about the 22 personal problems of employees' family members; is 23 that right? 24 A. Yes, sir. 25 Q. And the second example was about a child</p>	<p style="text-align: right;">Page 338</p> <p>1 Q. I think you testified earlier that you 2 would not receive as a general matter in your 3 email any of those types of records or documents; 4 is that right? 5 A. As a general matter, I would not have 6 information in my email related to decisions made 7 by the Justices in disposition of a final opinion. 8 I'm not even, to be honest, sure what that means. 9 Q. If you could look with me for a few 10 minutes at I believe it's ODC's Exhibit No. 12. 11 A. Yes, sir. 12 Q. This is your petition for original 13 jurisdiction and emergency request to quash the 14 subpoena; is that right? 15 A. Yes, sir. 16 Q. And if you could please turn with me to 17 ODC, this is Bates stamp number at the bottom ODC 18 3380. 19 A. Okay. 20 Q. There are a number of numbered 21 paragraphs on this page, but toward the bottom it 22 has Paragraph No. 5, "In her capacity as Court 23 Administrator." Do you see that paragraph, ma'am? 24 A. Yes, sir. 25 Q. And the last -- so I'll just read it.</p>
<p style="text-align: right;">Page 337</p> <p>1 abuse and neglect case; is that right? 2 A. Correct. 3 Q. And the third kind was about Judicial 4 Standards Commission investigations, emails 5 relating to that investigation; is that right? 6 A. Correct. 7 Q. If I could get you to turn with me to 8 exhibit, ODC Exhibit No. 6. Mr. Strauch's Exhibit 9 No. 6. 10 A. Yes, sir. 11 Q. This was the subpoena that you received 12 a courtesy copy of; is that right? 13 A. This was the subpoena served on the 14 Department of Administration on April 8th. I 15 received a copy on April 9th. 16 Q. And if we could look midway down that 17 page, Paragraph No. 3, you talked earlier with Mr. 18 Strauch about the exclusion that the Legislature 19 put into this, and you said this -- 20 A. Yes, sir. 21 Q. I'm sorry. I'll just read that again. 22 "This request excludes any emails and attachments 23 related to decisions made by the Justices in 24 disposition of a final opinion;" is that right? 25 A. Yes.</p>	<p style="text-align: right;">Page 339</p> <p>1 "In her capacity as Court Administrator, given her 2 many diverse duties, McLaughlin receives a wide 3 variety of emails and attachments that implicate 4 the rights and privileges of other parties. These 5 emails and attachments include, but are not 6 limited to;" did I read that right? 7 A. Yes, sir. 8 Q. And then Subparagraph (c), "Discussions 9 with Judges about case processing and ongoing 10 litigation in pending or potential cases;" did I 11 read that right? 12 A. You did. 13 Q. And then if you could turn the page, 14 please, to ODC 3381. 15 A. Yes. 16 Q. Paragraph (g). "Copied on exchanges 17 between Judges in which advice about case law and 18 potential decisions were being sought from other 19 Judges" ? 20 A. Yes, sir. 21 Q. Then Paragraph (h), "Copies on exchanges 22 between Judges in which information was exchanged 23 about judicial work product;" did I read that 24 correctly? 25 A. You did.</p>

<p style="text-align: right;">Page 340</p> <p>1 Q. That's the kind of information the 2 legislative subpoena was excluding, was it not? 3 MR. STRAUCH: Objection, 4 mischaracterization. 5 A. No, the legislative subpoena was 6 specifically excluding decisions made by Justices, 7 which I took to mean Justices on the Montana 8 Supreme Court. When I see "Judges," I assume 9 District Court Judges, Water Court Judges, or 10 Judges in the Courts of Limited Jurisdiction. So 11 I don't use the word "Justice" and "Judges" 12 interchangeably. 13 Q. (BY MR. GREEN) Thank you, Ms. 14 McLaughlin. Could I also have you look at 15 Subparagraph (f), "Information about potential 16 ongoing security risks to individual Judges, 17 including communications with law enforcement"? 18 A. Yes, sir. 19 Q. Does the Legislature fund security for 20 Judges of the Judicial Branch? 21 A. No. Judges, the security for District 22 Court Judges is the responsibility of local 23 Sheriffs. The Judges in the Courts of Limited 24 Jurisdiction, depending on if it's a City Court or 25 a Justice Court, it would be a local Police</p>	<p style="text-align: right;">Page 342</p> <p>1 Respondent's Exhibit P as in Peter. 2 A. Yes, sir. 3 Q. This was -- Do you have that in front of 4 you, Ms. McLaughlin? 5 A. I do, sir. 6 Q. You can see on the top right corner of 7 that first page it was filed on April 11th? 8 A. Yes. 9 Q. That was a Sunday? 10 A. I don't know without looking at a 11 calendar, but I'm assuming if you're telling me it 12 was a Sunday, it was a Sunday. 13 MR. STRAUCH: ODC will stipulate. 14 Q. (BY MR. GREEN) The Supreme Court 15 entered an order later that same Sunday granting 16 this emergency motion; is that right? 17 A. I don't know when the order was entered. 18 I'd have to have you point me to the exhibit. 19 MR. GREEN: Mr. Strauch, would you 20 stipulate it was granted that same Sunday? 21 MR. STRAUCH: Yes. 22 MR. GREEN: Okay. Thank you. 23 Q. (BY MR. GREEN) Ms. McLaughlin, I just 24 wanted to ask you. Do you know of any other time 25 that a person has had a motion filed in the</p>
<p style="text-align: right;">Page 341</p> <p>1 Department or a local Sheriff. 2 Q. And Subparagraph (f) doesn't talk about 3 which type of Judges were apparently facing 4 security risks, right? 5 A. Correct. 6 Q. Your attorney filed this emergency 7 motion to quash on a Sunday; is that right? 8 A. Yes. It was filed on Sunday. 9 Q. And -- 10 MR. STRAUCH: Excuse me, Mr. Chairman. 11 That mischaracterizes Exhibit 12. It states right 12 at the top it was filed on April 12th. 13 MR. GREEN: Sorry. I am referring to 14 the wrong exhibit. Thank you, Mr. Strauch. 15 Q. (BY MR. GREEN) The original, you did 16 file a motion to quash, though. Let me restate my 17 question. Your attorney did file a motion to 18 quash the legislative subpoena with the Supreme 19 Court on Sunday, April 11th; is that right? 20 A. Can you point me to the exhibit, Mr. 21 Green, so I'm not referencing something incorrect? 22 Q. Sure. Give me just one moment, please. 23 MR. STRAUCH: I believe it's your "P." 24 MR. GREEN: Thank you, Mr. Strauch. 25 Q. (BY MR. GREEN) That would be</p>	<p style="text-align: right;">Page 343</p> <p>1 Supreme Court on a Sunday and got an order 2 granting that motion that same Sunday? 3 A. Mr. Green, I'm not a lawyer, so I don't 4 have a lot of experience with what's filed before 5 the Supreme Court, and I don't work in the Clerk's 6 office, so I don't think I can answer that 7 question. 8 Q. So I guess the answer then is no, you're 9 not aware of that happening before? 10 A. I'm not. I wouldn't have any way of 11 knowing that. 12 Q. The Montana Supreme Court's final 13 decision in your case was issued in July of 2021; 14 does that sound right? 15 A. Again, can you point me to the exhibit? 16 I just don't want to get the dates wrong. 17 MR. STRAUCH: We'll stipulate July 14th, 18 2021. 19 MR. GREEN: Thank you. July 14th. 20 Q. (BY MR. GREEN) And after that, the 21 Attorney General's Office sought review of that 22 decision from the US Supreme Court; is that right? 23 A. That's correct. 24 Q. And the US Supreme Court eventually 25 denied the Attorney General's cert petition?</p>

<p style="text-align: right;">Page 344</p> <p>1 A. Correct, in the spring of 2022.</p> <p>2 Q. And after the US Supreme Court denied</p> <p>3 the Legislature's cert petition, the Attorney</p> <p>4 General's Office returned the emails to you that</p> <p>5 it had received from the Department of</p> <p>6 Administration; is that right?</p> <p>7 A. They returned two batches of emails to</p> <p>8 me. I'm unclear whether those emails came from</p> <p>9 the Legislature or the Department of</p> <p>10 Administration.</p> <p>11 Q. Did you review those documents to see if</p> <p>12 all the documents had been returned?</p> <p>13 A. I did not because I don't know what was</p> <p>14 produced in total, so it would have been difficult</p> <p>15 for me to determine if all of the documents and</p> <p>16 the copies had been returned.</p> <p>17 Q. And to your knowledge, do you know, did</p> <p>18 anyone else review the documents to see if they'd</p> <p>19 been returned, to see if they'd all been returned?</p> <p>20 A. Did anyone else --</p> <p>21 Q. Let me ask that question again. To your</p> <p>22 knowledge, did anyone else review the documents</p> <p>23 that you received to see if they had all been</p> <p>24 returned?</p> <p>25 A. I don't think anyone else would have</p>	<p style="text-align: right;">Page 346</p> <p>1 Q. Those were documents you said you</p> <p>2 received from the Department of Justice after the</p> <p>3 cert petition had been denied?</p> <p>4 A. Yes. Those two boxes were returned to</p> <p>5 me or delivered to me by Mr. Oestreicher and Mr.</p> <p>6 Dewhirst.</p> <p>7 Q. And who has had custody of those</p> <p>8 documents, the hard copy boxes, since they were</p> <p>9 returned to you?</p> <p>10 A. The documents were in my office actually</p> <p>11 taped shut, and then I received the request from</p> <p>12 ODC for the documents, and I don't remember when</p> <p>13 that happened, but I did deliver the documents to</p> <p>14 ODC.</p> <p>15 Q. So to your knowledge -- actually let me</p> <p>16 restate. I think you testified earlier that you</p> <p>17 had opened the boxes and looked through them at</p> <p>18 some point after you received them?</p> <p>19 A. I said I opened the boxes after they'd</p> <p>20 gone to ODC. I didn't open them before they went</p> <p>21 to ODC.</p> <p>22 Q. To your knowledge, do you know if anyone</p> <p>23 other than you or the people at ODC have looked</p> <p>24 through those documents since you received them?</p> <p>25 A. No. No one has but me and ODC.</p>
<p style="text-align: right;">Page 345</p> <p>1 known that. The documents were reviewed only by</p> <p>2 ODC and myself.</p> <p>3 Q. Ms. McLaughlin, between July of 2021 and</p> <p>4 March of 2022 you didn't take any actions to</p> <p>5 compel the return of the documents, did you?</p> <p>6 A. No.</p> <p>7 Q. In that same time frame your attorney,</p> <p>8 Mr. Cox, didn't take any actions to compel the</p> <p>9 return of the documents, did he?</p> <p>10 A. Mr. Cox didn't file anything, no.</p> <p>11 Q. And Mr. Cox was paid for his services as</p> <p>12 your lawyer in this case, wasn't he?</p> <p>13 MR. STRAUCH: Objection, relevance.</p> <p>14 CHAIR OGLE: Sustained.</p> <p>15 MR. GREEN: Mr. Chairman, if I could</p> <p>16 have a moment, please.</p> <p>17 CHAIR OGLE: Yes.</p> <p>18 Q. (BY MR. GREEN) Just a couple of final</p> <p>19 questions, Ms. McLaughlin.</p> <p>20 A. Yes, sir.</p> <p>21 Q. Mr. Strauch asked you earlier about a</p> <p>22 couple of boxes of documents that are sitting here</p> <p>23 on the witness stand; do you remember that line of</p> <p>24 questioning?</p> <p>25 A. Yes, sir.</p>	<p style="text-align: right;">Page 347</p> <p>1 MR. GREEN: Mr. Chairman, if I could</p> <p>2 enter a motion. I'm not sure what's going to</p> <p>3 happen to these documents, but just to make sure</p> <p>4 we maintain the privacy and sanctity of them, I</p> <p>5 moved to seal those documents so that they're not</p> <p>6 accessible as the part of the public record</p> <p>7 created in connection with this case.</p> <p>8 CHAIR OGLE: Mr. Strauch.</p> <p>9 MR. STRAUCH: Mr. Chairman, the contents</p> <p>10 of those documents are exactly what the Supreme</p> <p>11 Court did not want disclosed disseminated to</p> <p>12 anyone, and I can give this Commission my word as</p> <p>13 an officer of the Court that they will be retained</p> <p>14 and held on to in perpetuity if you direct me to.</p> <p>15 However, no one should be allowed to see</p> <p>16 them other than me or Counsel for the Respondent.</p> <p>17 And I would point out that I, in discovery,</p> <p>18 produced an inventory of the contents of those</p> <p>19 documents. It's Bates numbers ODC-0320 through</p> <p>20 ODC-2796, so a 2400 page inventory of the contents</p> <p>21 of those documents.</p> <p>22 They never asked to see them during the</p> <p>23 course of this litigation. They may see them now</p> <p>24 if they wish, but they cannot be released outside</p> <p>25 of this litigation because they're the very</p>

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1 subject matter of the Supreme Court opinion.
2 So I'll leave it to the Commission to
3 decide the proper disposition of those. However,
4 I think we all have to be sensitive to the fact
5 that these are the very emails that the Supreme
6 Court ordered not to be disseminated in the first
7 place, and to be maintained.
8 **MR. GREEN:** Mr. Chairman, Mr. Strauch's
9 words as an officer of the Court is good enough
10 for me. I just want to make sure they're
11 protected.
12 **CHAIR OGLE:** So the documents then will
13 remain in the possession of ODC during the
14 pendency of this proceeding, and I assume that the
15 Respondent or his Counsel would have access to
16 look at the documents if need be.
17 **MR. STRAUCH:** That's correct. No copies
18 can be made, no notes can be taken.
19 **CHAIR OGLE:** All right. And then that's
20 the way we'll leave it. That's satisfactory to
21 you, Mr. Green?
22 **MR. GREEN:** 100 percent, Mr. Chairman.
23 Thank you, and with that I have no further
24 questions.
25 **CHAIR OGLE:** Thank you. Any redirect,

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1 Mr. Strauch?
2 **MR. STRAUCH:** No, Mr. Chairman. May
3 this witness be excused? She's under our
4 subpoena.
5 **CHAIR OGLE:** Yes, she may be. Thanks,
6 Ms. McLaughlin.
7 **THE WITNESS:** I'm okay to leave?
8 **CHAIR OGLE:** Yes.
9 **THE WITNESS:** Okay. Thank you.
10 (Witness excused)
11 **CHAIR OGLE:** Mr. Green, why don't you
12 call your next witness.
13 **MR. COLEMAN:** Mr. Chairman, we'll call
14 Wylie Galt, and with the Panel's indulgence, I
15 will go downstairs and track him down.
16 **MR. STRAUCH:** Mr. Chairman, could we
17 take a ten minute break then, personal break?
18 **CHAIR OGLE:** Yes. We'll take a ten
19 minute break. We will reconvene in about 20
20 minutes, or say quarter to noon.
21 Gentlemen, let me ask you. You thought
22 the next two witnesses would be fairly brief.
23 **MR. COLEMAN:** I suspect they'll be even
24 briefer than we might have thought yesterday.
25 **CHAIR OGLE:** So we could go ahead before

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1 the lunch break?
2 **MR. COLEMAN:** Whatever the Panel's
3 preference is.
4 **CHAIR OGLE:** Are you guys good with that
5 on the Panel? Yes. Why don't you call your
6 witness, and let's get started in ten minutes, and
7 finish up with the testimony this morning.
8 (Recess taken)
9 **CHAIR OGLE:** We're back on the record,
10 and you can go ahead and call your next witness.
11 **MR. COLEMAN:** Respondent will call Wylie
12 Galt.
13 **CHAIR OGLE:** Would you state your name
14 for the record.
15 **MR. COLEMAN:** I'm sorry. Shane Coleman
16 on behalf of the Respondent.
17 **CHAIR OGLE:** I've seen you fellows over
18 at Counsel table, but I didn't know who was who.
19 **MR. COLEMAN:** I don't blame you. It's a
20 big state.
21 **MR. STRAUCH:** Mr. Chairman, it strikes
22 me that I forgot to close my case. ODC closes.
23 **CHAIR OGLE:** Thanks, Mr. Strauch.
24
25 **ERROL WYLIE GALT,**

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1 Having been first duly sworn, was examined and
2 testified as follows:
3
4 **DIRECT EXAMINATION**
5 **BY MR. COLEMAN:**
6 Q. Would you please state your name and
7 address for the record.
8 **A. Errol Wylie Galt, 71 Ranch Road,**
9 **Martinsdale, Montana.**
10 Q. Can you give the Panel a little, kind of
11 a thumbnail sketch of your background, Mr. Galt.
12 **A. I was first elected in 2013 to the State**
13 **House; was Speaker Pro Tem in the '19 session; was**
14 **Speaker of the House in the '21 session.**
15 Q. What do you do by way of occupation?
16 **A. I am a rancher.**
17 Q. Whereabouts?
18 **A. Central Montana, Martinsdale, a little**
19 **bit of eastern Montana.**
20 Q. What generally is your educational
21 background?
22 **A. I am a college graduate, a business**
23 **degree and a minor in economics.**
24 Q. Do you have a law degree of any sort?
25 **A. I do not have a law degree.**

<p style="text-align: right;">Page 352</p> <p>1 Q. You understand this matter concerns some 2 happenings between the Legislature and the Court 3 back in 2021? 4 A. I do. 5 Q. You're generally familiar with that time 6 frame, right? 7 A. Yes, I am. 8 Q. What was your position with the 9 Legislature in 2021? 10 A. I was the Speaker of the House. 11 Q. And so how did you come to be involved 12 in what we're calling the dispute, if you will, 13 between these governmental branches? 14 A. At that time, as the leader of the 15 House, when we heard about certain polling and 16 emails, I was the one, along with the President of 17 the Senate, that were kind of the spearhead of 18 trying to find what -- where these emails were. 19 Q. And before we jump into the back and 20 forth and the emails and the polling and whatnot, 21 can you give the Panel a little bit of a flavor, 22 if you will, of the types of legislation that was 23 being considered by the Legislature then that 24 would have affected the Courts. 25 A. There was I know a handful of judicial</p>	<p style="text-align: right;">Page 354</p> <p>1 thing that it did? 2 A. Yes. It would add another layer of 3 review, so that it was not just the Judicial 4 Branch watching the Judicial Branch. 5 Q. Would it have added non-lawyers and 6 non-judges to that Commission? 7 A. Yes, from what I remember. 8 Q. Was it a proposed ballot initiative? 9 A. It was a proposed ballot initiative. 10 Q. Would it have been a constitutional 11 amendment? 12 A. If I remember correctly, yes. 13 Q. Which are required to be a ballot 14 initiative, right? 15 A. Yes, but with a higher vote threshold as 16 well. 17 Q. In other words, you as the Legislature 18 can't amend the Constitution, right? 19 A. Correct. 20 Q. And how about SB 140? Do you remember 21 that bill? 22 A. I do not remember the specifics off the 23 top of my head. 24 Q. Do you remember legislation that 25 concerned what was formerly the Judicial</p>
<p style="text-align: right;">Page 353</p> <p>1 reform bills, as we call them. I would not say 2 they made up the bulk of what we were doing, but 3 there was a handful of bills that session. 4 Q. And was one of those bills SB 140? 5 A. Yes. 6 Q. Generally speaking, what would that bill 7 have done? What did it do? 8 A. The 140, was that the judicial review? 9 The constitutional ballot, or the ballot 10 initiative of judicial review, if I remember 11 correctly. 12 Q. Let me ask it a little differently 13 because I'm not sure you did. What was House Bill 14 685? Do you remember that one? 15 A. That was the constitutional initiative 16 for judicial review. 17 Q. That was one, that was a bill that 18 progressed its way through the Legislature? 19 A. Yes. How far exactly, I do not 20 remember. 21 Q. And that involved judicial review? 22 A. Yes. 23 Q. Again, I'm summarizing for expedience, 24 but generally would have changed the way judicial 25 misconduct complaints were handled; is that one</p>	<p style="text-align: right;">Page 355</p> <p>1 Nomination Commission? 2 A. I do. 3 Q. Was that affected by SB 140? 4 A. Yes. I do remember that. Not exactly 5 what it said, but a rough idea of it. 6 Q. And ultimately SB 140 became the law of 7 the State of Montana, right? 8 A. Yes. 9 Q. And that was litigated at the Montana 10 Supreme Court; you understand that, right? 11 A. Yes. 12 Q. At some point before Senate Bill 140 was 13 passed by the Legislature, and before House Bill 14 685 ultimately failed in the Legislature, did the 15 Legislature become aware of certain emails within 16 the Court system? 17 A. Yes. We had heard that there was 18 polling and emails going around about the 19 legislation we were moving. 20 Q. What period of time would this have been 21 generally? 22 A. This would have been around April, if I 23 remember correctly. 24 Q. So do you understand ultimately this 25 resulted in a so-called McLaughlin decision by the</p>

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1 Montana Supreme Court?

2 **A. Yes.**

3 Q. And that would be -- Do you recall that

4 that was decided in July of 2021?

5 **A. I do.**

6 Q. So is it fair to say that the emails

7 that came to your attention, that happened

8 sometime before the Court issued its decision in

9 McLaughlin?

10 **A. Yes.**

11 Q. What specifically did you hear about the

12 polling that was going on?

13 **A. That there was --**

14 **MR. STRAUCH:** Objection, hearsay.

15 **CHAIR OGLE:** Sustained.

16 Q. (BY MR. COLEMAN) Do you remember how

17 you learned that there was judicial polling going

18 on?

19 **A. I remember someone telling me.**

20 Q. Did that concern the Legislature?

21 **A. It did.**

22 Q. Why?

23 **A. Because we have a long precedent in**

24 **Montana of anything done within the elected**

25 **officials, that it is public record.**

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1 Q. And so what did the Legislature do in

2 response to that concern?

3 **A. We first filed a FOIA to receive the**

4 **emails.**

5 Q. Whom did you direct the FOIA to?

6 **A. Beth McLaughlin.**

7 Q. The Court Administrator of the Supreme

8 Court?

9 **A. Yes.**

10 Q. Generally do you recall what you were

11 seeking?

12 **A. We were seeking, I believe a lot of our**

13 **key words were HB 688, 668, SB 140, polling, kind**

14 **of all those along what -- you know, the bills we**

15 **were moving.**

16 Q. Do you remember how -- Do you remember

17 when that FOIA request might have been made

18 generally? We'll look at some documents here in a

19 minute.

20 **A. Before April, is all I kind of remember.**

21 **Slightly before the beginning of April, somewhere**

22 **in there.**

23 Q. At this time the legislation was still

24 in limbo in terms of whether it would pass; is

25 that right?

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1 **A. Yes.**

2 Q. In front of you there should be a

3 binder. I'm going to ask you to take a look,

4 please. There may be two binders.

5 **MR. COLEMAN:** May I have a moment, Your

6 Honor?

7 **CHAIR OGLE:** Yes.

8 Q. (BY MR. COLEMAN) (Provides document)

9 Mr. Galt, I've placed in front of you two exhibit

10 binders.

11 **UNKNOWN SPEAKER:** I forgot ours were up

12 there. I'm so sorry.

13 **MR. COLEMAN:** I'll take that one back

14 from you.

15 **THE WITNESS:** Perfect.

16 Q. (BY MR. COLEMAN) Mr. Galt, in front of

17 you are two exhibit binders. We're going to make

18 reference to a handful of the exhibits in there.

19 One of them I believe says ODC's exhibits, those

20 are numbered; the others have Respondent's

21 exhibits, those are letters.

22 **A. Gotcha.**

23 Q. I want to make this streamlined as much

24 as possible. I'm going to ask you to take a look,

25 please, at Respondent's Exhibit C.

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1 **A. (Complies)**

2 Q. Who is Abra Belke?

3 **A. She was the Chief of Staff for the**

4 **Senate.**

5 Q. What was her role in 2021?

6 **A. She ran a lot of the day-to-day**

7 **operations in the Senate, but due to limited staff**

8 **in the Legislature, we do share staff back and**

9 **forth.**

10 Q. Was she involved with trying to collect

11 emails records from the Court Administrator's

12 Office?

13 **A. Yes. She was the one we tasked with**

14 **getting the FOIA to the proper people.**

15 Q. Exhibit C, is that an email exchange

16 between Ms. Belke and Beth McLaughlin?

17 **A. Yes, it is.**

18 Q. Beth McLaughlin is Court Administrator;

19 do you understand?

20 **A. Yes.**

21 Q. And do you recall that in response to

22 the request made by the Legislature, that Ms.

23 McLaughlin produced two emails?

24 **A. Yes.**

25 Q. What was your reaction when you heard

<p style="text-align: right;">Page 360</p> <p>1 that two emails had been produced?</p> <p>2 A. That that was not near the emails that</p> <p>3 should have been.</p> <p>4 Q. Why did you think there might have been</p> <p>5 more?</p> <p>6 A. From what we had heard, we had heard --</p> <p>7 MR. STRAUCH: Objection, hearsay.</p> <p>8 CHAIR OGLE: Sustained.</p> <p>9 Q. (BY MR. COLEMAN) Based on your</p> <p>10 understanding of the polling that had gone on, did</p> <p>11 you believe that there would have been more than</p> <p>12 two emails?</p> <p>13 A. Yes.</p> <p>14 Q. I'll have you take a look at the next</p> <p>15 exhibit, Exhibit D.</p> <p>16 A. (Complies)</p> <p>17 Q. Is this also an email exchange between</p> <p>18 Ms. Belke and Ms. McLaughlin?</p> <p>19 A. Yes.</p> <p>20 Q. Do you remember that Ms. McLaughlin</p> <p>21 responded that some emails had been deleted?</p> <p>22 A. Yes.</p> <p>23 Q. Particularly that some emails related to</p> <p>24 polling on SB 140 had been deleted?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 362</p> <p>1 A. Yes, and available to the public upon</p> <p>2 request.</p> <p>3 Q. Did you see where Ms. McLaughlin told</p> <p>4 you at that time that she had to, quote,</p> <p>5 "acquiesce to sloppiness"?</p> <p>6 A. Yes.</p> <p>7 Q. And that she was dismayed that she had</p> <p>8 not retained the emails?</p> <p>9 A. Yes.</p> <p>10 Q. What did the Legislature do then in</p> <p>11 connection with trying to determine whether it</p> <p>12 could recover any of the other emails?</p> <p>13 A. We used our subpoena power to subpoena</p> <p>14 the Department of Administration to retrieve the</p> <p>15 emails.</p> <p>16 Q. I want to talk about the legislative</p> <p>17 subpoena process. How long did you say you served</p> <p>18 in the Legislature? I'm sorry.</p> <p>19 A. Eight years.</p> <p>20 Q. Prior to this, had you ever been</p> <p>21 involved with a legislative subpoena?</p> <p>22 A. No.</p> <p>23 Q. Prior to this, did you know of anybody</p> <p>24 else that maybe you'd worked with had been</p> <p>25 involved with a subpoena?</p>
<p style="text-align: right;">Page 361</p> <p>1 Q. Did that concern the Legislature?</p> <p>2 A. Very much.</p> <p>3 Q. Do you recall receiving Exhibit D?</p> <p>4 You're copied on this email, right?</p> <p>5 A. Yes.</p> <p>6 Q. That's your email address in the CC</p> <p>7 line?</p> <p>8 A. Yes.</p> <p>9 Q. And if we look at the full second</p> <p>10 paragraph, Ms. McLaughlin's written, "I've copied</p> <p>11 the President and Speaker. So I can be clear, I</p> <p>12 had no nefarious intent," and it goes on from</p> <p>13 there; is that correct?</p> <p>14 A. Correct.</p> <p>15 Q. And you, that's one of them anyway?</p> <p>16 A. Yes.</p> <p>17 Q. And the President is Mr. Blasdel?</p> <p>18 A. Yes.</p> <p>19 Q. Did you believe at that time -- Again,</p> <p>20 this is dated April 8th, 2021 -- that these were</p> <p>21 the sorts of emails that the Judicial Branch</p> <p>22 should have been retaining under the State's email</p> <p>23 policy?</p> <p>24 A. Yes.</p> <p>25 Q. State's document retention policy?</p>	<p style="text-align: right;">Page 363</p> <p>1 A. No.</p> <p>2 Q. How do you get documents from agencies</p> <p>3 and people then?</p> <p>4 A. Usually a FOIA request does it.</p> <p>5 Q. How do you get witnesses to appear at</p> <p>6 hearings, for instance?</p> <p>7 A. We just usually let them know when the</p> <p>8 committee hearing is, and they show up.</p> <p>9 Q. So why was a legislative subpoena issued</p> <p>10 in what I think you told us was the very first</p> <p>11 time in this case?</p> <p>12 A. We felt we were running into many road</p> <p>13 blocks getting to the information that we knew was</p> <p>14 there, so we used our power in the best way we</p> <p>15 thought possible to get the information we thought</p> <p>16 we needed.</p> <p>17 Q. And that was a legislative subpoena?</p> <p>18 A. Yes.</p> <p>19 Q. What did the Legislature receive in</p> <p>20 response to this legislative subpoena to the</p> <p>21 Department of Administration? Now I'm talking</p> <p>22 pre-April 11th, 2021.</p> <p>23 A. We received a bunch of emails.</p> <p>24 Q. And to be clear, there were further</p> <p>25 subpoenas issued by the Legislature, right?</p>

<p style="text-align: right;">Page 364</p> <p>1 A. Yes. 2 Q. Do you remember generally what that 3 first email to the Department of Administration 4 asked for? 5 A. I do not off the top of my head. 6 Q. I'm going to ask you to take a look, 7 please, at Exhibit F in front of you. 8 A. (Complies) 9 Q. Do you recognize that document? 10 A. I do. 11 Q. What is that? 12 A. That is one of the emails we received 13 from the DOA. 14 Q. To be clear, Exhibit F is a series of 15 emails that I'll tell you most, if not all, have 16 someone named Terri Hogan's name at the top. 17 A. Yes. 18 Q. Who is Terri Hogan? 19 A. I do not recall off the top of my head. 20 Q. Do you remember to whom the subpoenaed 21 emails were produced? 22 A. I do not. 23 Q. Were you concerned when you received 24 these emails, Exhibit F, about the substance of 25 them?</p>	<p style="text-align: right;">Page 366</p> <p>1 threshold, which proves that it was towards a 2 constitutional amendment. We need two-thirds to 3 even pass one of these to go on to the ballot 4 initiative. 5 Q. So this relates to the proposal to put 6 on the ballot a constitutional amendment that 7 would change the Judicial Standards Commission? 8 I'm over-simplifying, but is that generally it? 9 A. Yes. 10 Q. I want to just highlight a handful of 11 these responses in here. Will you take a look -- 12 and I'm going through in no -- Well, a couple of 13 things here. One, the document is not numbered at 14 the bottom, so bear with me. I'm going to try to 15 guide you, and I'm going to refer electronically 16 to the PDF number, which I hope I've faithfully 17 recorded on the copies of mine. 18 Take a look, if you will, please, this 19 is going to be the fourth page of the PDF. It 20 should be the fourth page of the hard copy there. 21 It's an email from Spaulding, Randal; do you see 22 that? 23 A. I do. 24 Q. Would you read the top email that Mr. 25 Spaulding has written to Beth McLaughlin.</p>
<p style="text-align: right;">Page 365</p> <p>1 A. Very concerned. 2 Q. Why? 3 A. Mostly because at this point it's 4 showing State resources being used towards 5 lobbying. 6 Q. Are there any other concerns that you 7 had in regard to content of the emails that were 8 produced? 9 A. There seemed to be a lot of opinions 10 that, from our recollection at that time with not 11 being produced these emails, that the Court was 12 trying to hide in very strong language. 13 Q. That was your belief? 14 A. Yes. 15 Q. Did you convey that belief later to the 16 Attorney General's Office? 17 A. Yes, we did. 18 Q. We'll get to that in a bit here. I'm 19 going to ask you to flip through Exhibit F, and 20 confirm for me. Do these emails in Exhibit F seem 21 to relate to House Bill 685? 22 A. Yes, they do. 23 Q. Can you explain to the panel why it is 24 that you think these relate to 685. 25 A. A lot of it they describe the vote</p>	<p style="text-align: right;">Page 367</p> <p>1 A. "The more I see in here, the more I 2 believe the Legislature should meet every ten 3 years for ten days, each legislator can sponsor no 4 more than ten bills, and they should get \$10 per 5 day per diem." 6 Q. Flip to the next page, which I believe 7 should be PDF-4. Do you see an email from Mike 8 McGrath? 9 A. I do. 10 Q. The Chief Justice of the Montana Supreme 11 Court? 12 A. Yes. 13 Q. Could you read for the record what his 14 comments were on House Bill 685 at that time. 15 A. "They don't seem to care much for 16 Judicial Standards, now that they have found out 17 about it. We'll need to pick off some votes here 18 and keep it below 100. Might be easier in the 19 House. Are there rules regarding timelines that 20 apply?" 21 Q. When you read that email, when you 22 received it, what was your understanding of what 23 he was conveying? 24 A. That he was ready to head to the 25 Legislature to start lobbying.</p>

<p style="text-align: right;">Page 368</p> <p>1 Q. What's the significance of keeping a 2 vote number below 100? 3 A. That is the threshold for the bill to 4 pass to go on to the ballot. 5 Q. If we look at the next page again, we're 6 still in Exhibit F, House Bill 685. 7 MR. STRAUCH: Mr. Chairman. 8 CHAIR OGLE: Yes. 9 MR. STRAUCH: This gets into again the 10 entire line of questioning that you sustained 11 earlier. They're now getting into an area that 12 the Montana Supreme Court has already decided, 13 which was that this was a proper use of the 14 judicial email system, and a proper discharge of 15 Ms. McLaughlin's duties. 16 And here we go again. And you've 17 already ruled on this. So I would ask you to 18 renew the sustaining of my objection so we can 19 move on to the issues in this case, please. 20 CHAIR OGLE: The objection is sustained 21 again. We have previously considered and ruled on 22 this, based upon the Supreme Court's order. I 23 think this issue has already been disposed. 24 MR. COLEMAN: Yes, and I certainly don't 25 want to run afoul of any ruling by this Panel,</p>	<p style="text-align: right;">Page 370</p> <p>1 gives him. His client's understanding of what was 2 going on, his client's perceptions, pre the 3 McLaughlin decision which comes out in July, is 4 absolutely relevant to whether the Attorney 5 General made statements that he, quote, "knows to 6 be false or with reckless disregard to the truth." 7 McLaughlin was decided later. It could 8 not have been known at that time. That's why we 9 think this is appropriate. 10 CHAIR OGLE: Well, number one, I think 11 you've made your point about the state of mind of 12 the Legislature during this time frame. Number 13 two, I don't think the Supreme Court ruling was 14 limited to one bill. So the objection is 15 sustained. Please move on. 16 MR. COLEMAN: Thank you, Mr. Chairman. 17 Q. (BY MR. COLEMAN) Mr. Galt, also in 18 front of you is Respondent's Exhibit I. I will 19 tell you that this is a series of emails I do not 20 intend to ask you about. These are the ones we 21 looked at before that are concerning Senate Bill 22 140. Do you recall that? 23 A. I do. 24 Q. And if I were to ask whether you had 25 similar concerns about the emails produced</p>
<p style="text-align: right;">Page 369</p> <p>1 Your Honor. May I be heard on one issue related 2 to this that I think is unique from what we heard 3 before? 4 CHAIR OGLE: Yes. 5 MR. COLEMAN: First off, we're talking 6 about House Bill 685, not 140, which was ruled 7 upon in McLaughlin. 8 Secondly, we're talking about the 9 Legislature's state of mind prior to July of 2021 10 when that ruling came out. And there's a reason 11 that's critical, and I'll get to that in a minute. 12 But it's impossible to say that that 13 information -- it was undecided at that time. 14 We're still months away from the McLaughlin case 15 deciding the issue. But more importantly, why do 16 we care about that if the Court's ultimately 17 ruled? It's because it's not a collateral attack, 18 not the way that it's being presented through this 19 witness. 20 Among other things, the Attorney General 21 is charged under Rule 8.2(a), among other things, 22 making false statements, making statements with 23 reckless disregard of the truth. 24 The Attorney General does not act in a 25 vacuum. He acts on information that his client</p>	<p style="text-align: right;">Page 371</p> <p>1 relating to Senate Bill 140, would it be the same 2 as what was just sustained in the ODC's objection 3 just moments ago? 4 A. It would be. 5 Q. Same concerns? 6 A. Yes, same concerns. 7 Q. At some point then did the Montana 8 Supreme Court quash that initial, what I'm going 9 to call the initial subpoena to the Department of 10 Administration? 11 A. Yes, they did. 12 Q. How did you learn about that? 13 A. We learned about it, I believe it was 14 Sunday night through a phone call, is how I think 15 Ms. Belke called me and told me about it. 16 Q. At that time was the Legislature a party 17 to that case? 18 A. No. 19 Q. To be clear, that's the so-called Brown 20 case? 21 A. Yes. 22 Q. Brown versus Gianforte? 23 A. Yes. 24 Q. Sometimes the Bradley versus Gianforte 25 case?</p>

<p style="text-align: right;">Page 372</p> <p>1 A. Yes.</p> <p>2 Q. There's both in the caption. So what</p> <p>3 did you do then?</p> <p>4 A. We felt that -- We disagreed with them</p> <p>5 on it basically.</p> <p>6 Q. Prior to that, had you reached out to</p> <p>7 the Attorney General's Office concerning this</p> <p>8 issue?</p> <p>9 A. No. I believe after that is when we</p> <p>10 reached out to the Attorney General.</p> <p>11 Q. Was that you?</p> <p>12 A. I can't remember exactly if it was me,</p> <p>13 or if we directed Ms. Belke to reach out to them.</p> <p>14 Q. I'm going to ask you to take a look at</p> <p>15 ODC Exhibit 11, duplicated as "S" in the other</p> <p>16 one. Let me know when you have that there.</p> <p>17 A. I believe I have it.</p> <p>18 Q. Do you recognize that letter?</p> <p>19 A. I do.</p> <p>20 Q. What is that?</p> <p>21 A. That is the response from the Attorney</p> <p>22 General's Office on our behalf.</p> <p>23 Q. Specifically who at the Attorney</p> <p>24 General's Office?</p> <p>25 A. Kristin Hansen.</p>	<p style="text-align: right;">Page 374</p> <p>1 Q. And before -- And this was, to confirm,</p> <p>2 the very first time a legislative subpoena had</p> <p>3 been issued, had been used, to your knowledge?</p> <p>4 A. Correct.</p> <p>5 Q. Certainly the first time you used it?</p> <p>6 A. Yes.</p> <p>7 Q. Ms. Hansen has written -- and I'm still</p> <p>8 on that bottom paragraph of the first page there</p> <p>9 -- she's written later on that, and I'm</p> <p>10 paraphrasing, the Legislature seeks to be informed</p> <p>11 on issues related to, and she's got three of them.</p> <p>12 One is to address whether members of the Judiciary</p> <p>13 and Court Administrator deleted records; do you</p> <p>14 see that?</p> <p>15 A. Yes.</p> <p>16 Q. Is that an accurate statement of what</p> <p>17 the Legislature had asked Ms. Hansen to undertake?</p> <p>18 A. Yes.</p> <p>19 Q. It also next identifies or states, "The</p> <p>20 Legislature would like to know whether the Court</p> <p>21 Administrator performed tasks for the Montana</p> <p>22 Judges Association;" do you see that?</p> <p>23 A. I do.</p> <p>24 Q. Was that something at the time that the</p> <p>25 Legislature thought would have been inappropriate?</p>
<p style="text-align: right;">Page 373</p> <p>1 Q. Did you work with her?</p> <p>2 A. I did.</p> <p>3 Q. I'm going to walk through a handful of</p> <p>4 the statements that Ms. Hansen has made in Exhibit</p> <p>5 ODC-11, starting in the first paragraph, of the</p> <p>6 first page -- and I apologize. I'm probably</p> <p>7 jumping around faster than you, without the</p> <p>8 highlighting on your copy. But the first</p> <p>9 paragraph generally she writes that the AG's</p> <p>10 Office had been retained by the Legislature to</p> <p>11 represent it; is that an accurate statement of</p> <p>12 what had happened?</p> <p>13 A. Yes.</p> <p>14 Q. Flipping down to the very bottom</p> <p>15 paragraph on the first page, Ms. Hansen has</p> <p>16 written, "The legislative power is broad;" do you</p> <p>17 see that?</p> <p>18 A. I do.</p> <p>19 Q. Did you agree with that statement at the</p> <p>20 time?</p> <p>21 A. Yes.</p> <p>22 Q. Again, this was before the McLaughlin</p> <p>23 Court ruled on the scope of the legislative</p> <p>24 subpoena?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 375</p> <p>1 A. Extremely.</p> <p>2 Q. And at the time, did Ms. Hansen's letter</p> <p>3 in that regard accurately state what it was that</p> <p>4 the Legislature was hoping to obtain?</p> <p>5 A. Yes.</p> <p>6 Q. And then in the next subpart to that,</p> <p>7 Ms. Hansen's written that, "The Legislature would</p> <p>8 like to know whether current policies and</p> <p>9 processes of the Judicial Standards Commission are</p> <p>10 sufficient to address the polling issue and other</p> <p>11 things;" do you see that?</p> <p>12 A. Yes.</p> <p>13 Q. And did Ms. Hansen faithfully describe</p> <p>14 the concern that the Legislature had in that</p> <p>15 paragraph?</p> <p>16 A. Yes, she did.</p> <p>17 Q. If we flip to the last paragraph on the</p> <p>18 next page, please. Ms. Hansen has written, "The</p> <p>19 Legislature does not recognize this Court's order</p> <p>20 as binding, and will not abide it;" do you see</p> <p>21 that?</p> <p>22 A. I do.</p> <p>23 Q. Was it your understanding that that was</p> <p>24 the Legislature's position at the time?</p> <p>25 A. Yes, it was.</p>

<p style="text-align: right;">Page 376</p> <p>1 Q. Was that your position at the time?</p> <p>2 A. Yes, it was.</p> <p>3 Q. Did you believe that you were still, as</p> <p>4 Speaker of the House, still entitled to have the</p> <p>5 Legislature get email records that might have been</p> <p>6 deleted at that time?</p> <p>7 A. Yes, I did.</p> <p>8 Q. If they were recoverable, you still</p> <p>9 thought you would be able to get them?</p> <p>10 A. Yes.</p> <p>11 Q. At then or any other time did you</p> <p>12 instruct the Attorney General's Office that you</p> <p>13 wanted to press this issue?</p> <p>14 A. Yes.</p> <p>15 Q. Did you ever tell them you wanted to</p> <p>16 give up on it?</p> <p>17 A. No.</p> <p>18 Q. Did you tell them you wanted to take it</p> <p>19 all the way to the Supreme Court?</p> <p>20 A. Yes.</p> <p>21 Q. Do you understand that a Supreme Court</p> <p>22 petition for certiorari -- that's a fancy legal</p> <p>23 term -- was filed in this case?</p> <p>24 A. I don't remember everything filed, but I</p> <p>25 probably was informed of that at the time.</p>	<p style="text-align: right;">Page 378</p> <p>1 as we could. That was our intent going into it.</p> <p>2 Q. So was the Legislature trying to obtain</p> <p>3 information about the Supreme Court Justices or</p> <p>4 other Judges' deliberations in court cases?</p> <p>5 A. No. We were just worried about the</p> <p>6 emails that were affecting the legislation that we</p> <p>7 were writing at the time.</p> <p>8 Q. Were you trying to get people's</p> <p>9 confidential medical records?</p> <p>10 A. No.</p> <p>11 Q. Did you expect that whoever was</p> <p>12 producing the documents, whether it be the</p> <p>13 Administration department or the Supreme Court,</p> <p>14 that they would redact sensitive information?</p> <p>15 A. Yes.</p> <p>16 Q. Do you redact sensitive information when</p> <p>17 you encounter it in your role in the Legislature?</p> <p>18 A. Yes.</p> <p>19 Q. You are familiar with policies requiring</p> <p>20 redaction of sensitive information?</p> <p>21 A. At the time when we were redacting, I</p> <p>22 was advised of those, so that we would follow</p> <p>23 them.</p> <p>24 Q. Have you personally redacted documents</p> <p>25 yourself?</p>
<p style="text-align: right;">Page 377</p> <p>1 Q. Did you understand then that asking the</p> <p>2 Supreme Court to hear something is a fairly</p> <p>3 unusual and extraordinary action?</p> <p>4 A. I felt like this whole thing was a very</p> <p>5 extremely new realm we've never been on, so I knew</p> <p>6 that we were heading into places that we'd never</p> <p>7 been before.</p> <p>8 Q. Did you think that this was the sort of</p> <p>9 case that would warrant taking it as far as it</p> <p>10 needed to go?</p> <p>11 A. 100 percent.</p> <p>12 Q. And setting aside what we've talked</p> <p>13 about now, what further action, after getting --</p> <p>14 and now I'm back to April 12th when we see Ms.</p> <p>15 Hansen's letter, and that follows on the heels of</p> <p>16 the order quashing the subpoena in the Brown case</p> <p>17 -- what other actions did the Legislature take</p> <p>18 then to try to get those records?</p> <p>19 A. I believe that we kept trying to do</p> <p>20 subpoenas through the DOA.</p> <p>21 Q. Do you remember, was the scope of those</p> <p>22 changed at all?</p> <p>23 A. I don't believe so. I believe that we</p> <p>24 tried to keep it very narrow to bills that we knew</p> <p>25 that were in emails, and keep our scope as narrow</p>	<p style="text-align: right;">Page 379</p> <p>1 A. I have.</p> <p>2 Q. Did the Legislature do anything by way</p> <p>3 of setting up a committee to investigate this</p> <p>4 matter further?</p> <p>5 A. Yes. The President and I realized that</p> <p>6 we had to get back to running the Legislature, so</p> <p>7 we formed a committee to continue down this path.</p> <p>8 Q. Who was on that committee?</p> <p>9 A. I remember Greg Hertz was on it -- but</p> <p>10 really trying stretch my memory here -- Amy</p> <p>11 Regier; if I remember correctly, put Sue Vinton on</p> <p>12 there as well. And I do not remember the Senators</p> <p>13 exactly besides Greg Hertz.</p> <p>14 Q. Once the committee was formed, were you</p> <p>15 involved in its working?</p> <p>16 A. Not much.</p> <p>17 Q. Did the committee ultimately prepare a</p> <p>18 report or reports?</p> <p>19 A. Yes.</p> <p>20 MR. COLEMAN: Nothing further, Mr.</p> <p>21 Chairman.</p> <p>22 CHAIR OGLE: Mr. Strauch,</p> <p>23 cross-examination.</p> <p>24 MR. STRAUCH: Yes, Mr. Chairman. Thank</p> <p>25 you, Mr. Chairman, members of the Commission.</p>

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1
2 **CROSS-EXAMINATION**
3 **BY MR. STRAUCH:**
4 Q. Speaker Galt, how are you?
5 **A. I'm doing well. How about yourself?**
6 Q. Good. Thank you. My name is Tim
7 Strauch, and I'm the Special Counsel for Office of
8 Disciplinary Counsel. You and I have never met,
9 have we?
10 **A. I don't believe so.**
11 Q. I looked at your background, and I see
12 that you're part of the proud Galt family that has
13 a couple hundred thousand acre ranch over by White
14 Sulphur Springs; is that right?
15 **A. That is correct.**
16 Q. It's beautiful country. I know it
17 because I hunt on the side that faces Canyon Ferry
18 on public, so it's very nice. All the elk go to
19 your place during hunting season.
20 **A. Well, we try to push them back as much**
21 **as we can.**
22 Q. At the end of the year. No, I'm kidding
23 with you. Anyway, beautiful country. I really
24 actually just have a few questions here, and I'll
25 start with Exhibit C that you were asked about.

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1 First of all, I just want to clarify
2 something. Is Exhibit C the FOIA request that you
3 were referring to when you used that term?
4 **A. Yes.**
5 Q. Okay. Thank you. And there's a couple
6 things. You were also asked about these, and I'll
7 start with "C," and on the second page of "C," Ms.
8 Belke states that she would like a breakdown of
9 which Judges voted which way on SB 140, and then
10 she says, "While the President is comfortable
11 waiting until Friday to receive the bulk of the
12 requested information, we are requesting the
13 breakdown immediately;" do you see that?
14 **A. I do.**
15 Q. So Ms. Belke conveyed that as it related
16 to the emails themselves, the President was
17 comfortable waiting until Friday, correct?
18 **A. Yes.**
19 Q. And if you see the date, just so you can
20 refresh your recollection, the date of her email
21 on the first page of Exhibit C is Wednesday, April
22 7th, correct?
23 **A. Yes.**
24 Q. So Friday, using simple math, would be
25 the 9th, correct?

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1 **A. Correct.**
2 Q. And Ms. McLaughlin writes back at the
3 top, among other things -- I believe you went
4 through all this except for the last sentence,
5 which I want you to look at. And Ms. McLaughlin
6 says, "As I said, I will make every effort to
7 search for and get the other requested information
8 to the President and the Speaker on Friday." Do
9 you see that?
10 **A. I do.**
11 Q. And then on Exhibit D, toward the end of
12 the second paragraph at the top of Ms.
13 McLaughlin's email, this is on Thursday the 8th,
14 she states, quote, "I have not completed the
15 search for other information, but will do so and
16 have it delivered tomorrow." Did I read that
17 correctly?
18 **A. Yes.**
19 Q. Do you know if she was given the chance
20 to do what she said she was going to do, and do a
21 search of the network, and provide that
22 information on Friday, as the President said he
23 was willing to wait?
24 **A. I believe she did, but she also told us**
25 **at the same time that she had already given us**

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1 **everything she had in her possession.**
2 Q. Is it your understanding that you did
3 give her until Friday the 8th?
4 **A. Yes.**
5 Q. Look at Exhibit 6, please. I said --
6 Friday the 9th. I'm sorry. Then Exhibit 6 is the
7 subpoena that the Legislature sent to the Director
8 of the Department, correct?
9 **A. Yes.**
10 Q. And the date of that subpoena is what?
11 **A. The 8th.**
12 Q. Yes, sir. So you subpoenaed the records
13 from the Department of Administration without
14 waiting for Ms. McLaughlin to get you the
15 information, correct?
16 **A. Correct.**
17 Q. And I think you said you don't have a
18 law degree, but I want to make sure. You're not
19 licensed as an attorney, are you?
20 **A. No.**
21 Q. Have you ever practiced law?
22 **A. No.**
23 Q. Have you ever appeared in court as
24 Counsel and had subpoenas issued?
25 **A. No.**

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1 Q. In fact, I think you said this might
2 have been your first experience with a subpoena;
3 is that right?
4 **A. Yes.**
5 Q. Do you recall receiving an email from
6 the Court Administrator Beth McLaughlin's attorney
7 Randy Cox after the Supreme Court issued the
8 Sunday order that you mentioned?
9 **A. I do remember. What exactly it said I**
10 **do not.**
11 **MR. STRAUCH:** Mr. Chairman, may I show
12 the witness the email to refresh his memory?
13 **CHAIR OGLE:** Yes, you may. Is this
14 something that's in the record, Mr. Strauch?
15 **MR. STRAUCH:** No, sir. I don't intend
16 to put it in the record. Under Rule 612, I just
17 intend to use it to refresh the witness's memory.
18 I don't have it in my folder. Can I have a
19 second? May I approach?
20 **CHAIR OGLE:** Yes.
21 Q. (BY MR. STRAUCH) Speaker Galt, I'm
22 handing you an email from Randy Cox, Sunday, April
23 11th at 9:16 p.m., and among others, it's
24 addressed to you. I do not wish you to read this
25 out loud because it's not in evidence, but would

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1 you please review it privately, and then I may ask
2 if this helps you to recall.
3 **A. Yes. (Examines document)**
4 Q. Have you had a chance to review that
5 email?
6 **A. I have.**
7 Q. Does it refresh your recollection of
8 having received it?
9 **A. Yes.**
10 Q. And having read it at the time?
11 **A. Yes.**
12 Q. Do you recall Mr. Cox explaining to you,
13 and President Blasdel, and Senator Regier, and Ms.
14 Belke, that all he was asking to do was get the
15 emails back so that his client, the Court
16 Administrator, could review them for confidential
17 information, and also determine if they had any
18 legal obligations to notify people their
19 confidential information was compromised? Do you
20 remember him saying that?
21 **A. Yes.**
22 Q. Did you respond to Mr. Cox?
23 **A. I did not personally, but someone may**
24 **have.**
25 Q. Do you know if anyone did?

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1 **A. I cannot recall at this time.**
2 **MR. STRAUCH:** Thank you, sir. May I
3 have the Commission's indulgence for just a
4 moment?
5 **CHAIR OGLE:** Yes, you may.
6 **MR. STRAUCH:** As I indicated, Your
7 Honor, we're not going to move for admission of
8 that unless there's no objection, but under Rule
9 612, I don't think I can.
10 **CHAIR OGLE:** I understand.
11 **MR. STRAUCH:** No further questions, Mr.
12 Chairman. Mr. Galt, nice to meet you. Thank you
13 for your time.
14 **THE WITNESS:** Nice to meet you as well.
15 **CHAIR OGLE:** Anything further with this
16 witness, Mr. Coleman?
17 **MR. COLEMAN:** Just briefly, Mr.
18 Chairman.
19
20 **REDIRECT EXAMINATION**
21 **BY MR. COLEMAN:**
22 Q. To confirm, why did you issue the
23 subpoena then?
24 **A. We assumed, with the way that the Court**
25 **Administrator had said that she'd already given us**

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1 **everything in her possession, that there was going**
2 **to be no more documents coming from her, and then**
3 **we were going after deleted emails at that point.**
4 Q. From a different State agency?
5 **A. From a different State agency.**
6 **MR. COLEMAN:** That's all I have.
7 **CHAIR OGLE:** Very well. Anything
8 further, Mr. Strauch?
9 **MR. STRAUCH:** Not of this witness, Your
10 Honor.
11 **CHAIR OGLE:** The witness can be excused
12 then.
13 (Witness excused)
14 **CHAIR OGLE:** Call your next witness, Mr.
15 Coleman.
16 **MR. COLEMAN:** The Respondent will call
17 Greg Hertz. It may be just a second. I
18 understand he's downstairs sequestered.
19 Mr. Hertz, will you take that chair
20 right there.
21
22 GREGORY J. HERTZ,
23 Having been first duly sworn, was examined and
24 testified as follows:
25 **DIRECT EXAMINATION**

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1 **BY MR. COLEMAN:**
2 Q. Please state your name and address for
3 the record, sir.
4 A. **Gregory J. Hertz. I reside at 34956**
5 **Rocky Pine Road in Polson, Montana.**
6 Q. What do you do for a living, Mr. Hertz?
7 A. **I'm currently involved in the retail**
8 **grocery business. I operate six retail grocery**
9 **stores.**
10 Q. Whereabouts?
11 A. **In Polson, Ronan, Lolo, Thompson Falls,**
12 **Lakeside, Montana, and St. Mary's, Idaho.**
13 Q. What's your involvement with the Montana
14 State Legislature?
15 A. **So I first ran for the Legislature in**
16 **2012, and I served in the House for eight years.**
17 **I currently just finished up four years in the**
18 **Senate, and I'm currently running for re-election.**
19 Q. What was your role in the Montana
20 Legislature in 2021?
21 A. **In 2021, I sat on several committees,**
22 **and also in regard to the matter that we're**
23 **talking about here today, I chaired a Select**
24 **Committee on Judicial Transparency.**
25 Q. Are you familiar with a dispute over the

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1 production and disclosure of emails in the spring
2 of 2021?
3 A. **Yes.**
4 Q. And in really general terms, what do you
5 recall about that?
6 A. **Well, in general, we were looking for**
7 **some information in regard to emails that we had**
8 **heard that were out there in the public, and we**
9 **had asked, the Legislative Branch had asked to get**
10 **those emails, and they were not produced. And**
11 **then it kind of fell into issuing subpoenas and**
12 **trying to retrieve some of that information.**
13 Q. Generally speaking -- we're not going to
14 get into the details of all of them -- but were
15 those emails between members of the judiciary that
16 concerned pending legislation?
17 A. **Yes, they were. We saw some of those**
18 **emails. It was quite disturbing that we saw the**
19 **judiciary weighing in on pending legislation that**
20 **they could possibly rule on in case this**
21 **legislation went to the Court.**
22 Q. More specifically, do you remember what
23 types of bills were pending at the time?
24 A. **So one of the bills that we were talking**
25 **about had to do with Senate Bill 140, and that**

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1 particular bill had to do with how vacancies with
2 Judges are filled. And the Constitution is fairly
3 clear. The Montana Constitution sets out rights
4 for different branches of government or
5 individuals, and items in the Constitution at
6 times say, "as a manner provided by law."
7 So what that does is kind of basically
8 opens the door for the Legislative Branch to
9 suggest how these particular items might be
10 enforced, and that's what we did with Senate Bill
11 140.
12 And what was particularly concerning to
13 myself and other legislators was we already had
14 Judges that seemed to be weighing that either they
15 thought the bill was unconstitutional -- which it
16 obviously was not. The ruling from the Montana
17 Supreme Court was six to one that it was not
18 unconstitutional -- but they were just weighing in
19 before this.
20 And eventually, as this was heading to
21 Court, some of these Judges may very well be on a
22 panel or in a court that are going to be reviewing
23 this, and they've already weighed in, and --
24 **MR. COLEMAN:** I'm going to interrupt
25 you. Mr. Strauch has --

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1 **MR. STRAUCH:** The objection is can we go
2 to question and answer, please?
3 Q. (BY MR. COLEMAN) Did you see emails
4 that suggested some Judges believed this bill,
5 Senate Bill 140, was unconstitutional before it
6 even passed?
7 A. **Yes.**
8 Q. Was that concerning to you?
9 A. **It was very concerning.**
10 Q. Why?
11 A. **Because as I had stated, that if this**
12 **were to end up in court, and we've already had**
13 **Judges that it looks like there's a perceived**
14 **bias, and they're violating their judicial rules**
15 **of conduct and standards, that they're already**
16 **weighing in on issues. And nobody wants to see**
17 **that, whether it's in this case or any other case**
18 **when it goes before the Court.**
19 **MR. STRAUCH:** Mr. Chairman, I'd move to
20 strike the legal conclusion about whether or not
21 Judges are violating their rules of judicial
22 conduct. The Senator is not a lawyer. He was not
23 disclosed as an expert. There are all kinds of
24 reasons why he should not be permitted to state
25 that, but he was not disclosed as an expert, nor

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1 would he be qualified as an expert on that issue.
2 I move to strike that answer.
3 **CHAIR OGLE:** Objection sustained.
4 **MR. COLEMAN:** To be clear, we're not
5 going to ask this witness his legal conclusion.
6 Q. (BY MR. COLEMAN) You don't have a law
7 degree, do you?
8 **A. No, I do not. I'm just a citizen**
9 **legislator.**
10 Q. Never practiced law?
11 **A. I have not.**
12 Q. So let's talk, without the objectionable
13 language here. Let's go back to my question which
14 was: What were your concerns about a sitting
15 Judge making comments that pending legislation is
16 unconstitutional before it's even passed?
17 **A. If we were to end up in a court case, in**
18 **front of any pending Judge who has already**
19 **presented a bias towards this bill, it's not a**
20 **fair trial, and it just flies in the face of**
21 **justice that you can make an opinion before you're**
22 **even hearing a case.**
23 Q. Separate and apart from Senate Bill 140,
24 was there another House Bill 685 that was
25 discussed at the time?

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1 **A. Yes.**
2 Q. And to be clear, Senate Bill 140 became
3 law, House Bill 685 did not?
4 **A. Correct.**
5 Q. What was House Bill 685?
6 **A. House Bill 685 was a constitutional**
7 **initiative that was amending the Montana**
8 **Constitution, and that would be put on the ballot,**
9 **and it's up to voters to determine whether they**
10 **want to amend the Constitution.**
11 Q. And the same question as with respect to
12 Senate Bill 140. In your work with the
13 Legislature, had you seen emails from sitting
14 Judges in the state of Montana that said that
15 House Bill 685 was likely unconstitutional before
16 it had even been voted on?
17 **A. Yes.**
18 Q. Was that concerning to you?
19 **A. Very concerning.**
20 Q. Did at the time you wonder how a
21 constitutional amendment itself could be
22 unconstitutional?
23 **A. Yes. In fact, I recall one comment from**
24 **one of the Judges was, "This is an**
25 **unconstitutional constitutional initiative," which**

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1 **quite frankly I couldn't understand that reasoning**
2 **as to how someone would say that.**
3 Q. How did you come to be appointed to be
4 the Chair of this committee?
5 **A. It was the Senate President who**
6 **appointed the committee asked me if I would be**
7 **willing to serve on the select committee.**
8 Q. And you told us a moment ago the name of
9 the committee. I apologize. It sounded like --
10 **A. It's the Select Committee on Judicial**
11 **Transparency. I don't have the full name in front**
12 **of me.**
13 Q. Who else was on this committee?
14 **A. There was another Senator, too, three**
15 **Senators -- excuse me -- and three House members.**
16 Q. Was the committee composed of members of
17 both parties?
18 **A. Yes, it was.**
19 Q. How many total? Did you say six?
20 **A. Six.**
21 Q. What generally did the committee do?
22 **A. What the committee had done is we looked**
23 **at -- we had concerns about a number of items.**
24 **Number one had to do with public information, the**
25 **public's right to know. And looking at emails,**

Page 395

1 **and trying to get that information, we also had**
2 **concerns about the Judicial Branch using their**
3 **resources and employees to lobby, which is in**
4 **direct violation of the statutes of Montana,**
5 **and --**
6 **MR. STRAUCH:** Objection, move to strike,
7 legal conclusion.
8 **CHAIR OGLE:** Sustained.
9 **THE WITNESS:** And we also looked at --
10 Q. (BY MR. COLEMAN) Let me -- and for
11 expedience, let me ask my questions.
12 **A. Perfect.**
13 Q. And that gives Mr. Strauch an
14 opportunity to interpose objections. In front of
15 you are a couple of different binders. One says
16 "Respondent's Exhibits," those have letters; the
17 other says, "ODC, Office of Disciplinary Counsel's
18 Exhibits," those have numbers. Do you see those?
19 **A. Yes, I do.**
20 Q. I'm going to look through just a handful
21 of those, and we're going to put them on the
22 screen, too, but I'm going to ask you to look at
23 the one in the binder. The first one I'm going to
24 ask you take a look, please, at Exhibit C. That's
25 going to be in the Respondent's exhibits.

<p style="text-align: right;">Page 396</p> <p>1 A. (Complies) All right. I believe I've 2 got Exhibit C open here. 3 Q. Do you know who Ms. Abra Belke is? 4 A. Yes, I do. 5 Q. Who is she? 6 A. She is the Senate Chief of Staff, works 7 for the President. 8 Q. In connection with these issues that 9 we've been discussing, was she responsible for 10 trying to obtain these emails from the Court 11 Administrator? 12 A. Yes. 13 Q. And did you understand that she had 14 submitted some sort of a FOIA request to the 15 Administrator for that purpose? 16 A. Yes. 17 Q. Do you remember what the results of that 18 FOIA request were? 19 A. I believe we only received maybe one or 20 two items, but not the bulk of the material that 21 she was looking for. 22 Q. And if we look at Exhibit C in front of 23 you, starting with the second page. You probably 24 have to look at the very bottom of the first page 25 that started it. Is that an email from Ms. Belke</p>	<p style="text-align: right;">Page 398</p> <p>1 April 8th, 2021. 2 A. Yes. I'm aware of that. 3 Q. What do you remember about this? 4 A. So as I recall, the subpoena was issued, 5 and the Department of Administration did provide 6 the Legislature emails. 7 Q. Do you recall that there was a Sunday 8 Court filing and an order that quashed the 9 subpoena? Fancy word for saying it's not 10 enforceable. 11 A. Yes. 12 Q. What do you recall about that? 13 A. So just as a lay person, I thought it 14 was highly unusual that the Court would meet on a 15 Saturday, and then make a ruling on Sunday 16 afternoon. 17 Q. Do you have any experience with court 18 matters? 19 A. A little bit. I've been involved in 20 several court matters, and generally in my 21 experience, things are basically done Monday 22 through Friday. Making motions, and hearing 23 rulings rarely, if ever, is it done to my 24 knowledge on a weekend. 25 Q. Your involvement would be as a litigant,</p>
<p style="text-align: right;">Page 397</p> <p>1 to Ms. McLaughlin requesting information? 2 A. Yes, it is. 3 Q. And do you see Ms. McLaughlin's response 4 at the top of Page 1 of Exhibit C where she 5 writes, "Attached is two items I can identify in 6 my records related to SB 140"? 7 A. Yes. 8 Q. Are these the two items that you were 9 referencing? 10 A. Yes. 11 Q. Take a look, please, at the next 12 exhibit, Exhibit D. 13 A. (Complies) 14 Q. Do you recall that Ms. McLaughlin had 15 noted that some of the emails that pertained to 16 this issue had been deleted? 17 A. Yes. 18 Q. Did that concern you? 19 A. Yes, it did, considering that I'm fully 20 aware of the email and public policy retention of 21 records. 22 Q. And do you understand that the 23 Legislature then issued a legislative subpoena to 24 the Department of Administration around this time? 25 We're still talking now that this one is dated</p>	<p style="text-align: right;">Page 399</p> <p>1 I presume? 2 A. Yes. 3 Q. Perhaps a trip and fall in the grocery 4 store? 5 A. Correct. 6 Q. And never in those instances, though, 7 did you get called to show up and testify on 8 Sunday, did you? 9 A. Never. 10 Q. What was the Legislature's position once 11 that subpoena was quashed on the 11th of April 12 2021? 13 A. So knowing our Montana Constitution and 14 our public's right to know, and the separation of 15 branches of government, and the fact that we have 16 the ability to issue subpoenas in doing our 17 investigation, I was quite surprised that those 18 subpoenas were quashed and ignored. 19 Q. Did the Legislature intend to just give 20 up at that point? 21 A. No, we did not. 22 Q. Is that one of the reasons your 23 committee was created? 24 A. Yes. 25 Q. To investigate the situation?</p>

<p style="text-align: right;">Page 400</p> <p>1 MR. STRAUCH: Objection, Mr. Chairman.</p> <p>2 Can we get question and answer, please? Counsel</p> <p>3 is leading.</p> <p>4 CHAIR OGLE: Please stick to question</p> <p>5 and answer.</p> <p>6 MR. COLEMAN: I will. I'm just trying</p> <p>7 to -- I apologize. I'm just trying to speed</p> <p>8 things up here.</p> <p>9 Q. (BY MR. COLEMAN) Going back then to</p> <p>10 the following, what happens following the Sunday,</p> <p>11 April 11th, 2021 order quashing the subpoena.</p> <p>12 With respect to that subpoena, had you ever been</p> <p>13 involved previously with a legislative subpoena?</p> <p>14 A. No, I have not.</p> <p>15 Q. Again, how long have you been in the</p> <p>16 Legislature?</p> <p>17 A. Since 2013.</p> <p>18 Q. Had you ever heard of one?</p> <p>19 A. Occasionally. They're rarely used.</p> <p>20 Q. Had you ever seen a subpoena be required</p> <p>21 from the Legislature, not in a court case, to</p> <p>22 obtain documents that maybe a committee of the</p> <p>23 Legislature was investigating?</p> <p>24 A. Not to my knowledge.</p> <p>25 Q. Have you ever had to subpoena a witness</p>	<p style="text-align: right;">Page 402</p> <p>1 around the 15th of April.</p> <p>2 Q. And did the committee request or</p> <p>3 subpoena folks to appear in front of it?</p> <p>4 A. Yes, it did.</p> <p>5 Q. Who did it ask to appear in front of it?</p> <p>6 A. We asked personal appearance from Court</p> <p>7 Administrator Beth McLaughlin.</p> <p>8 Q. When you say you asked, did you issue a</p> <p>9 subpoena for her appearance?</p> <p>10 A. I believe we did.</p> <p>11 Q. Did she appear?</p> <p>12 A. She did not.</p> <p>13 Q. Did you ask the Supreme Court Justices</p> <p>14 of the Montana Supreme Court to appear?</p> <p>15 A. We did not ask them to appear. We asked</p> <p>16 them for information.</p> <p>17 Q. Electronic information about their</p> <p>18 emails?</p> <p>19 A. Yes.</p> <p>20 Q. Did they in fact appear at a committee</p> <p>21 hearing?</p> <p>22 A. Yes, they did.</p> <p>23 Q. Describe that hearing for the Panel.</p> <p>24 A. So that hearing was very interesting.</p> <p>25 As a legislator, Chair of a committee, it was</p>
<p style="text-align: right;">Page 401</p> <p>1 to show up at a committee hearing of the</p> <p>2 Legislature?</p> <p>3 A. No, I have not.</p> <p>4 Q. Why not?</p> <p>5 A. Most of the time we reach out to</p> <p>6 individuals, and ask them for information, and</p> <p>7 they show up to the committee.</p> <p>8 Q. Were you involved in preparing that</p> <p>9 original, what I'm calling the original subpoena,</p> <p>10 the one that was quashed?</p> <p>11 A. No, I was not.</p> <p>12 Q. Were you involved in subsequent</p> <p>13 subpoenas?</p> <p>14 A. No, I was not.</p> <p>15 Q. Did you understand that subsequent</p> <p>16 subpoenas were issued?</p> <p>17 A. Yes.</p> <p>18 Q. How did you come to learn that?</p> <p>19 A. So as our select committee was</p> <p>20 established, and we were reviewing documents,</p> <p>21 those documents were provided to us, and so we</p> <p>22 became aware of them within our select committee.</p> <p>23 Q. Do you remember when the select</p> <p>24 committee was formed?</p> <p>25 A. It was in the middle of April, sometime</p>	<p style="text-align: right;">Page 403</p> <p>1 probably a historical event when all seven Supreme</p> <p>2 Court Justices were appearing before this</p> <p>3 committee. And the Chief Justice did agree to</p> <p>4 answer questions.</p> <p>5 As we went through the different</p> <p>6 Justices, I believe it was Justice Rice who -- in</p> <p>7 regard to the subpoena, he went to a District</p> <p>8 Court to look at that subpoena, and get a ruling</p> <p>9 on that.</p> <p>10 I believe Justice Sandefur, he provided</p> <p>11 some documentation, some information that we had</p> <p>12 requested, and talked about his deleting emails.</p> <p>13 But the remaining Justices did not</p> <p>14 provide any information that we had requested.</p> <p>15 Q. Did the remaining Justices answer</p> <p>16 questions from the committee?</p> <p>17 A. They did.</p> <p>18 Q. And in particular, at that time when the</p> <p>19 committee was doing its work with respect to the</p> <p>20 emails or otherwise, what were the committee's</p> <p>21 concerns? I can narrow that if that's too broad.</p> <p>22 A. So the committee's concerns were</p> <p>23 obviously not being able to access public records.</p> <p>24 Our concerns, too, were that there was obviously</p> <p>25 lobbying going on with the Montana Judges</p>

<p style="text-align: right;">Page 404</p> <p>1 Association and the Bar Association using State 2 resources and State employees. And then we were 3 also concerned about potential violations of 4 Montana Judicial Standards. 5 Q. Do you remember the three categories of 6 information that were sought by the subsequent 7 subpoenas of Ms. McLaughlin and to the members of 8 the Montana Supreme Court? 9 A. I don't. I think they're in one of our 10 documents, our FOIA report, but they were pretty 11 specific as to information about Senate Bill 140, 12 about polling, and about lobbying efforts done 13 with State resources. 14 Q. How many reports did this committee 15 produce? 16 A. We produced two reports. 17 Q. You referenced something called an 18 interim report? 19 A. Yes. 20 Q. Do you know when that came out? 21 A. I believe that came out sometime around 22 the first part of June of 2021. 23 Q. And you said a moment ago that those 24 topics were outlined -- of those subpoenas were 25 outlined in that initial or preliminary report?</p>	<p style="text-align: right;">Page 406</p> <p>1 Select Committee on Judicial Accountability and 2 Transparency. It's our initial report to the 67th 3 Montana Legislature. 4 Q. Who participated in the hearing? 5 A. This report was the members of that 6 select committee. 7 Q. How was the committee created? 8 A. It was appointed by then Speaker of the 9 House Galt, and Senate President Blasdel. 10 Q. What sort of duties did this committee 11 have? 12 A. To look at the concerns that we had in 13 regard to what had transpired with Senate Bill 14 140, House Bill 685, and other information that 15 was out in the public sphere in regards to emails. 16 Q. Did this committee operate at the behest 17 of the Legislature? 18 A. Yes. 19 Q. Was this report prepared in the ordinary 20 course of the committee's work? 21 A. Yes. 22 Q. Is this a public record made available 23 to anyone who wants to go see it? 24 A. Yes. 25 Q. Was the committee tasked with creating</p>
<p style="text-align: right;">Page 405</p> <p>1 A. Yes, very clearly. 2 Q. Would it refresh your recollection on 3 this issue as to those topics if we were to take a 4 look at that report? 5 A. Yes, it would. 6 Q. I'll ask you to take a look, please, at 7 what's Exhibit V in front of you. 8 A. (Examines document) Did you say "V" as 9 in victory? 10 Q. "V" as in victory. 11 A. (Complies) All right. I have it open. 12 MR. STRAUCH: Mr. Chairman, this is not 13 in evidence, and we object to its admission, so I 14 would ask that its contents not be read out loud, 15 please. 16 MR. COLEMAN: We do intend to move its 17 admission, and I was going to wait a little bit 18 longer, Your Honor, but I'll lay the foundation 19 and move its admission right now. 20 MR. STRAUCH: I'll wait for the 21 foundation, and then I have an objection. 22 CHAIR OGLE: All right. 23 Q. (BY MR. COLEMAN) What is Exhibit V in 24 front of you? 25 A. It is a report from the Special Joint</p>	<p style="text-align: right;">Page 407</p> <p>1 this report? 2 A. Yes. 3 MR. COLEMAN: Your Honor, I'll move the 4 admission of this exhibit. 5 CHAIR OGLE: Objection, Mr. Strauch? 6 MR. STRAUCH: Yes, Your Honor, a couple 7 of objections. First of all, this is hearsay. It 8 does not fall within the public records exception, 9 Rule 803(8). That's limited as to investigative 10 reports like this. That's limited to 11 investigative reports pursuant to, quote, 12 "pursuant to duty imposed by law, and as to which 13 there was a duty to report, or factual findings 14 resulting from an investigation made pursuant to 15 authority granted by law." 16 Your Honor, as I indicated earlier, and 17 you sustained my objection, in the McLaughlin case 18 the Supreme Court already ruled that the 19 Legislature did not have -- did not have -- 20 authority to investigate or make findings 21 regarding alleged Judicial or Court Administrator 22 misconduct, and I'll again cite for the record 23 McLaughlin 2021 Montana 178 Paragraphs 23 to 31. 24 Well, let me back up. The Legislature 25 in McLaughlin asserted its authority to prepare,</p>

<p style="text-align: right;">Page 408</p> <p>1 to do this investigation and to prepare findings, 2 and the Supreme Court rejected that. In that 3 litigation the Legislature submitted three 4 purposes for its position that it had authority. 5 No. 1, it asserted that it needed these 6 records in order to determine whether there was an 7 improper deletion of emails, and the McLaughlin 8 Court Paragraphs 23 to 31 specifically ruled on 9 that, and rejected that. It said it did not. I 10 quoted that language earlier. 11 No. 2, the Legislature said that it 12 needed this information to see if there had been 13 improper use of State resources to lobby. The 14 Senator again just repeated that. The Supreme 15 Court decided it did not. The Legislature did not 16 have authority or a duty under law to do that. 17 And that's McLaughlin Pages 33 -- Paragraphs 33 to 18 37. 19 The Senator referenced -- and again, 20 it's clear that this was an issue litigated in 21 McLaughlin -- that it was concerned about improper 22 prejudging by Judges, and again, the Supreme Court 23 said no, the Legislature does not have the 24 authority to investigate that. That's a matter 25 for the Judicial Standards Commission, which is a</p>	<p style="text-align: right;">Page 410</p> <p>1 it is, among other things, a waste of time, and 2 this is. It's been litigated and decided. 3 Rule 702. The Senator is not a lawyer. 4 He is not qualified to render an opinion as to 5 judicial conduct. He is not an attorney, and he's 6 not a Judge. He has no experience or 7 qualifications in that, and that I already cited, 8 the fact that these opinions, if he gives them 9 even orally, would be an improper collateral 10 attack. 11 And last but not least, and probably 12 most importantly, there was no disclosure of this 13 gentleman or any other as an expert on this issue. 14 This Commission ruled that those expert 15 disclosures would have been due ten days, ten 16 business days prior to this hearing. This 17 gentleman was not identified as an expert. He 18 should not be allowed to render opinions that he's 19 not qualified to give, and that the Montana 20 Supreme Court has already decided. 21 MR. COLEMAN: Mr. Chairman, if I may 22 address those in the reverse order in which they 23 were presented. 24 First off, with respect to the 702 25 objection, that's not raised in objections to our</p>
<p style="text-align: right;">Page 409</p> <p>1 constitutionally mandated body. And so the 2 Supreme Court rejected that. 3 This report is not admissible in 4 evidence because it is hearsay. It is a report 5 that was not pursuant to a duty imposed by law, 6 and not made to authority granted by law, and the 7 Supreme Court has already said so. So what we 8 have is a report that is hearsay purporting to 9 directly attack the Montana Supreme Court's 10 opinion. 11 Secondly, to the extent that this 12 Senator is being asked to render opinions as a 13 participant in that committee, even if we were not 14 to admit the report, but to be asked to give those 15 opinions, I would say there are four reasons to 16 reject that. 17 One is relevance for the reason I just 18 said. This case involves Respondent's conduct, 19 not the Judiciary's, which is solely the province 20 of the Judicial Standards Committee, a 21 constitutional authority. So the evidence has no 22 tendency to make the existence of any fact that is 23 of consequence to the determination of the action 24 more or less probable. Rule 401. 25 Irrelevant evidence may be excluded if</p>	<p style="text-align: right;">Page 411</p> <p>1 exhibits. I understand Mr. Strauch will say he's 2 not giving expert testimony, that's improper. 3 We're absolutely not offering the Senator, 4 Representative from Polson rather, as an expert 5 witness. He's not. He's here to talk to the 6 panel about what it was he was doing at the time 7 factually. 8 The report can be considered or 9 rejected, if it's admitted into evidence by this 10 Panel, for whatever parts that the Panel wants to 11 consider, or not at all. Largely it includes a 12 timeline of what the committee did factually. 13 That's not a finding on any judicial misconduct. 14 It's objective statements that the Court, the 15 Panel can take or leave. 16 Secondly, let's talk about hearsay. 17 We've got two responses to hearsay. First off, it 18 absolutely fits the definition of an exception 19 under Rule 803(8), Public Records and Reports, and 20 to read the exact language of the rule, "To the 21 extent not otherwise provided in this paragraph, 22 records, reports, statements, or data compilations 23 in any form of a public office or agency setting 24 forth its regularly conducted and regularly 25 recorded activities, or matters observed pursuant</p>

<p style="text-align: right;">Page 412</p> <p>1 to duty imposed by law, and as to which there was 2 a duty to report." 3 That is an exception. This is clearly a 4 committee established by law, by the Legislature 5 itself, for the purpose of doing this. It was 6 supposed to come up with a report, it did come up 7 with a report. That's the one that we've got in 8 front of us here, at least on this current issue. 9 There are exceptions to what I just 10 said. None of them apply. The exceptions are law 11 enforcement reports, they're clearly not that; 12 investigative reports prepared for a government 13 agency when offered by it in a case in which it is 14 a party -- that's the part you didn't hear. 15 The Legislature and this subcommittee, 16 or this committee rather, is not a party to this 17 matter. It's defined in this case. Fact findings 18 by a government agency in criminal matters -- not 19 at issue; and special investigations of a 20 particular complaint, case, or incident -- not an 21 issue; and any other -- there's a catch-all. 22 This fits the very -- This is exactly a 23 public report. That was why the committee was 24 formed, to create a report, and figure out where 25 it went. That's No. 1.</p>	<p style="text-align: right;">Page 414</p> <p>1 to what Mr. Knudsen put in his brief, and 2 certainly as to his subjective intent as to 3 whether it was false or incorrect. 4 CHAIR OGLE: Number one, Mr. Hertz's 5 mindset as to what the Legislature's thoughts were 6 is in the record already, and I can't really see 7 any relevance of this particular report to any of 8 the issues before this panel and this proceeding, 9 so the objection is sustained. 10 (Whereupon, Respondent's Exhibit V 11 was refused) 12 MR. COLEMAN: While we're at it, Mr. 13 Chairman, we'll move the admission also of Exhibit 14 K, the final report subject to I assume the same 15 objections with Mr. Strauch, and I would have the 16 same response to that. 17 MR. STRAUCH: Same objection. 18 CHAIR OGLE: Objection sustained. 19 (Whereupon, Respondent's Exhibit K 20 was refused) 21 Q. (BY MR. COLEMAN) Was one of the topics 22 investigated by your committee the question of 23 whether or not Judges had shown bias? 24 A. Yes. 25 Q. Was one of the topics of your committee</p>
<p style="text-align: right;">Page 413</p> <p>1 No. 2, we don't even need to get there, 2 because this is not offered for the truth. You 3 can take or leave the veracity of the findings 4 that the committee makes, even on an interim 5 basis, because what we're offering it for is what 6 the mindset at the time. 7 We're offering it for that very purpose, 8 and that is -- and I'll tie it right into the 9 relevance objection -- absolutely relevant for the 10 same reasons that we discussed with respect to the 11 previous witness. It's relevant because Mr. 12 Knudsen, among the many charges, is accused of 13 making false statements. He's accused of making 14 statements that have no -- that were made in 15 reckless disregard of the facts. 16 This was not decided in McLaughlin, 17 because McLaughlin didn't even occur until two 18 months after this report came out. We're looking 19 at Mr. Knudsen's conduct as reported to him by his 20 client. The client did that through many things 21 that it was investigating, one of which was this 22 particular interim report in May of 2021, months 23 before the McLaughlin decision. 24 Their state of mind, their belief as to 25 what the emails reflected is absolutely relevant</p>	<p style="text-align: right;">Page 415</p> <p>1 the question of whether members of the Judiciary 2 had used State time and resources to lobby? 3 A. Yes. 4 Q. Was the committee concerned about the 5 Montana Supreme Court Judges, Justices, ruling on 6 subpoenas to their own selves or employees? 7 A. Yes. 8 Q. Why? 9 A. I think citizens general understanding 10 of the Judiciary should be fair and unbiased to 11 everybody, and when one of the main issues is to 12 rule in their own case, and it's very disturbing 13 to myself and others, members of the public, that 14 when you look at something like this, what was 15 done, and they ruled on their very own subpoenas. 16 It would be very similar to a Judge who 17 had a case in front of him for a company that he 18 owned, and the case was in a matter of one of his 19 employees, and he was ruling on that case. 20 There were other alternatives that we 21 had concluded in our investigation that these 22 Judges could have looked to outside Courts to rule 23 on these, as Justice Rice did. Yet they held a 24 meeting on a Sunday, and ruled directly on 25 subpoenas that were directed at them personally.</p>

<p style="text-align: right;">Page 416</p> <p>1 MR. COLEMAN: Nothing further, Mr. 2 Chairman. 3 CHAIR OGLE: Cross-examination. 4 MR. STRAUCH: No, thank you, Mr. 5 Chairman. 6 CHAIR OGLE: Very well. This witness is 7 excused then. Thank you, Mr. Hertz. 8 (Witness excused) 9 CHAIR OGLE: You can call your next 10 witness, Mr. Coleman. 11 MR. COLEMAN: Mr. Chairman, a couple of 12 things. We have no more live witnesses. A couple 13 of matters, though. 14 We would like to introduce, present to 15 the Court as evidence -- I don't think it's 16 labeled as an exhibit -- the ODC's discovery 17 responses in this matter. 18 MR. STRAUCH: Mr. Chairman, ODC's 19 conduct in this case is not an issue in this case. 20 It wasn't listed as an exhibit. I don't know what 21 the relevance would be. If Counsel can direct my 22 attention to some response that would be probative 23 as to an issue here that's at issue in this 24 litigation, I would reconsider, but I'm not aware 25 of any.</p>	<p style="text-align: right;">Page 418</p> <p>1 sustained. That document is a marked exhibit in 2 this case, although it hadn't been admitted. 3 There's no necessity. This is not a proper -- 4 This is an affidavit. It's hearsay. 5 In addition to that, there's already, to 6 the extent that there needs to be a preservation 7 of this issue, they filed a motion in limine. The 8 report was in front of this Commission, and the 9 Commission decided it. There's plenty of case law 10 that says nothing further is needed to be done on 11 that issue to preserve it for appeal. So yes, I 12 object. This is an affidavit. It's just a 13 summary of a report. 14 CHAIR OGLE: That issue has been 15 determined by the order on the motion in limine, 16 Mr. Coleman, so that's not going to be allowed in. 17 MR. COLEMAN: Absolutely preserved then. 18 We understand. 19 CHAIR OGLE: It's preserved with the 20 motion and your -- 21 MR. COLEMAN: One moment, if I may. 22 Just one matter, Mr. Chairman. 23 We did list on -- I'm going to reargue 24 something you just told me no on -- the request 25 for admission being admitted. One admission is</p>
<p style="text-align: right;">Page 417</p> <p>1 MR. COLEMAN: We're certainly not saying 2 ODC's conduct is at issue here, Your Honor. We 3 have a series of Requests for Admission in there 4 that we think narrow the scope of the claims 5 against the Attorney General. All but one of 6 those were admitted, to my recollection. 7 CHAIR OGLE: Are those on the witness 8 list? 9 MR. COLEMAN: Not on the witness list. 10 It's not a witness. It is just discovery 11 responses. 12 CHAIR OGLE: Is it on the exhibit list? 13 MR. COLEMAN: It's not listed as an 14 exhibit, because it's -- well, I don't know that. 15 CHAIR OGLE: Objection sustained then. 16 If it's not on the list, we're not going to allow 17 it. 18 MR. COLEMAN: We would also like the 19 Panel's indulgence to accept an offer of proof. 20 We have it in writing from our expert witness who 21 was excluded from testifying. We'd like to just 22 be able to file that. 23 MR. STRAUCH: Your Honor, I don't even 24 know what it says. I haven't seen it. But the 25 objection to the expert report itself was</p>	<p style="text-align: right;">Page 419</p> <p>1 whether there are other people that have filed 2 complaints, disciplinary complaints against Mr. 3 Knudsen over this issue. 4 Mr. Cox testified on the stand he was 5 not allowed to give that information, or whether 6 he has. There are requests, Responses for 7 Requests for Admission that directly address that 8 issue. 9 MR. STRAUCH: Mr. Chairman, Counsel may 10 have forgotten, but I objected to that based on 11 relevance. Whether or not other people filed a 12 grievance is not relevant or probative as to any 13 issue in this case. A grievance was filed, and 14 that's all that is needed. 15 And in fact, under the Rules for Lawyer 16 Disciplinary Enforcement, I believe it's Rule 9 -- 17 I don't know off the top of my head because I 18 haven't done this stuff in awhile. Five I'm told 19 -- that ODC doesn't need a complaint at all. 20 The authority under the rules is that if 21 something comes to its attention, publicly or 22 otherwise, it has an obligation to investigate. 23 Relevance. 24 CHAIR OGLE: The objection is sustained. 25 MR. COLEMAN: We have nothing further</p>

<p style="text-align: right;">Page 420</p> <p>1 for the Panel. We conclude our case, rest. 2 CHAIR OGLE: All right. Respondent 3 rests. So there's no more witnesses? 4 MR. STRAUCH: No rebuttal. 5 CHAIR OGLE: All right. Before we take 6 a break here for lunch, I would like to rule on 7 the motion for post-trial briefing. 8 We do understand -- the Panel has 9 considered the motion. We do understand and do 10 intend to make findings of fact and conclusions of 11 law. We will do that, and hope to do that as 12 expeditiously as possible. 13 We don't believe there is a right to 14 submit post-trial briefs in this matter, or 15 post-trial findings and conclusions, and so we are 16 going to deny that motion. There's a great deal 17 of information in the record. Pleadings, 18 exhibits, testimony, all of that is going to be 19 considered, and we are going to render findings of 20 fact and conclusions of law as expeditiously as we 21 can, and I don't believe any additional -- it 22 would delay the process in order to wait for a 23 transcript and then wait for post-trial findings, 24 and conclusions, and we're going to move forward 25 without the need for that. So that motion is</p>	<p style="text-align: right;">Page 422</p> <p>1 ODC filed a detailed Complaint in this 2 matter against the Attorney General alleging 41 3 areas of misconduct. The Attorney General has 4 repeatedly called this complaint unprecedented. I 5 agree. It is unprecedented because this conduct 6 is unprecedented. 7 In the course of this hearing, we went 8 through some, but not all, of the statements made 9 by the AG's office in court filings comprising the 10 41 counts. The rest of statements are laid out in 11 each count of the Complaint, and highlighted in 12 the corresponding court records admitted as 13 exhibits in this hearing, and I invite the 14 Commission to review those exhibits in rendering 15 its decision. 16 To be clear, not only is there clear and 17 convincing evidence that the Attorney General or 18 his subordinates made the statements comprising 19 the 41 counts, but it is undisputed that is the 20 case. They are right there in the court records 21 admitted as exhibits in this hearing. It doesn't 22 get any clearer than that. That the conduct 23 occurred is an irrefutable fact. The only issue 24 is, I would submit, whether it violates the rules 25 that the ODC has charged.</p>
<p style="text-align: right;">Page 421</p> <p>1 denied. 2 MR. STRAUCH: Mr. Chairman, I know we're 3 going to break for lunch. I assume after lunch 4 we'll do closings. 5 CHAIR OGLE: Correct. We will take a 6 break. Why we don't reconvene here at 2:00, and 7 both sides will have an opportunity for closing 8 arguments, and then we will probably begin 9 deliberating shortly after the conclusion of the 10 closing arguments. We'll see you back here at 11 2:00. 12 (Lunch recess taken) 13 CHAIR OGLE: Okay. We're back from our 14 lunch break. Back on the record in the matter of 15 Austin Miles Knudsen, Supreme Court No. 16 PR-23-0496, ODC File No. 21-094. Is the ODC 17 prepared to proceed? 18 MR. STRAUCH: Yes, Mr. Chairman. 19 CHAIR OGLE: Respondent, are you ready 20 to proceed? 21 MR. CORRIGAN: Yes, Mr. Chairman. 22 CHAIR OGLE: Mr. Strauch, why don't you 23 go ahead with your closing argument. 24 MR. STRAUCH: Mr. Chairman, members of 25 the Commission, esteemed Counsel.</p>	<p style="text-align: right;">Page 423</p> <p>1 And briefly again, the rules at issue 2 are 3.4 Charlie, knowing disobedience of an 3 obligation under his sworn duties pursuant to his 4 oath for admission to the Bar -- that oath is 5 Exhibit 40; and disobedience of the Montana 6 Supreme Court's July 14, 2021 order that is 7 Exhibit 24. 8 No. 2, the Rule 5.1(c), responsibility 9 for subordinates lawyers misconduct, which he 10 admits, and the evidence proved, clear and 11 convincing evidence proved he ratified or ignored. 12 No. 3, 8.2 Alpha, reckless statements 13 concerning the qualifications of the integrity of 14 the Judge or Judges, particularly here the 15 Justices of the Montana Supreme Court. 16 Rule 8.4(d), Delta, conduct prejudicial 17 to the administration of justice. 18 And lastly 8.4(a), which as the 19 Commission knows, there is a separate and 20 independent violation of Rule 8.4(a) for any 21 violation of the Rules of Professional Conduct, 22 and that is a stand alone, separately charged, and 23 separately disciplinable charge. 24 Since he appeared with his comments 25 about his personal involvement, quote unquote -- I</p>

<p style="text-align: right;">Page 424</p> <p>1 believe that's the term he used -- since he 2 appeared from making that comment to be trying to 3 distance himself from the statements that his 4 subordinates made, I'd like to start with Mr. 5 Attorney General's responsibility for the conduct 6 of his subordinates. 7 Rule 5.1 Charlie provides that a lawyer 8 within a firm shall be responsible for another 9 lawyer in the firm's violation of the rules if -- 10 and these are two things, but they're or's, 11 they're disjunctive -- if the lawyer orders -- 12 which there's no evidence of here -- or with 13 knowledge of the specific conduct -- which there 14 is evidence here. He admitted he had knowledge of 15 it -- ratifies or ignores the conduct involved. 16 And here I believe he did both, and the evidence 17 proved. 18 No. 2, another way a lawyer, a 19 supervisory lawyer violates Rule 5.1 is if he has 20 managerial authority and/or direct supervisory 21 authority over the other lawyer, and knows of the 22 conduct at a time when its consequences can be 23 avoided or mitigated, but fails to take reasonable 24 remedial action. And I would submit the evidence 25 proves violations of both one and two, but as I</p>	<p style="text-align: right;">Page 426</p> <p>1 issue is whether the supervising attorney violated 2 5.1 by failing to satisfy the ethical 3 responsibilities of a partner or supervisory 4 lawyer in relation to the supervised attorney's 5 misconduct. 6 And there are several cases on this 7 point. In fact, the model rule comment to 5.1 8 lists many of them. But by way of example, In Re: 9 Anonymous Member of the South Carolina Bar, 552 10 S.E.2d 10; In Re: Phillips, an Arizona case, 244 11 P.3d 549; the same ABA publication that I gave 12 you, and as I said the comments to the rules. 13 Thus unlike vicarious liability under 14 5.1, it is not necessary to prove that the 15 Attorney General participated or was personally 16 involved in the acts and omissions of his 17 subordinates. That is not an element. 18 There is clear and convincing evidence 19 that the Attorney General ratified the conduct of 20 his subordinates and his responsibility under 5.1 21 in his letter to the Court Exhibit 19, and his 22 response to ODC Exhibit 39, and his testimony 23 yesterday. 24 But even if this Commission were to 25 determine that those actions do not constitute</p>
<p style="text-align: right;">Page 425</p> <p>1 said, they're disjunctive. 2 To be clear, 5.1 is not limited to law 3 firms, but includes, quote, "Managing lawyers in 4 government legal departments." That's the 5 American Bar Association. The title of the 6 publication is "The Legislative History, the 7 Developments of ABA Model Rules of Professional 8 Conduct," at Page 592, the 2013 publication. 9 And there is specific case law on that 10 precise issue. The only case that I was able to 11 find is a Kansas case, In Re: Kline 311 P.3d 321. 12 I don't believe it was contested here 13 that the rule applies to the Attorney General's 14 Office, but clearly the law says it does. 15 As for comments regarding personal 16 involvement, that strikes me as suggestive that 17 the test here is one of vicarious liability, which 18 the lawyers on this committee would understand, 19 but the lay folks may not. And vicarious 20 liability is where a master or a person that 21 somebody works for is vicariously liable for 22 people that work for him or her in situations 23 where it's within the scope of the employee's 24 duties. 25 That is not the test under 5.1. The</p>	<p style="text-align: right;">Page 427</p> <p>1 ratification, the Attorney General nevertheless 2 still bears responsibility under 5.1 if he ignored 3 the conduct and/or knew of it at the time, but 4 failed to take any remedial, reasonable remedial 5 action. 6 The case law on that is In Re: Myers 584 7 S.C.2d, 357; also Mandleman, M-A-N-D-E-L-M-A-N, 8 714 N.W.2d 512. 9 If you look at those cases, the facts 10 here are even more compelling. Not only did the 11 Attorney General know what his subordinates had 12 said and do nothing, but his response indicates he 13 vigorously supported and defended them. That's 14 Exhibit 39. The AG's failure to take any remedial 15 action to these subordinates' clear violation is 16 second only to his endorsement of their improper 17 conduct. A true managerial lawyer sets ethical 18 rule-following example to his subordinates, not 19 cheerleading their deplorable conduct. There's 20 clear and convincing evidence of 5.1. 21 Rule 3.4 Charlie states that a lawyer 22 shall not knowingly disobey an obligation under 23 the rules of a Tribunal except for an open refusal 24 based on an assertion that no valid obligations 25 exists.</p>

<p style="text-align: right;">Page 428</p> <p>1 Now, I can't tell for sure -- I guess 2 we'll hear next -- but I'm not sure if there's any 3 disagreement that the Attorney General's Office 4 disobeyed his -- Well, he said he disagreed with 5 me that he violated his oath by being 6 disrespectful, and I guess they're saying they 7 didn't violate the Supreme Court order because 8 they eventually turned over the emails. This 9 Commission can make its own determinations as to 10 the validity of either of those arguments. 11 However, I want to be very crystal clear 12 about what was charged and what was not charged. 13 The Complaint was in fact very detailed, and very, 14 very, very, very carefully drafted, so there could 15 be no question about this. And the evidence here 16 was also narrowly tailored to these issues. 17 The rules of the Tribunal that he's 18 being charged with violating are, No. 1, his oath 19 as an officer of the Court, that's Exhibit 40; and 20 No. 2, his obligations to follow one order, and 21 one order only -- one order and one order only -- 22 and I'm going to say it a third time -- one, the 23 July 14th, 2021 order to immediately return 24 Judicial Branch emails, Exhibit 24. 25 Lest there be any doubt, although I</p>	<p style="text-align: right;">Page 430</p> <p>1 ethics, entering an illegal order, and having 2 subpoenas issued in defiance of a Court order." 3 The parallel between that case and this 4 are uncanny. 5 The AG admitted yesterday he never 6 informed the Court that he openly refused his 7 sworn obligation as an officer of the Court. He 8 admitted that. He never did, and I asked him to 9 revoke it today, and he said no. There was no 10 possible way that the exception for an open 11 refusal applies to any violations of his oath as 12 an officer of the Court. 13 That oath -- that oath, Exhibit 40 -- 14 includes the obligation of, quote, "maintaining 15 the respect --" "maintaining the respect due to 16 the Courts of Justice and Judicial Officers," end 17 quote. And it includes the obligations of, quote, 18 "striving --" "striving to uphold the honor and to 19 maintain the dignity of the profession," end 20 quote. 21 The statements discussed at this 22 hearing, the additional ones highlighted in the 23 Court records admitted as exhibits, were 24 disrespectful. Here are some of the most 25 egregious.</p>
<p style="text-align: right;">Page 429</p> <p>1 think Mr. Attorney General admitted in his 2 testimony, but lest there be any doubt that the 3 rules of the Tribunal include not just orders, but 4 also the oath, taken when each one of us is 5 admitted to the Bar in this privileged profession 6 that we have. 7 And the case on that, the most 8 compelling case on that I found is a case called 9 Ligon versus Stilley, L-I-G-O-N and Stilley is 10 S-T-I-L-L-E-Y, 371 S.W.2d 615. There the Court 11 held that Stilley violated the Arkansas equivalent 12 of Rule 3.4(c) in several respects, including -- I 13 think it's instructive here -- 14 "By intentionally being disrespectful of 15 the justice system of the Arkansas Supreme Court 16 individually and as a Court by accusing the 17 Justices in the Court of not being a competent 18 Tribunal; by preparing or ratifying Court 19 pleadings containing language that was clearly 20 intemperate, contemptuous, and disrespectful to 21 the Justices of the Arkansas Supreme Court 22 individually and as a Court," parentheses, 23 "including that they could not obtain due process, 24 being deprived of an impartial arbiter, having a 25 clear conflict of interest, disregarding judicial</p>	<p style="text-align: right;">Page 431</p> <p>1 Exhibit 11, the April 12th letter. "The 2 Legislature does not recognize this Court's order 3 as binding and will not abide by it. The 4 Legislature will not entertain the Court's 5 interference in the Legislature's investigation of 6 the series of troubling conduct of members of the 7 Judiciary. The subpoena is valid and will be 8 enforced." 9 Mr. Chairman, members of the Commission, 10 that is the statement of a lawyer. That is not 11 the statement of a Senator. That's not the 12 statement of any of the honorable members of our 13 Legislature. That is the statement of the 14 Lieutenant Attorney General. That is the 15 statement of Mr. Knudsen's subordinate. 16 Exhibit 13, the April 14th motion to 17 dismiss. You remember it. It doubles down on the 18 letter. 19 Exhibit 16, the April 18th, 2021 letter. 20 You remember it. "Ludicrous." "The Court 21 statement is ludicrous." Wholly outside the 22 bounds of rational thought. 23 Exhibit 17, April 30th, motion to 24 disqualify the Supreme Court Justices, quote, 25 "This matter has arisen because evidence of</p>

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<p>1 judicial misconduct has come to public light. The</p> <p>2 self-interest is so apparent, any attempt by this</p> <p>3 Court to decide the question runs afoul of State</p> <p>4 law and the Code of Judicial Conduct."</p> <p>5 Not made -- not made in a Judicial</p> <p>6 Standards Committee proceeding; made in a public</p> <p>7 filing by the Chief Legal Officer of this state,</p> <p>8 whose duty it is to follow the rules, including</p> <p>9 the rules that require those kinds of complaints</p> <p>10 to be made to that committee, and not in a public</p> <p>11 filing. And any suggestion that that kind of</p> <p>12 language is necessary in order to assert a</p> <p>13 conflict of interest in a motion to disqualify a</p> <p>14 Judge is absolute nonsense.</p> <p>15 It is not the fact that they took the</p> <p>16 position that the Supreme Court had a conflict of</p> <p>17 interest. It is the way they asserted that</p> <p>18 position, and only the lawyers control that.</p> <p>19 Their clients can scream until they're blue that</p> <p>20 they want their lawyers to say these things about</p> <p>21 the Court, but the lawyers are not permitted to do</p> <p>22 it, and they should have told their clients that,</p> <p>23 because that was their ethical responsibility.</p> <p>24 The Honorable Attorney General's letter,</p> <p>25 May 19th, is Exhibit 19. "Please refrain." This</p>	<p>1 It says that the Court's position that</p> <p>2 the Judges will make this determination, quote,</p> <p>3 "defies common sense." Not only are they</p> <p>4 dishonest, but they don't even have common sense.</p> <p>5 Exhibit 26, the August 11th, 2021</p> <p>6 Petition for Rehearing. I'll just go through them</p> <p>7 quickly. "Questionable judicial conduct." The</p> <p>8 Court's position, quote, "blinks reality." The</p> <p>9 Court's statement is, quote, "stunning</p> <p>10 counter-factual denial." "Counter-factual."</p> <p>11 Quote, "These advisory statements must</p> <p>12 be withdrawn." This is a lawyer in a brief to the</p> <p>13 highest Court of this state telling it what it</p> <p>14 must do, and it's accusing the Court of again</p> <p>15 numerous misstatements.</p> <p>16 But maybe I guess you can disregard even</p> <p>17 all of that, and we just can deal with one.</p> <p>18 December 6th, 2021, Petition for Cert to</p> <p>19 the United States Supreme Court. Now, I can tell</p> <p>20 you, it is very difficult to get heard in that</p> <p>21 Court. It is a privilege. It is a privilege. It</p> <p>22 is the highest privilege of a lawyer to be able to</p> <p>23 make an argument in writing or orally to that</p> <p>24 Court. That is the highest privilege we have as</p> <p>25 litigators. There is no higher Court in this</p>
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<p>1 is a lawyer to the Montana Supreme Court in a</p> <p>2 public document. "Please refrain from threatening</p> <p>3 or maligning the integrity of my attorneys who are</p> <p>4 assiduously living up to their ethical obligations</p> <p>5 under unusual circumstances."</p> <p>6 "If you wish to vent." "If you wish to</p> <p>7 vent any further frustrations about the conduct of</p> <p>8 attorneys in my office, I invite you to contact me</p> <p>9 directly."</p> <p>10 He also says in the footnote of that</p> <p>11 letter regarding a Court statement that it's,</p> <p>12 quote, "inaccurate almost to a word." I don't</p> <p>13 know about you, but where I grew up, if somebody</p> <p>14 says I'm saying something inaccurate, they're</p> <p>15 calling me dishonest, maybe worse.</p> <p>16 Exhibit 20, the May 26th, 2021 petition</p> <p>17 for rehearing. This is the one that includes the</p> <p>18 following: "Public records tell a different tale</p> <p>19 than what you're saying, Court." It says the</p> <p>20 Court is perverse. Perverted? This is one that</p> <p>21 says the Court appears to suffer from "the bias of</p> <p>22 Maslow's hammer." I had to look it up. It is not</p> <p>23 a compliment. It is very disrespectful. "If all</p> <p>24 you have is a hammer, everything looks like a</p> <p>25 nail."</p>	<p>1 country. It is extremely well-respected, and it</p> <p>2 deserves respect.</p> <p>3 What did the Attorney General say about</p> <p>4 the highest Court of this state that sits in this</p> <p>5 courtroom? "Judicial self-dealing on this scale</p> <p>6 might be unprecedented in the Nation's history;"</p> <p>7 an officer of the Montana Supreme Court telling</p> <p>8 the United States Supreme Court.</p> <p>9 Speaking of the Supreme Court, the</p> <p>10 Attorney General says, "It reached out to</p> <p>11 facilitate a case brought by its appointee to</p> <p>12 conceal its misbehavior." He accused the Court of</p> <p>13 being untrue. These statements, "A panegyric to</p> <p>14 insincerity came after the non-party Justices</p> <p>15 stayed their own subpoenas."</p> <p>16 This one makes it sound like the Montana</p> <p>17 Supreme Court is a gang. The six McLaughlin</p> <p>18 Justices "charged ahead, ensuring a result that</p> <p>19 bailed themselves out of an investigation prompted</p> <p>20 by their own imperfect behavior."</p> <p>21 And then again, a reference to their</p> <p>22 "emasculating that power" that they're given,</p> <p>23 quote, "to conceal Judicial Branch misbehavior</p> <p>24 from the light of day."</p> <p>25 He wouldn't admit it. I gave him, I</p>

<p style="text-align: right;">Page 436</p> <p>1 don't know how many times. Somebody in the 2 audience said I'm not going to do it again, am I? 3 Yes, I did. I wanted to give him every 4 opportunity. I bet if I asked it five times, I 5 asked it 35 times. Maybe more. Yes, I did. "Was 6 this intemperate? Was this contemptuous? Was it 7 insulting? Was it undignified of our profession?" 8 Every single time, "No." Every single time. No 9 acknowledgment of wrongfulness. 10 In addition, the Attorney General 11 violated his obligation to comply with the July 12 14th Supreme Court order, Exhibit 24, quashing the 13 subpoenas, and ordering the immediate return of 14 all Judicial Branch emails. 15 Important facts: The AG's office never 16 obtained a stay of that order; never obtained a 17 stay. If you want to ignore a Court order, if you 18 want to disregard a Court order, there's only one 19 way to do it. And you move for stay of 20 enforcement, and he could have done that at the 21 Supreme Court level, the Montana Supreme Court 22 level. He could have done that at the US Supreme 23 Court level. He did not. 24 What did he do? He decided on his own 25 when and how he would comply with the order to</p>	<p style="text-align: right;">Page 438</p> <p>1 Lawyers can imagine what might happen. 2 The Supreme Court might issue a contempt citation. 3 It might call the Attorney General in before the 4 Court and say, "Please explain yourself." There 5 are any number of things. They could issue 6 sanctions. That's what an open refusal is. You 7 don't get to just say, "I'm not going to do it," 8 you know, whatever you end up doing ten months 9 from now. It doesn't work that way. 10 You know what, I've researched every 11 case I could find under this rule, and that 12 exception to 3.4, I could only find one that even 13 -- one. I mean uniformly when the Courts of other 14 states have looked at this rule, all they look at 15 is: Did an attorney disobey an order? They don't 16 even get to some kind of an open refusal. 17 But I found one, and it's In Re: Ford. 18 It's an Alaska case, 128 P.3d 178. And it clearly 19 says you have to inform the Court. 20 Telling Randy Cox you're not going to do 21 it isn't going to get it; telling your 22 constituents, your clients you're not going to do 23 it, isn't going to get it. It's not up to Randy 24 Cox or Beth McLaughlin to take it upon themselves 25 to move for sanctions. That suggestion is utter</p>
<p style="text-align: right;">Page 437</p> <p>1 immediately return. We're not allowed to do that. 2 And to be clear, he never ever openly in a letter, 3 in a brief, or otherwise, refused to obey the July 4 14th, 2021 order. 5 Now these guys may point to that early 6 letter that came out a day after the Sunday order. 7 He's not charged with violating that order. And 8 then they may point out the brief that says, "By 9 the way, we're not following that order, but any 10 other order we're not going to follow." You don't 11 get to do that. 12 If you want to openly defy a Court 13 order, there's one way to do it. The Court issues 14 the order; you read it; you understand it; and 15 then you tell the Court, "I can't comply with it." 16 Then guess what? The Court has an opportunity to 17 do something about it. Didn't happen here. 18 Didn't happen. Didn't happen. 19 And if I'm hearing the suggestions 20 correctly in this courtroom, they're saying, 21 "Well, look. The Supreme Court never did anything 22 to us." You never told the Supreme Court you 23 weren't going to immediately return the emails. 24 You didn't do it. So it's entirely left to 25 speculation what would have happened if he had.</p>	<p style="text-align: right;">Page 439</p> <p>1 nonsense. 2 One person had the obligation to comply 3 with that order, and that one person, the Attorney 4 General, never told the Supreme Court he was not 5 going to follow it. Did he immediately return? 6 Did he immediately return? Clear and convincing 7 evidence he did not. Eight to nine months later. 8 And I asked him if he would commit under 9 oath that there were no additional copies in his 10 client's system somewhere, and he couldn't. What 11 are you supposed to do when your client is ordered 12 to do something? You're supposed to confirm it 13 was done. He didn't do it, or if he did do it, he 14 couldn't commit. 15 This failure to comply with the Supreme 16 Court's July 14th, 2021 order is clear and 17 convincing evidence of a violation of Rule 3.4(c). 18 Rule 8.2(a) Alpha, "A lawyer shall not 19 make a statement that the lawyer knows to be false 20 or with reckless disregard." And I'm emphasizing 21 that because we didn't even attempt, because it 22 would have been impossible to prove intent to be 23 false. We are contending that these statements 24 were made with reckless disregard as to the truth 25 or falsity concerning the qualifications or</p>

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<p>1 integrity of the Montana Supreme Court. 2 The purpose of the rule is to preserve 3 -- The purpose of Rule 8.2 Alpha is to preserve 4 public confidence in the fairness and impartiality 5 of our system of justice. Many cases. I will 6 give you a few cites. 7 Kentucky Bar Association against Waller, 8 929 S.W.2d 181. And this case says, so that it is 9 perfectly clear to everybody in this courtroom, 10 "Disrespectful language directed at a Judge is not 11 sanctioned." It's not sanctioned because the, 12 quote, "The Judge has such delicate sensibilities 13 as to be unable to withstand comment, but rather 14 that such language promotes disrespect for the law 15 and the judicial system." 16 To similar effect is the Ray case, 17 R-A-Y, at 797 So.2d 556. And the Mississippi Bar 18 Lumumba, 912 So.2d 871. There are more ABA 19 annotations. 20 Here the Attorney General repeatedly 21 accused the Montana Supreme Court of judicial 22 misconduct, dishonesty, and defying legality and 23 common sense. Now again, to be clear, he didn't 24 just assert that there were errors in court 25 findings or conclusions. He didn't just assert</p>	<p>1 these things because his clients wanted him to. 2 And I think this above all else is the most 3 remarkable thing that I've heard in these hallowed 4 chambers. 5 The notion that because one's client 6 wants you to do something as a lawyer means it 7 excuses your ethical obligations in any way, 8 shape, or form, is so antithetical to the rules, 9 and our rule of law, and our system of justice, 10 I'm not even sure how to express it in words, and 11 I know how to use words. 12 I'll direct your attention to just a 13 couple things that every lawyer in the state 14 understands. 15 Rule 1.2(a), that's the rule that 16 discusses what a lawyer's job is and what the 17 lawyer's client's job is. It sets -- It sets 18 forth very clearly, and we all know this, that a 19 client controls the objectives, the client 20 controls the objectives of the litigation. The 21 lawyer controls the means. 22 There is no doubt -- no doubt -- no 23 doubt in my mind that Mr. Attorney General 24 understood his client's objectives. No doubt. 25 But he and only he got to control the means; the</p>
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<p>1 that there was a conflict of interest. What did 2 he do? Repeatedly, willfully, and knowingly make 3 statements that undermined the presumed integrity 4 and qualification of our Montana Supreme Court 5 Justices, all of them -- all of them -- regardless 6 of their political background. 7 A couple of Montana cases. A recent, 8 fairly recent Montana disciplinary case I'll bring 9 to your attention were nowhere near egregious like 10 this. Miller, that's PR-18-0139. The Supreme 11 Court concluded that Miller violated Rule 8.2(a) 12 by asserting that Judge Lovell altered testimony 13 and created affirmative defenses. The AG here 14 attacked the Supreme Court much more explicitly 15 and repeatedly. 16 Another case fairly recent, and I 17 suspect this Commission remembers these cases, but 18 in any event. Myers PR-16-0245. The Supreme 19 Court concluded that Myers violated Rules 8.2(a) 20 and 8.4(d) by using, quote, "highly inflammatory 21 language to make baseless accusations of 22 conspiracy, fraud, vice, unethical behavior, 23 illegal acts against, among other people, the 24 Honorable Judge Langton." 25 The Attorney General testified he said</p>	<p>1 means including what procedures to use; whether to 2 write a letter as compared to a motion; whether 3 certain language is appropriate; what approach to 4 take. Those were his and only his issues to 5 control, not his client's. 6 And if there is any doubt as to the 7 meaning of Rule 1.2(a), the preamble to our rules 8 in three different places say precisely what I'm 9 saying: Paragraph 6, 9, and 10 briefly. 10 Six, "While it is a lawyer's duty, when 11 necessary, to challenge the rectitude of official 12 action, it is also a lawyer's duty to uphold the 13 legal process." 14 No. 9. To the point of being a zealous 15 advocate, we've heard that term a lot here, and 16 certainly the Attorney General was a zealous 17 advocate. That term was taken out of the rules, 18 but I'll adopt it for purposes of this. 19 No. 9 says, "A lawyer can be a dedicated 20 advocate," and that's the term that's used, "But a 21 lawyer can be a dedicated advocate on behalf of a 22 client, even an unpopular one, but in doing so 23 must comply with these Rules of Professional 24 Conduct," end quote. And I would submit to this 25 committee, to this Commission, that you can even</p>

<p style="text-align: right;">Page 444</p> <p>1 insert the word "zealous," and it wouldn't change 2 the meaning. 3 Paragraph 10, these principles, the 4 basic principles discussed here, "include the 5 lawyer's obligation to protect and pursue a 6 client's legitimate interests within the bounds of 7 the law, while maintaining a professional courtesy 8 and civil attitude toward all persons involved in 9 the legal system." There is no question as to the 10 meaning of those words. And the clear, and the 11 absolute, unquestionable take-away from our ethics 12 rules is that lawyers follow their client's 13 instructions until they can't. 14 The Attorney General I believe suggested 15 here, from some of the discussion by his lawyers 16 about his belief that what he was pursuing was 17 just, and his actions were just and justified, 18 because he believed, he believed they were. 19 But implied in the argument is that the 20 standard for reasonable belief is a subjective 21 one; in other words his. It's not. This is not a 22 defamation case where that standard applies -- and 23 it's a well known case to the lawyers here in this 24 room -- New York Times against Sullivan 376 US 25 254. That subjective standard is not applicable</p>	<p style="text-align: right;">Page 446</p> <p>1 think, but these are not just opinions. These 2 statements insinuate that the Attorney General was 3 privy to some facts about the two cases and about 4 the motivation of the Montana Supreme Court in 5 rendering its decision. That takes it out of the 6 realm of pure opinion. 7 And there's a lot of cases that say 8 that, but a very helpful one, instructive one, is 9 the Topp case, 925 P.2d 1113, where, as I said, 10 there's a complete list in the ABA model rules. 11 Applying the correct standard, the 12 objective standard, in the present case, there's 13 clear and convincing evidence that the Attorney 14 General and his subordinates violated 8.2(a) by 15 repeatedly and recklessly accusing the Montana 16 Supreme Court of judicial misconduct, dishonesty, 17 defying reality, common sense, and the law. 18 Move on to Rule 8.4(d) Delta. That 19 makes it professional misconduct for the lawyer to 20 engage in conduct that is prejudicial to the 21 administration of justice. 22 I would submit to this Commission there 23 are two types of conduct here prejudicial to the 24 administration of justice. They're the AG's 25 statements, and there's also his obligation to</p>
<p style="text-align: right;">Page 445</p> <p>1 in a disciplinary case. 2 And lest there be any doubt of it, and 3 there's cases upon cases upon cases that say that, 4 but the Montana Supreme Court said in Miller, 5 according to the Montana Supreme Court, "As 6 explained in the United States District Court case 7 Sandler," and there's a cite, "The standard to be 8 applied regarding Rule 8.2(a) is not the 9 subjective standard of the New York Times, but is 10 rather an objective standard: What a reasonable 11 attorney considered in the light of all of his 12 professional functions would do in the same or 13 similar circumstances." 14 And so honorable members of this 15 Commission, the issue that you have to decide is 16 would a reasonable attorney in these circumstances 17 make such statements. When you review the records 18 in evidence, you can see nothing that transpired 19 in these cases would justify such outrageously 20 false accusations; and that any evidence, quote 21 unquote, the Attorney General relied upon in 22 making these statements barely even qualifies as 23 sketchy. 24 Also I don't know if this suggestion is 25 going to be made. I haven't heard it yet, I don't</p>	<p style="text-align: right;">Page 447</p> <p>1 follow the July 14th, 2021 order, Exhibit 24, to 2 immediately return Judicial Branch emails. 3 We've gone through the statements. I 4 won't belabor it. But there are additional 5 highlighted ones in the Court records, and those 6 statements were intemperate, contemptuous, 7 insulting, and undignified. I gave you the case 8 cited earlier where the Arkansas Supreme Court 9 that said these things are not acceptable. 10 I would submit they're undignified of 11 any member of this profession, any member. But 12 probably most importantly the chief member, the 13 general. 14 Unlike Rule 8.2(a) Alpha, 8.4(d) Delta 15 does not require proving falsity. That's the 16 Waller case, 929 S.W.2d 181. There the Supreme 17 Court of Kentucky said the following: The 18 Respondent appears to believe that truth or some 19 concept akin to the truth such as accuracy or 20 correctness is a defense to the charge against 21 him," under 8.4(d). 22 "In this respect he has totally missed 23 the point. There can never be a justification for 24 a lawyer to use such scurrilous language with 25 respect to a Judge in pleadings or in open court.</p>

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<p>1 The reason is not that the Judge is of such 2 delicate sensibilities that he would be unable to 3 withstand the comment, but rather that such 4 language promotes disrespect for the law and for 5 the judicial systems." 6 "Officers of the Court are obligated to 7 uphold the dignity of the Court, and at a minimum 8 --" "at a minimum, this requires them to refrain 9 from conduct of the type at issue here." 10 There have been I would say noise in the 11 pleadings here. I can't recall how many pages the 12 Attorney General's amended answer was. I didn't 13 object to it, as I thought it was instructive as 14 to his position and his defiance. 15 But in it, it seems to assert that there 16 is some First Amendment right to say basically 17 anything you want. And in the context of judicial 18 proceedings, an attorney's First Amendment rights 19 are not without limits. Although litigants and 20 the lawyers do not check their First Amendment 21 rights at the Courthouse door, those rights are 22 often subordinated to other interests inherent in 23 the judicial setting. 24 And a fairly instructive case here is 25 the United States Supreme Court opinion. I</p>	<p>1 more generally. And I've given you these cites 2 before, but the case names are Miller, Myers, 3 Kline. Another one is McClellan 754 N.E.2d 500. 4 Thus the statements that we went through 5 here constitute clear and convincing evidence of 6 violation of 8.4(d). 7 The United States Supreme Court in that 8 Gentile case that I cited to you said, "It is 9 unquestionable that in the courtroom itself during 10 a judicial proceeding, whatever right to free 11 speech," quote unquote, "an attorney has is 12 extremely circumscribed. An attorney may not by 13 speech or other conduct resist a ruling of the 14 Trial Court beyond the point necessary to preserve 15 a claim for appeal." 16 And quote, "An attorney's free speech 17 rights do not authorize unnecessary resistance to 18 an adverse ruling. Once a Judge rules, a zealous 19 advocate complies, then challenges the ruling on 20 appeal. The advocate has no free speech right to 21 reargue the issue, resist the ruling, or insult 22 the Judge," quote unquote. That's In Re: Coe 903 23 S.W.2d 916. 24 As I indicated to the fifth Rule 8.4 25 Alpha, "A finding that a lawyer violated any</p>
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<p>1 believe it was written by Chief Justice Rehnquist 2 -- I haven't read it recently, so I'm not going to 3 sit here to swear to that, but I believe it was -- 4 a very well-respected jurist in the history of 5 this country, in Gentile versus State Bar of 6 Nevada, 501 US 1030, 1991. 7 I'll give you some other cites; Sandlin, 8 12 F.3d 861; Koster, 93 F.R.D. 471; State versus 9 Carruthers, 35 S.W.3d 516; Hill, 860 So.2d 1. 10 This one I think is instructive in terms 11 of what is being asserted here in this courtroom 12 today. "A lawyer is not free to seek refuge 13 within his own First Amendment right of free 14 speech to fill a courtroom with a litany of 15 speculative accusations and insults." That's 16 Cooper 872 F.2d 1. That's a First Circuit case. 17 When you review the records in evidence, 18 you can see nothing to support an objective 19 standard in terms of what a reasonable attorney 20 would do under similar circumstances. 21 There is a nexus that's required in 22 these cases on an 8.4(d) case, and the nexus 23 required is not limited to harm to the particular 24 proceeding, but it also includes establishing by 25 conduct that injures or harms the justice system</p>	<p>1 ethics rule constitutes a separate and additional 2 violation." That is the majority standard, and 3 that's again -- I don't even need to go through 4 the case law because I think the Commission 5 routinely does that, but in any case, the cases 6 are discussed in the ABA model rules. Certainly 7 the practice of this Commission. 8 In summary, undermining -- this is what 9 I see. Undermining public confidence in the 10 judicial system by the highest legal officer in 11 this state, repeated pattern of misconduct, 12 multiple offenses, refusal to acknowledge the 13 wrongful nature of his conduct, failure to 14 remediate or take corrective action, those are 15 things that this Commission evaluates all the 16 time. These are all aggravating factors in every 17 case this Commission has ever decided. Every 18 single one of them is here. 19 I want to comment on something that I 20 heard for the first time yesterday, and the 21 Attorney General talked about maybe in hindsight 22 -- and I'm paraphrasing -- maybe in hindsight, he 23 probably should have not allowed such sharp 24 language, but they were in the middle of an 25 emergency.</p>

<p style="text-align: right;">Page 452</p> <p>1 And you know, I can understand things 2 are said in the heat of battle. We all do it, and 3 we regret it. It's understandable. We're 4 supposed to maintain cool heads as lawyers, but 5 sometimes can't. We're human. And I don't think 6 this Commission should fault the Attorney General 7 for saying something in the heat of battle alone. 8 It happens. 9 But what does a responsible attorney do? 10 They apologize. They apologize. They correct it. 11 They remediate it. If you need to file an 12 amendment by interlineation to your brief to take 13 out the sharp language, you do it. If you 14 misstate something in the heat of battle, you tell 15 the Court you did, and you apologize. 16 But I'm also going to ask you: What 17 emergency? What emergency did the Attorney 18 General have? By the time they started making 19 these disrespecting -- by the time they started 20 disrespecting and maligning the Court in court 21 filings April 14th of 2021, they already had the 22 emails. They already had them. Nobody else had 23 them, not even the Court Administrator, those 24 emails she was supposed to control. 25 But I'll ask you another question.</p>	<p style="text-align: right;">Page 454</p> <p>1 everybody in this room should appreciate it. 2 But he also said something else: 3 "Cooler heads should have prevailed," and he's 4 right. But who were the cooler heads? Ten, ten 5 lawyers? The lawyers are supposed to be the 6 cooler heads. We're supposed to be the ones that 7 are independent, and exercise professional 8 judgment; we're the ones that are supposed to be 9 able to maintain cool in a battle. 10 I want to go through a few cases. As I 11 said when I started, I believe this case is 12 unprecedented. I couldn't agree more with those 13 guys on that. And we have no prior Montana 14 disciplinary cases that even approach the level of 15 misconduct here, but there are a few that I can 16 recall where things like a fraction of this 17 happened. 18 In Miller, the one statement that Miller 19 made about His Honor Judge Lovell, he got a public 20 admonition. In Myers, the lawyer who made some 21 nasty comments about Judge Langton, he was 22 suspended for seven months. Epperson, not a case 23 that I was familiar with until I looked it up. 24 PR-15-129. 25 After Judge Simonton notified the</p>
<p style="text-align: right;">Page 453</p> <p>1 Emergency in my mind is temporally limited. It 2 doesn't stretch out for months and months and 3 months. The statements in Exhibits 11, 13, 16, 4 17, 19, 20, 26, and 30 span the next eight months 5 after perhaps the emergency on Sunday, April 2021. 6 Eight months. 7 Now, as I said, things happen in the 8 heat of battle. Okay. Maybe that goes on for 9 eight months. I don't think so. This Commission 10 can decide. But how was it an emergency? How was 11 it an emergency? When the Montana Supreme Court 12 decided this case, and the Attorney General then 13 applied to the US Supreme Court on a discretionary 14 writ, how was that situation an emergency that 15 would excuse maybe things said in the heat of 16 battle? How was that an emergency? It wasn't. 17 I'm sorry. It just wasn't. 18 While I respect the Attorney General's I 19 think very sincere statement that things could 20 have been said differently, maybe hindsight is 21 20/20, I totally absolutely 100 percent respect 22 that, and I'm not taking away from it, and I don't 23 think this Commission should take away from it. 24 He said it for the first time. It's okay. He 25 said it, and I appreciate it, and I think</p>	<p style="text-align: right;">Page 455</p> <p>1 parties he would not accept Epperson's client's 2 plea agreement, Epperson sent an email to Judge 3 Simonton's Judicial Assistant, to the Clerk of 4 Court, and stated in part, "One more thing. 5 Neither my client nor I will show up if the Judge 6 refuses to vacate the trial set for July 8th, and 7 he can throw my ass in jail for contempt if he 8 chooses." Epperson got a public admonition. 9 Morin I'm sure is a case the Commission 10 remembers, PR-19-0017. The Commission found 11 further that Morin engaged in abusive, 12 unprofessional, and uncivil conduct toward other 13 Counsel -- toward other Counsel -- and bullying 14 and intimidating tactics that are unbecoming a 15 Montana lawyer. 16 However, the ODC in that case did not 17 appropriately charge the violations, and when the 18 COP recommended disbarment notwithstanding that, 19 the COP recommended disbarment, the Supreme Court 20 agreed, and noted, quote, "We share the 21 Commission's concerns regarding Morin's conduct, 22 both in this matter, and as an overall pattern of 23 conduct, her lack of contrition, and her 24 unwillingness to accept responsibility for her 25 actions." These are the words of the Montana</p>

<p style="text-align: right;">Page 456</p> <p>1 Supreme Court.</p> <p>2 The Court also noted that Morin</p> <p>3 perpetuated this conduct in objections filed, that</p> <p>4 she filed with Montana Supreme Court, directed at</p> <p>5 the Commission on Practice. Does that sound</p> <p>6 familiar? It happened here.</p> <p>7 "Morin's conduct is inconsistent with</p> <p>8 the effective practice of law, and does not serve</p> <p>9 the public, the clients, or the legal profession,</p> <p>10 or herself." Morin was disbarred.</p> <p>11 McCann, PR-16-0635. She filed three</p> <p>12 pleadings accusing Judge Manley of "bias,</p> <p>13 impartiality, and unethical conduct, and</p> <p>14 impropriety due to the Court violating the law."</p> <p>15 Sound familiar? McCann was disbarred.</p> <p>16 I'm not going to make a specific</p> <p>17 recommendation to this Commission. I can't. I</p> <p>18 can't. And the reason I can't is I can't relate</p> <p>19 to this. It is so antithetical to what I</p> <p>20 understand it is to be a lawyer that I am</p> <p>21 speechless.</p> <p>22 Ours is a wonderful profession. It is</p> <p>23 necessary and crucial to protecting the rule of</p> <p>24 law. You know, I'm mindful of people misquoting</p> <p>25 Shakespeare so often on this. "Kill all the</p>	<p style="text-align: right;">Page 458</p> <p>1 unethical conduct is permissible or tolerable.</p> <p>2 The rule of law depends on it.</p> <p>3 CHAIR OGLE: Thank you, Mr. Strauch.</p> <p>4 Mr. Corrigan.</p> <p>5 MR. CORRIGAN: Mr. Chairman, if I could</p> <p>6 ask for indulgence for a brief five minute break.</p> <p>7 Mr. Strauch threw out a number of cases. I just</p> <p>8 want to get my head around that. I promise it</p> <p>9 will be brief.</p> <p>10 CHAIR OGLE: All right. We'll take five</p> <p>11 minutes. Reconvene here in five minutes.</p> <p>12 (Recess taken)</p> <p>13 CHAIR OGLE: You may proceed, Mr.</p> <p>14 Corrigan.</p> <p>15 MR. CORRIGAN: Thank you, Mr. Chairman,</p> <p>16 and members of the Commission. I want to thank</p> <p>17 you for your time and attention this week. I know</p> <p>18 this isn't an easy case, and this has been a</p> <p>19 lengthy proceeding.</p> <p>20 ODC mentioned a number of cases, and I</p> <p>21 won't have time to respond to them all, but I do</p> <p>22 want to point out two things quickly, should the</p> <p>23 Commission decide to reconsider whether to accept</p> <p>24 post-trial briefing or post-hearing briefing, and</p> <p>25 I do think it's important, and I'm going to give</p>
<p style="text-align: right;">Page 457</p> <p>1 lawyers." There is more to it. Read it. "Kill</p> <p>2 all the lawyers, and then there would be anarchy</p> <p>3 or tyranny." That's the full quote. I'm</p> <p>4 paraphrasing. I'm not a wordsmith as Shakespeare.</p> <p>5 Our profession and we individual</p> <p>6 attorneys are the punch line to lawyer jokes, and</p> <p>7 sometimes even threats on our person and</p> <p>8 reputation -- something I can personally relate to</p> <p>9 in this case -- but we persevere, and we uphold</p> <p>10 our obligations to our clients and the judicial</p> <p>11 system, and in doing so we protect our profession,</p> <p>12 the dignity and authority of the Court, and the</p> <p>13 administration of justice.</p> <p>14 But when the chief legal officer of our</p> <p>15 state demeans, disparages, and defies the highest</p> <p>16 court in the state, and its Judges, and our system</p> <p>17 of justice, we are called, we are required to take</p> <p>18 action.</p> <p>19 And anybody in this courtroom in front</p> <p>20 of me or behind me that thinks that I willingly</p> <p>21 signed up for this is dead wrong.</p> <p>22 We must meet the AG's deplorable and</p> <p>23 unethical conduct with serious and compelling</p> <p>24 discipline. No one can be left with even a hint</p> <p>25 that anything close to this disrespectful and</p>	<p style="text-align: right;">Page 459</p> <p>1 you two examples here at least as to why the</p> <p>2 Commission should take note of the cases, and be</p> <p>3 careful to read them.</p> <p>4 ODC referenced a new case called Stilley</p> <p>5 v. Committee. It's supposed to be an Arkansas</p> <p>6 Supreme Court case. But it actually held</p> <p>7 something different. On Page 404 to 405, the</p> <p>8 Court said, "The use of disrespectful language for</p> <p>9 a Court or officer of the Court is not in and of</p> <p>10 itself serious misconduct," and it goes on to say,</p> <p>11 "However, in this case, Stilley's repeated and</p> <p>12 continuous use of strident disrespectful language</p> <p>13 constituted serious misconduct."</p> <p>14 Now, why did it say that? Because</p> <p>15 Stilley engaged in misconduct that resulted in</p> <p>16 substantial prejudice to a client, specifically</p> <p>17 his conduct caused his client's brief to be</p> <p>18 entirely stricken from the record. Again, Stilley</p> <p>19 was actually an appeal from a lawyer disciplinary</p> <p>20 case where it appears that the subject of the</p> <p>21 discipline then tried to depose Supreme Court</p> <p>22 Justices over the conflict of interest. That is</p> <p>23 not the case we have here.</p> <p>24 And then Mr. Strauch referenced a United</p> <p>25 States Supreme Court case called Gentile v.</p>

<p style="text-align: right;">Page 460</p> <p>1 Nevada, that's 501 US 1030, which is co-authored 2 by Chief Justice Rehnquist and Justice Kennedy. 3 And in that case Nevada disciplined an attorney 4 for speech critical of the exercise of the state's 5 power because Nevada claimed it would prejudice an 6 adjudicative proceeding. 7 In that case, the Supreme Court actually 8 reversed the Court's decision there, and said, 9 quote, on Page 1058, "The vigorous advocacy we 10 demand of the legal profession is excepted because 11 it takes place under the neutral and dispassionate 12 control of the judicial system." And it goes on 13 to say, "It cannot be said that Petitioner's 14 conduct demonstrated any real or specific threat 15 to an adjudicative proceeding. Any statements 16 have the full protection of the First Amendment." 17 Those are just the two examples I could 18 glean from the cases cited by ODC, so I encourage 19 the Commission to read the cases cited very 20 carefully, and I'm going to throw out a few cases 21 of our own as well, and I would encourage the 22 Commission to read those as well. 23 Yesterday in my opening I told you ODC 24 would offer no new evidence in support of its case 25 against the Attorney General, and ODC's witnesses</p>	<p style="text-align: right;">Page 462</p> <p>1 ODC wants you to view this case through 2 the lens of McLaughlin, and decide that there are 3 no facts that matter. To paraphrase a famous 4 line, ODC simply wants you to know misconduct when 5 you see it. But the statements and letters and 6 legal filings don't exist in a vacuum. That 7 happens in context, and context absolutely matters 8 for these charges. 9 ODC wants you to believe that nothing 10 the Legislature saw mattered; that polling was 11 never done; that emails were never released; the 12 Judges didn't quash their own subpoenas. What 13 we're asking you as a Commission to do is remove 14 the lens, and evaluate this on what the Attorney 15 General and the Legislature thought at the time. 16 The evidence you saw cements the factual 17 basis for every statement the Attorney General 18 made in litigation, and position taken, even if 19 you don't agree with those statements or legal 20 positions. 21 Now, you've heard a lot of testimony at 22 times, non-linear and maybe out of context, so I'd 23 like to explain how we got here, and put you in 24 the state of mind of the Attorney General and his 25 client at the time.</p>
<p style="text-align: right;">Page 461</p> <p>1 really told you nothing more than why the Supreme 2 Court Administrator filed her lawsuit, and why her 3 lawyer filed an emergency motion over the weekend, 4 and how he attempted to get back the documents and 5 how the documents were returned. 6 The lion's share of ODC's cross involved 7 asking the Attorney General if the statements made 8 by his office violated the Rules of Professional 9 Conduct, to which the Attorney General denied. 10 So really what you heard is nothing more 11 than ODC's opinion, but ODC isn't an expert, it 12 isn't a Judge. ODC wasn't involved in this high 13 stakes constitutional litigation. ODC wasn't 14 there. All ODC has is the McLaughlin decision, 15 the briefing, and the public filings, and now it 16 wants to Monday morning quarterback the decisions 17 that were made. 18 And if the McLaughlin decision is 19 controlling here, and no additional facts are 20 relevant, that only underscores the Attorney 21 General's argument that discipline would have been 22 appropriate before the proceedings at issue, not 23 years later; not to mention McLaughlin and Brown 24 were original proceedings, with no factual 25 findings or discovery.</p>	<p style="text-align: right;">Page 463</p> <p>1 The Governor signed a bill called Senate 2 Bill 140, which changed the mechanism for 3 selecting Judges to fill interim vacancies in 4 State District Courts. Plaintiffs promptly 5 challenged that law in March of 2021 in an 6 original action before the Montana Supreme Court 7 titled Brown v. Gianforte. Chief Justice McGrath 8 recused himself from the case, and District Judge 9 Kurt Krueger had been appointed to sit in place of 10 the Chief Justice. 11 Within two weeks of Brown being filed, 12 the media released emails from the Judicial Branch 13 concerning SB 140, and it was only after these 14 emails were released that the AG's office moved to 15 disqualify Judge Krueger. 16 As you saw in ODC's Exhibit 5, the 17 emails revealed that the Governor and his Counsel 18 at the time, the Attorney General's Office, the 19 emails revealed that the Montana Supreme Court 20 Administrator sent an email poll on January 29th, 21 2021 to every Judge and Justice in Montana on 22 behalf of the Montana Judges Association to review 23 SB 140 and take a position on it. A number of 24 Judges expressed their opposition to SB 140 using 25 the "reply all" button.</p>

<p style="text-align: right;">Page 464</p> <p>1 Several months later Judge Krueger had 2 accepted an appointment to hear Brown versus 3 Gianforte, which challenged the substantive 4 constitutionality of SB 140. And Judge Krueger 5 had taken the position on SB 140. As I said, 6 after learning of these emails, the Attorney 7 General's Office filed a motion to disqualify 8 Judge Krueger and any Judge who voted on the SB 9 140 polls on April 1st, 2021.</p> <p>10 The motion also requested that the Court 11 disclose the voting results of SB 140 polling, and 12 that the Court stay proceedings in light of the 13 recusal issues.</p> <p>14 On April 1st, 2021, the Legislature also 15 notified the Attorney General's Office that it 16 intended to pass resolutions to intervene in Brown 17 versus Gianforte, but that intervention was 18 delayed. Why was it delayed? Because things only 19 got more complicated from there.</p> <p>20 As you saw in Exhibit C, legislative 21 staff reached out to Administrator McLaughlin on 22 April 7th, 2021 following the Supreme Court's 23 order on the Governor's motion to disqualify Judge 24 Krueger. Legislative staff noted in that 25 communication that while the Supreme Court's order</p>	<p style="text-align: right;">Page 466</p> <p>1 emails or paper notes related to the SB 140 poll. 2 She considered them ministerial in nature, and 3 that they were collected as an administrative 4 courtesy to Judges, and didn't keep them. To 5 explain the lack of records, she confessed to 6 sloppiness.</p> <p>7 As you heard from Speaker Galt and 8 Senator Hertz, that triggered serious concerns 9 from the Legislature about the Judicial Branch's 10 use of State emails, and why a State employee was 11 deleting records of this activity.</p> <p>12 Then as we all saw, the Legislature 13 issued a subpoena to the Department of 14 Administration for McLaughlin's emails and deleted 15 emails between January 4th, 2021 and April 8th, 16 2021, excluding any emails with attachments 17 related to decisions made by Justices in 18 disposition of a final opinion.</p> <p>19 The next day the Department of 20 Administration began complying with the subpoena 21 on April 9th, 2021. That's when Supreme Court 22 Administrator McLaughlin hired Randy Cox to 23 represent her in the litigation that of course 24 became the subject of this Complaint.</p> <p>25 On Saturday, April 10th, 2021, Mr. Cox</p>
<p style="text-align: right;">Page 465</p> <p>1 described the vote total, the order included no 2 breakdown of which Judges voted which way.</p> <p>3 So the Legislature requested that 4 McLaughlin provide a breakdown of the vote, and 5 McLaughlin responded that she could only find two 6 records related to SB 140, neither of which 7 contained the polling breakdown of SB 140.</p> <p>8 McLaughlin told, also told the 9 legislative staff that the Judicial Branch policy 10 did not require retention of ministerial type 11 emails.</p> <p>12 As you saw in Exhibit D, the next day on 13 April 8th, the legislative staff followed up with 14 additional questions to McLaughlin. The 15 Legislature wanted to know five things in that 16 email: If McLaughlin would be producing the 17 requested documents; if she deleted the emails and 18 records related to SB 140; and asked her to 19 identify the Judges who called her with SB 140 20 poll responses; identify any Judges who 21 participated in the poll who do not use the "reply 22 all" feature, and produce all Judicial Branch 23 policy for retention of records.</p> <p>24 McLaughlin then responded that same day 25 and told the Legislature she did not retain the</p>	<p style="text-align: right;">Page 467</p> <p>1 was preparing to file an emergency motion to quash 2 McLaughlin's subpoena -- or excuse -- to quash the 3 subpoena to the Department of Administration. But 4 rather than seeking a temporary restraining order 5 from a State District Court, Mr. Cox chose to file 6 an emergency motion with the Montana Supreme 7 Court.</p> <p>8 You heard the Clerk of the Supreme Court 9 testify that the Court isn't generally open 10 weekends, and doesn't accept filings on weekends, 11 and he testified that the Court generally doesn't 12 -- excuse me -- he testified that the Court 13 doesn't usually, if ever, meet on weekends.</p> <p>14 In Exhibit KK you saw Justice Sandefur's 15 admission to this Commission that Mr. Cox called 16 him on Saturday, April 10th, and had a roughly 17 five minute conversation with him. Amazingly Mr. 18 Cox does not remember this conversation.</p> <p>19 Mr. Cox then called Acting Chief Justice 20 Rice and left him a voice mail, letting him know 21 he would be filing an emergency motion on behalf 22 of his client. Justice Sandefur informed Mr. Cox 23 that he wasn't sure an emergency motion could be 24 filed in the Brown case.</p> <p>25 Now, as you saw in ODC's Exhibit 7 on</p>

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<p>1 Sunday, April 11th, 2021, Department of 2 Administration Director Misty Ann Giles informed 3 Mr. Cox that DOA was complying with the subpoena, 4 and would continue to produce documents on Monday, 5 April 12th, and that Mr. Cox should talk to the 6 Legislature to resolve any issues. 7 Now once again, ODC's witness admitted 8 that the timeline didn't quite make sense. He was 9 confused as to what propelled him into that ex 10 parte conversation, whether it was that Sunday 11 email or something prior. 12 So ODC's witness couldn't remember a 13 five minute ex parte conversation with a sitting 14 Montana Supreme Court Justice, during one of the 15 most consequential events in the State's history, 16 and thought the Sunday email -- excuse me -- and 17 thought that the Sunday email led him to doing 18 something he did the day before. 19 Importantly, Mr. Cox never provided 20 notice of these ex parte conversations to the 21 Governor's Office, the Attorney General's Office, 22 Department of Administration, or the Legislature. 23 The Montana Supreme Court never mentioned these 24 communications in any orders or opinions. 25 On Sunday, April 11th, Justice Rice</p>	<p>1 On April 12th, McLaughlin filed a new 2 emergency petition to quash the subpoena in a new 3 case called McLaughlin v. Legislature. 4 That week the Legislature formed a 5 Special Joint Select Committee on Judicial 6 Accountability and Transparency, and later that 7 week the committee issued a new subpoena, this 8 time to the Montana Supreme Court Justices, 9 seeking production of documents. 10 So why was the Legislature concerned 11 about the Judicial Branch? Supreme Court 12 Administrator McLaughlin and her attorney 13 testified that the primary concern for the lawsuit 14 was to protect sensitive records from public 15 disclosure, including confidential employee 16 medical records. 17 That might be true, but what's 18 undisputed is that the emails the Legislature 19 received from the Department of Administration on 20 April 9th contained a number of concerning 21 communication that did not fall into those 22 categories. 23 Despite McLaughlin's protestations about 24 medical records, there is no evidence that the 25 Legislature ever received any email turned over to</p>
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<p>1 contacted the Clerk of Court to come in for 2 McLaughlin's emergency filing and for the Montana 3 Supreme Court's emergency order quashing the April 4 8th subpoena. 5 And McLaughlin filed her emergency 6 motion in Brown versus Gianforte, but McLaughlin 7 was not a party to Brown, and neither was the 8 Legislature, and the Legislature had not yet moved 9 to intervene in this case, and it wouldn't do so 10 until April 1st. 11 It's undisputed that the Sunday order 12 was extraordinary. It's also undisputed that this 13 extraordinary relief was granted to the Supreme 14 Court's employee. 15 This highly irregular procedure angered 16 the Legislature. On Monday, April 12th, the AG's 17 office began representing the Legislature over the 18 quashed subpoena. As the Attorney General 19 testified, the highly irregular nature of the 20 Sunday order necessitated the irregular step of 21 the AG's office sending a letter to the Montana 22 Supreme Court expressing its displeasure with the 23 proceedings, and asserting a legal position that 24 the Court did not have jurisdiction over the 25 Legislature.</p>	<p>1 the Department of Administration that contained 2 the type of sensitive information that 3 Administrator McLaughlin claimed she wanted to 4 protect. 5 As you heard from Speaker Galt and 6 Senator Hertz, the Administrator of the Court 7 engaged in conduct that was of great interest to 8 the Montana Legislature. We know Senate Bill 140 9 was not the only bill that she conducted a poll 10 on, and she was conducting pending, polls on 11 pending legislation at the behest of a private 12 organization, the Montana Judges Association, as 13 you were shown in Exhibit F. 14 I'd like to walk you through the three 15 categories of counts that we've put in -- in the 16 three buckets, Rule 8.2(a), Rule 3.4(c), and Rule 17 8.4(d). 18 For Rule 8.2(a), ODC did not prove by 19 clear and convincing evidence that the Attorney 20 General or his attorneys made a statement that the 21 Attorney General knew to be false or in reckless 22 disregard as to its truth or falsity concerning 23 the qualifications or integrity of a Judge. There 24 was a good faith basis for every statement that 25 was made.</p>

<p style="text-align: right;">Page 472</p> <p>1 Now, the Office of Disciplinary Counsel 2 in its closing cited a number of Montana 3 disciplinary cases for the proposition that the 4 Attorney General's statements violated the Rules 5 of Professional Conduct. We actually had a couple 6 of these cases on our list as well, but I think 7 that the standard that the case employs is 8 particularly important. 9 ODC cited a case called In Re: Brian 10 Miller, that's MT PR-18-0139, where the allegation 11 in the motion to recuse were, quote, "wholly 12 unsubstantiated by any evidence." 13 Another case is titled In Re: Genet 14 McCann. That's MT PR-16-0635. And the quote is, 15 "The Court characterized the language as 16 scurrilous, libelous, and outrageous for 17 allegations of judicial impropriety for which," 18 quote, "no factual support has ever been 19 provided." 20 I believe ODC cited a case called In Re: 21 Robert Myers, which is MT PR-16-0245, which says, 22 quote, "Baseless factual contentions in a 23 disqualification motion, none of which," quote, 24 "appears to have even a minimum quantum of 25 evidentiary support."</p>	<p style="text-align: right;">Page 474</p> <p>1 disobeyed an obligation under the rules of a 2 Tribunal, except for "an open refusal based on an 3 assertion that no valid obligation existed." 4 The Attorney General of course made an 5 open refusal, based on the fact that no valid 6 obligation existed. These statements were made 7 openly in public letters and court filings, and 8 the only refusal that ODC has now sort of 9 half-heartedly disputed as being open was made 10 directly to McLaughlin's attorney, and that 11 attorney never took action to compel return of the 12 documents. 13 It's also important to note that the 14 Montana Supreme Court of course didn't even order 15 return of the documents until July of 2021. That 16 was three months after the first tranche of 17 documents had been released via subpoena through 18 the Department of Administration. 19 In other words, as you heard in 20 testimony, the horse was already out of the barn 21 by the time the Montana Supreme Court issued that 22 order, and the AG's Office preserved the status 23 quo by holding on to the documents until the US 24 Supreme Court denied the Legislature's final 25 appeal in March of 2022, and then the documents</p>
<p style="text-align: right;">Page 473</p> <p>1 Another Montana disciplinary case called 2 In Re: Douglas, that's MT-05-029, where an 3 attorney was disciplined for statements about a 4 Judge that had, quote, "No reasonable, factual, or 5 legal basis." 6 Even if ODC is correct in its position 7 on what was decided in McLaughlin, it doesn't 8 matter. These concerns didn't come out of 9 nowhere. The Attorney General had a good faith 10 basis for making all of those statements that 11 certainly were not reckless. You have seen the 12 evidence about judicial polling, and the subpoena 13 covered some documents that did belong to the 14 Justices. 15 Now, a reasonable mind can absolutely 16 disagree on whether that was a conflict of 17 interest, or whether that was proper, but it's 18 wholly unreasonable to say that the Attorney 19 General lacked any reasonable factual basis for 20 these arguments, much less that it would have 21 appeared to have not even met a minimum of a 22 quantum of evidentiary support. 23 Now, moving next to Rule 3.4(c). Again, 24 ODC failed to prove by clear and convincing 25 evidence that the Attorney General knowingly</p>	<p style="text-align: right;">Page 475</p> <p>1 were returned. 2 Now, ODC again wants to Monday morning 3 quarterback this, but ODC doesn't get to decide 4 what the law is for openly refusing. ODC wasn't 5 there. This goalpost moving is unsurprising. 6 Some things the Attorney General did were too 7 open. Here it wasn't open enough. Was it 8 important that the Attorney General preserve the 9 status quo because the horse was out of the barn, 10 and neither McLaughlin nor her Counsel took action 11 to compel the return of the documents. 12 Next, there's nothing but unfounded 13 speculation by McLaughlin, and her attorney, and 14 the Office of Disciplinary Counsel, that not all 15 the documents were returned. In fact, ODC has 16 failed to present any evidence that they weren't 17 returned. ODC could have conducted discovery on 18 this; forensic analysis could have been 19 introduced; any number of things could have been 20 done, but you saw no evidence of that. 21 Moving next to Rule 8.4(d). ODC again 22 failed to prove by clear and convincing evidence 23 that the Attorney General engaged in conduct which 24 is prejudicial to the administration of justice. 25 ODC did not offer any evidence that the Attorney</p>

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<p>1 General delayed or altered the course of 2 proceedings that resulted in a direct disruption 3 of pending proceedings. 4 As my colleague pointed out, we've 5 calculated that there are somewhere around 127 6 unique counts in this Complaint, and many of them 7 involve statements made in briefing. I won't take 8 you through every single statement, but I'd like 9 to provide context for a few of the statements 10 that ODC highlighted, and some of the ones that 11 highlight the overreach by ODC in this Complaint. 12 Now, some of these charges are overreach 13 because they involve statements that in almost no 14 circumstances constitute professional misconduct. 15 Just to go through a few examples, Count 25A, 26A, 16 27A, fault the Attorney General for saying the 17 Montana Supreme Court, quote, "misstated," dot 18 dot, "material facts." 19 Moving on to Count 27A, which attempts 20 to sanction the Attorney General for saying that 21 something would, quote, "defy common and 22 constitutional sense." 23 Count 29H, 30C, 31H, fault the Attorney 24 General for saying that the opinion contained, 25 quote, "numerous misstatements." Counts 12 and</p>	<p>1 Attorney General included, really naive enough to 2 believe that this could happen? Good grief. It 3 is ludicrous in the extreme to argue that I-166 as 4 law would give any public official fair notice of 5 what he or she is supposed to do or not to do." 6 That case is Montanans Opposed to I-166 v. 7 Bullock, 2012 MT 168 Paragraph 36. 8 Finally, on ludicrous, I'd like to point 9 the Court or the Commission to the Montana Supreme 10 Court's 2021 decision in Haffner-Lynn v. Annala, 11 2021 MT 234 N, Paragraph 27, where the Montana 12 Supreme Court described arguments made by 13 litigants. Quote, "Finally, Janet decried that 14 it's ludicrous the District Court's finding that 15 Misty's actions suggest she was striving to meet 16 her father's burgeoning need for care and 17 assistance without completely stripping away his 18 independence." 19 Now moving on to the quote about defying 20 common sense. In 2023, Justice McKinnon wrote an 21 opinion in a case, saying quote, "It defies common 22 sense and sound judgment not to view the latter 23 situation, the SVORA scheme since 2007, as 24 punishment for a person's sexual crime," end 25 quote, and that case is State v. Hinman, 2023 MT</p>
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<p>1 13A fault the Attorney General for calling a legal 2 proposition ludicrous. Counts 25F, 27F, 25H, 3 fault the Attorney General saying it was perverse 4 to suggest something. 5 I urge the Commission to look at how 6 common it is for attorneys to use such words and 7 phrasing in briefing. In fact, these terms are 8 not infrequently used by Justices of the Montana 9 Supreme Court. 10 Take the word "ludicrous." In March of 11 this year, Justice Sandefur wrote a fiery dissent 12 in a voting rights case. He said, quote, "The 13 heretofore novel idea that has now been sold to 14 this Court that legislative acts, and thus the 15 alleged ulterior motives of the Legislature can 16 now be put on trial, requiring evidentiary proof 17 upon every constitutional challenge, is frankly 18 ludicrous, and a serious affront to the delicate 19 balance of constitutional separation of powers 20 upon which our precious forum of 21 distributed-powers government so critically 22 depends." That's Montana Democratic Party v. 23 Jacobsen, 2024, MT 66 Paragraph 162. 24 Then I point you to a dissent by Justice 25 Nelson in 2012, quote, "But is anyone, the</p>	<p>1 116 Paragraph 18. 2 In 2009, the Montana Supreme Court wrote 3 an opinion that said, quote, "The implications of 4 this argument defy common sense and logic, and are 5 nothing short of Kafkaesque." That case is 6 Ammondson v. Northwest Corp 2009 MT Paragraph 36. 7 Moving on to perverse. In a case called 8 Inter-Fluve v. Montana 18th Judicial District, 9 that's at 2005 MT 103 Paragraph 36, the Court 10 said, quote, "As stated in Moore Business Forms, 11 Inc. v. Cordant Holdings Corp, because the 12 attorney/client privilege belongs to the client, 13 it would be perverse to allow the privilege to be 14 asserted against the client." 15 And lastly in dissent in 2011, Justice 16 Nelson wrote, quote, "Nevertheless, the Court 17 perverts this principle to hold that when the 18 Legislature does not enact any legislation at all, 19 i.e., when the Legislature takes no action 20 whatsoever in relation to a particular statute, 21 the Legislature tacitly ratifies this Court's 22 statutory construction. This proposition is 23 without foundation in law or reason." That case 24 is Musselshell Ranch Company v. Seidel-Joukova, 25 and the cite is 2011 Montana 217 Paragraph 55.</p>

<p style="text-align: right;">Page 480</p> <p>1 Mr. Chairman, and members of the 2 Commission, my team and I could run Westlaw and 3 Lexis searches for days to find examples of these 4 phrases being used inside and outside the state of 5 Montana in judicial opinions and in briefing. And 6 the point I'm trying to make is that these are not 7 irregular terms of phrase by any means, and ODC 8 has vastly overreached. 9 Other charges relating to statements by 10 the Attorney General simply have a factual basis, 11 and might as well be -- or excuse me. Other 12 charges made by the Attorney General have a 13 factual basis and are absolutely true. 14 Counts 15A and 17A allege a violation 15 for saying, quote, "That weekend transaction which 16 necessarily included ex parte communications that 17 have neither been acknowledged or disavowed 18 resulted in the Court stifling production of its 19 own public records held by McLaughlin." 20 Similarly Count 29F alleges a violation 21 for saying, quote, "This controversy began when an 22 unnoticed weekend order in a case that the present 23 Defendant was not a party to facilitated by ex 24 parte communications." 25 Now, you may not like the Attorney</p>	<p style="text-align: right;">Page 482</p> <p>1 You may agree with Mr. Cox that no one 2 had to disclose those conversations, that the 3 Court never had an obligation to disclose them, 4 but it's still a fact that they were never 5 disclosed, and that's what matters. 6 Mr. Chairman and members of the 7 Commission, we all understand that none of this 8 occurs in a vacuum. I don't think anyone disputes 9 that the events of the Brown and McLaughlin were 10 politically charged and unprecedented. You heard 11 the Attorney General himself say that in hindsight 12 there were probably things he would have done 13 differently. I would imagine there are others 14 involved in this saga that also would have done 15 things differently. 16 The important thing from the Attorney 17 General's perspective was that everyone in this 18 case seemingly moved on after the United States 19 Supreme Court denied the Legislature's final 20 appeal. So the Judiciary, Beth McLaughlin, 21 ultimately won. It might have been messy, but the 22 subpoenas were invalidated and the documents were 23 returned. 24 The Montana Supreme Court didn't issue 25 sanctions or other discipline against the Attorney</p>
<p style="text-align: right;">Page 481</p> <p>1 General's characterization or turns of phrase, but 2 nothing in those statements is actually untrue 3 based on this record. 4 Mr. Cox admitted to two ex parte 5 conversations with Justices of the Montana Supreme 6 Court. Mr. Cox's call to Justice Rice on Saturday 7 led to Justice Rice instructing the Clerk of Court 8 to come in on a Sunday so that the Court could 9 receive and decide that motion. And nothing in 10 the record shows that these conversations were 11 ever acknowledged or disavowed. And Mr. Cox 12 admitted the quashed subpoena included public 13 records of the Court Justices. 14 Similarly Count 27 faults the Attorney 15 General for saying, quote, "The Court's multiple 16 procedural irregularities granting unnoticed 17 weekend relief to non-parties -- for non-parties 18 refusing to disclose ex parte communications," 19 etc. 20 Again, you heard the Clerk of the Court 21 testify to the procedural irregularity of the 22 Sunday motion. Mr. Cox himself admitted that this 23 was an emergency motion, and the Court granted 24 relief to a non-party. That means that these 25 communications were never disclosed.</p>	<p style="text-align: right;">Page 483</p> <p>1 General and his staff, and there's no evidence 2 that there were any other complaints by attorneys 3 involved in the litigation against the Attorney 4 General or his staff, and that's the way this 5 should have ended. 6 Now, of course the branches of 7 government still battle to this day. Some of the 8 underlying issues are not going anywhere. To 9 paraphrase James Madison, "Ambition counteracts 10 ambition as the branches push and pull against 11 each other," especially on consequential issues of 12 Montana law. You can see similar conflicts 13 between the branches at the national level. 14 To rule in favor of the Attorney 15 General, you don't have to agree that his legal 16 positions were correct. You don't have to endorse 17 every forcible turn of phrase employed in his 18 briefing. You don't have to take the 19 Legislature's side. You can actually conclude 20 that no one in the Judicial Branch acted 21 improperly, and that there was no conflict of 22 interest when the Justices ruled on the subpoenas 23 in McLaughlin. 24 All you have to do is that the Attorney 25 General had a good faith basis for saying and</p>

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<p>1 doing what he did. The record is absolutely 2 sufficient for you to make that conclusion. 3 You've heard a lot of testimony about legal rules 4 relating to open refusal to comply with a Court 5 order, or when ex parte conversations are 6 appropriate and need be disclosed. 7 I would admit these are difficult issues 8 that even thoughtful lawyers don't always get 9 right. If you think this is a close call at all, 10 I urge you to err on the side of leniency, given 11 these circumstances, the highly unusual nature of 12 these proceedings, the unique separation of powers 13 problems presented here. 14 Now, if you have concern what happens if 15 the Attorney General isn't disciplined for these 16 actions, let me offer a few thoughts to you in 17 closing. Our position has always been that Courts 18 have the authority to discipline attorneys if 19 rhetoric or conduct goes too far. The same Courts 20 and attorneys on the other side can also police 21 refusals to obey Court orders. 22 If something is prejudicial to the 23 administration of justice, especially under unique 24 circumstances, the Courts are the best place to 25 make those determinations, and ODC's broadsweeping</p>	<p>1 just more -- all the more reason for post-trial 2 briefing there. We of course only had five 3 minutes to address these cases, so I do apologize. 4 But I encourage the Court to read the 5 Gentile case, read all the cases cited by both my 6 friend on the other side of the aisle, and the 7 Respondent's, because I do think there are some 8 very important issues to resolve there. So I 9 apologize for misspeaking in terms of 10 characterizing the Gentile case. Thank you, Mr. 11 Chairman and members. 12 CHAIR OGLE: Do you have any response, 13 Mr. Strauch? 14 MR. STRAUCH: Certainly not. Thank you. 15 CHAIR OGLE: Very well. Then we will be 16 in recess here, or we'll adjourn actually. We're 17 going to take this matter under advisement, and we 18 will be meeting, and deliberating, and trying to 19 get findings of fact and conclusions of law out as 20 soon we can. We're going to try to move 21 expeditiously. So thank you all for your -- 22 MR. CORRIGAN: Mr. Chairman. 23 CHAIR OGLE: Mr. Corrigan. 24 MR. CORRIGAN: Does the Commission know 25 how long it might take to get a transcript of</p>
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<p>1 Complaint here goes entirely too far. 2 Now, I understand you might be concerned 3 about what ODC discusses as upholding the dignity 4 of the Court going forward, and I would simply say 5 this: Imposing a penalty under those 6 circumstances would not serve the purposes of the 7 Rules of Professional Conduct as ODC alleges. It 8 would not actually do anything to help public 9 confidence in the judicial system. It will not 10 seal the fault lines in our political system. In 11 fact it will likely only exacerbate the conflict 12 between the branches. In short, it would not 13 serve the interests of justice. Thank you for 14 your time. 15 CHAIR OGLE: Thank you, Mr. Corrigan. 16 MR. COLEMAN: We have one issue to 17 address with Mr. Corrigan before this moves on, if 18 that's all right. 19 CHAIR OGLE: Issue to address? You want 20 to talk to him? 21 MR. COLEMAN: Yes, please. 22 MR. CORRIGAN: Mr. Chairman, I have to 23 come up and apologize under my duty. When we 24 quoted the Gentile case, we were actually quoting 25 a concurrent, so I apologize, and I think that</p>	<p>1 these proceedings? 2 CHAIR OGLE: We are hoping to have one 3 by the end of next week. There's certainly no 4 guarantees from the Court Reporter, and as you 5 noticed, there were two different Court Reporters 6 here, and so they'll have to coordinate on things. 7 But that's what we're hoping for. 8 MR. CORRIGAN: Thank you, Mr. Chairman. 9 CHAIR OGLE: Thank you. All right. 10 We'll adjourn. Thank you all. 11 (The proceedings were concluded 12 at 3:50 p.m.) 13 * * * * * 14 15 16 17 18 19 20 21 22 23 24 25</p>

C E R T I F I C A T E

STATE OF MONTANA)

: SS.

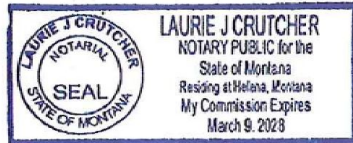
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing pages 247 to 487 contain a
true record of the Day 2 of the proceedings to the
best of my ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal this 17th day of
October, 2024.

Laurie J. Crutcher



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