IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 25-0054

DAVID SASLAV, MONTANA ENVIRONMENTAL INFORMATION CENTER, and KAYLEE HAFER,

Plaintiffs and Appellees,

and

MONTANA FREE PRESS, THE ASSOCIATED PRESS, MONTANA BROADCASTERS ASSOCIATION, MONTANA NEWSPAPER ASSOCIATION, DAILY MONTANAN, HAGADONE MEDIA MONTANA, LLC, LEE ENTERPRISES, INC., and ADAMS PUBLISHING GROUP,

Plaintiff-Intervenors and Appellees,

v.

JERRY HOWE, in his official capacity as Executive Director of the Montana Legislative Services Division of the Montana State Legislature, and MONTANA LEGISLATIVE SERVICES DIVISION OF THE MONTANA STATE LEGISLATURE,

Defendants and Appellants,

and

STATE OF MONTANA, and STATE SENATOR BARRY USHER,

Defendant-Intervenors and Appellants.

On Appeal from Montana Eighth Judicial District Court,
Cascade County, Cause No. CDV-24-539,
Hon. John A. Kutzman, District Court Judge

PLAINTIFF-INTERVENORS' RESPONSE TO STATE'S EMERGENCY MOTION TO STAY

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INTRODUCTION

This case concerns whether the public is entitled to examine a collection of public documents called a "junque file." Junque files contain materials related to the legislative drafting process, including bill drafts, background materials, bill drafting requests, correspondence with bill drafting staff, lobbyists and other third parties, and legal staff notes. *See* App. A, ¶¶ 6–11.

For *at least* the past 30 years, Appellant Montana Legislative Services Division (Legislative Services)—and by extension Montana legislators—have provided to the public complete, unredacted junque files upon request, as soon as available, pursuant to Art. II, § 9 of the Montana Constitution. *Id.*, ¶¶ 12–14. The district court's order maintains that long-standing practice.

Appellants State of Montana and Sen. Barry Usher (State) seek an "emergency" stay of that order. The State argues Legislative Services' new September 2024 policy asserting that a legislator's communications with "legislative staff, lobbyists, stakeholders, or other third parties" are subject to a "nondisclosure privilege" pursuant to Art. V, § 8 and may be withheld from the public unless waived by individual legislators. *See* App. D, Ex. B-3. The State contends the district court's order impermissibly requires disclosure of privileged records. The State is mistaken.

No Montana case has held the contents of a junque file are privileged or otherwise confidential. The only case to address the issue (a 1995 First Judicial District Court order) held the opposite: that bill drafts and other documents during the bill drafting stage are subject to public disclosure under Art. II, § 9, and that public disclosure does not conflict with Art. V, § 8 (the speech and debate clause). App. A, ¶¶ 45–50. That is, unequivocally, the condition maintained by the district court's order.

A stay is not appropriate. A stay would upend the status quo and, in turn, deny the public the right to examine records that for thirty years have been treated and disseminated as public records.

LEGAL STANDARD

This Court typically *reviews* an order from the district court granting or denying a motion for stay under M. R. App. P. 22(2).[1] Rule 22(2) requires that the appellant demonstrate "good cause," supported by affidavit. M. R. App. 22(2)(a)(i); *Mont. Envtl. Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, No. DA 2209964, 2022 Mont. LEXIS 735, *5 (Aug. 9, 2022).

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[1] The State did not first seek a stay in the district court. Nor did it submit an affidavit supporting "extraordinary circumstances" for failing to do so. Summary denial is the usual fate of such a motion. M.R. App. P. 22(4); *Dahood v. Lussy*, No. DA 19-0577, 2019 Mont. LEXIS 681, *2 (Oct. 29, 2019).

The Court also considers the factors outlined in *Hilton v. Braunskill*, 481 U.S. 770 (1987), governing stays of civil judgments, which include: (1) whether the applicant made a strong showing it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether a stay will substantially injure the other parties; and (4) where the public interest lies. *Id.*

Moreover, when considering whether to stay a preliminary injunction, this Court considers whether the requested relief would "maintain the status quo pending consideration of the issues." *Mont. Democratic Party v. Jacobsen*, No. DA 22-0172, 2022 Mont. LEXIS 459, *5–6 (May 17, 2022). The merits of the preliminary injunction are only determined "after full consideration of the issues on appeal." *Id.* at *6. The status quo is the "last actual, peaceable, noncontested condition which preceded the pending controversy." *Porter v. K&S P'ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981).

ARGUMENT

I. The State has not made a "strong showing" of likely success.

The State asserts that *O'Neill v. Gianforte*, 2025 MT 2, ¶ 13, 420 Mont. 125, ___ P.3d ___, and *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 20–22, 27, 390 Mont. 290, 412 P.3d 1058, recognized certain preexisting legal privileges as exceptions to Art. II, § 9 (executive and attorney-client privilege, respectively) and that the

district court failed to consider whether Art. V, ¶ 8 "confers a nondisclosure privilege" that also operates as an exception. State Br., pp. 4, 6–9.

O'Neill, however, is dispositive of the State's argument. *O'Neill* recognized that for any "privilege" to operate as an exception to Art. II, § 9, it must be rooted in Montana law at the time of the Constitution's adoption:

> [In *Nelson*] we identified a second exception to Article II, Section 9, that evinces an alternate consideration in the final step of the process: when there is a preexisting legal privilege that was protected by statute or common law at the time of the Constitution's adoption that is necessary for the integrity of government. Based on the unique nature of Montana's right to know, any privilege we identify as an exception to the right to know must be grounded in Montana law at the time of the Constitution's adoption, *rather than the law of other states or the federal government*.

O'Neill, ¶ 13 (emphasis added, internal quotations and citations omitted).

The State does not bother tying to Montana law its argument that Art. V, § 8 confers a "nondisclosure privilege." It instead expressly relies on federal law and the law of another state. *See* State Br., p. 4 (citing *In re Sealed Case*, 80 F.4th 355, 365 (D.C. Cir. 2023) for proposition the speech and debate clause "confers a nondisclosure privilege"); *id.*, pp. 8–9 (citing *Edwards v. Vesilind*, 790 S.E.2d 469, 535 (Va. 2016) for proposition that bill drafting records are protected by "legislative privilege").

Nor does the state explain how the D.C. Circuit's conception of federal legislative privilege squares with the "unique nature of Montana's constitutional right to know," *O'Neill*, ¶ 13, particularly considering the federal constitution does not contain a right to know. Unlike the federal constitution, Montana's constitutional right to know was specifically designed to prevent government secrecy. Delegate Eck, when introducing Art. II, § 9 for adoption, explained that very point: "The committee intends by this provision that the deliberations and the resolution of all public matters be subject to *public scrutiny*." Mont. Const. Conv. Verbatim Transcr., Vol. V, 1670 (Mar. 7, 1972) (emphasis added). And, as this Court has long recognized, Art. II, § 9 creates a "constitutional presumption that every document within the possession of public officials is subject to inspection." *Bryan v. Yellowstone Cty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 39, 312 Mont. 257, 60 P.3d 381.

This Court has only considered the speech and debate clause on one occasion. In *Cooper v. Glaser*, a legislator was sued by a constituent (for defamation) for comments made on the House floor. 2010 MT 55, ¶ 4, 355 Mont. 342, 228 P.3d 443. *Cooper* affirmed the trial court's dismissal, holding the legislator's comments were the "precise circumstances under which legislators should be immune [under Art. V, § 8] from the threat of prosecution." *Id.*, ¶ 14. This Court has offered no

hint that Art. V, § 8 confers any privilege beyond immunity from suit, let alone a nondisclosure privilege for otherwise public records.

The State's failure to analyze and explain why Montana would follow, let alone is bound by, the D.C. Circuit's formulation of "legislative privilege" in light of Art. II, § 9 is fatal to its required showing of a "strong" likelihood of success.[2] *Westmoreland*, 2022 Mont. LEXIS 735 at *5. The State, in other words, fails to show "a substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

II. The State cannot establish irreparable injury.

The State's argument it will suffer irreparable injury absent a stay likewise rests on the faulty, and unsupported, premise that legislative privilege "protects against public disclosure." State Br., p. 10. Again, confidentiality is not what even

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[2] Contrary to the State' suggestion, the federal circuits are split as to whether federal legislative privilege is a non-disclosure privilege. While the D.C. Circuit has so found, *see U.S. v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007), the Ninth and Third Circuits have refused the invitation. *U.S. v. Renzi*, 651 F.3d 1012, 1032 (9th Cir. 2011) (the federal speech and debate clause "does not incorporate a non-disclosure privilege"); *In re Grand Jury Investigation (Eilberg)*, 587 F.2d 589, 596–597 (3d Cir. 1978) (distinguishing legislative privilege from other privileges that protect against disclosure (*e.g.* the attorney-client privilege) because legislative privilege "is not designed to encourage confidences by maintaining secrecy," but instead "when applied to records . . . is one of nonevidentiary use, not of non-disclosure"). And, as *Renzi* noted, the U.S. Supreme Court has never held the federal legislative privilege is a non-disclosure privilege. *Renzi*, 651 F.3d at 1031 (refusing to recognize "some grandiose, yet apparently shy, privilege of non-disclosure that the Supreme Court has not thought fit to recognize").

federal legislative privilege aims to protect. *In re Fattah*, 802 F.3d 515, 527–528 (3d Cir. 2015) (legislative privilege "was not designed to encourage confidences by maintaining secrecy;" it was designed to "free the legislator from the executive and judicial oversight that realistically threatens to control his conduct as a legislator"). The State points to *nothing* rooted in Montana law that Art. V, § 8 was designed to confer confidentiality over otherwise public records.

The State's failure to address the status quo is telling regarding its claimed harm. For 30 years, Legislative Services, the State, legislators, lobbyists, and, importantly, the public have understood that the contents of junque files are subject to public examination. App. A, ¶ 61. The State, in other words, has never enjoyed a "privilege" that treats some of the contents of junque files as confidential. Considering the State's abject failure to explain why—based on Montana law—Art. V, § 8 confers a confidential privilege, the State offers no basis to upset the status quo in favor of what would amount to the recognition of a completely new privilege in Montana.[3]

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[3] To that end, the district court's order would not "in effect be a form of final relief." *Mercer v. Mont. Dep't of Pub. HHS*, No. DA 24-01512, 2024 Mont. LEXIS 964, *7 (Sept. 5, 2024). The mandate is limited to Appellees' handful of previously requested (and redacted) junque files, while the preliminary injunction simply maintains the status quo and precludes Legislative Services from invoking a privilege this Court has not previously recognized while the case proceeds. The privilege at issue in *Mercer*, the attorney-client privilege, is a preexisting nondisclosure privilege recognized by Montana law, and concerned a single document request.

III. The public interest and harm to other parties cut sharply against a stay.

The State's final contention, that maintaining the status quo would burden Legislative Services' limited resources, strains credulity. Again, for the past 30 years, Legislative Services has provided to the public complete and unredacted junque files upon request, as soon as available. App. A, ¶¶ 6–11. There is *nothing* in the record—and the State provides none with its motion—suggesting that public examination of junque files burdens Legislative Services or otherwise prevents Legislative Services from "operating an efficient 90-day session."

The State also glosses over the affect a stay would have on the Press and Plaintiffs, blithely noting "[a]ny harm to Appellees can be cured through production following a full trial on the merits." State Br., p. 11. The State's argument is contrary to settled law and the record.

First, the violation of Appellees' constitutional right to know is, by itself, enough to overcome the State's contention a stay will not harm them. *Mont. Cannabis Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161 (district court "properly concluded that the loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued").

Second, the declarations and testimony offered by the Press (*see* App. N, Ex.

1–4, 7) demonstrate a stay will cause substantial injury. For 30 years, Legislative Services has routinely disseminated complete junque files to the public. *See* Dec. Susan Fox, ¶¶ 2–7, App. N, Ex. 7. The information contained in junque files is a crucial tool to the Press's ability to accurately and completely report on government happenings. *See* Dec. M. Dennison, ¶¶ 12–15, App. N, Ex. 1; Dec. E. Dietrich, ¶¶ 8–9, App. N, Ex. 2; Dec. D. Ehrlick, ¶¶ 4–9, App. N, Ex. 3; Dec. A. Hanson, ¶¶ 6–10, App. N, Ex. 4.

Junque files aid in identifying the entity or person sponsoring a bill, determining whether an outside lobbying organization drafted a bill, and timely reporting on last minute changes to a bill while ensuring the accuracy of the reporting. *See* Dec. M. Dennison, ¶¶ 12–15, App. N, Ex. 1; Dec. E. Dietrich, ¶¶ 8–9, App. N, Ex. 2; Dec. D. Ehrlick, ¶¶ 4–9, App. N, Ex. 3; Dec. A. Hanson, ¶¶ 6–10, App. N, Ex. 4.

Legislative Services' challenged policy has already harmed the Press. In October 2024, Eric Dietrich requested the junque file for a proposed bill concerning tax breaks for wireless communications. Legislative Services redacted portions of the file hiding two important fields from public inspection, including a description of what the bill aimed to do and whether the bill drafter was supposed to work with lobbyists or stakeholders. *See* Dec. E. Dietrich, ¶¶ 5–7, App. N, Ex. 2;

App. N, Ex. 5. Mr. Dietrich sought this information to ensure accurate reporting on Montana's property tax system and legislation aimed at shifting tax burdens to other taxpayers—a matter of significant public interest. Dec. E. Dietrich, ¶ 5, App. N, Ex. 2. The redactions prevented Mr. Dietrich from discerning, and ultimately reporting on, how the bill will burden taxpayers. *Id.*

The Press needs to be apprised of, and report on, a bill's stakeholders, a bill's subject matter, and the potential effects of a bill to accurately, and timely, inform the public of pending legislation during the legislative process. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490-91, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) ("in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations").

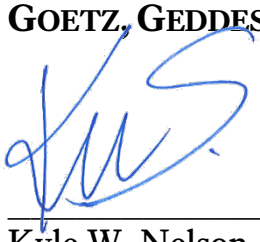
Treating junque files as confidential denies the Press, and by extension the public, timely information concerning potential legislation. A stay would effectively close the door to public access to junque files for the 2025 legislative session—contrary to the purpose of a stay—and compound that harm.

CONCLUSION

For the foregoing reasons, the Court should deny the State's motion.

DATED this 24th day of January, 2025.

GOETZ, GEDDES & GARDNER, P.C.



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CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11 and 22, the undersigned certifies that this brief is set in a proportionally spaced font (14 pt.) and does not exceed 10 pages of text exclusive of the documents described in Rule 22(2)(a)(ii) and (iii).

Kyle W. Nelson
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APPENDIX

For the Court's convenience, Plaintiff-Intervenors attach excerpts of Defendant-Intervenors' Appendix to their Emergency Motion to Stay, as referenced in the above brief. Plaintiff-Intervenors attach the original District Court copy (Dkt. 35) of Appendix "N", to reflect the exhibit stickers on the Declarations, for ease of reference.

Appendix No.	**Document Name**
A	District Court Order Granting Preliminary Injunction and Writ of Mandamus (Dkt. 42), January 21, 2025
D, Ex. B-3	Waiver of Legislative Privilege for Communications Related to Bill Drafts, September 24, 2024
N	Plaintiff-Intervenors' Notice Re: Joinder of Plaintiffs' Motion and Brief for Preliminary Injunction (Dkt. 35), December 30, 2024

CERTIFICATE OF SERVICE

I, Kyle W. Nelson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-24-2025:

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