IN THE SUPREME COURT OF THE STATE OF MONTANA

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,

Intervenor-Plaintiffs and Appellees,

v.

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

Defendants, and

STATE OF MONTANA, and STATE SENATOR BARRY USHER,
Intervenor-Defendants and Appellants.

BRIEF OF AMICUS CURIAE GOVERNOR GIANFORTE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County Cause No. CDV-24-539,
The Honorable John A. Kutzman, Presiding

(Appearances on the following page)

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Statement of Interest

Article VI, Section 4(1) of the Montana Constitution provides, "[t]he executive power is vested in the governor who shall see that the laws are faithfully executed." The Framers intended this provision to ensure the "state's chief executive will be chief in fact, not in rhetoric." *Bullock v. Fox*, 2019 MT 50, ¶ 19, 395 Mont. 35, 435 P.3d 1187. As chief executive, the Governor has a duty to defend the separation of powers. Mont. Const. art. III, § 1. That includes defending the historic constitutional privileges of all three branches. That duty recently led the Governor to veto bills that would have deprived the executive and judicial branches of such privileges. *See* Governor Gianforte, S.B. 40 Veto Letter, May 16, 2025[1]; Governor Gianforte, H.B. 271 Veto Letter, May 16, 2025.[2] The same duty leads the Governor to urge this Court to reverse the ruling below.

Summary of Argument

In an era defined by "waves of state constitution-making" that reflected unique and "pressing local concerns," the retention of legislative privilege was remarkably uniform. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 240 (2003) (quotation omitted). "Even as states in other ways revised their constitutions" to "promote a

[1] https://governor.mt.gov/25.05.16_SB_40_Veto_Letter.pdf
[2] https://governor.mt.gov/25.05.16_HB_271_Veto_Letter.pdf

more open and deliberative state legislative process, they did not alter their legislative privilege provisions." *Id.* at 242 (citation and quotation marks omitted).

That is just what happened in Montana. Montana's 1889 Constitution contained a Speech or Debate Clause nearly identical to the U.S. Constitution's. And while Montana's 1972 Constitution was innovative in many ways, the 1972 Framers adopted the same Speech or Debate Clause with no debate—in the middle of a decade that saw the most significant jurisprudential treatments of legislative privilege. *See* Huefner, 45 Wm. & Mary L. Rev. at 250 (recounting the many decisions on the scope of legislative privilege between 1966 and 1979).

Though the 1972 Framers sought to expand government transparency, they also expected that the right to know would not be absolute. They made clear that this Court would recognize exceptions with deep historical roots that are necessary for the integrity of government. *See O'Neill v. Gianforte*, 2025 MT 2, ¶¶ 11–14, 420 Mont. 125, 561 P.3d 1018; *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 12–30, 390 Mont. 290, 412 P.3d 1058

As former members of this Court understood, Montana's "[F]ramers would not have chosen to abandon the centuries-old common-law tradition of confidential *judicial* deliberations without even five minutes of discussion to suggest that they intended such a momentous change in judicial decision making." *In re Selection of a*

Fifth Member to Montana Districting Comm'n, 1999 WL 608661, at *19 (Mont. Sup. Ct. Aug. 3, 1999) (Turnage, J., specially concurring) (emphasis added). But affirming here would require this Court to assume the Framers discarded the centuries-old tradition of legislative privilege without *any* discussion. Indeed, that is what the District Court seemed to believe when it concluded that Article II, Section 9 overrides any legislative privilege over deliberative documents in junque files. The ruling below is grievously wrong. And the Governor agrees with Intervenor-Defendants' well-reasoned arguments why it must be reversed. He writes to stress two additional points.

1. Legislative privilege rests on the same constitutional foundations as judicial and executive (or gubernatorial) privilege. All three privileges are essential to the separation of powers. Thus, when one branch strips another of such a privilege, it upsets the separation of powers and undermines the liberty that divided power protects.

2. Plaintiffs' arguments, and the District Court's reasoning, follow from a misunderstanding of why legislative privilege exists. Legislative privilege has endured since 1689 because it protects representative democracy and secures the rights of the people. Removing legislative privilege will not increase transparency. It

will chill open creative legislative deliberation, and especially discourage legislators from exploring heterodox and counter-majoritarian views.

I. Legislative privilege—like judicial and gubernatorial privilege— is essential to the separation of powers.

In Federalist 51, Madison famously argued that the structure of government must "furnish the proper checks and balances between the different departments." Madison understood that humans are not angels and that ambition is an indelible part of human nature. THE FEDERALIST NO. 51 (James Madison). The best defense of liberty, in Madison's view, was that "[a]mbition must be made to counteract ambition." *Id.* This insight is woven into the U.S. Constitution's structure, where "the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights." *Id.* Madison understood that "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer *each* department the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist, No. 51 (emphasis added).

Because public servants are not "angels"—even in Montana—the same concerns are embedded in the Montana Constitution. Mont. Const. art. III, § 1. Echoing Madison, Montana's separation of powers ensures that no "single branch"

claims "inordinate power," *Powder River Cnty. v. State*, 2002 MT 259, ¶ 114, 312 Mont. 198, 60 P.3d 357, and promotes a "firm maintenance of [each branch's] own clear authority coupled with a frank and cheerful concession of the rights of the co-ordinate departments." *State ex rel. Hills v. Sullivan*, 48 Mont. 320, 330, 137 P. 392, 395 (1913). One of the 1972 Framers' chief goals was to reestablish these "fundamental" concepts of "checks and balances by separate branches of government." *Bullock v. Fox*, 2019 MT 50, ¶ 18, 395 Mont. 35, 435 P.3d 1187 (citing Mont. Const. Conv., Committee Proposals, Feb. 17, 1972, pp. 449–50).

If past is prologue, the ambition that leads to interbranch disputes is neither new nor going to disappear anytime soon. *See, e.g.*, S.B. 40 (2025), H.B. 271 (2025); *In re Knudsen*, PR 23-0464; *McLaughlin v. Mont. State Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980; *Coate v. Omholt*, 203 Mont. 488, 662 P.2d 591 (1983). Nor should it. Madison's answer is not to hope that public servants might one day become "angels," but to give each branch "the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51. Constitutional privileges—for all three branches—have long provided one of those "necessary constitutional means."

A. When one branch diminishes another's historic constitutional privilege, it upsets the separation of powers.

The Anglo-American legal tradition has long recognized similar constitutional privileges for all three branches of government. These privileges exist for similar reasons: to protect one branch from interference by the others and to benefit the people. When one branch retains a constitutional privilege for itself while gutting the privilege of another, it undermines the separation of powers and removes from one branch "the necessary constitutional means ... to resist encroachments of the others." Federalist No. 51. Montana's framers sought to reestablish "checks and balances by separate branches of government." *Bullock*, ¶ 18. They did not intend to empower one branch to abolish another branch's privilege.

Judicial Privilege. Judicial privilege is "grounded in constitutional principles of separation of powers and the due process afforded by independent decision-making." *Commonwealth v. McClure*, 172 A.3d 698, 694 (Pa. Super. Ct. 2017). The privilege "permits judges to discuss freely ... all issues involved in a case, to advance tentative views for the sometimes enlightening reactions of wiser colleagues, and to criticize candidly ... the notions offered by other colleagues, all without fear of subsequent embarrassment to any member of the Court." *In re Selection of a Fifth Member to Mont. Districting Comm'n*, 1999 WL at *15 (Turnage, J., specially

concurring). And it safeguards the "judiciary's independence from the other branches of government and from outside influences and extraneous concerns." *In re Enforcement of Subpoena*, 463 Mass. 162, 171–72, 972 N.E. 2d 1022, 1029 (2012); *see also McLaughlin*, ¶ 47 ("judicial work product" is shielded from disclosure).

Judicial privilege shares deep constitutional roots with legislative and executive privilege. *See In re Certain Complaints*, 783 F.2d 1488, 1521 (11th Cir. 1986); Charles W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 Val. U. L. Rev. 1, 66–67 (2008). Consistent with this history, Montana's Framers understood that the right to know would not destroy the tradition of secrecy in judicial deliberations. *See Nelson*, ¶ 21; *see also McLaughlin*, ¶ 48 & n. 9; *In re Selection of a Fifth Member to Mont. Districting Comm'n*, 1999 WL 608661, at *19. It would upset the separation of powers if one branch attempted to pare back this deeply rooted constitutional privilege while retaining its own. *See* Governor Gianforte, S.B. 40 Veto Letter, May 16, 2025 ("Senate Bill 40 upsets the separation of powers by eroding the privilege of one branch of government while retaining it in another.").[3]

Executive/Gubernatorial Privilege. Executive privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under

[3] https://governor.mt.gov/25.05.16_SB_40_Veto_Letter.pdf

the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Like judicial privilege, it dates to early American history. Take *Marbury v. Madison*, where Chief Justice John Marshall observed that for a court to intrude "into the secrecy of the cabinet" would give the appearance of "intermedd[ling] with the prerogatives of the executive." 5 U.S. (1 Cranch) 137, 170 (1803). And "[s]ince the beginnings of our nation, executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government." *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997). Like its federal cousin, Montana's gubernatorial privilege is rooted in the Governor's authority as the single head of the executive branch and the Framers' recognition that the Governor needs candid advice from advisors to carry out his constitutional duties. *See O'Neill*, ¶¶ 18–20. Just like judicial privilege, gubernatorial privilege creates space for candid, blunt advice that might be chilled "were the advice subject to immediate disclosure." *O'Neill*, ¶ 22; *cf. In re Selection of Fifth Member*, 1999 WL 1999 WL at *15 (Turnage, J., specially concurring) (recognizing similar purpose for judicial deliberations privilege).

Like judicial and legislative privilege, gubernatorial privilege has historical roots that date back to the 1889 Constitution. *See O'Neill*, ¶ 18. Were another branch to strip the executive of this privilege, it would violate the separation of powers. *See*

O'Neill v. Gianforte, DA 23-055 Oral Argument (58:03–58:24)[4] ("Where do you find in the Constitution support for ... giving certain privileges to the judicial branch over judicial deliberations but not the executive branch?") (Baker, J.); *accord* Governor Gianforte, H.B. 271 Veto Letter, May 16, 2025.[5]

Legislative Privilege. The same historical pedigree and rationale support legislative privilege. *See Gibson v. Goldston*, 85 F.4th 218, 225 (4th Cir. 2023) (judicial immunity correlates to legislative immunity and prosecutorial immunity in the executive branch); *see also In re 2022 Legislative Districting of the State*, 282 A.3d 147, 196 (Md. 2022) (noting legislative privilege and judicial privilege protect the deliberations of each branch). Like gubernatorial privilege, legislative privilege is rooted in a provision from the 1889 Constitution that was carried forward without debate into the 1972 Constitution. *See O'Neill*, ¶19. As Judge Abbott recognized, that provision was "nearly a cut-and-paste of its ... 1789 and 1689 forebears." *Mont. Conservation Voters v. Jacobsen* ("*MCV*") DDV-2023-702 at 13 (Mont. First Jud. Dist. Ct. July 12, 2024). And, like judicial and gubernatorial privilege, legislative privilege protects the separation of powers and is necessary for the Legislature to function. The privilege "free[s] the legislator from executive and judicial oversight that

[4] https://www.youtube.com/watch?v=tpB1zw6Hn0w
[5] https://governor.mt.gov/25.05.16_HB_271_Veto_Letter.pdf

realistically threatens to control his conduct as a legislator." *Gravel v. United States*, 408 U.S. 606, 618 (1972). As Madison and Jefferson explained, "to put the representative into jeopardy of criminal prosecution, of *vexation, expense, and punishment* before the Judiciary, if his communications, *public or private*, do not exactly square with their ideas of fact or right" would be to collapse the separation of powers and undermine representative democracy. Huefner, 45 Wm. & Mary L. Rev. at 232 (quoting 8 Works of Thomas Jefferson 322–323 (1797)) (emphasis added).

In short, executive, judicial, and legislative privilege have all long been recognized as the necessary three legs of the stool for the government to function. Each protects the separation of powers and the democratic system of government. These privileges mutually reinforce each other, ensuring that no "single branch" accumulates "inordinate power" at the expense of another. *Powder River Cnty.*, ¶ 114. The separation of powers cannot countenance one branch stripping another of a deeply rooted constitutional privilege while maintaining the "great security" of those privileges for itself. *See* SB 40 and HB 271 Veto Letters.

Judicial independence would suffer if the Legislature compelled disclosure of this Court's internal deliberations. The Framer's desire for a strong, accountable executive branch would be stifled if the Governor could not receive candid advice from executive branch employee. And representative democracy would falter if

courts or prosecutors could compel disclosure of legislators' internal deliberations. Constitutional privileges ward off these evils. Politics change over time, but the legislative privilege has continued in an unbroken line from 1689 to nearly every state constitution. *See* Huefner, 45 Wm. & Mary L. Rev. at 224. To abolish it would be to strike a blow at a four-century tradition of a government of divided powers.

B. Shrinking any branch's constitutional privilege inevitably pits co-equal branches against each other.

These concerns are not academic. Depriving one branch of a privilege—a "necessary constitutional means to resist the encroachment of the others"—Federalist 51, invariably spirals into real interbranch conflict and separation of powers issues. Look no further than the decision below.

Soon after it concluded that Montana legislators lacked *any* privilege over deliberative materials in junque files, the District Court ordered legislative staff to disclose these materials in **five days.** App.16, ¶ 73. The District Court has since ordered that future documents must be disclosed in **two days**. App.16, ¶ 74*; but see Saslav v. Howe*, DA 25-0054, Order (Mont. Sup. Ct. Jan. 28, 2025) (Shea, J., concurring) ("Requesting an extension of the deadline for production from the District Court would be the correct procedure to follow at this point....It is reasonable to expect that an extension of the deadline pending what I anticipate will be a prompt order from the District Court would be granted if requested.").

This fast-track order ensures that documents will be disclosed—and privileges waived—before a legislator can seek a stay. And recent history suggests what will happen next: those requesting documents will insist that any appeal of a disclosure order is moot. *See* DA 24-0153, *Wild Montana, et al. v. Gianforte, et al.,* Appellees' Ans. Br., at 16–21 (Feb. 18, 2025) (arguing that executive branch officials mooted appeal by complying with District Court mandamus order).

The District Court's order also drives a wedge between legislators and their attorneys. By compelling immediate disclosure of all documents, the District Court put legislators' attorneys in an impossible position—between the Scylla of violating their clients' constitutional privilege and the Charybdis of denying a court order. *cf.* DA 25-0054, Second Stay Order at 7–8 (Rice, J., dissenting) ("[T]he District Court has forced the State into a Hobson's Choice: either seek to protect its client's claimed privilege and risk contempt, or surrender the privileged documents and lose the case.").

Worse, the District Court concluded that no privilege existed because previous "legislators, the Legislative Council, Legislative Services, *lobbyists*, *journalists*, and the public all understood that these were public documents" based on a 1995 district court decision. App.16–17. This was wrong on several levels. First, the Legislature cannot waive the privilege on behalf of a single member—

much less staff, "lobbyists" or "journalists." Article V, Section 8 makes clear that the privilege belongs to individual members. The Clause refers to "[a] member of the legislature" and provides that "[*h*]*e* shall not be questioned in any other place for any speech or debate in the legislature." Mont. Const. art. V, § 8 (emphasis added). Courts have likewise understood the privilege to belong to individuals. *See, e.g.*, *Brewster*, 408 U.S. at 507, 524 (the privilege "protect[s] the integrity of the legislative process by insuring the independence of individual legislators"); *Coffin*, 4 Mass. at 27 ("the privilege ... is not so much the privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house."). And this makes sense. Allowing the legislative body to waive privilege over the objections of individual members would undermine the privilege's protection for dissenting or minority views. *See* Huefner, 45 Wm. & Mary L. Rev. at 287.

Second, the District Court bound all future Montana legislators to how their predecessors interpreted a 1995 District Court's decision—a decision that applied a defunct, pre-*Nelson* framework and failed to consider the historical meaning of the Speech or Debate Clause. That cannot be.

These issues all "interfere[] with "the proper functioning of the legislative branch." *Forward Mont. v. State*, 2024 MT 75, ¶ 30, 416 Mont. 175, 546 P.3d 778.

And they arose within *days* of one district court's order stripping legislators of their constitutional privilege. Recognizing the mutual, historic, and constitutional privileges that have endured throughout the American experiment will help stave off these disputes.

II. By reinforcing the separation of powers, legislative privilege promotes representative democracy and individual liberty.

Plaintiffs spin legislative privilege as a cynical attempt to exclude the people from the lawmaking process. Whatever the rhetorical force of that argument, it lacks any legal or historic support. Constitutional privileges have endured because they benefit the public and protect liberty. Judicial privilege allows courts to fulfil their constitutional duty to interpret the law without political influence. This does not benefit individual judges; it benefits the people of Montana. Gubernatorial privilege promotes considered decision-making by Montana's chief executive through candid communication with those facilitating his exercise of his constitutional duties without the fear of political backlash. This, too, benefits the People. So too with legislative privilege. Like the constitutional privileges of its co-equal branches, legislative privilege protects the independence of the legislative branch to benefit the people. That has been recognized since before the American founding.

A. Legislative privilege has always existed to promote liberty and democracy.

A "proper understanding of the legislative privilege reveals the importance of a broad interpretation to promote the robust functioning of representative democracy and allow elected representatives to serve their constituents more effectively." Huefner, 45 Wm. & Mary L. Rev. at 227. This understanding has justified legislative privilege throughout its long history.

Before legislative privilege reached America, it was recognized in the 1689 English Bill of Rights as "one of the chief means of upholding and preserving the *liberty of the subject*." Huefner, 45 Wm. & Mary L. Rev. at 230 (emphasis added) (quoting Mary Patterson Clarke, Parliamentary Privilege in the American Colonies, at 2 (1943)). The same understanding supported legislative privilege throughout early American history. During the colonial era, legislative privilege was seen "as crucial to protecting individual rights." Huefner, 45 Wm. & Mary L. Rev. at 231 (citing Clarke at 127, 130–31). Some early state constitutions made that purpose explicit: "The freedom of deliberation, speech, and debate, in either house of the legislature, *is so essential to the rights of the people*, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." Mass. Const. of 1780, art. XXI, reprinted in 5 Sources and Documents of United States Constitutions 92, 95 (William F. Swindler ed., 1975);

see also N.H. Const. of 1784, art. XXX, reprinted in 6 Sources and Documents of United States Constitutions 394, 397 (emphasis added).

Justice James Wilson, one of the Founding generation's preeminent legal thinkers, understood the privilege's necessity for representative democracy. He explained that a legislator may "discharge his public trust with firmness and success," only if he can "enjoy the fullest liberty of speech," and "be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." 2 The Works of James Wilson 38 (Andrews ed., 1896), quoted in *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951). So did Jefferson and Madison. A decade after the Constitutional Convention, they observed that legislative privilege enables legislators "to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully" and to ensure that legislators, "in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive." Huefner, 45 Wm. & Mary L. Rev. at 232 (quoting 8 Works of Thomas Jefferson 322-23 (1797), reprinted in 2 The Founders' Constitution 336 (Philip B. Kurland & Ralph Lerner eds., 1987)).

The first reported American case interpreting legislative privilege expressed the same view. *See Coffin v. Coffin*, 4 Mass. 1 (1808). *Coffin*, which the U.S.

Supreme Court later called "perhaps[] the most authoritative case in this country" on the legislative privilege, *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881), explained that the privilege exists "not with the intention of protecting the members against prosecutions for their own benefit, but to **support the rights of the people**, by enabling their representatives to execute the functions of their office without fear of prosecutions." *Coffin*, 4 Mass. at 27. To achieve these ends, the *Coffin* Court concluded that the privilege protected "every thing said or done" by a representative acting in a legislative capacity. *Id.* Justice Story later hailed the privilege afforded by the Speech or Debate Clause as a "great and vital privilege ... without which all other privileges would be comparatively unimportant, or ineffectual." 2 Joseph Story, Commentaries on the Constitution § 863 (1833).

A year after Montana's Constitutional convention, Montana's former U.S. Senator Metcalf said it best: "the speech or debate clause is as essential [today] to the success of our continuing experiment in self-government as at the moment of its adoption. For it is the clause which reinforces the separation of powers, **without which the democratic system of government would cease to function**." Constitutional Immunity of Members of Congress, Hearings Before the Joint Comm. on Congressional Operations, 93d Cong. 1st Sess. 2 (1973) (emphasis added)

Legislative privilege has endured because it protects the rights of the people and promotes functioning democracy. The privilege especially protects minority or heterodox voices in the Legislature whose priorities may not align with the majority of voters in Montana. A legislator free to debate, brainstorm, and question policies—even in ways that many Montanans might disagree with—without fear of subpoena, reprisal, or compelled testimony, can more vigorously represent her constituent's interests. This is just what Madison envisioned: without structural safeguards, "the rights of the minority will be insecure." Federalist No. 51.

B. Legislative privilege ensures the people remain in charge and especially protects dissenting views.

Plaintiffs will surely argue that legislative privilege is antithetical to representative democracy. As Justice Wilson, Justice Story, Madison, Jefferson, and Senator Metcalf recognized, the opposite is true. Rather than empowering and informing voters, compelled disclosure of legislative acts and documents will drive candid discussion into informal channels outside public view. The public won't get a clearer window into legislative thinking—just a more fragmented, inaccessible, and misleading one. *Cf. Times Mirror Co. v. Superior Ct.*, 53 Cal. 3d 1325, 1345, 813 P.2d 240, 252 (Cal. 1991) ("[I]f the public and the Governor were entitled to precisely the same information, d would likely receive it."). Here would be just a few practical effects.

1. Legislative deliberation will be chilled. If legislators fear exposure of every idea they consider—even bad ones they ultimately discard—they will protect *themselves*, not the people. They will self-censor and avoid exploring ideas that could court controversy. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States v. Nixon*, 418 U.S. 683, 705 (1974).

2. Compelling legislators to "fork over every scrap of paper," *see MCV*, DDV-2023-702 at 19, will lead legislators to say what they think the public—or a key constituency—wants to hear. Legislators will prematurely "commit themselves to an ultimately inferior policy position, rather than allowing them carefully to develop a superior course of action and then go about marketing it to colleagues and constituents." Huefner, 45 Wm. & Mary L. Rev. at 282. Legislators will cabin important discussions into private channels and carefully sanitize any document that could be disclosed. Strategic negotiation and bipartisan deal making will also suffer. *Cf. In re Selection of a Fifth Member to Montana Districting Comm'n*, 1999 WL 608661, at *15 ("[F]reedom of expression in camera should be encouraged among Justices whose duty it is to strive, at least, to reach majority accord when that can be achieved without compromise of legal principles.").

3. Legislative staff will also be reluctant to provide legislators with candid, blunt, and potentially unpopular advice if they know that they may be publicly outed as disagreeing with their boss.

4. Legislators advocating for unpopular causes will be most chilled by the fear of compelled exposure. Without any space for private deliberation, legislators will be less inclined to explore views that might draw the ire of a democratic majority.

These are just examples. The bottom line is that—just as with judicial privilege and gubernatorial privilege—a space for free deliberation is necessary for a functioning legislature. Removing legislative privilege will not bring more transparency. Everyone benefits when legislators are allowed a rough draft.

C. Legislative privilege—together with other provisions in the Montana Constitution—strikes the appropriate balance for legislative functioning and government transparency.

Like the plaintiff in *O'Neill*, *see* DA 23-055, Ans. Br. (Mar. 12, 2024), Plaintiffs here press an absolutist position: No legislative privilege, no matter what. *See, e.g.*, Mot. for Stay, App.F at 8 ("Legislative privilege has no basis under the Montana Constitution."). The District Court agreed, ordering disclosure of every jot and tittle in every junque file. But the right to know "is not absolute." *O'Neill*, ¶ 11; *Nelson*, ¶ 13. And the Montana Constitution already provides a framework for

advancing the important purposes of legislative privilege while ensuring the people's right to know remains intact.

First, courts have long understood that the Speech or Debate Clause has intrinsic boundaries. For instance, legislative privilege applies only to legislative acts "integral to the legislative process." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see also Doe v. McMillan*, 412 U.S. 306, 324 (1973). As the District Court in *MCV* rightly understood, this means a "party may not compel the production of nonpublic documents that contain a legislator's deliberations and motivations." *MCV*, DDV-2023-702 at 20. And it "is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). The core question here is whether a court can compel disclosure of documents that reveal legislative deliberations and motives. The answer is a resounding no. *See Brewster*, 408 U.S. at 525; *United States v. Johnson*, 383 U.S. 169, 184–185 (1966). There may be edge cases, but the Court need not resolve every question in this appeal. The contours of the privilege—what acts are "integral to the legislative process"—can be defined by this Court "over time in the context of particular factual situations" *Nelson*, ¶¶ 18–19, with a mature body of federal and state case law as a guide. *See Cooper v. Glaser*, 2010 MT 55, ¶¶ 11–12,

355 Mont. 342, 228 P.3d 443 (noting the paucity of Montana cases on the meaning and scope of the Speech or Debate Clause and looking to federal law for guidance). To affirm would be to gut legislative privilege; to reverse would allow this Court to answer the easy question in this case and leave edge cases for another day.

Second, Article V, Section 10(3) guarantees that "the session of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public." Section 10(3) enumerates specific proceedings that must always be open to the public. *See AP v. Usher*, 2022 MT 24, ¶ 20, 407 Mont. 290, 503 P.3d 1086.

Third, Montana legislators remain politically accountable to the people. They must ultimately answer to the voters for how they vote and why. And a legislator may elect to waive her privilege at any time. Huefner, 45 Wm. & Mary L. Rev. at 284.

Thus, the Montana Constitution ensures the people can openly participate and creates a bounded space within which the legislature can effectively deliberate. Affirming the decision below would upset this delicate balance. That holding would be hard to square with the unbroken historical recognition of legislative privilege and the text of the Speech or Debate Clause. It would also violate the separation of powers.

Conclusion

This Court should reverse the District Court's determination that legislators did not—and could not—have any privilege over materials contained in junque files. To affirm would be to ignore history and undermine the separation of powers.

Dated: June 5, 2025

Respectfully submitted,

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Certificate of Compliance

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionally spaced Equity A text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4,926 words, excluding those sections exempted under Rule 11(4)(d).

Dated: June 5, 2025

/s/ Timothy Longfield

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I, Timothy Longfield, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 06-05-2025:

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