IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. OP 25-0594

John Meyer
COTTONWOOD ENVIRONMENTAL LAW CENTER
P.O. Box 412 Bozeman, MT 59771
John@cottonwoodlaw.org
(406) 546-0149

David K.W. Wilson, Jr.
Robert Farris-Olsen
MORRISON SHERWOOD WILSON & DEOLA
401 N. Last Chance Gulch
Helena, MT 59601
kwilson@mswdlaw.com
rfolsen@mswdlaw.com

Attorneys for Cottonwood Environmental Law Center

STATE OF MONTANA, Petitioner, v. FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY, HON. MICHAEL F. MCMAHON, Respondent.	**RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF SUPERVISORY CONTROL**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Pursuant to this Court's August 26, 2025, Order, and Rule 14, M. R. App. P., Plaintiffs respond to the State of Montana's Petition for Writ of Supervisory Control.

Plaintiffs' Amended Complaint challenges the constitutionality of House Bill 407 on its face.[1] (Exhibit B.)[2] HB 407 prohibits local governments and their electors from adopting and enforcing ordinances regulating "auxiliary containers", commonly known as "single-use plastics". Plaintiffs maintain that HB 407 prevents local governments and them from fulfilling the constitutional duty to "maintain and improve a clean and healthful environment" imposed upon them. Mont. Const. art. IX, section 1(1). As a result, Plaintiffs argue that HB 407 violates their fundamental right to a "clean and healthful environment". Mont. Const. art. II, section 3, *Held v. State,* 2024 MT 312, P17, 419 Mont. 403, 560 P.3d 1235. (Amended Complaint, paragraphs 90-108, Exhibit B).

House Bill 407 implicates a fundamental constitutional right. Consequently, the District Court will be required to "strictly scrutinize" it. To establish the constitutionality of HB 407, the State must demonstrate "a compelling state

[1] Now codified as Sections 7-1-111(21), 7-1-121, and 7-5-131(2)(f), MCA.
[2] All references to Exhibits are to those attached to the State's Petition.

interest and that the statute is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective". *Id.* at P 57.

In an effort to discover the State's claimed "compelling state interest", Plaintiffs served Requests for Production of Documents pursuant to Rule 34, M. R. Civ. P. (State's Second Supplemental Responses, Exhibit F). The State objected to producing documents pursuant to all but one of those Requests. Plaintiffs moved the District Court for an order compelling the State to produce the requested documents. The District Court entered its Order on July 23, 2025, compelling the State to produce the requested documents it claimed were privileged, together with a privilege log, for an *in camera* review, and compelling the State to produce all other requested documents to Plaintiffs. (Motion to Compel Order (Order), Exhibit A.) The District Court also deemed certain requests for admission as admitted.

The State has petitioned this Court for a Writ of Supervisory Control contending that the District Court is proceeding based upon a "mistake of law and is causing a gross injustice", "constitutional issues of statewide importance are involved", and that the normal appeal process is inadequate. Consequently, the State asks the Court to issue a Writ of Supervisory Control, or in the alternative, stay the State's compliance with the Motion to Compel order pending full briefing.

II. STANDARD OF REVIEW

Supervisory control is an "extraordinary remedy." *Montana Democratic Party v. Mont. First Jud. Dist. Ct.,* 2024 MT 207, ¶ 9, 418 Mont. 100, 556 P.3d 540. The State's Petition is made pursuant to Rule 14(3), which provides in pertinent part:

> Supervisory control. The supreme court has supervisory control over all other courts, and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. Such control is an extraordinary remedy and is sometimes just when urgency or emergency factors exist making the normal appeal process inadequate, and when the case involves purely legal questions, and when one or more of the following circumstances exist:
>
> a) The other court is proceeding under a mistake of law and is causing a gross injustice.
>
> b) Constitutional issues of statewide importance are involved;
>
> …

M. R. App. P.14.

A decision to grant a petition for writ of supervisory control is made on a "case-by-case" basis. *Stokes v. Thirteenth Jud. Dist. Ct.,* 2011 MT 182, P 5, 361 Mont. 279, 259 P.3d 754. This Court refrains from granting a petition for a writ of supervisory control if the petitioner has an "adequate remedy of appeal." *Id.* An "inadequate remedy of appeal" exists when the error cannot be remedied by an appeal following trial. *Barrus v. Mont. First Jud. Dist. Ct.,* 2020 Mt 14, P 22, 398 Mont. 353, 456 P.3d 577.

III. BACKGROUND -- THE DISCOVERY REQUESTS AT ISSUE

In an effort to determine the "compelling state interest" that the State relies on to defend this action, Plaintiffs submitted twenty-five Requests for Production of Documents to the State pursuant to Rule 34, M. R. Civ. P. (State's Second Supplemental Responses, Exhibit F). The State produced documents in response to only one of those Requests. Requests for Production Nos. 1, 2, and 3 are a representative sample of the Requests to which the State objected.

> No. 1. Please produce a true and correct copy of the transcripts of all proceedings in the Montana House of Representatives during which HB 407 was discussed.
>
> No. 2. Please produce a copy of all reports, articles, extracts, and other documents filed with the Montana House of Representatives for consideration in connection with HB 407.
>
> No. 3. Please produce a copy of all emails, letters, and other communications received by the Montana House of Representatives for consideration in connection with HB 407.

(Exhibit F.)

The other Requests sought the same documents received by the Montana Senate in connection with its consideration of House Bill 407. In addition, the other Requests sought similar documents received by the Montana House and Senate in connection with other Bills regulating single-use plastics on a state-wide basis introduced in either the Montana House or Senate, but that did not pass.

IV. ARGUMENT

A. The State's Objections

The State contends that the District Court is proceeding based upon a "mistake of law which implicates serious constitutional concerns". (State's Brief, p. 9). The State argues that the Motion to Compel Order is founded upon three (3) "mistakes of law" which are causing a "gross injustice":

(1) The District Court erroneously concluded that the Attorney General represents the Legislature,

(2) The District Court erroneously concluded that the Attorney General is in "possession, custody, or control" of the requested documents, and

(3) The District Court erroneously required the Attorney General to produce documents it claimed were subject to "legislative privilege" for an *in camera* review, together with a privilege log.

(State's Brief, pp. 8-17.) The State maintains the normal appeal process is inadequate, justifying the issuance of a Writ of Supervisory Control. (State's Brief, p. 16.)

B. The District Court is not Proceeding Based on a "Mistake of Law" nor "Causing a Gross Injustice."

The District Court was not proceeding erroneously when it concluded the Attorney General is representing the interests of the Legislature and defending its action and inaction in this litigation.

The Attorney General objected to producing the requested documents on the grounds that he was not representing the Legislature. The District Court rejected this argument, concluding: "This argument is meritless since the Attorney General's

office elected to defend the Legislature's interests relative to Plaintiffs' challenges to House Bill 407." (Motion to Compel Order, p. 5, Exhibit A.) This conclusion is not a "mistake of law. . . causing a gross injustice".

The Attorney General has represented the State's interest throughout this litigation. Although the Legislature is not a named party in this litigation, its interests are clearly involved. The Legislature has an interest in ensuring that Bills it passes are constitutional. By defending the constitutionality of HB 407, the Attorney General is defending the State's – and by extension, the Legislature's -- interest in ensuring that HB 407 is not declared unconstitutional.

Plaintiffs alleged that the Legislature's interest in passing HB 407 was to prevent local governments and their electors from fulfilling the constitutional duty imposed upon them by Mont. Const. art. IX, sec. 1 to "maintain and improve a clean and healthful environment". (Amended Complaint, Paragraph 99, Exhibit B.) The Attorney General denied that the Legislature prevented local governments and Plaintiffs from fulfilling their constitutional duty. Plaintiffs further alleged that the Legislature's passage of HB 407 violated their right to a "clean and healthful environment" guaranteed by Mont. Const. art. II, sec. 3. (Amended Complaint, Paragraph 97, Exhibit B.) The Attorney General denied this allegation. By doing so, the Attorney General is defending the Legislature's interest.

This District Court also concluded: "At every stage of this litigation, the Attorney General's Office has defended the Legislature's actions relative to HB 407. (Motion to Compel Order, p. 7, Exhibit A.) That conclusion is not a "mistake of law. . . causing a gross injustice".

The Attorney General has defended the Legislature's action throughout this litigation. The Legislature acted by passing HB 407, and the Attorney General is defending that action.

The Attorney General is also defending the Legislature's *inaction* in this litigation. Plaintiffs alleged that the Legislature failed to pass several Bills, addressing, on a statewide basis, the harm caused by single-use plastics. (*See* Amended Complaint, Paragraph 101, Exhibit B.) Plaintiffs alleged that this failure was a violation of the Legislature's duty to "provide adequate remedies for the protection of the environmental life support systems from degradation". Mont. Const. art. IX, section 1(3). (Amended Complaint, Paragraph 103, Exhibit B.) The Attorney General denied these allegations.

The Attorney General has repeatedly represented the State's and the Legislature's interests and defended the Legislature's actions and inactions by denying allegations in Plaintiffs' Amended Complaint. This included defending the Legislature's ability to limit a citizens' right to initiative. *Cottonwood Env't L. Ctr. v. State*, 2024 MT 313, ¶¶ 13-14, 419 Mont. 457, 560 P.3d 1227. Consequently, the

District Court's conclusions that the Attorney General is representing the Legislature's interests and defending its actions and inactions in this litigation is not a "mistake of law and causing a gross injustice".

Even if the District Court was mistaken in concluding the Attorney General was representing the Legislature, that mistaken conclusion was not a "mistake of law"; it was a mistake of fact. A Writ of Supervisory Control may only issue if a district court is proceeding based upon a "mistake of law". Rule 14(3), M.R. App. P.

Moreover, even if the District Court was proceeding under a "mistake of law" in concluding the Attorney General was representing the Legislature, that mistaken conclusion does not cause a "gross injustice". The Attorney General, as the State's counsel in this litigation, was obligated to produce the requested documents unless the District Court concludes they are privileged following an *in camera* review. If the District Court concludes the documents are not privileged, and the State disagrees with that conclusion, it is entitled to seek stay of that Order from the District Court or this Court.

For these reasons, the District Court was not proceeding based upon a "mistake of law . . . causing gross injustice" entitling the State to the issuance of a Writ of Supervisory Control.

C. The District Court did not err when it concluded the Attorney General must produce the requested documents.

The State maintains that the District Court erred when it concluded the Attorney General must produce the requested documents even though those documents were not in his "possession, custody, or control". (State's Brief, pp. 12-13). The State's position is based upon a mistaken premise – the Request for Production of documents were addressed to the Attorney General; they were not.

The Requests for Production of Documents were addressed to the State of Montana. Rule 34(a)(1), M. R. Civ. P. provides in pertinent part: "a party may serve upon any other party a request … to produce … items in the responding party's possession, custody, or control."

The Attorney General is not a party to this litigation; he is the legal representative of the State, a party to this litigation. In responding to the discovery requests, the Attorney General acknowledges that his office is the attorney or counsel for the State of Montana, and not the defendant. For example, in the State's discovery responses, the State advises "Defendant State of Montana ("the State"), by and through its undersigned counsel," then lists a series of general objections on behalf of "the State;" and signs the document as "attorneys for Defendant." (Exhibit D, at Exhibit A.) Likewise, the supplemental responses include the same clarifications that the Attorney General is not the defendant, but rather the attorney or counsel for the Defendant State of Montana.

As a result, the question is not whether the Attorney General is in "possession, custody or control" of the requested documents. The question is whether *the State of Montana*, as a party to this litigation, is in "possession, custody, or control" of the requested documents. A party is in "possession, custody, or control" of documents if it has a "legal right to the documents upon demand". *Cox v. Magers,* 2018 MT 21, P 23, 390 Mont. 224, 411 P.3d 1271. In *Cox,* this court held that a plaintiff is required to produce medical records in the possession of his/her health care provider since he/she has the legal right to those records.

There can be no question that the State is in "possession, custody, or control" of the requested documents. The fact that they were received, and are maintained, by the Legislature is not relevant. The Legislature is a branch of the state government. Mont. Const. art. III, section 1.

The suggestion that the Attorney General does not have the "legal right" to the documents is absurd. The Attorney General is the chief legal officer of the State with the powers and duties provided by law. Mont. Const. art. VI, section 4(4). One court has described that authority as "vast executive authority". *Imperial Sovereign Court v. Knutson,* 699 F. Supp. 3d 1018, 1032 (D. Mont. 2023); *see generally, State ex rel. Olsen v. Pub. Serv. Comm'n*, 129 Mont. 106, 115-16, 283 P.2d 594, 599 (1955)

Troublingly, Montana Attorney General Knudsen has advanced this exact same argument previously and lost. *See, e.g.*, *In re Soc. Media Adolescent Addiction/Personal Inj. Prods. Liab. Litig. (Social Media)*, 2024 U.S. Dist. LEXIS 160893, at *454-67 (N.D. Cal. Sep. 6, 2024). For example, in the multidistrict litigation regarding social media harms, Attorney General Knudsen resisted discovery seeking information from separate constitutional officers such as the Governor's Office, Office of the Commissioner of Higher Education, and the Office of Public Instruction. *Id.*, *455. He objected *inter alia* because the Attorney General is a "separate entity and independent from the Montana agencies." *Id.*, *454. The Court rejected the Attorney General's attempt to disclaim control over those agencies and found that "the Montana Attorney General has legal control, for purposes of discovery, over the documents of the listed Montana agencies." *Id.* Continuing, the Court noted that the Attorney General's arguments focused on the wrong analysis. It was not whether the Attorney General's office possessed them, but whether they exerted control. *Id.* **463-65. Ultimately, the Court found that the Attorney General had control over the documents and found that the "Montana Attorney General has legal control, for purposes of discovery, over the documents of the listed Montana agencies." *Id.*, *466.

Furthermore, the Attorney General's position is inconsistent, if not flat out contradictory. In one breath, they advise that it cannot obtain documents from the

legislature, but simultaneously objects to production based on the "attorney-client privilege." (Exhibit D at Exhibit A.) The Attorney General cannot simultaneously withhold documents based on its asserted privilege with the Legislature, while also refusing to produce those same documents. *Social Media*, 2024 U.S. Dist. LEXIS 160893, at *461

Disingenuously, the State argues that Plaintiffs have the legal right to secure the documents by exercising the subpoena power granted to them by Rule 45, M. R. Civ. P. (State's Brief, p. 15). It suggests that Plaintiffs subpoena the documents rather than bother the Attorney General with the task of securing them. If Plaintiffs, as private citizens, have the "legal right" to secure the requested documents, surely the Attorney General has that right while representing the State in this litigation. *See, e.g.*, *Social Meida*, 2024 U.S. Dist. LEXIS 160893, at *465-66.

Even if the District Court was proceeding based on a "mistake of law," when concluding the Attorney General had the legal right to "possession, custody, or control" of the requested documents, that mistake is not causing "gross injustice". The Attorney General must request the documents from the Legislature, if it refuses to provide them to him, the District Court has the power to order the Legislature to produce them. Rule 34(2)(E), M. R. Civ. P.

For these reasons, the District Court was not proceeding based on a "mistake of law. . . causing a gross injustice" entitling the State to the issuance of a Writ of Supervisory Control.

D. The District Court did not err when it required the State to submit for an *in camera review* any documents it believed were subject to "legislative privilege".

The State contends that the Requests for Production seek the production of documents that are subject to "legislative privilege". It argues the District Court's requirement that it produce documents the State believes to be privileged for an *in camera* review, together with a privilege log, is based upon a "mistake of law and is causing a gross injustice".

The State's position assumes that the Requests for Production seek documents that are privileged. It does not identify any Request for Production that supports that assumption. There are no Requests for Production that seek documents that are protected by privilege. Requests for Production Nos. 1, 2, and 3 quoted above are representative of all the Requests for Production.

Any claim of "legislative privilege" must be derived from Mont. Const. art. V, section 8 which provides in pertinent part: **"Immunity.** …He (legislator) shall not be questioned in any other place from any speech or debate in the Legislature." This Court has not had the opportunity to define the scope of "legislative privilege".

However, a similar privilege issue is now pending in this Court and has been fully briefed. *Saslav v. Howe,* DA 25-0054. Plaintiffs will not repeat the points made by the parties in that case in their respective briefs. Although the scope of "legislative privilege" at issue in *Saslav* is also an issue in this case, the documents sought in each case are different.

In *Saslav,* Plaintiffs sought "junque files" which are understood to be "An electric compilation of various documents related to a piece of legislation … including … written correspondence between legislators, legislative staff, lobbyists, stakeholders, and other third parties regarding bill drafting …" (Appellant's Brief, p. 2, fn. 2) In this case, Plaintiffs do not seek "junque files". They only seek hearing transcripts, reports received by the Legislature, and emails, letters, and other communications **received** by the Legislature in connection with its consideration of HB 407 – in other words, the public documents that make up the legislative record.

Request for Production No. 1, sought transcripts of proceedings before the House and Senate in connection with HB 407. There can be no argument that these transcripts are not subject to "legislative privilege". The transcripts are of public hearings in which the public has a constitutional right to participate guaranteed by Mont. Const. art. II, section 9.

Request for Production No. 2 sought copies of reports, articles, and extracts filed with the Legislature in connection with its consideration of HB 407. There can

be no argument that these reports are not subject to "legislative privilege". They are not reports prepared by a legislator. They are reports prepared by parties who wish to educate the Legislature on HB 407.

Finally, Request for Production No. 3 sought "emails, letters, and other communications **received by** the Legislature in connection with House Bill 407". (Emphasis added) This Request for Production did not request emails, letters, or other communications authored by any individual legislator and sent to another legislator or third party.

The documents Plaintiffs seek in this case were not sent or authored by a legislator. As a result, they will not reveal a legislator's thoughts, opinions, or motives associated with HB 407. They may, however, reveal the thoughts, opinions, or motives of third parties who either supported or opposed HB 407. For these reasons, the District Court was not proceeding based upon a "mistake of law" when ordering the production of documents at issue.

Even if the District Court were proceeding based upon a "mistake of law", when ordering the production of the requested documents, that mistake is not "causing gross injustice". The District Court allowed the State to produce any documents it believed to be privileged for an *in camera* review. If the District Court orders production of documents the State contends are privileged after the i*n camera* review, the State can then seek a stay of that order pending appeal. This is the exact

method prescribed by this Court in *O'Neill v. Gianforte*, 2025 MT 2, ¶¶ 26-28, 420 Mont. 125, 561 P.3d 1018.

For these reasons, the District Court was not proceeding based on a "mistake of law causing gross injustice" entitling it to a Writ of Supervisory Control.

E. The Motion at Issue Does not Involve Constitutional Issues of Statewide Importance.

It appears the State believes the discovery issue resolved through the Motion to Compel Order presents two issues that involve constitutional issues of statewide importance. First, it argues that the discovery Order raises significant "separation of powers" issues. The Attorney General argues that the legislative and executive are separate branches of government creating the potential for a conflict of interest preventing him from representing both.

This position is indefensible in light of the Attorney General's involvement in *Saslav, supra.* In that case, Plaintiffs sued the Montana Legislative Services Division of the Montana State Legislature and its director seeking a Writ of Mandamus compelling them to produce "junque files". The Attorney General, on behalf of the State, and sitting Senator Barry Usher, moved to intervene. That Motion was granted. The Attorney General filed a Brief with this Court arguing that the "junque files" sought were privileged. The Attorney General clearly had no concerns for a conflict in that case between representing the State and a sitting Senator, and consequently, should have no genuine concerns for a conflict in this case.

The State also argues that the legislative privilege issue is a "constitutional issue of statewide importance". As discussed *supra* at 14-17, the Request for Production seeking communications does not implicate "legislative privilege". The communications requested are not authored or sent by a legislator. As a result, they do not contain a legislator's thoughts, opinions, or motives, and therefore, are not privileged.

For these reasons, "constitutional issue of statewide importance are not involved in this case entitling the State to the issuance of a Writ of Supervisory Control.

F. The State's Right to the Normal Appeal Process is Adequate

The State argues that its right to appeal the District Court's Motion to Compel Order is "inadequate". It asserts that, if it is required to produce documents for an *in camera review,* together with a privilege log before it can pursue the normal appeal process, the legislative privilege will already have been violated.

The State's concern with the District Court's requirement that it provide documents claimed to be privileged, together with a privilege log, is premature. It presumes there are emails, letters, or other communications that the State must produce for *in camera* review, together with a privilege log. It also presumes the District Court will order the provision of the documents it claims are privileged to Plaintiffs. As discussed, the Requests for Production do not request any privileged

documents. However, if the State identifies documents that are responsive to the Requests for Production that it believes are privileged, and the District Court decides to order them produced to Plaintiffs, then it can seek a stay of the Order from the District Court or this Court. That time has not come.

V. CONCLUSION

The District Court is not proceeding based on a "mistake of law . . . causing gross injustice". "Constitutional issues of statewide importance" are not involved in this case. As a result, the State is not entitled to a Writ of Supervisory Control.

DATED this 29th day of September, 2025.

By: /s/ John Meyer
John Meyer
Attorneys for Cottonwood Environmental Law Center

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2)(E) of the Montana Federal Local Rules of Procedure, I certify that the foregoing document is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2018 for Mac is 3,975 excluding caption, tables and certificate of compliance.

DATED this 29th day of September, 2025.

By: ___/s/ John Meyer_____
John Meyer
Attorneys for Cottonwood Environmental Law Center

CERTIFICATE OF SERVICE

I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-27-2025:

Christian Brian Corrigan (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana
Service Method: eService

David Kim Wilson (Attorney)
401 North Last Chance Gulch
Helena MT 59601
Representing: Cottonwood Environmental Law Center, Liz Ametsboschler, Danny Choriki, Jeremy Drake, Katie Harrison, Youpa Stein, Mary Stranahan, Jan Swanson, Tomas Waldorf
Service Method: eService

Robert M. Farris-Olsen (Attorney)
401 N. Last Chance Gulch
Helena MT 59601

Representing: Cottonwood Environmental Law Center, Liz Ametsboschler, Danny Choriki, Jeremy Drake, Katie Harrison, Youpa Stein, Mary Stranahan, Jan Swanson, Tomas Waldorf
Service Method: eService

Timothy Longfield (Attorney)
7 West 6th Avenue
Helena MT 59601
Representing: Greg Gianforte
Service Method: eService

Dale Schowengerdt (Attorney)
7 West 6th Avenue, Suite 518
Helena MT 59601
Representing: Greg Gianforte
Service Method: eService

Michael F. McMahon (Respondent)
228 Broadway, Second Floor
Helena MT 59601
Service Method: Conventional

Electronically Signed By: John Phillip Meyer
Dated: 09-27-2025