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BEFORE THE COMMISSION ON PRACTICE OF THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF AUSTIN MILES KNUDSEN,	)))	Supreme Court Cause No. PR 23-0496
An Attorney at Law,	))	ODC File No. 21-094
Respondent.	)	**RESPONDENT'S ANSWER**

* *

Respondent Attorney General Austin Knudsen answers the Office of Disciplinary Counsel's ("ODC") Complaint as follows:

GENERAL DENIAL

The Montana Commission on Practice has never seen a disciplinary complaint like this. It alleges 41 counts against the sitting Montana Attorney General for conduct that occurred while he represented the Montana Legislature in a conflict between the Legislature and the Judicial Branch. What precipitated this disciplinary complaint? A long-running, politically fraught dispute that began years ago with a bill to change Montana's method of filling mid-term judicial vacancies, the Legislature's discovery of judiciary-wide emails pre-judging the constitutionality of that (then-pending) legislation, and legislative subpoenas for those emails. The dispute went all the way to the U.S. Supreme Court, where the Legislature argued that the Justices of the Montana Supreme Court violated the Due Process Clause by refusing to recuse from a case involving legislative subpoenas requesting their own records. That fight seemingly ended when the U.S. Supreme Court denied the Legislature's petition for a writ of certiorari.

But that was not the end. Now, more than a year later, Montana's Office of Disciplinary Counsel has charged Attorney General Austin Knudsen with professional misconduct for his representation of the Legislature. The breathtaking 41 counts of alleged misconduct seek to discipline the Attorney General for, among

other things, zealously representing his client—one of three co-equal branches of Montana's tripartite government—in an unprecedented separation-of-powers case pressing what the Attorney General determined to be well-founded allegations of judicial misconduct.

A. The story behind this disciplinary complaint begins in the Montana Legislature's 2021 session. In March 2021, the Legislature passed, and Governor Gianforte signed, Senate Bill 140—legislation that changed how mid-term judicial vacancies are filled. Before SB140, Montana's Judicial Nomination Commission vetted and recommended candidates to the Governor to fill any such vacancies. But SB140 allows the Governor—with public input and Senate approval—to fill judicial vacancies.

Like most legislation, SB140 attracted some opposition. Unlike most opposition, some came from sitting members of Montana's judiciary. That included public opposition from Montana Chief Justice Mike McGrath, who lobbied the Governor against SB140 before the Governor eventually signed it. Chief Justice McGrath's public opposition led to his recusing from an original action challenging SB140's constitutionality filed in the Montana Supreme Court the day after the Governor signed it. When Chief Justice McGrath recused, he picked District Judge Kurt Krueger to sit as his replacement.

B. Not two weeks after that original action was filed, emails became public showing that Chief Justice McGrath was not the only member of Montana's judiciary who had taken a position on SB140. In January 2021—two months before SB140 was passed or signed—Montana Supreme Court Administrator Beth McLaughlin emailed (using government email accounts) every Montana judge and justice. She asked them to review and take a position on SB140, and made a click-poll available for that purpose. Apart from that poll, some members of the judiciary expressed their views via "reply-all" emails. For example, Judge Deschamps said in a reply-all email, "I oppose this bill. Apart from being unconstitutional in violation of Mont. Const. Art. VII, §8(2) which requires a nomination commission …."

Judge Krueger, whom Chief Justice McGrath picked to sit in his place in the original action challenging SB140, also sent a reply-all email. In it, he said: "I am also adamantly oppose[d] [to] this bill." All those communications appear to constitute prima facie violations of Rule 2.11 of the Montana Code of Judicial Conduct, which prohibits judges from making public or nonpublic statements that would prejudice an impending case.

Upon learning of those emails, the State quickly moved to disqualify Judge Krueger (and any other judges who took a position on SB140 before it was enacted) from the original action challenging SB140's constitutionality. Publicly available emails reveal that, upon learning that the State intended to move to disqualify Judge

Krueger, Jim Goetz and Cliff Edwards—the attorney representing the parties challenging SB140—attempted to contact Chief Justice McGrath, *ex parte*, via telephone on April 1, 2021. *See* https://townsquare.media/site/125/files/2021/04/MT-Leg-SupCo-Docs2.pdf. Chief Justice McGrath admitted that he called Judge Krueger immediately after the State filed the Motion to Disqualify Judge Krueger.

Judge Krueger recused within hours. Shortly after that, the six members of the Montana Supreme Court who had not recused themselves issued an order denying that any Supreme Court Justice had participated in the poll or inappropriate correspondence.

C. What occurred in the ensuing weeks was an unprecedented dispute between two co-equal branches of Montana's tripartite government. It began in early April 2021, when the Montana Legislature issued two legislative subpoenas. The first was to Supreme Court Administrator McLaughlin, seeking all public records in her possession related to the SB140 poll. When the Legislature saw that McLaughlin's response (on an extended deadline) included only two emails—along with an apology and an explanation that she had not retained emails—Senate Judiciary Chairman Keith Regier then issued on April 8 legislative subpoena to the Director of the Department of Administration for McLaughlin's emails during the 2021 Legislative session. Those subpoenas expressly excluded emails or attachments

related to decisions made by Montana's Supreme Court Justices in disposition of final opinions. The goal was to learn whether McLaughlin's apparently deleted emails might still be retrievable from the state's email servers. On Friday, April 9, 2021, the Department partially complied with the subpoena, providing a 2,450-page collection of documents, including more emails related to SB140 and other proposed legislation.

The judicial branch responded almost immediately. Two days later, on Sunday, April 11, 2021, Supreme Court Administrator McLaughlin filed an emergency motion with the Montana Supreme Court to quash the April 8 subpoena to the Department of Administration. This Sunday filing was irregular for a number of reasons.

First, the Court is not open on Sundays and ordinarily does not accept motions or other filings over the weekend. That morning, however, the Clerk of the Montana Supreme Court, Bowen Greenwood, received a message from Justice Jim Rice. Justice Rice was the Acting Chief Justice in the original action challenging SB140 (*Brown v. Gianforte*) because Chief Justice McGrath had recused. Justice Rice informed Mr. Greenwood that he had received a message from attorney Randy Cox, who had been retained to represent McLaughlin. Mr. Cox told Justice Rice that McLaughlin would be filing an emergency motion with the Supreme Court. Justice Rice told Mr. Greenwood that Rice would need to make a decision about whether to

convene the Court in response to McLaughlin's emergency motion. Justice Rice sent back a message to Cox stating something generic because he did not want to create an *ex parte* conversation. Mr. Cox then called Mr. Greenwood to inform him that McLaughlin had filed an emergency motion but that he also desired to add some information to his motion (Cox ultimately filed a supplemental motion). Later that day, Justice Rice spoke with Mr. Greenwood again and informed him that the Supreme Court was concerned about the subpoena and intended to issue an order by the end of the day.

Second, McLaughlin filed that motion in the pending original action challenging SB140's constitutionality—even though she was not a party to that case, and neither were the Montana Legislature nor the Department of Administration.

Despite all those irregularities, later that Sunday, the Court temporarily quashed the April 8 legislative subpoena to the Department.

The next day (Monday, April 12), the Legislature retained the Attorney General's Office as counsel. Later that Monday, the Office sent a letter to the Montana Supreme Court conveying the Legislature's position that the Court lacked jurisdiction to quash a duly issued subpoena when neither the issuer nor the recipient were parties to the case in which the order to quash was entered.

In response, later that same day (April 12), McLaughlin filed her own lawsuit—styled *McLaughlin v. Montana State Legislature*—as an original action at

the Montana Supreme Court. That original action sought to quash the Legislature's April 8 subpoena. Chief Justice McGrath, who had recused in the lawsuit challenging SB140, did not recuse in *McLaughlin*.

Two days later (on Wednesday, April 14), the Legislature not only moved to dismiss *McLaughlin* but also formed a select committee to investigate judicial document retention, judicial lobbying, and other potential judicial impropriety. The next day (on Thursday, April 15), Legislative leadership issued new subpoenas—to McLaughlin and to each member of the Montana Supreme Court—ordering their appearance at an April 19 meeting of the select committee and the production of (a) McLaughlin's computer and (b) documents related to judicial branch polls on pending legislation and to judicial lobbying. Those subpoenas also expressly excluded case-related deliberations and other decisional materials.

But the very next day (on Friday, April 16), in response to another emergency motion from McLaughlin, the Montana Supreme Court issued a combined order in *McLaughlin* and in the SB140 merits challenge. That combined order quashed not only the April 8 legislative subpoena to the Department of Administration but also the second legislative subpoena to McLaughlin and the legislative subpoenas issued to the Justices the previous day. Chief Justice McGrath also sent a letter to the Legislature stating that the emails requested in their subpoenas were categorially privileged and that the Court would not produce them.

Even so, the select legislative committee held its meeting on Monday, April 19, as scheduled. McLaughlin neither appeared nor produced materials. All members of the Montana Supreme Court appeared, but only Justice Sandefur produced some of the requested public records.

The committee hearing's purpose was to fully understand the degree to which the Montana Judges Association's lobbying activities were directed by public employees and officers using public resources and whether current law was sufficient to ensure taxpayer resources were not inappropriately used for the benefit of private organizations. It was also to understand and address inconsistencies in records retention policies. For example, State record retention policies dictate that "routine: nonpermanent" emails be retained for three years. McLaughlin stated that she did not retain her emails related to SB140 and other judicial branch polls and records. McLaughlin confessed to "sloppiness" and claimed that these public records were "ministerial" in nature to her, and on that basis, she deleted them. Justice Sandefur stated "it has been [his] routine practice to immediately delete non-essential email traffic." Justice Shea and Chief Justice McGrath stated they routinely delete emails deemed non-essential. Finally, Chief Justice McGrath stated "our policy regarding retention is that we're to clear our email boxes periodically because they fill up and our IT people don't have the capacity."

A few weeks later (on April 30), the Legislature filed a Motion to Disqualify the Justices in *McLaughlin*, citing due process and judicial-ethics concerns. The Court denied that motion on May 12. Thereafter the Legislature tried for weeks to negotiate with the Court to get information relevant to its investigation, but the Court refused to discuss the investigation or subpoenaed documents with the Legislature because of the pending suit. So, in late June 2021, the Legislature withdrew its subpoenas issued to the Department of Administration, McLaughlin, and the Supreme Court Justices, and moved to dismiss *McLaughlin* as moot.

Though the subpoenas that were the predicate for *McLaughlin* no longer existed, the Supreme Court still denied the Legislature's motion to dismiss the case as moot. Then, in July 2021, the Court issued an opinion quashing the withdrawn subpoenas. That opinion also prohibited further discussion about the emails or their contents between legislators, between legislators and legislative staff, between legislators and their counsel, and among counsel's staff. It also ordered the Legislature to take measures to retrieve any of the judicial emails that had been disseminated to third parties, like the media. The Court then denied the Legislature's petition for rehearing.

On September 1, 2021, the Attorney General's Office sent a letter to McLaughlin's counsel stating that the Legislature was weighing its options in the

McLaughlin matter and that all documents would be retained until all avenues for judicial relief were exhausted.

The Legislature then filed a petition for a writ of certiorari with the United States Supreme Court on December 6, 2021, which was denied on March 21, 2022. On March 22, 2022, the Department of Justice produced all the records received from the Montana Legislature, which the Montana Legislature in turn received from the Department of Administration, subject to the Supreme Court's July 14, 2021, Order in Cause No. OP 21-0173. Subsequently, the Department of Justice received additional, possibly duplicative, documents from legislative staff and then returned the entire compilation of subsequently received records on April 15, 2022.

At any point during this saga, the Montana Supreme Court could have instituted disciplinary proceedings against the Attorney General for perceived violations of the Montana Rules of Professional Conduct. But it didn't. Attorneys involved in the case as opposing counsel could have invoked the Rule 11 process or filed disciplinary complaints against the Attorney General for perceived violations of the MRPC. But they didn't. Instead, this highly irregular disciplinary complaint is based on a grievance filed by a lawyer in California nearly two years ago.

D. The allegations in this disciplinary complaint relate to the way Attorney General Knudsen and lawyers in his office represented the Legislature in the intense,

politically charged litigation described above. Specifically, the complaint's counts arise from these litigation events:

- Six counts from the April 12 letter that the Attorney General's Office sent to the Montana Supreme Court stating the Legislature's position about the validity of the April 8 order temporarily quashing subpoenas.
- Three counts from arguments in the Legislature's April 14 motion to dismiss the *McLaughlin* original action.
- Five counts from an April 18 letter that the Attorney General's Office sent to the members of the Montana Supreme Court about their obligations under the legislative subpoenas to appear and testify at the April 19 select committee hearing.
- Four counts from arguments made in the Legislature's April 30 Motion to Disqualify the Justices hearing the *McLaughlin* case.
- Six counts from statements in a May 19 letter from the Attorney General responding to statements in the Court's May 12 order denying the Legislature's motion to disqualify the Justices hearing *McLaughlin*.
- Four counts from arguments made in the Legislature's May 26 petition for rehearing of the Court's May 12 order denying the Legislature's Motion to Disqualify the Justices hearing *McLaughlin*.

- Four counts from arguments made in the Legislature's August 11 petition for rehearing of the Montana Supreme Court's July 14 order and opinion quashing the withdrawn subpoenas.
- Four counts from the Legislature's arguments in its petition for a writ of certiorari seeking the U.S. Supreme Court's review of the Montana Supreme Court's July 14 order quashing the subpoenas.
- Five counts from the Attorney General's decision to return materials received from the subpoena to the Department of Administration only after the U.S. Supreme Court denied the Legislature's cert petition.

None of the Attorney General's actions warrant disciplinary proceedings.

GENERAL OBJECTION

The Complaint alleges legal conclusions or mixed conclusions of law and fact. To the extent that the Complaint asserts legal conclusions couched as factual allegations, those allegations are insufficient under Mont. R. Civ. P. 8. *See Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6 ("[T]he court is under no duty to take as true legal conclusions or allegations that have no factual basis") (citation omitted); *Ashcroft v. Iqbal,* 556 U.S. 662, 679, (2009).

"General Allegations"

"Nature of the Action"

1. Respondent admits that this is a disciplinary action brought pursuant to the Rules of Professional Conduct ("MRPC" or "Rules") and that the MRPC govern the conduct of Montana lawyers. The second and third sentences of Paragraph 1 purport to characterize the contents of the MRPC and a decision of the United States Supreme Court, which speak for themselves and are therefore the best evidence of their contents; therefore, no response is required. As to the fourth sentence of Paragraph 1, Respondent admits that the Complaint charges the Attorney General with violations of the rules of professional conduct. To the extent the fourth sentence of Paragraph 1 attempts to characterize the MRPC, the Rules speak for themselves and are therefore the best evidence of their contents, so no response is required. The fifth sentence of Paragraph 1 purports to characterize a decision of the United States Supreme Court, *In re Sawyer*, 360 U.S. 322 (1959), which speaks for itself and is therefore the best evidence of its contents; therefore, no response is required. The allegations in the sixth and seventh sentences of Paragraph 1 contain ODC's characterization of the case and conclusions of law that are unsupported by the factual record. Respondent denies the allegations contained in the sixth and seventh sentences of Paragraph 1. Respondent denies any allegation which does not accurately reflect the MRPC.

"Jurisdiction"

2. Respondent admits that Attorney General Knudsen was admitted to practice law in 2008. To the extent Paragraph 2 purports to characterize the oath taken by Montana attorneys or the MRPC, those speak for themselves and are therefore the best evidence of their contents; therefore, no response is required. Respondent denies any allegation which does not accurately reflect the MRPC.

3. Admit.

"Attorney General Knudsen's Qualifications and Duties"

4. Admit.

5. The first sentence of Paragraph 5 purports to characterize the constitutional and statutory duties of the Attorney General of Montana. To the extent a response to the first sentence of Paragraph 5 is required, Respondent admits that:

a. Pursuant to Article VI, Section 4(4) of the Montana Constitution, the attorney general is the legal officer of the state and shall have the duties and powers provided by law.

b. Pursuant to Mont. Code. Ann. § 2-15-501, one of the duties of the attorney general is to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest.

Respondent denies any allegation which does not accurately reflect the duties of the Attorney General.

The second sentence of Paragraph 5 contains a vague and puzzling statement regarding the "basis" for the Attorney General's representation of the Montana Legislature. Because it is a matter of public record that the Attorney General represented the Legislature, the allegations in the second sentence of Paragraph 5 are denied. To the extent the allegations in the second sentence of Paragraph 5 dispute the existence or validity of the Attorney General's representation of the Montana Legislature in connection with the *McLaughlin* proceedings, denied.

"*Brown* and *McLaughlin* Proceedings"

6. Admit.

7. Respondent admits the allegations contained in the first sentence of Paragraph 7. As to the allegations contained in the second sentence of Paragraph 7, Respondent admits that Derek Oestreicher, in his capacity as an employee of the Attorney General, submitted a Declaration in support of the Motion to Disqualify Judge Krueger. To the extent the allegations in the second sentence of Paragraph 7 purport to characterize the contents of the Oestreicher Declaration, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

8. Paragraph 8 contains legal conclusions to which no response is required. To the extent a response is required, Respondent denies the allegations in Paragraph 8 because it mischaracterizes the recusal process, the MRPC, and the facts of the case. First, Paragraph 8's characterization of the proper procedure is wrong.

The disqualification procedure exists for a reason, and the Attorney General properly followed that process in *Brown*. That's confirmed by the fact that Judge Krueger immediately recused himself from the SB140 litigation following the Motion to Disqualify and the supporting Oestreicher Declaration. The Complaint's view of the MRPC does not accord with governing law because it suggests the proper course of action for Respondent would have been to file a judicial standards complaint rather than a Motion to Disqualify. That would have been highly disruptive of the judicial process and prejudicial to the defense of SB140 during fast-paced, high-stakes litigation. Second, the allegations in Paragraph 8 suggest that Respondent should have filed a misconduct complaint against Judge Krueger rather than simply seeking to disqualify him—a choice that would only have *escalated* the situation. Finally, the allegations in Paragraph 8 seem to assume that Respondent was *required* by MRPC 8.3 to file a complaint with the judicial standards commission in lieu of (or in addition to) a recusal motion. This belies ODC's entire theory of the case. If the Justices of the Montana Supreme Court believed the Attorney General had committed ethical violations during the *Brown* or *McLaughlin* matters, they were also under an affirmative duty to inform the appropriate disciplinary authority of the misconduct (or take action on their own). They didn't. Instead, this Complaint is the result of a grievance filed by a lawyer in California that had no involvement in these proceedings.

9. Respondent admits that on April 8, 2021, the Legislature issued a subpoena signed by Sen. Keith Regier to Misty Giles, Director of the Department of Administration. To the extent the allegations in Paragraph 9 purport to characterize the contents of the subpoena, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

10. Paragraph 10 purports to characterize specific interactions between the Department of Administration and the Montana Legislature. Respondent is, thus, without sufficient knowledge of facts upon which to admit or deny Paragraph 10, and therefore denies the same.

11. The allegations in Paragraph 11 purport to characterize the Montana Supreme Court's April 11, 2021, order in *Brown v. Gianforte*, which speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

12. Respondent denies the first sentence of Paragraph 12 because it does not accurately reflect how the documents were produced to the Attorney General. The second sentence of Paragraph 12 is vague and confusing because it is unclear as to what is meant by "copying." To the extent the allegations in Paragraph 12 suggest the Attorney General improperly disclosed the contents of the documents produced by the Department of Administration, denied. The only email disclosure attributable to a Department of Justice Attorney was on April 1, 2021, when Derek Oestreicher attached the emails related to the judiciary's SB140 poll as exhibits to his declaration

supporting Governor Gianforte's Motion to Disqualify Judge Krueger in *Brown*. As the Oestreicher declaration explained, the emails were disclosed in the regular course of a court proceeding, consistent with Oestreicher's ethical obligation under Rule 8.3(b). The third sentence in Paragraph 12 is vague and confusing and purports to characterize ODC's knowledge of certain events or "reasons." Respondent is, thus, without sufficient knowledge of facts upon which to admit or deny the third sentence of Paragraph 12, and therefore denies the same. To the extent the allegations in the third sentence of Paragraph 12 dispute the existence or validity of the Attorney General's representation of the Montana Legislature in connection with the *McLaughlin* proceedings beginning on April 12, 2021, denied.

13. Respondent admits that on April 12, 2021, the Attorney General's Office wrote a letter to Acting Chief Justice Jim Rice on behalf of the Montana Legislature, a co-equal branch of government under the Montana Constitution. To the extent the allegations in Paragraph 13 purport to characterize the contents of the April 12, 2021, letter, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required. Respondent admits a copy of the letter is filed in the Montana Supreme Court's docket in *Brown v. Gianforte*.

14. Admit.

15. Respondent admits that on April 14, 2021, the Attorney General filed a Motion to Dismiss McLaughlin's petition on behalf of the Montana Legislature, a

co-equal branch of government under the Montana Constitution. To the extent that Paragraph 15 purports to characterize the contents of the Motion to Dismiss the *McLaughlin* Petition, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

16. Admit.

17. Respondent admits that on April 18, 2021, the Attorney General's Office wrote a letter to all Justices of the Montana Supreme Court on behalf of the Montana Legislature, a co-equal branch of government under the Montana Constitution. To the extent the allegations in Paragraph 17 purport to characterize the contents of the April 18, 2021, letter, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required. Respondent admits a copy of the letter is filed in the Montana Supreme Court's dockets in *Brown v. Gianforte* and *McLaughlin v. Montana Legislature*.

18. Respondent admits that on April 30, 2021, the Attorney General filed a Motion to Disqualify all Justices on behalf of the Montana Legislature, a co-equal branch of government under the Montana Constitution. To the extent that Paragraph 18 purports to characterize the contents of the Motion to Disqualify, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

19. Respondent admits that on April 30, 2021, the Attorney General filed in McLaughlin a Response to the Petition on behalf of the Montana Legislature, a co-equal branch of government under the Montana Constitution. To the extent that Paragraph 19 purports to characterize the contents of the Response to the Petition, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

20. Admit.

21. Respondent admits that on May 19, 2021, the Attorney General wrote a letter to the Supreme Court in response to its May 12, 2021, on behalf of the Montana Legislature, a co-equal branch of government under the Montana Constitution. To the extent that Paragraph 21 purports to characterize the contents of the May 12 letter, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required. Respondent admits a copy of that letter is filed in the Court's docket in *McLaughlin*.

22. Paragraph 22 purports to characterize the Attorney General's May 21, 2021, letter to the Montana Supreme Court, which speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

23. The first sentence in Paragraph 23 purports to characterize the Attorney General's May 21, 2021, letter to the Montana Supreme Court, which speaks for itself and is therefore the best evidence of its contents; therefore, no response is

required. The second in Paragraph 23 sentence purports to characterize the Attorney General's obligations under the MRPC. To the extent a response is required, Respondent admits that the Attorney General—like all other attorneys and judges in Montana—has a duty to comply with the MRPC.

24. Paragraph 24 purports to characterize the Attorney General's May 21, 2021, letter to the Montana Supreme Court, which speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

25. Respondent admits that on May 26, 2021, the Attorney General filed in *McLaughlin* a Petition for Rehearing of the Court's May 12 Order on behalf of the Montana Legislature, a co-equal branch of government under the Montana Constitution. To the extent that Paragraph 25 purports to characterize the contents of the Petition for Rehearing, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

26. Admit.

27. Admit.

28. Admit.

29. Paragraph 29 purports to characterize the Montana Supreme Court's decision in *McLaughlin v. Mont. State Legislature*, 2021 MT 178, which speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

30. To the extent the allegations in Paragraph 30 dispute the existence or validity of the Attorney General's representation of the Montana Legislature in connection with the *McLaughlin* proceedings, denied. Respondent admits that following the United States Supreme Court's denial of the Legislature's petition for writ of certiorari on March 21, 2022, the Department of Justice, on March 22, 2022, produced all the records received from the Montana Legislature, which the Montana Legislature in turn received from the Department of Administration, subject to the Supreme Court's July 14, 2021, Order in Cause No. OP 21-0173. Respondent further admits that subsequently the Department of Justice received additional, possibly duplicative, documents from Legislature staff and then returned the entire compilation of subsequently received records on April 15, 2022.

31. Respondent admits that on August 11, 2021, the Attorney General filed in *McLaughlin* a Petition for Rehearing of the Court's July 14 Order on behalf of the Montana Legislature, a co-equal branch of government under the Montana Constitution. To the extent that Paragraph 31 purports to characterize the contents of the Petition for Rehearing, it speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

32. Admit.

33. Respondent admits the first sentence of Paragraph 33. The second sentence of Paragraph 33 purports to characterize the content of the Montana

Legislature's Petition for Writ of Certerorari, which speaks for itself and is therefore the best evidence of its contents; therefore, no response is required.

34. Admit.

COUNTS

The Attorney General denies that any count in the complaint properly alleges a violation of any Montana Rule of Professional Conduct. The 41 counts include allegations that the Attorney General violated Rule 3.4(c) (13 counts), Rule 8.2(a) (6 counts), Rule 8.4(d) (13 counts), Rule 5.1(c) (25 counts), and Rule 8.4(a) (9 counts). The Attorney General denies each allegation for the following reasons:

A. The Attorney General did not violate rule 3.4(c): Counts 1, 3, 7, 10, 12, 15, 19, 21, 25, 29, 33, 37-38.

1. The Attorney General's open refusal to follow the Court's April 11 Order was based on an assertion that no valid obligation existed and thus was allowed by Rule 3.4(c)'s plain terms.
    i. The Complaint faults the Attorney General for disobeying the Montana Supreme Court's April 11 Order purporting to quash the Legislature's subpoena, as well as for his refusal to immediately return materials produced under that subpoena.
    ii. But the Attorney General consistently argued that that Order was invalid—a position he pressed all the way to the United States

Supreme Court. And as soon as that Court denied the Legislature's petition for a writ of certiorari—and the Attorney General had thus exhausted every opportunity to challenge the Order—he complied. Thus, his refusal to immediately comply with the April 11 Order was both "open" and "based on an assertion that no valid obligation exists," making his actions permissible under Rule 3.4(c)'s plain terms.

iii. Start with the rule's built-in exception: An attorney must not disobey an obligation, "*except for* an open refusal based on an assertion that no valid obligation exists." Rule 3.4(c) (emphasis added). The only time this phrase appears in the compiled public disciplinary orders is in the text of the rule itself—it appears the Montana Supreme Court has never had occasion to consider its terms. *See generally* Office of Disciplinary Counsel for the State of Montana, *Public Discipline Under the Montana Rules of Professional Conduct* (2022). But perhaps that's because their plain meaning is so clear: The key phrases—"open refusal," "assertion," and "valid obligation"—are not difficult to understand.

iv. First, the Attorney General "assert[ed]" that the April 11 Order imposed "no valid obligation." Throughout the litigation, he repeatedly expressed the Legislature's view that the Order was illegitimate and, therefore, not binding. *See* Letter from State of Montana Department of Justice, at 2 (April 12, 2021) "The Legislature does not recognize this Court's [April 11] Order as binding."); Motion to Dismiss in the Supreme Court of the State of Montana, at 8 (April 14, 2021) ("The April 11 Order] will not bind the Legislature."). And despite the Court's April 11 pronouncement to the contrary, the Attorney General continued to assert that the subpoena was "valid" and would "be enforced." April 12 Letter, at 2. Taken separately or together, these statements amounted to an "assertion that no valid obligation exist[ed]" as a result of the April 11 Order. Rule 3.4(c).

v. Second, the Attorney General's refusal to immediately comply with the Court's April 11 Order was made "open[ly]." Rule 3.4(c). There was nothing even remotely clandestine about it: the Attorney General repeatedly expressed, in publicly filed documents, that the Legislature would "not abide" or "follow[]" the Court's invalid Order. *See* April 12 Letter, at 2; April 14

MTD, at 8. If these repeated, public assertions of the Legislature's position don't amount to an "open refusal," it's hard to imagine what would qualify.

vi. The Attorney General's statements about the April 11 Order thus made plain that his refusal to immediately comply was an "open refusal based on an assertion that no valid obligation exists." Rule 3.4(c).

vii. But even assuming the Attorney General's statements left any room for doubt, his actions eliminated it. The United States Supreme Court denied the Legislature's petition for a writ of certiorari on March 21, 2022. That marked the end of the road for the Legislature's ability to legitimately challenge the April 11 Order. And the very next day, the Attorney General and lawyers under his supervision returned all the materials in their possession produced in response to the Legislature's subpoena. In other words, as soon as it was no longer tenable to "assert[] that no valid obligation exist[ed]," Rule 3.4(c), the Attorney General stopped making that assertion and complied with the April 11 Order. To fault him for failing to return the subpoenaed materials "immediately," *see* Compl., Counts 37-38, is to fail to

recognize his right to challenge the Order's validity—a right that Rule 3.4(c)'s text explicitly preserves.

viii. In sum, because the Attorney General's refusal to immediately comply with the April 11 Order was "based on an assertion that no valid obligation existed," Rule 3.4(c), his actions were permitted under the plain terms of the Rule, and the counts alleging violations on the basis of those actions should be dismissed. *See* Compl., Counts 3, 7, 37, 38.

2. The Attorney General did not otherwise knowingly disobey an obligation under the rules of a tribunal.

    i. The Complaint alleges that the Attorney General violated Rule 3.4(c) in two additional ways: First, by "[s]ending the Court a letter to reargue an issue, resist the ruling, or insult the judge[.]" *See* Compl., Counts 1, 10, 19. And second, by making "contemptuous, undignified, discourteous, and/or disrespectful" statements. *See id.* Counts 3, 7, 12, 15, 21, 25, 29, 33. But under either charge, the conduct alleged does not amount to a violation of Rule 3.4.

    ii. First, no authority suggests that "sending the Court a letter" amounts to disobedience of an obligation under the rules of a

tribunal—especially in light of the unprecedented nature of this dispute between two co-equal branches of government.

iii. Take, for starters, the April 12 Letter, which was the Legislature's response to the Court's April 11 Order quashing the Legislature's subpoena. *See* Compl., Count 1. The Court entered that Order even though McLaughlin had filed the motion after business hours in a case in which the Legislature was not a party. And it did so even though Legislature had not yet had any chance to respond. Faced with these irregularities, it's not clear what, exactly, ODC thinks was the appropriate procedural device for the Legislature to adequately defend its interests. But in these extraordinarily unusual circumstances, the Attorney General's decision to send the Court a letter defending the Legislature's interests was far from blameworthy, let alone knowing disobedience of an obligation.

iv. So too for the April 18 Letter. *See* Compl., Count 10. That letter was the Legislature's response to the Court's staying subpoenas directed at the Court's individual members—who again were not parties to any case. The Legislature fundamentally disagreed with the Court's treatment of those subpoenas as part of any case

before it. And the letter expressly stated its purpose: It was *not* sent "to reargue an issue, resist the ruling, or insult the judge," as the complaint alleges. Compl., Count 10. Rather, the Legislature explained that "purpose of [its] letter [was] to provide a process for the subpoenaed justices to produce the subpoenaed documents prior to the hearing," since those Justices were not, in its view, properly part of the case. Letter from State of Montana Dep't of Justice, at 2 (April 18, 2021).

v. Nor was the May 19 Letter sent "to reargue an issue, resist the ruling, or insult the judge." Compl., Count 10. In fact, the Attorney General made explicit that his purpose was "not to respond to the substance of [the Court's May 15] Order." Letter from State of Montana Dep't of Justice, at 1 (May 19, 2021). And he explained that he was sending the letter "personally" to invite the Court to "vent any further frustrations about the conduct of attorneys" in the Attorney General's office by "contact[ing him] directly." *Id.* at 2. This invitation for further dialog is the opposite of resisting a ruling or insulting judges.

vi. Second, the Complaint faults the Attorney General for making "contemptuous, undignified, discourteous, and/or disrespectful"

statements. *See* Compl., Counts 3, 7, 12, 15, 21, 25, 29, 33. Those labels are inaccurate. But even if the statements can be viewed as calling the Court's integrity into question, there can be no obligation to refrain from making such statements in a dispute over judicial conflicts of interest. Otherwise, motions to disqualify judges would always be barred by the MRPC. *Any* statement alleging a conflict of interest or other basis for judicial disqualification might be deemed "disrespectful"—especially by the members of the judiciary whose impartiality is called into question. *Cf. United States v. Cooper*, 872 F.2d 1, 3-4 (1st Cir. 1989) ("A motion to recuse … is inherently offensive to the sitting judge because it requires the moving party to allege and substantiate bias and prejudice—traits contrary to the impartiality expected from a mortal cloaked in judicial robe." (footnote omitted)); *Holt v. Virginia*, 3831 U.S. 131, 137 (1965) ("[I]f the charges were 'insulting' [to the Court] it was inherent in the issue of bias raised.").

vii. In all events, many of the statements the Complaint alleges to be "contemptuous, undignified, discourteous, and/or disrespectful" were purely descriptive and therefore outside the Rule's ambit.

Some described evidence of misconduct revealed in public records. *See, e.g.*, Compl., Count 15 ("*This matter has arisen because evidence of judicial misconduct has come to public light.*"). Others described the undisputedly unusual procedural history of the dispute. *See, e.g.*, *id.* Count 25 (" . . . *the Court's multiple procedural irregularities* (*granting unnoticed weekend relief to nonparties for nonparties, refusing to disclose ex parte communications, etc.*")). And still other statements simply explained the basis for the alleged conflict of interest. *See, e.g.*, *id.* ("*Here, the Justices are institutionally and personally interested in the outcome, so their ability to be impartial is justifiably suspect*.").

viii. The Attorney General acknowledges that he pressed his client's position firmly, at times employing strong language. But far from violating rules of professional conduct, the Attorney General was upholding them: Montana attorneys have an affirmative obligation to report judicial misconduct, *see* Rule 8.3(b), and all attorneys are obliged to act with "zeal in advocacy upon the client's behalf." ABA Model R. Prof. Conduct 1.3 cmt. 1; *United States v. Westmoreland*, 419 F. Supp. 3d 1277, 1279 (D. Utah

2019) (recognizing this obligation); *see also* ABA Model R. Prof. Conduct Preamble ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."). Had the Attorney General refrained from aggressively asserting the Legislature's position, he would have fallen short with respect to these other obligations.

B. The Attorney General did not violate rule 8.2(a): Counts 4, 16, 22, 26, 30, 34.

1. The circumstances giving rise to this dispute gave the Attorney General legitimate legal and factual support for his statements "concerning the qualifications or integrity" of the members of the Montana Supreme Court. Rule 8.2(a). He therefore committed no violation of Rule 8.2(a), which prohibits a lawyer from making such statements only if he "knows [them] to be false or with reckless disregard as to [their] truth or falsity." *Id.*

2. Montana attorneys violate Rule 8.2(a) when they make allegations of judicial misconduct *without* any factual evidence or legal support. *See, e.g.*, *In re Brian Miller*, MT PR 18-0139 (2019) (attorney violated 8.2(a) by making allegations in motion to recuse that were "wholly unsubstantiated by any evidence"); *In re Genet McCann*, MT PR 16-

0635 (2018) (attorney violated 8.2(a) by making "scurrilous, libelous and outrageous" allegations of judicial impropriety, for which "no factual support ha[d] ever been provided"); *In re Robert Myers*, MT PR 16-0245 (2017) (attorney violated 8.2(a) by making "baseless factual contentions" in a disqualification motion, none of which "appeared to have even a minimum quantum of evidentiary support"); *In re Douglas*, MT 05-029 (2008) (attorney violated 8.2(a) by making statements about the judge with "no reasonable factual or legal basis"). That is not what happened here. The Attorney General's statements were amply supported by undisputed facts and compelling legal arguments.

3. Take the Attorney General's contentions that the Justices had an interest in the outcome of the *McLaughlin* case. *See* Compl., Counts 4, 16, 22, 26, 34. These allegations were based on undisputed facts: The Justices were ruling on Legislative subpoenas, which were issued to their own Court Administrator and to *the Justices themselves*, and which ordered the production of their own Court's records. At the absolute least, those facts supported the Attorney General's argument that the Justices' "impartiality might reasonably be questioned" since they were themselves subjects of the subpoenas. Montana Code of Judicial Conduct 2.12(A). The Attorney General's contentions that the Justices

were "institutionally and personally interested in the outcome" of the *McLaughlin* case, Compl., Count 26, had a solid foundation in both facts and law.

4. So too with the Attorney General's broader allegations of misconduct. In several places, the Complaint faults the Attorney General for generally alleging judicial misbehavior or impropriety. *See* Compl., Counts 4, 16, 30, 34. But this matter arose in the first place because "evidence of judicial misconduct [came] to public light." *Id.* Count 16. That evidence included the emails about SB 140 between McLaughlin and *every* Montana state judge. The existence and content of those emails is not—and has never been—in dispute. And it was on the basis of those emails that the Attorney General alleged misconduct, specifically arguing that the prejudicial correspondence violated Montana Code of Judicial Conduct Rule 2.11(A) ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.").

5. Finding the Attorney General in violation of Rule 8.2(a) based on those well-supported allegations would conflict with both the rule's text and

with the Commission's past practice. As to the text: There is simply no indication that the Attorney General made any statement he "[knew] to be false," nor any "with reckless disregard as to its truth or falsity." Rule 8.2(a). Instead, he made allegations based on ample and largely undisputed evidence. And as to past practice: In previous instances of public discipline, the Commission has deemed it appropriate to sanction attorneys for making *unfounded* allegations of judicial misconduct. *See generally, e.g.*, *In re Brian Miller*, MT PR 18-0139 (2019); *In re Genet McCann*, MT PR 16-0635 (2018); *In re Robert Myers*, MT PR 16-0245 (2017); *In re Douglas*, MT 05-029 (2008). If the Attorney General were disciplined here for what he determined to be well-founded allegations, it would be a stark departure indeed. And that departure would surely chill other attorneys from raising well-supported concerns about judicial misconduct in the future.

C. The Attorney General did not violate rule 8.4(d): Counts 2, 5, 8, 11, 13, 17, 20, 23, 27, 31, 35, 39, 40.

1. Because the Attorney General's conduct was not prejudicial to the administration of justice, he did not violate Rule 8.4(d).

2. The Complaint alleges 13 counts of violations of Rule 8.4(d). *See* Compl., Counts 2, 5, 8, 11, 13, 17, 20, 23, 27, 31, 35, 39, 40. Rule 8.4(d)

prohibits a lawyer from "engag[ing] in conduct that is prejudicial to the administration of justice." To prove a violation of this Rule, ODC must demonstrate, by clear and convincing evidence, "some nexus between the conduct charged and an adverse effect upon the administration of justice." *In re Olson*, 354 Mont. 358, 364 (2009) (citing *People v. Jaramillo*, 35 P.3d 723 (Colo.O.P.D.J. 2001) and incorporating Colorado caselaw interpreting Colo. RPC 8.4(d)); *see also id.* at 367 (same).

3. That "adverse effect upon the administration of justice" must be direct and concrete. Courts have, for example, recognized a violation where an attorney's conduct "directly delayed and altered the course of court proceedings." *People v. Johnson*, 35 P.3d 192, 194 (Colo. PDJ 1999); *see also Jaramillo*, 35 P.3d at 731 (citing *Johnson*). So too where an attorney's conduct "resulted in direct disruption of pending proceedings." *People v. Wright*, 35 P.3d 153, 157 (Colo. PDJ 1999); *see also Jaramillo*, 35 P.3d at 731 (citing *Wright*).

4. ODC has not identified any similarly direct adverse effect here. The Complaint alleges that the Attorney General violated Rule 8.4(d) in two ways: First, by sending letters and making statements that failed to uphold the dignity of the Court. And second, by failing to immediately

return materials produced under the subpoena in *McLaughlin*. But neither charge involved any direct adverse effect on the proceedings.

5. First, the Complaint alleges that the Attorney General violated Rule 8.4(d) by failing to "uphold the dignity of the Court." *See* Compl., Counts 2, 5, 8, 11, 13, 17, 20, 23, 27, 31, 35. The theory goes that, as an "officer[] of the Court," the Attorney General was "obligated to uphold the dignity of the Court" and thus required to "refrain from sending a letter to the Court in criticism of its Order" and "refrain from making . . . statements" that would call the dignity of the Court into question. *Id.*

6. This theory suffers from several problems. For one, even assuming the Attorney General jeopardized "the dignity of the Court" by sending letters and making statements critical of the Justices' actions, there is no reason to think that calling the Court's dignity into question—without more—qualifies as a direct "adverse effect upon the administration of justice." *In re Olson*, 354 Mont. at 364. For another, the Complaint has not alleged that any *other* adverse effect—such as delay or disruption—resulted from the Attorney General sending those letters and making those statements. In fact, the record reflects that

there was none: The proceedings continued uninterrupted despite the various filings highlighted in the Complaint.

7. And it cannot be that Rule 8.4(d) obliges attorneys to refrain from criticizing the judiciary *in a dispute about judicial misconduct*. As already discussed, if that were the rule, then Montana attorneys could never raise legitimate concerns about conflicts of interest or other judicial misconduct—even though they have obligations under the MRPC to report violations of the code of judicial conduct, *see* Rule 8.3(b), and to protect their clients' interests and ensure their clients receive a fair hearing.

8. Second, the Complaint alleges that the Attorney General violated Rule 8.4(d) by failing to "immediately return to Court Administrator Beth McLaughlin all the materials within his possession, custody, or control that were produced pursuant to the subpoenas at issue in *McLaughlin*, or all the copies or reproductions thereof." Compl., Count 39. This charge fails for similar reasons: the Attorney General's retention of the records while challenging the validity of the Court's order had no adverse effect on the proceedings. It caused no delay or disruption to the *McLaughlin* litigation. And, as already discussed, the temporary

retention was warranted by the Attorney General's "assertion that no valid obligation [to return the materials] exist[ed]." Rule 3.4(c).

9. None of the alleged violations of 8.4(d) actually involved any "adverse effect upon the administration of justice" in ongoing proceedings. *In re Olson*, 354 Mont. at 364. Therefore, the 13 counts alleging those violations should be dismissed.

D. The Attorney General did not violate Rules 8.4(a): Counts 6, 9, 14, 18, 24, 28, 32, 36, 41, or Rule 5.1(c): Counts 1-5, 7, 8, 10-13, 15-17, 25-27, 29-31, 33-35, 38, 39, 49.

1. Absent underlying violations of the Rules of Professional Conduct, the Attorney General cannot be found to have violated Rules 8.4(a) or 5.1(c).
2. The Complaint alleges 25 counts of violations of Rule 5.1(c), which notes that a supervisory lawyer "shall be responsible" for violations by lawyers over whom he has "direct supervisory authority" or whose conduct he orders. *See* Compl., Counts 1-5, 7, 8, 10-13, 15-17, 25-27, 29-31, 33-35, 38, 39, 49.
3. Second, it alleges nine counts of violations of Rule 8.4(a), which notes "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce

another to do so, or do so through the acts of another." *See* Compl., Counts 6, 9, 14, 18, 24, 28, 32, 36, 41.

4. The Attorney General has supervisory authority over the lawyers in the Attorney General's office. But because none of the conduct alleged involved a violation of the Rules of Professional Conduct, he cannot be held liable under either of these rules.

AFFIRMATIVE DEFENSES

Respondent asserts the following affirmative defenses without prejudice to the denials in this Answer, and without admitting any allegations of the Complaint not otherwise admitted. Respondent reserves the right to further amend these pleadings to add such further affirmative defenses as discovery and development of the case may disclose:

FIRST AFFIRMATIVE DEFENSE

1. The allegations in the Complaint fail to allege a violation of the Montana Rules of Professional Conduct.

SECOND AFFIRMATIVE DEFENSE

2. If the Montana Rules of Professional Conduct can be read to apply to the Attorney General's conduct in this case, those Rules are unconstitutionally overbroad and vague in violation of the First Amendment to the United States Constitution.

a. It is essential to the "fair administration of justice" that litigants, and the attorneys representing their interests, be able to "challenge in good faith the neutrality of a judge who appears to be biased against a party." *Cooper*, 872 F.2d at 5.

b. "[A]ll true statements reflecting adversely on the reputation or character" of members of the judiciary are protected by the First Amendment, and "[l]awyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken." *Standing Committee on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1436-37, 1438 (9th Cir. 1995). That is precisely what the Attorney General did here.

3. To the extent Rule 8.2(a) can be read to prohibit criticisms of the judiciary that are supported by a reasonable factual basis, the Rule is overbroad.

a. The overbreadth doctrine provides that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). The doctrine is justified "on the ground that it provides breathing room for free expression," since "[o]verbroad laws 'may

deter or "chill" constitutionally protected speech,'" *United States v. Hansen*, 599 U.S. 762, 769-70 (2023) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

b. And the constitutionally protected speech at issue here is no small matter: "attorney speech about what is pending or occurring in a court is political speech," and "[a]ny speech about a judge or a judge's rulings . . . is central to the First Amendment." Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 Emory L. J. 859, 863 (1998).

c. That is why "the fair administration of justice *requires* that lawyers challenge a judge's purported impartiality when facts arise which suggest the judge has exhibited bias and prejudice." *Cooper*, 872 F.2d at 4.

d. "To judge whether a statute is overbroad, [courts] must first determine what it covers." *Hansen*, 599 U.S. at 770. Here, that's not hard to do: Rule 8.2(a) prohibits lawyers from making a "statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."

e. By its plain terms, that rule does not apply to statements like the Attorney General's that are based on actual evidence. *See U.S. Dist. Ct.*

for E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (concluding that the text of Washington state's substantively identical Rule 8.2(a) was "consistent with . . . constitutional limitations").

f. But if the Commission were to ignore the plain text and apply the rule to statements supported by a "reasonable factual basis," the rule would be unconstitutionally overbroad. *Yagman*, 55 F.3d at 1437 (citing *Sandlin*, 12 F.3d at 864). "[A]ll true statements reflecting adversely on the reputation or character of federal judges" are protected by the First Amendment. *Id.* Thus, "[l]awyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken." *Id.* at 1438. Any rule to the contrary "is overbroad because it purports to punish a great deal of constitutionally protected speech." *id.* at 1436-37. As already explained, the Attorney General's criticisms of the Montana Supreme Court were uniformly "supported by a reasonable factual basis." *Yagman*, 55 F.3d at 1438. So if Rule 8.2(a) can be applied to the Attorney General, it can be applied to *any* attorney who raises a legitimate concern about judicial misconduct. And if that's true, the rule must be invalidated as overbroad because "a substantial number of its applications are unconstitutional." *Stevens*, 559 U.S. at 473.

4. Rules 3.4(c), 8.2(a), and 8.4(d) are unconstitutionally vague if they cover the Attorney General's conduct as alleged here.

a. Rules 3.4(c), 8.2(a), and 8.4(d) are impermissibly vague because they (1) fail to provide fair notice of the conduct prohibited, and (2) invite arbitrary and discriminatory enforcement.

b. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

c. That means that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*

d. The vagueness doctrine "appl[ies] fully to attorney disciplinary proceedings." *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626, 666 (1985) (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part).

e. And "[w]hen speech is involved, rigorous adherence to th[e] requirements [of vagueness doctrine] is necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Studios*, 567 U.S. 239, 253-54 (2012).

f. Here, if Rules 3.4(c), 8.2(a), and 8.4(d) can be understood to sweep the Attorney General's actions within their ambit, then they are too vague to provide fair notice of the conduct they prohibit.

g. Start with the allegations that the Attorney General violated Rule 3.4(c). Rule 3.4(c) prohibits "knowing[] disob[edience] of an obligation under the rules of a tribunal." But all of the actions charged as violations of Rule 3.4(c) related either to the Attorney General's challenge to the validity of the Court's Order quashing the Legislature's subpoena or to his allegations of judicial misconduct.

h. If the Rule prohibits challenging the Court's order—while *expressly permitting* "an open refusal based on an assertion that no valid obligation exists"—then its terms are "so vague that men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (cleaned up). And the same is true if the Rule prohibits the Attorney General from raising legitimate concerns about judicial impartiality.

i. Likewise, Rule 8.2(a) prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."

j. If that rule can be read to encompass statements supported by ample, reliable evidence, as the Attorney General's statements were, then the rule means the precise *opposite* of what it says. And if that's true, no "person of ordinary intelligence" would "know what is prohibited" or be able to "act accordingly." *Grayned*, 408 U.S. at 108.

k. And if Rule 8.4(d), which prohibits "conduct that is prejudicial to the administration of justice," can be read to forbid legitimate criticisms of the judiciary, then it too is impermissibly vague.

l. The text of the rule provides no notice that such criticisms are prohibited—especially if they are raised within a motion to disqualify or other filing similarly aimed at disqualifying a judge in a particular proceeding. *Cf. Cooper*, 872 F.3d at 4 (noting that "when facts arise which suggest the judge has exhibited bias or prejudice," the "appropriate mechanism" to challenge the judge's impartiality "is a motion to recuse").

m. In short, if these Rules can be read to conflict with their plain meaning and to cover the Attorney General's conduct, then they fail to provide a reasonable person fair notice of what is prohibited, and they are thus unconstitutionally vague.

THIRD AFFIRMATIVE DEFENSE

5. If the Montana Rules of Professional Conduct can be read to apply to the Attorney General's conduct in this case, those Rules violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or are otherwise unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, having fully Answered the allegations and claims stated in the Complaint, and having stated his Affirmative Defenses thereto, Respondent prays for relief as follows:

1. That the Complaint and all counts therein be dismissed, with prejudice.

Respectfully submitted this 27th Day of November 2023.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing document was served upon the persons named below, addressed as follows:

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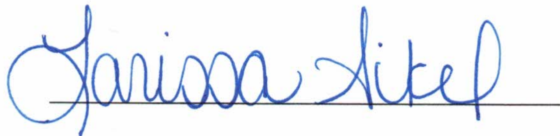

CERTIFICATE OF SERVICE

I, Mark D. Parker, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 11-27-2023:

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