

FILED

04/01/2021

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 21-0125

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON
FINLEY, and the LEAGUE OF WOMEN VOTERS OF MONTANA,

Petitioners,

v.

GREG GIANFORTE, Governor of the State of Montana,

Respondent.

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APR 01 2021

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Clerk of Supreme Court
State of Montana

ORIGINAL

**MOTION TO DISQUALIFY JUDGE KURT KRUEGER
AND FOR OTHER MISCELLANEOUS RELIEF**

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ATTORNEYS FOR PETITIONERS

Pursuant to M. R. App. P., Rule 16, the Governor first respectfully moves for the immediate recusal or disqualification of Judge Kurt Krueger and any Montana judicial officer who “voted” on or expressed public approval or disapproval of Senate Bill 140 (SB 140), as described herein. Second, the Governor respectfully requests disclosure to the parties of the voting results of Montana Supreme Court Administrator McLaughlin’s poll regarding SB 140, described below. Third, the Governor respectfully moves for a stay of this proceeding until such time as the Court can seat an impartial and independent judicial panel to decide this case. Given the gravity of the present motions, for good cause shown, and pursuant to Rule 29(1), the Governor finally moves for leave to exceed the word count limitations of Rule 16(3). The word count of these combined Motions, excluding footnotes and attachments, is 1,986 words. Petitioners’ Counsel objects to this motion.

INTRODUCTION

The United States Supreme Court has long held that due process requires, at minimum, an impartial judiciary. *United States v. Washington*, 157 F.3d 630, 660 (9th Cir. 1998) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in

both civil and criminal cases.”)). Montana’s Code of Judicial Conduct (MCJC) prohibits judges from making statements on pending or impending cases that would impair or interfere with the fairness of that matter, Mont. R. Jud. Conduct, Rule 2.11; and compels recusal “in any proceeding in which the judge’s impartiality might reasonably be questioned.” *Id.* at Rule 2.12. Judicial impartiality and fairness are in doubt, here.

On January 29, 2021, Montana Supreme Court Administrator Beth McLaughlin emailed *every* Montana Supreme Court Justice and *every* Montana District Court Judge—using government email accounts—to request that they “review and take a position on [Senate Bill 140] ... us[ing] the voting buttons (accept/reject) on your toolbar. If you can’t find the voting button, just shoot me a note.” Declaration of Derek J. Oestreicher, Exhibit A (hereinafter “Exhibit A”). In response, the Honorable District Judge Kurt Krueger—the judge the Chief Justice selected to replace him in this case following recusal—emailed: “I am also adamantly oppose [sic] [Senate Bill 140].” Such prejudgment of SB 140 reasonably demonstrates Judge Krueger’s partiality and bias, which requires his recusal or disqualification from this case. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S.

868, 872 (2008) (requiring recusal where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”).¹

Public confidence in the integrity of Montana’s judiciary relies on judicial impartiality and independence, free from impropriety and the appearance of impropriety. *See Williams-Yulee v. The Florida Bar*, 575 U.S. 433, 445 (2015) (quoting *Caperton*, 556 U.S. 868 at 889, 129 S. Ct. 2252 (“We have recognized the ‘vital state interest’ in safeguarding ‘public confidence in the fairness and integrity of the nation’s elected judges.’”). That confidence has been shaken. To restore public confidence in this adjudicatory process, the voting results of Administrator McLaughlin’s poll regarding SB 140 should be disclosed, and the Court should stay this matter until the Court seats an impartial judicial panel to decide this case.

BACKGROUND

On January 29, 2021, Administrator McLaughlin sent an email to every Montana Justice and Judge with the subject line “SB 140.” Exhibit A. The email stated:

¹ While it is currently unknown who among the state judicial officers “voted” in support or opposition to SB 140 using Administrator McLaughlin’s email toolbar, the following district court judges responded to Ms. McLaughlin’s invitation to take a position on the bill: Judge Elizabeth Best, Judge Katherine Bidegaray, Judge John Brown, Judge Matthew Cuffe, Judge David Cybulski, Judge Ray Dayton, Judge Dusty Deschamps, Judge Amy Eddy, Judge Brenda Gilbert, Judge Leslie Halligan, Judge Kurt Krueger, Judge Yvonne Laird, Judge Jennifer Lint, Judge James Manley, Judge Nickolas Murnion, Judge Jon Oldenburg, Judge Howard Recht, and Judge Robert Whelan.

Attached is a bill that Judge Todd has asked MJA [Montana Judges Association] to review and take a position on. Please take a look at it – sorry to do this to you *again* but use the voting buttons (accept/reject) on your toolbar. If you can't find the voting button, just shoot me a note.

Exhibit A (emphasis added). It is unclear from Administrator McLaughlin's email whether Montana's judiciary participated in other polls related to SB 140, or whether it normally participates in similar polls and dialogue related to other proposed laws. The email chain does not reveal the poll results, including whether judges or justices voted using the toolbar. But 18 District Court Judges responded to McLaughlin,² using their government email accounts, with opinions regarding SB 140. *See Exhibit*

A. That judicial commentary included:

- "I'm in opposition to the bill." – **Judge Leslie Halligan**
- "I can't find the button but I oppose." – **Judge Elizabeth Best**
- "Beth, I definitely oppose this bill." – **Judge John Brown**
- "I am opposed." – **Judge Robert Whelan**
- "I oppose." – **Judge David Cybulski**
- "I do not support this bill." – **Judge Amy Eddy**
- "I am not in favor of dissolving the JNC. However, I certainly think it can be overhauled to be less political and more objective." – **Judge Yvonne Laird**
- "I oppose this bill." – **Judge Dusty Deschamps**
- "I oppose this bill, but do not disagree that the process can be improved." – **Judge Jennifer Lint**
- "Having never been through the process, I must agree with those Judges that believe a through [sic] study is needed. I am against centering the appointment without public input. I am therefore

² Judge Matthew Cuffe did not express a position in his emailed response, but rather asked "[h]as there been any discussion as to why the change?"

against this bill. These appointments cannot be political.” – **Judge Jon Oldenburg**

- “It sounds like this bill should be studied and reconsidered in two years. It does appear some improvements in the process may be advisable, but if the main concern is politicization, this bill goes in the other direction.” – **Judge James Manley**
- “I am also adamantly oppose this bill.” – **Judge Kurt Krueger**
- “I oppose.” – **Judge Ray Dayton**
- “Beth, I am apposed [sic] to this bill. Brenda.” – **Judge Brenda Gilbert**
- “I also adamantly oppose.” – **Judge Nickolas Murnion**
- “I am not sure if this bill is the right fix, but having been through the process of being considered for a judicial appointment twice, in my opinion the current process of screenings by the judicial nomination commission needs to be overhauled.” – **Judge Howard Recht**
- “I agree with Judges Recht and Laird.” – **Judge Katherine Bidegaray**

Exhibit A. Each email was sent using the “reply-all” feature. Thus, every Montana Judge and every Justice presumably observed their colleagues’ expressions and comments concerning SB 140.

LEGAL STANDARDS

Montana has declared that an independent, fair, and impartial judiciary is indispensable to its system of justice. MCJC, Preamble (2009) (cited by *French v. Jones*, 876 F.3d 1228, 1230 (9th Cir. 2017)). A judge is required to act at all times in a manner that promotes “public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” MCJC 1.2. Further, a judge is prohibited from making “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.” MCJC 2.11.

When engaging in extrajudicial activities, a judge shall not “participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” MCJC 3.1. “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” MCJC 2.12.

“It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process” under the Fourteenth Amendment to the U.S. Constitution. *Caperton*, 556 U.S. at 876. Montana’s Due Process Clause, *see* MONT. CONST. art. II, § 17, similarly is the “guiding principle of our legal system” and contemplates tenacious adherence “to the ideal that both sides of a lawsuit be guaranteed a fair trial.” *Lopez* 883. *v. Josephson*, 2001 MT 133, ¶ 35, 305 Mont. 446, 30 P.3d 326. A judge’s actual bias clearly violates due process. *See Caperton*, 556 U.S. at 883. But even absent actual bias, Judge Kreuger’s actions create a probability of bias that due process cannot tolerate. *See Caperton*, 556 U.S. at 877 (concluding that due process is implicated where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable”).

ARGUMENT

Pursuant to MCJC Rules 1.2, 2.11, 2.12, and 3.11, Judge Krueger should recuse himself or be disqualified because he has made a public statement demonstrating actual bias that can reasonably be expected to affect the outcome of, and jeopardize the fairness of, this action. Rule 2.12 requires Judge Krueger's disqualification because his impartiality in this matter can be reasonably questioned. Even if, arguendo, Judge Krueger harbored no actual bias against SB 140 and endeavored to approach the issue fairly and impartially, the probability and appearance of bias created by his public statement would lead to the reasonable conclusion that he has prejudged this case.

I. The MCJC requires Judge Krueger to disqualify himself because of his bias and prejudgment of the issues involved in this case.

The MCJC requires a judge to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. MCJC 1.2. To that end, a judge is expressly prohibited from making "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." MCJC 2.11. Judges likewise are prohibited from participating "in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." MCJC 3.1(C). In any circumstance in which a judge's impartiality might reasonably be questioned,

the judge “shall disqualify himself or herself.” MCJC 2.12. A judge’s unique authority and role within our constitutional system sometimes delimits her ability to opine publicly on matters likely to come before the judiciary.³

Judge Krueger’s continued participation in this case violates these judicial conduct rules. The same is true for Judge Krueger’s judicial colleagues who echoed his sentiments or voted to approve or disapprove SB 140. Judge Krueger’s statement that he “adamantly oppose[s] [Senate Bill 140]” can only be characterized as a biased prejudgment of the issues presented in this case. “Adamant” is defined as “utterly unyielding in attitude or opinion in spite of all appeals.”⁴ In other words, Judge Krueger has publicly stated that, in spite of all argument to the contrary, he is intractably decided on the issue of SB 140. He is biased and prejudiced against SB 140. His opposition is adamant. This type of prejudgment—expressed a mere two months before he was selected to replace the Chief Justice in this case—erodes public confidence in the impartiality and independence of the judiciary.

³ These types of restrictions on judicial speech are ubiquitous throughout the states and obviously satisfy any level of First Amendment scrutiny. *See French v. Jones*, 876 F.3d 1228, 1231 (9th Cir. 2017); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002). The U.S. Supreme Court has held that “protecting the integrity” of the judiciary and “maintaining the public’s confidence in an impartial judiciary” are compelling government interests. *Williams-Yulee*, 575 U.S. at 445; *see id.* at 447 (“[N]o one denies that [the concept of public confidence in judicial integrity] is genuine and compelling.”). To the extent MCJC Rules 1.2, 2.11, and 3.1 proscribe some judicial speech, those rules are narrowly tailored to further Montana’s compelling interest in preventing both actual and perceived judicial bias.

⁴ *See Adamant*, DICTIONARY.COM, <https://www.dictionary.com/browse/adamant>.

Judge Krueger's statement and participation in this case directly violates MCJC Rules 1.2, 2.11, and 3.1, and demand his immediate recusal or disqualification.⁵

II. Due process requires Judge Krueger's recusal because of the objective risk of actual bias and prejudgment.

Judge Krueger's public statement demonstrates actual bias, which is sufficient grounds for recusal or disqualification under the U.S. and Montana Constitutions. See *Caperton*, 556 U.S. at 883 (“[A]ctual bias, if disclosed, no doubt would be grounds for appropriate relief.”). Yet even without Exhibit A's proof of actual bias, due process would nevertheless require his disqualification here because his actions have created a “probability of bias.” *Id.* at 884. Judge Krueger's public statement is tantamount to a *guarantee* of actual bias, so it necessarily poses the *risk* of actual bias. Due process accordingly requires his recusal and disqualification.

CONCLUSION

Pursuant to the MCJC and the due process guarantees of the U.S. and Montana Constitutions, the Governor respectfully requests that Judge Krueger recuse himself or be disqualified from this case. The Governor also requests that any other Montana

⁵ Judge Krueger's selection as the Chief Justice's replacement raises other troubling questions under the judicial conduct rules. By the time of that selection, presumably every judicial officer in the state was aware of Judge Krueger's strident opposition to SB 140. Respondent presumes that at least some of Judge Krueger's colleagues took action under Rules 2.16(A) and (C) of the Montana Code of Judicial Conduct, but as of this date, any such remedial actions have not succeeded in recusing or disqualifying him from this case.

judicial officers who, like Judge Krueger, expressed approval or disapproval of SB 140 recuse themselves or be disqualified. The Governor requests that the Court produce to the parties the voting results of Administrator McLaughlin's poll regarding SB 140. The Governor moreover requests a stay until all the communications and poll results related to SB 140 are released to the parties and the panel is duly recomposed.⁶ And finally, the Governor requests leave under Rule 29(1), and for good cause shown, to exceed the word count limitations of Rule 16(3).

Respectfully,

Greg Gianforte
GOVERNOR OF MONTANA

Austin Knudsen
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⁶ The undersigned, having learned of the facts disclosed in Exhibit A, hereby aver that they have fulfilled their obligations under Rule 8.3(b) of the Montana Rules of Professional Conduct.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document by email to the following addresses:

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Date: April 1, 2021

/s/ Rochell Standish
ROCHELL STANDISH