No. 21–859

In the Supreme Court of the United States

THE MONTANA STATE LEGISLATURE, ET AL.,
Petitioners,

v.

BETH MCLAUGHLIN,
Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Like many of our fundamental legal traditions, due process of law originated in an effort to restrain arbitrary power. Magna Carta, ch. 39 (1215). "[H]ere is a law which is above the King and which even he must not break." Winston S. Churchill, *The Birth of Britain* 256–57 (1956). At Runnymede, Parliament's forebear set forth protections against the capricious deprivations of an autocratic King and his courts. *See Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819); *see also* Renée Lettow Lerner, *The Troublesome Inheritance of Americans in Magna Carta and Trial by Jury*, *in Magna Carta and its Modern Legacy* 82 (Robert Hazell & James Melton eds., 2015) ("Magna Carta was not only, in the view of Americans, the symbol of general principles of constitutional government and the rule of law. It was also the source of specific rights."). Wittingly or not, due process arose alongside—and institutionalized and safeguarded—the separation-of-powers heritage Americans today take for granted. Insisting upon due process is thus of paramount importance in separation-of-powers disputes like this one. *Contra* Opp.31–33.

At its core, due process guarantees the right of every litigant to a fair proceeding in a fair tribunal. What happened below, however, made a mockery of that right. The Montana Legislature was haled—against its will—into a state-court proceeding where the judges doubled as interested parties. To no one's surprise, the judges vindicated their own interests and obliterated the Legislature's.

Despite Respondent's misdirection and obfuscation of the circumstances below, the petition's central, still-unresolved issue remains: whether the Due Process Clause of the Fourteenth Amendment protects the Legislature from the maltreatment it suffered below. To answer that question, the Court must first resolve a circuit split and decide whether sub-sovereign components of states—like legislatures—are persons for purposes of the Fourteenth Amendment's Due Process Clause.

Resolving these exceptionally important questions is critical not only for government litigants, but also for the integrity of the Nation's courts. Settling the inter-circuit split and clearly recognizing state legislatures' protections under the Due Process Clause will stymie the type of judicial self-dealing that transpired below.

I. The Montana Legislature can bring a due process claim under the Fourteenth Amendment.

Among its various strictures, constitutional due process means—at bottom—that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955); *Walker v. Birmingham*, 388 U.S. 307, 320 (1967); FEDERALIST NO. 10. Whatever else might be said about the Legislature's objection here, it emphatically isn't invoking due process as a sword to make an affirmative claim like the parties in the cases Respondent cites. Opp.28–31. Rather, the Legislature is asking this

Court to protect the right of *all* litigants to fair proceedings. The remaining question, therefore, is whether state *legislatures* in their *independent capacity* are persons under the Fourteenth Amendment's Due Process Clause—just like corporations and many other public entities are.

Respondent says no, but her reasoning proceeds from a false premise. Contra her arguments, the Legislature "is not the State of Montana." Pet.20. The proceeding below names *the State Legislature*—not *the State*—as the respondent. *McLaughlin v. Mont. State Legislature*, 489 P.3d 482 (Mont. 2021). And the Legislature seeks to redress *its* injuries—injuries distinct from the State's. That makes Respondent's sole argument—that states enjoy no due process rights—a non sequitur.

Indeed, this question implicates a longstanding circuit split over whether state entities and subdivisions are persons. *See, e.g.*, *South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 991 (8th Cir. 2012) ("The circuits are split as to whether a state's political subdivisions are afforded due process under the Fifth Amendment."). The Third and Ninth Circuits, for example, have held that school districts are persons for purposes of the Fifth and Fourteenth Amendments. *See Bd. of Nat. Res. v. Brown*, 992 F.2d 937, 943 (9th Cir. 1993); *In re Real Est. Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 765 n.3 (3d Cir. 1989). Similarly, courts have held that public corporations such as water districts can raise procedural due process claims because they are persons. *See, e.g.*, *Metro. Water Dist. of S. California v. United States*, 628 F. Supp. 1018, 1023 (S.D. Cal. 1986). And in the Foreign

Sovereign Immunities Act context, the Second Circuit has held that "when it comes to the Fifth Amendment ... only the sovereign itself and its 'alter egos' are not 'persons.'" *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 49 (2d Cir. 2021); *see also id.* ("Agencies and instrumentalities of foreign sovereigns retain their status as "separate legal person[s]."). [1] That analysis hits the mark; it would be strange indeed for "[a]gencies and instrumentalities of foreign sovereigns," *id.*—but not instrumentalities of sovereign U.S. states—to qualify as persons for purposes of constitutional due process.

On the other side of the circuit split, the Fifth and Seventh Circuits have held that municipalities and other state entities are not persons for purposes of the Fifth and Fourteenth Amendments. *La. Dep't of Rev. v. J.C.C. Holding Co. (In re Jazz Casino)*, Nos. 03-3018, 03-3245, 2004 U.S. Dist. LEXIS 18732, at *25 (E.D. La. Sep. 3, 2004) ("A State or state agency is not entitled to constitutional due process protection."), *aff'd*, 134 F. App'x 749 (5th Cir. 2005); *City of E. St. Louis v. Cir. Ct. for the Twentieth Jud. Cir.*, 986 F.2d 1142, 1144 (7th Cir.1993) ("Municipalities cannot challenge state action on federal constitutional grounds because they are not 'persons' [and] ... cannot invoke the protection of the Fifth or Fourteenth Amendments."). A federal district court in Texas reached the same conclusion about water districts.

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[1] Beyond that, this Court has held that state municipalities can be "persons" for purposes of the Fifth Amendment's Takings Clause, *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 278 n. 31 (1969), and Section 1983 liability, *Board of the County Commissioners v. Brown*, 520 U.S. 397, 403 (1997).

See El Paso Cnty. Water Imp. Dist. No. 1 v. Int'l Boundary & Water Comm'n, 701 F. Supp. 121, 123 (W.D. Tex. 1988).

Respondent thus plainly errs by contending that "there is no conflict of authority on" whether components of a state—like a legislature—have due process rights. Opp.28.

This unresolved question will only grow in importance due to the explosion of litigation involving state legislatures. In fact, this Court recently confirmed that legislative bodies pursuing legislative subpoenas have rights independent of the other branches of government. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) ("Th[e] 'power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.'"); *see also Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755, 764 (D.C. Cir. 2020) ("[T]he Supreme Court has acknowledged the essentiality of information to the effective functioning of Congress and long 'held that each House has power to secure needed information' through the subpoena power."). Because information gathering is an indispensable part of the legislative function, *id.*, court proceedings that could impair that power must be at least as fair to state legislatures as other court proceedings are to municipalities, school districts, and water districts.

And basic fairness is all the more imperative when the subject of legislative information gathering is a state judiciary. Given precedents expressly recognizing state legislatures' informational rights, *id.*, and their standing to initiate federal litigation, *Arizona*

State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015), resolving their status as "persons" under the Fourteenth Amendment is a vital federal question that's "subsidiary" to and "fairly included" within the question presented. S. Ct. R. 14.1(a).

This critical federal question awaits a definitive answer from this Court. This Court should resolve the circuit split and hold that state legislatures are persons within the meaning of the Fourteenth Amendment's Due Process Clause.

II. State recusal standards must comply with the Fourteenth Amendment.

Respondent's suggestion that no federal question exists ignores the straightforward federal question here: whether the Justices of the Montana Supreme Court violated the Montana Legislature's Fourteenth Amendment due process rights by declining to recuse from a case in which the Justices harbored direct, substantial, and disqualifying interests. Pet. at i. If the Montana Legislature is a person within the meaning of the Fourteenth Amendment—another threshold federal question—then this Court's ability to decide this question cannot be doubted. *Contra* Opp.23–28. State courts are entities restrained by the Due Process Clause. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009). So even if the Justices' non-recusal decision rested "entirely on an interpretation of … state statutes, the state constitution, and state rules of appellate procedure," Opp.24, the Montana Supreme Court would nevertheless be bound to decide

those issues in a manner that comports with the Due Process Clause. *Caperton*, 556 U.S. at 876–81. That should be unremarkable; the Fourteenth Amendment regulates *the states*. U.S. Const. amend. XIV, § 1 ("No *State* shall … deprive any person of life, liberty, or property, without due process of law ….").[2]

Yet Respondent argues that Montana courts—so long as they confine their decisions to state-law grounds—may evade the reach of the Fourteenth Amendment. Opp.23. That's of course wrong, a fact that shouldn't be lost on Respondent—or the Montana Supreme Court. *See Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020) ("Because the elimination of the [scholarship] program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as … resting on adequate and independent state law grounds.").

True, most judicial disqualification matters are resolved under state laws, ethics rules, and judicial canons, and will therefore "be resolved without resort to the Constitution." *Caperton*, 556 U.S. at 890. That's because "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Id.* at 889. And its protections "establish[] a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). That "floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal … before a judge with no

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[2] From the very beginning of this dispute, the Legislature has maintained that the Due Process Clause prohibits the Montana Supreme Court from hearing and deciding this case. App. 205–208, 223–28, 236–38, 250–52.

actual bias against the defendant or interest in the outcome of his particular case." *Id.* at 904-05 (quotation marks and internal citations omitted). Importantly, recusal mandated by the Due Process Clause doesn't require proof of actual bias. *Id.* Instead, "under a realistic appraisal of psychological tendencies and human weakness," the inquiry is whether a potentially disqualifying interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. at 883–84.

In this case, the Montana Justices' disqualifying interests couldn't be clearer. The Legislature subpoenaed Respondent's records to learn the extent of *improper judicial communications* she possessed but then deleted or failed to retain.[3] App.293; 288–341; 356–57. And the Montana Supreme Court—specifically the Chief Justice—appoints and directs Respondent's duties. Pet. 4–6, 13, 23. So by deciding whether to conceal Respondent's records, the Justices were really deciding whether to conceal their own.[4]

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[3] Respondent counterfactually claims she repeatedly "appealed to the [Department of Administration], the Legislative leadership, and the Attorney General's office" to negotiate a more orderly record-production process. Opp.32 (citing App. 33; Resp.App.36a–40a). After Respondent admitted to legislative leadership that she possessed no further responsive records and the subpoenas issued, however, there's no evidence she ever attempted to negotiate with legislative leadership or the Attorney General's office. Pet.6–7.

[4] Respondent claims she sought to prevent disclosing only *privileged* subpoenaed documents. Opp.11 n.5. But below, she

Irrespective of their own subpoenas, then, the Justices' foray into McLaughlin's record subpoenas protected their own "direct, personal, [and] substantial" interests in the case's outcome. *Caperton*, 556 U.S. at 876. That not only implicates state-level ethics rules but also runs afoul of the actual and probable biases triggering recusal under the Due Process Clause. *Id.* at 886–87.

And the facts get even more "extreme by any measure," because the Justices also decided, *sua sponte*, to quash their own, individual subpoenas. *Id.* at 887; Pet. 21–25. Far beyond probable bias, this demonstrated "actual bias." *Gramley*, 520 U.S. at 905. Indeed, these actions satisfy even a narrower framing of the Fourteenth Amendment's fair tribunal guarantee. *See Williams v. Pennsylvania*, 579 U.S. 1, 29 (2016) (Thomas, J., dissenting) (citing *Earl of Derby's Case,* 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K. B. 1614) (observing that due process historically precluded a judge from "adjudicat[ing] a case in which he was a party"). When they quashed their own subpoenas, the Justices made the case their own, thereby violating the ancient precept that "no man can be a judge in his own case." *In re Murchison*, 349 U.S. at 136. The Justices' personal stake in the outcome was clear.

And neither case Respondent cites makes it less clear. Opp.26 (citing *United States v. Will*, 449 U.S. 200 (1980); *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 541 U.S. 913 (2004)).

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vigorously opposed any document production, whatsoever. Resp.App.10a; Resp.App.11a; Resp.App.12a–18a.

Will simply doesn't apply here. Pet.28–30. Respondent's contrary argument conflates *Will*'s invocation of the Rule of Necessity with an ordinary due process challenge. Opp.26. *Will*, however, wasn't an ordinary due process challenge. There, all parties and the Court agreed that *all* Article III judges possessed direct, pecuniary interests in the case's outcome. *Will*, 449 U.S. at 210–12. And importantly, all parties and the Court agreed that the Rule of Necessity should override those disqualifying interests. *Id.* at 212. But no universal agreement exists here about whether non-disqualified Montana judges could adjudicate this case consistent with due process standards. And nothing in *Will* forecloses the Legislature's Fourteenth Amendment arguments.[5]

Respondent's reliance on *Cheney* fares no better. Opp.26–27. First, the Montana Supreme Court neither cited nor relied on *Cheney*. App.12–30. Second, *Cheney* properly disabused litigants of the notion that unsubstantiated allegations of bias resulting from friendship can reasonably call into question a judge's impartiality. 540 U.S. at 920–24. That's not this case. The facts—not unsubstantiated allegations—confirm the Justices' personal and institutional biases. Pet. 21–27. And the Justices' characterizing this dispute as "[t]he Legislature's unilateral attempt to manufacture a conflict," App.23, "is heavy on rhetoric but light on fact[s] …." Opp.39. The Legislature's investigation didn't spontaneously materialize. It began when leaked documents revealed judges'

[5] Respondent doesn't counter the Legislature's argument that the Montana Justices' invocation of the Rule of Necessity conflicts with the rules set forth in that case. Opp.24, 26; Pet.28–30.

unquestionably prejudicial and inappropriate behavior conducted on government time and computers.[6]

This case presents precisely the kind of "extraordinary situation" warranting invocation and enforcement of Fourteenth Amendment due process protections. *Caperton*, 556 U.S. at 887; Opp.31 (acknowledging this case presents "highly unusual circumstances"). *Caperton* applies beyond the context of campaign contributions and judicial elections. *But see* Opp.26. It commands that the Fourteenth Amendment applies where "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 872.

Here, probability borders on certainty. The Montana Supreme Court first thwarted a legislative probe investigating judicial misfeasance by issuing orders without jurisdiction. The Justices then accepted original jurisdiction over an action filed by *their* appointee who sought to conceal *their* records. They then quashed the subpoenas targeting Respondent's records, and quashed their own document subpoenas, too. They consistently refused to negotiate with the Legislature over the records in question, claiming to be barred by the pending lawsuit they had orchestrated. And finally, the Justices retained jurisdiction by erroneously invoking the Rule of Necessity. And they did it all to prevent a coequal branch from investigating documented judicial misbehavior.

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[6] *Cheney*, in fact, helps the Legislature. Recusal may be required where a judge expressed an opinion concerning the merits of a case at bar. 541 U.S. at 922 n.3. And that's just what Chief Justice McGrath did, below. App.630.

"On these extreme facts the probability of actual bias rises to an unconstitutional level." *Id.* at 886–87.[7]

III. This case is not moot.

Respondent also now argues the case is moot because below the Legislature voluntarily withdrew its subpoenas to spur negotiation over the requested records. Pet.16; App.513–15. Her position is surprising, considering she vigorously opposed the Legislature's dismissal motion below. *Compare* Opp.38–39, *with* Resp.App.177–81. Respondent argued below that mootness did not bar the Montana Justices from adjudicating a challenge to withdrawn legislative subpoenas; but now, she argues mootness should foreclose this Court's review of whether the Montana Supreme Court violated due process by adjudicating that very challenge. The fact is, the Montana Justices maintained and decided the case despite the Legislature's due process objections. This petition's federal due process question, therefore, remains live, undisturbed, and prime for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] Respondent's discussion of the Montana Supreme Court's merits analysis of *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), is entirely beside the point. Opp.31–38. That discussion addresses the final decision below, not the due process question raised in this petition.

Respectfully submitted,

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