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Significant Montana Cases

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SIGNIFICANT MONTANA CASES

Victoria Hill, Eric Monroe & Marti A. Liechty*

I. INTRODUCTION

The business of the Montana Supreme Court has increased in volume, but not necessarily in scope, since its inception.¹ The Court has both original and appellate jurisdiction.² The inaugural term of the Court was held in Virginia City on May 17, 1865.³ It was not until Montana achieved statehood in 1889, and adopted its first constitution, that the judicial system expanded significantly—augmenting the Supreme Court’s bench to three members, each serving a six-year tenure.⁴ The number of seats on the bench has slowly increased over time, most recently in 1979, from which point forward the Montana Supreme Court’s bench has maintained seven members.⁵

Significant Montana Cases is a recurring legal short in the *Montana Law Review* in which staff members attempt to select the most impactful Montana Supreme Court decisions from the previous term, and then explain the expected impact and breadth of those decisions. As a general matter, the Montana Supreme Court tends to decide cases that require further discussion, clarification, or analysis. The authors used largely the same criterion in the diligent selection of which decisions to feature here.⁶

Broadly, 2021 brought a presidential inauguration,⁷ COVID-19 management,⁸ and headline-grabbing jury verdicts.⁹ At home, Montanans spent

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1. *A Montana Supreme Court Overview for Students*, MONTANA JUDICIAL BRANCH, <https://perma.cc/CT28-WGL9> (last visited March 27, 2022) [hereinafter *Montana Supreme Court Overview*].

2. MONT. CONST. art. VII, § 2(1).

3. *Montana Supreme Court Overview*, *supra* note 1 (noting that the first Chief Justice, Hezekiah L. Hosmer was appointed by President Abraham Lincoln on June 30, 1864).

4. *Id.* (noting that Montana achieved statehood on November 8, 1889).

5. *Id.*

6. *Id.*

7. See Joseph R. Biden, Jr., Inaugural Address (Jan. 20, 2021), available at <https://perma.cc/WD4M-MVED>.

8. See, e.g., Alexander Tin, *FDA authorizes first antiviral pill to treat COVID-19*, CBS NEWS (Dec. 22, 2021), <https://perma.cc/SG59-45PP>.

9. See, e.g., Connor Donevan & Brianna Scott, *Jury Finds Derek Chauvin Guilty On All Counts In Killing George Floyd*, NPR (Apr. 20, 2021), <https://perma.cc/T4LD-DNME>; James Fanelli & Corinne Ramey, *Ghislaine Maxwell Found Guilty in Epstein Sex-Abuse Case*, THE WALL STREET JOURNAL, Dec. 29, 2021, available at <https://perma.cc/6Y3T-EGLB>; *Theranos Founder Elizabeth Holmes Found Guilty of Investor Fraud*, N.D. CAL. U.S. ATT’Y’S OFFICE, DOJ (Jan. 4, 2022), <https://perma.cc/QZL2-7YNE>.

2021 continuing to experience and navigate life in “precedented times.”¹⁰ In the midst of these events, the Montana Republican Party regained control of the house, senate, and governorship for the first time since 2003, and subsequently churned out a tremendous amount of new law—more than 700 bills were passed¹¹—many of which have resulted in an influx of litigation in Montana courts.¹² Meanwhile, the Montana Supreme Court similarly broke unprecedented ground, issuing decisions that have transformed the entirety of Montana’s legal landscape. Only a handful of those decisions will be recapitulated here.

II. *STATE V. PHAM*¹³

In *State v. Pham*, the Montana Supreme Court held that an agent’s arrest of a Vietnamese man based solely on his staring at the abnormal sight of a Montana Highway Patrol (MHP) van full of marijuana was unconstitutional.¹⁴ The Montana Supreme Court thereby remanded the case back to the district court in Custer County with an order reversing the judge’s decision that Pham was not seized, which had allowed prosecutors to use as evidence the 19 pounds of marijuana found in the trunk of the car that Pham was driving.¹⁵

In August 2017, Hoang Vinh Pham drove from his home in Minnesota to Butte, Montana, to check on a vehicle he had wrecked.¹⁶ Pham stopped at a Conoco gas station off the interstate in the eastern Montana town of Miles City.¹⁷ While there, he went into the gas station to use the restroom, pay for gas, and heat up a bowl of noodles in the store’s microwave.¹⁸

Agent Richard Smith and two uniformed MHP troopers were about to drive from Miles City to Billings to transport approximately 960 pounds of marijuana for evidence storage in a three-quarter-ton, full-sized utility van with panels and windows on the side.¹⁹ Agent Smith was dressed in civilian clothes, carried a gun in a leg holster, and wore a necklace carrying his

10. See Dillon J. Mims, PRECEDENTED TIMES (2021) (a podcast “about America’s past, America’s present, and how it all seems to be repeating itself,” setting out to “disprove the notion that we are living through ‘unprecedented times’”).

11. Eric Dietrich, *Laws on Trial: Where Montana’s bill challenges stand now*, MONT. FREE PRESS (Dec. 21, 2021), <https://perma.cc/8DLG-3XHW>.

12. Eric Dietrich, *Laws on Trial*, MONT. FREE PRESS (Feb. 18, 2022), <https://perma.cc/MH4R-ERL6>.

13. 497 P.3d 217 (Mont. 2021).

14. *Id.* at 224.

15. *Id.* at 221, 224.

16. *Id.* at 219.

17. Brief of Appellant at 4, *State v. Pham*, 497 P.3d 217 (Mont. 2021) (No. DA 19-0421).

18. *Pham*, 497 P.3d at 219.

19. Brief of Appellant, *supra* note 17, at 4–5.

Division of Criminal Investigation (DCI) badge.²⁰ The officers stopped at the Conoco station before starting their journey.²¹ When Agent Smith entered the Conoco, he noticed Pham looking out the station window, staring at the police van.²²

Smith and the two MHP troopers approached Pham after Pham had returned to his car to pump gas.²³ Agent Smith testified that he believed Pham was either lost or committing a crime based on the length of time that Pham was staring at the police van.²⁴ Agent Smith denied that Pham's Vietnamese ethnicity factored into his decision to approach Pham, but acknowledged that he was aware of several arrests of Vietnamese people for drug trafficking traveling along the same route.²⁵ The parties disagree about what happened next.²⁶

At his hearing on his motion to suppress, Pham testified that since moving to the United States in 1983, he primarily speaks Vietnamese with friends and family.²⁷ Pham testified that an officer in uniform "came close to [Pham] and asked [him], 'Well, you managed to run away[,]'" which confused Pham.²⁸ (Agent Smith asserted at the motion to suppress hearing that he recognized Pham from an accident in Butte where "a Black male and an Asian male had run from the scene."²⁹) When defense counsel asked Pham whether he believed he was free to leave, Pham responded, "They did not let me go anywhere. They kept me in there and they pulled me away even though I tried to pump gas. So I did not do anything against them."³⁰ Pham denied opening his car door or trunk to allow Agent Smith to search the vehicle and testified that Agent Smith "did not ask me and I did not consent and he kept me there and he did it by himself."³¹ Pham indicated that Agent Smith opened the trunk, but he was unaware whether Agent Smith used the key or a button in the car to do so.³²

The State asserts a very different description of the events.³³ Agent Smith testified that Pham voluntarily engaged in conversation that Agent

20. *Pham*, 497 P.3d at 219.

21. Brief of Appellant, *supra* note 17, at 4.

22. *Pham*, 497 P.3d at 219.

23. Brief of Appellant, *supra* note 17, at 6.

24. *Pham*, 497 P.3d at 219.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 220.

29. Brief of Appellant, *supra* note 17, at 32.

30. *Pham*, 497 P.3d at 220.

31. *Id.*

32. *Id.*

33. *See id.* at 220–22.

Smith characterized as “very cordial.”³⁴ Agent Smith asked Pham if he was lost, and then asked about Pham’s family and reason for travel.³⁵ Agent Smith testified that he was aware that Vietnamese culture teaches deference to police, but he believed his conversation with Pham was different from “a lot of ethnic conversations” because Pham looked Agent Smith in the eye, and Agent Smith did not believe he needed to tell Pham he was free to leave.³⁶ Agent Smith testified that Pham voluntarily opened his rear door and trunk and allowed Agent Smith to search the vehicle.³⁷ Agent Smith found several boxes in the trunk and asked Pham’s permission to open them.³⁸ The State claims that Pham indicated that the boxes were not his and allowed Agent Smith to search them.³⁹ The boxes contained 19 pounds of marijuana, leading to Pham’s arrest.⁴⁰ At trial, Pham was found guilty of felony possession with intent to distribute and sentenced to 15 years in the Montana State Prison.⁴¹

On appeal, the Montana Supreme Court unanimously decided that Agent Smith seized Pham when Agent Smith continued his conversation and asked to search Pham’s vehicle after confirming that Pham was not lost and not committing an immediately apparent offense.⁴² To determine whether Pham was seized, the Court used the factors adopted by the United States Supreme Court in *United States v. Mendenhall*⁴³ by evaluating the totality of the threatening presence of several officers, the display of a weapon by an officer, the officer’s physical touching of the person, or the use of language or tone of voice indicating that compliance with the officers request is compelled.⁴⁴ Here, two of the officers were armed and in uniform, and although Agent Smith was in plain clothes, he wore his DCI badge indicating he was an officer.⁴⁵ Agent Smith and Trooper Kilpela employed a “continuous barrage of questions,” which indicated that Pham’s compliance was compelled.⁴⁶ The Court held, therefore, that a reasonable person in Pham’s position would not have felt “free to leave,” and thus, Pham was seized.⁴⁷

34. *Id.* at 220.

35. *Id.*

36. *Id.* at 221.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 223.

43. 446 U.S. 544 (1980).

44. *Pham*, 497 P.3d at 222 (citing *Mendenhall*, 446 U.S. at 554).

45. *Id.* at 223.

46. *Id.*

47. *Id.*

In determining that Pham was seized, the Court distinguished *Pham* from four prominent Montana search and seizure cases—*State v. Wilkins*,⁴⁸ *State v. Ballinger*,⁴⁹ *State v. Dupree*,⁵⁰ and *State v. Questo*⁵¹—on the basis that, in those cases, law enforcement possessed some valid initial reason to approach the individual.⁵² Whereas here, Pham’s responses to Agent Smith’s questions ruled out that he was lost or in need of help, and Agent Smith testified that he “didn’t know what the offense [he was] looking at was.”⁵³ Thus, Agent Smith and the two MHP officers did not have a valid reason to keep engaging with Pham.⁵⁴

After a determination that Pham was seized, the Court held that Agent Smith did not have particularized suspicion to seize Pham.⁵⁵ Particularized suspicion for an investigative stop requires that the officer have objective data and articulable facts from which the officer can make certain reasonable inferences and a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense.⁵⁶

On its face, *Pham*’s holding might not appear to be significant to Montana practitioners. There is no dissent.⁵⁷ *Pham* does not alter the test for seizure of a person or particularized suspicion in Montana.⁵⁸ *Pham* plainly holds that an individual staring at a police van full of marijuana does not give an officer particularized suspicion to seize an individual.⁵⁹

Pham is significant because the Montana Supreme Court has been a tool for racism, and particularly racism against Asian Montanans, during an earlier part of its history.⁶⁰ In 1883, the Montana Supreme Court upheld convictions for non-Chinese defendants 50% of the time, while upholding convictions for Chinese defendants at nearly the same rate of 52%.⁶¹ But from 1883 to 1902, the Court upheld convictions for non-Chinese defendants 63% of the time; while the Court upheld convictions for Chinese defendants at a rate of 75%.⁶²

48. 205 P.3d 795 (Mont. 2009).

49. 366 P.3d 668 (Mont. 2016).

50. 346 P.3d 1114 (Mont. 2015).

51. 433 P.3d 403 (Mont. 2019).

52. *Pham*, 497 P.3d at 223.

53. *Id.*

54. *Id.* at 224.

55. *Id.* at 223.

56. *Id.* at 224 (citing *State v. Strom*, 333 P.3d 218, 282 (Mont. 2014)).

57. *See id.*

58. *See id.* at 222–23.

59. *See id.* at 223–24.

60. *See, e.g.*, John R. Wunder, *Law and Chinese in Frontier Montana*, MONTANA: THE MAGAZINE OF W. HISTORY, 1980, at 29.

61. *Id.*

62. *Id.*

Here, the Montana Supreme Court rejected the ghost of its past self by denying the State a successful prosecution based on racial profiling. The Court stops just short of explicitly calling out the racism inherent in the State's arrest and subsequent prosecution of Pham in summing up the case with, "Viewed in the totality of the circumstances, we are left with the fact that Agent Smith saw a Vietnamese person, traveling along a route where other Vietnamese individuals had been arrested for drug trafficking, and became suspicious that Pham was trafficking drugs."⁶³

Pham also poses a significant counterfactual. What if Agent Smith had given some other reason to seize Pham? Montana law bars police officers from racial profiling individuals suspected of crime.⁶⁴ However, this statutory prohibition provides significant leeway and deference to officers: "The race or ethnicity of an individual may not be the *sole* factor in constituting a particularized suspicion that an offense has been or is being committed in order to justify the detention of an individual or the investigatory stop of a motor vehicle."⁶⁵ This statute is consistent with the standard given by the United States Supreme Court—that race may be *a* factor in determining probable cause, so long as it is not the *only* factor.⁶⁶ Thus, it is possible that if Agent Smith had also said that from his many years of police experience he knew that suspicious individuals tend to show a heightened concern for police activity in the form of staring, the State's crime of racial profiling could be forgiven by the Court.

Pham's outcome is a significant step in the Montana Supreme Court's treatment of its citizens of color, particularly Asian Montanans. In the final paragraph of the opinion, Justice Laurie McKinnon, writing for the majority, quotes United States Supreme Court Justice Sonya Sotomayor's dissent in *Utah v. Strieff*, "When we condone officers' use of [these devices] without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating them as second-class citizens."⁶⁷ Although once nearly 10% of Montana's population,⁶⁸ in 2020 Asian Montanans accounted for just 1% of Montana's population.⁶⁹ This diaspora was influenced by the discriminatory treatment that Asian Montanans received by

63. *Pham*, 497 P.3d at 224.

64. MONT. CODE ANN. § 44-2-117(1) (2021).

65. *Id.* (emphasis added).

66. *Utah v. Strieff*, 579 U.S. 232, 252 (2016) (Sotomayor, J., dissenting) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975)) (emphasis added). It is unclear whether this signals that Montana will adopt the presence of a valid warrant exception to the exclusionary rule that the United States Supreme Court adopted in *Strieff*.

67. *Pham*, 497 P.3d at 224 (citing *Strieff*, 579 U.S. at 252 (Sotomayor, J., dissenting)).

68. Wunder, *supra* note 60, at 21–22.

69. America Counts Staff, *Montana Population Topped the One Million Mark in 2020*, U.S. CENSUS BUREAU (Aug. 15, 2021), <https://perma.cc/QZN7-VDWF>.

the Montana Supreme Court in both criminal and civil matters.⁷⁰ While racism against Asian Montanans still very much haunts this state,⁷¹ the Montana Supreme Court's holding in *Pham* correctly denies the State a prosecution built on evidence from a police investigation entirely motivated by race.

—Victoria Hill

III. *CLARK FORK COALITION V. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION*⁷²

In *Clark Fork Coalition v. Montana Department of Natural Resources and Conservation*, the Montana Supreme Court, in a 5-2 decision, upheld the Montana Department of Natural Resources and Conservation (DNRC) decision to grant RC Resources, Inc. (RCR) a water use permit for the proposed Phase 2 of the Rock Creek Mine Project (RCMP) in Montana's Cabinet Mountains Range near Noxon, Montana.⁷³ The Montana Supreme Court reversed the judgment of the district court striking down the permit, and the Court rejected the district court's conclusion that the "legal demands" of the Montana Water Use Act (MWUA) required DNRC to consider whether the proposed use also complies with Montana Water Quality Act (MWQA) classification and applicable MWQA nondegradation standards, independently applicable to the source and affected waters under the MWQA.⁷⁴ The Court also rejected Clark Fork Coalition's argument that the MWUA violated their right to a clean and healthful environment under the Montana Constitution by denying them the opportunity for advance MWQA compliance review by DNRC as part of the MWUA beneficial water use permitting process.⁷⁵

The RCMP is a proposed two-phase underground silver and copper mining operation of RCR spread across various sites in and about the Kaniksu National Forest in Sanders County, Montana.⁷⁶ Phase 1 will disturb a total of about 20 acres on public and private land and involve excavation of approximately 178,000 tons of waste rock and ore from the evaluation adit (*i.e.*, a tunnel or shaft).⁷⁷ The purpose of Phase 1 is to obtain the metallurgical, geotechnical, and hydrological data necessary for further as-

70. See Wunder, *supra* note 60, at 22–23.

71. See Jordan Unger, *Increased reports of discrimination directed at Asians in Missoula as COVID spreads*, MISSOULA CURRENT (Oct. 16, 2020), <https://perma.cc/7W32-25NT>.

72. 481 P.3d 198 (Mont. 2021).

73. *Id.* at 201, 224.

74. *Id.* at 217.

75. *Id.* at 223–24.

76. *Id.* at 201.

77. *Id.* at 202.

assessment of the technical, economic, and legal feasibility of commercial mining operations under the proposed Phase 2.⁷⁸ The Phase 2 permit authorizes the RCR to annually appropriate up to 857 acre-feet of groundwater that will flow into the underground adits.⁷⁹

The Clark Fork Coalition and other environmental groups (“Objectors”) originally filed a Montana state court action in 2002 alleging that MDEQ illegally issued the 2001 Montana Pollutant Discharge Elimination System (MPDES) permit without conducting a full MWQA nondegradation review of the proposed discharge into the Clark Fork River.⁸⁰ In 2018, Objectors petitioned for judicial review of the DNRC agency decision that granted RCR the permit on the grounds that the DNRC erroneously concluded that their MWQA objections were not pertinent as a matter of law to whether the proposed volume of water is legally available as referenced in § 311(1)(a)(ii) of the MWUA.⁸¹ Alternatively, Objectors asserted that even if the DNRC correctly interpreted that section of the MWUA, the MWUA would violate Article II, Section 3,⁸² and Article IX, Section 1,⁸³ of the Montana Constitution by denying them adequate remedy to enforce MWQA nondegradation standards in this case.⁸⁴

In an opinion written by Justice Dirk Sandefur, the Court noted that the MDEQ is responsible for administering the MMRA, MWQA, and the Montana Environmental Policy Act (MEPA), which govern all water quality issues regarding mining operations under Montana law.⁸⁵ In contrast, the DNRC is responsible for administering the MWUA, which governs who, how much, and for what purposes individuals and entities may use water in Montana.⁸⁶

In approving a permit to appropriate water, the DNRC must evaluate whether the applicant has proved, by a preponderance of the evidence, that the permit meets the criteria under § 311 of the MWUA.⁸⁷ More specifically, DNRC will issue a permit if the applicant proves that there is water physically available and that water can be considered legally available dur-

78. *Id.*

79. *Id.* at 199.

80. *Id.* at 206.

81. *Id.* at 212.

82. *See* MONT. CONST. art. II, § 3 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . .”).

83. *See* MONT. CONST. art. IX, § 1(3) (“The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”).

84. *Clark Fork Coal.*, 481 P.3d at 212.

85. *Id.* at 204–05.

86. *Id.* at 205.

87. *Id.* at 214.

ing the period which the applicant seeks to appropriate.⁸⁸ “Legal availability” is determined by physical water availability; identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and an analysis of the evidence of physical water availability and the existing legal demands.⁸⁹

The Court found this MWUA provision to be clear and unambiguous, in that nothing in the MWUA manifests an intent to incorporate compliance with MWQA classification-based nondegradation standards—independently applicable to the subject water use under the MWQA—with the required or permissible MWUA considerations regarding “existing legal demands of the source supply” of water.⁹⁰

On legislative intent, the Court found that the primary purpose of the MWUA was to provide for the beneficial use of Montana waters through a centralized administration.⁹¹ Additionally, the Court noted that the MWUA’s secondary purpose was to provide for the wise utilization, development, and conservation of state waters for the maximum benefits to Montanans, with the least possible degradation of the natural aquatic ecosystems.⁹² However, the Court rejected Objectors’ argument that this secondary purpose is served by limiting the scope of water quality nondegradation objections under the MWUA because the Montana Legislature separately charged the MDEQ with the duty and expertise to administer the standards at issue here.⁹³

Justice Laurie McKinnon, joined by Justice Ingrid Gustafson, dissented on the issue of the MWUA’s “legal demands,” which they argue is dispositive in this case.⁹⁴ First, the dissent states that the majority’s analysis should have remained confined to the MWUA.⁹⁵ Next, the dissent argues that the majority incorrectly interpreted that the legislative intent of the MWUA and MWQA was that the DNRC and MDEQ were to have *mutually exclusive* responsibilities in their roles protecting Montanans’ constitutional right to a clean and healthful environment.⁹⁶ The dissent cites that the framers of the Montana Constitution wanted “the strongest environmental protection provision found in any state constitution.”⁹⁷

88. MONT. CODE ANN. § 85-2-311(1)(a)(i)–(ii) (2021).

89. *Id.* § 85-2-311(1)(a)(ii)(A)–(C).

90. *Clark Fork Coal.*, 481 P.3d at 215.

91. *Id.* at 215–16.

92. *Id.* at 219.

93. *Id.*

94. *Id.* at 224 (McKinnon, J., with Gustafson, J., dissenting).

95. *Id.*

96. *Id.*

97. *Id.* (quoting *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999)).

The dissent argues that the Outstanding Resource Waters (ORWs) within the federally designated Cabinet Mountain Wilderness Area are statutorily protected against dewatering under both federal and state law.⁹⁸ Under Montana law, ORWs are of such environmental, ecological, or economic value that the state should prohibit changes to the existing quality of those waters to the greatest extent practicable.⁹⁹ The parties did not dispute that the issuance of the DNRC's water permit for the Rock Creek Mine project would deplete one or more specifically identified and protected ORWs.¹⁰⁰ The Montana Legislature has mandated that both the DNRC and the MDEQ have the responsibility to enforce these protections.¹⁰¹ Based on the plain language of the MWUA, which authorizes the DNRC to issue water permits, the DNRC was required to consider the impact of dewatering on these protected ORWs before it issued a water permit which would deplete a federally and state protected stream.¹⁰² Since the DNRC did not consider the impact on ORWs, despite having evidence that these protected waters would be depleted, the dissenting Justices would affirm the district court's decision that the impact on ORWs must be considered by the DNRC before issuance of a water permit.¹⁰³

Clark Fork Coalition is significant because its holding compartmentalizes environmental harms into agency camps, limiting the potential success for future environmental causes of action in Montana. Furthermore, it adds to the small number of Article II, Section 3 cases litigated at the Montana Supreme Court—of which the Court has most often rejected the constitutional claims of environmentally-concerned groups asserting their right to a clean and healthful environment.¹⁰⁴ This lack of legal teeth in this constitutional provision is significant because, as the dissent correctly identifies, the delegates to the 1972 Montana Constitutional Convention wanted “the strongest environmental protection provision found in any state constitution.”¹⁰⁵

—Victoria Hill

98. *Id.* at 224–25.

99. MONT. CODE ANN. § 75-5-315 (2021).

100. *Clark Fork Coal.*, 481 P.3d at 225 (McKinnon, J., with Gustafson, J., dissenting).

101. *Id.*

102. *Id.* at 226.

103. *Id.*

104. Westlaw Edge search for Montana cases using the phrase “clean and healthful environment” in MONT. CONST. art. II, § 3 only revealed 35 total cases (accessed Apr. 3, 2022).

105. *Clark Fork Coal.*, 481 P.3d at 224 (McKinnon, J., with Gustafson, J., dissenting) (quoting *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999)).

IV. *STATE V. Q. SMITH*¹⁰⁶

In *State v. Q. Smith*, the Montana Supreme Court held that Quincy Smith had a reasonable expectation of privacy in his driveway which was violated after a sheriff's deputy—who had pulled Smith over—refused Smith's request to leave and come back with a warrant.¹⁰⁷

On May 15, 2019, Smith and his friend Jacques Hennequin were driving on Hidden Valley Road in Ravalli County towards Hennequin's house, where Smith also resided. Ravalli County Sheriff's Deputy Nicholas Monaco was driving on Hidden Valley Road in the opposite direction when he observed Smith's vehicle traveling approximately 17 miles per hour over the speed limit. Monaco turned around, activated his lights, and pursued Smith's vehicle. Although Monaco had activated his lights, his dash camera footage showed that Smith's vehicle was only visible for roughly one second before it rounded an "S" shaped curve in the road. Approximately 21 seconds after Monaco activated his lights, Smith pulled into a 350-foot residential driveway and parked next to a garage.¹⁰⁸

Hennequin's house is located on a five-acre property which has both a perimeter fence encompassing the property and an interior fence surrounding the house and yard.¹⁰⁹ Although both fences have gates, both gates were open on the night of the stop.¹¹⁰ Additionally, although the residence is partially shielded from the road and neighboring properties by numerous trees and foliage, the property did not have any "No Trespassing" signs posted.¹¹¹

Shortly after Smith parked his vehicle, Monaco approached Smith and Hennequin and informed them that he had pulled Smith over for speeding.¹¹² Both Smith and Hennequin immediately informed Monaco that he was on private property and would need to return with a warrant.¹¹³ Rather than leaving the property, Monaco radioed for backup and requested Smith's license and registration.¹¹⁴ The stop then ripened into an investigation for driving under the influence ("DUI") after Monaco detected an odor of alcohol on Smith.¹¹⁵ During the course of the DUI investigation, Sergeant Guisinger arrived to assist Monaco.¹¹⁶ The confrontation between

106. 501 P.3d 398 (Mont. 2021).

107. *Id.* at 406.

108. *Id.* at 401.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 402.

115. *Id.*

116. *Id.*

Smith, Hennequin, and the officers ultimately resulted in Guisinger tasing and arresting Smith.¹¹⁷

Smith was later charged with speeding, obstructing a peace officer, DUI, and resisting arrest—all misdemeanors. Smith moved the justice court to suppress all evidence obtained during the altercation, arguing that Monaco's initial entry onto his driveway and refusal to leave violated his constitutional rights. The justice court denied the motion and found Smith guilty of all charges following a bench trial. On appeal to the Twenty-First Judicial District Court, the district court again denied Smith's motion to suppress, concluding that Smith did not have a reasonable expectation of privacy in his driveway. Smith pleaded guilty to misdemeanor DUI but reserved his right to appeal the district court's denial of his motion to suppress. Smith then appealed to the Montana Supreme Court.¹¹⁸

The Montana Supreme Court reviews lower court findings of fact in denials of suppression motions for clear error and reviews the district court's interpretation and application of the governing law.¹¹⁹

Smith argued on appeal that he had a reasonable expectation of privacy in his driveway because the driveway was within the curtilage of the home and that no exigent circumstances existed to allow Monaco to conduct a warrantless investigation on the property.¹²⁰ The State countered that Smith did not have an expectation of privacy that society would recognize as reasonable and that Smith's failure to stop after Monaco initiated contact constituted a hot pursuit, creating an exigent circumstance justifying Monaco's warrantless entry.¹²¹

The Court began its analysis by examining the protections from unreasonable searches and seizures afforded under the Fourth Amendment to the United States Constitution and under Article II, Section 11 of the Montana Constitution.¹²² Additionally, the Court noted that under Article II, Section 10, an individual's right to privacy "shall not be infringed without the showing of a compelling state interest," evidencing that the Montana Constitution provides greater privacy protection than the Fourth Amendment.¹²³

Because the Montana Constitution provides this greater privacy protection, the Court found it unnecessary to determine whether Smith's drive-

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 401.

121. *Id.* at 403, 405.

122. *Id.* at 402. *See also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."); MONT. CONST. art. II, § 11 ("The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. . .").

123. *Q. Smith*, 501 P.3d at 403 (quoting MONT. CONST. art. II, § 10).

way was within the curtilage of his dwelling under the Fourth Amendment framework.¹²⁴ Instead the Court looked to its decision in *State v. Bullock*¹²⁵ to determine whether Smith had a reasonable expectation of privacy in his driveway and, therefore, whether Monaco's search had been unlawful.¹²⁶ In *Bullock*, the Court rejected the distinction between curtilage and open fields drawn under the Fourth Amendment and instead adopted a three-part test to determine whether an unlawful government search has occurred.¹²⁷ Under this three-part test, the Court considers "(1) whether [an individual has] an actual expectation of privacy . . . ; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the [S]tate's intrusion."¹²⁸

Smith argued that he satisfied the first factor under *Bullock* because the length of the driveway, the perimeter and interior fencing surrounding the property, and the secluded nature of the property indicated that he had an actual expectation of privacy.¹²⁹ The Court rejected this argument, finding that—unlike in *Bullock*, where the landowner had moved his cabin farther from the road, erected fencing, and posted "No Trespassing" signs—neither Smith nor Hennequin had taken measures to communicate that entry was not permitted.¹³⁰ Specifically, although the property was surrounded by two fences, both gates were open and no signs were posted which would have given Monaco warning that he should not enter the property.¹³¹

Although the Court found that Monaco was justified in his initial entry of the property, the dynamic changed once Smith and Hennequin informed him that entry onto their property was not permitted.¹³² The Court reasoned that the second factor under *Bullock* indicates that regardless of whether there are gates or signs posted, society recognizes an actual expectation of privacy as reasonable once a resident communicates that entry is not permitted.¹³³ Here, the Court found that once Smith informed Monaco he was trespassing and needed a warrant, the communication was unmistakable.¹³⁴

Finally, the Court considered the third factor of whether the State's intrusion had infringed upon Smith's reasonable expectation of privacy. Here, the State argued that Monaco's intrusion onto the property was mini-

124. *Id.*

125. 901 P.2d 61 (Mont. 1995).

126. *Q. Smith*, 501 P.3d at 403.

127. *Id.*

128. *Id.* (quoting *State v. Smith*, 97 P.3d 567, 570 (Mont. 2004)).

129. *Id.* at 404.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 405.

mal under the circumstances. The Court found this argument persuasive, noting (1) that Monaco had initiated the stop prior to Smith entering his property, and (2) that Monaco's subsequent pursuit of Smith onto the property and preliminary questioning regarding who lived on the property and whether Smith was the driver were minimally intrusive. However, the Court reasoned that after Smith informed Monaco that he lived on the property and explicitly invoked his right to privacy, Monaco's refusal to leave and the subsequent DUI investigation constituted a search requiring a warrant or an exception to the warrant requirement.¹³⁵

Having determined that Monaco's additional questioning and DUI investigation constituted a search, the Court next considered whether exigent circumstances existed which justified a warrantless search.¹³⁶ The Court noted that an exigent circumstance is one "that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."¹³⁷

Here, the State first argued that Smith's failure to pull over after Monaco initiated a stop constituted a hot pursuit justifying entry onto the property.¹³⁸ The Court found this argument unpersuasive, citing its prior decision in *State v. Sorenson*¹³⁹ in which the Court held that a "hot pursuit justified a warrantless entry only if a felony has been committed and the suspect is fleeing."¹⁴⁰ As Monaco only pursued Smith onto his property for a misdemeanor speeding violation, the circumstances did not amount to a hot pursuit justifying exigent circumstances.¹⁴¹

The State next argued that, had Monaco been forced to obtain a warrant, Smith would have been able to avoid the DUI charge because he could have later claimed that he only consumed alcohol after returning home.¹⁴² The Court again found this argument unpersuasive, noting that at no point prior to entering Smith's driveway did Monaco suspect Smith of driving under the influence.¹⁴³ Specifically, Smith was not driving erratically and Monaco did not smell alcohol on Smith until more than seven minutes after

135. *Id.*

136. *Id.*

137. *Id.* (citing *State v. Wakeford*, 953 P.2d 1065, 1068 (Mont. 1998)).

138. *Id.*

139. 590 P.2d 136 (Mont. 1979).

140. *Q. Smith*, 501 P.3d at 406 (quoting *Sorenson*, 590 P.2d at 139) (internal quotation marks omitted).

141. *Id.*

142. *Id.*

143. *Id.*

his investigation began.¹⁴⁴ Therefore, the Court held that Smith’s failure to stop for a minor traffic violation did not create an exigent circumstance allowing Monaco to conduct a warrantless search after Smith invoked his right to privacy by demanding that Monaco obtain a warrant.¹⁴⁵ On these grounds, the Court reversed and remanded the case to district court with instructions “to enter an order suppressing all evidence obtained by the officers after they were told to leave Smith’s residence.”¹⁴⁶

Q. Smith is a significant case for Montana practitioners working in criminal law. This decision reinforces the broader protections to privacy guaranteed by the Montana Constitution and clarifies that even when a property is not secluded, fenced off, or marked with “No Trespassing” signs, once the owner invokes their right to privacy, the State risks suppression of the evidence unless it retreats off the property and obtains a warrant before continuing an investigation for misdemeanor offenses.

—Eric Monroe

V. *MONTANA INDEPENDENT LIVING PROJECT, INC. v. CITY OF HELENA*¹⁴⁷

In *Montana Independent Living Project, Inc. v. City of Helena*, the Montana Supreme Court held that the Montana Independent Living Project, Inc. (MILP) was barred from bringing a retaliation claim under the Montana Human Rights Act (MHRA) because the plain language of the statute allows only an “individual”—not a non-human entity—to file retaliation claims.¹⁴⁸

MILP is a state- and federally-funded non-profit and independent living center that advocates for individuals with disabilities in Montana.¹⁴⁹ In 2014, MILP requested funds from the City of Helena (“City”) to purchase a van that could be used when city services were unavailable to transport individuals with disabilities.¹⁵⁰ This request was initially ranked as a top priority for City funding by the Helena Area Transportation Advisory Committee (HATAC), an informal committee of stakeholders that offers non-binding recommendations to the City regarding transportation services.¹⁵¹

144. *Id.*

145. *Id.*

146. *Id.* at 407.

147. 479 P.3d 961 (Mont. 2021).

148. *Id.* at 965.

149. *Id.*

150. *Id.* at 963.

151. *Id.*

On February 17, 2015, MILP filed a complaint with the Montana Human Rights Bureau (HRB) claiming that the City's public transit system had discriminated against people with disabilities by segregating them from others after the City adopted a new series of bus routes.¹⁵² Following MILP's complaint, the City Commission elected to depart from its typical practice of following the HATAC's recommendations, downgraded the priority of MILP's van request, and placed another project ahead of it.¹⁵³ However, despite the City Commission lowering the priority of MILP's request, the Montana Department of Transportation nonetheless funded MILP's request.¹⁵⁴

After the City downgraded MILP's request, MILP withdrew its initial complaint with the HRB and filed a new complaint alleging that the City had violated the MHRA when it retaliated against MILP by lowering the priority of their request as a direct result of MILP filing a complaint with the HRB.¹⁵⁵

As part of its investigation, MILP discovered and produced e-mails and other communications which it alleged showed animus and discriminatory behavior toward MILP and its Chief Executive Officer, Robert Maffit.¹⁵⁶ However, despite MILP's production of the e-mails and communications, the HRB found there was "no reasonable cause to believe the City had retaliated against either MILP or Maffit."¹⁵⁷ Additionally, the HRB concluded that because MILP was a corporation and not an individual, MILP did not have standing to file a retaliation complaint under the MHRA.¹⁵⁸ The relevant section of the MHRA states that it is an unlawful discriminatory practice for a governmental entity or agency to "discharge, expel, blacklist, or otherwise discriminate against an *individual* because the individual has . . . filed a complaint . . . under this chapter."¹⁵⁹ The term "individual" is not defined in the MHRA, and the HRB interpreted this provision to mean that non-human entities do not qualify as individuals and are therefore barred from filing retaliation complaints under this section.¹⁶⁰

Following the HRB's decision, MILP and Maffit brought an action in district court seeking a judicial determination that the HRB's decision was "unlawful, incorrect, and an abuse of discretion."¹⁶¹ The City moved to

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (citing MONT. CODE ANN. § 49-2-301 (2021)).

159. MONT. CODE ANN. § 49-2-301 (emphasis added).

160. *Mont. Indep. Living Project, Inc.*, 479 P.3d at 963–64.

161. *Id.* at 963.

dismiss MILP's retaliation action for failure to state a claim, which the district court granted on November 18, 2019.¹⁶² In granting the City's motion to dismiss, the district court agreed with the HRB that the MHRA "does not allow non-human entities to sue for retaliation," and therefore, that MILP had no standing.¹⁶³ MILP appealed this decision to the Montana Supreme Court and asked the Court to determine whether the language of the MHRA under § 49-2-301 prevented non-human entities from filing complaints for retaliation.¹⁶⁴

The Montana Supreme Court reviews *de novo* a district court's ruling on a motion to dismiss.¹⁶⁵ Furthermore, interpretation of a statute is a question of law which the Court also reviews *de novo*.¹⁶⁶

MILP first argued that the district court erred in failing to conform its interpretation of the statutory language to the MHRA's "broad purpose and legislative history," and because its conclusion did not comport with "federal authority that supports a broad implied right of action for retaliation."¹⁶⁷ While the Montana Supreme Court agreed that the MHRA's protection from discrimination is broad, the Court also noted that, although "person" is defined in the statute, the MHRA does not define "individual."¹⁶⁸ Therefore, the Court turned to the plain language of the statute to determine whether the language was "clear and unambiguous"—in which case, no further interpretation would be required.¹⁶⁹

Here, the Court found that the language of § 49-2-301 "clearly and unambiguously prohibits a 'person' from retaliating against an 'individual,'" and because the statute uses both "person" and "individual," the statute clearly draws a distinction between the two.¹⁷⁰ Specifically, the Court noted that "[w]hen the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings."¹⁷¹ The Court reasoned that because "person" is defined under the MHRA to include both "individuals" and non-human entities, the inclusion of "individual" in § 49-2-301 would be unnecessary and redundant unless the legislature specifically intended to distinguish the two.¹⁷² Thus, the Court concluded that the legislature's inclusion of "individual" in the lan-

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* (quoting *Hein v. Scott*, 353 P.3d 494, 497 (Mont. 2015)).

166. *Id.* (quoting *Bates v. Neva*, 339 P.3d 1265, 1267 (Mont. 2014)).

167. *Id.* at 964.

168. *Id.*

169. *Id.* (citing *Gannett Satellite Info. Network, Inc. v. State*, 201 P.3d 132, 135 (Mont. 2009)).

170. *Id.*

171. *Id.* (citing *Densley v. Dep't of Ret. Sys.*, 173 P.3d 885, 889 (Wash. 2007)).

172. *Id.* at 964–65.

guage of the statute was clearly and unambiguously intended to exclude non-human entities.¹⁷³

MILP next argued that the use of the word “individual” was irrelevant because, in a different section of the MHRA, § 49-2-501(1) allows a “person” harmed by a discriminatory practice to file a complaint under the MHRA.¹⁷⁴ However, the Court found that MILP had misread the language of the statute and that, in fact, a “person” is permitted to file a complaint “only if the person suffers a ‘Prohibited Discriminatory Practice’ as defined by Part 3 of the MHRA.”¹⁷⁵ The Court found MILP’s argument unpersuasive when noting that the “prohibited practices” described in § 49-2-301 proscribe retaliation against “an individual” and, therefore, “the law makes retaliation a prohibited practice only when the retaliation is directed at an individual.”¹⁷⁶

Finally, MILP argued that if the MHRA did not support an implied right of action for non-human entities to file retaliation claims, federal authority did.¹⁷⁷ However, the Court found that, because the statute clearly and unambiguously bars claims by non-human entities, the Court did not need to address MILP’s argument regarding other federal authority interpreting the meaning of an “individual.”¹⁷⁸ Thus, the Court held that the district court was correct in finding that § 49-2-301 does not permit non-human entities to file retaliation claims under the MHRA and that the plain language of the statute allows only a “natural human person”—an “individual”—to seek a remedy for retaliation.¹⁷⁹

Montana Independent Living Project, Inc. is a significant case for Montana practitioners working in civil law. The Montana Supreme Court’s decision makes clear that the MHRA does not permit non-human entities to bring claims seeking redress for retaliation. Unless the statute’s language is amended to remove “individual” or else add a definition of “individual” that includes non-human entities, such entities will be unable to bring a claim of retaliation under the MHRA.

—Eric Monroe

173. *Id.* at 965.

174. *Id.*; see also MONT. CODE ANN. § 49-2-501(1) (2021) (“A person claiming to be aggrieved by any discriminatory practice prohibited by this chapter may file a complaint with the department.”).

175. *Mont. Indep. Living Project, Inc.*, 479 P.3d at 965 (citing MONT. CODE ANN. § 49-2-301).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

VI. *CHILDRESS V. COSTCO WHOLESALE CORP.*¹⁸⁰

In an original proceeding, the Montana Supreme Court answered a legal question of first impression certified by the United States Court of Appeals for the Ninth Circuit: Whether, under Montana law, parasitic emotional distress damages are available for an underlying negligence claim for personal property damage.¹⁸¹ The Court, in a unanimous opinion penned by Senior Associate Justice Jim Rice, answered in the negative and declined to extend claims for parasitic emotional distress damages to cases where the underlying claim is damage to or loss of personal property as a result of negligent conduct.¹⁸²

As a general matter, parasitic emotional distress damages are a category of damages, not a separate claim—sometimes considered a damage award’s “peripheral element.”¹⁸³ Parasitic emotional distress damages may also be termed “loss of enjoyment of life,” “emotional damages,” or “hedonic damages.”¹⁸⁴ These damages occur, and may be claimed, as a result of some negligently inflicted physical injury.¹⁸⁵ But what exactly constitutes parasitic emotional distress damages varies across jurisdictions—the common denominator being that these damages must have a “host” claim within which to attach.¹⁸⁶ What constitutes a proper “host” claim also varies across jurisdictions; there are limits on what causes of action may serve as actionable “host” claims.¹⁸⁷ Ultimately, awarding parasitic damages continues to be debated, and the legal landscape is fraught over how to handle awards of the same.¹⁸⁸ One scholar notes that the increasing prevalence of such awards may be due to the shift in tort law “from formalistic limitations on liability toward making the plaintiff whole. This focus on wholeness inevitably has come to encompass parasitic emotional harms.”¹⁸⁹

180. 493 P.3d 314 (Mont. 2021).

181. *Id.* at 314.

182. *Id.* at 318.

183. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 831 (2007).

184. *Id.*

185. *Id.*

186. *See id.* at App. D.

187. *See id.*

188. Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605, 2610 (2015) (explaining the “brief but complicated history of emotional harm claims,” distinguishing between awards for “parasitic harm to personal injury or property damage claims” and stand-alone claims for emotional distress, and discussing that the common law “traditionally recognized emotional harm claims as a component of trespassory torts . . . allowing the presumption of damages without a showing of related physical injury”).

189. Kircher, *supra* note 183, at 837.

A. Background

On September 23, 2016, Randall and Claudia Childress (“Childresses”) took their car to Costco Wholesale Tire Center (“Costco”) in Missoula to get its tires rotated before heading back home to Pritchard, Idaho.¹⁹⁰ The Childresses went to pick up their car following the service, only to discover that a Costco employee had mistakenly given its keys to a man pretending to be the Childresses’ son, who then drove the car away.¹⁹¹ Located at a truck stop a short time later, the vehicle was abandoned and several items were missing, including a handgun, ammunition, a house key, and documents containing the Childresses’ home address.¹⁹²

Following the occurrence, Costco prepared an incident report wherein it indicated that its employee caused the damage.¹⁹³ Costco also paid for a rental car, paid for the Childresses’ car to be detailed, and asked the Childresses to keep track of other expenses with the intent of later reimbursing them.¹⁹⁴ The Childresses, out of fear of returning home, spent roughly five days traveling between Idaho and Eastern Washington.¹⁹⁵ When they did return home, the Childresses submitted a demand to Costco for an additional \$4,195.48, which purported to cover costs associated with the rekeying of their car, trailer, and home, as well as replacing items stolen from the vehicle and travel expenses from the preceding five days.¹⁹⁶ The parties negotiated this figure down to a payment of \$3,480 in exchange for a signed release; the Childresses took the signed release to an attorney for review, thereafter seeking—albeit unsuccessfully—an increased demand.¹⁹⁷

B. Procedural Posture

The Childresses subsequently filed suit against Costco in the United States District Court for the District of Montana, Missoula Division, alleging negligence, bailment, negligent infliction of emotional distress (NIED), and negligent training and supervision.¹⁹⁸ The Childresses ultimately proceeded to trial on the negligence and bailment claims.¹⁹⁹ At trial, the Childresses presented evidence that Randall Childress—who had previously

190. Order and Opinion at 2, *Childress v. Costco Wholesale Corp.*, No. CV-18-183-M-DWM (D. Mont. Apr. 2, 2019), <https://perma.cc/V9CY-BGPR>.

191. *Id.*

192. Order at 1, *Childress v. Costco Wholesale Corp.*, No. CV-18-183-M-DWM (D. Mont. Dec. 21, 2021), <https://perma.cc/GJX8-T3SL>.

193. Order and Opinion, *supra* note 190, at 2.

194. *Id.*

195. *Id.*

196. *Id.* at 2–3.

197. *Id.* at 3.

198. Order, *supra* note 192, at 1–2.

199. *Id.* at 2.

suffered post-traumatic stress disorder (PTSD) following his military service in Vietnam—had experienced exacerbated symptoms as a result of the event.²⁰⁰ Additionally, the Childresses presented evidence that Claudia Childress subsequently suffered from stress, sleeplessness, fear, and nightmares.²⁰¹

Following closing arguments, but before the court issued jury instructions, Costco moved to exclude any claim for emotional distress damages on grounds that Montana law did not allow claims of negligent damage to personal property to serve as a host claim for parasitic emotional distress damages.²⁰² Over Costco's objection, the district court instructed the jury that if it found for the Childresses on the negligence claim, then it also "must determine the amount of damages" for any injury caused as a result of Costco's negligence.²⁰³ In doing so, the federal district court gave the jury an instruction outlining "Emotional Distress – Generally."²⁰⁴ Under the parameters of this instruction, emotional distress includes "the mental, physical, and emotional pain and suffering experienced and that with reasonable probability will be experienced in the future."²⁰⁵ The jury verdict held Costco liable on both bailment and negligence, and awarded "non-property" damages as to the latter.²⁰⁶

Thereafter, Costco appealed to the United States Court of Appeals for the Ninth Circuit, with the central issue being whether the standard outlined in the district court's jury instruction was properly applied in determining the parasitic emotional distress damage award when the original "host" cause of action—Randall's independent NIED claim—had been withdrawn.²⁰⁷ Costco argued the district court violated Montana law by allowing the jury to assign a "non-property" damages award—which effectively awarded parasitic emotional distress damages.²⁰⁸ Costco argued this violated Montana law because the award was based solely on negligent damage to personal property and no precedent existed in Montana for negligent property damage to act as a host for an award of parasitic damages.²⁰⁹ The Childresses argued the district court did not err in instructing the jury,

200. *Childress v. Costco Wholesale Corp.*, 978 F.3d 664, 666 (9th Cir. 2020).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 666–67 (noting that the jury instruction issued by the district court was modified from MONT. PATTERN JURY INSTR. 25.02, "Personal Injury (Emotional Distress - Generally)").

205. *Id.*

206. *Id.* at 667 (noting that the jury awarded \$2,278.43 in property damages on the bailment claim and \$62,750 in unspecified, non-property damages on the negligence claim).

207. Opening Brief of Defendant-Appellant at 10, *Childress v. Costco Wholesale Corp.*, 978 F.3d 664 (9th Cir. 2020) (No. 19-35441, 19-35493) [hereinafter Appellant's Brief].

208. *Id.* at 1.

209. *Id.*

and that the proper requisite standard for an award of parasitic emotional distress damages is a showing that the negligent conduct caused some property or monetary damage.²¹⁰

The Ninth Circuit answered Costco's appeal by certifying a question of law—in “the spirit of comity and federalism,” and pursuant to Rule 15 of the Montana Rules of Appellate Procedure—to the Montana Supreme Court.²¹¹ The court of appeals stated “whether parasitic emotional distress damages are available for an underlying negligence claim for personal property damage or loss presents important policy ramifications for Montana that have not yet been resolved by the Montana Supreme Court.”²¹² The Montana Supreme Court accepted the certified question and approved a scheduling order roughly three months later.²¹³

C. *Original Proceeding at the Montana Supreme Court*

Costco presented several arguments in its briefing to the Montana Supreme Court. First, Costco argued that parasitic emotional distress damages may not be recovered when the underlying “host” claim is negligent damage to personal property.²¹⁴ Costco noted the Montana Supreme Court has specifically held that emotional distress damages, as a matter of law, are not appropriate in all cases,²¹⁵ and further cited the Restatement (Third) of Torts for the long-standing rule that “[r]ecovery for emotional harm resulting from negligently caused harm to personal property is not permitted.”²¹⁶

Second, Costco argued that Montana law requires a heightened standard of proof for independent NIED claims.²¹⁷ In *Sacco v. High Country Independent Press, Inc.*,²¹⁸ the Montana Supreme Court held that NIED can sometimes stand as an independent cause of action, but only in “circumstances where *serious or severe* emotional distress to the plaintiff was the

210. Appellee Childresses' Answering Brief at 19, *Childress v. Costco Wholesale Corp.*, 978 F.3d 664 (9th Cir. 2020) (No. 19-35441, 19-35493).

211. *Childress*, 978 F.3d at 665.

212. *Id.*; see also Katrina Thorness, Preview, *Childress v. Costco Wholesale Corp.: Parasitic Emotional Distress – Will Montana Courts Soon Be Flooded by Litigation over Hurt Feelings?*, 81 MONT. L. REV. ONLINE 24, 30 (2020), <https://perma.cc/8KP6-6EV4> (previewing the parties' oral argument before the Ninth Circuit, noting “it is less likely that the Ninth Circuit will certify the question to the Montana Supreme Court, because the question present[ed] is based on case law, not a bill enacted by the Montana Legislature,” and predicting that the court of appeals would dispose of the case procedurally by reversing the district court and granting Costco's request for a new trial).

213. Order at 1, *Childress v. Costco Wholesale Corp.*, 493 P.3d 314 (Mont. 2021) (No. OP 20-0526).

214. Costco's Opening Brief on Certified Question at 11, *Childress v. Costco Wholesale Corp.*, 493 P.3d 314 (Mont. 2021) (No. OP 20-0526), <https://perma.cc/889H-YGYF> [hereinafter Opening Brief].

215. *Id.* at 9 (citing *Maloney v. Home Investment Center, Inc.*, 994 P.2d 1124 (Mont. 2000)).

216. *Id.* at 11 (citing RESTATEMENT (THIRD) OF TORTS § 47 cmt. m (AM. LAW INST. 2013)).

217. *Id.* at 13.

218. 896 P.2d 411 (Mont. 1995).

reasonably foreseeable consequence of the defendant's negligent act or omission."²¹⁹ Costco argued that to allow Claudia's recovery for parasitic damages would effectively include emotional distress as an element of a compensatory damage award, and void *Sacco's* "serious or severe" standard.²²⁰ Costco posited that such nullification of long-standing precedent would open the floodgates on emotional distress claims.²²¹ Finally, Costco argued that just because claims for parasitic emotional distress damages have been allowed in certain types of cases, namely—bad faith insurance,²²² civil rights or discrimination,²²³ and loss of use and enjoyment of real property²²⁴—this did not mean that emotional distress damages were available for "any and all torts" under Montana law.²²⁵

In reply, the Childresses argued that the controlling principle under Montana law was that the severity of the harm governs the amount—not the availability—of recovery for parasitic emotional distress damages.²²⁶ The Childresses argued that *Jacobsen v. Allstate*²²⁷ created a bright-line rule affirming the proposition that recovering damages in cases of parasitic emotional distress does not require the heightened showing outlined in *Sacco*.²²⁸ In *Jacobsen* and its progeny, the Montana Supreme Court declined to apply *Sacco's* heightened standard of proof and held that "the 'serious or severe' standard announced in *Sacco* applies only to independent claims of negligent or intentional infliction of emotional distress."²²⁹ The *Jacobsen* court went on to adopt the standard in Montana Pattern Jury Instruction 25.02—the same instruction the United States District Court approved at trial when it instructed the jury on emotional distress—that there is no "definite standard by which to calculate compensation for mental and emotional suffering and distress."²³⁰ Simply put, the Childresses maintained that *Jacobsen*

219. *Id.* at 421–22 (emphasis added).

220. Opening Brief, *supra* note 214, at 13.

221. *Id.* at 23; *see also Sacco*, 896 P.2d at 425–26 ("Concern over a floodgate of claims for emotional distress, particularly fraudulent claims, is alleviated by the necessity to prove that the emotional distress suffered is severe or serious. . . . Concern over seemingly unlimited liability for defendants is alleviated by the necessity of demonstrating that plaintiff's serious or severe emotional distress was the reasonably foreseeable consequence of defendant's negligent act or omission.").

222. Opening Brief, *supra* note 214, at 14–15 (citing *Jacobsen v. Allstate*, 215 P.3d 649 (Mont. 2009) (recognizing claims for emotional distress parasitic damages under the Unfair Trade Practices Act)).

223. *Id.* at 14 (citing *Vortex Fishing Systems v. Foss*, 38 P.3d 836 (Mont. 2001)).

224. *Id.* (citing *Maloney v. Home Investment Center, Inc.*, 994 P.2d 1124, 1137 (Mont. 2000)).

225. *Id.*

226. Childresses' Principal Brief at 9, *Childress v. Costco Wholesale Corp.*, 493 P.3d 314 (Mont. 2021) (No. OP 20-0526), <https://perma.cc/LX7N-7WZS> [hereinafter Principal Brief].

227. 215 P.3d 649 (Mont. 2009).

228. Principal Brief, *supra* note 226, at 9.

229. *Id.* at 13 (citing *Jacobsen*, 215 P.3d at 664).

230. MONT. PATTERN JURY INSTR. CIV. 25.02 (2d ed. 2003).

remains good law and should be extended to allow parasitic emotional damage awards where that emotional distress is hosted by a claim of negligent damage to personal property.²³¹

The arguments before the Court were conflated in that the parties were not arguing or disagreeing on the same underlying issue. Costco maintained that there was *no basis whatsoever* in Montana law for an award of parasitic emotional distress damages to attach where negligence results in damage to personal property.²³² Costco argued that, absent a proper “host” claim, the Childresses’ only option was to maintain an independent claim of NIED—which would fail, since the severity of the emotional harm would not pass muster under *Sacco*’s “serious or severe” requirement.²³³ On the other hand, the Childresses argued that the availability for damages existed *de facto*, and based this argument on two key premises.²³⁴ First, damages are automatically available because harm occurred as a result of negligence, and the severity of that harm controls the amount to be awarded, thus rendering *Sacco* inapplicable.²³⁵ Second, a separate line of Montana precedent, spawning from *Jacobsen*, affirmed “the proposition that parasitic emotional distress damages do not require a special showing of ‘serious or severe’ harm.”²³⁶

The Montana Supreme Court sided with Costco,²³⁷ taking issue with the federal district court’s “off-the-cuff remarks,” specifically, that the distinction between real and personal property is one “that doesn’t have much of a difference.”²³⁸ On the contrary, the Court in this case deemed the differences between real and personal property to be quite notable.²³⁹ In mak-

231. Principal Brief, *supra* note 226, at 14.

232. Opening Brief, *supra* note 214, at 8 (“There is no precedent in Montana, or elsewhere, allowing a parasitic claim for emotional distress damages premised only upon damage to personal property.”).

233. *Id.* (“Allowing a plaintiff to maintain a parasitic emotional distress claim arising solely from personal property damage and without a negligent infliction of emotional distress claim is contrary to Montana law and nullifies the heightened liability standard set by the Montana Supreme Court in *Sacco*.”).

234. *See* Principal Brief, *supra* note 226, at 17–18.

235. *Id.* (citing *White v. Longley*, 244 P.3d 753, 762–63 (Mont. 2010)) (“Instead, ‘the severity of the distress affects the amount of damages recovered but not the underlying entitlement to recover’.”).

236. Principal Brief, *supra* note 226, at 18 (citing *White*, 244 P.3d at 762–63) (“The *Jacobsen* decision consisted of a very careful effort by the Court to review the case law and clarify confusion over ‘parasitic claims’ for emotional distress. It held: *Sacco*’s ‘heightened standard threshold’ of ‘serious or severe’ does not apply.”).

237. Order, *supra* note 192, at 5–6. *See also* Memorandum at 2, *Childress v. Costco Wholesale Corp.*, No. 19-35441 (9th Cir. Oct. 26, 2021), <https://perma.cc/5SAV-C2ET> (vacating the \$62,750 negligent damages award and remanded the case to federal district court); *Childress v. Costco Wholesale Corp.*, 340 F.R.D. 398, 398 (D. Mont. 2022) (Childresses ultimately recovering an award for bailment damages—\$2,278.43).

238. *Childress v. Costco Wholesale Corp.*, 493 P.3d 314, 317 (Mont. 2021).

239. *Id.* (“A review of our precedent reveals that we have differentiated between real and personal property, extending parasitic emotional distress damages to the loss of the use and enjoyment of land;

ing this distinction, the Court essentially accepted Costco’s argument that “American society is more likely to consider real property to be tied to a person’s identity,” when compared with personal property.²⁴⁰ The Court “foreclosed parasitic emotional distress as an element of damages for loss to personal property,” concluding there was no evidence that the stolen items in this case were “so intrinsically intertwined with the Childress family dynamic that without these articles their ‘personal identity’ would be irreparably impacted.”²⁴¹

D. Conclusion

Ultimately, the outcome in this case was determined by the fact that the Childresses failed to allege a claim at trial within which parasitic emotional distress damages may be available, and that they further failed to prove “a subjective relationship with the property on a ‘personal-identity’ level.”²⁴² Practitioners seeking an award for parasitic emotional distress damages should note that the Montana Supreme Court has now made clear that where the harm is caused by the deprivation of “fungible property whose value is derived from its utility, not for its intrinsic value,” an award for parasitic emotional distress damages will be unavailable.²⁴³ Practitioners seeking an award of parasitic emotional distress damages should creatively paint their arguments within the Court’s lines of a “personal-identity” property concept.²⁴⁴

—Marti A. Liechty

VII. *McLAUGHLIN V. MONTANA STATE LEGISLATURE*²⁴⁵

The Montana Supreme Court formidably exercised its power of original jurisdiction when it quashed a series of subpoenas issued by the Montana State Legislature to Montana’s Judicial Branch. Two separate Montana Supreme Court opinions resulted from the facts of this case and will be addressed in turn.

but we have never explicitly foreclosed parasitic emotional distress as an element of damage for loss to personal property.”).

240. Opening Brief, *supra* note 214, at 20.

241. *Childress*, 493 P.3d at 318.

242. *Id.* (citing Margaret Jane Radin, *Property and Personhood*, 34 STAN L. REV. 957, 1005 (1982)).

243. *Id.*

244. *Id.* at 317 (citing Radin, *supra* note 242, at 1002–08) (discussing Radin’s distinguishing of “purely economic and fungible property loss—for which courts are reluctant to award emotional distress damages given how easily the property may be replaced—from nonfungible, personal and identifying property loss—which is not readily replaceable, leaving courts more open to emotional distress damages”).

245. 493 P.3d 980 (Mont. 2021) [hereinafter *McLaughlin II*].

The Legislature issued two subpoenas to Misty Ann Giles, Director of the Montana Department of Administration (DOA),²⁴⁶ another to the Montana Supreme Court Administrator, Beth McLaughlin,²⁴⁷ and even subpoenaed the Justices themselves.²⁴⁸ The subpoenas all essentially pertained to, and purported to recover, the same information—the substantive results of a survey that polled select members of Montana’s judiciary.²⁴⁹ The Montana Judges Association (MJA), through McLaughlin, surveyed its members regarding Senate Bill 140, which the Legislature was considering at the time the survey was administered and has since been signed into law.²⁵⁰ After learning of the poll and expressing concern that engagement with the same could compromise future judicial impartiality, the Legislature requested and received the final results of the poll from McLaughlin; upon requesting more, the Legislature learned that some of the MJA member email responses had been deleted in accordance with administrative routine.²⁵¹ The subpoenas sought production of all existing and recoverable emails and attachments; although the requests were temporally limited to the time that the poll was administered, the subpoenas did not indicate a similar limitation with respect to subject matter.²⁵²

Following the first subpoena’s issuance and McLaughlin’s subsequent emergency motion to quash it, the Montana Supreme Court approved a temporary order quashing the subpoena, but not before DOA had already begun producing documents—with more than 5,000 Judicial Branch emails disclosed to the Legislature in less than one day.²⁵³ The day following the temporary order, the Legislature informed the Court it “does not recognize this Court’s order as binding and will not abide [by] it. . . . The subpoena is

246. See Petition for Original Jurisdiction and Emergency Request to Quash/Enjoin Enforcement of Legis. Subpoena at Ex. A, *McLaughlin v. Mont. State Leg.*, 489 P.3d 482 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/79AD-6SV5> (first subpoena demanding production of all emails and documents sent to or received by McLaughlin over a three-month period) [hereinafter Petition for Original Jurisdiction]; Petitioner’s Notice of Additional Legislative Subpoena at Ex. A, *McLaughlin v. Mont. State Leg.*, 489 P.3d 482 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/MW8D-WZ3V> (second subpoena requiring Giles’s appearance and production of documents by that afternoon).

247. See Emergency Motion to Quash Revised Legis. Subpoena at 3, *Brown v. Gianforte*, 488 P.3d 548 (Mont. 2021) (OP 21-0125), <https://perma.cc/72TL-TBGU>.

248. See Motion to Disqualify Justices at 5, *McLaughlin v. Mont. State Leg.*, 489 P.3d 482 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/R9XN-CLDC>.

249. *McLaughlin v. Mont. State Leg.*, 489 P.3d 482, 483 (Mont. 2021) [hereinafter *McLaughlin I*].

250. *Id.*; see also *Brown v. Gianforte*, 488 P.3d 548, 560 (Mont. 2021) (upholding the constitutionality of Senate Bill 140, which abolished the Judicial Nominating Commission); cf. J.T. Stepleton, *Judging on the Merits: Reconsidering Brown v. Gianforte and the Elimination of the Montana Judicial Nominating Commission*, 83 MONT. L. REV. 379 (2022) (arguing for reconsideration of *Brown* on the basis that it contradicts the intentions of the framers of Montana’s 1972 Constitution and neglects to analyze key “ramification-era documents”).

251. *McLaughlin I*, 489 P.3d at 483.

252. *Id.*

253. *Id.*

valid and will be enforced.”²⁵⁴ That same day, McLaughlin filed a petition to permanently enjoin the subpoena’s enforcement.²⁵⁵

Two days later, the Legislature served subpoenas on each individual Montana Supreme Court justice—informing the justices that they were required to appear before the Legislature and produce various communications to the Legislature, such as those related to any polls sent to members of the Judicial Branch and any communication among the justices regarding pending legislation.²⁵⁶

Following the Legislature serving the justices with subpoenas, the Montana Department of Justice sent additional correspondence to the Court addressing several points.²⁵⁷ First, this correspondence appeared to notify the bench of the justices’ individual requirements to respond to the request of the Special Joint Select Committee on Judicial Transparency and Accountability (the “Special Committee”).²⁵⁸ Second, it fundamentally disputed the temporary order—stating that “[t]he Court here lays claim to sole authority over provision of due process for all branches of government, which is ludicrous”—and further insisted that “the entirety of the legislative session is one giant exercise in due process.”²⁵⁹ Ultimately, every justice appeared before the Legislature and answered questions relating to the Special Committee’s investigation into alleged judicial misconduct.²⁶⁰

A. McLaughlin I

Before the Court could resolve the subpoena dispute on its merits, the Court first needed to resolve issues of procedure—in *McLaughlin I*.²⁶¹ The Legislature, through its counsel at the Department of Justice, moved to disqualify the entire bench from hearing the case, challenging whether the justices could maintain neutrality given the Court’s “obvious interest in providing a specific answer to that dusty old legal question about the scope of legislative subpoena power.”²⁶² McLaughlin opposed the motion on grounds that “the Legislature simply assumes the Court is corruptible in this

254. Petition for Original Jurisdiction, *supra* note 246, at Ex. C-2, available at <https://perma.cc/M3ED-QW49>.

255. *McLaughlin I*, 489 P.3d at 484.

256. *Id.*

257. Correspondence from Lt. Gen. Kristin Hansen to the Justices of the Mont. Sup. Ct. at 1, *McLaughlin v. Mont. State Leg.*, 489 P.3d 482 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/X6AS-WKEF> [hereinafter Hansen Correspondence].

258. *Id.* at 2.

259. *Id.* (taking the position that while judges are included in the administration of due process, “their opportunity is limited by their special duty of impartiality in decision-making”).

260. *McLaughlin I*, 489 P.3d at 485.

261. *See id.* at 489.

262. Mont. State Leg.’s Petition for Rehearing Regarding the Court’s May 12 Order at 5, *McLaughlin v. Mont. State Leg.*, 493 P.3d 980 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/8KCK-P9WZ>.

case because it has a relationship with McLaughlin,” and instead advanced the position that “[c]onfidences in the justices’ integrity ‘cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor’.”²⁶³

In denying the Legislature’s motion, the Court reasoned that “[t]he Legislature’s blanket request to disqualify all members of this Court appears to be directed to disrupt the normal process of a tribunal whose function is to adjudicate the underlying dispute consistent with the law, the constitution, and due process.”²⁶⁴ The Court further rejected the Legislature’s argument that “due process does not allow a judge to be a judge in his own case.”²⁶⁵ The Court determined that the “expansive and overarching nature” of the Legislature’s investigation would effectively disqualify every Montana judge from adjudicating the substance of these claims.²⁶⁶ Thus, the Court invoked the Rule of Necessity to conclude that none of the justices should be disqualified.²⁶⁷ The bench unanimously agreed that the Legislature had issued subpoenas upon them personally to create the appearance of a conflict, and concluded that “succumb[ing] to the Legislature’s request” would relieve the Court of its “responsibilities and obligations.”²⁶⁸

After issuing its opinion in *McLaughlin I*, the Court received correspondence from Attorney General Austin Knudsen, accusing the Court of making “thinly veiled threats and attacks on the professional integrity of attorneys” in his office, and further insisted:

[W]hile this dispute is extraordinary and troubling, please refrain from threatening or maligning the integrity of my attorneys who are assiduously living up to their ethical obligations under unusual circumstances. If you wish to vent any further frustrations about the conduct of attorneys in my office, I invite you to contact me directly.²⁶⁹

263. Petitioner’s Response to Respondent’s Motion to Disqualify Justices at 2–3, *McLaughlin v. Mont. State Leg.*, 489 P.3d 482 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/6XPY-XX34> (citing *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 916 (2009)).

264. *McLaughlin I*, 489 P.3d at 486–87.

265. *Id.* at 486.

266. *Id.*

267. *Id.* at 487 (citing 2 H. Rolle, *An Abridgment of Many Cases & Resolutions at Common Law* 93 (1668) (translation)) (applying the Rule of Necessity to conclude that none of the justices would be disqualified from adjudicating the case on the merits, and noting the Rule emanated from a 1430 Chancellor of Oxford ruling that “if an action is sued in the bench against all Judges there, then by necessity they shall be their own judges”).

268. *Id.* at 489 (with District Judge Donald Harris sitting by designation for Justice Jim Rice, who had recused himself). See also *DOJ Statement on Justice Rice Recusal*, MONT. DEP’T OF JUSTICE (May 5, 2021), available at <https://perma.cc/NP37-Z83Q> (“Justice Rice reaffirmed his integrity and the fundamental principle of justice—that no one should be the judge in their own case. I hope is colleagues [*sic*] on the Supreme Court will exhibit the same courage and character.”).

269. Correspondence from Att’y Gen. Austin Knudsen to the Chief Justice, Assoc. Justices, and Judge Harris at 2, *McLaughlin v. Mont. State Leg.*, 493 P.3d 980 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/4H22-V4YR>; see also Mara Silvers, *How Austin Knudsen is flipping the script of attorney*

The Legislature continued to maintain that judicial proceedings were not the proper forum for resolving these disputes,²⁷⁰ and subsequently petitioned for a rehearing, imploring that “the Court must therefore forgive the Legislature if reasonable doubt persists about the Court’s statements and ability to fairly adjudicate its dispute.”²⁷¹

McLaughlin opposed the petition, arguing that the Legislature’s purpose “can only be political because, as a legal matter, it completely fails to satisfy” the necessary legal standard of review.²⁷² The Court denied the Legislature’s petition for rehearing,²⁷³ agreeing in essence with McLaughlin’s argument that “the petition merely disagrees with the Court’s rationale and takes a new swing with the same bat.”²⁷⁴

Two weeks later, the Legislature moved to dismiss the action as moot, on grounds it had rescinded and withdrawn all the subpoenas “as a measure of good faith that will hopefully encourage the judiciary to interact in good faith with its sister branch of government.”²⁷⁵ McLaughlin opposed the Legislature’s motion to dismiss, arguing exceptions to the mootness doctrine rendered the Legislature’s efforts immaterial at this stage of the proceedings.²⁷⁶ McLaughlin noted, “Montana has almost no case law addressing the scope of legislative subpoena power. An answer to the pending legal questions will benefit state officials”²⁷⁷

The Court denied the Legislature’s motion to dismiss, concluding that withdrawal of the subpoenas did not impact the already-existing litiga-

general, MONT. FREE PRESS (June 15, 2021), <https://perma.cc/F3WL-BV8X> (“A notable number of his fellow attorneys agree that Knudsen has upended the norms and standards of his office. In doing so, some contend, Knudsen and his staff are undermining the very legal system they are sworn to protect, with potentially profound consequences. . . . [But according to Knudsen,] ‘Montanans had the chance to vote for status quo a couple different times in the AG’s race. They didn’t do it. . . . I’m an aggressive guy. I think people knew what they were voting for with me.’” (internal quotation marks omitted)).

270. Mont. State Leg.’s Petition for Rehearing Regarding the Court’s May 12 Order, *supra* note 262, at 9 (“This interbranch dispute should not be settled judicially . . .”).

271. *Id.* at 7.

272. Petitioner’s Response to Respondent’s Petition for Rehearing at 1, *McLaughlin v. Mont. State Leg.*, 493 P.3d 980 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/LKQ7-XWHA>.

273. Order Denying Petition for Rehearing at 1, *McLaughlin v. Mont. State Leg.*, 493 P.3d 980 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/LFB6-U777>.

274. Petitioner’s Response to Respondent’s Petition for Rehearing, *supra* note 272, at 1.

275. Mont. State Leg.’s Motion to Dismiss as Moot at 2, *McLaughlin v. Mont. State Leg.*, 493 P.3d 980 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/RH4M-KREQ>.

276. Petitioner’s Response to Respondent’s Motion to Dismiss as Moot at 3, *McLaughlin v. Mont. State Leg.*, 493 P.3d 980 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/M2S7-KR2K> (citing *Havre Daily News, LLC v. City of Havre*, 142 P.3d 864, 867–79 (Mont. 2006)) (stating that the recognized exceptions to the mootness doctrine are “public interest,” “voluntary cessation,” and “capable of repetition, but evading review”).

277. *Id.*

tion,²⁷⁸ and exhibited skepticism that the issues of the case were fully resolved.²⁷⁹ In its order, the Court stated “[t]he Legislature’s decision to act first, and deal with the ramifications later, does not allow it to declare the issue moot when it determines that it has achieved what it wishes.”²⁸⁰

As such, McLaughlin’s petition to quash the subpoenas and enjoin enforcement of the same proceeded for adjudication on its merits.²⁸¹

B. McLaughlin II

Associate Justice Beth Baker’s unanimous majority opinion had two primary holdings. First, the Court held that the subpoenas were invalid as a result of being “impermissibly overbroad,” seeking to “expand the scope of legislative authority.”²⁸² Second, if the Legislature seeks to subpoena a state officer’s records, Montana courts “must conduct any needed *in camera* review and balance competing privacy and security interests” to determine whether redactions are necessary.²⁸³

The Court’s discussion began by noting that the Montana Constitution contains no specific legislative investigatory power.²⁸⁴ Although this power has been held to be inherently implied by Article V, Section 1,²⁸⁵ the Legislature here issued subpoenas pursuant to statutory authority.²⁸⁶ Additionally, as the Court noted, “[t]he legislative branch is not a law enforcement agency; its inquiry must be related to, and in furtherance of, a legitimate task of the [Legislature].”²⁸⁷ According to the Court, a subpoena serves a legitimate task, or “valid legislative purpose,” when it concerns “a subject

278. Order Denying Motion to Dismiss at 2, *McLaughlin v. Mont. State Leg.*, 493 P.3d 980 (Mont. 2021) (No. OP 21-0173), <https://perma.cc/6YGR-9N6F>.

279. *Id.* at 4 (citing Mont. State Leg.’s Motion to Dismiss as Moot, *supra* note 275, at 4).

280. *Id.* at 3.

281. *See* *McLaughlin v. Mont. State Legislature*, 493 P.3d 980, 983 (Mont. 2021).

282. *Id.*

283. *Id.* at 983, 996 (quoting Comm’r of Political Practices for Mont. v. Mont. Republican Party, 485 P.3d 741, 745 (Mont. 2021)) (“Whenever a government entity seeks to exercise the power of the state to compel an individual . . . to relinquish documents or to appear for examination, due process concerns are necessarily implicated, which in turn necessarily implicates judicial oversight.”).

284. *Id.* at 984–85.

285. *Id.* at 985 (citing Opinion No. 60, 43 Mont. Att’y Gen. Op. 220, 222 (1990), available at <https://perma.cc/3YFV-UHB8>); *see also* *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)) (“This power of inquiry—with processes to enforce it—is an essential and appropriate auxiliary to the legislative function.” (internal quotation marks omitted)).

286. *McLaughlin II*, 493 P.3d at 985 (citing MONT. CODE ANN. § 5-5-101(1) (2021) (“A subpoena requiring the attendance of any witness before either house of the legislature or a committee of either house may be issued by the president of the senate, the speaker of the house, or the presiding officer of any committee before whom the attendance of the witness is desired.”)).

287. *Id.* (internal citation omitted).

on which legislation could be had.”²⁸⁸ Further, when there is a valid legislative purpose, the subpoena must be “no broader than reasonably necessary to support [the] legislative objective.”²⁸⁹ Importantly, “investigations solely conducted for the personal aggrandizement of the investigators or to ‘punish’ those investigated are indefensible. And there is no [legislative] power to expose for the sake of exposure.”²⁹⁰

The Court observed that the Legislature failed to delineate any legislative purpose in its first subpoena, while the revised and subsequent subpoenas stated three core purposes, none of which the Court found to be sufficient: (1) to determine whether legislation pertaining to the Judicial Branch’s records retention protocols should be enacted; (2) to determine whether the Court Administrator performed tasks for the MJA in violation of law; and (3) to determine whether Montana judges responding to MJA polls resulted in improper “pre-judging” of issues related to pending legislation.²⁹¹

The Court disposed of the first purpose after applying the constitutional separation of powers doctrine: “[A]ddressing alleged violations of existing law is an enforcement matter entrusted to the executive, not to the legislative, branch of government.”²⁹² The Court similarly found the second purpose to be invalid, since the Court Administrator “acts within her job duties when she coordinates contact between district court judges and legislatures or conducts a poll to allow district judges, through the Montana Judges Association, to provide the legislature with relevant information regarding how proposed legislation will affect Judicial Branch functions.”²⁹³ Finally, the Court discarded the third proffered purpose by again applying the separation of powers doctrine: “To maintain independence of the judiciary, the Constitution commits the oversight of judges to the judicial branch.”²⁹⁴ The Court further noted the Judicial Standards Commission, not the Legislature, is tasked with investigating the possibility of judicial misconduct.²⁹⁵

288. *Id.*

289. *Id.* at 986 (citing *Trump*, 140 S. Ct. at 2036).

290. *Id.* (citing *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

291. *Id.* at 988.

292. *Id.* at 989 (citing MONT. CODE ANN. §§ 2-6-1002(13), 2-6-1012(1)(e), 3-2-402(1)(a) (2021)) (noting that the definition of public information does not include confidential information, and highlighting that the Judicial Branch already has a prescribed records retention policy).

293. *Id.* at 991 (noting that “district court judges therefore are not ‘lobbying’ when they inform members of the Legislature how proposed legislation will affect the function of the Judicial Branch”).

294. *Id.* at 992.

295. *Id.*; see MONT. CODE JUD. CONDUCT R. 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.”).

As to all three purported “valid legislative purposes,” the Court determined the Legislature wholly failed to “adequately identify its claims and explain how the evidence offered connects to the legislative purpose it puts forth.”²⁹⁶ In the absence of a valid legislative purpose, the Court further noted the scope of the subpoenas “sweep far too broadly,”²⁹⁷ and also failed to “safeguard the process that ordinarily attends the issuance of such compelled process.”²⁹⁸

Finally, the Court addressed the Legislature’s ongoing claim that this matter was not being resolved in the proper forum.²⁹⁹ The opinion acknowledged that there is “likely” a better “place for discussion among the branches,” but exploring such an option was foreclosed when the Legislature “resorted to direct subpoena without opening any such discussion with the Judicial Branch and without even giving notice of the first subpoena.”³⁰⁰

Two concurring opinions accompanied *McLaughlin II*’s majority decision. Associate Justice Laurie McKinnon specially concurred,³⁰¹ and indicated she would apply the separation of powers doctrine to substantially limit the majority’s holding.³⁰² Justice McKinnon reframed the issue as “whether the legislature seeks to investigate misconduct of the Judicial Branch,”³⁰³ and in answering affirmatively, would reach essentially the same result since the Legislature’s end goal “clearly does *not* constitute a ‘valid legislative purpose.’”³⁰⁴ She deprecated the majority for “implicitly lend[ing] credibility and legitimacy to a legislative act which was blatantly

296. *McLaughlin II*, 493 P.3d at 992 (citing *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2036 (2020)).

297. *Id.* at 994.

298. *Id.* at 995 (citing MONT. R. CIV. P. 45) (discussing that the Montana Rules of Civil Procedure require service of a subpoena “no less than 10 days before the commanded production of information”; that the party responsible for issuing the subpoena take “reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena”; and that the subpoena be quashed if it “requires disclosure of privileged or other protected matter, if no exception or waiver applies”).

299. *Id.* at 996 (“Is there nonetheless, as the Legislature suggests, a place for discussion among the branches if it desires more dialogue with the Court or information from the Judicial Branch? Likely so. But that is not what this Petition is about and not what the Legislature suggested when it resorted to direct subpoena without opening any such discussion with the Judicial Branch and without even giving *McLaughlin* notice of the first subpoena.”).

300. *Id.*

301. *Id.* at 997 (McKinnon, J., specially concurring).

302. *Id.* at 1001 (“When addressing a separation of power issue, it is important to understand the branches are to work together to secure a workable government for its citizens, while respecting each branch’s autonomy.”).

303. *Id.* at 997.

304. *Id.* (emphasis in original).

designed to interfere with, if not malign, a coequal and independent branch of government.”³⁰⁵

Associate Justice Dirk Sandefur also concurred, “to call-out what this recklessly ginned-up ‘crisis’ is truly about.”³⁰⁶ He said these matters are “not the result of some petty and obscure turf war,”³⁰⁷ but are about “protecting and preserving the existence and integrity of rule of law under the supreme law of this State for the mutual benefit of all and posterity, *regardless of partisan political stripe, agenda, or divide*.”³⁰⁸ He proclaimed the personal and societal freedoms which inherently accompany existence in a modern civil government would vanish if not for the “preservation and respect for the distinct functions of all three co-equal branches of government.”³⁰⁹ Justice Sandefur concluded that society’s form of constitutional government is “designed to avoid” the fate contemplated by an 1887 adage—that “absolute power corrupts absolutely.”³¹⁰

On Dec. 6, 2021, the Legislature filed a petition for a writ of certiorari to the United States Supreme Court.³¹¹ In March of 2022, the nation’s highest court declined to accept the petition.³¹²

C. Conclusion

At the end of it all, this case boils down to a rather inevitable pair of familiar concepts: institutional legitimacy³¹³ and judicial review.³¹⁴ The

305. *Id.* at 997–98 (outlining the history of legislative abuses perpetrated by the unchecked English Parliament, and concluding that “[n]ever has a legislative branch of government presumed, until today, that its investigative authority to summon witnesses and documents was unrestrained, plenary, and unreviewable by the judicial branch for violations of fundamental rights and privileges”).

306. *Id.* at 1004 (Sandefur, J., concurring).

307. *Id.* (“Beyond the smoke-screen of the catchy but demonstrably false allegations leveled against the judiciary is an unscrupulously calculated and coordinated partisan campaign to undermine the constitutional function of Montana’s duly-elected nonpartisan branch to conduct independent judicial review of legislative enactments for compliance with the supreme law of the state—the Montana Constitution.”).

308. *Id.* (emphasis in original).

309. *Id.*

310. *Id.* at 1005 (quoting English historian and moralist John Dalberg-Acton).

311. See generally Petition for a Writ of Certiorari, *Mont. State Leg. v. McLaughlin*, No. 21-859 (U.S. Dec. 6, 2021); Notice of Filing, *Mont. State Leg. v. McLaughlin*, No. 21-859 (U.S. Dec. 6, 2021). See also The Editorial Board, *Conflicts of Supreme Judicial Interest*, THE WALL STREET JOURNAL, Dec. 27, 2021, available at <https://perma.cc/624N-NFUT> (supporting the petition, positing that the conflict in this instance “couldn’t be clearer,” and urging the U.S. Supreme Court to “reinforce standards of ethical judicial conduct”).

312. See Notice of Ruling, *Mont. State Leg. v. McLaughlin*, No. 21-859 (U.S. Mar. 24, 2022).

313. See generally THE FEDERALIST No. 78, ¶ 7 (Alexander Hamilton) (McLean’s ed.) (“The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”).

Legislature posited that, under these circumstances, the two cannot coexist.³¹⁵ *McLaughlin*—and more importantly, the Montana Supreme Court—disagreed. Underlying the *McLaughlin* decisions is the concept that judicial review is proper, and its exercise should innately enhance institutional legitimacy. The Court here clearly realized, and respected, the axiomatic principle that a court’s power exists at the behest of public trust.³¹⁶ As modern political society has evolved in polarizing ways, this evolution may be evidence that public opinion is “the least dangerous branch[’s]”³¹⁷ most valuable, yet fleeting, seal of approval.

The Montana Supreme Court admonished the Legislature’s attempt to circumvent the Montana Constitution, thereby reinforcing its autonomous power to interpret the same.³¹⁸ This approach is not unfamiliar to American political history, as stated by Alexander Hamilton in *The Federalist Papers*:

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.³¹⁹

Montana practitioners, and frankly, the public-at-large, should aspire for the Judiciary—in Montana and otherwise—to be an institution that fosters and protects widespread public confidence, while also indiscriminately dispensing due process. Here, while both parties aspire to this utopia, there is extreme disagreement as to the means through which this end can be

314. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”).

315. Motion to Disqualify Justices, *supra* note 248, at 4 (“Members of this Court have an obligation to promote confidence in the independence, integrity, or impartiality of the judiciary . . . but these actions do precisely the opposite.”).

316. See Petitioner’s Response to Respondent’s Motion to Disqualify Justices, *supra* note 263, at 2–3 (citing *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 927 (2004)) (“Confidence in the justices’ integrity ‘cannot exist in a system that assumes them to be corruptible to the slightest friendship or favor.’”).

317. THE FEDERALIST NO. 78, *supra* note 313, ¶ 7 (“Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”).

318. *McLaughlin v. Mont. State Legislature*, 493 P.3d 980, 994 (Mont. 2021) (applying a constitutional doctrine of law—separation of powers—to conclude that “enforcement of the law is not a ‘legitimate task’ of the legislative function” under the Montana Constitution).

319. THE FEDERALIST NO. 78, *supra* note 313, ¶ 12.

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reached and maintained. Which of these means is more desirable, preferable, or endurable remains to be seen. *McLaughlin I* and *II* help reinforce that the Montana Supreme Court—much like the rest of the legal profession—remains largely autonomous, continuously endeavoring to “emphatically . . . say what the law is.”³²⁰

—*Marti A. Liechty*

320. *Marbury v. Madison*, 5 U.S. at 177.

