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CLERK OF THE
DISTRICT COURT
TERRY HALPIN

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DEPUTY

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

PLANNED PARENTHOOD OF
MONTANA, and JOEY BANKS, M.D.,
on behalf of themselves and their
patients,

Plaintiffs,

vs.

STATE OF MONTANA, by and through
AUSTIN KNUDSEN, in his official
capacity as Attorney General,

Defendant.

DV-21-00999

Hon. Gregory R. Todd

**STATE OF MONTANA'S BRIEF IN
SUPPORT OF ITS MOTION TO
DISQUALIFY JUDGE**

The State moves pursuant to Montana Code Annotated § 3-1-805 and the Montana Code of Judicial Conduct for Judge Todd to disqualify himself from *Planned Parenthood v. State* for cause.

Section 3-1-805 requires disqualification when a party files an affidavit alleging facts showing personal bias or prejudice of the presiding judge. Whether a judge should be disqualified is guided by the Montana Code of Judicial Conduct, including Rule 2.12, which requires a judge to disqualify himself when “[t]he judge

has a personal bias or prejudice concerning a party or a party’s lawyer.” *See Boland v. Boland*, 2019 MT 236, ¶ 37, 397 Mont. 319, 450 P.3d 849; *see also* Mont. Code Judicial Conduct Rule 2.2 (requiring judges to “perform all duties of judicial office fairly and impartially”); Rule 2.3 (requiring judges to “perform the duties of judicial office ... without bias or prejudice” and not use words that “manifest bias or prejudice”); Rule 2.4 (prohibiting judges from allowing “political ... or other interests or relationships [] influence the judge’s judicial conduct or judgment”).

The State has attached a supporting affidavit (“Exhibit A”) with facts showing that Judge Todd expressed personal bias and prejudice against the State during the preliminary injunction hearing on September 23, 2021. The State has also attached an unofficial daily transcript of the hearing (“Exhibit B”). One of Judge Todd’s remarks in particular to the State’s attorney demonstrates bias. Judge Todd revealed his displeasure and disagreement with the State, the Attorney General and his clients, and other Executive Branch officials regarding a separate and complex political and legal dispute between Montana’s Judiciary, the Legislature, and the Executive Branch—a dispute in which Judge Todd features prominently. This came in the context of the State’s essential argument that the laws under challenge in this case are not unconstitutional because the State—via the Legislature and state health boards—“have a role to play in setting these standards.” Daily Transcript at 36. The Court followed with: “Like they’ve done in the judiciary as well. But that’s a different topic right?” *Id.*

Judge Todd was referencing a matter unrelated to the case at bar. He was referring to an ongoing political and legal dispute between the Judiciary and the Legislature that arose in the context of leaked judicial emails showing many state judges opining on the constitutionality of pending legislation. The relevant emails related to the Montana Judges Association’s poll on Senate Bill 140, which eliminated the Judicial Nominating Commission. Judge Todd is (or was at the time) the President of the Montana Judges Association and requested the poll, which was administered by the Supreme Court Administrator over state email accounts. Part of this ongoing dispute resulted in a Montana Supreme Court case. *See McLaughlin v. Legislature*, 2021 MT 178 (July 14, 2021). The Attorney General has represented the Legislature in that dispute. Judge Todd’s comment is not based on “average personal experience,” *Draggin’ Y Cattle Co. v. Addink*, 2016 MT 98, ¶¶ 29–30, 383 Mont. 243, 371 P.3d 970, but rather a very specific dispute involving Judge Todd’s conduct. This comment calls into question his ability to maintain an “open mind” to the State’s arguments in *Planned Parenthood. Id.*

The State did not initially seek to disqualify Judge Todd because the State believed Judge Todd could put his personal feelings aside and dispense unbiased justice in this case. His interjection at oral argument last week proved the State wrong. The case at bar is a constitutional challenge to statutes that regulate abortion practices for the safety and welfare of pregnant women and pain-capable unborn human persons. These are exceedingly important government interests, and are entirely unrelated to the important issues in the separate interbranch dispute Judge

Todd invoked. The State, like any party, deserves a fair, unbiased shake before this Court. And that may be particularly true in this case, where the stakes are so high. The health of pregnant women and the lives of pain-capable unborn persons hang in the balance. Based on his statement, that State no longer believes Judge Todd can provide unbiased justice—at least not in this case. Judge Todd’s remark unfortunately reveals that he is unable to cabin his feelings about the Attorney General and Legislature in that other dispute and focus in an unbiased manner on this dispute, where the Attorney General is defending legislative enactments.

Regarding timing, the State obtained an expedited transcript last night, September 28, 2021, after 5:00 PM. This motion will have been filed within 24 hours of that. The State understands Judge Todd intends to rule on the preliminary injunction motion this week. But there has been no delay by the State; indeed, the State has moved with considerable expedition. So there can be no argument that the State is taking advantage of the constrained timeline in this case. Plaintiffs chose to file this lawsuit when they did, just before the implementation deadline. Briefing concluded on September 17, 2021. The hearing was conducted on September 23, 2021, and Judge Todd indicated that he would rule on the motion prior to October 1, 2021. The State could not have filed this motion and affidavit any earlier; it had to first review the transcript in full.

Plaintiffs oppose this motion, but they will not be prejudiced. Judge Todd has announced his retirement in December and will likely be unable to see this case to resolution, regardless of disqualification.

The State moves for Judge Todd's disqualification and requests he proceed no further in the cause. Mont. Code Ann. § 3-1-805(1).

DATED the 29th day of September, 2021.

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By: /s/ David M.S. Dewhirst
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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by email to

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Date: September 29, 2021


Rochell Standish

Exhibit A

Affidavit of David Dewhirst

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

PLANNED PARENTHOOD OF
MONTANA, and JOEY BANKS,
M.D., on behalf of themselves and
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DV-21-00999

Hon. Gregory R. Todd

**AFFIDAVIT OF DAVID M.S.
DEWHIRST IN SUPPORT OF
STATE OF MONTANA'S
MOTION TO DISQUALIFY
JUDGE**

STATE OF MONTANA)
 : ss.
County of Lewis and Clark)

1. I am the Solicitor General of Montana.

2. I certify that I make this affidavit in good faith, pursuant to

MCA § 3-1-805.

3. I have appeared in *Planned Parenthood of Montana v. State*, DV21-00999, before Judge Gregory Todd.

4. I argued on behalf of the State of Montana against Plaintiffs' Motion for Preliminary Injunction on September 23, 2021 before Judge Todd.

5. Montana Code of Judicial Conduct Rule 2.12 requires a judge to disqualify himself when “[t]he judge has a personal bias or prejudice concerning a party or a party’s lawyer.”

6. Rule 2.2 requires judges to “perform all duties of judicial office fairly and impartially.” Comment 4 to this Rule says, “A judge should manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.”

7. Rule 2.3(A) requires a judge to “perform the duties of judicial office ... without bias or prejudice.”

8. Rule 2.3(B) states that a judge “shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice ...” Comment 2 to this Rule lists “attempted humor based upon stereotypes” as an example of bias. Comment 3 defines harassment as “verbal ... conduct that denigrates or shows hostility or aversion toward a person on bases such as ... political affiliation.”

9. Rule 2.4 states, “A judge shall not permit ... political ...or other interests or relationships to influence the judge’s judicial conduct or judgment.”

Comment 1 to this Rule “requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.”

10. At the Preliminary Injunction hearing on September 23, Judge Todd showed bias and prejudice against the State and its counsel, the Attorney General’s office, by interjecting a reference to a separate political and legal dispute between the Judiciary and the Legislature. This was far outside the scope of the issues in *Planned Parenthood* and demonstrates Judge Todd’s unwillingness or inability to adjudge in an unbiased and nonprejudicial manner a case involving the State and the Legislature’s powers.

11. I have attached an unofficial daily transcript of the proceedings as “Exhibit B.” Given the timing of the hearing and the anticipated preliminary injunction order, *see* Daily Transcript at 82 (“I’m going to decide within a week.”), the State was unable to obtain an official transcript. The State received this unofficial transcript on September 28, 2021 after 5:00 PM.

12. In response to the judge’s question about the Legislature setting medical standards of care, I noted that “many of the medical bodies are created by the legislature” and that “the State and these medical bodies have a role to play in setting these standards.” Daily Transcript at 36. The Court stated,

“Like they’ve done in the judiciary as well. But that’s a different topic, right?” *Id.* When I stated I wasn’t sure what Judge Todd was talking about, Judge Todd responded, “Well, that’s not in discussion here today.” *Id.* It is clear now that Judge Todd was referencing the ongoing dispute between the Legislature and the Judiciary, address in part by *McLaughlin v. Legislature*. At issue in that dispute is an internal poll sent out to Montana judges about several of the Legislature’s bills, including SB 140. The internal poll was sent out at the request of Judge Todd, who is President of the Montana Judges Association. The hostility of that dispute has resulted in public statements from members of all three branches of Montana government.

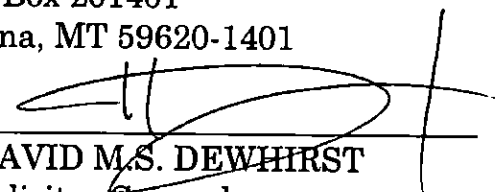
13. This comment shows bias and prejudice against the State’s attorneys, who are tasked with representing the State as a body politic (as in *Planned Parenthood*) and its discrete branches of government (as in *McLaughlin*). Judge Todd clearly disagrees with the Legislature and its counsel in *that* dispute, likely because it arose from Judge Todd’s request for an internal judicial poll. The *McLaughlin* proceeding or the public square—not the *Planned Parenthood* hearing—is the place to express disagreement or make jokes about the Legislature and its attorneys for actions related to that interbranch dispute. Judge Todd’s comment was inappropriate and demonstrates that he is unable to separate his views about the Legislature and the Attorney General from the instant case.

14. Judge Todd may ultimately disagree with the State's legal arguments in *Planned Parenthood*, but this disagreement must be rooted in the law rather than in animus against the State and its attorneys.

15. Judge Todd's remark demonstrates bias and prejudice against the State, and Judge Todd should be disqualified in accordance with MCA § 3-1-805.

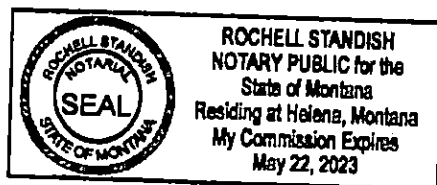
DATED the 29th day of September, 2021.

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By: 
DAVID M.S. DEWHIRST
Solicitor General

Attorney for Defendant

SUBSCRIBED AND SWORN TO before me this 29th day of September, 2021.




NOTARY PUBLIC

Exhibit B

Transcript Excerpts from September 23, 2021
Hearing on Preliminary Injunction

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I N D E X

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E X H I B I T S

PLAINTIFF'S

ADMITTED

(None)

DEFENDANT'S

(None)

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1 these standards -- it's well settled in federal case law
2 that states may regulate abortion practices in order to
3 maintain the integrity of the medical profession.

4 THE COURT: So you're regulating medical
5 practices by establishing different standards of care
6 beyond what the medical profession has established; is
7 that right? You're legislating additional medical
8 standards?

9 MR. DEWHIRST: I think that's probably accurate,
10 Your Honor. Yeah.

11 THE COURT: Okay.

12 MR. DEWHIRST: I would also remind the Court,
13 however, that many of the medical bodies are created by
14 the legislature. And it's also well settled from *Wiser*
15 and the *Montana Cannabis* case that the State and these
16 medical bodies have a role to play in setting these
17 standards.

18 THE COURT: Like they've done in the judiciary
19 as well. But that's a different topic; right?

20 MR. DEWHIRST: I'm not sure I understand what
21 you're talking about.

22 THE COURT: Well, that's not in discussion here
23 today.

24 MR. DEWHIRST: I would hope not. First of all,
25 HB 136 doesn't prohibit any previability abortions. As

1 THE COURT: All right. Here's what I'm going to
2 do: State, you can submit whatever affidavits you want
3 to that. But obviously, the sooner the better because of
4 the time constraints that I -- for the sake of all the
5 matters here, I'm going to decide within a week. So --

6 MR. DEWHIRST: Yes, sir. Would you like to put
7 a deadline on it, sir? Like Wednesday or Tuesday?

8 THE COURT: I would say Tuesday, September 28th,
9 by 5:00 p.m.

10 MR. DEWHIRST: Okay.

11 MR. GRAYBILL: And, Your Honor, to promote the
12 State's principle of no litigation by ambush, we would
13 ask for an instruction that the affidavits not introduce
14 new arguments and material but cover the material in our
15 reply affidavits and be confined to that subject matter
16 only.

17 THE COURT: Well, I guess that's -- if we're
18 talking about the ideas of rebuttal and surrebuttal, that
19 makes sense. But you say what you want to say or get the
20 testimony in the affidavits that you want from the State.
21 I'll ferret out what needs to be ferreted out. Okay.
22 Anything more from either side?

23 MR. GRAYBILL: No, Your Honor.

24 THE COURT: All right. Thank you for your
25 arguments. Thank you for not reading your briefs, and

1 CERTIFICATE OF REPORTER

2
3 I, GEOFFREY CURTISS, Official Court Reporter, RPR4 Do hereby certify that I reported in machine
5 shorthand the foregoing proceedings at the time, place
6 and with the appearances of counsel hereinbefore noted.7 I further certify that the transcript transcribed
8 from my original shorthand notes by means of
9 computer-assisted transcription, is a full, true, and
10 correct transcript of the oral testimony adduced
11 therein, to the best of my ability.12 I further certify that I am not of counsel for,
13 nor in any way related to, any of the parties in this
14 matter, nor am I in any way interested in the outcome
15 thereof.16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 28th day of September, 2021.18
19
20 /s/ Geoffrey Curtiss
21 GEOFFREY CURTISS
22 Official Court Reporter, RPR
23
24
25