Mark D. Parker
PARKER, HEITZ & COSGROVE, PLLC
401 N. 31st Street, Suite 1600
P.O. Box 7212
Billings, MT 59103-7212
Phone: (406) 245-9991
Email: markdparker@parker-law.com

Christian Brian Corrigan
Solicitor General
OFFICE OF THE ATTORNEY GENERAL
215 North Sanders
Helena, MT 59601
Phone: (404) 444-2797
Email: Christian.Corrigan@mt.gov

Tyler Green
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
Phone: (703) 243-9423
Email: tyler@consovoymccarthy.com

Attorneys for Respondent

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

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

* *

INTRODUCTION

Respondent Attorney General Austin Knudsen respectfully requests that the Commission on Practice ("Commission") disqualify Adjudicatory Panelist Patricia Klanke ("Ms. Klanke") due to her representation of Montana Supreme Court Justice James Rice in *Rice v. Montana State Legislature*, BDV-2021-451, Mont. First Judicial Dist., Lewis and Clark County, (2021). Ms. Klanke's involvement runs afoul of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Article II, Section 17 of the Montana Constitution, the Montana Rules of Professional Conduct, and the Montana Code of Judicial Conduct.

On September 12, 2024, Respondent requested disclosure of the members of the upcoming Adjudicatory Panel for this matter. The Commission obliged and disclosed that the Adjudicatory Panel would consist of: "Randy Ogle (Chair), Patricia Klanke (attorney member), Substitute attorney member (TBA), Troy McGee (lay member), Lois Menzies (lay member), and Elinor Nault (lay member)."[1] See COP Email, dated September 12, 2024, attached as Ex. A.

The Commission appointed Ms. Klanke as the Attorney Member to the Commission on Practice for Area F on June 18, 2024, following the resignation of Andres

[1] The Commission also informed Respondent that: "Per Rule 4(C) of the Montana Rules for Lawyer Disciplinary Enforcement, a substitute attorney member is required to constitute a quorum and will be appointed by the Montana Supreme Court from the attorney member area either in Area C, Area D, or Area E, as these are the areas of the three recused attorney members of the Adjudicatory Panel. The Supreme Court appoints attorney members per Rule 2(A) of the Montana Rules for Lawyer Disciplinary Enforcement." Ex. A. On September 17, 2024, the Supreme Court appointed Carey Matovich to sit by designation as the third attorney member.

Haladay. Mr. Haladay previously worked as an employee of the Montana Department of Justice and sued the Department in 2022[2] alleging unfair discrimination when passed over for promotion due to his political beliefs.[3]

The Commission must disqualify Ms. Klanke from the Adjudicatory Panel and cure all prejudice resulting from her involvement. Ms. Klanke represented Justice Rice in his district court lawsuit to quash the Montana Legislature's April 15, 2021, subpoena issued to him (as well as every other member of the Montana Supreme Court and Supreme Court Administrator Beth McLaughlin). See Petitioner's Response in Opposition to Motion to Dismiss, filed July 1, 2021, attached as Ex. B. She's already taken a position on the propriety of that subpoena, which is adverse to Respondent's representation in that controversy. This is the same subpoena, controversy, and underlying facts that were at issue in *Brown v. Gianforte* and *McLaughlin v. Legislature*. In other words, the exact same subpoena, controversy, and underlying facts that constitute the entire basis for the 41 counts against Attorney General Knudsen.

---

[2] John Riley, *Montana Human Rights Bureau says state DOJ discriminated in hiring process based on political beliefs*, KTHV (Sept. 29, 2022), https://www.ktvh.com/news/montana-human-rights-bureau-says-state-doj-discriminated-in-hiring-process-based-on-political-beliefs.

[3] Respondent asked ODC in discovery whether Mr. Haladay had participated in these proceedings in any way. ODC answered: "[T]o the best of ODC's knowledge, COP member Haladay has not participated in any review, discussion, or deliberation of this matter." If ODC's answer is inaccurate, Respondent respectfully requests that the Commission immediately disclose the extent of Mr. Haladay's participation and order additional briefing.

Ms. Klanke's conflict of interest isn't hypothetical, attenuated, or imputed. It's real. It's obvious. And it shocks the conscience.

The Commission must, at minimum, disqualify Ms. Klanke from the hearing panel. *See United States v. Washington*, 157 F.3d 630, 660 (9th Cir. 1998) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.")); *see also Bullman v. State*, 2014 MT 78, ¶ 17, 374 Mont. 323, ¶ 17, 321 P.3d 121, ¶ 17 (holding that "the plain language of Rule 2.12 clearly requires recusal when the judge has personal knowledge of disputed facts stemming from his previous representation of a client in a separate and related matter.").

But there's more. If Ms. Klanke has already participated in this matter in any capacity, the Commission must take immediate remedial action. First, the Commission must vacate any order or decision in which she participated. *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995) ("[W]here one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process."). That includes the Order denying Respondent's Motion for Summary Judgment. Second, Ms. Klanke's involvement (formal or informal) taints the participation of any of member of the Commission that participated with her in prior orders, discussions, or conferences. As a result, the Commission must disqualify those members as well.

For these reasons, Respondent respectfully request that the Commission disqualify Ms. Klanke, disclose the extent of her prior participation in these proceedings, and take all appropriate remedial action required by the Due Process Clause.

BACKGROUND

The relevant facts of this case bear repeating under these circumstances. In 2021, litigants challenged the constitutionality of SB 140, which changed the method for filling mid-term judicial vacancies in Montana. Challengers filed suit directly in the Montana Supreme Court to declare it unconstitutional. *Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548. Due to his public lobbying against SB 140, Chief Justice McGrath recused from *Brown* and selected District Court Judge Kurt Krueger to hear the case in his stead. Per court rules, Associate Justice James Rice was appointed Acting Chief Justice for *Brown*.

Not two weeks after that original action was filed, emails became public showing that Chief Justice McGrath was not the only member of Montana's judiciary who had taken a position on SB 140. In January 2021—when the Legislature was still considering SB 140—Supreme Court Administrator Beth McLaughlin emailed every Montana Supreme Court Justice and every Montana district court judge using government email accounts, asking that they "review and take a position on" SB 140. The email included a click-poll, to which many state judges responded. Even so, some judges' individual views became public when they chimed in on the long chain of "reply-alls." Many simply declared their opposition. Others offered more fulsome explanations. Still others went further, explicitly stating their view that SB 140 was

unconstitutional. Judge Krueger, the Chief Justice's replacement in *Brown*, specifically offered his views: "I am also adamantly oppose [sic] this bill." Learning this, the State quickly moved to disqualify Judge Krueger and any other judicial officers who took a position on SB 140 before it was enacted. Judge Krueger recused within hours.

In early April 2021, the Montana Legislature issued two legislative subpoenas. The first was to Supreme Court Administrator McLaughlin, seeking all public records in her possession related to the SB 140 poll. When the Legislature saw that McLaughlin's response (on an extended deadline) included only two emails—along with an apology and an explanation that she had not retained emails—Senate Judiciary Chairman Keith Regier then issued an April 8 legislative subpoena to the Director of the Department of Administration ("DOA") for McLaughlin's emails during the 2021 Legislative Session. On Friday, April 9, 2021, the Department partially complied with the subpoena, providing a 2,450-page collection of documents, including more emails related to SB 140 and other proposed legislation.

Two days later, on Sunday, April 11, 2021, Supreme Court Administrator McLaughlin filed an emergency motion with the Montana Supreme Court to quash the April 8 subpoena to DOA. That Sunday morning, the Clerk of the Montana Supreme Court, Bowen Greenwood, received a message from Justice Jim Rice. Justice Rice was the Acting Chief Justice in *Brown* because Chief Justice McGrath had recused. Justice Rice informed Mr. Greenwood that he had received a message from attorney Randy Cox, whom McLaughlin had retained to represent her. Later that Sunday, the Court temporarily quashed the April 8 legislative subpoena to DOA.

On April 12, 2021, McLaughlin filed her own lawsuit—styled *McLaughlin v. Montana State Legislature*—as an original action at the Montana Supreme Court. That original action sought to quash the Legislature's April 8 subpoena. On April 14, the Legislature not only moved to dismiss *McLaughlin* but also formed a select committee to investigate judicial document retention, judicial lobbying, and other potential judicial impropriety. On April 15, Legislative leadership issued new subpoenas—to McLaughlin and to each member of the Montana Supreme Court—ordering their appearance at an April 19 meeting of the select committee and the production of (a) McLaughlin's computer and (b) documents related to judicial branch polls on pending legislation and to judicial lobbying. On April 16, in response to another emergency motion from McLaughlin, the Montana Supreme Court issued a combined order in McLaughlin and in the SB 140 merits challenge. That combined order quashed not only the April 8 legislative subpoena to DOA but also the second legislative subpoena to McLaughlin and the legislative subpoenas issued to the Justices the previous day.

Justice Rice recused himself from all proceedings in *McLaughlin*. Instead, Justice Rice chose to challenge the validity of the Legislature's April 15 subpoena in Lewis & Clark County district court, *Rice v. Montana State Legislature*, No. BDV-2021-451. See Petition dated April 19, 2021, attached as Ex. C.

Justice Rice's lawsuit was based entirely on the events leading up to and including *Brown* and *McLaughlin*. *See, e.g.*, page 1 of Brief of Petitioner in Support of Petition for Declaratory Judgment, dated April 15, 2021, attached as Ex. D ~~at 1~~ ("The Court is familiar with the facts giving rise to this dispute. Those facts are set out in

the Court's Preliminary Injunction Order, May 18, 2021, and in *McLaughlin v. Montana State Legislature*, 2021 MT 120, 404 Mont. 166, 489 P.3d 482 ("*McLaughlin I*").").

Justice Rice's Petition alleged that he had reviewed the communications sought by the Legislature and believed that "not a single communication subject to the Subpoena is or would be the basis for judicial discipline [or] claims of bias." Ex. C at 7. Justice Rice further alleged that he "ha[d] nothing to hide" but did "have something to fear, that being a potentially inappropriate intrusion into the communications of the Judiciary and into a justice's private affairs, what Petitioner believes is a recent disturbing pattern of overreaching by the Department of Justice, sometimes in concert with Respondent State Legislature … which has led inexorably to Respondent's issuance of subpoenas to the Justices." *Id.* Justice Rice sought judicial review of the subpoena "[b]ecause of threatened harm and injury, both personally and judicially." *Id.*

Justice Rice took issue with the way the Legislature and Department of Justice characterized *Brown* and *McLaughlin*. *See id.* at 5 ("Respondent State Legislature stated therein it would pursue this course even if the subpoenaed materials would 'tend to 'disgrace' the Judicial Branch or render it 'infamous,' citing § 5-5-105(2), MCA. What was being insinuated by the comment in Respondent's briefing concerning a potential 'disgrace' to the Judiciary is unknown to Petitioner."); *id.* at n.3 ("The Department of Justice has made similar recent out-of-court statements attacking the Supreme Court.").

Justice Rice initially filed his Complaint *pro se*. Ex. C. But he eventually retained Curt Drake and Patricia Klanke of the Drake Law Firm as counsel. Ex. B at 1. The Department of Justice represented the Legislature throughout the litigation. *See, e.g.*, *id.* at 7.

LEGAL STANDARD

"[T]he requirement that proceedings which adjudicate individuals' interests in life, liberty, or property be free from bias and partiality has been 'jealously guarded.'" *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995) (quoting *Marshall v. Jerrico*, 446 U.S. 238 (1980)). As such, a license to practice law may not be revoked or suspended without due process. *See, e.g.*, *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 38, 348 Mont. 80, 201 P.3d 8 ("[C]ourts have recognized that some licenses may contain property interests … protected by the due process clause."); *People v. Varallo*, 913 P.2d 1, 6 (Colo. 1996) *Huckaby v. Ala. State Bar*, 631 So. 2d 855, 857 (Ala. 1993) *Conway v. State Bar*, 767 P.2d 657, 660 (Cal. 1989); *cf. State v. VanDyke*, 2008 MT 439N, ¶ 6, 348 Mont. 372 ("[O]nce issued, a driver's license becomes a property interest that may not be suspended or revoked without the procedural due process guaranteed by the Montana and United States Constitutions.").

"At a minimum, Due Process requires a hearing before an impartial tribunal." *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995). Montana's Due Process Clause, *see* MONT. CONST. art. II, § 17, similarly sets the "guiding principle of our legal system" and contemplates tenacious adherence "to the ideal that both sides of a lawsuit be guaranteed a fair trial." *Lopez v. Josephson*, 2001 MT 133, ¶ 35, 305 Mont.

446, 30 P.3d 326. Both actual bias and a high probability of bias trigger due process concerns. *See Withrow v. Larkin*, 421 U.S. 35, 46–53 (1975). This neutrality principle applies in administrative adjudications and quasi-judicial proceedings. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 n.2 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

Courts have held that the proper procedure to challenge the impartiality of the decision-maker in quasi-judicial proceedings is to request the examiner to withdraw from the case. *See, e.g.*, *Ginsburg v. Richardson*, 436 F.2d 1146, 1151 (3rd Cir. 1971); *Wells v. Apfel*, 2000 U.S. App. LEXIS 26163, at *16 (6th Cir. Oct. 12, 2000); *Idegwu v. Colvin*, 2013 U.S. Dist. LEXIS 163393, at *41 (D. Del. Nov. 18, 2013).

ARGUMENT

I. The Commission must disqualify Ms. Klanke because of her previous, direct involvement in this matter.

The facts and legal issues in ODC's Complaint against the Attorney General are inextricably intertwined with *Rice v. Montana Legislature*, where Ms. Klanke represented Justice Rice. That self-evident conflict offends due process, the Code of Judicial Conduct, and the Montana Rules of Professional Conduct ("MRPC").

Start with due process. Courts begin with a rebuttable presumption that adjudicators are honest and impartial. *Hess v. Bd. of Trs. of S. Ill. Univ.*, 839 F.3d 668, 675 (7th Cir. 2016). To overcome that presumption, "the party claiming bias must lay a specific foundation of prejudice or prejudgment, such that the probability of actual bias is too high to be constitutionally tolerable." *Id.* Alleged prejudice must be evident from the record and cannot be based on speculation or inference. *McClure*,

456 U.S. at 196. "[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. 47. "A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing." *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 518 (10th Cir. 1998) (quotations omitted).

For example, in *Staton v. Mayes*, 552 F.2d 908 (10th Cir.) (as amended), *cert. denied*, 434 U.S. 907 (1977), a school superintendent was dismissed by a majority vote of the school board. The members comprising the majority had made statements about the superintendent, both in public and in private, prior to any hearing on the matter. The court held that although such statements in an election campaign or between members weren't improper, "a due process principle is bent too far when such persons are then called on to sit as fact finders and to make a decision affecting the property interests and liberty interests of one's reputation and standing in his profession." *Id.* at 915. Ms. Klanke has even more direct involvement with the facts of this case than simply making public statements about it.

Ms. Klanke's attorney–client relationship with Justice Rice gives her direct personal involvement in this dispute. The Washington Supreme Court explained that although "[t]he presumption of fairness for judges likewise applies to hearing officers in attorney disciplinary proceedings," *In re Disciplinary Proceeding Against King*, 168 Wash. 2d 888, 904, 232 P.3d 1095, 1102 (2010), "because hearing officers often

are also practicing attorneys, conflicts of interest and other factors that can imperil the appearance of fairness may have a higher probability of occurring." *Id.* n.7.

Justice Rice was the Acting Chief Justice during *Brown v. Gianforte*. Justice Rice received the *ex parte* communication from McLaughlin's attorney and called the Supreme Court in on a Sunday to temporarily quash the first subpoena issued by the Legislature. The Office of Disciplinary Counsel ("ODC") has also listed Justice Rice as a potential witness in this case.

As recognized by the Washington Supreme Court in *King*, Ms. Klanke does not shed her professional obligations as an attorney by serving on the Commission. To the contrary, this proceeding takes place at the behest of ODC and before the Commission on Practice—both charged by the Supreme Court with enforcing the MRPC. Those rules, therefore, loom large in the due process analysis.

In her capacity as an attorney, Ms. Klanke couldn't represent the Attorney General or ODC in this matter due to her representation of Justice Rice. *See* MRPC R. 1.7(a)(2) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."); *id.* R. 1.9(a) ("(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives

informed consent, confirmed in writing."). In other words, if the MRPC prevent Ms. Klanke from participating in this case as an attorney due to her representation of Justice Rice, she certainly cannot serve as an impartial decisionmaker.

Finally, although this is a quasi-judicial proceeding the Montana Code of Judicial Conduct is instructive. *See Draggin' Y Cattle Co. v. Junkermier*, 2017 MT 125, ¶ 36, 387 Mont. 430, 442, 395 P.3d 497, 505 ("Because disqualification proceedings are premised upon a litigant's constitutional right to a fair and impartial tribunal, we are unpersuaded by Peters's contention that a violation of the Code cannot be the basis for vacating a judge's decision."). First, "Rule 2.12 requires that a judge disqualify [her]self 'in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.' A judge shall also disqualify [her]self if the judge 'served as a lawyer in the matter in controversy.'" *Bullman v. State*, 2014 MT 78, ¶ 14, 374 Mont. 323, 327, 321 P.3d 121, 124 (quoting Mont. Code of Jud. Conduct 2.12(A)(5)(a)); *see also Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."). Rule 2.12(A)(5)(a) applies because Ms. Klanke served as an attorney for Justice Rice in the underlying controversy. *See Williams*, 579 U.S. at 9–10 ("the judge's 'own personal knowledge and impression' of the case, acquired through his or her role in the prosecution, may carry far more

weight with the judge than the parties' arguments to the court."). Justice Rice is also a prospective witness in this matter.

Second, "the plain language of Rule 2.12 clearly requires recusal when the judge has personal knowledge of disputed facts stemming from his previous representation of a client in a separate and related matter." *Bullman*, ¶ 17. Justice Rice's lawsuit directly challenged legislative subpoenas issued to the justices in an investigation of potential misconduct by the judiciary. *In re B.W.S.*, 2014 MT 198, ¶ 17, 376 Mont. 43, 46, 330 P.3d 467, 470 (ruling judge was required to recuse as a matter of law because he presided over the permanency plan and termination hearings after having actively represented the Guardian ad Litem in several hearings as counsel in the same case). ODC's Complaint attempts to discipline the Attorney General for statements made by the Department of Justice concerning the same alleged judicial bias and misconduct. Ms. Klanke has knowledge of the disputed facts regarding legislative subpoenas and the conduct of the Department of Justice. Ms. Klanke's representation of Justice Rice, moreover, gives her knowledge of confidential information in this case. She cannot participate.

II. If Ms. Klanke participated in adjudicating Respondent's Motion for Summary Judgment, the Commission must vacate the Order.

Respondent respectfully requests that the Commission disclose the extent of Ms. Klanke's involvement, if any, in this matter. If Ms. Klanke has had no involvement with this matter to date, her disqualification suffices. But if she had any other involvement, the Commission must cure the prejudice from it.

First, if Ms. Klanke participated in adjudicating Respondent's Motion for Summary Judgment, the Commission must vacate that Order. One biased member of a tribunal is sufficient to taint the entire panel and deprive a plaintiff of procedural due process. *See Stivers*, 71 F.3d at 748 ("Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings."); *see also Williams*, 579 U.S. at 15 ("[I]t does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party."); *Hicks v. Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (vacating commission decision and remanding for de novo reconsideration, even though biased commissioner belatedly recused himself and did not vote on final decision); *Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n*, 138 425 F.2d 583, 592 (D.C. Cir. 1970) (vacating and remanding agency decision "despite the fact

that former Chairman Dixon's vote was not necessary for a majority"); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767–98 (6th Cir. 1966) (agency decision must be vacated and remanded for de novo review; result "is not altered by the fact that [the biased panel member's] vote was not necessary for a majority"); *Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (3rd Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.').

Second, Ms. Klanke's involvement in any aspect of this case taints the participation of every co-panelist. The Commission must prospectively disqualify any panelist who has participated in this matter with Ms. Klanke. That's due to Ms. Klanke's attorney-client relationship with Justice Rice and the unique nature of the Commission's structure.

The U.S. Supreme Court's decision in *Williams* provides guidance. There, the Pennsylvania Supreme Court vacated a lower court decision granting postconviction relief to a prisoner. 579 U.S. at 4. One of the justices on the Pennsylvania Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. *Id.* The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief, which violated the Due Process Clause. *Id.* Although the Court remanded back for rehearing without the disqualified justice, it recognized that it may not be able to provide complete constitutional relief "because judges who were exposed to a disqualified judge may still be

influenced by their colleague's views when they rehear the case." *Id.* at 16; *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Blackmun, J., concurring) ("mere participation in the shared enterprise of appellate decisionmaking—whether or not [the improperly seated judge] ultimately wrote, or even joined, the [tribunal's] opinion—pose[s] an unacceptable danger of subtly distorting the decisionmaking process.").

That's because "voluminous" literature has found that "judges' views are quite often influenced by the composition of the courts on which judges sit." Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 102 n.121 (2009) (collecting citations). Adding to the risk, the private nature of court deliberations makes it impossible for the public to determine "the actual effect a biased judge had on the outcome of a particular case." *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring).

The current circumstances produce a particularly high risk of lingering bias following Ms. Klanke's disqualification. First, as discussed above, her knowledge of this case as counsel for Justice Rice makes it nearly impossible to purge the taint of her past participation. The disqualified justice in *Williams* was merely adversarial to the defendant and had no such information.

Second, the Commission's structure makes it uniquely susceptible to lingering bias because the Adjudicatory Panel is made up of three non-attorney members. The U.S. Supreme Court has recognized that even judges are at risk of bias when reconsidering their past decisions. *See Williams*, 579 U.S. at 9 ("There is, furthermore, a

risk that the judge 'would be so psychologically wedded' to his or her previous position as a prosecutor that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'") (quoting *Withrow*, 421 U. S. at 57).

But unlike judges who, on remand, may be able to reconsider their prior ruling), attorneys and laypersons in particular may not be able to approach decision-making with a blank slate. *Cf. United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) ("*Daubert* is meant to protect juries from being swayed by dubious scientific testimony. When the district court sits as the finder of fact, there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."). For example, the U.S. Supreme Court generally finds limiting instruction inadequate where a jury of laypersons would be unlikely to disregard prejudicial evidence. The touchpoint of that analysis centers on two issues. First, that the inadmissible evidence is highly probative of a fact issue a jury must decide. Second, that the information may not be considered due to some overarching policy concern related to the rules of evidence. That distinction is best illuminated by *Jackson v. Denno*, 378 U.S. 368 (1964), and *Bruton v. United* States, 391 U.S. 123 (1968). In *Jackson*, the Court found that a limiting instruction was insufficient to cure prejudice to the jury through the introduction of an involuntary confession. In that case, the Court described a limiting instruction as an "unmitigated fiction." *Id.* at 388 n.15. In *Bruton*, the Court considered a joint trial where one codefendant's confession implicated another. The Court ruled that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in

determining petitioner's guilt, admission of [a codefendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126.

CONCLUSION

The Commission should disqualify Ms. Klanke and cure the taint of any prior participation. Otherwise, the proceedings against Attorney General Knudsen cannot satisfy due process.

DATED this 19th day of September, 2024.

Respectfully submitted,

/s/ *Christian B. Corrigan*
Christian B. Corrigan
Solicitor General
Office of the Attorney General
215 North Sanders
Helena, MT 59601
Phone: (404) 444-2797
Email: Christian.Corrigan@mt.gov

Attorney for Respondent

CERTIFICATE OF SERVICE

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

Timothy B. Strauch
c/o Office of Disciplinary Counsel
P.O. Box 1099
Helena, MT 59624-1099
tstrauch@montanaodc.org

Shelly Smith
Commission on Practice
P.O. Box 203005
Helena, MT 59620-3005
shellysmith@mt.gov

DATED this 19th day of September, 2024.

/s/ Christian B. Corrigan
CHRISTIAN B. CORRIGAN