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.	)	**AMICUS BRIEF IN SUPPORT OF RESPONDENT AUSTIN MILES KNUDSEN**

* *

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STATEMENT OF INTEREST

Amici States each have elected or appointed Attorneys General. These States each have an interest in ensuring that State Attorneys General may exercise their discretionary authority conferred by their respective State Constitutions without improper interference or distractions.

Litigation, even against other State agencies—and even against the State Judiciary—is, sometimes necessary. Normal litigation practices, including even aggressive discovery, cannot be the basis for ethics complaints. Delicacy in dealing with potential disputes between constitutional branches of government must be a paramount concern. And potential suspension for an Attorney General for engaging in his lawful duty representing his client, here the Legislature, implicates fundamental separation of power concerns.

Amici States, their Attorneys General, and their Legislatures have a unique perspective in this litigation—they too represent constitutional offices. Indeed, many of the Attorneys General represent the judiciary. And zealous advocacy on behalf of their clients cannot be the basis for partisan grievances. Their interest is aligned with but differentiated from that of Attorney General Knudsen and thus will aid the Court.

INTRODUCTION

Forty-three States have independently elected Attorneys General—and each of those States shares several truths. *First*, the independently elected Attorney General has broad discretion in exercising her constitutional duties. *Second*, the Attorney General is accountable to the people: There are two ways to divest her of the discretion the State Constitution confers on her, and that is to remove her from office through election or impeachment. *Third*, any attempt by the judiciary to restrict the Attorney General's discretionary choices risks interfering with the exercise of the Attorney General's constitutional authority and violating fundamental separation-of-powers principles.

The Office of Disciplinary Counsel's recommendation to suspend the sitting Attorney General of Montana from legal practice for 90 days raises each of those vital concerns. That becomes even more pressing when, as here, the underlying dispute fundamentally implicates the Judiciary itself. The underlying dispute arose between the Legislature and the Judiciary over a subpoena for documents relating to the Judiciary's functioning. At various points in the underlying case here, multiple Justices have recused—indeed, some Justices initially declined to recuse and are only recused now, on the eve of argument. These are unfortunately unique circum-

stances involving weekend filings, non-disclosed *ex parte* communications, and a discovery dispute between coordinate branches of State government. And now, the Legislative, Judicial, and Executive branches are all implicated in this intra-State dispute, as the Judiciary at the center of the underlying dispute weighs disciplining the Attorney General for his zealous representation of the Legislature.

Around the country, political adversaries seek to limit the discretionary choices elected of Attorneys General. Here, around the country is more literal—the underlying ethical grievance was filed by an attorney living in California. Their means are novel: Invoking rules of professional conduct, they complain to the State Bar that certain discretionary choices are unacceptable and deserving of discipline. The first counsel tasked with evaluating the disciplinary matter recused, and the second counsel recommended a private letter of admonition. Now, the third counsel is seeking serious discipline for the Attorney General's zealous advocacy on behalf of the Legislature.

In other words, political adversaries eschew the ballot box and ask state judiciaries or state bars to be final arbiters of discretionary constitutional choices by Attorneys General. Here, the suggested punishment is suspending the duly elected Attorney General of Montana from the practice of law for 90 days. That is improper

and places this Court in the unenviable position of risking a constitutional crisis.

Neither the State Bar nor this Court is an appropriate forum for what is ultimately a political fight. And while it is, of course, true that the Attorney General is subject to general rules of professional conduct, those rules cannot be used to limit discretionary authority conferred by a State Constitution. Nor can they be weaponized to undermine the will of the voters who elected the Attorney General in the first place. This Court should decline to enter the fray and dismiss the complaint.

ARGUMENT

I. Disciplinary rules enforcement cannot interfere with an Attorney General's exercise of constitutionally conferred discretionary authority.

State Attorneys General are, like any other attorney, subject to the rules of professional conduct. But Attorneys General are unlike other members of the bar in two important ways. *First*, the Attorney General's law practice involves wielding the executive power the State Constitution confers on her. *Second*, the Attorney General represents the public that elected her, and if the voters do not approve of the way she wields that power, they can divest her of it.

Because of those unique features of the Attorney General's law practice, separation-of-powers principles insulate certain actions from review by the state bar's disciplinary body—which, after all, is a creature of the judiciary. *See In re Advisory Opinion to Commission on Practice*, 159 Mont. 541, 542 (Mont. 1971) (relaying the preambulatory language from the January 5, 1965 order); *accord Webster v. Comm'n for Lawyer Discipline*, 704 S.W.3d 478, 496 (Tex. 2025); *Messameno v. Statewide Grievance Comm.*, 663 A.2d 317, 336 (Conn. 1995). In reviewing a bar complaint against an Attorney General, courts must first ask whether the conduct complained of can be subject to discipline in the first place.

Actions unrelated to the Attorney General's constitutional authority or duties may well warrant discipline. *See, e.g.*, *Webster*, 704 S.W.3d at 500 (identifying private-capacity representation, *ultra vires* conduct, or criminal conduct). Consider, for example, Rule 8.4(b) of the Montana Rules of Professional Conduct, which provides that a lawyer shall not "commit a serious crime[.]" The Montana Constitution grants the Attorney General no authority to commit crimes so subjecting her to discipline for such actions creates no separation-of-powers problem.

But, to the extent an Attorney General is exercising discretion in the discharge of his constitutional duties, separation-of-powers

principles limit the judicial branch from interfering with that exercise of executive power. *See Webster*, 704 S.W.3d at 496. Courts have long recognized, and the United States Supreme Court has recently reaffirmed, that judicial intrusion on executive discretion violates the separation of powers. *See United States v. Texas*, 599 U.S. 670, 678–79 (2023) (citing cases involving "problems raised by judicial review" over executive "discretion" in various contexts). Justices on this Court, too, have made clear that "whenever a particular executive duty requires the exercise of political or administrative discretion, it has deemed itself without power to interfere, whether such discretion was wisely exercised or not." *State ex rel. Kidder v. Fouse*, 353 P.2d 755, 758 (Mont. 1960) (Harrison, C.J., op.)

Many of the Attorney General's actions involve the exercise of discretion because, both in Montana and in many other States, the State Constitution confers broad discretion on this executive office. *See*, *e.g. W. Tradition P'ship., Inc. v. Attorney General*, 291 P.3d 545, 550 (Mont. 2012) ("[I]f a challenge is brought to a state statute, the Attorney General has discretion to decide whether or not to defend its constitutionality."); *Imperial Sovereign Court v. Knudsen*, 699 F.Supp.3d. 1018, 1032 (D. Mont. 2023) (recognizing the "vast" executive authority granted the Attorney General under the "Montana Constitution and the Montana Code"); *see also Webster*, 704 S.W.3d at 495–96 (describing the Attorney General's "broad discretionary

power in carrying out his [constitutional] responsibility to represent the State"); *Hoffman v. Madigan*, 80 N.E.3d 105, 113 (Ill. App. 2017) ("The Attorney General has broad discretion to conduct litigation on behalf of the State, including evaluating the evidence and other pertinent factors to determine what action, if any, can and should properly be taken." (cleaned up)); *State v. Lead Indus., Ass'n*, 951 A.2d 428, 473 (R.I. 2008) ("[T]he Attorney General [] has broad powers and responsibilities . . . In the course of exercising those powers, the Attorney General is vested with broad discretion." (cleaned up)).

Thus, the question for a court reviewing a disciplinary complaint against an Attorney General is whether the conduct complained of involved the exercise of constitutionally conferred discretionary authority. If the answer is "yes," the court should proceed no further.

And here, the conduct identified in the complaints against the Attorney General falls into that category. None of the Attorney General's actions constituted clear violations of the Montana Rules of Professional Conduct. Even worse, this complaint arises from allegedly sharp filings and communications made while representing the Legislature—another Constitutional branch of government. Novel theories of professional responsibility against a duly elected

Constitutional officer for conduct in litigationshould be met with skepticism under both the federal and Montana Constitutions.

To the extent there is any doubt about that conclusion, the Court should err on the side of caution rather than risk intruding on the executive's authority and violating the separation of powers. *See Webster*, 704 S.W.3d at 499-01 (rejecting State Bar's novel interpretation of a disciplinary rule that "eschew[ed] any limiting principle" and had no "precedent"). As the inclusion of the separation-of-powers provision in the Montana Constitution makes clear, the intrusion of one branch on the authority of another is essential to protect individual freedom. *See* Mont. Const. Art. III, § 1; *see also Collins v. Yellen*, 141 S. Ct. 1761, 1796 (2021) (Gorsuch, J., concurring in part) ("Protecting this aspect of the separation of powers isn't just about protecting [executive] authority. Ultimately, the separation of powers is designed to secure the freedom of the individual." (cleaned up)).

Permitting the judicial branch to sanction the Attorney General in this context also offends the broader structure of the Montana Constitution. Like many of its counterparts, it already provides a structural method for removing the Attorney General from office outside of elections. Article V vests that power solely with the Montana Legislature—a politically accountable branch. *See* Montana Const. Art. V, § 13. In other words, ODC's actions unilaterally

expropriate the power of the people and their elected representatives in two branches of government.

ODC attempts to distinguish from the most recent cases in the Country to assess the potential liability for an Attorney General before its disciplinary committee. *See* ODC Br. at 80 (missing citations to *Paxton v. Comm'n for Lawyer Discipline*, 2025 WL 492748 (Tex. 2025) and *Webster*, 704 S.W.3d 478).

At the time of ODC's brief, it was correct that *Paxton* "has not been reversed." ODC Br. at 81. But that opinion has now been vacated by the Texas Supreme Court after the Texas State Bar voluntarily dismissed its entire case following its loss in *Webster*. *See Paxton*, 2025 WL 492748 at *1–2. *Paxton* is therefore no longer good law.

As for *Webster*, the Court found that "the judiciary lacks" a "free-ranging power to second-guess the attorney general's . . . exercise of discretion that is wholly divorced from and collateral to the litigation in which those filings are made." *Webster*, 704 S.W.3d at 496. The Texas State Bar's efforts to claim such power through the artifice of a disciplinary action "creates unauthorized friction between the judicial and executive departments" and a court entertaining such a claim "would violate the separation-of-powers doctrine." *Id.*

Here too, given the necessarily intertwined nature of the dispute between constitutional branches and offices implicating the fundamental role of the State Attorney General, this Court should embrace humility and parsimony in meting out potential discipline.

II. If this case is permitted to proceed, it will open the floodgates to more like it and will undermine State Attorneys General in the discharge of their constitutional duties.

A. The need to respond to disciplinary complaints of this sort unduly interferes with the ability of State Attorneys General to do their jobs.

The job of a State Attorney General is not easy. In Montana, the Attorney General not only provides legal representation for the State, its constitutional officers, statutory boards, and commissions, but also oversees significant law enforcement efforts. At any given time, the Attorney General is overseeing diverse cases across Montana. And the Attorney General oversees not only civil but also criminal prosecutions and appeals. The responsibilities of Attorneys General in other States are similar.

Adding to the Attorney General's busy docket responding to improper disciplinary complaints obviously risks creating a struggle. Disciplinary proceedings take time and distract the Attorney General from the public's business. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) (expressing concern about the sort of inquiries that "can be peculiarly disruptive of effective government"). And

with his personal law license on the line, it is difficult for the Attorney General to delegate the matter.

While the States do not argue that the Attorney General should be immune from all disciplinary proceedings—and acknowledge that any disciplinary complaint against the Attorney General will interfere with his ability to get his job done—they push back against such discipline here. Legitimate complaints—those that do not implicate the Attorney General's executive discretion—need not be addressed here.

Without that limitation, political adversaries will have endless opportunities to haul the Attorney General before the disciplinary commission: It isn't hard to find fundamental political disagreements about basic facts, evidence, and law at the heart of nearly every controversial case. Those risks are magnified when the adverse party is the Judiciary or one of its arms or agents.

Indeed, sharply worded disputes are common in the legal profession. But allowing such normal litigation behavior to be the cause of a disciplinary complaint due to the opposing party's status as judges risks enflaming interbranch breaks in comity even further. This case started in 2021—a distraction spanning almost four years *and* an election in which the people of Montana had the ability to assess the complaint and participate in an election. Attorney General Knudsen was reelected in a landslide. Second-guessing of

the propriety of that election is inappropriate. And disrupting the proper functioning the Attorney General's Office for *years* cannot be made so easy.

B. Political adversaries who cannot succeed at the ballot box will increasingly turn to bar discipline as an alternative method of political control over their elected Attorneys General.

The real question in this case is not whether the allegedly sharp filings made while representing the Legislature violate professional conduct. Instead, it is whether courts will permit the politicization of the State Bars and weaponization of disciplinary rules against elected executive officers discharging their constitutional duties. This Court should quash the attempt to politicize the disciplinary process.

Sometimes the Judicial branch will have policy disagreements with the other branches of government. But the context of that disagreement flavors the propriety of how the courts can handle that disagreement. Here, former Chief Justice Mike McGrath opposed a bill enacted by the Legislature and signed by the Governor. *See* Knudsen Br. at 2. Beyond that public opposition, many judges weighed in on a poll to determine the position of district judges. *Id.* And beyond that private poll, some judges hit "reply all" to state their positions to the other judges.

Chief Justice McGrath picked Judge Kurt Krueger to sit as his replacement to determine the bill's constitutionality. But as now-public documents show, Judge Krueger replied to all the State judges in Montana that he was "adamantly opposed to this bill." *Id.* at 3 (cleaned up). After that email came to light, the State moved to disqualify the Judge—and he quickly complied. But six Justices declined to recuse themselves, despite the questions raised by both the poll and underlying communications. Unfortunately, the Judiciary did not retain many records related to emails—but they may have been recoverable on the State's servers. *Id.* at 4–5. So the Legislature sent a subpoena for those emails.

Following a never-before-seen *ex parte* communication between counsel moving to quash the subpoena and an extraordinarily rare weekend ruling, the subpoena was quashed. *Id.* at 8.

This complaint exemplifies a new sort of lawfare cut from the same cloth as those antidemocratic efforts. The complainant here is not a Montana resident. Allowing this type of complaint to be filed by someone lacking any insight or stake in Montana's function of government brings a gross partisan sheen to this delicate interbranch conflict.

"Concerned citizens" using the rules of professional conduct to chasten elected Attorneys General for making the very choices their

State's voters elected them to make is a perversion of our disciplinary systems across the country. *See Webster*, 704 S.W.3d at 505 (describing underlying bar complaint made against the First Assistant Attorney General of Texas by "an out-of-state, inactive Texas attorney"). Indeed, there is already a means for "concerned citizens" to exert political control over the office of the Attorney General: elections.

Here, the State Bar's disciplinary commission is neither an appropriate substitute for nor a proper supplement to the people's will.

To the extent that this Court fears there may be no Court available to discipline an errant Attorney General, it should noted that there is a better placed disciplinary body—the Court in which the purported bad behavior occurred. *See id.* at 504 (explaining that "a court can sanction" the Attorney General "and other executive-branch lawyers for conduct that occurs before that court and that violates" the disciplinary rules). As Respondent notes, this dispute between the Legislature and the Judiciary "occurred in plain sight in front of the Montana Supreme Court and the public" yet the "Montana Supreme Court didn't issue any discipline against the Attorney General." Knudsen Br. at 119. And no "judge, justice or attorney" notified ODC of any potential ethical violation, as required under *their* ethical obligations. *Id.*

That obligation to report any ethical violation has been recently affirmed by this Court. *See Schuff v. A.T. Klemens & Son*, 16 P.3d 1002, 1014 (Mont. 2000). In *Schuff*, this Court explained that failing to promptly report an "obvious" rule violation itself ran afoul of Montana Rule of Professional Conduct 8.3. *Id.* In that case, this Court referred inappropriate behavior to the Commission—without prejudice of having prejudged the result—as required under their obligations under the Montana Rules. *Id.* There, the Court recognized that the obligation to report raised questions as to "why such violations were not reported to the disciplinary authority with jurisdiction" to resolve the alleged ethical issue. *Id.* at 1015–16.

If this Court observed such egregiously unethical behavior that it warrants a 90-day suspension of the elected Attorney General—why was there no referral or disciplinary action within the underlying case? Why was it incumbent on a California-based attorney to start the process four years ago that this case has now come before this Court? Presumably such a flagrant violation would implicate this Court's own ethical reporting concerns. *See id.* Or perhaps the Complaint filed against the Attorney General is not so strong—and not strong enough to bear the separation-of-powers crisis that this Court is being asked to trigger.

Finally, there is an appreciable risk that this type of political activism will incentivize bar complaints made for the sole purpose

of obstructing the ability of Attorneys General and their staff to carry out their constitutional responsibilities. The weaponization of the attorney grievance process impedes the work of the people and frustrates the constitutional structure. *Am. K-9 Detection Services, LLC v. Freeman*, 556 S.W.3d 246, 252 (Tex. 2018) (quoting *Marbury v. Madison*, 5 U.S. 137, 170 (1803)). Due to those concerns, courts should extend maximum discretion to Attorneys General and their staff in all but the most clear and extreme cases of misconduct.

CONCLUSION

The ODC erred in declining to dismiss the Complaint against the Attorney General. This Court should fix that decision.

Dated this 14th day of March 2025. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 11 of the Montana Rules of Appellate Procedure. I certify that this *amicus* brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,238 words, excluding certificate of service and certificate of compliance

/s/ *Dale Schowengerdt*