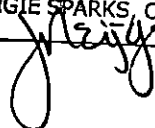


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**FILED**

JUL 02 2021

ANGIE SPARKS, Clerk of District Court  
By  Deputy Clerk

Attorney for Plaintiffs

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

THOMAS WINTER AND BARBARA  
BESSETTE,

*PLAINTIFFS,*

v.

THE STATE OF MONTANA, BY AND  
THROUGH GREG GIANFORTE, IN  
HIS OFFICIAL CAPACITY AS  
GOVERNOR OF MONTANA,

*DEFENDANT.*

Cause No. ADV-2021-699

**BRIEF IN SUPPORT  
OF  
EX PARTE MOTION FOR  
TEMPORARY RESTRAINING  
ORDER AND MOTION TO SHOW  
CAUSE**

Plaintiffs, through counsel, submit this Brief in Support of their Ex Parte Motion for Temporary Restraining Order and Motion to Show cause and state as follows:

**Summary**

Senate Bill 140 (“SB 140”) requires that a person eligible for appointment to a judicial vacancy be an “applicant” before they can be considered a “nominee,” *see* SB 140, §§ 4(2), 5(2), and grants the Governor complete control over the application process. This violates Mont. Const. art. III, § 1, because it grants the executive branch power that Mont. Const. art. VII, § 8(2) reserves to the legislative branch.

Absent the grant of a Temporary Restraining Order (“TRO”), and beginning tomorrow, July 1, 2021, the Governor will be able to appoint a replacement to the existing vacancy in the Eighth Judicial District Court, Cascade County. The Governor has issued press releases stating his intent to name a replacement in July 2021. Further, pursuant to the plain language of SB 140, the Governor must appoint a replacement by July 30, 2021, which is thirty days after the close of the public notice period. A TRO is necessary in order to preserve the status quo until a hearing can be held on the requested preliminary injunction.

Plaintiffs request that this Court grant their Ex Parte Motion for Temporary Restraining Order and Motion to Show Cause pending a hearing on Plaintiffs’ requested preliminary injunction, *see Complaint*, ¶¶ 62–72.

Additionally, Plaintiffs request that this Court order the State to appear and show cause why the requested preliminary injunction should not be granted.

### **Legal Standard**

“Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order.” Mont. Code Ann. § 27–19–314.

“The purpose of a temporary restraining order is to preserve the status quo until a hearing can be held to determine whether an injunction should be granted.” *Montana Tavern Ass'n v. State By & Through Dep't of Revenue*, 224 Mont. 258, 264, 729 P.2d 1310, 1314–15 (Mont. 1986) (citations omitted); *see also Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 14, 400 Mont. 1, 462 P.3d 218. A district court has the discretion “to grant or deny a TRO application without first holding a hearing[.]” *Flying T. Ranch*, at ¶ 14.

To obtain a TRO, the moving party must present a prima facie case with a “probable right” and a “probable danger that such right will be defeated without the special interposition of the court.” *Boyer v. Karagacin*, 178 Mont. 26, 33, 582 P.2d 1173, 1177 (Mont. 1978) (*overruled on other grounds Shammel v. Canyon Resources Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912).

It is not necessary for a court to be satisfied that the moving party “will certainly prevail” prior to issuing a temporary restraining order. *Boyer*, 178 Mont. at 33, 582 P.2d at 1177.

A court may issue a TRO without written or oral notice to the adverse party or the adverse party’s attorney when “(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or the party's attorney could be heard in opposition; and (2) the applicant or the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give notice and the reasons supporting the applicant's claim that notice should not be required.”

### Argument

**I. Plaintiffs have made a prima facie showing that they are entitled to a preliminary injunction under either Mont. Code Ann. § 27–19–201(1) or Mont. Code Ann. § 27–19–201(3).**

Plaintiffs’ request for a preliminary injunction, and the facts supporting the same, are set for in the verified Complaint for Declaratory and Injunctive Relief filed June 25, 2021. In general, the reasons underlying Plaintiffs’ request for a preliminary injunction can be summarized as follows.

First, Plaintiffs have made a prima facie showing that they are entitled to a declaration that SB 140 is unconstitutional and a fundamental aspect of Plaintiffs’ requested relief is the enjoinder of the Governor’s further exercise of power under SB 140—in particular, the enjoinder of the Governor’s imminent exercise of power under SB 140 in connection with the

pending vacancy in the Eighth Judicial District Court. *See* Mont. Code Ann. § 27–19–201(1). Through their verified Complaint, Plaintiffs have demonstrated that SB 140 violates the separation of powers clause of the Montana Constitution by allowing the executive branch to exercise power belonging to the legislative branch in the absence of a constitutional provision expressly permitting such an exercise. In part, SB 140 does so by granting the Governor unrestrained discretion over the application process necessary for eligible individuals to complete prior to being designated nominees for a judicial vacancy and by granting the Governor unbound authority over the manner in which nominees are selected, effectively allowing the Governor to exercise legislative power to determine the precise manner in which nominees are selected and resulting in the implementation of processes not contemplated by the plain language of SB 140 (e.g. the Governor’s creation of an “Advisory Council”).

Second, Plaintiffs have made a prima face showing that the Governor’s appointment of a judicial officer to the pending vacancy in the Eighth Judicial District Court (Cascade County) is imminent. For the reasons set forth in Plaintiffs’ Complaint, the result of this appointment would be the installment of a judicial officer that is not vested by law with judicial authority. Such an appointment would tend to cause the judgment by this Court to produce an undesirable effect because, as recently noted by the Montana Supreme Court, such a judgment from this Court would call into question all acts taken by the appointed judge and render them void resulting in a monumental loss of judicial resources and posing an incredible burden to the court system. *See Brown v. Gianforte*, 2021 MT 149, ¶¶ 15–17, \_\_ Mont. \_\_, \_\_ P.3d \_\_.

## **II. Plaintiffs are entitled to the issuance of a temporary restraining order.**

Again, to obtain a TRO, the moving party must present a prima facie case with a “probable right” and a “probable danger that such right will be defeated without the special interposition of

the court.” *Boyer v. Karagacin*, 178 Mont. 26, 33, 582 P.2d 1173, 1177 (Mont. 1978) (*overruled on other grounds Shammel v. Canyon Resources Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912).

Here, through the allegations in their Complaint, Plaintiffs have demonstrated that SB 140 violates the separation of powers clause of the Montana Constitution. As part of their requested relief, Plaintiffs ask this Court to declare SB 140 void. The Montana Supreme Court recently characterized the potential harm posed by the appointment of a judicial officer under a void appointment statute as “irreparable.” *Brown*, ¶ 18.

Mr. Winter and Ms. Bessette are residents of Montana and subject to the jurisdiction of this State’s district courts. They have a fundamental due process right in the appointment of judicial officers that are vested with judicial authority. *See Brown*, ¶ 19 (“The seriousness of such a ‘judge’ unlawfully wielding authority that may affect the Petitioners is a sufficiently clear threat to Petitioners’ property or civil rights to meet the case-or-controversy requirement for standing”). Under the Court’s interpretation of the individual rights, and potential harms to such rights, impacted by SB 140 in *Brown v. Gianforte*, these facts are sufficient to establish a “probable right” sufficient to obtain the requested TRO.

Further, there is a clear danger that such right will be impacted without this Court’s intervention. Through verified allegations in the Complaint, Plaintiffs have established that the Governor’s appointment of a replacement to the pending vacancy in the Eighth Judicial District Court (Cascade County) will be made under an unconstitutional, and therefore void, appointment statute is imminent. “The Governor has stated that he will name his ‘appointee’ in July 2021.” Complaint, ¶ 46. The Governor has also stated that the period for public comments on the existing applicants to the pending vacancy closes today, June 30, 2021. Complaint, ¶ 48. Pursuant to SB

140, § 5(3), the Governor must appoint a replacement within thirty days of the close of the public comment period. Complaint, ¶ 34. These facts are sufficient to demonstrate that, if this Court does not intervene, Plaintiffs' rights, including their fundamental rights to due process and individual dignity, *see Brown*, ¶ 18, would be impacted.

Additionally, as stated above, Plaintiffs have made a prima facie showing that they are entitled to a preliminary injunction under either Mont. Code Ann. § 27-19-201(1) or Mont. Code Ann. § 27-19-201(3). *See* Complaint, ¶¶ 62-72. Accordingly, it is appropriate to grant the requested TRO in order to preserve the status quo pending a hearing on the requested preliminary injunction.

Finally, the Montana Supreme Court's statements in *Brown v. Gianforte* concerning the underlying issues implicated by SB 140 cannot be ignored. Indeed, a close reading of said analysis leaves no alternative option but to seek the extraordinary remedy of injunctive relief. In *Brown*, the Court noted that the rulings issued by a district court judge appointed pursuant to SB 140 "will impact hundreds of litigants, criminal defendants, and third parties." *Brown*, ¶ 16. Further, the Court recognized that "should SB 140 be found unconstitutional through the normal course of litigation and appeals after an appointed judge presides in the case, motions, briefs, or hearings in any affected cases would need to be re-heard, and warrants, orders, or sentences the judge issued would be voided." *Brown*, ¶ 16. This scope of the burden this would place on the judicial system in the effected county is indescribable.

But more importantly, the Court found that these concerns pale in comparison to the constitutional and due process issues implicated by SB 140. "A judge's authority is wide and far-reaching: the judge may compel payment of fees and awards, divest litigants of their property,

declare a defendant's guilt or innocence, sentence offenders to prison, separate families, and otherwise strip people of the civil and political rights to which they are guaranteed." *Brown*, ¶ 17.

Plaintiffs have made a prima facie showing that SB 140 is unconstitutional. If Plaintiffs are correct, without this Court's intervention "in the near future there would be a person in Cascade County with no vested authority acting—in the literal sense—as a judge." *Brown*, ¶ 19. Under these circumstances, especially following the Montana Supreme Court's decision in *Brown v. Gianforte*, to not seek injunctive relief would cause more harm than obtaining said relief. Plaintiffs' have established a "probable right" and a "probable danger that such right will be defeated without the special interposition of the court."

For these reasons, and due to the fundamental due process and constitutional concerns raised by the issues in this case, this Court should grant the requested temporary restraining order.

**III. This Court may issue the requested TRO without notice to the Governor or the Governor's counsel.**

Plaintiffs seek ex parte temporary restraining order, as described in Mont. Code Ann. § 27–19–315.

**A. As shown in the verified Complaint, a delay in reaching the merits of this request would likely result in immediate and irreparable injury to Plaintiffs.**

Plaintiffs' Complaint for Declaratory and Injunctive Relief was verified by Mr. Winter. Attached to the Complaint as Exhibits 3, 5, and 6, were public statements issued by the Governor reflecting his intended timeline for appointing a replacement to the pending vacancy in the Eighth Judicial District Court. As public statements issued to the public by the Governor's office, these documents contain information that is known within the State of Montana and the accuracy of these statements cannot be reasonably questioned.

“The Governor has stated that he will name his ‘appointee’ in July 2021.” Complaint, ¶ 46. The Governor has also stated that the period for public comments on the existing applicants to the pending vacancy closes today, June 30, 2021. Complaint, ¶ 48. Pursuant to SB 140, § 5(3), the Governor must appoint a replacement within thirty days of the close of the public comment period. Complaint, ¶ 34.

In summary, beginning at the close of the public comment period today at 5 p.m., the Governor is statutorily entitled to name his appointee to the Eighth Judicial District Court.

Accordingly, a default briefing schedule, as contemplated by the Montana Rules of Civil Procedure, in addition to a hearing, would not resolve in time to prevent the irreparable harm caused by the Governor’s appointment of a replacement to the pending vacancy in the Eighth Judicial District Court.

As described above, the Montana Supreme Court has already characterized the harm caused by a judge appointed pursuant to a void appointment statute to be “irreparable.” As Plaintiffs are Montana residents and subject to the jurisdiction of the Eighth Judicial District Court, including Ms. Bessette who is a resident of Cascade County, a delay in reaching the merits of the requested injunctive relief would likely result in immediate and irreparable injury to the Plaintiffs.

**B. Notice to the Governor or the Governor’s counsel should not be required in this case.**

As further set forth in the Declaration attached as Exhibit 1, Plaintiffs have made efforts to provide notice to the Governor and his counsel concerning the injunctive relief requested in this Complaint. But, due to the circumstances of this case, and given that the Governor is authorized to appoint a replacement following the close of the public comment period today, June 30, 2021, at 5 p.m., the timing does not allow meaningful time for the State to respond.



Simply put, irreparable and immediate injury will likely result if the status quo is not maintained until this Court can hold a hearing on the requested preliminary injunction.

**Conclusion**

For these reasons, Plaintiffs respectfully request that this Court issue a temporary restraining order enjoining the Governor's exercise of appointment power under SB 140 and issue an order requiring the State to show cause why the requested preliminary injunction should not be granted.

DATED this 30<sup>th</sup> day of June, 2021.

TARLOW STONECIPHER  
WEAMER & KELLY, PLLC



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E. Lars Phillips  
*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of June, 2021, a true and correct copy of the foregoing document was served on the following by e-mail and U.S. Mail:

Governor Greg Gianforte  
P.O. Box 200801  
Helena, MT 59620-1401  
governor@mt.gov

Attorney General Austin Knudsen  
215 N. Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
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