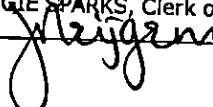


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FILED

JUL 09 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

(*correct*)

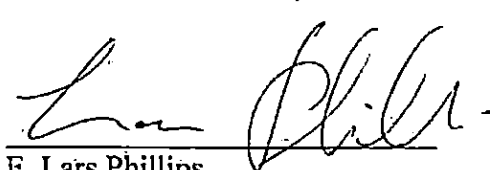
**PLAINTIFFS' NOTICE OF FILING OF
PETITION FOR WRIT OF
SUPERVISORY CONTROL**

Plaintiffs hereby notify the Court and Hon. Michael McMahon that they have filed a
Petition for Writ of Supervisory Control with the Montana Supreme Court on July 9, 2021.

A copy of the Petition is attached to this Notice as Exhibit A.

DATED this 9th day of July, 2021.

TARLOW STONECIPHER
WEAMER & KELLY, PLLC


E. Lars Phillips
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

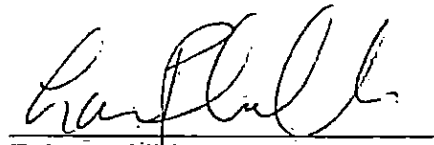
I hereby certify that on the 9th day of July, 2021, a true and correct copy of the foregoing document was served on the following:

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U.S. Mail Only

Honorable Michael F. McMahon
District Court Judge
First Judicial District Court
P.O. Box 158
Helena, MT 59624



E. Lars Phillips

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA _____

THOMAS WINTER AND BARBARA BESSETTE,
Petitioners,

v.

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS
AND CLARK COUNTY, THE HONORABLE MIKE
MCMAHON, PRESIDING JUDGE,
Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL

*Original Proceeding arising from Winter v. Gianforte, Cause No. BDV-
2021-699, Montana First Judicial District Court, Lewis and Clark
County, Hon. Mike McMahon, District Court Judge.*

Appearances:

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Introduction

“Any statute must yield to the fundamental law of the land. The Constitution does not yield to the statute.” *State ex rel. Strandberg v. State Bd. of Land Comm'rs*, 131 Mont. 65, 74, 307 P.2d 234, 239 (Mont. 1957). SB 140 violates Montana’s Constitution in two ways.

First, the Constitution requires the Governor to appoint a replacement to a judicial vacancy from nominees selected in the manner provided by law. The Constitution does not expressly permit or direct the Governor to determine who those nominees may be. *See* Mont. Const. art. III, § 1. The grant of appointment authority to the Governor is also a limitation on his authority—he is limited to the act of appointment only. Senate Bill 140 is unconstitutional because it violates this limitation by empowering the Governor to exercise discretion over the selection of nominees.

Second, by granting the Governor plenary authority over the application process and requiring eligible persons to participate in the application process as a prerequisite to being considered nominees, and in the absence of any identifiable limitation on the power granted to the Governor, Senate Bill 140 is a void delegation of legislative authority.

Exercise of supervisory control over these proceedings is appropriate because the Governor has appointed a replacement to the previous vacancy in the Eighth Judicial District Court, resulting in the installation of a district court judge lacking constitutional authority, and this Court can resolve this existing crisis by determining this purely legal question.

Statement of Facts

Mr. Winter is a resident of Missoula County, is registered to vote in Montana, and pays taxes in Montana. Complaint, ¶ 12. Barbara Bessette is a resident of Cascade County, is a registered voter in Montana, and pays taxes in Montana. Complaint, ¶ 13.

Senate Bill 140 was signed into law on March 16, 2021. Exhibit 2 (hereinafter “SB 140”). Under SB 140, “eligible persons” are individuals who meet the “qualifications set forth by law for holding judicial office.” SB 140, § 2(2). Applicants are “eligible persons” who participate in the Governor’s application process. SB 140, § 3. “[N]ominees,” in turn, are “applicant[s]” who are “eligible persons” and who “receive[] a letter of support from at least three adult Montana residents” under the timeframe set by the Governor. SB 140, § 4(4).

SB 140 requires that applications be submitted directly to the Governor and grants the Governor the authority to investigate the applicants. SB 140, §§ 2(1)–(2); SB 140, § 3. SB 140 empowers the Governor to interview applicants, review public comment, and receive letters of support submitted concerning an applicant. SB 140, § 4(1)–(2).

Further, SB 140 empowers the Governor to appoint from the “list of applicants” as opposed to allowing the Governor to appoint from the “nominees.” SB 140, § 5(1).

By its terms, SB 140 limits nominees to “applicant[s] who [have] the qualifications set forth by law and who receive[] a letter of support from at least three adult Montana residents by the close of the public comment period provided for in subsection (1)[.]” SB 140, § 4(2). Thus, an “eligible person” may not be a “nominee” unless they participate in the application process set by the Governor, regardless of whether they receive the requisite letters of support. SB 140, § 4(2).

On April 30, 2021, the Governor was notified of a vacancy in the Eighth Judicial District Court. Exhibit 3. The Governor announced the solicitation of “applications from and nominations of any lawyer in good standing” on May 4, 2021. Exhibit 4. The Governor required

applications to be submitted by June 1, 2021, and set a public comment period for June 1, 2021 through June 30, 2021. *Id.*

The Governor's May 4 solicitation of applications included a link to a publicly available application form. *See* Exhibit 5. The Application requires that applicants consent to the Governor's investigation and verification of any information submitted in the application, as well as to the disclosure of a broad swath of information. *Id.*, at 5. The scope of the investigation that eligible persons are required to submit to under the Governor's Application cannot be overstated. *Id.* The Application requires that applicants consent to the Governor's investigation and verification of any information contained in the Application, and requires that applicants disclose any "information, files, records, or reports" requested by the Governor from employers, associates, law enforcement agencies, all governmental agencies, and all other public or private agencies. *Id.*

Petitioners filed the underlying Complaint on June 25, 2021, and—on June 30, 2021—moved for a temporary restraining order preventing the Governor from appointing a replacement to the vacancy in the Eighth Judicial District Court, pending a hearing on a

preliminary injunction. The motion was fully briefed on July 1, 2021. The District Court denied Plaintiffs' motion for a temporary restraining order on July 2, 2021, and set a preliminary injunction hearing for July 15, 2021. The Governor appointed Mr. David J. Grubich to the Eighth Judicial District Court on July 7, 2021.

Issue Presented

Does Senate Bill 140's grant of power to the executive branch violate Mont. Const. art. III, § 1?

Brown v. Gianforte, 2021 MT 149, __ Mont. __, __ P.3d __ does not answer this question.

First, the *Brown* petitioners did not raise the separation of powers issue. Their Petition defined the scope of the constitutional question presented to the Court. When parties fail to "present a reasoned argument to advance their position, supported by citations to appropriate authority," this Court's caselaw is "well-settled" that it "will not consider unsupported issues or arguments." *Griffith v. Butte School Dist. No. 1*, 2010 MT 246, ¶ 42, 358 Mont. 193, 244 P.3d 321. Thus, the separation of powers argument presented in this petition was not considered by this Court.

Second, because the *Brown* petitioners had, in summary, argued that Mont. Const. art. VII, § 8(2) required a judicial nomination commission, *Brown* was limited to the narrow holding of whether SB 140 violated the plain language of this provision. *Brown*, ¶ 3.

Third, if *Brown* did decide this question, *Brown* was wrongly decided because this Court was not presented with a sufficient record to evaluate how the statutory scheme functioned because the case was filed one day after the statute was signed, before any exercise of executive authority had occurred, and this Court did not consider Mont. Const. art. III, § 1, in reaching its decision.

Constitutional Provisions at Issue

The following constitutional provisions are implicated by this petition: Mont. Const., art. III, § 1; Mont. Const., art. V, § 1; and Mont. Const., art. VII, § 8(2).

Argument

At minimum, SB 140 is unconstitutional because it allows the Governor to appoint “from the list of applicants,” SB 140, § 5(1)—the criteria of what an eligible person must do to be an “applicant” being left to the discretion of the Governor—rather than requiring the

Governor to appoint from those “eligible persons” who are “nominees,” as defined by SB 140, §§ 4(2), 5(2). This is a fatal flaw that contradicts Mont. Const. art. VII, § 8(2)’s requirement that the Governor shall appoint a replacement from nominees selected in the manner provided by law, but it is not the most egregious of the constitutional deficiencies that permeate this statutory scheme.

I. SB 140’s delegation of power to the Governor violates Mont. Const. art. III, § 1.

A party challenging a statute’s constitutionality must meet a “heavy burden” and establish, “beyond a reasonable doubt, that the statute is unconstitutional, and any doubt must be resolved in favor of the statute.” *State v. Spady*, 2015 MT 218, ¶ 12, 380 Mont. 179, 354 P.3d 590.

A. SB 140’s delegation of power to the Governor to determine who may be a nominee violates Article III, Section 1.

Mont. Const. art. III, § 1, mandates that any person “charged with the exercise of power properly belonging to one branch” is forbidden from exercising “any power properly belonging to either of the others” absent express constitutional provisions directing or permitting such

exercise. This clause is not a suggestion: it is the fundamental law of this State and must be strictly construed and closely followed.

Put another way, this clause “specifically allows one branch to exercise the power properly belonging to another branch if the Constitution expressly directs or permits.” *Baumgardner v. Pub. Employees’ Ret. Bd. of State*, 2005 MT 199, ¶ 24, 328 Mont. 179, 185, 119 P.3d 77, 81.

The Constitution provides specific requirements for the process of filling judicial vacancies. *See* Mont. Const., art. VII, § 8(2). It requires the Governor to appoint certain judicial officers “from nominees selected in the manner provided by law.” *Id.* The Constitution does not contain express direction or permission granting the Governor the authority to determine who the nominees for a judicial vacancy may be, i.e., determining who meets the statutorily-predicate criteria of being an “applicant.”

By granting the Governor the power to investigate eligible persons, SB 140, § 2(1), and the power to set the terms of the application process, *id.*, § 3, SB 140 grants the Governor the power to determine who may be considered a nominee. Because there is no

express permission or direction granting the Governor the authority to make such a determination, SB 140 violates Article III, Section 1.

Montana's Constitution "is a limitation upon the power of the legislature and not a grant of power to that body." *State ex rel. James v. Aronson*, 132 Mont. 120, 127, 314 P.2d 849, 852 (Mont. 1957) (citation omitted). Because the Constitution is a document of limitation, a statute is invalid if it "contravene[s] some express or implied limitation" found in the Constitution. *See State ex rel. Woodahl v. Straub*, 164 Mont. 141, 147–48, 520 P.2d 776, 780 (Mont. 1974). Where the exercise of authority by one branch of government is questioned, the limitation inherent in the Constitution itself is further amplified by the limitation imposed on all branches of government by Mont. Const. art. III, § 1. SB 140 and the plain language of Article VII, Section 8(2), must be interpreted through the lens of this limitation.

First, Article VII, § 8(2)'s grant of power to the Governor to "appoint a replacement from nominees selected in the manner provided by law" is an implied limitation on the power of the Governor. By including a grant of power, Article VII, § 8(2) necessarily implies a limitation against all powers not granted. Accordingly, it precludes the

Governor from determining who the nominees may be, i.e., defining the criteria of who may be an applicant.

Second, in light of Article III, Section 1, this clause also contains an implied limitation on the power of the Legislature. Through the phrase, “in the manner provided by law,” the Constitution grants the Legislature the ability to determine how these nominees are selected conditioned upon the implied limitation precluding the Governor from exercising this power. Accordingly, Article III, Section 1, prevents the Legislature from delegating the power to select nominees to the Governor.

SB 140 violates both the implied limitation on the Governor, which precludes him from determining who the nominees may be, and the implied limitation imposed on the Legislature, which precludes it from granting such power to the Governor.

This analysis is supported by the well-established principle that the words of a constitution may not be ignored as meaningless. *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 516, 534 P.2d 859, 863 (Mont. 1975) (citations omitted). What meaning can the clause, “the Governor

shall appoint a replacement from nominees,” have if the Governor is given the power to reset the criteria necessary to be a nominee?

By empowering the Governor to investigate the qualifications of “eligible persons,” SB 140, § 2(2), and making the designation of nominee conditional on an eligible person’s participation in the application process, over which the Governor has plenary authority, SB 140, §§ 4(2), SB 140 renders this clause of Mont. Const. art. VII, § 8(2), meaningless, resulting in a delegation of authority that violates the separation of powers.

B. Even if Article III, Section 1, does not render any delegation of authority to the Governor void, SB 140 is still unconstitutional because the Legislature failed to prescribe adequate bounds to the Governor’s exercise of authority.

The manner of evaluating delegations of legislative authority to administrative agencies, referred to as the nondelegation doctrine, is well-established. *Bacus v. Lake County*, 138 Mont. 69, 354 P.2d 1056 (Mont. 1960). This Court has expanded this analysis to legislative delegations to private individuals, see *State v. Mathis*, 2003 MT 112, ¶ 22, 315 Mont. 378, 381, 68 P.3d 756, 759, and legislative delegations to

the Board of Regents, *Duck Inn, Inc. v. Montana State Univ.-N.*, 285 Mont. 519, 526, 949 P.2d 1179, 1183 (Mont. 1997).

This Court has held that a statute must not vest an agency with “arbitrary and uncontrolled discretion,” *White v. State*, 233 Mont. 81, 88, 759 P.2d 971, 975 (Mont. 1988), and found that “[i]f the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity.” *Matter of Peila*, 249 Mont. 272, 276, 815 P.2d 139, 142 (Mont. 1991). The thrust of the nondelegation doctrine is that “[t]he law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion.” *Bacus*, 138 Mont. at 78, 354 P.2d at 1061.

While this Court has not applied the nondelegation doctrine to legislative delegations of authority to the Governor, the analysis is instructive here.

Under SB 140, an eligible person may not be considered for a judicial post unless that person has applied to the Governor. SB 140, § 3. Only after an eligible person has submitted themselves to the Governor’s power to investigate, *id.* § 2(1) by applying to the governor, *id.*, § 2(2),

does that person become eligible for a judicial post—a “nominee,” Id. § 4(2).

SB 140 contains no identifiable limitation on the Governor’s authority during the application phase of the appointment process and provides the Governor with extraordinary power over individuals attempting to become a member of a co-equal branch of government. For example, the Application Form requires that applicants authorize the disclosure of any “information, files, records, or reports requested” by the Governor from “a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions [the applicant has] attended, any references furnished by [the applicant], employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to [the applicant’s] citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history.” Exhibit 5, at 5.

Additionally, since the announcement of a vacancy in the Eighth Judicial District Court, the Governor's actions have underscored the plenary authority granted to the Governor relating to the application process. For example, the Governor announced the creation of an "Advisory Council" to "assist in identifying and reviewing qualified candidates to fill the district court judge vacancy in the Eighth Judicial District." SB 140 does not contemplate nor authorize the creation of an 'advisory council.'

SB 140 grants the Governor unfettered control over the application process and, in doing so, abandons the ultimate decision—whether the eligible person can meet the criteria to become an nominee—to the Governor's arbitrary and uncontrolled discretion. In the context of analyzing this legislative delegation to the Governor, the focus is not on what the Governor has done, but on the lack of guidelines or limitations on what the Governor might do, and the lack of policy guidance provided to the Governor regarding what his actions should be purposed towards. *See Bacus*, 138 Mont. at 79, 354 P.2d at 1061.

Therefore, even if this Court does not find the Governor's exercise of authority arbitrary or a result of uncontrolled discretion, SB 140 is unconstitutional because it does not contain appropriate safeguards to prevent such an exercise. An overly broad delegation of power does not avoid a finding of unconstitutionality if the subsequent exercise of power does not offend—it is the delegation of power in itself that is the act offensive to the constitution.

Further, the United States Supreme Court has held that limitations on legislative delegation are “less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.” *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975). Here, the limitation must be more stringent, not less: the Governor does not possess independent authority to investigate and select nominees for judicial office. Rather, the Governor's power in this context is expressly limited to the appointment of “a replacement from nominees selected in the manner provided by law.” Mont. Const., art. VII, § 8(2).

Finally, the delegation of legislative power contained in SB 140 cannot be separated from the implied limitation on the Governor's

authority contained in Article VII, § 8(2), and given force by Article III, § 1. “Any purported delegation by the legislature of powers inappropriate to the recipient branch of government would be clearly unconstitutional.” *Montana State Univ. v. Ransier*, 167 Mont. 149, 153, 536 P.2d 187, 189 (1975).

“[T]he 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.” *Brown*, ¶ 56 (Rice., J., concurring) (citation omitted). The United States Supreme Court has consistently recognized this fundamental purpose of the separation of powers. “The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” *Myers v. United States*, 272 U.S. 52, 293 (1926).

This is consistent with this Court’s well-established interpretation of the importance of the separation of powers: “[t]he Montana Constitution demands that the three branches of government remain

separate and distinct . . . in order to keep each branch accountable to the people, and to prevent too much power from being lodged in any one branch of government.” *Linder v. Smith*, 193 Mont. 20, 32–33, 629 P.2d 1187, 1194 (Mont. 1981) (citations omitted).

In conclusion, if SB 140 does not require that eligible persons participate in the application process, then the Governor’s use of SB 140 to force applicants to submit to the invasive investigation and disclosure requirements stated in the Application demonstrates the lack of appropriate parameters around the delegation of legislative authority to the Governor.

On the other hand, if SB 140 does require that such persons participate in the application process, then the statutory scheme impermissibly allows the Governor to arbitrarily set additional requirements determinative of who may be considered a nominee.

C. When evaluating SB 140, this Court should consider the effect of Senate Bill 402—which is conditionally effective upon a determination that SB 140 is unconstitutional.

While statutes enjoy a presumption of constitutionality, and this Court must avoid an unconstitutional interpretation, if possible, *see Brown*, ¶ 31 (citations omitted), adequate consideration must be given

to Senate Bill 402, signed into law on May 11, 2021, which re-establishes the Judicial Nomination Commission in the event “the clerk of the Montana supreme court certifies to the code commissioner that Senate Bill No. 140 is found unconstitutional or otherwise invalid.” Senate Bill 402, § 6(2). At minimum, this Court should interpret Senate Bill 402 as acknowledgement, by the Montana Legislature, that SB 140 poses serious constitutional concerns.

II. Supervisory Control is Appropriate

The Governor completed the appointment of a replacement to the Eighth Judicial District Court on July 7, 2021, *see* Exhibit 2–8.¹ Because this appointment was made under a constitutionally infirm statutory scheme, it has created an urgent and emergency factor rendering the normal appellate process inadequate, requiring this Court’s exercise of supervisory control over the proceedings.

This Court has supervisory control over all Montana courts. Mont. Const. art. VII, § 2(2). Supervisory control is an extraordinary remedy,

¹ The exhibits attached to this Writ are press releases and public documents provided by the Governor and memorialized on the website created by the Governor’s Office, nominatejudges.mt.gov, created for this purpose. This Court should take judicial notice of the facts contained in these documents pursuant to Rule 201, Mont. R. Evid.

and this Court considers such requests on a case-by-case basis. *Sweeney v. Dayton*, 2018 MT 95, ¶ 6, 391 Mont. 224, 416 P.3d 187.

This Court may exercise supervisory control when “urgency or emergency factors” render the normal appeal process inadequate, when the case involves “purely legal questions,” and when “constitutional issues of state-wide importance are involved.” Rule 14(3)(b), Mont. R. App. P; see *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 2019 MT 115, ¶ 5, 395 Mont. 478, 443 P.3d 407 (citation omitted). “Judicial economy and inevitable procedural entanglements [have been] cited as appropriate reasons for this Court to issue a writ of supervisory control.” *Stokes v. Montana Thirteenth Jud. Dist. Ct.*, 2011 MT 182, ¶ 5, 361 Mont. 279, 281, 259 P.3d 754, 756 (citations omitted) (alteration original).

This Court’s considerations regarding whether to exercise supervisory control are similar to its considerations when considering whether to exercise original jurisdiction. Compare Mont. R. App. P. 14(3) with 14(4). This Court recently found that urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate in the context of a challenge to SB 140. See *Brown*, ¶

30. The district court’s denial of Plaintiffs’ motion for temporary restraining order and the Governor’s subsequent appointment to the Eighth Judicial District Court compel the same conclusion here.

This case presents a constitutional issue of state-wide importance—as this Court recognized, if Petitioners’ constitutional challenge to SB 140 is successful, “it would render any rulings by an individual appointed to the [then-current] vacancy in the Eighth Judicial District void ab initio,” which this Court characterized as a “wholly untenable situation.” *Brown*, ¶¶ 26–30.

This case presents the purely legal question of whether SB 140 violates the separation of powers mandate contained in Mont. Const. art. III, § 1. *Mathis*, ¶ 8 (“Whether a statute is constitutional is a question of law”).

Finally, there is no adequate remedy of appeal. The question posed to this Court comes in even more urgent and emergent circumstances than the question posed in *Brown*. The Governor has appointed a replacement to the Eighth Judicial District Court. That appointment became effective immediately. A district court judge has been installed in the Eighth Judicial District Court who—if Petitioners

are correct—lacks vested constitutional authority. *Brown*, ¶¶ 15–19.

Due to the lack of injunctive relief and the Governor’s appointment, allowing this case to proceed through the ordinary course of litigation in the trial court and subsequent appeal will result in a final decision that will come months, if not years, from now. Every day that passes creates additional procedural and substantive harm due to the newly-appointed judge’s lack of constitutional authority.

For these reasons, this Court’s exercise of supervisory control is appropriate.

Conclusion

Petitioners ask this Court to exercise supervisory control of this cause in the First Judicial District Court, decide this issue of state-wide issue of great constitutional importance, and issue whatever orders it deems necessary to carry out its decision.

//

//

DATED this 9th day of July, 2021.

/s/ E. Lars Phillips

E. LARS PHILLIPS

MT Bar# 42374365

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 3,942, excluding signatures, the cover page, certificate of compliance, and certificate of service.

DATED this 9th day of July, 2021.

/s/ E. Lars Phillips

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2021, a true and correct copy of the foregoing document was served on the following by e-mail and

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Honorable Michael F. McMahon
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First Judicial District Court
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/s/ E. Lars Phillips

E. LARS PHILLIPS

APPENDIX OF EXHIBITS

Exhibit 1 – Complaint for Declaratory and Injunctive Relief

Exhibit 2 – Senate Bill No. 140

Exhibit 3 – April 30, 2021 Vacancy Notice

Exhibit 4 – May 4, 2021 Press Release

Exhibit 5 – Application for District Court Judgeship

Exhibit 6 – May 14, 2021 Press Release

Exhibit 7 – June 2, 2021 Press Release

Exhibit 8 – July 7, 2021 Appointment Letter of David J. Grubich

EXHIBIT 1

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FILED

JUN 25 2021

ANGIE SPARKS, Clerk of District Court
By [Signature] 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
(email)

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

pd.

Plaintiffs, through counsel, submit this Complaint for Declaratory and
Injunctive Relief state as follows:

1. The manner of selecting nominees for vacancies in the office of
supreme court justice or district court judge set forth in Senate Bill 140 ("SB 140")
cannot withstand constitutional scrutiny under Article III, Section 1, of Montana's
Constitution.

2. SB 140 violates Montana's Constitution by allowing the Governor to exercise power over the determination of which eligible persons may fill a judicial vacancy prior to designation of nominees for the position.

3. Under Montana's Constitution, any person "charged with the exercise of power properly belonging to one branch" of government is forbidden from exercising "any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art. III, § 1.

4. Article VII, § 8(2) directs the Governor to "appoint a replacement from nominees selected in the manner provided by law." This directive constitutes an implied limitation on the Governor's exercise of power in the context of a judicial vacancy.

5. SB 140 unconstitutionally removes this limitation on the Governor's power by granting the Governor the power to determine which eligible persons shall be considered "nominees." In this way, SB 140 vests the executive with near plenary authority in determining which eligible persons to appoint to fill a judicial vacancy.

6. To illustrate: pursuant to SB 140, § 4(2), to be considered a "nominee" for a judicial vacancy, an individual must be an "applicant" for the position. Prior to the selection of nominees—and, indeed, as a predicate act to the selection of nominees—SB 140 allows to Governor to, in part: first, set the terms

of the applications an individual must submit to be considered for the vacancy; second, receive the applications from “eligible persons,” SB 140, § 3; and third, investigate the “qualifications of eligible persons.” SB 140, § 2(1). In this way, SB 140 gives the Governor broad insight into, and power over, the selection of individuals seeking to fill the judicial vacancy.

7. This exercise of power by the executive branch fundamentally alters the balance of co-equal branches of government in Montana. The plain language of Mont. Const. art. VII, § 8(2) allows the Governor to play a limited role in the context of judicial vacancies, only allowing him to appoint a replacement from “nominees selected in the manner provided by law.” SB 140 provides the Governor with unconstitutionally unfettered access into the judicial appointment process and results in the executive branch gaining an outsized and unequal place among the branches of government.

8. This State’s history is rich with reasons why the separation of power between three co-equal branches of government is, perhaps, the single most fundamental and important aspect of our system of government. *See generally Brown v. Gianforte*, 2021 MT 9, ¶ 72, __ Mont. __, __ P.3d __ (McKinnon, J., dissenting).

9. The Montana Supreme Court has recently considered “whether SB 140 is unconstitutional under Article VII, Section 8(2) of the Montana

Constitution, which provides that when a vacancy occurs on the Supreme Court or one of the District Courts, “the governor shall appoint a replacement from nominees selected in the manner provided by law,” and concluded that the statute survives review under that specific provision of Montana’s Constitution. *See Brown*, ¶2 FN 1.

10. The Montana Supreme Court has not considered the questions presented in this Complaint: Whether SB 140’s statutory scheme, which grants the Governor near plenary authority to determine which eligible persons shall be appointed to fill a judicial vacancy violates Mont. Const. art. III, § 1.

11. Plaintiffs request that this Court immediately enjoin the Governor’s implementation of SB 140, find SB 140 unconstitutional, and declare SB 140 void.

PARTIES

12. Thomas A. Winter is a resident of Missoula County, Montana. He is a registered voter in Montana and intends to vote during the 2022 election cycle. Mr. Winter pays taxes in Montana. Mr. Winter formerly represented House District 96 in the Montana Legislature.

13. Barbara Bessette is a resident of Cascade County, Montana. She is a registered voter in Montana and intends to vote during the 2022 election cycle. Ms. Bessette pays taxes in Montana. Ms. Bessette formerly represented House District 24 in the Montana Legislature.

14. Defendant Greg Gianforte is the Governor of the State of Montana and is responsible for the execution of its laws. He is named in his official capacity only.

15. Defendant State of Montana is one of the 50 sovereign states.

JURISDICTION AND VENUE

16. This Court has jurisdiction to grant declaratory and injunctive relief under the Montana Uniform Declaratory Judgments Act. Mont. Code Ann. § 27–8–201.

17. Venue is proper in Lewis & Clark County pursuant to Mont. Code Ann. § 25–2–126.

CONSTITUTIONAL PROVISIONS AT ISSUE

18. Mont. Const., art. III, § 1:

The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

19. Mont. Const., art. V, § 1:

The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.

20. Mont. Const. art. VII, § 8(2):

For any vacancy in the office of supreme court justice or district court judge, the governor shall appoint a replacement from nominees selected in the manner provided by law.

If the governor fails to appoint within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the appointment from the same nominees within thirty days of the governor's failure to appoint.

STATEMENT OF FACTS

21. Montana's government is divided into the executive branch, the legislative branch, and the judicial branch. Mont. Const., art. III, § 1. Unless expressly authorized by the Montana Constitution to do so, each person who exercises a power granted to one of these branches is prohibited from exercising a power belonging to any other branch. *Id.*

22. Montana's governor is an officer of the executive branch, Mont. Const., art. VI, § 1(1). The legislative power granted by the Constitution is vested in Montana's Legislature. Mont. Const., art. V, § 1. The judicial branch consists of this Court and various courts of lower and limited jurisdiction. Mont. Const., art. VII, § 1.

23. While the Constitution mandates the election of justices and judges, it also contains a provision directing the process for filling judicial vacancies when they arise. *See* Mont. Const., art. VII, § 8(2).

I. Senate Bill 140

24. On March 16, 2021, the Governor signed Senate Bill 140 into law (Exhibit 1).

25. SB 140 provides that the Governor receives applications for vacant positions directly. *See* SB 140, § 2(2); SB 140, § 3.

26. SB 140 gives the Governor the power to investigate applicants for judicial vacancies. SB 140, § 2(1).

27. SB 140 requires “[a] lawyer in good standing who has the qualifications set forth by law for holding judicial office” to “apply to the governor for consideration.” SB 140, § 2(2). SB 140 also allows any person to submit an application to the Governor on the lawyers behalf. SB 140, § 2(2).

28. SB 140 grants the Governor the power to review applications, take public comment, interview applicants, and receive letters of support. SB 140, § 4(1)–(2). SB 140 leaves to the Governor’s unfettered discretion the power to create rules, regulations, and whatever else he might deem relevant in his efforts to complete these tasks. *See id.*

29. In that regard, SB 140 grants the power to determine the contours of such an application to the Governor as it does not prescribe the form of the application required to apply for a judicial vacancy, nor does it state the required scope of the application. *See* SB 140, § 3.

30. In order to be considered a nominee for a judicial vacancy, an interested person must apply to the Governor for consideration. SB 140, § 4(2) (“*Each applicant* who has the qualifications set forth by law and who receives a letter of support from at least three adult Montana residents by the close of the public comment period provided for in subsection (1) must be considered a nominee for the position.”) (emphasis added).

31. Accordingly, in order to be considered a nominee for a judicial vacancy, an interested person must submit to investigation by the Governor. *See* SB 140, § 4(2).

32. SB 140 requires that the Governor, or the Chief Justice of the Montana Supreme Court, make an appointment to fill the judicial vacancy at issue within thirty days of the close of the public comment period. SB 140, § 5(1).

33. SB 140 allows the Governor to make an appoint to fill the judicial vacancy at issue from “the list of applicants.” SB 140, § 5(1).

34. SB 140 provides that, if the Governor fails to make an appointment within 30 days of the close of the public comment period provided for in subsection (1), “the chief justice shall make the appointment from the same list of applicants within 30 days of the governor’s failure to appoint.” SB 140, § 5(3).

35. SB 140 provides that, “[f]or the purposes of Article VII, Section 8, of the Montana constitution, the governor must be construed to receive the names of

the nominees at the close of the public comment period provided for in [section 4].” SB 140, § 5(2).

II. Governor Gianforte’s exercise of power under SB 140

36. On April 30, 2021, Chief Justice McGrath notified Governor Gianforte of a vacancy in the Eight Judicial District Court, Department A. *See* Exhibit 2, at 1.

37. On May 4, 2021, Governor Gianforte announced he would be “accepting applications from and nominations of any lawyer in good standing” in connection with the Eighth Judicial District Court. *See* Exhibit 3, at 1.

38. The Governor’s May 4th announcement included a link to an application form and requested that applications be submitted by June 1, 2021. *Id.* The Governor’s announcement also stated that the public would be allowed to provide letters of support “or other comments regarding the applications” beginning on June 1, 2021 and continuing through June 30, 2021. *Id.*

39. An Application Form, consisting of thirty-nine questions, is publicly available through the nominatejudges.mt.gov/vacancies web portal. Exhibit 4.

40. Upon information and belief, the Governor authorized the contents of the Application Form.

41. The Application Form requires that applicants consent to the Governor's investigation and verification of any information submitted in the application. Exhibit 4, at 5.

42. The Application Form requires that applicants authorize the disclosure of any "information, files, records, or reports requested" by the Governor from "a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions [the applicant has] attended, any references furnished by [the applicant], employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to [the applicant's] citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history." Exhibit 4, at 5.

43. Based on the Application Form, in order to be considered an applicant, an individual must submit to the disclosure of the information referenced in Paragraph 36, *supra*.

44. Based on the Application Form, in order to be considered an applicant, an individual must submit to investigation by the Governor.

45. Unburdened from statutory constraints, the Governor has created an Advisory Council for Eighth Judicial District Vacancy to “assist in identifying and reviewing qualified candidates to fill the district court judge vacancy in the Eighth Judicial District.” Exhibit 5, at 1. The creation of such an “Advisory Council” is not contemplated by SB 140.

46. The Governor has stated that he will name his “appointee” in July 2021. *Id.*

47. On June 2, 2021, Governor Gianforte issued a press release soliciting public comment on applicants to the vacancy in the Eighth Judicial District Court. Exhibit 6, at 1. The June 2 Press Release indicated the Governor had determined that five attorneys met the qualifications to be considered applicants for the position: Rebekah J. French, David Joseph Grubich, Michele Reinhart Levine, Tracy Labin Rhodes, and Matthew S. Robertson.

48. The June 2 Press Release requested that public comment be submitted to the Governor by June 30, 2021, at 5 p.m. Exhibit 6, at 1.

COUNT I – DECLARATORY RELIEF

49. Plaintiffs reallege the previous paragraphs stated above.

50. Montana’s Declaratory Judgment Act allows an individual whose “rights, status, or other legal relations are affected by a statute” to “have

determined any question of construction or validity of a statute.” Mont. Code Ann. § 27–8–202.

51. The Governor is prohibited from exercising any power belonging to the Legislature unless the Montana Constitution expressly authorizes such an exercise. *See* Mont. Const., art. III, § 1; Mont. Const., art. VI, § 1; Mont. Const., art. V, § 1.

52. Mont. Const. art. VII, § 8(2), states “[f]or any vacancy in the office of supreme court justice or district court judge, the governor shall appoint a replacement from nominees selected in the manner provided by law.”

53. SB 140 violates the separation of powers provision of Montana’s Constitution, *see* Mont. Const. art. III, § 1, by allowing the Governor to exercise power over the determination of who may fill a judicial vacancy prior to the selection of nominees because SB 140:

- a. Grants the Governor the sole authority to investigate applicants for judicial vacancies, SB 140, § 2(1);
- b. Grants the Governor the authority to investigate individuals prior to their selection as nominees, *see* SB 140, § 2(2);
- c. Requires that eligible persons submit applications to the Governor in order to be considered, SB 140, § 2(2);

- d. Grants the Governor the authority to set the parameters to determine who qualifies as an applicant, SB 140, § 3;
- e. Grants the Governor the authority to set the terms of the required application, *see* SB 140, § 3;
- f. Grants the Governor the authority to receive applications directly, *see* SB 140, §§ 2(2), 3;
- g. Grants the Governor the authority to review applications and public comment submitted concerning the applicants, *see* SB 140, § 4(1);
- h. Grants the Governor the authority to receive “letters of support” and, by implication, review said letters for sufficiency, SB 140, § 4(1)–(2); and
- i. Grants the Governor the authority to appoint “from the list of applicants,” SB 140, § 5(1).

54. Additionally, as demonstrated his actions to date, the Governor interprets SB 140 to grant him the power to take actions in the course of the pre-nomination process that are not expressly provided for by statute. For example, the Governor has formed an “Advisory Council” tasked with identifying and reviewing qualified candidates.

55. Through this exercise of power, the Governor is effectively making law—an act forbidden by Mont. Const. art. III, § 1.

56. By granting the Governor unrestrained discretion in this context, the Legislature has delegated power that Mont. Const. art. VII, § 8(2), requires it to retain—again, in violation of Mont. Const. art. III, § 1.

57. Because SB 140 grants the Governor the authority to determine which eligible persons may be considered nominees, the statutory scheme grants power to the executive that is not contemplated expressly in Montana’s constitution thereby violating the separation of powers, rendering meaningless the clause that the Governor “shall appoint a replacement from nominees selected in the manner provided by law.” Mont. Const. art. VII, § 8(2).

58. SB 140 violates the separation of powers provision of Montana’s Constitution, *see* Mont. Const. art. III, § 1, by over-delegating legislative authority to the executive branch.

59. Plaintiffs seek a ruling from this Court, pursuant to Mont. Code Ann. § 27–8–101, et seq, declaring the rights, status, and other legal relations of the parties to this action.

60. Plaintiffs are entitled to seek declaratory relief pursuant to Mont. Code Ann. § 27–8–202 as they are individuals whose rights, status, or other legal relations are affected by SB 140.

61. Plaintiffs seek a declaration from this Court that SB 140 is unconstitutional under Mont. Const. art. III, § 1.

COUNT II: INJUNCTIVE RELIEF

62. Plaintiffs reallege the previous paragraphs stated above.

63. Pursuant to Mont. Code Ann. § 27–19–201, a party may obtain a preliminary injunction by meeting the requirements of one of the following five subsections:

- a. [W]hen it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually, Mont. Code Ann. § 27–19–201(1);
- b. [W]hen it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant, Mont. Code Ann. § 27–19–201(2);
- c. [W]hen it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual, Mont. Code Ann. § 27–19–201(3);
- d. [W]hen it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition, Mont. Code Ann. § 27–19–201(4); or
- e. [W]hen it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15, Mont. Code Ann. § 27–19–201(5).

See Driscoll v. Stapleton, 2020 MT 247, ¶ 13, 401 Mont. 405, 473 P.3d 386.

64. The subsections of Mont. Code Ann. § 27–19–201 are disjunctive; “a court need find just one subsection satisfied in order to issue a preliminary injunction.” *Driscoll*, ¶ 13 (citations omitted).

65. A preliminary injunction has a limited purpose: “to preserve the status quo and minimize the harm to all parties pending final resolution on the merits.” *Driscoll*, ¶ 14 (quoting *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73). In this context, the Montana Supreme Court has defined “status quo” as the “last actual, peaceable, non[-]contested condition which preceded the pending controversy.” *Driscoll*, ¶ 14 (quoting *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 14, 334 Mont. 86, 146 P.3d 714).

66. The issuance of a preliminary injunction requires only that the applicant has “made a prima facie showing she will suffer harm or injury.” *Driscoll*, ¶ 14. Mont. Code Ann. § 27–19–201(2) requires a showing of “great or irreparable injury,” while the remaining four subsections require “a lesser degree of harm.” *Driscoll*, ¶ 14.

67. Plaintiffs are only required to establish a prima facie violation of their rights in order to obtain a preliminary injunction. *Driscoll*, ¶ 16. This does not require that Plaintiffs establish a certainty that they will prevail. *See Driscoll*, ¶ 16.

68. First, Plaintiffs are entitled to the issuance of a preliminary injunction under Mont. Code Ann. § 27–19–201(1). Through this Complaint, Plaintiffs ask this Court, in part, to enjoin the Governor from appointing a judicial officer to the pending vacancy in Cascade County under the current iteration of SB 140.

Plaintiffs have demonstrated that SB 140 violates the separation of powers clause of the Montana Constitution by granting the Governor near plenary authority over the judicial vacancy appointment process. On the basis of this Complaint, Plaintiffs are entitled to a declaration from this Court that SB 140 is unconstitutional, and a preliminary injunction would restrain the Governor from installing a judicial officer that is not vested by law with judicial authority.

69. Second, Plaintiffs are entitled to the issuance of a preliminary injunction under Mont. Code Ann. § 27–19–201(3). As set forth in Paragraphs 36–48 of this Complaint, the Governor is in the process of completing an appointment under the process set forth in SB 140. For the reasons set forth in this Complaint, should the Governor complete this appointment, the result will be the installment of a judicial officer that is not vested by law with judicial authority. While the completion of said action would not moot the claims presented by Plaintiffs, it would result in a vast waste of judicial resources and call into question any action taken by said judicial officer during the pendency of these proceedings which, as a result, would render the relief Plaintiffs seek ineffectual.

70. For these reasons, Plaintiffs are entitled to the issuance of a preliminary injunction under either Mont. Code Ann. § 27–19–201(1) or Mont. Code Ann. § 27–19–201(3).

71. Plaintiffs request a preliminary injunction to preserve the status quo and preclude the Governor from appointing a judicial officer to the pending vacancy in Montana’s Eighth Judicial District Court, Cascade County.

72. Plaintiffs request a permanent injunction precluding the Governor from appointing a judicial officer under SB 140 pursuant to a declaration from this Court that SB 140 is unconstitutional.

RELIEF REQUESTED

Plaintiffs pray that this Court:

1. Order the State of Montana to show cause at a hearing as to why the injunctive relief requested should not be granted;
2. Enjoin the exercise of executive power through Senate Bill 140;
3. Declare Senate Bill 140 unconstitutional;
4. Declare Senate Bill 140 void; and
5. Provide such other and further relief as this Court deems just and proper.

//

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Dated this 25th day of June, 2021.

TARLOW STONECIPHER
WEAMER & KELLY, PLLC



E. Lars Phillips
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 25th 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
contactdoj@mt.gov



E. Lars Phillips
Attorney for Plaintiffs

VERIFICATION

STATE OF MONTANA)

: ss.

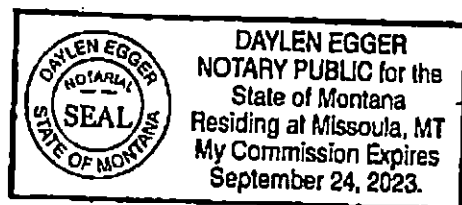
County of Missoula)

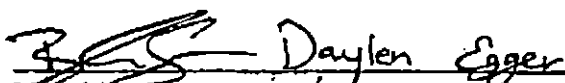
Thomas A. Winter, being first duly sworn upon his oath, deposes and says:

That he is a resident of Montana; that he is an authorized representative for all Plaintiffs; that he has read the foregoing Complaint, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge.


Thomas A. Winter

SIGNED AND SWORN TO before me on the 25th day of June, 2021, by
Thomas A. Winter.




NOTARY PUBLIC for the State of Montana

CHAPTER # _____

SENATE BILL NO. 140.

INTRODUCED BY K. REGIER, J. ELLSWORTH.

AN ACT GENERALLY REVISING LAWS RELATED TO CERTAIN JUDICIAL APPOINTMENTS; PROVIDING A DIRECT APPOINTMENT PROCESS FOR THE GOVERNOR TO APPOINT DISTRICT COURT JUDGES AND SUPREME COURT JUSTICES TO FILL JUDICIAL VACANCIES; REPEALING THE JUDICIAL NOMINATION COMMISSION; AMENDING SECTIONS 2-15-1707, 3-7-221, AND 39-71-2901, MCA; REPEALING SECTIONS 3-1-1001, 3-1-1002, 3-1-1003, 3-1-1004, 3-1-1005, 3-1-1006, 3-1-1007, 3-1-1008, 3-1-1009, 3-1-1010, 3-1-1011, 3-1-1012, 3-1-1013, AND 3-1-1014, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

STATE OF MONTANA

FILED

March 16, 2021

Secretary of State

By *Angie McFarlane*

This bill was received by the Governor

this 11th day
of March, 2021.

By Tony Scibner

Approved March 16, 2021.

[Signature]
Governor

EXHIBIT 1



AN ACT GENERALLY REVISING LAWS RELATED TO CERTAIN JUDICIAL APPOINTMENTS; PROVIDING A DIRECT APPOINTMENT PROCESS FOR THE GOVERNOR TO APPOINT DISTRICT COURT JUDGES AND SUPREME COURT JUSTICES TO FILL JUDICIAL VACANCIES; REPEALING THE JUDICIAL NOMINATION COMMISSION; AMENDING SECTIONS 2-15-1707, 3-7-221, AND 39-71-2901, MCA; REPEALING SECTIONS 3-1-1001, 3-1-1002, 3-1-1003, 3-1-1004, 3-1-1005, 3-1-1006, 3-1-1007, 3-1-1008, 3-1-1009, 3-1-1010, 3-1-1011, 3-1-1012, 3-1-1013, AND 3-1-1014, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Judicial vacancy – notice. (1) (a) Upon receiving notice from the chief justice of the supreme court, the governor shall appoint a candidate, as provided in [sections 1 through 7], to fill any vacancy on the supreme court or the district court.

(b) The chief justice of the supreme court shall appoint a candidate to fill any term or vacancy for the chief water judge or associate water judge pursuant to 3-7-221.

(2) Within 10 days of the date of receipt by the governor of the notice from the chief justice of the supreme court that a vacancy has occurred or the effective date of a judicial resignation has been announced, the governor shall notify the public, including media outlets with general statewide circulation and other appropriate sources, that a vacancy has been announced, including the deadline within which applications must be received.

Section 2. Investigation – qualifications for appointment. (1) The governor may authorize investigations concerning the qualifications of eligible persons.

(2) A lawyer in good standing who has the qualifications set forth by law for holding judicial office may be a candidate and may apply to the governor for consideration, or application may be made by any person on

the lawyer's behalf.

Section 3. Applications. An eligible person may apply for the vacant judicial position by completing and submitting to the governor an original signed paper application and an electronic copy of the original application by the deadline date. The deadline date must be within 40 days of the governor's receipt of the notice of vacancy provided by the chief justice.

Section 4. Public comment. (1) The governor shall establish a reasonable period for reviewing applications and interviewing applicants that provides at least 30 days for public comment concerning applicants.

(2) Each applicant who has the qualifications set forth by law for holding judicial office and who receives a letter of support from at least three adult Montana residents by the close of the public comment period provided for in subsection (1) must be considered a nominee for the position.

(3) The total time from receipt of notice of a vacancy until appointment may not exceed 100 days.

(4) The application, public comment, and any related documents are open to the public except when the demands of individual privacy clearly exceed the merits of public disclosure.

Section 5. Appointments. (1) The governor, or the chief justice of the supreme court for the office described in 3-7-221, shall make an appointment within 30 days of the close of the public comment period from the list of applicants.

(2) For purposes of Article VII, section 8, of the Montana constitution, the governor must be construed to receive the names of the nominees at the close of the public comment period provided for in [section 4].

(3) If the governor fails to appoint within 30 days of the close of the public comment period provided for in subsection (1), the chief justice shall make the appointment from the same list of applicants within 30 days of the governor's failure to appoint.

Section 6. Senate confirmation – exception – nomination in Interim – appointment contingent on vacancy. (1) (a) Except as provided in subsection (2):

- (i) each appointment must be confirmed by the senate; and
 - (ii) an appointment made while the senate is not in session is effective until the end of the next special or regular legislative session.
- (b) If the appointment is subject to senate confirmation under subsection (1)(a) and is not confirmed, the office is vacant and another selection of nominees and appointment must be made.
- (2) The following appointments are not subject to senate confirmation, and there must be an election for the office at the general election immediately preceding the scheduled expiration of the term or following the appointment, as applicable:
- (a) an appointment made while the senate is not in session if the term to which the appointee is appointed expires prior to the next legislative session, regardless of the time of the appointment in relation to the candidate filing deadlines for the office; and
 - (b) an appointment made while the senate is not in session if a general election will be held prior to the next legislative session and the appointment is made prior to the candidate filing deadline for primary elections under 13-10-201(7), in which case the position is subject to election at the next primary and general elections.
- (3) A nomination is not effective unless a vacancy in office occurs.

Section 7. Duration of appointment – election for remainder of term. (1) If an appointment subject to [section 5] is confirmed by the senate, the appointee shall serve until the appointee or another person elected at the first general election after confirmation is elected and qualified. The candidate elected at that election holds the office for the remainder of the unexpired term.

(2) If an incumbent judge or justice files for election to the office to which the judge or justice was elected or appointed and no other candidate files for election to that office, the name of the incumbent must nevertheless be placed on the general election ballot to allow voters of the district or state to approve or reject the incumbent. If an incumbent is rejected at an election for approval or rejection, the incumbent shall serve until the day before the first Monday of January following the election, at which time the office is vacant and another appointment must be made.

Section 8. Section 2-15-1707, MCA, is amended to read:

"2-15-1707. Office of workers' compensation judge – allocation – appointment – salary. (1)

There is the office of workers' compensation judge. The office is allocated to the department of labor and industry for administrative purposes only as prescribed in 2-15-121.

(2) The governor shall appoint the workers' compensation judge for a term of 6 years in the same manner provided by ~~Title 3, chapter 1, part 10~~ [sections 1 through 7], for the appointment of supreme court justices or district court judges. A vacancy must be filled in the same manner as the original appointment.

(3) To be eligible for workers' compensation judge, a person must:

(a) have the qualifications necessary for district court judges found in Article VII, section 9, of the Montana constitution;

(b) devote full time to the duties of workers' compensation judge and not engage in the private practice of law.

(4) The workers' compensation judge is entitled to the same salary and other emoluments as that of a district judge but must be accorded retirement benefits under the public employees' retirement system."

Section 9. Section 3-7-221, MCA, is amended to read:

"3-7-221. Appointment of chief water judge and associate water judge – terms of office. (1) The chief justice of the Montana supreme court shall appoint a chief water judge as provided in ~~Title 3, chapter 1, part 10~~ [sections 1 through 7]. The chief justice of the Montana supreme court may appoint an associate water judge ~~as provided in Title 3, chapter 1, part 10.~~

(2) To be eligible for the office of chief water judge or associate water judge, a person shall have the qualifications for district court or supreme court judges found in Article VII, section 9, of the Montana constitution.

(3) The term of office of the chief water judge and the associate water judge is 4 years, subject to continuation of the water divisions by the legislature."

Section 10. Section 39-71-2901, MCA, is amended to read:

"39-71-2901. Location of office – court powers – withdrawal – substitution – vacancy. (1) The

principal office of the workers' compensation judge must be in the city of Helena.

(2) The workers' compensation court has power to:

(a) preserve and enforce order in its immediate presence;

(b) provide for the orderly conduct of proceedings before it and its officers;

(c) compel obedience to its judgments, orders, and process in the same manner and by the same procedures as in civil actions in district court;

(d) compel the attendance of persons to testify; and

(e) punish for contempt in the same manner and by the same procedures as in district court.

(3) The workers' compensation judge shall withdraw from all or part of any matter if the judge believes the circumstances make disqualification appropriate. In the case of a withdrawal, the workers' compensation judge shall designate and contract for a substitute workers' compensation judge to preside over the proceeding from the list provided for in subsection (7).

(4) If the office of the workers' compensation judge becomes vacant and before the vacancy is permanently filled pursuant to ~~Title 3, chapter 1, part 10~~ sections 1 through 7, the chief justice of the Montana supreme court shall appoint a substitute judge within 30 days of receipt of the notice of vacancy. The chief justice shall select a substitute judge from the list provided for in subsection (7) or from the pool of retired state district court judges. The chief justice may appoint a substitute judge for a part of the vacancy or for the entire duration of the vacancy, and more than one substitute judge may be appointed to fill a vacancy.

(5) If a temporary vacancy occurs because the workers' compensation judge is suffering from a disability that temporarily precludes the judge from carrying out the duties of office for more than 60 days, a substitute judge must be appointed from the substitute judge list identified in subsection (7) by the current judge, if able, or by the chief justice of the supreme court. The substitute judge may not serve more than 90 days after appointment under this subsection. This subsection applies only if the workers' compensation judge is temporarily unable to carry out the duties of office due to a disability, and proceedings to permanently replace the judge under ~~Title 3, chapter 1, part 10~~ sections 1 through 7, may not be instituted.

(6) A substitute judge must be compensated at the same hourly rate charged by the department of justice agency legal services bureau for the provision of legal services to state agencies. A substitute judge must be reimbursed for travel expenses as provided for in 2-18-501 through 2-18-503. When a substitute judge

has accepted jurisdiction, the clerk of the workers' compensation court shall mail a copy of the assumption of jurisdiction to each attorney or party of record. The certificate of service must be attached to the assumption of jurisdiction form in the court file.

(7) The workers' compensation judge shall maintain a list of persons who are interested in serving as a substitute workers' compensation judge in the event of a recusal by the judge or a vacancy and who prior to being put on the list of potential substitutes have been admitted to the practice of law in Montana for at least 5 years, currently reside in Montana, and have resided in the state for 2 years."

Section 11. Repealer. The following sections of the Montana Code Annotated are repealed:

- 3-1-1001. Creation, composition, and function of commission.
- 3-1-1002. Staggered terms of members.
- 3-1-1003. Vacancies.
- 3-1-1004. No compensation — travel expenses.
- 3-1-1005. Commission members not eligible for judicial office.
- 3-1-1006. Secretary — election and duties.
- 3-1-1007. Commission to make rules — confidentiality of proceedings.
- 3-1-1008. Quorum.
- 3-1-1009. Investigation by commission — application for consideration.
- 3-1-1010. Lists submitted to governor and chief justice — report on proceedings.
- 3-1-1011. Governor or chief justice of the supreme court to nominate from list.
- 3-1-1012. When governor fails to nominate.
- 3-1-1013. Senate confirmation — exception — nomination in the interim — appointment contingent on vacancy.
- 3-1-1014. Duration of appointment — election for remainder of term.

Section 12. Codification instruction. [Sections 1 through 7] are intended to be codified as an integral part of Title 3, chapter 1, and the provisions of Title 3, chapter 1, apply to [sections 1 through 7].

Section 13. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,
SB 140, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2021.

Speaker of the House

Signed this _____ day
of _____, 2021.

SENATE BILL NO. 140

INTRODUCED BY K. REGIER, J. ELLSWORTH

AN ACT GENERALLY REVISING LAWS RELATED TO CERTAIN JUDICIAL APPOINTMENTS; PROVIDING A DIRECT APPOINTMENT PROCESS FOR THE GOVERNOR TO APPOINT DISTRICT COURT JUDGES AND SUPREME COURT JUSTICES TO FILL JUDICIAL VACANCIES; REPEALING THE JUDICIAL NOMINATION COMMISSION; AMENDING SECTIONS 2-15-1707, 3-7-221, AND 39-71-2901, MCA; REPEALING SECTIONS 3-1-1001, 3-1-1002, 3-1-1003, 3-1-1004, 3-1-1005, 3-1-1006, 3-1-1007, 3-1-1008, 3-1-1009, 3-1-1010, 3-1-1011, 3-1-1012, 3-1-1013, AND 3-1-1014, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

THE SUPREME COURT OF MONTANA

MIKE McGRATH
CHIEF JUSTICE



JUSTICE BUILDING
215 NORTH SANDERS
PO BOX 203001
HELENA, MONTANA 59620-3001
TELEPHONE (406) 444-5490
FAX (406) 444-3274

April 30, 2021

Greg Gianforte
Governor, State of Montana
Office of the Governor
P.O. Box 200801
Helena, MT 59620

Dear Governor Gianforte:

Pursuant to the Senate's adverse action to Hon. Michele Reinhart Levine's confirmation, the position as state district judge, Department A, in the Eighth Judicial District is officially vacant.

As of last week the Department A calendar had 125 cases set for trial between now and August. For that reason, I am asking that you initiate the replacement process as soon as possible.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike McGrath".

Mike McGrath
Chief Justice

C: Hon. John A. Kutzman
Hon. Beth Best
Hon. John W. Parker
Tina Henry, Clerk of District Court, Cascade County
Beth McLaughlin, Supreme Court Administrator

EXHIBIT 2

FOR IMMEDIATE RELEASE
May 4, 2021

Contact: Brooke Stroyke, Office of the Governor

Gov. Gianforte Solicits Applications, Nominations for Eighth Judicial District Judgeship

HELENA, Mont. – The chief justice of the Montana Supreme Court has notified Governor Greg Gianforte there is a vacancy in the Eighth Judicial District (Cascade County).

The governor is now accepting applications from and nominations of any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge. The application form is available electronically at nominatejudges.mt.gov. Applications must be submitted electronically as well as in hard copy by Tuesday, June 1, 2021. Applications will be made available to the public.

Commencing Tuesday, June 1 and continuing through Friday, June 30, 2021, the public will be given the opportunity to provide letters of support or other comments regarding the applicants at nominatejudges.mt.gov. Applicants must receive at least three letters of support to be considered for appointment by the governor.

The governor's appointee, who will be named in July 2021, will be required to run for election in the 2022 election.

###

EXHIBIT 3

APPLICATION FOR
DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name.
2. Birthdate.
3. Current home address.
4. Email address.
5. Preferred phone number.
6. Judicial position you are applying for.
7. Date you became a U.S. citizen, if different than birthdate.
8. Date you become a Montana resident.

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.
10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.
12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

EXHIBIT 4

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).
14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).
15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.
16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.
17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.
18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.
19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.
20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.
21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.
22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.
23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.
24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.
26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.
28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.
29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.
30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).
31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.
33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.
36. What three qualities do you believe to be most important in a good district court judge?
37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.
39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

(Date)

(Signature of Applicant)

A signed original and an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Tuesday, June 1, 2021

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

Gov. Gianforte Announces Advisory Council for Eighth Judicial District Vacancy

Friday, May 14, 2021/Categories: [Governor's Office](#), [Montana.gov](#)/Tags:

HELENA, Mont. – Governor Greg Gianforte today announced an advisory council to assist in identifying and reviewing qualified candidates to fill the district court judge vacancy in the Eighth Judicial District.

“Comprised of accomplished attorneys and long-time community leaders, the Eighth Judicial District Advisory Council will assist me in identifying exceptional candidates to serve as the district court judge in the Eighth Judicial District,” Gov. Gianforte said. “I have charged the advisory council with casting a broad net to identify well-qualified candidates who are committed to the fair, consistent, and objective application of the law and who will interpret laws, not make them from the bench.”

Members of the advisory council follow:

David Bowen, *retired chief of police of Great Falls Police Department*

Brett Doney, *president of the Great Falls Development Authority*

Shane Etzwiler, *president of the Great Falls Chamber of Commerce*

Brion Lindseth, *attorney at KLB Business Law*

Ron Nelson, *attorney at Church Harris Johnson & Williams P.C.*

Greg Pinski, *former judge for the Eighth Judicial District*

Kristy Pontet-Stroop, *executive director of the Alliance for Youth*

Jennifer Quick, *deputy county attorney for Cascade County*

Christie Slaughter, *probation and parole officer for the State of Montana*

Ruth Uecker, *assistant superintendent, K-12 Great Falls Public School District*

The governor is accepting applications from and nominations of any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge. The application form is available electronically at nominatejudges.mt.gov. Applications must be submitted electronically as well as in hard copy by Tuesday, June 1, 2021. Applications will be made available to the public.

Commencing Tuesday, June 1 and continuing through Friday, June 30, 2021, the public will be given the opportunity to provide letters of support or other comments regarding the applicants at nominatejudges.mt.gov. Applicants must receive at least three letters of support to be considered for appointment by the governor.

The governor's appointee, who will be named in July 2021, will be required to run for election in the 2022 election.

###

Print

EXHIBIT 5

Number of views (179)/Comments (0)

Gov. Gianforte Solicits Public Comment on Eighth Judicial District Judge Applicants

Wednesday, June 2, 2021/Categories: [Governor's Office](#), [Montana.gov](#)/Tags:

HELENA, Mont. – Governor Greg Gianforte today announced he is seeking public comment on applicants to the vacancy in the Eighth Judicial District (Cascade County).

Members of the public can provide letters of support or other comments regarding the applicants through Wednesday, June 30, 2021 at 5 p.m.

The governor has received applications from the following attorneys whose applications may be found at [nominatejudges.mt.gov](#):

- Rebekah J. French
- David Joseph Grubich
- Michele Reinhart Levine
- Tracy Labin Rhodes
- Matthew S. Robertson

Members of the public should submit letters or other comments by email to nominatejudges@mt.gov, by fax to (406) 444-4151, or by mail to Attn: Hannah Slusser, Governor's Office, PO Box 200801, Helena, MT 59620.

Letters or other comments submitted will be publicly available and posted at [nominatejudges.mt.gov](#).

Applicants must receive at least three letters of support to be considered for appointment by the governor.

The governor's appointee, who will be named in July 2021, is subject to election in 2022.

###

Print

Number of views (400)/Comments (0)

EXHIBIT 6

EXHIBIT 2

CHAPTER # _____

SENATE BILL NO. 140

INTRODUCED BY K. REGIER, J. ELLSWORTH

AN ACT GENERALLY REVISING LAWS RELATED TO CERTAIN JUDICIAL APPOINTMENTS; PROVIDING A DIRECT APPOINTMENT PROCESS FOR THE GOVERNOR TO APPOINT DISTRICT COURT JUDGES AND SUPREME COURT JUSTICES TO FILL JUDICIAL VACANCIES; REPEALING THE JUDICIAL NOMINATION COMMISSION; AMENDING SECTIONS 2-15-1707, 3-7-221, AND 39-71-2901, MCA; REPEALING SECTIONS 3-1-1001, 3-1-1002, 3-1-1003, 3-1-1004, 3-1-1005, 3-1-1006, 3-1-1007, 3-1-1008, 3-1-1009, 3-1-1010, 3-1-1011, 3-1-1012, 3-1-1013, AND 3-1-1014, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

STATE OF MONTANA

FILED

March 16, 2021

Secretary of State

By Angie McLaughlin

This bill was received by the Governor

this 11th day
of March, 2021.

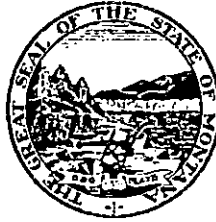
By Tony Scribner

Approved March 16, 2021.

[Signature]
Governor

EXHIBIT

2



AN ACT GENERALLY REVISING LAWS RELATED TO CERTAIN JUDICIAL APPOINTMENTS; PROVIDING A DIRECT APPOINTMENT PROCESS FOR THE GOVERNOR TO APPOINT DISTRICT COURT JUDGES AND SUPREME COURT JUSTICES TO FILL JUDICIAL VACANCIES; REPEALING THE JUDICIAL NOMINATION COMMISSION; AMENDING SECTIONS 2-15-1707, 3-7-221, AND 39-71-2901, MCA; REPEALING SECTIONS 3-1-1001, 3-1-1002, 3-1-1003, 3-1-1004, 3-1-1005, 3-1-1006, 3-1-1007, 3-1-1008, 3-1-1009, 3-1-1010, 3-1-1011, 3-1-1012, 3-1-1013, AND 3-1-1014, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Judicial vacancy -- notice. (1) (a) Upon receiving notice from the chief justice of the supreme court, the governor shall appoint a candidate, as provided in [sections 1 through 7], to fill any vacancy on the supreme court or the district court.

(b) The chief justice of the supreme court shall appoint a candidate to fill any term or vacancy for the chief water judge or associate water judge pursuant to 3-7-221.

(2) Within 10 days of the date of receipt by the governor of the notice from the chief justice of the supreme court that a vacancy has occurred or the effective date of a judicial resignation has been announced, the governor shall notify the public, including media outlets with general statewide circulation and other appropriate sources, that a vacancy has been announced, including the deadline within which applications must be received.

Section 2. Investigation -- qualifications for appointment. (1) The governor may authorize investigations concerning the qualifications of eligible persons.

(2) A lawyer in good standing who has the qualifications set forth by law for holding judicial office may be a candidate and may apply to the governor for consideration, or application may be made by any person on

the lawyer's behalf.

Section 3. Applications. An eligible person may apply for the vacant judicial position by completing and submitting to the governor an original signed paper application and an electronic copy of the original application by the deadline date. The deadline date must be within 40 days of the governor's receipt of the notice of vacancy provided by the chief justice.

Section 4. Public comment. (1) The governor shall establish a reasonable period for reviewing applications and interviewing applicants that provides at least 30 days for public comment concerning applicants.

(2) Each applicant who has the qualifications set forth by law for holding judicial office and who receives a letter of support from at least three adult Montana residents by the close of the public comment period provided for in subsection (1) must be considered a nominee for the position.

(3) The total time from receipt of notice of a vacancy until appointment may not exceed 100 days.

(4) The application, public comment, and any related documents are open to the public except when the demands of individual privacy clearly exceed the merits of public disclosure.

Section 5. Appointments. (1) The governor, or the chief justice of the supreme court for the office described in 3-7-221, shall make an appointment within 30 days of the close of the public comment period from the list of applicants.

(2) For purposes of Article VII, section 8, of the Montana constitution, the governor must be construed to receive the names of the nominees at the close of the public comment period provided for in [section 4].

(3) If the governor fails to appoint within 30 days of the close of the public comment period provided for in subsection (1), the chief justice shall make the appointment from the same list of applicants within 30 days of the governor's failure to appoint.

Section 6. Senate confirmation -- exception -- nomination in interim -- appointment contingent on vacancy. (1) (a) Except as provided in subsection (2):

- (i) each appointment must be confirmed by the senate; and
 - (ii) an appointment made while the senate is not in session is effective until the end of the next special or regular legislative session.
- (b) If the appointment is subject to senate confirmation under subsection (1)(a) and is not confirmed, the office is vacant and another selection of nominees and appointment must be made.
- (2) The following appointments are not subject to senate confirmation, and there must be an election for the office at the general election immediately preceding the scheduled expiration of the term or following the appointment, as applicable:
- (a) an appointment made while the senate is not in session if the term to which the appointee is appointed expires prior to the next legislative session, regardless of the time of the appointment in relation to the candidate filing deadlines for the office; and
 - (b) an appointment made while the senate is not in session if a general election will be held prior to the next legislative session and the appointment is made prior to the candidate filing deadline for primary elections under 13-10-201(7), in which case the position is subject to election at the next primary and general elections.
- (3) A nomination is not effective unless a vacancy in office occurs.

Section 7. Duration of appointment -- election for remainder of term. (1) If an appointment subject to [section 5] is confirmed by the senate, the appointee shall serve until the appointee or another person elected at the first general election after confirmation is elected and qualified. The candidate elected at that election holds the office for the remainder of the unexpired term.

(2) If an incumbent judge or justice files for election to the office to which the judge or justice was elected or appointed and no other candidate files for election to that office, the name of the incumbent must nevertheless be placed on the general election ballot to allow voters of the district or state to approve or reject the incumbent. If an incumbent is rejected at an election for approval or rejection, the incumbent shall serve until the day before the first Monday of January following the election, at which time the office is vacant and another appointment must be made.

Section 8. Section 2-15-1707, MCA, is amended to read:

"2-15-1707. Office of workers' compensation judge – allocation – appointment – salary. (1)

There is the office of workers' compensation judge. The office is allocated to the department of labor and industry for administrative purposes only as prescribed in 2-15-121.

(2) The governor shall appoint the workers' compensation judge for a term of 6 years in the same manner provided by ~~Title 3, chapter 1, part 10~~ [sections 1 through 7], for the appointment of supreme court justices or district court judges. A vacancy must be filled in the same manner as the original appointment.

(3) To be eligible for workers' compensation judge, a person must:

(a) have the qualifications necessary for district court judges found in Article VII, section 9, of the Montana constitution;

(b) devote full time to the duties of workers' compensation judge and not engage in the private practice of law.

(4) The workers' compensation judge is entitled to the same salary and other emoluments as that of a district judge but must be accorded retirement benefits under the public employees' retirement system."

Section 9. Section 3-7-221, MCA, is amended to read:

"3-7-221. Appointment of chief water judge and associate water judge – terms of office. (1) The chief justice of the Montana supreme court shall appoint a chief water judge as provided in ~~Title 3, chapter 1, part 10~~ [sections 1 through 7]. The chief justice of the Montana supreme court may appoint an associate water judge as provided in ~~Title 3, chapter 1, part 10~~.

(2) To be eligible for the office of chief water judge or associate water judge, a person shall have the qualifications for district court or supreme court judges found in Article VII, section 9, of the Montana constitution.

(3) The term of office of the chief water judge and the associate water judge is 4 years, subject to continuation of the water divisions by the legislature."

Section 10. Section 39-71-2901, MCA, is amended to read:

"39-71-2901. Location of office – court powers -- withdrawal – substitution -- vacancy. (1) The

principal office of the workers' compensation judge must be in the city of Helena.

(2) The workers' compensation court has power to:

(a) preserve and enforce order in its immediate presence;

(b) provide for the orderly conduct of proceedings before it and its officers;

(c) compel obedience to its judgments, orders, and process in the same manner and by the same procedures as in civil actions in district court;

(d) compel the attendance of persons to testify; and

(e) punish for contempt in the same manner and by the same procedures as in district court.

(3) The workers' compensation judge shall withdraw from all or part of any matter if the judge believes the circumstances make disqualification appropriate. In the case of a withdrawal, the workers' compensation judge shall designate and contract for a substitute workers' compensation judge to preside over the proceeding from the list provided for in subsection (7).

(4) If the office of the workers' compensation judge becomes vacant and before the vacancy is permanently filled pursuant to ~~Title 3, chapter 1, part 10~~ sections 1 through 7, the chief justice of the Montana supreme court shall appoint a substitute judge within 30 days of receipt of the notice of vacancy. The chief justice shall select a substitute judge from the list provided for in subsection (7) or from the pool of retired state district court judges. The chief justice may appoint a substitute judge for a part of the vacancy or for the entire duration of the vacancy, and more than one substitute judge may be appointed to fill a vacancy.

(5) If a temporary vacancy occurs because the workers' compensation judge is suffering from a disability that temporarily precludes the judge from carrying out the duties of office for more than 60 days, a substitute judge must be appointed from the substitute judge list identified in subsection (7) by the current judge, if able, or by the chief justice of the supreme court. The substitute judge may not serve more than 90 days after appointment under this subsection. This subsection applies only if the workers' compensation judge is temporarily unable to carry out the duties of office due to a disability, and proceedings to permanently replace the judge under ~~Title 3, chapter 1, part 10~~ sections 1 through 7, may not be instituted.

(6) A substitute judge must be compensated at the same hourly rate charged by the department of justice agency legal services bureau for the provision of legal services to state agencies. A substitute judge must be reimbursed for travel expenses as provided for in 2-18-501 through 2-18-503. When a substitute judge

has accepted jurisdiction, the clerk of the workers' compensation court shall mail a copy of the assumption of jurisdiction to each attorney or party of record. The certificate of service must be attached to the assumption of jurisdiction form in the court file.

(7) The workers' compensation judge shall maintain a list of persons who are interested in serving as a substitute workers' compensation judge in the event of a recusal by the judge or a vacancy and who prior to being put on the list of potential substitutes have been admitted to the practice of law in Montana for at least 5 years, currently reside in Montana, and have resided in the state for 2 years."

Section 11. Repealer. The following sections of the Montana Code Annotated are repealed:

- 3-1-1001. Creation, composition, and function of commission.
- 3-1-1002. Staggered terms of members.
- 3-1-1003. Vacancies.
- 3-1-1004. No compensation -- travel expenses.
- 3-1-1005. Commission members not eligible for judicial office.
- 3-1-1006. Secretary -- election and duties.
- 3-1-1007. Commission to make rules -- confidentiality of proceedings.
- 3-1-1008. Quorum.
- 3-1-1009. Investigation by commission -- application for consideration.
- 3-1-1010. Lists submitted to governor and chief justice -- report on proceedings.
- 3-1-1011. Governor or chief justice of the supreme court to nominate from list.
- 3-1-1012. When governor fails to nominate.
- 3-1-1013. Senate confirmation -- exception -- nomination in the interim -- appointment contingent on vacancy.
- 3-1-1014. Duration of appointment -- election for remainder of term.

Section 12. Codification instruction. [Sections 1 through 7] are intended to be codified as an integral part of Title 3, chapter 1, and the provisions of Title 3, chapter 1, apply to [sections 1 through 7].

Section 13. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,
SB 140, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2021.

Speaker of the House

Signed this _____ day
of _____, 2021.

SENATE BILL NO. 140

INTRODUCED BY K. REGIER, J. ELLSWORTH

AN ACT GENERALLY REVISING LAWS RELATED TO CERTAIN JUDICIAL APPOINTMENTS; PROVIDING A DIRECT APPOINTMENT PROCESS FOR THE GOVERNOR TO APPOINT DISTRICT COURT JUDGES AND SUPREME COURT JUSTICES TO FILL JUDICIAL VACANCIES; REPEALING THE JUDICIAL NOMINATION COMMISSION; AMENDING SECTIONS 2-15-1707, 3-7-221, AND 39-71-2901, MCA; REPEALING SECTIONS 3-1-1001, 3-1-1002, 3-1-1003, 3-1-1004, 3-1-1005, 3-1-1006, 3-1-1007, 3-1-1008, 3-1-1009, 3-1-1010, 3-1-1011, 3-1-1012, 3-1-1013, AND 3-1-1014, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

EXHIBIT 3

THE SUPREME COURT OF MONTANA

MIKE McGRATH
CHIEF JUSTICE



JUSTICE BUILDING
215 NORTH SANDERS
PO BOX 203001
HELENA, MONTANA 59620-3001
TELEPHONE (406) 444-5190
FAX (406) 444-3274

April 30, 2021

Greg Gianforte
Governor, State of Montana
Office of the Governor
P.O. Box 200801
Helena, MT 59620

Dear Governor Gianforte:

Pursuant to the Senate's adverse action to Hon. Michele Reinhart Levine's confirmation, the position as state district judge, Department A, in the Eighth Judicial District is officially vacant.

As of last week the Department A calendar had 125 cases set for trial between now and August. For that reason, I am asking that you initiate the replacement process as soon as possible.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike McGrath".

Mike McGrath
Chief Justice

C: Hon. John A. Kutzman
Hon. Beth Best
Hon. John W. Parker
Tina Henry, Clerk of District Court, Cascade County
Beth McLaughlin, Supreme Court Administrator

EXHIBIT

3

EXHIBIT 4

FOR IMMEDIATE RELEASE
May 4, 2021

Contact: Brooke Stroyke, Office of the Governor

Gov. Gianforte Solicits Applications, Nominations for Eighth Judicial District Judgeship

HELENA, Mont. – The chief justice of the Montana Supreme Court has notified Governor Greg Gianforte there is a vacancy in the Eighth Judicial District (Cascade County).

The governor is now accepting applications from and nominations of any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge. The application form is available electronically at nominatejudges.mt.gov. Applications must be submitted electronically as well as in hard copy by Tuesday, June 1, 2021. Applications will be made available to the public.

Commencing Tuesday, June 1 and continuing through Friday, June 30, 2021, the public will be given the opportunity to provide letters of support or other comments regarding the applicants at nominatejudges.mt.gov. Applicants must receive at least three letters of support to be considered for appointment by the governor.

The governor's appointee, who will be named in July 2021, will be required to run for election in the 2022 election.

###

EXHIBIT 5

APPLICATION FOR DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name.
2. Birthdate.
3. Current home address.
4. Email address.
5. Preferred phone number.
6. Judicial position you are applying for.
7. Date you became a U.S. citizen, if different than birthdate.
8. Date you become a Montana resident.

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.
10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.
12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).
14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).
15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.
16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.
17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.
18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.
19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.
20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.
21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.
22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.
23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.
24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.
26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.
28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.
29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.
30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).
31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.
33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.
36. What three qualities do you believe to be most important in a good district court judge?
37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.
39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

(Date)

(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Tuesday, June 1, 2021

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

EXHIBIT 6

Gov. Gianforte Announces Advisory Council for Eighth Judicial District Vacancy

Friday, May 14, 2021/Categories: [Governor's Office](#), [Montana.gov](#)/Tags:

HELENA, Mont. – Governor Greg Gianforte today announced an advisory council to assist in identifying and reviewing qualified candidates to fill the district court judge vacancy in the Eighth Judicial District.

“Comprised of accomplished attorneys and long-time community leaders, the Eighth Judicial District Advisory Council will assist me in identifying exceptional candidates to serve as the district court judge in the Eighth Judicial District,” Gov. Gianforte said. “I have charged the advisory council with casting a broad net to identify well-qualified candidates who are committed to the fair, consistent, and objective application of the law and who will interpret laws, not make them from the bench.”

Members of the advisory council follow:

David Bowen, *retired chief of police of Great Falls Police Department*

Brett Doney, *president of the Great Falls Development Authority*

Shane Etzwiler, *president of the Great Falls Chamber of Commerce*

Brion Lindseth, *attorney at KLB Business Law*

Ron Nelson, *attorney at Church Harris Johnson & Williams P.C.*

Greg Pinski, *former judge for the Eighth Judicial District*

Kristy Pontet-Stroop, *executive director of the Alliance for Youth*

Jennifer Quick, *deputy county attorney for Cascade County*

Christie Slaughter, *probation and parole officer for the State of Montana*

Ruth Uecker, *assistant superintendent, K-12 Great Falls Public School District*

The governor is accepting applications from and nominations of any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge. The application form is available electronically at nominatejudges.mt.gov. Applications must be submitted electronically as well as in hard copy by Tuesday, June 1, 2021. Applications will be made available to the public.

Commencing Tuesday, June 1 and continuing through Friday, June 30, 2021, the public will be given the opportunity to provide letters of support or other comments regarding the applicants at nominatejudges.mt.gov. Applicants must receive at least three letters of support to be considered for appointment by the governor.

The governor's appointee, who will be named in July 2021, will be required to run for election in the 2022 election.

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Print

Number of views (179)/Comments (0)



EXHIBIT 7

Gov. Gianforte Solicits Public Comment on Eighth Judicial District Judge Applicants

Wednesday, June 2, 2021/Categories: [Governor's Office](#), [Montana.gov](#)/Tags:

HELENA, Mont. – Governor Greg Gianforte today announced he is seeking public comment on applicants to the vacancy in the Eighth Judicial District (Cascade County).

Members of the public can provide letters of support or other comments regarding the applicants through Wednesday, June 30, 2021 at 5 p.m.

The governor has received applications from the following attorneys whose applications may be found at [nominatejudges.mt.gov](#):

- Rebekah J. French
- David Joseph Grubich
- Michele Reinhart Levine
- Tracy Labin Rhodes
- Matthew S. Robertson

Members of the public should submit letters or other comments by email to nominatejudges@mt.gov, by fax to (406) 444-4151, or by mail to Attn: Hannah Slusser, Governor's Office, PO Box 200801, Helena, MT 59620.

Letters or other comments submitted will be publicly available and posted at [nominatejudges.mt.gov](#).

Applicants must receive at least three letters of support to be considered for appointment by the governor.

The governor's appointee, who will be named in July 2021, is subject to election in 2022.

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Print

Number of views (400)/Comments (0)



EXHIBIT 8

OFFICE OF THE GOVERNOR
STATE OF MONTANA

GREG GIANFORTE
GOVERNOR



KRISTEN JURAS
LT. GOVERNOR

July 7, 2021

The Honorable Christi Jacobsen
Secretary of State
Helena, MT 59620

Dear Secretary Jacobsen:

I have appointed David J. Grubich as District Court Judge to fill the vacancy in Department 1 of the Eighth Judicial District in accordance with Sections 1 through 7 of SB 140 (2021), to fill the seat vacated by the resignation of District Court Judge Gregory G. Pinski.

Judge Grubich will coordinate his transition with Chief Justice Mike McGrath and the Eighth Judicial District, including his start date.

If you need any additional information, please contact Lieutenant Governor Kristen Juras at extension 5550.

Sincerely,

A stylized, handwritten signature of Greg Gianforte in black ink.

GREG GIANFORTE
Governor

cc: Chief Justice Mike McGrath