IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. OP 21-0125

BOB BROWN, DOROTHY BRADLEY, VERNON FINLEY, MAE NAN ELLINGSON, and the LEAGUE OF WOMEN VOTERS OF MONTANA,

Petitioners,

v.

GREG GIANFORTE, Governor of Montana,

Respondent.

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION

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SUMMARY OF ARGUMENT

Broad language that minimally constrains political actors ought to be read on its own terms, without resort to canons normally reserved for "ambiguous" language in constitutional or statutory provisions. This is especially so in light of Montana caselaw establishing that courts must presume statutes to be constitutional. *Amicus* does not suggest that historical documents—such as the notes from constitutional conventions—may never be consulted to determine the meaning of certain terms and phrases. Rather, unless that meaning is codified into law through the use of words and phrases, it is not appropriate to give credence to historical documents in order to supersede the plain meaning of the text of the Montana Constitution.

Because the words contained in Article VII of the Montana Constitution do not prohibit the judicial selection process codified in SB 140, MONT. CODE ANN. § 3-1-XXX (effective March 16, 2021); *see also* Pet., at Appendix A, p. 2—including the use of letters of support from Montana residents in order to trigger the governor's consideration of nominees for the bench—this Court's inquiry need go no further. In fact, by establishing that the selection process will be mandated by law, the text of Article VII specifically allows for the judicial selection process codified in SB 140. Most importantly, this Court should not try to determine, on a case-by-case basis, whether any specific nomination and selection structure is

consistent with the intent of the framers of Article VII, as opposed to the actual text of the Article.

ARGUMENT

I. Montana Statutes are Presumed Constitutional, and it is the Text of Constitutional Provisions that Courts Must Heed.

SB 140 establishes, *inter alia*, the following procedures for filling vacancies in the judicial branch:

> (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.

MONT. CODE ANN. § 3-1-XXX (effective March 16, 2021).

As this Court has stated, "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act. The party challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute." *State v. Davison*, 2003 MT 64, ¶8, 314 Mont. 427, 429, 67 P.3d 203. "If a doubt exists, it is to be resolved in favor of the legislation." *GBN, Inc. v. Mont. Dept. of Revenue* (1991),

249 Mont. 261, 265, 815 P.2d 595, 597; *State v. Stark* (1935), 100 Mont. 365, 52 P.2d 890, 891 ("[T]he constitutionality of any act shall be upheld if it is possible to do so.").

The appropriate means of evaluating whether the requirements in SB 140 are consistent with the text of Article VII of the Montana Constitution is to consider the ordinary public meaning of Article VII at the time of the text's adoption. *See Cross v. VanDyke*, 2014 MT 193, ¶11, 375 Mont. 535, 539, 332 P.3d 215 ("[W]e must implement the framers' intent by viewing the plain meaning of the words used and applying their usual and ordinary meaning.") (internal brackets and quotation marks omitted); *accord District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) ("[W]e are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.") (internal quotation marks and citations omitted).

When evaluating statutes or constitutional provisions, it is not the individual intentions of public officials or framers that govern. *See, e.g.*, *American Lung Association v. Environmental Protection Agency*, 985 F.3d 914, 1012 (D.C. Cir. 2021) (Walker, J., concurring in part) ("It is the law that governs, not the intent of the lawgiver. That's because, among other reasons, it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning

of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.") (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997)); *Cf. Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."). As Justice Gorsuch wrote in his recent book:

> Originalism reinforces the rule-of-law values of notice and equality. Most obviously, by interpreting the text according to its ordinary public meaning, and accepting that it cannot be changed outside the amendment process, originalism ensures that citizens know with some predictability the content of their constitutional rights . . . The least powerful among us get the same treatment as the most powerful, and cannot have their rights balanced away by judges.

NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 125 (2019).

To the extent that the framers of a constitutional provision desire that their expectations be codified into law, those expectations ought to be made expressly in the text of the constitutional provision. *State v. Moody* (1924), 71 Mont. 473, 230 P. 575, 579 ("It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it."); *accord United States v. Sprague*, 282 U.S. 716, 732 (1931) ("If the framers of the instrument had any thought that amendments differing in purpose should be ratified

in different ways, nothing would have been simpler that so to phrase article 5 as to exclude implication or speculation.").

This is not to suggest that judges may not consult historic documents to determine the meaning of vague terms that require interpretation. But, by contrast, judges ought not *expand the meaning of terms*, based on the wishes of those who initially framed constitutional provisions. *See Chiafalo v. Washington*, 140 S. Ct. 2316, 2335 (2020) (Thomas, J., concurring) ("But the Framers' expectations aid our interpretive inquiry only to the extent that they provide evidence of the original public meaning of the Constitution. They cannot be used to change that meaning."); (*citing* ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997)); c*f. New Prime v. Oliveria*, 139 S. Ct. 532, 539 (2019) ("[I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands.").

II. The Text of Article VII Does Not Limit the Term "Nominee" or "Selected" to Commission-Approved Candidates.

The parties agree that Article VII of the Montana Constitution provides the following:

> (1) Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.
> (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 . . . Appointments made under this subsection shall be subject to confirmation by the senate, as provided by law.

MONT. CONST., ART. VII, § 8(1)–(2).

These constitutional provisions contemplate several key circumstances. First, while justices and judges are generally elected by qualified electors, vacancies in the office of supreme court justice or district judge—outside of the normal election schedule—will occur from time to time. Second, when a vacancy occurs, it is the governor that appoints a replacement to fill the vacancy. That replacement, moreover, is limited to a pool of "nominees selected," and the nominees selected to be in the pool are limited to those who are "selected in a manner provided by law." Once the nominee is chosen by the governor, that individual is subject to confirmation by the senate, also "as provided by law."

On the other hand, these provisions do *not* settle the specific processes regarding numerous facets of the nomination and selection process—a process specifically reserved to be "provided by law." For instance, the provisions themselves do not define who the "qualified electors" are, meaning the individuals who vote on justices and judges. Nor do they prevent the senate from adopting specific legislative rules on its own confirmation process, which may be "provided by law." And, most importantly for this matter, the provisions do not set forth any limitations on how the pool of "nominees selected" that the governor must choose from is established, other than that the process must be "in the manner provided by

law." Courts are well-equipped to make the latter determination. *See State v. Bailey* (1896), 18 Mont. 554, 46 P. 1116, 1117 (determining whether members of the Republican Silver Party were nominated in a legal manner).

Thus, the Court must answer whether it is impermissible, as Petitioners suggest, for the legislature to deem "nominees selected" as those individuals who "receive[] a letter of support from at least three adult Montana residents by the close of the public comment period." *See* Pet. at 13 (arguing that the "the only reasonable interpretation of the word "nominee" bars self-nominations). In answering that question, and in order to determine the meaning of individual words, this Court ought to, as it has in the past, consult commonly used dictionaries for the definitions of terms. *See Cross v. VanDyke*, ¶11 (consulting the 1971 edition of The Compact Edition of the Oxford English Dictionary); *Keller v. Smith* (1976), 170 Mont. 399, 405, 553 P.2d 1002, 1007 (consulting the 4th edition of Black's Law Dictionary, Revised); *State v. Stewart* (1916), 53 Mont. 18, 161 P. 309, 312, (reviewing numerous dictionaries for the definition of the terms "restrict" and "restrictions"). Such an approach has been deemed appropriate by numerous courts. *See, e.g.*, *Heller*, 554 U.S. at 581 (referring to dictionaries for the terms "keep," "bear," and "arms"); *Agro Dutch Industries Ltd. v. United States*, 508 F.3d 1024, 1031 (Fed. Cir. 2007) ("In order to ascertain the established meaning of a term it is appropriate to consult dictionaries.") (internal quotation marks and ellipses omitted).

Put simply, the ordinary public meaning of a "nominee" in 1972, and today, for that matter, does not include the requirement that a nominee be selected by a committee or commission; nor does it suggest a bar on self-nomination or nomination by three adult Montana residents. *See, e.g.*, BLACK'S LAW DICTIONARY (4th ed., 1968) ("One who has been nominated or proposed for an office."); BLACK'S LAW DICTIONARY (5th ed., 1979) (same); BLACK'S LAW DICTIONARY (7th ed., 1999) ("A person who is proposed for an office, position, or duty."); WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1968) ("A person who has been nominated."); *see also id.* (defining "nominate" to mean "To appoint or propose for appointment to an office or place.").

Similarly, in other authorities, the definition of a "nominee" is "a person named or proposed for an office, duty, or position." *See Winter v. Woltinek*, 56 F. Supp. 884, 895 n.3 (E.D. Ky. 2014) (citing the 2002 edition of WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY); *see also* Office of the Arizona Attorney General, Ltr. To the Honorable Jack A. Brown, Ariz. Op. Atty. Gen. No. I00-014 (Ariz. A.G.), 2000 WL 863158, at *2 (2000) (citing the definition of "nominee" from the 1993 edition of WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY). While these definitions contemplate nominees for elected office, they are not limited thereto. Nor, more importantly, do they limit the term "nominee" to situations where a committee or other specific body has done the nominating. The word "nominee"

presumes a nominator, but does not dictate the form or identity of that nominator. In other words, there is nothing in the definition of the word nominee that requires a commission—as opposed to three Montana adult residents—to make a nomination and select nominees for the Governor's review and consideration. Even if it can be said that the framers of Article VII intended that only committees or commissions ever be permitted to select nominees, such intention is not realized in the plain meaning of the text, and this Court ought not rewrite the words of the text based on subjective intent.

Petitioners contend that SB 140 essentially requires self-nomination, and that the Montana Constitution does not permit self-nomination or self-selection as the means by which an individual distinguishes themselves from the general population, so as to become a "nominee" for the governor's choosing. Pet. at 12 (describing SB 140's provision regarding choosing as a "crude attempt to address this problem of constitutionality"). But crude or not, SB 140 satisfies the bare terms of the Montana Constitution, and this Court may not abandon the plain meaning of the Montana Constitution in favor of alternative interpretation that would invalidate a duly enacted state statute. *See State v. Edwards*, 38 Mont. 250, 99 P. 940, 945 (1909) ("It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."). The

Montana Constitution requires the nomination process to be provided by law, and SB 140 provides an adequate nomination process by enacted law.

III. SB 140 Merely Codifies One Manner, Among Many, of Satisfying Article VII's Requirements.

Petitioners suggest that SB 140 provides the Governor of Montana with "plenary power to fill a vacancy." Pet., at 11. But this is incorrect. Instead, SB 140 permits the governor to fulfill the terms of the Montana Constitution in a specific manner, "provided by law." MONT. CONST., ART. VII, §8(2). Indeed, even Petitioners recognize that the state legislature had to enact legislation to "implement" Article VII, Pet. at 12; it was not, standing alone, sufficient to establish a committee or commission system. Now, SB 140 provides another means of satisfying Article VII: that an individual supported by three adult Montana residents is a "nominee," and that designating an individual as a nominee constitutes a selection process, as distinct from members of the general public who are not selected as nominees.

To be sure, Petitioners object to the idea that individuals may, in some cases, essentially self-nominate and self-select themselves for consideration for judicial office by gathering the support of three adult Montana residents. And Petitioners have mined the legislative history behind Article VII to argue that SB 140 adopts a "manner" that was not what the framers of the amendment *contemplated*. But these arguments are unavailing, because neither of these arguments is a sufficient basis to

strike down a practice that is consistent with the Montana Constitution. As this Court stated over 130 years ago:

> Although the framers of our constitution went far in providing for the convenient administration of justice in our state, a study of that instrument plainly shows that they left to the legislative assembly the further enactment of provisions to render the administration of justice still more convenient and speedy, by providing in detail for supplying temporary vacancies or absence or disabilities occurring in respect to the office of district judge, and we cannot supply all that may be needed by construction.

Wallace v. Helena Electric Ry. Co. (1890), 10 Mont. 24, 25 P. 278, 283 (internal citations omitted).

That Petitioners wish that the governor ought to be further bound by certain restrictions on the nomination process is no argument in favor of over-interpreting the strictures of Article VII, or functionally altering the written text of that Article. Courts are not here to make decisions based on the appropriate scope of gubernatorial power as a policy matter, nor even on the basis of prudence. If such restrictions are good policy measures in the abstract, the Court may leave such policy questions to the amendment process. *Moody*, 71 Mont. 473, 230 P. at 579 ("What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require."). But a court may not put a thumb on the scale of judicial interpretation in order to make "good" policy. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 48 ("If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always

going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong.") (internal quotation marks omitted).

IV. This Court Should Reject the Broad Use of Legislative Intent to Interpret Constitutional Provisions with Broad Language.

This Court has held that it may consider the legislative intent behind constitutional provisions in some instances. *See Keller*, 553 P.2d at 1007, 170 Mont. at 407 ("While such determination is not binding on this Court, it is entitled to consideration."). In *Keller*, the Court held that a specific term in the Montana Constitution was ambiguous, because it was capable of more than one meaning. *Keller*, 553 P.2d at 1007, 170 Mont. at 406 ("As the language itself is not clear, we must resort to extrinsic rules of construction."); *Inquiry Concerning Complaint of Judicial Standards Com'n v. Not Afraid*, 2010 MT 285, ¶15–17, 358 Mont. 532, 538, 245 P.3d 1116, 2111 (evaluating the term "public office").

There is a significant difference, however, between *broad* constitutional language that may be sufficiently vague so as to require ordinary judicial interpretation, and *ambiguous* constitutional language that requires resort to what the framers intended when the text was written. *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 84–85 (2012) ("Usually, however, the change produced by nonoriginalists gives a different meaning to provisions that are not ambiguous but vague. Statutes often—and constitutions always—employ general terms such as *due process*, *equal protection*,

and *cruel and unusual punishments*.") (emphasis in original). When language is broad, courts are fully capable of looking to historical sources to determine the meaning of specific terms or provisions. *See Keller*, 170 Mont. at 407, 553 P.2d at 1007; *Heller*, 554 U.S. at 593 ("This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.") (emphasis in original).

On the other hand, the fact that broad language in constitutional provisions—like the terms "nominees" or "selected"—may be satisfied in numerous ways is not evidence that the language is in fact ambiguous. *Cf. Stewart*, 53 Mont. 18, 161 P. at 312 ("The framers of our Constitution were discriminating in their choice and use of language. They apparently experienced no difficulty in choosing apt words to express the particular shade of meaning which they intended to attach to any provision."). Nor is broad language subject to continual review and revision, as courts look back to whether a specific practice is really consistent with what the framers of a provision meant when they drafted the broad language. In that approach, true danger to our constitutional system lies. As Judge Easterbrook wrote in his famous law review article on the "Dead Hand" of constitutional provisions that bind subsequent generations of popularly elected representatives, our system

depends on a definite and understandable contract between the government and the people:

> The fundamental theory of political legitimacy in the United States is contractarian, and contractarian views imply originalist, if not necessarily textualist, interpretation by the judicial branch. Otherwise a pack of lawyers is changing the terms of the deal, reneging on behalf of a society that did not appoint them for that purpose. This is not a controversial proposition. It is sound historically: the Constitution was designed and approved like a contract. It is sound dispositionally: it is the political theory the man in the street supplies when he appeals to the Constitution (or to the legitimacy of the electoral process, even though his candidate lost).

Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998). Fundamentally, it is inconsistent with the principles underlying constitutional government—and dangerous to the body politic—to bar elected representatives from engaging in certain types of policymaking, because further study of 1972 Constitutional Convention notes reveals that they are acting inconsistently with the intent of some framers.

For these reasons, Petitioners' urging that the Court consider the Constitutional Convention Notes in order to alter the plain meaning of the text of the Montana Constitution should be rejected.

CONCLUSION

It is the public meaning of the words in the Montana Constitution that bind and limit its lawfully elected legislators, not the subjective intent of the individuals who participated in the crafting of those words.

For these reasons, this Court should limit its decision-making process to the plain meaning and application of the text before the Court.

DATED this the 14th day of April 2021,

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure Rule 11(4)(a) and (d), I certify that this brief is proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); has left, right, top and bottom margins of 1 inch; and has a word count calculated by Microsoft Word of 3560 words (excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service).

DATED this 14th day of April 2021.

/s/ Cody J. Wisniewski
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