IN THE SUPREME COURT OF THE STATE OF MONTANA
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.

AMICUS CURIAE BRIEF OF THE MONTANA TRIAL LAWYERS ASSOCIATION AND THE MONTANA DEFENSE TRIAL LAWYERS

On Petition for Original Jurisdiction

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INTRODUCTION

Since the 1970s, Montana has relied upon the Judicial Nomination Commission to submit nominees to the Governor for appointment to judicial vacancies. The Commission was transparent and provided a layer of separation between the non-partisan judiciary and the necessarily partisan executive branch. The Commission investigated the qualifications of each applicant to help ensure their appointment was based on merit, not political affiliation.

On March 16, 2021, Respondent Governor Greg Gianforte signed Senate Bill No. 140 ("SB 140") into law. SB 140 dissolved the Judicial Nomination Commission and allows the Governor to handpick judicial appointments with no oversight. This new law violates the Montana Constitution and threatens judicial quality and independence. Because civil litigants on all sides of the "vs." depend on qualified, fair and impartial judges, the Montana Trial Lawyers Association ("MTLA") and Montana Defense Trial Lawyers ("MDTL") are joining as *amici* for likely the first time ever to urge this Court to declare SB 140 unconstitutional.

ISSUE PRESENTED

Whether SB 140 violates Article VII of the Montana Constitution.

STATEMENT OF FACTS

The Petitioners set forth the relevant factual background in their Petition for Original Jurisdiction.

SUMMARY OF ARGUMENT

Mont. Const. Art. VII, § 8(2) requires the governor to appoint a nominee selected by a nominating committee to fill a judicial vacancy. The framers of the Montana Constitution intended to require the Legislature to create a nominating committee to select qualified nominees from the pool of candidates from which the governor could make an appointment. SB 140 violates the Montana Constitution by abolishing the Judicial Nomination Commission and allowing the governor to directly appoint whomever he or she pleases, regardless of the applicant's qualifications for the position, to fill judicial vacancies. This threatens judicial independence, threatens to diminish the quality of the Montana judiciary, and will erode the public's confidence that judges will act appropriately and impartially.

ARGUMENT

I. SB 140 Violates the Montana Constitution

A. The Plain Language and the Framer's Intent Require a Nominating Committee

This Court applies the same rules to interpret Montana's Constitution as it does to interpret statutes. *Nelson v. City of Billings*, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. Just as the goal of interpreting statutes is to give effect to the Legislature's intent, the goal of interpreting the Constitution is to give effect to the 1972 Constitutional Convention Delegates' intent. *Id.* When possible, the Court

should determine the Delegates' intent from the Constitution's plain language. *Id.* But even when the Constitution's language is clear and unambiguous, the Court must also consider "the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Id.*

Here, both the Constitutional Convention Verbatim Transcripts and the plain language of Article VII, § 8(2) show the Delegates intended to require the Legislature to create a nominating committee to limit who the governor could appoint to fill Supreme Court and district court vacancies. The relevant portion of Article VII, § 8(2) provides, "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." (emphasis added). Throughout the Delegates' consideration and discussion of the provision that ultimately became Article VII, § 8, the Delegates routinely discussed the nominating committee that §8 required the Legislature to create.

For example, when Delegate Ben Berg introduced his "minority plan," which ultimately became Article VII, § 8, he explained that it was intended to require the Legislature to create a nominating committee as an essential part of the nominating process:

> It provides for a–what we call "merit selection" in this, that it would create a committee—that is, a committee would be created by the

> Legislature—which would submit nominees, and that means more than one, to the Governor, and the Governor would then nominate that one from those names.

Constitutional Convention Verbatim Transcripts, February 29, 1972, 1085.[1] In the final exchange before the Delegates adopted the minority plan by a vote of 88-0, Delegate Berg concisely explained why the Delegates chose to leave the creation of the nominating committee to the Legislature:

> DELEGATE SWANBERG: Mr. Berg, I don't wish to seem dense about this, but I fail to find anyplace in here where there's a merit system mentioned.
>
> DELEGATE BERG: Well, in all vacancies—if you'll read the first paragraph—in all vacancies in the offices of Supreme Court justices and District Court judges, the Governor of the state shall nominate a Supreme Court or District Court judge from nominees selected in the manner provided by law. Now, that means that he must make his selection from nominees in the manner provided by law. **It is contemplated that the Legislature will create a committee to select and name those nominees.** That's where merit selection comes in.
>
> DELEGATE SWANBERG: But it's not so stated in our Constitution?
>
> DELEGATE BERG: No, because **it was not stated for the very reason that if we locked it into the Constitution and the composition of the committee needed changing, it's difficult to do it by amendment.** If you leave it to the Legislature and it needs changing, it can readily be done year by year.
>
> DELEGATE SWANBERG: Under the situation that we have in the Constitution, though, if the Legislature decided not to form this commission, then we'd have the same situation we have now, do we not, where the Governor would simply appoint the judge?

[1] Excerpts from the Constitutional Convention Verbatim Transcripts are found at Appendix A.

> DELEGATE BERG: Yes, but I think **this is a pretty clear direction to the Legislature of the intent of this Convention**.

Constitutional Convention Verbatim Transcript, February 29, 1972, 1113–1114 (emphasis added).

The Delegates' intent is further shown by their rejection of an amendment to Delegate Berg's minority plan that would have eliminated confirmation by the Senate and the language requiring the governor to appoint "from nominees selected in a manner provided by law." Constitutional Convention Verbatim Transcripts, February 29, 1972, 1104–1106. Chairman Leo Graybill summarized the Delegates' understanding of the effect of the proposed amendment before calling for a vote: "Yeah, we'll have a roll call vote—which has the effect of eliminating the commission system and eliminating the Senate confirmation." Constitutional Convention Verbatim Transcripts, February 29, 1972, 1104–1106. The Delegates rejected the proposed amendment 26–69. Constitutional Convention Verbatim Transcripts, February 29, 1972, 1104–1106.

Indeed, this Court has already acknowledged the Delegates' intent to require the Legislature to create a nominating committee when discussing Article VII, § 8's adoption in *State ex rel. Racicot v. Dist. Court*, 243 Mont. 379, 387, 794 P.2d 1180, 1184-85 (1990):

> The minority proposal provided for the selection of justices and judges through a system of appointment. **The Judicial Nominating Committee would review the records of candidates and present the**

> **governor with a list of the most qualified nominees. From this list, the governor would select a nominee to be confirmed or rejected by the Senate.** A confirmed appointee could face a contested election in the first primary following Senate approval. Thereafter, the appointee would run in an approval-or-rejection contest in a general election for each succeeding term. **The delegates were informed that the appointment method of systematically screening judicial candidates "is more conducive to attaining a qualified, capable judiciary than the elective method whereby candidates are chosen more for political appeal than merit."**
>
> The delegates voted to adopt the minority, appointment proposal and then, in a series of debates and amendments before the committee of the whole, broadened its election provisions. The delegates specifically rejected elections as the primary method of judicial selection, but voted overwhelmingly to extend the contested election provision beyond the first election after Senate confirmation to all other elections an incumbent would face.

State ex rel. Racicot v. Dist. Court, 243 Mont. 379, 387–88, 794 P.2d 1180, 1184-85 (1990) (internal citations omitted) (emphasis added).

Although the Delegates chose not to establish or explicitly refer to a nominating committee in the Constitution itself, the Delegates all believed they were requiring the Legislature to create a nominating committee, or at least establish some other merit-based selection process to screen the candidates that could be considered by the governor for appointment. Their use of the terms "nominees" and "selected" in Article VII, § 8(2) reflects that intent. Black's Law Dictionary explains that a person seeking nomination is a candidate, not a nominee. A candidate becomes a nominee only when he or she is chosen to be nominated:

> **nominee** (nom-i-**nee**), *n.* **1.** A person who is proposed for an office, membership, award, or like title or status. • An individual seeking nomination, election, or appointment is a *candidate.* A candidate for election becomes a *nominee* after formally being nominated.

Nominee, *Black's Law Dictionary* (11th ed. 2019).

The term "selected" also conveys the Delegates' intent that the governor would not be allowed to consider every applicant or candidate for appointment. "Select" means "to choose (as by fitness or excellence) from a number or group: pick out." *Select*, *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/select. Accessed 6 Apr. 2021. There is no "selection" of nominees if the governor can consider the entire pool of candidates.

B. SB 140 Violates Art. VII, § 8(2) of the Montana Constitution

SB 140 violates Mont. Const. Art. VII, § 8(2) because it fails to establish a manner for *selecting nominees* to be sent to the governor for his or her consideration. Instead, it gives the governor unchecked authority to directly appoint any candidate without any formal vetting of the candidate's qualifications. SB 140, § 1(a). While SB 140 does require candidates to submit three letters of support from Montana citizens to be considered for appointment, requiring letters of support does not establish a "manner for selecting nominees." SB 140, § 4(2). It merely establishes an additional requirement to be qualified for appointment.

SB 140 unconstitutionally repeals the statutes that established the Judicial Nomination Commission ("Commission") without providing for any other manner for selecting nominees from the pool of candidates to be sent to the governor for his or her consideration. *See* SB 140, § 11. Because SB 140 does not establish any manner for selecting nominees to be considered by the governor, this Court does not have to address whether some process for selecting nominees other than the Commission would satisfy Article VII, § 8(2)'s requirements. SB 140's failure to establish any process for selecting nominees to be considered by the governor renders it inarguably unconstitutional.

II. A Nomination Commission Is Needed to Preserve Judicial Independence

A. The Public Depends on a Qualified, Fair and Impartial Judiciary

Montanans expect its judiciary to be qualified, independent, fair and impartial. To further that goal, Montanans deliberately moved away from allowing governors to fill judicial vacancies purely by "appointment" as permitted in the 1889 Montana Constitution, to requiring governors to fill vacancies from "nominees selected in the manner provided by law." Mont. Const. Art. VII, § 8(2). The delegates deliberately chose a process focused on "merit selection" instead of political affiliation.

Every litigant relies upon a fair and impartial judiciary to decide issues presented before Montana courts. *See State v. Dunsmore*, 2015 MT 108, ¶ 11, 378

Mont. 514, 347 P.3d 1220 ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."). The Commission helped ensure that candidates who would make good judges are presented to the governor for appointment to the bench, regardless of their political affiliations. MTLA and MDTL are jointly appearing as *amici* to urge this Court to preserve judicial independence and the quality of Montana's judiciary on which members of both groups depend.

Cognizant of its obligation to remain independent and impartial, the judicial branch is bound by the Montana Code of Judicial Conduct. *Draggin' Y Cattle Co. v. Addink*, 2016 MT 98, ¶¶ 24-25, 383 Mont. 243, 371 P.3d 970. Relevant here, the Code for Judicial Conduct requires judges to act "in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." M. C. Jud. Cond., Rule 1.2. Judges cannot "participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality[.]" M. C. Jud. Cond., Rule 3.1(C). For example, judges are generally prohibited from engaging in partisan political activities. *See* M. C. Jud. Cond., Rules 4.1 – 4.2. Violations of these principles erode at "[p]ublic confidence in the judiciary." M. C. Jud. Cond., Rule 1.2, cmt 1.

When a governor can directly appoint whomever he or she wants to fill a judicial vacancy, the public cannot trust that the new judge was chosen based on

merit and will act with impartiality. Instead, the assumption will be that the choice was based on political ideology. As John Schultz, a delegate to the 1972 Montana Constitutional Convention, stated in debate over Art. VII, § 8(2): "we have strong corporate influence; where, if I can elect a Governor, and through that office nominate and appoint the district and the Supreme Court judges, I can run this state. . . . I can own it." Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. App. Prac. and Process 47, 65 (Append. B). Direct judicial appointments by the governor works against the Code of Judicial Conduct's goals of creating public trust in the impartiality of the judiciary.

Attorneys seeking judicial appointment should be considered based upon their ability to perform judicial work competently and diligently while maintaining their independence and proper decorum. M. C. Jud. Cond., Rules 1.2, 2.5, and 2.8. Judicial appointments should not be based on political ideology or ties to a gubernatorial administration. The public views direct appointees as eroding the public trust in an impartial judiciary. "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). Judges should be chosen on merit, not their political worth.

B. A Nominating Commission is the Best Way to Keep Public Confidence in Appointed Judges

When the 1973 Montana Legislature created the constitutionally mandated Commission to present nominees to the Governor to fill judicial vacancies, it established a framework that allows nomination and selection based on merit and allows the public to observe and engage in the process. This necessary process helped ensure that there is public scrutiny and a layer of separation between the executive branch and judicial nominees. § 3-1-1001, MCA, *et seq*.

The Commission helps prevent against cronyism by vetting and evaluating the candidates before forwarding three to five nominees to the governor for appointment. R. of the Jud. Nom. Comm'n, Rule 7.1. The governor, regardless of her or his political affiliation, cannot handpick a judicial appointment; he or she must choose from a group of the most qualified nominees presented by the Commission. When a nominee makes it past the Commission, Montanans have more faith that the judge was selected due to merit, and not political or personal affiliation.

The public can observe the entire process to help hold the Commission accountable to its goal of selecting meritorious nominees. The Legislature requires the Commission to make all its proceedings and documents available to the public "except when the demands of individual privacy clearly exceed the merits of

public disclosure." § 3-1-1007, MCA. Consistent with the goal of public scrutiny, the Commission has created rules that allow the public to observe how candidates are evaluated. Its internal rules require the Commission to maintain a website where all documents are available for public view. R. of the Jud. Nom. Comm'n, Rule 1.4. All meeting and proceedings are open to the public except in extraordinary circumstances. R. of the Jud. Nom. Comm'n, Rule 4.1. Applications by prospective nominees and public comments are publicly available on the Commission's website. R. of the Jud. Nom. Comm'n, Rules 3.4, 5. The applicants' interviews are public and held in the district where the vacancy occurs. R. of the Jud. Nom. Comm'n, Rule 6.2. After the interviews, the Commission members publicly discuss the applicants' qualifications before voting on which nominees to forward to the Governor. R. of the Jud. Nom. Comm'n, Rule 7.

The Commission may not be perfect. There may be smaller reforms that could improve the Commission's process. However, the Commission has worked for decades and has consistently presented quality nominees. Some of Montana's most respected jurists were presented to the governor by the Commission. Gov. Stan Stephens appointed the Hon. Diane Barz as a Supreme Court justice, which made her the first woman to serve in that role. Gov. Stephens later appointed the Hon. Karla Gray, who would become the first female Chief Justice. Gov. Marc Racicot appointed the Hon. Susan Watters to Thirteenth Judicial District. Judge

Watters would later become the first female U.S. District Court Judge in the District of Montana. Other respected and retired Supreme Court justices nominated by the Commission include the Hon. Chip Erdmann and Hon. John Warner.

The Commission helps ensure that qualified candidates are presented to the governor for appointment. It has worked since the 1970s. By statute and its own internal rules, the Commission allows for public participation to help ensure that Commission members are acting with integrity when evaluating candidates and presenting the most qualified candidates to the governor for consideration. The abolition of the Commission by SB 140 not only violates the Montana Constitution, but it destroys the merit based, non-partisan selection process that the 1972 Montana Constitutional Convention Delegates sought to preserve when they unanimously voted 88-0 to adopt Mont. Const. Art. VII, § 8(2).

C. SB 140 Threatens to Erode Away Judicial Independence

With its passage, SB 140 upended decades of reliance on the Commission to act as a buffer between a non-partisan judicial branch and a partisan executive branch. As part of SB 140, the Legislature abolished the Commission. SB 140, § 11. The governor can pick any member of the State Bar to serve as a judge. SB 140, § 1(a). No investigation or formal evaluation is mandated; SB 140 only provides that the governor "*may* authorize investigations concerning the qualification of eligible persons." SB 140, § 2(1) (emphasis added).

Under the new system, the governor can easily handpick anybody to fill judicial vacancies without any regard to the appointee's qualifications. There is no nominating process. Applicants can apply straight to the governor without independent evaluation of the candidates. SB 140, § 3. While the applicant needs to have three letters in support, that is not a particularly onerous task. SB 140, § 4(2). Although SB 140 requires all written documents to be made publicly available, any candidate interviews by the governor are not public. *See* SB 140, § 4(4).[2]

SB 140 is a direct threat to judicial independence and impartiality. No longer will appointees be publicly evaluated and vetted before consideration by the governor. The result could be the appointment of unqualified judges who will not fairly apply the law to litigants in Montana courts.

A transparent, non-partisan, merit-based process for vetting judicial candidates is essential to an independent and quality judiciary. If the Court permits SB 140 to stand, practitioners and litigants may no longer have experienced and qualified judges to hear their cases. All litigants – civil and criminal – need

[2] SB 140's endorsement of non-public interviews for judicial vacancies further violates Article II, Sections 8 and 9 of the Montana Constitution. The right to know and the right to participate in government were specifically protected by the 1972 Constitution. Both rights find their roots in efforts to protect against insider political dealings and secrecy of governmental actions. Sunlight is the "best of disinfectants; electric light the most efficient policeman." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976).

experienced, qualified, and impartial judges to hear the case's facts and fairly apply the law. If a governor affiliated with any political party is permitted unfettered authority to appoint whomever he or she pleases as a judge or justice, Montana law may be inconsistently applied by judges who otherwise would not make it past the Commission due to a lack of qualification. The result will negatively impact every party that appears in a Montana court.

CONCLUSION

SB 140 is an unconstitutional threat to Montana's independent and quality judiciary. Montana litigants depend on quality judges that fairly and independently apply the law to their cases. For that reason, the MTLA and MDTL have taken the unprecedented step of jointly filing this brief. Public trust in the judiciary depends upon open and non-partisan judicial appointments that comply with the Montana Constitution. This Court should grant the Petitioners their requested relief and declare SB 140 to be unconstitutional.

RESPECTFULLY SUBMITTED this 14th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the MTLA and MDTL's *Amicus Curiae* Brief is printed with proportionately spaced Times New Roman, non-script typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 5,000 words as calculated by my Microsoft Word software, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

Dated this 14th day of April, 2021.

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