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STATE OF MONTANA
Case Number: OP 21-0125

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0125

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

Petitioners,

v.

GREG GIANFORTE, Governor of the State of Montana,

Respondent.

RESPONSE TO PETITION FOR ORIGINAL JURISDICTION

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The Governor hereby responds to the Petition for Original Jurisdiction.

BACKGROUND

Petitioners ask this Court to exercise original jurisdiction and declare that the Legislature lacks authority to determine how judicial nominees are presented to the Governor under Article VII, § 8(2) of the Montana Constitution. Specifically, Petitioners challenge Senate Bill (SB) 140, which allows the governor to fill judicial vacancies by selecting from nominees who have submitted applications and who received at least three letters of support during the public comment period.[1] Nominees must then be confirmed by the Montana Senate. SB 140, § 6.

ARGUMENT

As a threshold matter, Petitioners lack standing. Petitioners additionally have failed to demonstrate urgency or emergency factors rendering the normal adjudicatory process inadequate. And finally, even absent these barriers, this Court should reject jurisdiction because Petitioners cannot establish that SB 140 violates the Montana Constitution's plain language, which unambiguously grants authority to the Legislature to

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[1] *Available at* https://leg.mt.gov/bills/2021/billpdf/SB0140.pdf (last accessed March 28, 2020).

determine—in its discretion—how judicial nominees are selected. *See* Mont. Const. art. VII, § 8(2) ("[T]he governor shall appoint a replacement from nominees selected *in a manner provided by law.*") (emphasis added).

I. Petitioners lack standing.

"The rule is well-established in Montana that only those who are adversely affected by a statute will be heard to question its validity." *Jones v. Judge*, 176 Mont. 251, 253, 577 P.2d 846, 847–48 (1978) (citation omitted). "Standing is a threshold jurisdictional requirement that limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing)." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187 (citations omitted).

A. Petitioners lack case-or-controversy standing.

Petitioners must demonstrate "a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action." *Id.* ¶ 31 (citation and internal quotation marks omitted). Further, "[t]he alleged injury must be concrete, meaning actual or imminent, and not abstract, conjectural, or

hypothetical; redressable; and distinguishable from injury to the public generally." *Id.* (citations omitted).

Individual Petitioners' status as "residents of Montana and voters and taxpayers" misses the mark. Petition at 5. No right to vote is in jeopardy here. *See Jones*, 176 Mont. at 254, 577 P.2d at 848 (mere "stature as an elector will generally not allow an individual to … invok[e] the judicial power"). SB 140 has nothing to do with judicial elections, unlike those challenges to judicial election laws where this Court has accepted original jurisdiction. *See Id.* (challenging statutes permitting judges nominated while Senate is out of session to act as appointments until the following session ends); *Keller v. Smith*, 170 Mont. 399, 401, 553 P.2d 1002, 1004 (1976) (challenging statutes "provid[ing] for a general election ballot on retention or rejection of all unopposed incumbent district court judges and supreme court justices"); *Yunker v. Murray*, 170 Mont. 427, 428, 554 P.2d 285, 286 (1976) (seeking declaratory judgment that sitting district judges are required to run on "retain or reject ballot[s]").

Similarly, Petitioners Brown, Bradley, and Ellingson have no particularized injury based on their participation in the 1972 Montana Constitutional Convention (1972 Convention) or 1973 Montana Legislature.

See Raines v. Byrd, 521 U.S. 811, 829, 117 S. Ct. 2312, 2322 (1997) (six members of Congress lacked standing to challenge constitutionality of congressional act because the injury alleged was "wholly abstract and widely dispersed").

Finally, Petitioner League of Women Voters of Montana has not shown that it—or any of its members—has suffered any concrete, particularized, redressable injury. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 42, 360 Mont. 207, 255 P.3d 80 (holding an organization may demonstrate standing by filing "suit on its own behalf to seek judicial relief from injury to itself" and vindicate its "rights and immunities" or "assert[ing] the rights of its members" if "at least one of its members would have standing").

Petitioners' interest and participation in Montana politics cannot transform their abstract, conjectural, and hypothetical harms into concrete redressable injuries. Petitioners fail the requirements of case-or-controversy standing.

B. This Court should reject jurisdiction under the doctrine of prudential standing.

"Prudential standing is a form of 'judicial self-governance' that discretionarily limits the exercise of judicial authority consistent with the

separation of powers." *Bullock*, ¶ 43 (quoting *Heffernan*, ¶ 32). It "embodies the notion that courts generally should not adjudicate matters more appropriately in the domain of the legislative or executive branches or the reserved political power of the people." *Id.* (citation and internal quotation marks omitted). So "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department[,] … the issue is not properly before the judiciary." *Id.* ¶ 44 (cleaned up).

As discussed in Section III, the Montana Constitution unambiguously grants authority *to the Legislature* to determine how nominees for a judicial vacancy are presented to the Governor. Mont. Const. art. VII, § 8(2). It would violate the separation of powers for this Court to second-guess those determinations. The Petition should be dismissed for lack of prudential standing.

II. No "urgency or emergency factors" exist here to justify original proceedings under Rule 14(4).

This Court will only accept original jurisdiction "when urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of state-

wide importance." Mont. R. App. P. 14(4). Original proceedings are accordingly appropriate only where: "(1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist making the normal appeal process inadequate." *Hernandez v. Bd. of Cnty. Comm'rs*, 2008 MT 251, ¶ 9, 345 Mont. 1, 189 P.3d 638 (citation omitted). These factors are disjunctive; absent one, the petition fails.

No urgency or emergency exists here because Petitioners' alleged concerns are entirely speculative and hopelessly attenuated. They cite the pending confirmation of three appointed judges to support the urgency of their Petition. But the decision whether to confirm these judges rests solely with the Montana Senate. Mont. Const. art. VII, § 8(2). SB 140 neither disturbs nor bears on that confirmation process. In fact Petitioners' true concerns arise only if the Senate rejects those appointments, and the Governor *then* appoints individuals who were not among those forwarded by the Judicial Nomination Commission (Commission). Petitioners muse: "Imagine if a Justice of the Montana Supreme Court resigns and the Governor appoints a replacement." Petition at 9. Yet

unless they know something the Governor doesn't, it is purely speculative to suggest any Justice will resign before a district court could consider the case.[2]

"Courts do not function, even under the Declaratory Judgments Act, to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions." *In re Mont. Trial Lawyers Ass'n*, 2020 Mont. LEXIS 1627, *3–4, 400 Mont. 560, 466 P.3d 494 (citation omitted). Yet by failing to identify any urgency or emergency factors, that is precisely what Petitioners ask this Court to do.

Attempting to overcome this hurdle, Petitioners analogize to *Hernandez*, an original proceeding addressing whether the creation of justice's courts of record was constitutional. But *Hernandez* is nothing like this case. There, the Court concluded normal appellate processes were inadequate because:

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[2] Petitioners additionally opine that putting the constitutionality of SB 140 to a district judge could place them in "an impossible position, having to rule on whether a fellow judicial officer had been appointed in a constitutional manner." Petition at 11. Such are the burdens of high office. Montana's judiciary is a branch of government, not a social club, and judges have been making decisions regarding the legitimacy of government appointments for a very, very long time. *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

> Before an appeal from a justice court judgment presenting this issue could reach this Court, potentially hundreds of misdemeanor criminal cases would be resolved in the justice's courts of record throughout Montana. If Petitioner's claims were ultimately sustained, any judgments of conviction would be undermined and the prosecutions likely lost due to the running of the statute of limitations in those cases.

Hernandez, ¶ 10. Here by contrast, there is no indication a judicial appointment will be made under SB 140 before Petitioners can bring their case in district court. Petitioners thus ask this Court to provide a substitute for regular procedure where no emergency or urgency exists. *See Brisendine v. Dep't of Commerce*, 253 Mont. 361, 366, 833 P.2d 1019, 1021 (1992) ("[I]t is not the true purpose of the declaratory judgment to provide a substitute for other regular actions.") (citation omitted).

This Court should reject jurisdiction under Mont. R. App. P. 14(4).[3]

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[3] Petitioners' attempts to paint this action "urgent" likewise demonstrate their lack of standing. In fact the glaring lack of any evidence (or argument) supporting Petitioners' standing demonstrates that this case involves more than "purely legal questions." The Petition begs factual questions—including about standing—that must be addressed in a district court. *See Hernandez*, ¶ 9.

III. Petitioners cannot demonstrate that SB 140 is unconstitutional.

Even if Petitioners had standing and met the requirements of Rule 14(4), their Petition fails because SB 140 is constitutional. Petitioners focus heavily on the drafting history of the Constitution and what certain delegates to the 1972 Convention said. But they never address the bellwether question: may this Court even consider this history? They avoid that question because the answer is obviously no. Petitioners don't even bother identifying textual ambiguities that might justify recourse to Convention history; because of course the text is unambiguous.

This Court should therefore begin and end its analysis by reviewing the plain language of Article VII, § 8, which grants the Legislature authority to determine how judicial vacancies are filled.

A. SB 140 complies with the Montana Constitution's plain language.

"Statutes are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Hernandez*, ¶ 15 (citation omitted). Moreover, "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* (citations omitted). Petitioners "bear[] the burden of proving that [SB

140] is unconstitutional beyond reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute." *Id.* (cleaned up).

This Court interprets the Montana Constitution the same way it interprets statutes. *Shockley v. Cascade Cnty.*, 2014 MT 281, ¶ 19, 376 Mont. 493, 336 P.3d 375. The Court's role is "to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101. Montana courts consider constitutional provisions holistically, "without isolating specific terms from the context in which they are used," *City of Missoula v. Pope*, 2021 MT 4, ¶ 9, 402 Mont. 416, 478 P.3d 815, and "giv[e] words their usual and ordinary meaning." *Contreras v. Fitzgerald*, 2002 MT 208, ¶ 14, 311 Mont. 257, 54 P.3d 983. When constitutional language is unambiguous, courts must discern the framers' intent "from the plain meaning of the language used without further resort to means of statutory construction." *Larson v. State*, 2019 MT 28, ¶ 28, 394 Mont. 167, 434 P.3d 241; *accord Jones*, 176 Mont. at 254, 577 P.2d at 848 ("When the words of a statute are plain, unambiguous, direct and certain, it speaks for itself and there is nothing for the court to construe.") (citations omitted).

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." This unambiguous language delegates to the Legislature the method of identifying judicial nominees. *See State ex rel. Strandberg v. State Bd. of Land Comm'rs*, 131 Mont. 65, 68, 307 P.2d 234, 236 (1957) ("The words 'as may be prescribed by law' means as may be provided by the Legislature.") (citing Mont. Const. art. XI, § 4 and XVII, § 1). "Because the language is unambiguous there is nothing for the Court to construe." *See Jones*, 176 Mont. at 255, 577 P.2d 846 at 848.

Petitioners extrapolate from the word "nominees" that Article VII, § 8 dictates "the Governor [must] receive a list of 'nominees' from some other source." Petition at 12. "List" and that last prepositional phrase—"from some other source"—is where the mischief resides; both insert words and conditions that don't exist.[4] As for the actual text, "nominees" simply means that the Governor must select from at least two otherwise-qualified lawyers. But even Petitioners admit that SB 140 satisfies that requirement: "Each applicant who has the qualifications set forth by law

[4] Even if these terms existed, "other source" would include self-nomination.

for holding judicial office and who receives a letter of support from at least three adult Montana residents [during the comment period] must be considered a nominee ....” Petition at 14 (citing SB 140, § 4(2)).

Article VII, § 8 does not reference a “commission,” or provide *any* direction as to how nominees are selected. Elsewhere by contrast, the Constitution unambiguously calls for the creation of judicial commissions. *E.g.*, Mont. Const. art. VII, § 11 (“The legislature shall create a judicial standards commission.”). So the framers certainly knew how to create commissions; the fact that they did in Article VII, § 11 but declined to do so in Article VII, § 8 means the two provisions cannot impose the same requirements. *See Gregg v. Whitefish City Council*, 2004 MT 262, ¶ 38, 323 Mont. 109, 99 P.3d 151 (“Different language is to be given different construction.”). Article VII, § 11’s plain language requires the Legislature to create a commission; Article VII, § 8 requires the Legislature to create a process.

Petitioners cannot prove “beyond a reasonable doubt” that SB 140 is unconstitutional. *Hernandez*, ¶ 15. Rather, the plain language of Article VII, § 8 demands the conclusion that SB 140—providing a process for presenting judicial nominees to the governor—is constitutional. This

ends the inquiry. *Larson*, ¶ 28, *Keller*, 170 Mont. at 405, 553 P.2d at 1006.

IV. Article VII, § 8's history confirms the framers' desire to give the Legislature discretion to determine how nominees are presented to the Governor.

Because Article VII, § 8's plain language unambiguously grants the Legislature authority to determine how judicial nominees are selected, this Court need not—and should not—delve into the framers' intent. *See Larson*, ¶ 28. But contrary to Petitioners' arguments, the drafters of Article VII, § 8 specifically and intentionally vested the Legislature with authority to determine how judicial nominees are presented to the Governor.

Despite its absence from the text, Petitioners argue that the framers nonetheless meant to include "committee" or "commission" in Article VII, § 8. Petition at 14. They do so principally by curating stray remarks from delegates' speeches. History, however, demonstrates the omission was intentional. Between 1945 and 1967, five proposed constitutional amendments specifically calling for a judicial nomination commission

failed to pass.[5] Observing these defeated amendments, the framers of the Montana Constitution chose a middle path: to allow for, but not require, a judicial nominating commission, leaving the specific method to the Legislature's discretion.[6]

Prior to the 1972 Convention, the Judicial Subcommittee suggesting revisions recommended that the delegates "vest[] the legislature with authority to provide for the election o[r] other method of selection of justices and judges." *See* Montana Constitutional Convention Commission, Report No. 7: Constitutional Provisions Proposed by Constitution Revision Subcommittees, 15–16 (1972) (noting the Legislature could adopt, "*if it sees fit*," a selection method relying on a commission) (emphasis added). During the full Convention, Chairman Leo Graybill noted the proposed article would "have a commission set up by the Legislature that would

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[5] *See* SB 153 (1967) ("Providing for the selection of justices and judges by the governor from a list of nominees presented by the nominating commissions."); House Bill (HB) 104 (1963); HB 230 (1959); HB 48 (1957); HB 145 (1945).

[6] *See* Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. App. Prac. & Process 47, 65 (2015) (noting the modified selection plan adopted by the delegates reflected elements of Professors Mason and Crowley's proposal); *see also* David R. Mason and William F. Crowley, *Montana's Judicial System—A Blueprint for Modernization*, 29 Mont. L. Rev. 1, 11 (1967) (proposing an amendment that judges be "elected by the electors of the state at large, as hereafter provided, unless the legislative assembly shall provide by law another method of selection," which would "make possible, but not require" a judicial selection commission).

give the Governor nominees, and the Governor would nominate from the commission, *or from whatever method the Legislature has determined, I should say*." IV Montana Constitutional Convention, Verbatim Transcript 1088 (1979) (hereinafter Convention Transcript) (emphasis added).

Article VII, § 8's history—like its plain language—repudiates Petitioners' argument that a Commission is constitutionally required.

V. The history of SB 140's predecessor statute does not bear on SB 140's constitutionality.

The Constitution didn't create the Commission; the Legislature did. *See* Petition, ¶ 4 (admitting the Commission was created by SB 28 (1973)). Contrary to Petitioners' argument, the Legislature's decision to enact SB 28 in 1973 does not support the conclusion that the Constitution mandated—or that the Legislature understood it to mandate—the Commission.

SB 28 actually highlighted the deference afforded the Legislature by the Constitution. The delegates to the 1972 Convention had discussed the potential for a commission that would be "bi-partisan," "geographically distributed," "with at least one member from each judicial district," and with members "elected by the Legislature." I Montana Constitutional Convention, Proceedings 520-21 (1972). But SB 28 instead created

a Commission dominated by the partisan interests of the legislative and executive branch at the time. *See* Johnstone, *supra* note 6, at 72–73; Montana Constitutional Society of 1972, "100 Delegates: Montana Constitutional Convention of 1972" 31 (1989) (Delegate Melvin, stating: "Sadly, the Legislature tossed the mechanics of the appointment of judges right into the political kettle."). SB 28 was not unconstitutional because its process was contrary to the desires of some delegates; the same is true for SB 140.

Petitioners also argue that because the Commission operated "for almost fifty years," Petition at 2–3, the Legislature cannot change it. They reason that the Commission's long life essentially transforms it from a constitutionally copacetic method to a constitutionally mandated one. But "legislative bodies cannot bind future legislative bodies in this way." *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 59, 384 Mont. 503, 380 P.3d 771. Petitioners' argument is also historically unsound; the statute governing the nominations process has been amended numerous times since 1972.[7]

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[7] Mont. Code Ann. § 3-1-1001 alone was amended four times after its enactment. *See* En. Sec. 1, Ch. 470, L. 1973; amd. Sec. 30, Ch. 344, L. 1977; R.C.M. 1947, 93-705; amd. Sec. 6, Ch. 21, L. 1979; amd. Sec. 1, Ch. 651, L. 1987; amd. Sec. 1, Ch. 810, L. 1991; amd. Sec. 1, Ch. 12, L. 2009; amd. Sec. 1, Ch. 335, L. 2011.

Petitioners repeatedly impugn as unacceptably political any process but the old Commission's. But their reasoning undermines their concerns. While barring the elimination of the Commission, Petitioners' argument would nevertheless allow the Legislature to reconstitute the Commission's membership to, for example, a committee comprised of the Lieutenant Governor and other gubernatorial appointees; or the Speaker of the House and Senate President; or the directors of the Republican and Democratic Parties. This curious result underscores the silliness of Petitioners' argument.

The Legislature's enactment of SB 28 simply does not bear on the constitutionality of SB 140, nor does it reflect the framers' intent.

VI. The language of the Voter Information Pamphlet does not support a conclusion that SB 140 is unconstitutional.

As a threshold matter, this Court should decline Petitioners' invitation to consider whether the Voter Information Pamphlet supports the "plain language" of Article VII, § 8 because the language is unambiguous. *Larson*, ¶ 28. For this same reason, Petitioners' reliance on *Keller* is misplaced. *See Jones*, 176 Mont. at 254, 577 P.2d at 848 (rejecting reliance on Keller where "[t]he language of the Constitution is unequivocally clear"). In *Keller*, the Court recognized legislative intent is "determined

from the plain meaning of the words used, if possible, and if the intent can be so determined, the courts may not go further and apply any other means of interpretation." *Keller*, 170 Mont. at 405, 553 P.2d at 1006 (determining that "incumbent" in a previous version of Article VII, § 8 was ambiguous). Here the language is unambiguous; had the framers desired to control how nominees were presented to the Governor, they would have said so plainly.

Similarly, Petitioners cite but find no support in *State ex rel. Mont. Citizens for Pres. of Citizen's Rights v. Waltermire*, 227 Mont. 85, 738 P.2d 1255 (1987). There, the Court found that the language of the constitutional amendment as filed and certified by the Secretary of State was materially different from the language submitted to Montana voters in the voter information pamphlet, which purported to set forth the full text of the amendment. *Id.* . Here, however, the exact language of Article VII, § 8 was presented to the voters. Petition at Appendix B, p. 13. Petitioners don't even argue that Article VII, § 8 was mispresented to the voters; *Waltermire* is inapplicable.

The Voter Information Pamphlet is irrelevant to interpreting the plain language of Article VII, § 8 and does not support a conclusion that SB 140 is unconstitutional.

VII. Petitioners' descriptions of the Commission process are misplaced.

Finally, Petitioners repeatedly warn that SB 140 "threatens to politicize an otherwise-nonpartisan, independent, and effective means of filling judicial vacancies." Petition at 2–3 (the Commission "has worked effectively to facilitate the independence and competency of the Montana Judiciary"), 6 ("independent judicial selection"), 9 ("politically-neutralizing impact of the [Commission]"), 12 ("independent vetting process"). But these chimerical depictions defy reality; just ask Montana's judges. Earlier this year, several judges explained how the Commission process was overtly partisan, abusive, and sexist. One judge's experience taught her the Commission "certainly is political," and should be reformed to be "less political and more objective." Decl. Oestreicher (Apr. 1, 2021), Ex. A at 13 (E-mail from Judge Yvonne Laird (Jan. 29, 2021)). Another judge remarked that the Commission "does not conduct an independent investigation into the qualifications of the candidates …. I was grilled by certain commission members about my religion and little else." *Id.* at 6 (E-mail

from Judge Howard Recht (Jan. 29, 2021)). A third explained that when she encountered the Commission she was asked "inappropriate … questions … such as did my husband at the time approve of my application, and did I really think it was in the best interest of my children to move schools." *Id.* at 9 (E-mail from Judge Amy Eddy (Jan. 29, 2021)). The Commission moreover is demonstrably partisan based on members' political contributions.[8]

This is the process Petitioners hope to save?

Petitioners' halcyon depictions of the Commission are apparently as groundless as their legal arguments.

CONCLUSION

This Court should reject the Petition for three separate reasons: (1) Petitioners lack standing; (2) Petitioners have failed to demonstrate the factors necessary to obtain original jurisdiction; and (3) Petitioners have failed to establish that SB 140 violates Article VII, § 8's plain language or is otherwise unconstitutional "beyond a reasonable doubt." *Hernandez*, ¶ 15.

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[8] Senate Judiciary, Ex. 2, Comments of Lt. Gov. Kristen Juras in Support of SB 140 at 4 (Feb. 9, 2021), *available at* https://leg.mt.gov/bills/2021/Minutes/Senate/Exhibits/jus27a02.pdf (citing Mont. Comm. of Political Practices Campaign Electronic Reporting System for years 2000 through 2020).

Respectfully submitted this 14th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this pleading is printed in a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,981 words, excluding certificate of service and certificate of compliance.

/s/ David M.S. Dewhirst
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CERTIFICATE OF SERVICE

I, David M.S. Dewhirst, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition to the following on 04-14-2021:

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Dated: 04-14-2021