IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court 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,

and

MONTANA STATE LEGISLATURE,

Intervenor-Respondent.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Montana's 1889 Constitution accorded Montana's governor unfettered discretion in filling judicial vacancies.[1]

The framers of the 1972 Montana Constitution rejected the 1889 system as giving the Governor excessive power. SB 140 unconstitutionally resurrects 1889 power for the Governor. Respondents' persnickety responses miss this critical point: **the 1972 Constitution intentionally, substantively changed the process of filling judicial vacancies.**

ARGUMENT

A. Petitioners have standing.

Because the judiciary article is imbued with the public interest, standing requirements are not as constricted as Respondents argue. For example, in interpreting the judiciary article, this Court held in *Committee for an Effective Judiciary v. State*, 209 Mont. 105, 679 P.2d 1223 (1984) that the framers were "primarily motivated by the public interest":

> The concern of the delegates was not to confer benefits on the judiciary nor on individual members of the judiciary. Rather, their concern was for the **health of the judicial system itself—for the public interest.**

[1] Mont. Const. (1889), art. VIII, § 34 (judicial vacancies "shall be filled by appointment, by the governor of the State….").

At 109 (emphasis added). As a result, this Court found individual standing based solely on voter status:

> Where the public and the electorate were so clearly intended to benefit by a constitutional provision, we hold that a registered voter has standing to assert that public interest….
>
> ***
>
> We must therefore recognize that a public interest exists…to assert the integrity and supremacy of this constitutional provision voted on and passed by the delegates and later voted on a ratified by the people of this state. **We hold that a registered voter has the standing to make this assertion.**

Id. at 108, 110.[2] *Effective Judiciary* relied on *Jones v. Judge*, 176 Mont. 251, 577 P.2d 846 (1978), another case which found the status of registered voter sufficient to establish standing to raise a constitutional challenge under the judiciary article.[3]

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[2] This less-constricted approach to standing also applies to other constitutional provisions. In *Schoof v. Nesbit*, 2014 MT 6, ¶ 15, 373 Mont. 226, 316 P.3d 830, this Court held: "A plaintiff's standing may arise from an alleged violation of a constitutional or statutory right." In *Montanans for Coal Trust v. State*, 2000 MT 13, ¶ 18, 298 Mont. 69, 996 P.2d 856, this Court found standing based on the status of the individual challengers: "All the individuals are taxpayers in Montana; and all claim a strong interest in the preservation of the Montana Coal Tax Trust Fund." *See also Butte-Silver Bow Local Govern. v. State*, 235 Mont. 398, 401-402, 768 P.2d 327, 329 (1989).

[3] The Governor cites *dicta* from *Jones* to support his argument against standing. In fact, in that case, the plaintiffs were suing as registered voters and this Court determined they had standing.

In *Keller v. Smith*, 170 Mont. 399, 401, 553 P.2d 1002, 1004 (1976), this Court interpreted the judiciary article, finding standing on the part of Keller, a "voter, resident and taxpayer of Flathead County, Montana." In *Yunker v. Murray*, 170 Mont. 427, 554 P.2d 285 (1976), this Court interpreted the judiciary article and entered a declaratory judgment at the behest of Yunker, "a registered voter in precinct 59, Yellowstone County, Montana, within the Thirteenth Judicial District." *Id.* at 428.

In *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 8, 365 Mont. 92, 278 P.3d 455, another judiciary article case, this Court found standing based on the plaintiffs' status: "Plaintiffs are Montana citizens, taxpayers, and electors who have participated in elections for justices of the Montana Supreme Court…." *Id.* at 95, 459.

In short, Petitioners have standing.

B. Original jurisdiction is appropriate.

Respondents argue that original jurisdiction is inappropriate because there is no urgency. They argue that Petitioners' concerns are "speculative" and that there are presently no judicial vacancies.

However, things have changed. Recently, the Montana Senate refused to confirm the district judge for the Eighth Judicial District (Cascade County). The

Governor is now proceeding to fill the vacancy without the constitutionally-required screening of the Judicial Nomination Commission. *See* Exhibit A. Petitioners will soon file for a preliminary injunction against further gubernatorial action under SB 140 until this Court resolves this constitutional challenge.[4]

Resort to the district courts, even if it earlier had been available, is now imprudent because there has been a concerted effort to smear the district courts based on a perfectly proper internal poll of the district judges facilitated by the Court Administrator. Judges over the years have routinely participated in legislative hearings on matters that affect the courts. It is perfectly appropriate and consistent with the canons of judicial ethics to do so (for example, the need for additional judges in overburdened districts). Rule 3.2(B), Montana Rules of Judicial Conduct (allowing appearance before governmental bodies "in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties….")

[4] By letter of May 3, 2021, Petitioners' counsel requested that Respondents stay any action to fill judicial vacancies pursuant to SB 140 until this Court resolves the present constitutional challenge. *See* Exhibit B. Predictably, the Governor's counsel declined to stipulate, citing the pressing need to fill the vacancy in Cascade County.

Despite this common practice, some Legislators claim to be "shocked"[5] by this practice. Certain parties have chosen to besmirch the integrity of virtually all of the district judges of the state—and some Respondents are not totally blameless in this feral attack.

For these reasons, the matter is properly before this Court on original jurisdiction.

C. SB 140 is unconstitutional.

1. SB 140 is inconsistent with the plain meaning of Article VII, § 8.

Petitioners agree that the meaning of the constitutional provision, if plain, is controlling. Here, the language is plain—and it is inconsistent with SB 140.

Article VII, § 8(2) provides: "[T]he governor shall appoint a replacement from **nominees** selected in the manner provided by law." (emphasis added). The plain language evinces a clear intent of the framers that the governor is to receive a list of "nominees." The original version of SB 140 ignored the constitutional requirement that the appointment be made from a set of nominees. It simply provided that any "eligible person" may "apply" (i.e., as applicant) for a vacant

[5] Recall the famous line from the film *Casablanca*, where Captain Renault said of Rick's Café: "I'm shocked—*shocked*—to find gambling is going on in here!"

judicial position and, after public comment, the governor may make the appointment.

When this failure to address the term "nominees" was pointed out at a legislative committee hearing, the sponsors attempted to salvage the bill by adding Section 4(2). This provides that each "applicant" who receives a letter of support from at least three adult Montana residents "**must be considered a nominee**…." (emphasis added). But simply equating an "applicant" with the term "nominee" does not salvage constitutionality. Respondents' attempt to twist the meaning of the word "nominee" by equating it with "applicant" is reminiscent of Lewis Carroll's *Alice's Adventures in Wonderland*: "'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean….'"

The term "applicant" means "one who applies (as for a job)." Merriam-Webster.[6] Importantly, Microsoft Bing, in describing "applicant," lists synonyms, **none of which include "nominee."**[7]

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[6] https://www.merriam-webster.com/dictionary/applicant

[7] These synonyms include "candidate," "interviewee," "competitor," "contestant," "contender," "entrant," "claimant," "suppliant," "supplicant," "petitioner," "suitor," "postulant," "prospective student/employee," "aspirant," "possibility," "possible," "job-seeker," "job-hunter," and "auditioner." https://www.bing.com/search?q=applicant&form=QBLH&sp=-1&pq=applican&sc=8-8&qs=n&sk=&cvid=04CB4F31AC2740AE8D8F6791EF371CAB

SB 140 uses the terms "apply," "applicant," and "application" numerous times. For example:

- A lawyer in good standing "**may apply** to the governor for consideration, or **application may be made** by any person on the lawyer's behalf." Section 2(2) (emphasis added).

- "**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**…." Section 3 (emphasis added).

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

- "Each **applicant** [who has a letter of support from at least three adult Montana residents]…must be considered a nominee for the position." Section 4(2) (emphasis added).

- "The **application**…[is] open to the public." Section 4(4) (emphasis added).

- "The governor…shall make an appointment…from the list of **applicants**." Section 5(1) (emphasis added).

- If the governor fails to appoint, the chief justice shall make the appointment "from the same list of **applicants**…." Section 5(3) (emphasis added).

But the constitution **does not say** "the governor shall nominate a replacement from **applicants** selected in the manner provided by law." It uses the term "nominees," not "applicants." Moreover, the term "selected" has a

particular connotation with respect to "nominees." The actual words of Art. VII, § 8(2) are: "[T]he governor shall appoint a replacement from the **nominees selected** in the manner provided by law." (emphasis added). It would be unnatural to change the language to "the governor shall appoint a replacement from the **applicants selected** in the manner provided by law." Under SB 140, there would be no "selection" of applicants at all. Instead, any minimally qualified person can "apply," thus making the word "selected" surplusage. This is contrary to the rules of constitutional/statutory construction. *Dunphy v. Anaconda Co.*, 151 Mont. 76, 438 P.2d 660 (1968).

For examples of common uses of the terms "applicant" and "nominee," and the difference between the two, in the context of judicial vacancies, see *Howard v. City of Kansas City*, 332 S.W.3d 772, 776 (S. Ct. Mo. 2011, *en banc*) ("The charter establishes a five-member municipal judicial nominating commission…which interviews **applicants** and submits a panel of three qualified persons' **nominees** for any judicial vacancy…."). (emphasis added). *See also Ambrosier v. Brownback*, 375 P.3d 1007, 1011 (S. Ct. Ks. 2016) ("[T]he Commissioner vets the **applicants** and submits the names of **nominees** to the governor…."); (emphasis added); *State ex rel. Dickie v. Besler*, 954 N.W.2d 425, 428 (S. Ct. Iowa 2021) ("The letter invited **applications**. The letter advised **applicants** that they would be interviewed by the

Commission…and, following the interviews, the Commission would send two **nominees** to the governor.") (emphasis added); *In re Advisory Opinion to the Governor*, 551 So.2d 1205, 1207 (S. Ct. Fla. 1989) ("Like the constitutional provision, the rules provide that judicial nominating procedure begins upon the occurrence of 'a vacancy,' and results in 'no less than three **nominees** from a list of **applicants** who meet the requirements of the Florida Constitution….'") (emphasis added); and *Bredesen v. Tennessee Judicial Selection Commission*, 2014 S.W.3d 419, 442 (S. Ct. Tn. 2007) (mandating relief including acceptance of additional "**applications**" and, after additional hearings, "the Commission shall select and certify to the governor three **nominees** to fill the judicial vacancy.") (emphasis added).

In sum, there is a difference between the word "nominee" and the word "applicant." The Constitution uses the word "nominee" and SB 140 is unconstitutional under the plain meaning of Article VII, § 8.

2. Both the language of the 1972 Voter Information Pamphlet and the adoption of the Judicial Nomination Commission by the 1973 Legislature support the plain language of Article VII, § 8.

The language of the Voter Information Pamphlet in 1972 supports Petitioners' interpretation of the plain meaning of Montana's Constitution. Additionally, the 1973 Montana Legislature, which immediately followed the

passage of the 1972 Constitution, implemented the Judicial Nomination Commission based on their temporally-proximate understanding of the recently-passed Constitution. Both of these actions support Petitioners' plain-meaning position.

Respondents make no effort to argue on the merits of these two points. Instead, they simply take the position that they are not cognizable because the plain-meaning rule controls.

As noted, SB 140 is contrary to the plain meaning of the judiciary article. If that is not clear enough, the Voter Information Pamphlet and the actions of the immediately-ensuing Legislative session provide added support. *See* Petition, pp. 11-14, citing *Keller, supra*, which considered both the Convention "notes" and the implementing legislation of 1973.

3. The framers' debates confirm the Petitioners' interpretation.

While there was contentious debate by the framers on the judiciary article, centering largely on merit selection as opposed to election of judges, there is no question with respect to filling vacancies, all delegates envisioned a judicial nomination commission/committee. Petition, pp. 14-19.

The framers ultimately opted to adopt a hybrid version of the "minority proposal." This process was described by this Court:

> 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…. 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."

State ex rel. Racicot v. Dist. Court, 243 Mont. 379, 387, 794 P.2d 1180, 1185 (1990) (internal citations omitted) (emphasis added). The delegates ultimately voted to adopt the minority merit appointment proposal, but also broadened its election provisions. *Id.*, 243 Mont. at 387-88.

The Legislature's brief cites language from Delegate Berg, who spearheaded the minority proposal and spoke in favor of merit selection. Ironically, the same quotation was used in the amicus brief of MTLA/MDTL, who cited the language in **support** of the Petitioners' position. In fact, this language does support Petitioners:

> DELEGATE BERG: Well, 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**….

Constitutional Convention Verbatim Transcript, February 29, 1972, 1113 (emphasis added). Delegate Berg proceeded to explain why the "committee" language is not in the Constitution. It was only because:

> [I]**f 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.

Id. (emphasis added). When another delegate asked Berg what would happen if the Legislature decided not to form this commission, Berg responded: "Yes, but I think **this is a pretty clear direction to the Legislature of the intent of this Convention**." *Id.* (emphasis added). In short, the intent of the framers was clearly expressed and supports the plain language of the Constitution.

CONCLUSION

A declaratory judgment should be entered declaring SB 140 unconstitutional.

Respectfully submitted this 10th day of May, 2021.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Equity Text A text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word, excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance, is 2,488 words, not in excess of the 2,500 -word limit.

By: /s/ James H. Goetz
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