IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. _____

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.

PETITION FOR ORIGINAL JURISDICTION

(Appearances on next page)

APPEARANCES

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This is an original proceeding challenging the constitutionality of SB 140, recently passed by the Montana Legislature and signed into law by the Governor. This petition seeks a declaratory judgment and a writ of injunction under Rules 14(2) and (4), M.R.App.P. This case involves purely legal questions of constitutional interpretation. Urgency factors exist, making litigation in the trial courts and the normal appeal process inadequate. The issues presented are of statewide importance.[1]

BACKGROUND

1. The Montana Constitution of 1889 provided that in the case of vacancy in the position of Justice of the Supreme Court, the district court, or the clerk of the Supreme Court "shall be filled by appointment, by the governor of the State." Mont. Const. (1889), art. VIII, § 34.

2. Addressing concerns over too much power with the Governor's office and improper politicization of the courts, Article VII of the 1972 Constitution was adopted. Section 8 provided that the Governor could fill vacancies by selection from a group of nominees through a procedure provided by law.

3. Convening the next year, 1973, the 43rd Legislative Assembly

[1] Because this petition challenges the constitutionality of a State statute, the parties are filing a Notice of Constitutional Question and serving it on the Montana Attorney General pursuant to 5.1(a), M.R.Civ.P, and Rule 27, M.R.App.P.

considered numerous measures necessary to implement the newly-adopted Constitution. Among these was SB No. 28, "An Act Providing for the Filling of Vacancies in the Office of District Court Judge and Supreme Court Justice to Comply with Article VII, Section 8 of the 1972 Montana Constitution; Repealing Sections 93-209, 93-220, 93-309, RCM 1947." That measure passed and is codified at § 3-1-1001, MCA, *et seq*.

4. SB 28 provided for the creation, composition, and function of a "Judicial Nomination Commission." The members are appointed for four-year terms on a staggered basis. The Commission is composed of a diverse group of seven members, four laymen, two attorneys, and a district judge.

5. SB 28 provided that when a judicial vacancy occurs, the Commission publishes a notice of vacancy and establishes a period for receiving applications. The Commission reviews such applications and accepts public comment concerning applicants. The Commission is then required to submit to the Governor or Chief Justice of the Montana Supreme Court a list of three to five nominees for appointment to the vacant position. All such appointments are subject to Senate confirmation. *See* §§ 3-1-1010 and -1011, MCA.

6. This system of filling judicial vacancies, in effect for almost fifty years, has worked effectively to facilitate the independence and competency of the

Montana judiciary. Notwithstanding its efficacy, Montana's Judicial Nomination Commission is now purportedly abolished by SB 140 (copy attached as Appendix A), which was signed into law on March 16, 2021. SB 140 provides that any eligible person may apply directly to the Governor for a vacant judicial position and the Governor has the unfettered discretion to appoint after providing at least thirty days for public comment concerning applicants. This threatens to politicize an otherwise-nonpartisan, independent, and effective means of filling judicial vacancies.

PARTIES

7. Respondent Greg Gianforte is the duly elected Governor of the State of Montana and, as such, is Montana's chief executive officer, ultimately responsible for the effectuation of all state laws.

8. Petitioner Bob Brown was elected to the Montana House of Representatives in 1970 and served two terms as a representative from Flathead County. He was a member of the House Judiciary Committee in 1973 when the Montana Legislature enacted SB 28, which established the Judicial Nomination Commission. He later served eighteen years in the Montana Senate, serving in various leadership positions, including President of the Senate. Mr. Brown served on the State Board of Public Education for four years and as Montana Secretary of

State for a four-year term beginning in 2004. He was the Republican nominee for Governor in 2004.

9. Petitioner Dorothy Bradley served in the House of Representatives in the Montana Legislature as a representative from Gallatin County from 1971–1978 and 1985–1992, including in 1973 when she voted with the majority to adopt SB 28. She has, over the course of her career, been active in Montana politics and in efforts to ensure good government. In 1991–92, Ms. Bradley was the Democratic nominee for Governor of Montana.

10. Petitioner Vernon Finley was born and raised on the Flathead Indian Reservation in his grandparents' home. He credits his grandparents with teaching him the traditional cultural perspective. His western education consists of a Bachelor's, Master's, and Doctoral degrees in Education from the University of Montana, Oklahoma City University, and the University of Georgia, respectively. Mr. Finley is a former teacher and served on the Confederated Salish and Kootenai Tribes' Tribal Council for four years, including for three years as Chairman. He is currently the Director of the Kootenai Culture Committee.

11. Petitioner Mae Nan Ellingson, a resident of Missoula, was the youngest delegate to serve in the 1972 Montana Constitutional Convention and is now one of the few surviving delegates. Now retired, Ms. Ellingson previously

practiced public finance law, including serving as a bond counsel for State and local governments. She is a long-time advocate for good government and equality under the law.

12. Each of the individual Petitioners (Brown, Bradley, Finley, and Ellingson) are residents of Montana and voters and taxpayers.

13. Petitioner the League of Women Voters of Montana is a nonpartisan political organization that encourages informed and active participation in government, seeks to defend and improve our democracy, works to increase understanding of major public policy issues, and influences public policy through education, advocacy and litigation. It supports an independent judiciary with judges selected on the basis of merit and elections that protect the citizens' right to vote.

THE FACTS WHICH MAKE IT APPROPRIATE THAT THE SUPREME COURT ACCEPT JURISDICTION

The "urgency or emergency factors" required by Rule 14(4), M.R.App.P., exist here because SB 140 purports to go into effect immediately and give the Governor of Montana unfettered discretion to fill judicial vacancies. SB 140 was spirited through the Legislature at extraordinary speed despite the opposition of many responsible organizations such as the Montana Trial Lawyers Association, the State Bar of Montana, the Montana Defense Trial Lawyers Association, and the League of Women Votes of Montana.

At present, there are three judges—in the First Judicial District (Lewis and Clark and Broadwater Counties), the Eighth Judicial District (Cascade County), and the Eighteenth Judicial District (Gallatin County)—who were appointed by the previous Montana Governor in 2020, after careful compliance with the nominating procedures of § 3-1-1001, MCA, *et seq*. They are subject to the approval of the Montana Senate. The pendency of these three appointments and the fact that the Senate has not yet confirmed makes this Petition all the more urgent.

The passage of SB 140 threatens an imminent disruption of Montana's judicial appointment process. If SB 140 is not immediately overturned, the next judicial replacement, at the whim of Montana's Governor, will be constitutionally suspect, probably political, and inimical to the interest of all Montanans in a competent, independent judiciary. Given the palpable unconstitutionality of SB 140 and the imminent threat to the public's interest in independent judicial selection, the need for this Court's exercise of original jurisdiction is compelling.

THE PARTICULAR LEGAL QUESTIONS EXPECTED TO BE RAISED

Whether SB 140 is unconstitutional under Article VII of the Montana Constitution.

THE ARGUMENTS AND AUTHORITIES FOR ACCEPTING JURISDICTION AND PERTAINING TO THE MERITS

A. THE AUTHORITIES FOR ACCEPTING JURISDICTION.

This Court held in *Hernandez v. Bd. of County Commissioners*, 2008 MT 251, ¶9, 345 Mont. 1, 189 P.3d 630:

> Assumption by this Court of original jurisdiction over a declaratory judgment action is proper when: (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. *Montanans for Coal Trust*, ¶ 27 (citing *Butte-Silver Bow Local Govern. v. State*, 235 Mont. 398, 401-402, 768 P.2d 327, 329 (1989); *State ex rel. Greely v. Water Court of State*, 214 Mont. 143, 691 P.2d 833 (1984)…. All of these criteria are met here.

See also White v. State, 233 Mont. 81, 84, 759 P.2d 971, 973 (1988); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Clinch*, 1999 MT 342, ¶¶ 5–9, 297 Mont. 448, 992 P.2d 244; *Mont. Assoc. of Counties, et al. v. Montana*, 2017 MT 267, ¶ 2, 389 Mont. 183, 404 P.3d 733.

In *Keller v. Smith*, 170 Mont. 399, 401, 553 P.2d 1002 (1976), this Court accepted original jurisdiction over the petition of Robert S. Keller, who alleged that certain statutory sections were unconstitutional under the very constitutional section involved in the present case, Article VII, § 8. Keller was a "voter, resident and taxpayer of Flathead County, Montana." This Court also accepted original

jurisdiction regarding voter challenges to judicial election laws in *Jones v. Judge*, 176 Mont. 251, 577 P.2d 846 (1978) and *Yunker v. Murray*, 170 Mont. 427, 554 P.2d 285 (1976), and accepted supervisory control in *State ex rel. Racicot v. Dist. Ct. of the First Jud. Dist.*, 243 Mont. 379, 794 P.2d 1180 (1990).

In *Hernandez*, this Court considered on original jurisdiction the constitutionality of a legislative measure that authorized Montana counties to establish justice courts as justice's courts of record. *Id.* ¶ 2. This Court held that emergency factors "exist in this case that would make the normal appeal process inadequate," stating:

> 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….

Id. ¶ 10. This Court held that to require an action to be brought in a county which had created such court "would needlessly spawn litigation and any further delay would create confusion as to the administration of justice." *Id.*

The present case involves issues of statewide importance because the Judicial Nomination Commission reviews all persons who apply to fill vacancies on the Montana Supreme Court as well as all applicants to fill vacancies in the district

courts throughout Montana. This case solely involves questions of statutory and constitutional construction.

The normal appeal processes are inadequate. Because SB 140 purports to be effective immediately, any new judicial vacancy may be filled virtually immediately through a process that lacks the vital politically-neutralizing impact of the Judicial Nomination Commission with its procedures to ensure public participation and competence.

Imagine if a Justice of the Montana Supreme Court resigns and the Governor appoints a replacement. There is no viable process for challenging such appointment in the lower courts, nor would there be a viable "normal" appeal process.

Hernandez's holding applies here. Failure by this Court to exercise original jurisdiction would consign the present challenge to a district court, which would be in an impossible position, having to rule on whether a fellow judicial officer had been appointed in a constitutional manner. In the meantime, such judicial officer would presumably serve, consider numerous cases, and issue rulings which, as in *Hernandez*, might be considered suspect because of the constitutional impropriety of the appointment of such judge. Thus, this case presents an almost identical

situation to the one this Court thought appropriate for original jurisdiction in *Hernandez*.

B. THE ARGUMENTS PERTAINING TO THE MERITS.

> *There is clear agreement on the part of all that we do need good judges…. The question is how to recruit them.*
>
> - Delegate Jim Garlington
> Const. Con. Tr. Vol. IV, p. 1032.

1. SB 140 is unconstitutional under the plain language of Montana's Constitution.

Montana's 1889 Constitution provided that judicial vacancies "shall be filled by **appointment**, by the governor of the State." Mont. Const. (1889), art. VIII, § 34 (emphasis added). That was repealed in 1972.

Article VII, § 8(2) now[2] provides: "[T]he governor shall appoint a replacement from **nominees** selected in the manner provided by law." The meaning of the word "nominees" (plural) is obvious. It is clear that the Governor may not make an "appointment" *sua sponte*. The plain language evinces a clear intent of the framers that the Governor is to receive a list of "nominees" from some other source.

[2] The 1972 language was slightly different, providing that "the governor shall nominate a replacement from a list of nominees selected…." The 1972 version was modified by constitutional amendment in 1992. Amd. Const. Amend. No. 22 (approved November 3, 1992).

2. The plain language is supported by the Voter Information Pamphlet.

This Court, in *Keller, supra*, cited the "Convention notes" on the very provision here in question, Article VII, § 8, stating: "Perhaps the best indication of the intent of the framers is found in the explanatory notes as prepared by the Constitutional Convention." *Keller*, 170 Mont. at 407.

These "Convention notes" (Appendix B) were used in 1972 to inform the voters on the upcoming vote to ratify the new Constitution. That document describes the judicial vacancy feature of Article II, § 8 as follows:

> When there is a vacancy (such as death or resignation) the governor appoints a replacement but **does not have unlimited choice** of lawyers as under 1889 constitution. **He must choose his appointee from a list of nominees** and the appointment must be confirmed by the senate – a new requirement.

Appendix B, p. 13 (emphasis added).[3] This confirms the intent that the Governor does not have plenary power to fill a vacancy—he must choose his appointee "from a list of nominees[.]"

[3] In *State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire*, 227 Mont. 85, 89–90, 738 P.2d 1255, 1257–58 (1987), this Court stressed the importance of the Voter Information Pamphlet in statewide elections, noting: "It is in the voter information pamphlet that a glaring error as to the text of the proposal was committed[,]" and "[i]t is elementary that the voters not be misled to the extent they do not know what they are voting for or against."

At a committee hearing on SB 140, opponents pointed out the constitutional defect—absence of a list of nominees carefully vetted by an independent source. The majority then made a crude attempt to address this problem. It added an amendment providing that any applicant for a judicial vacancy who self-nominates will be considered a "nominee" if the applicant "receives a letter of support from at least three adult Montana residents…." SB 140, § 4(2) (Appendix C, "Amendment – 1st Reading").

Such artful wordplay does not cure the constitutional defect. The entire thrust of the Montana Constitution of 1972 was to replace the Governor's sole discretion to fill vacancies with a system that provided a list of qualified nominees derived through an independent vetting process.

3. Legislative implementation in the immediately ensuing Legislative Session of 1973 confirms the plain meaning.

When the Montana Legislature convened in 1973, it enacted legislation (SB 28) to implement Article VII, § 8. That measure created the Judicial Nomination Commission. SB 28's title speaks volumes: "An Act Providing for the Filling of Vacancies in the Office of District Court Judge and Supreme Court Justice to **Comply with Article VII, Section 8 of the 1972 Montana Constitution**, Repealing Sections 93-209, 93-220, 93-309, RCM 1947" (emphasis added).

The actions of the Legislature in implementing the new Constitution were found to be persuasive evidence of the framers' intent in *Keller*, *supra*. The Court said: "Here, the Legislature had no difficulty in determining that the intent of the framers of the 1972 Montana Constitution was that all unopposed incumbent judges and justices were subject to approval or rejection by the voters." 170 Mont. at 407. Noting the implementing legislation, the Court observed:

> It is presumed that the Legislature acted with integrity and an honest purpose to keep within constitutional limits. Sutherland Statutory Construction, 4th Ed., Vol. 2A, Sec. 45.11, p. 33, and cases cited therein.

Id. The Court then noted, and relied on, the "principle of reasonableness in construction of an ambiguous constitutional provision," finding the law "favors rational and sensible construction." *Id.* (citing 2A Sutherland, *Statutory Construction* § 45.12, p. 37 (4th ed.)).

In the present case, the only reasonable interpretation of the word "nominees" is that it means what it says—and it certainly doesn't mean that any person can self-nominate or that the Governor can make his own "nominees" and then select from his own list of "nominees."

In short, the Commission was specifically designed to limit the choice of the Governor so that the executive would not have unconstrained control of the

nomination process. That is consistent with debate at the Convention and the 1972 Voter Information Pamphlet sent as part of the ratification process.

4. The Constitutional Convention debates confirm the plain meaning.

Legislative history may be considered if there is any arguable ambiguity in the language of the constitutional provision. In determining the meaning of provisions of the Montana Constitution of 1972, the framers' intent is controlling. *Keller,* 170 Mont. at 404. Because *Keller* found the term "incumbent" in the text of Article VII, Section 8 arguably ambiguous, it turned to the Constitutional Convention and the legislative history of the provision and the enabling legislation to determine the framers' intent, although advising caution because the framers' intent is not always monolithic. *Id.* at 406, 408-409; *see also Racicot*, 273 Mont. at 386–87.

It is clear from the Constitutional Convention debates on the judiciary article that the framers clearly envisioned such nominees would be made by a separate, independent "committee" or "commission."

At the 1972 Constitutional Convention, there were serious differences of opinion on whether Montana judges should be popularly elected or selected under

what was known as the "Missouri Plan," with a merit-based selection process. [4] What emerged was neither the Missouri Plan's merit-based approach (the minority report) or solely popular election (the majority report), but a hybrid proposal by Delegate Melvin.

The majority proposal supported election of judges. On vacancies, the majority proposal provided that Supreme Court vacancies will be filled by the Governor and district court vacancies by the relevant county commissioners. Const. Con. Tr. Vol. 1, p. 491. Regarding judicial vacancies, the minority disagreed, stating:

> The minority is not satisfied with the current process of unlimited gubernatorial appointive power of judges…. Therefore, we have limited the governor's nomination to those nominees **selected by a committee**, created by and dependent upon the legislature. This system, we believe, accords an effective check and balance.

Id. at 521 (emphasis added).

The framers ultimately adopted this minority proposal on filling vacancies.[5] The framers declined to spell out the minutiae of the nomination process because

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[4] *See Racicot*, 243 Mont. at 387–88; *see also* Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. App. Prac. and Process 47, 61, 63–67 (2015); Jean M. Bowman, *The Judicial Article: What Went Wrong*, 51 Mont. L. Rev. 492, 497–502 (1990).

[5] The majority proposal on popular elections was ultimately accepted, although its codification into the Constitution was muddied. That confusion was clarified with

they felt this was a matter better left to the Legislature. For that reason, they used the language "a nomination process as established by law."

Although the Constitution left the details to the Legislature,[6] the transcripts leave no doubt that the framers envisioned a separate "commission" to evaluate and nominate the "nominees." In describing this approach, Delegate Berg described this proposal as one of "merit election," stating:

> That it would create a committee—that is, 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.

Const. Con. Tr. Vol. IV, p. 1085. Delegate Melvin summarized his (successful) amendment as follows:

> Actually, the proposal before you would accommodate times when there are vacancies in the office of District Court judges or Supreme Court judges by putting into effect the **nomination by the committee**, then the appointment by the Governor, confirmation by the Senate.

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the 1992 amendment to adopt Article VII, § 8(1), Mont. Const., which provides: "Supreme court justices and district court judges shall be elected by the qualified electors as provided by law."

[6] When Article VII, § 8 was modified by voter initiative in 1992, the Voter Information Pamphlet stated: "The governor is limited to appointments from a list recommended by a Judicial Nominating Committee which is required by the Constitution, and whose membership and rules are established by the legislature." "Rebuttal of argument supporting Constitutional Amendment 22," at p. 6 (Appendix D).

Id. at 1112 (emphasis added).

The debates of the framers are replete with references to a nominating "committee" or "commission." Many delegates opposed the Melvin proposal, and more supported it. It was clear, however, that **all** delegates understood that the proposal envisioned a separate "commission/committee" to be established to select a list of "nominees." *See, e.g.*, *id.* at 1090 (Hanson, expressing concern about whether a fair committee that was free from outside control could be selected); *id.* at 1090–91 (Holland: "How can we guarantee that this commission—the ones that name the candidates—won't be dominated by some special interest group?"); *id.* at 1093 (Davis: "You can say what you want, any select committee's going to be a committee of the establishment. There's just no other way to get around it…," but supporting the Melvin compromise.); *id.* at 1094 (Berg: "I suggest to you that that committee, committing two to three or four names to the Governor, is going to get the Governor a fairly wide selection of nominees, and he can select…whom he wants—from that committee."); *id.* at 1096 (McKeon: "I'm afraid, Mr. Chairman, that any committee, whether it be select, blue ribbon or whatnot, will not be a committee whose interests are the interests of the people…."); *id.* at 1104 (Joyce: "[N]o matter how astute or how brilliant or how able or how fairly the Legislative

Assembly may set up a commission to select these nominees, you cannot take the human element out of the situation.").

In sum, there were delegates who opposed the "commission" approach, preferring some other means of filling vacancies, and delegates who supported that approach—but there can be no doubt that the system under discussion was one whereby a **commission** would supply the lists of nominees to the Governor. That proposal passed and was enacted into law, thus supporting the plain meaning of Article VII, § 8.

Finally, Delegate Aronow spoke passionately about the vital importance of judicial independence:

> [I]t is dreadfully important…that the courts be made independent, be made strong, be made unafraid to act for fear of reprisal from one of the other branches of the government. And it is only in that manner that we can guarantee to our people the liberties that we wish them to have.
>
> ****
>
> The courts should also be made strong enough and independent enough that they have no fear of striking down an unconstitutional legislative act. They should have no fear of saying to the Executive branch of government, "You've gone too far: you've impugned upon the rights of individuals."

Const. Con. Tr. Vol. IV, pp. 1069–70.

Because SB 140 is contrary to Article VII of the 1972 Montana Constitution, it must be found unconstitutional.

CONCLUSION

Petitioners request that this Court accept original jurisdiction, enjoin any acts that might be taken in furtherance of SB 140 pending full consideration by this Court, direct such briefing as the Court deems suitable, and, after due consideration, determine SB 140 to be unconstitutional.

Respectfully submitted this 17th day of March, 2021.

EDWARDS & CULVER

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced 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, Certificate of Service, and Certificate of Compliance, is 3,993 words, not in excess of the 4,000-word limit.

By: /s/ James H. Goetz
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following parties, by the means designated below, this 17th day of March, 2021.

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By: /s/ James H. Goetz
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CERTIFICATE OF SERVICE

I, James H. Goetz, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 03-17-2021:

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