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Jon Metropoulos
Metropoulos Law Firm
1 South Montana Avenue
Helena, Montana 59601
(406) 442-0285
jon@metropouloslaw.com

KD Feeback
Toole & Feeback, PLLC
702 Main Street
PO Box 907
Lincoln, Montana 59639
(406) 362-4025
kdfeeback@gmail.com

*Attorneys for Amicus Montana Family Foundation*

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

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| BOB BROWN, DOROTHY BRADLEY, VERNON FINLEY, MAE NAN ELLINGSON, and the LEAGUE OF WOMEN VOTERS OF MONTANA,<br><br>Petitioners,<br><br>-vs-<br><br>GREG GIANFORTE, Governor of Montana,<br><br>Respondent. | **No. OP 21-0125**<br><br>***Amicus Curiae* Brief of Montana Family Foundation Supporting Respondent** |

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Montana Family Foundation (MFF), respectfully files this brief supporting Respondent and in opposition to the Petition for Original Jurisdiction.

## STATEMENT OF INTEREST

The Montana Family Foundation (MFF) is a research and education organization dedicated to supporting, protecting and strengthening Montana families. A non-profit corporation under 26 U.S.C. 501(c)(4), it regularly participates as *amicus curiae* in litigation involving issues of importance to Montana families. *See e.g, Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020).

An integral part of MFF's pro-family political philosophy is to promote and protect the free exercise of religion, holding this to be central both to families and to a fair and free society. A necessary corollary of this is MFF's interest, no less than that of the Petitioners, the *amici curiae,* and, indeed Respondents, in preserving an independent, non-political judiciary. MFF believes religious freedom cannot thrive or even survive without that.

MFF's brief explains the erroneous factual and logical basis of Petitioners' assertion that the previous process for filling judicial vacancies was beyond reproach, so successful in producing an independent judiciary, both by its intent and its operation that it evolved into a constitutional institution. MFF argues the factual inaccuracy and the logical fallacy central to this premise of Petitioners'

argument counsel rejection of the Petition for original jurisdiction.

**BACKGROUND**

Petitioners challenge the Legislature's replacement of the previous "manner provided by law." for filling judicial vacancies, known as the Judicial Nomination Commission ("JNC") process, with the current "manner provided by law" when it enacted SB 140 recently. *See* Mont. Const. art VII, § 8(2). Petitioners and their *amici*, Montana Trial Lawyers (hereafter "*Amici*"), argue the JNC was a constitutionally mandated method of filling vacancies in the judiciary. Pet. at 12; *Amici* at 2. Petitioners assert the JNC process ensured selection of judges based solely on merit and eliminated improper considerations, such as political or, presumably, religious bias. Consequently, they ask the Court to hold SB 140 and the Direct Appointment process (DA) it installed unconstitutional because, in their opinion, the new process "threatens" the existing bias-free selection of judges based on merit and, consequently, the independence and quality of the judiciary.

*Amici*, assert in the opening sentence of their argument, the constitution "requires the governor to appoint a nominee selected by a nominating committee to fill a judicial vacancy," only later admitting the constitution nowhere mentions a "nominating committee." *Amici* at 2, 6. Relying on the purported peerless conduct of the JNC process over the years, *Amici* ask this Court to impose on the plain language of the Constitution the drafters claimed intent to require a JNC founded

on their exegesis of "appoint," "select" and "nominee," suggesting the Constitutional drafters "actually" must have intended to enshrine the JNC process, but did not. *Amici* at 3, 6, 7; *but see* 4, cmts of Del. Berg.

*Amici* invite the Court along a thorny path through a thicket unrooted in the words of the constitutional provision at issue. And the conclusion they urge on the Court is nonsensical.

The more direct and obvious explanation for the plain words actually used in Article VII, Section 8 (2), which omit any mention of a nominating committee, is that the intent is the Governor would appoint a "nominee" selected "as provided by law," to fill a vacancy and who the Governor would, consequently, "nominate" to stand for Senate approval. Just as SB 140 requires.

But, more telling in regard to constitutional analysis (if the Court decided to look beyond the plain text of Article VII, Section 8(2)) is the fact that the constitutional drafters knew full well how to specify what institutions they intended to establish on the bedrock of the Constitution. They did not do so with the JNC, in stark contrast with their intentional creation of constitutionally-ordained institutions: *See e.g.,* Article XII, section 1 (Department of Agriculture); Article XII, section 2 (Department of Labor); Article VI, section 7 (allowing 20 departments). In light of this, it cannot be seriously maintained that the delegates plainly "intended" to enshrine the JNC process in the Constitution, but did not for

some reason. They plainly knew how to do that, and they would have had they wanted to. They did not.

The only logical implication to derive from the actual words in Article VII, Section 8 (2), therefore, contrasted with the speculative evidence adduced by *Amici* from the delegates' discussion of a "nominating committee," is that the delegates *intentionally did not want to make such a committee a constitutional requirement.* To conclude the opposite—after all their discussion and then the omission of any mention of the JNC from the Constitution—stands logic on its head. *See Amici* Br. at 4.

## ISSUE PRESENTED

Whether the Court should assume original jurisdiction over this challenge to the constitutionality of SB 140 and the Direct Appointment (DA) process for judicial vacancies.

## ARGUMENT

### Introduction

The stark contrast between the presumed constitutionality of legislative enactments, and the complete lack of textual support for the JNC process in Article VII, § 8(2) of the Montana Constitution demonstrates the Petition's lack of merit. The paucity of facts demonstrating any urgency or emergency exists concerning filling judicial vacancies mirrors the lack of constitutional support for Petitioners'

argument. A system exists, and is still in operation, for dealing with judicial vacancies while the selection process of a new judge occurs. Montana law provides there shall be no delay in regular proceedings due to judicial vacancy. § 3-1-311 MCA. Any vacancy in a judicial district is covered by another judge until an appointment or election can be had to fill the seat. § 3-5-111 MCA.

The courts and judicial districts are familiar with this process and ably administer it. And justice continues within Montana courts. There is no reason to expect this to change. No emergency or need for urgency has been shown to exist here. The usual litigation process will suffice.

Nevertheless, according to Petitioners and *Amici*, by implication and explicit statement, SB 140 should be presumed facially unconstitutional, because, they claim, in comparison to the JNC process it "threatens" the independence of the judiciary." Pet. at 2-3; *see also Amici* Br. at 1. Due to the infancy of SB 140, Petitioners' position is factually, mere speculation.

"A legislature's enactment is presumed constitutional." *Ingraham v. Champion International*, 243 Mont. 42, 47, 793 P.2d 769, 772 (1990), "A party challenging the constitutionality of a statute has the burden of proving it unconstitutional beyond a reasonable doubt." *Romero v. J & J Tire*, 238 Mont. 146, 149, 777 P.2d 292, 294(1989), Moreover, this Court "must be cognizant, as Champion contends in brief, that in analyzing constitutional challenges, this Court

has certain boundaries surrounding the power of the Court to determine constitutionality. Among those is the principal of avoiding constitutional questions whenever possible." *See State ex rel. Hammond v. Hager*, 160 Mont. 391, 400, 503 P.2d 52, 57 (1972). Moreover, an act of the legislature will not be declared invalid as repugnant to some provision of the Constitution, unless its invalidity appears beyond a reasonable doubt. *Shea v. North-Butte Mining Company*, 55 Mont. 522, 530, 179 P. 772 (1919). "In the construction of a statute, the intention of the legislature is to be pursued if possible." *Mont. Code Ann. §* 1-2-102; *see also* Mont. Code Ann. § 1-2-101 ("In the construction of a statute, the office of the judge is simply 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").

The new process installed by the Legislature for filling vacancies when it enacted SB 140 not having been tried, it cannot be assumed and cannot be proven to be any less prompt or any less efficient than the former process, particularly in terms of protecting the independence and integrity of the judiciary. Indeed, to presume this would violate the principles of constitutional challenges noted above.[1]

In this brief, MFF addresses the asserted but unsupported and incorrect factual basis of Petitioners' claim: That by virtue of its history and their idealized

[1] To presume this based on the fact the DA process employs executive vetting and appointment followed by Senate approval would also be to presume Judges sitting as the result of such a process—i.e. federal judges—are more likely to lack judicial independence. The error of such a presumption requires no explanation.

view of its outcomes, the JNC process is superior, virtuous, even pure, and, thus, constitutionally sacrosanct. MFF then will address the logical fallacy at the heart of Petitioners' argument.

## A. The Previous JNC Process was not a paragon of good governance beyond reproach, but instead allowed behaviors that participants broadly agreed warranted change precisely because, they said, the process was politicized.

Unsurprisingly, long incumbent interests and powers, which evidently prospered under the former system, finding it not only to their preference but to their profit, objected in legislative hearings on SB 140.[2] As was their right, the opponents urged clinging to the legislatively-established JNC process for filling judicial vacancies, first enacted by the Legislature in 1973 and amended six times since then, most recently in 2011. There, as here, the basis for their position was that the existing system works well, providing through an ostensibly impartial vetting process, a merit-based list of competent candidates from which the Governor could select, and that the SB 140 system would not produce satisfactory results. Pet. at 1.

Failing to persuade the Legislature of the truth of this assertion, they now claim a constitutional basis for their position. Tellingly, Petitioners' presumptions of superiority on the part of the JNC process, reflecting their presumptions of

[2] While not including the Petitioners, these legislative opponents included the State Bar of Montana, and the amici Montana Trial Lawyers Association and Montana Defense Trial Lawyers, among others, including, notably, the Montana Judges Association.

inferiority on the part of the new DA process, lack any citation to supporting authority or fact.

But credible evidence bearing on this presumption is at hand and contradicts it. *See* Exhibit A to Declaration of Derek J. Oestreicher, General Counsel, Montana Attorney General and attorneys for Respondent (hereafter citing to the specific page of the exhibit as "Ex. A. at __.")

In response to a request from the Montana Judges Association to "review and take a position on" SB 140, the Supreme Court Administrator sent an email to all the Montana Supreme Court Justices and, MFF presumes, many if not all the District Court judges in the State. Ex. A. at 1. The recipient list totals 60, seven Supreme Court Justices and 53 District Courts. Ex A. contains the responses of eighteen District Court Judges. None supported SB 140.[3]

Six, however, stated evidence contradicting the idealized image of the JNC process Petitioners project. These six range from citing very specific facts about their own experiences with the process, fairly characterized as bitter remonstration against the JNC, to a mere recognition of the need for reform. Moreover, these are not mere opinion, but, as noted, state facts of their own experience and,

[3] Based on press reports and copies of emails published on internet sites, it appears, in fact, that many more District Court judges responded to the question, and three supported SB 140. The factual details contained within that information, which can be developed and vetted in the litigation process, are not necessary to MFF's argument in support of SB 140 and against granting the Petition, though it appears, again from press reports, that full examination of all the responses will support MFF's contentions that the JNC process was, itself, flawed precisely in respect to political independence and religious freedom.

significantly, provide corroboration of those facts. They are summarized below in the chronological order they appear in Exhibit A.

This evidence raises concerns not only about the lack of respect for religious liberty but also the lack of political independence in the operation of the previous JNC system.

1. The first is an email from Judge Howard F. Recht. Ex. A at 6. While not stating a position on the bill, Judge Recht states the JNC "needs to be overhauled." After reciting the ideal functioning of such a commission, in his opinion, he notes how the JNC fails in this regard. Then concludes: "A member of the commission can vote against a candidate based upon race, gender, religion, or perceived political affiliation. In my case (both times) I was grilled by certain commission members about my religion and little else. Although I was passed on to the governor both these times, those commission members who voted against me were the same ones who grilled me about my religion. In my opinion, this needs to change." The second, fourth, fifth, and sixth Judicial responders, as outlined below, explicitly supported Judge Recht's comments to one degree or another. The sixth one, in particular, Judge Jennifer Lint, should be noted, since Judge Lint specifically corroborates Judge Recht's recollection.

2. Judge Amy Eddy, while not supporting SB 140, echoed Judge Recht's concerns with the JNC process, noting that she had been asked "inappropriate"

questions, such as whether her husband approved of her application and whether she had considered the best interests of her children. Exhibit A at 9.

3. Judge Yvonne Laird, while also not supporting dissolution of the JNC stated, "[h]owever, I certainly think it can be overhauled to be less political and more objective. It has been my experience and my observation that the JNC while not tied directly to the executive branch certainly is political. This has resulted in very well qualified people not getting their names forwarded to the governor for consideration and names going forward that should not. My bottom line is, the JNC is not working as contemplated by the Montana Constitution and a hard look needs to be taken as to how it should continue to operate." Ex. A at 13.

4. Judge Katherine Bidegary simply stated, "I agree with Judges Recht and Laird." Ex. A at 14.

5. Similarly, Judge James Manley counseled more study and agreed, "It does appear some improvements in the process may be advisable…" Ex. A at 15.

6. Finally, Judge Jennifer Lint, also not supporting SB 140 noted, "[h]owever, as someone who heard some of the questioning of Judge Recht in person, and then also reported to me by completely appalled members of the local bar who sat in the hearings, many of the questions asked Judge Recht were way out of bounds. Sounds like Judge Eddy suffered the same. While I did not get posed

offensive questions, many were smarmy and delivered in a demeaning manner." Ex. A at 17.[4]

Thus, it is evident from members of the existing Montana judiciary itself that the JNC process was flawed and political in operation. It tolerated, perhaps even fostered, religious intolerance. According to their email opinions, it was plainly political. Was it unconstitutional as a result? No. However, neither can it be viewed as having been elevated, through years of spotless operation, into a constitutionally-protected let alone required institution.

While the outcomes of the JNC process—the quality of Montana District Court judges as a whole and individually are not at issue here, this candid evidence from Judges who had passed through that process should eliminate the argument that it was so elevated and pure as to enjoy *de facto* constitutional status. If, as the Petitioners imply, its purpose was to protect the judiciary from political considerations, not a few Judges provide evidence that it failed. And plainly, in at least some cases, it allowed the expression *and the operation* of religious intolerance through the votes of commission members. *See* comments of Judge Recht and Judge Lint.

[4] The lack of full disclosure of the responses by District Court judges, including the reported three judges who supported SB 140, and the reported deletion of public records is both unfortunate and concerning. But it raises issues separate from the one presented by the Petition and MFF's argument against granting the requested relief.

The available facts having demonstrated the JNC process was not unflawed in operation, thus dispelling the basis for Petitioners' claim on its behalf, the only legal question is whether the Legislature had the constitutional power to enact SB 140 and replace it. That answer is yes. But to get to that answer, to focus on the correct subject of analysis here, one must set aside the implied premise of the Petition, that the previous JNC process has, by dint of its long years of spotless operation, become a constitutional requirement. Even if the JNC process worked flawlessly, which clearly it did not, that would not be relevant to the legal question here.

The previous process for filling judicial vacancies presented one way to handle the issue; it was flawed in operation, as attested by numerous judges. The Legislature decided to provide another way. It, too, may be flawed in operation. But neither is constitutionally mandated and both are constitutionally allowed. Only time will tell if the new, existing policy will prove better, worse, or about the same as the old.

With no textual support in the Constitution for the JNC process, and in light of its unequivocal empowerment of the Legislature to enact a "manner provided by law," the Court can only conclude it empowers the Legislature to change the system and attempt to make progress away from the JNC system, marred as it was by politicization and, shamefully, religious intolerance.

**B. The previous JNC process allowed the operation of politics in both the appointment of JNC members, their conduct of the process, including their voting for and against interviewees, and the selection, by the Governor or the Chief Justice, from a list of nominees, demonstrating that, logically, the assertion it was "superior" because it eliminated politics from the process is unfounded,**

In addition to the false factual premise of the Petitioners' argument, logically the former JNC process for forwarding nominees to the Governor for his or her selection conflicts with Petitioners' premise that it "de-politicized" the process. Instead, clearly politics and political choices attended the process every step of the way.

First, and obviously the Governor, a political official elected state-wide, selected a majority of four of the total seven members of the JNC. See § 3-1-1001 MCA. Next, the JNC culled down the list of aspirants, both through the application process and then interviews, and in their conduct of that process clearly engaged in what many would call political choices or decisions. Then, the Governor (or Chief Justice) would select from a list of three to five sent to him, again engaging in a political choice. Therefore, the JNC itself did not select a single, most deserving candidate, but the Governor, a political official, selected from the slate he was given.

Whether this choice made by the Governor (or Chief Justice) in all cases arose from a political decision (it did in some cases, according to some of the

responding Judges), it cannot be argued the JNC *eliminated* politics from the process.

Indeed, it is not clear at all that either the JNC process or the SB 140 process is more or less "political." They both involve decisions made by politicians exercising their judgment and discretion. (Some element of politics is in the nature of a democratic government and cannot be "eliminated" from any process.) Thus, neither may be considered constitutionally ordained nor proscribed on the grounds it eliminated or allowed politics into the process. Rather, it is simply true that both practices result in the governor appointing a person "selected in the manner provided by law." Mont. Const. art. VII, § 8(2). And the Constitution authorizes the Legislature to establish this "manner."

## CONCLUSION

For the reasons stated above, the Court should not accept jurisdiction of the Petition.

RESPECTFULLY SUBMITTED this 4th day of May 2021.

Metropoulos Law Firm
/s/ Jon Metropoulos

Toole & Feeback, PLLC
/s/ KD Feeback
Attorneys for Montana Family Foundation

## CERTIFICATE OF COMPLIANCE

In accord with Montana Appellate Rule 11(4) (a) I certify this *amicus curiae* brief is printed with proportionately spaced 14 point type, is double spaced and does not exceed 5,000 words excluding the Table of Contents, Table of Authorities, and Certificates of Compliance and Service.

Dated this 4th day of May 2021.

Toole & Feeback, PLLC

/s/ KD Feeback

## CERTIFICATE OF SERVICE

I, KD Feeback, hereby certify that I have served true and accurate copies of the foregoing Motion to the following and others via the Court's efile service on May 4th 2021:

A. Clifford Edwards (Attorney)
1648 Poly Drive
Bilings MT 59102
Representing: Dorothy Bradley, Bob Brown, Mae Nan Ellingson, Vernon Finley, Montana League of Women Voters

James H. Goetz (Attorney)
PO Box 6580
Bozeman MT 59771-6580
Representing: Dorothy Bradley, Bob Brown, Mae Nan Ellingson, Vernon Finley, Montana League of Women Voters

Austin Miles Knudsen (Govt Attorney) 215 N. Sanders
Helena MT 59620
Representing: Governor Greg Gianforte

Anita Milanovich
General Counsel, Office of the Governor
PO Box 200801
Helena, Montana 59620

Emily Jones
Jones Law Firm
115 North Broadway, Ste 410
Billings, Montana 59101
Representing the Montana State Legislature

/s/ KD Feeback

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