IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 21–0125

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

Petitioners,

v.

GREG GIANFORTE,

Respondent,

and

MONTANA STATE LEGISLATURE,

Intervenor-Respondent.

MONTANA STATE LEGISLATURE'S SUMMARY RESPONSE TO PETITION

Original Proceeding in the Montana Supreme Court

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

LEGAL ISSUES 2

ARGUMENT 2

I. JURISDICTIONAL REQUIREMENTS ARE NOT MET. 2

A. PETITIONERS LACK STANDING. 2

B. NO URGENCY OR EMERGENCY FACTORS EXIST 4

C. DUE PROCESS CONCERNS DISFAVOR EXERCISE OF JURISDICTION. 6

II. SB 140 IS NOT UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT 11

A. SB 140 COMPORTS WTIH THE PLAIN LANGUAGE OF THE MONTANA CONSTITUTION 11

B. ALTERNATIVELY, OUTSIDE SOURCES SUPPORT THE CONSTITUTIONALITY OF SB 140… 13

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 17

TABLE OF AUTHORITIES

Cases

Butte-Silver Bow Gov. v. State, 235 Mont. 398, 768 P.2d 327 (1989) 2

Chovanak v. Matthews, 120 Mont. 520, 188 P.2d 582 (1948) 3

City of Missoula v. Cox, 2008 MT 364, 346 Mont. 422, 196 P.3d 452..... 11, 12

Goldstein v. Commn. on Practice, 2008 MT 8, 297 Mont. 493, 995 P.2d 923 7

Hernandez v. Bd. of Cty. Commn., 2008 MT 251, 345 Mont. 1, 189 P.3d 638 11

In re Mont. Trial Lawyers Assn., 2020 Mont. LEXIS 1627, 400 Mont. 560, 466 P.3d 494 (2020) 4

Jones v. Judge, 176 Mont. 251, 577 P.2d 846 (1978) 3, 12

Keller v. Smith, 170 Mont. 399, 553 P.2d 1002 (1976).....13

May v. First Natl. Pawn Brokers, Ltd., 269 Mont. 19, 887 P.2d 185 (1994).....6

Mayberry v. Penn., 400 U.S. 455 (1971).....7

Mont. for the Coal Trust v. State, 2000 MT 13, 298 Mont. 69, 996 P.2d 856 .....2, 3

State v. Lucero, 214 Mont. 334, 693 P.2d 511 (1984).....11

Constitutional Provisions

Mont. Const. Art. VII, § 3(2).....9

Mont. Const. Art. VII, § 8(2)..... 1, 12, 13, 15, 16

Rules

Mont. Code Jud. Cond. R. 2.11.....11

Mont. Code Jud. Cond. R. 2.12.....11

Mont. Code Jud. Cond. R. 2.13.....11

Mont. Code Jud. Cond. R. 2.4.....11

Mont. Code Jud. Cond. R. 2.6.....11

Mont. Code Jud. Cond. R. 3.1.....11

Mont. Code Jud. Cond. R. 1.2.....11

Mont. Code Jud. Cond. R. 2.2.....11

Mont. Code Jud. Cond. R. 2.3.....11

Mont. R. App. P. 14(4).....2

Mont. Sup. Ct. R. § IV(1) 9

Statutes

Mont. Code Ann. § 1-2-101 (2019) 12, 13

Mont. Code Ann. §§ 3-1-1001 et seq.....1

Mont. Code Ann. § 3-1-701 (2019) 10

Mont. Code Ann. § 3-1-702 (2019) 10

Mont. Code Ann. § 3-5-101 (2019) 6

Mont. Code Ann. § 3-5-301(1)(c) (2019).....6

Mont. Code Ann. § 3-5-301(1)(e) (2019).....6

SB 140 (2021) 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 16

Other Authorities

Aaron Flint, *Updated–Documents Obtained: Montana Judges Above The Law?*, NewsTalk95, Apr. 11, 2021 (https://townsquare.media/site/125/files/2021/04/MT-Leg-SupCo-Docs2.pdf)....8

Black's Law Dictionary (2nd. Ed. 2001). 12

HB 104 (1963) 14

HB 145 (1945) 14

HB 230 (1959) 14

HB 48 (1957) 14

SB 153 (1967) 14, 16

I Montana Constitutional Convention, Verbatim Transcript (1979) 14, 15

IV Montana Constitutional Convention, Verbatim Transcript (1979) 16

Mike Dennison, *Supreme Court Administrator Asks Again To Block GOP Subpoena On Emails*, MTN News, April 13, 2021 8

Mike Dennison, Twitter, https://twitter.com/mikedennison/status/1377770666716327936, April 1, 2021 ..9

Seaborn Larson, *Judges' Emails Deleted, GOP 'Concerned' About Records Policy*, Billings Gazette, Apr. 9, 2021 9

Seaborn Larson, *MT Supreme Court Halts Legislative Subpoena for Emails*, Helena Independent Record, Apr. 12, 2021 10

STATEMENT OF FACTS

The Montana State Legislature ("Legislature")[1] – not this Court, and not even the Governor – is vested with the constitutional authority to determine the process by which judicial vacancies are appointed. Mont. Const. Art. VII, § 8(2). With strong bicameral support, the Legislature enacted SB 140 changing the process to nominate judicial candidates for gubernatorial appointment. (SB 140 (2021).) SB 140 eliminates the judicial nomination commission (Mont. Code Ann. §§ 3-1-1001 et seq.), allowing the governor to directly appoint nominees to fill certain judicial vacancies. (SB 140, § 1.) SB 140 defines who may be considered a nominee: a qualified lawyer in good standing whose application is timely submitted to the governor, who goes through an interview, is subject to public comment, and who receives at least three timely letters of support. (*Id.* at §§ 2–4.)

Petitioners challenge the constitutionality of SB 140. (Petition, pp. 10–18.) The individual Petitioners base standing to sue on their status as Montana residents, voters, and taxpayers. (*Id.* at p. 5.) Petitioner Montana League of Women Voters' ("LWV") basis for standing is unstated and unclear. (*Id.*) Petitioners assert exercise of original jurisdiction is appropriate because this case involves constitutional issues of statewide importance, involves purely legal

[1] The Court granted the Legislature permission to intervene in this matter with a proviso that the Legislature commit to "abide by and comply with all orders of the Court." The Legislature commits to abide by orders that the Court has proper jurisdiction to issue.

questions of statutory and constitutional construction, and urgency and emergency factors make the normal appeal process inadequate. (*Id.* at pp. 5–9.) However, original jurisdiction is improper because Petitioners lack standing, and no emergency or urgency factors exist.

LEGAL ISSUES

1. Do the Petitioners have standing to sue?
2. Have the Petitioners shown sufficient urgency or emergency factors?
3. Is SB 140 unconstitutional?

ARGUMENT

I. JURISDICTIONAL REQUIREMENTS ARE NOT MET.

Assumption of original jurisdiction over a declaratory judgment action is only proper when standing is established; constitutional issues of major statewide importance are involved; the case involves purely legal questions of statutory and constitutional construction; and urgency and emergency factors exist making the normal appeal process inadequate. *Mont. for the Coal Trust v. State*, 2000 MT 13, ¶ 25, 298 Mont. 69, 996 P.2d 856.; Mont. R. App. P. 14(4).

A. PETITIONERS LACK STANDING.

Petitioners' standing to bring this action is essential to the Court's acceptance of original jurisdiction. *Butte-Silver Bow Gov. v. State*, 235 Mont. 398, 401, 768 P.2d 327, 329 (1989). Only those to whom a statute applies and who are

adversely affected can question its constitutional validity in a declaratory judgment proceeding. *Chovanak v. Matthews*, 120 Mont. 520, 527, 188 P.2d 582, 585 (1948). Private citizens may not restrain official acts when they fail to allege and prove damages to themselves differing from that sustained by the general public. *Jones v. Judge*, 176 Mont. 251, 253, 577 P.2d 846, 847 (1978). Where a party's only interest is as a resident, citizen, taxpayer, or elector and is the same as other citizens, electors, taxpayers, and residents, that interest is insufficient to invoke juridical power to determine the constitutionality of a legislative act. *Chovanak*, 120 Mont. at 527, 188 P.2d at 585 (citations omitted). Taxpayer standing must involve questions of tax validity or constitutional validity to collect or use the proceeds by the government. *Coal Trust*, ¶ 25 (citation omitted). Stature as an elector will not allow an individual to bring an action unless the elector is denied rights and sufficiently affected to challenge the Act denying him the right. *Jones*, 176 Mont. at 254, 577 P.2d at 848.

Here, the individual Petitioners' only allegations regarding standing to bring this constitutional challenge are that they are Montana residents, voters, and taxpayers. (Petition, p. 5.) LWV alleges no facts supporting its standing to sue. (*Id.*) Petitioners' scant assertion of voter and taxpayer status is insufficient to confer standing. SB 140 is not a tax bill. This case presents no questions of tax validity, expenditure of tax monies, or government's ability to collect or use tax

proceeds. Petitioners therefore have no taxpayer standing. Likewise, Petitioners lack voter or resident standing because SB 140 does not deprive them of any constitutional or statutory rights (they have asserted none) and they have shown no particularized injury. Voters have no right to select nominees for appointment to judicial vacancies or to determine how nominees are selected. Those powers are constitutionally vested in the Legislature, not the voters. Petitioners hint at an interest in preserving "a competent, independent judiciary" but admit this interest is shared by all Montanans. (Petition, p. 6.) Petitioners offer no proof – or even allegations – that SB 140 will affect their rights or cause them particularized injury. Therefore, they lack standing.

B. NO URGENCY OR EMERGENCY FACTORS EXIST.

"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 Assn.*, 2020 Mont. LEXIS 1627, *3–4, 400 Mont. 560, 466 P.3d 494 (2020) (quotation omitted). Petitioners contend that, "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." (Petition, p. 6.) Petitioners' fears are wholly speculative. A confirmation decision on three of former Governor

Bullock's appointees is expected before *sine die*, currently scheduled for May 11, 2021. If confirmed, Petitioners' fears (ostensibly) will never be realized. There are no other current vacancies.

Furthermore, Petitioners submit no proof whatsoever that hypothetical lawyers who may be appointed are "probably political" or that those theoretical nominees would be "inimical to the interest of all Montanans in a competent, independent judiciary." This is pure conjecture on Petitioners' part. Without knowing who the lawyers are and the facts surrounding their appointment (including their qualifications, background, opinions, experiences, known biases, and many other factors), Petitioners' request is tantamount to seeking an advisory opinion from the Court.

Moreover, Petitioners' speculative fears are ironic given that judges who have undergone the judicial nomination commission process admit it is overtly political, inappropriate, subjective, and borderline abusive. (*See* Decl. Derek J. Oestreicher ¶ 2 and Ex. A (Apr. 1, 2021).) For example, Judge Recht observed:

> "The commission does not conduct an independent investigation into the qualification of candidates. [. . .] 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."

(*Id.* at Ex. A.) Judge Eddy observed:

> "Similar to Judge Recht, on the first time through I was asked inappropriate, in my mind, questions by the lay members – 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.*) Clearly, the commission process is no guarantee of achieving the Petitioners' stated goals.

Additionally, Petitioners have failed to show that litigation and appeal are inadequate. They assert, without support, that there is no viable process to challenge a judicial appointment in lower courts and thus no "normal" appeal process. (Petition, p. 9.) However, district courts have original jurisdiction in all cases at law and equity and in all special actions and proceedings. Mont. Code Ann. §§ 3-5-301(1)(c), (e) (2019). If the current appointees are not confirmed, the SB 140 process will take at least 70 days, and up to 100 days. (Ex. 1 at §§ 1(2), 3, 4.) Petitioners have made no showing that a district court would lack the power to grant relief under § 3-5-101. Simply put, Petitioners have failed to demonstrate that "urgency or emergency factors exist."

C. DUE PROCESS CONCERNS DISFAVOR EXERCISE OF JURISDICTION.

"[A]ny tribunal permitted to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *May v. First Natl. Pawn Brokers, Ltd.*, 269 Mont. 19, 24, 887 P.2d 185, 188 (1994) (quotation omitted). Dealings that might create an impression of possible bias should be disclosed to the parties. *Id.*, 887 P.2d at 188 (citation omitted). A fair and impartial tribunal is a basic guarantee of due process. *Goldstein v. Commn. on*

Practice, 2008 MT 8, ¶ 64, 297 Mont. 493, 995 P.2d 923 (Nelson, J. dissenting). Due process violations may be adjudged not only based on actual harm, but also on risk that potential prejudice may occur due to an inherent flaw in the process itself. *Id.* (citing *Mayberry v. Penn.*, 400 U.S. 455, 469 (1971) (Harlan, J. concurring) ("the appearance of even-handed justice . . . is at the core of due process.")).

When Petitioners filed this case, Chief Justice McGrath recused himself and District Judge Krueger was appointed to participate in his place. (Or. (Mar. 24, 2021).) Shortly thereafter, it was revealed that Judge Krueger had participated in an e-mail poll sent to every Montana district court judge and Supreme Court justice, using government e-mail accounts, requesting that they take a position on SB 140. (Decl. Oestreicher ¶ 2 and Ex. A.) Judge Krueger stated he is "adamantly oppose[d]" to SB 140. (*Id.* at Ex. A.) Only after these e-mails came to light did Judge Krueger recuse himself from the case. (Not. of Recusal (Apr. 2, 2021).)

The Court has advised (without disclosing additional information or documents about the e-mail poll) that no member of the Court participated in the poll. (*Id.*) However, the e-mails show that Judge Krueger's response was sent to Justices McGrath, Rice, McKinnon, Baker, Shea, Sandefur, and Gustafson, as were the responses of every judge who opined or voted to "accept/reject" SB 140. (Decl. Oestreicher ¶ 2 and Ex. A.) Assuming the justices read these e-mails, they were aware Judge Krueger "adamantly oppose[d]" SB 140 when he was appointed

to this case. They are also aware of their colleagues' opinions on SB 140. The airing of strong views by nearly all colleagues in a close-knit state cannot help but raise questions of bias.

Moreover, minutes after they were notified, Petitioners' counsel called the Chief Justice *ex parte* to communicate regarding Respondent's imminent motion to disqualify Judge Krueger.[2] Aaron Flint, *Updated–Documents Obtained: Montana Judges Above The Law?*, NewsTalk95, Apr. 11, 2021 (https://townsquare.media/site/125/files/2021/04/MT-Leg-SupCo-Docs2.pdf); Mike Dennison, *Supreme Court Administrator Asks Again To Block GOP Subpoena On Emails*, MTN News, April 13, 2021. Counsel requested a return call on their personal cell phone numbers. (*Id.*) The Chief Justice's staff commented that communication with counsel is not "a good idea." (*Id.*) This communication raises the following serious questions:

- What, if anything, was discussed *ex parte* between Petitioners' counsel and the Chief Justice?
- Why were Petitioners' counsel alerting the recused Chief Justice before the motion was filed?
- Why do Petitioners' counsel believe that the Chief Justice can influence this case when he has recused himself?

[2] This Court has ultimate regulation of the practice of law in Montana. The Legislature alerts the Court to these issues and leaves to its discretion whether further action is required under the Montana Rules of Professional Conduct.

- What influence is the Chief Justice still exerting in this case despite recusal?

For example, the Chief Justice was quoted as saying "court might go with 6 rather than 7 justices on SB 140 case[.]" Mike Dennison, Twitter, https://twitter.com/mikedennison/status/1377770666716327936, April 1, 2021. In fact, the Court did suspend its internal operating rules requiring a seven-justice panel to hear this case.[3] (Or. (Apr. 7, 2021)); Mont. Sup. Ct. R. § IV(1) ("The Supreme Court en banc shall consist of seven members. The Court en banc shall hear all cases in which [. . .] a bona fide challenge is made to the constitutionality of a statute[.]"). According to press reports, the Chief Justice is in the know about this case, making *ex parte* communications with a party wholly improper.

The Legislature has undertaken an investigation of these matters, requesting certain documents from the Supreme Court Administrator. The Administrator reluctantly provided limited records after initially stating she did not retain the poll results, in possible violation of state government records retention rules. In fact, the Administrator deleted e-mails related to these issues. Seaborn Larson, *Judges' Emails Deleted, GOP 'Concerned' About Records Policy*, Billings Gazette, Apr. 9, 2021.

[3] This conflicts with Mont. Const. Art. VII, § 3(2), which provides: "A district judge **shall** be substituted for the chief justice or a justice in the event of disqualification or disability[.]" (Emphasis supplied).

Also troubling is the Court's unprecedented efforts to thwart the Legislature's subpoena of, among other things, these deleted e-mails. The Court's own Administrator – appointed by the Court, who serves at the pleasure of the Court, under the direction of the Court (Mont. Code Ann. §§ 3-1-701, and -702) – filed an emergency motion in this case to quash the subpoena on a Sunday, which the Court temporarily granted the same day. Seaborn Larson, *MT Supreme Court Halts Legislative Subpoena for Emails*, Helena Independent Record, Apr. 12, 2021. It did so even though the Administrator, the Legislature, and the Department of Administration were not parties to this case, even though the Legislature's subpoena is not at issue in this case, and even though the Governor received no notice of the Motion.

At a minimum, this Court's knowledge that Judge Krueger "adamantly oppose[d]" SB 140 when it appointed him to this case, knowledge of judicial colleagues' opinions, Petitioner's counsel's *ex parte* phone call to the Chief Justice, and the Administrator's deletion of relevant e-mails "create an impression of possible bias" that raises serious due process concerns. Additionally, through its Temporary Order, the Court put itself in the untenable position of ruling on the disclosure of judicial branch e-mails – a clear conflict of interest – purporting to bind persons who were not parties to the case over issues not raised by any party. These actions heighten the appearance of bias and implicate Mont. Code Jud.

Cond. R. 1.2, 2.2, 2.3, 2.4, 2.6, 2.11, 2.12, 2.13, and 3.1. On grounds of these serious due process concerns, this Court should decline to accept jurisdiction.

II. SB 140 IS NOT UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT.

Statutes are presumed to be constitutional; it is the Court's duty to avoid an unconstitutional interpretation if possible. *Hernandez v. Bd. of Cty. Commn.*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638 (citations omitted). Every possible presumption must be indulged in favor of the constitutionality of a legislative act. *Id.* (citations omitted). The party challenging the constitutionality of a statute bears the burden of proving unconstitutionality "beyond a reasonable doubt" and, if any doubt exists, it must be resolved in favor of the statute. *Id.* (citations omitted). Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs. *State v. Lucero*, 214 Mont. 334, 344, 693 P.2d 511, 516 (1984). Under these standards – or even more lenient ones – Petitioners' constitutional argument utterly fails to prove the unconstitutionality of SB 140.

A. SB 140 COMPORTS WITH THE PLAIN LANGUAGE OF THE MONTANA CONSTITUTION.

"[C]onstitutional provisions are interpreted by use of the same rules as those used to interpret statutes." *City of Missoula v. Cox*, 2008 MT 364, ¶ 9, 346 Mont. 422, 196 P.3d 452 (quotation omitted). Whenever the language "is plain, simple,

direct and unambiguous, it does not require construction, but construes itself." *Id.* (quotation omitted). The terms must be given the natural and popular meaning in which they are usually understood. *Jones*, 176 Mont. at 254, 577 P.2d at 848 (citation omitted). A judge's office is simply to ascertain and declare what is in terms or substance contained in a statute [or constitutional provision], not to insert what has been omitted or to omit what has been inserted. Mont. Code Ann. § 1-2-101 (2019).

Art. VII, § 8(2) provides in relevant part:

> 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 provision unequivocally authorizes the Legislature to determine how judicial nominees are selected in the event of a vacancy. The plain meaning of the word "nominee" is a person who is proposed for an office, position, or duty. *Nominee*, *Black's Law Dictionary* (2nd. Ed. 2001). Art. VII, § 8(2) does not provide for a nomination commission or any other nominating body. The clear intent of the framers, evidenced by the unambiguous language of Art. VII, § 8(2), was to leave the nominee selection process to the Legislature's discretion. Nothing in SB 140 violates the plain, direct, unambiguous language of Art. VII, § 8(2).

Petitioners admit Art. VII, § 8(2) is unambiguous, asserting the meaning of the word "nominees" is "obvious." However, they then claim the provision says

something it obviously does not, that "[t]he plain language evinces a clear intent of the framers that the Governor is to receive a list of 'nominees' from some other source." (Petition, p. 10.) Of course, Art. II, § 8(2) does not say this at all. It does not contain the phrase "list of nominees from some other source," nor does it mandate a source from which nominees must come. Such terms may not be inserted when they were omitted by the framers. § 1-2-101. Nothing in the plain language of Art. VII, § 8(2) prohibits nomination of judicial appointments in the manner provided by SB 140. Petitioners' argument that SB 140 is unconstitutional because it does not provide for a "list of nominees from some other source" is negated by the plain language of Art. VII, § 8(2), which requires no such thing.

B. ALTERNATIVELY, OUTSIDE SOURCES SUPPORT THE CONSTITUTIONALITY OF SB 140.

Because Art. VII, § 8(2) is unambiguous, reference to other sources is prohibited. The intent of the framers is controlling and "[s]uch intent shall first be 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 v. Smith*, 170 Mont. 399, 405, 553 P.2d 1002, 1006 (1976) (emphasis supplied). Petitioners assert the plain meaning of Art. VII, § 8(2) renders SB 140 unconstitutional, and then erroneously rely on numerous outside sources to support this position. Not only is reliance on outside sources improper

because the provision can be interpreted on its plain language, but also outside sources do not support Petitioners' position – quite the opposite.

While the LWV may favor a merit-based judicial selection process (Petition, p. 5), the 1972 Constitutional Convention delegates did not. In fact, the delegates considered and rejected a proposal to require a commission process in favor of deference to the legislature to **allow** the creation of a commission, but not **require** it. The legislative history and convention transcripts support the Legislature's right to determine how judicial nominees are selected and the constitutionality of SB 140.

From 1945 to 1972, five constitutional amendments were proposed, each calling for a nomination commission, all of which were defeated. HB 145 (1945); HB 48 (1957); HB 230 (1959); HB 104 (1963); and SB 153 (1967). At the 1972 Constitutional Convention, the delegates debated a commission process, but ultimately adopted a proposal that largely preserved the status quo. The majority proposal, identical to the 1889 Constitution, provided in relevant part:

> Vacancies in the office of the justice of the supreme court, or judge of the district court, or other appellate court, or clerk of the supreme court, shall be filled by appointment by the governor of the state[.]

I Montana Constitutional Convention, Verbatim Transcript 506 (1979). The minority proposal provided in relevant part:

> In all vacancies in the offices of supreme court justices and district court judges [. . .], the governor of the state shall nominate a supreme

> court justice or district court judge from nominees selected in the manner provided by law.

Id. at 519. The minority proposal authorized, but did not require, a commission process.

The delegates' final discussion before voting on what is now Art. VII, § 8(2) demonstrates the framers' intent to allow for a judicial nomination commission, but not require one:

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

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

Id. at Vol. VI, 1113. Despite any desire the delegates may have had for the legislature to create a nominating commission, they clearly understood it was not constitutionally required and, in the absence of such a body, in the words of Delegate Swanberg, "we'd have the same situation we have now [. . .] where the Governor would simply appoint the judge[.]" The delegates chose not to go so far as constitutionalizing the commission; instead, they clearly and unequivocally placed discretion over the process in the hands of the Legislature, and no one else.

CONCLUSION

The Court should decline to exercise jurisdiction in this case because Petitioners lack standing, no urgency or emergency factors exist, and due process concerns merit restraint under the circumstances of this case. SB 140 is constitutional under the plain language of Art. VII, § 8(2), which does not require a judicial nomination commission or other body to select nominees for judicial vacancies, but leaves that selection process squarely to the discretion of the Legislature. Outside sources support this interpretation. For the reasons stated in this Summary Response, the Montana State Legislature respectfully requests that the Court decline to exercise jurisdiction in this matter; or, if it exercises jurisdiction, that it declare SB 140 constitutional.

Respectfully submitted this 14th day of April, 2021.

By: /s/ *Emily Jones*
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11 (4)(3) and 14(9)(b), I certify that this Summary Response is printed with proportionately-spaced, size 14 Times New Roman font, is double spaced, and contains 3,862 words, excluding the cover pages, table of contents, table of authorities, certificate of compliance, and certificate of service, as calculated by Microsoft Word.

DATED this 14th day of April, 2021.

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I, Emily Jones, 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