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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

TOM WINTER AND BARBARA BESSETTE, Plaintiffs, v. STATE OF MONTANA, BY AND THROUGH GREG GIANFORTE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MONTANA, Defendant.	Cause No. BDV-2021-699 Hon. Michael F. McMahon (email) **STATE OF MONTANA'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

The Complaint in this case should be dismissed pursuant to Montana Rule of Civil Procedure 12(b)(6) because the Plaintiffs cannot, and do not, state a valid legal theory challenging the constitutionality of Senate Bill (SB) 140.[1] The Montana Supreme Court has unambiguously held that "the Montana Constitution grants the authority to the Legislature to determine how nominees for a judicial vacancy are presented to the Governor," and that SB 140 fulfilled the Legislature's constitutional responsibility. *Brown v. Gianforte*, 2021 MT 149, ¶¶ 24, 50–51, 404 Mont. 269, 488 P.3d 548. Some constitutional cases are close calls. Not this one.

I. BACKGROUND

The Montana Constitution provides that, in the case of a judicial vacancy, the Governor shall appoint a replacement from nominees selected in a manner provided by law. MONT. CONST. art. VII, § 8. The 1973 Montana Legislature passed Senate Bill 28, codified at Mont. Code Ann. § 3-1-1001 to -1014, which created a Judicial Nominating Commission

[1] In their Complaint, titled "Complaint for Declaratory and Injunctive Relief," Plaintiffs appear to request a preliminary injunction. (*See* Pls.' Compl., ¶ 68). However, Plaintiffs never filed a motion for a preliminary injunction. Therefore, this Court should not entertain their request, particularly given that Plaintiffs have the burden to demonstrate a preliminary injunction is necessary under Mont. Code Ann. § 27-19-201. *See Driscoll v. Stapleton*, 2020 MT 247, ¶ 33, 401 Mont. 405, 473 P.3d 386.

within the judicial branch to screen and forward nominees to the Governor for appointments to judicial vacancies. The Commission accepted applications for judicial vacancies, held public hearings, and conducted background checks on applicants. After the Commission vetted applicants, it forwarded a list of three to five nominees from which the Governor could appoint a replacement to the vacancy. The Governor could decline to appoint any of the forwarded nominees.

The 2021 Montana Legislature passed SB 140, which repealed the commission process and replaced it with a new procedure for producing nominees for judicial vacancies. Those seeking to become nominees must adhere to the legislative process by meeting the qualifications and receiving the requisite letters of support. The Governor, after a period of public comment, then appoints one of the nominees. SB 140, § 5.[2] As the Supreme Court noted, "many aspects of the SB 140 process are not appreciably different" from the prior commission process. *Brown*, ¶ 44. In practice, the Governor adopted many of the same tools to vet applicants as were used by the Commission. *See id.*, ¶ 44; *compare* Pls.' Compl., Ex. 3 (describing the Governor's process) *with* Tyler Manning,

[2] A copy of SB 140 is attached as Exhibit 1 to Plaintiffs' Complaint.

Commission seeks feedback on nine judicial candidates, Helena Independent Record (Aug. 28, 2020), https://helenair.com/news/local/commission-seeks-feedback-on-nine-judicial-candidates/article_ccdfb8eb-755f-5329-9d1b-595ec66dbf85.html (describing the Judicial Nomination Commission's process).

In June 2021, the Montana Supreme Court upheld the constitutionality of SB 140. *Brown*, ¶ 51. The Court determined that the underlying "objective" of Article VII, § 8—the same provision at issue here—is to ensure the Governor appoints "good judges," and that SB 140 accomplishes that purpose. *Id.* ¶¶ 43, 47 (citing Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, p. 1105). The Court noted that Article VII, § 8 was drafted as a compromise among delegates to the 1972 Constitutional Convention—some delegates wanted an independent judicial nominations commission, and some wanted direct appointment by the governor. *Id.* ¶¶ 35–41. The result of the constitutional compromise was such that the Constitution "delegated the process for selecting nominees to the Legislature in broad language that the selection of nominees be in the manner provided by law." *Id.*¶ 41 (internal citations omitted).

Thus, as the Montana Supreme Court explained, "the Montana Constitution grants the authority to the Legislature to determine how nominees for a judicial vacancy are presented to the Governor[.]" *Id.* ¶ 24. While that authority must "be exercised in compliance with the provisions of the Constitution," the Court unambiguously held that the process prescribed by SB 140 does, in fact, comply with the Constitution. *Id.* ¶ 50.

II. LEGAL STANDARD

Montana Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint if the plaintiff "fail[s] to state a claim upon which relief can be granted." A plaintiff fails to meet its burden, and a claim should be dismissed pursuant to Rule 12(b)(6), "if [the plaintiff] either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim." *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165. A court has no obligation to take as true legal conclusions that have no factual basis. *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6. But a court does have an obligation to "avoid an unconstitutional interpretation if possible," and to resolve any

doubt about the constitutionality of a statute in favor of the statute. *See Brown,* ¶ 32; *State v. Davison,* 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203 ("Every possible presumption must be indulged in favor of the constitutionality of a legislative act."); *GBN, Inc. v. Mont. Dep't of Revenue,* 249 Mont. 261, 265, 815 P.2d 595, 597 (1991) ("If a doubt exists, it is to be resolved in favor of the legislation"); *State v. Stark,* 100 Mont. 365, 368, 52 P.2d 890, 891 (1935) ("[T]he constitutionality of any Act shall be upheld if it is possible to do so.").

III. ARGUMENT

A. This Court should grant the State's motion to dismiss because Plaintiffs lack standing to bring this challenge.

"[T]he judicial power of Montana courts is limited to justiciable controversies—in other words, a controversy that can be disposed of and resolved in the courts." *Gateway Opencut Mining Action Grp. v. Bd of Cnty. Comm'rs,* 2011 MT 198, ¶ 16, 361 Mont. 398, 260 P.3d 133. Thus, "justiciability is a threshold issue." *Montanans Against Assisted Suicide (MAAS) v. Bd. of Med. Examiners,* 2015 MT 112, ¶ 10, 379 Mont. 11, 347 P.3d 1244.

"Standing is a threshold jurisdictional requirement" in which plaintiffs must "clearly allege past, present, or threatened injury to a property or civil right" that is "distinguishable from injury to the public generally." *Brown*, ¶¶ 9–10. The inquiry into a plaintiff's alleged injury to a legally recognized right is to ensure that the "complaining party is the proper party before the court[.]" *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P.3d 1187. "[A] general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing[.]" *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241.

Plaintiffs' alleged injury is unclear as they fail to allege any concrete interest or right that is impaired by SB 140. *See* Pls.' Compl., ¶¶ 12–13, 50. The gravamen of the Complaint is that SB 140 allegedly violates the separation of powers. *See* Pls.' Compl., ¶ 1. But Plaintiffs fail to allege this purported constitutional infirmity causes a justiciable injury. Even in separation of powers cases, an individual must identify an interest beyond the Constitution's structural integrity. *See Bond v. United States*, 564 U.S. 211, 222–223 (2011); *see also, e.g., Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (sustaining a challenge because challenger was subject to enforcement proceeding); *Clinton*

v. City of N.Y., 524 U.S. 417 (1998) (sustaining a challenge by the City of New York and health care providers who would be subjected to liability under the new law); *INS v. Chadha*, 462 U.S. 919 (1983) (sustaining a challenge by an individual seeking to avoid deportation under the new law). As the Court stated in *Larson*, generalized allegations are insufficient to invoke the court's jurisdiction because doing so would effectively authorize the courts to render advisory opinions. *Larson*, ¶ 46; *see also Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567.

Because the Montana Supreme Court already upheld SB 140's constitutionality, Plaintiffs cannot show any injury to any legal right. *See Brown*, ¶ 51. Plaintiffs' status as voters and taxpayers is insufficient to confer standing absent a showing they will suffer an injury to a property or civil right. *See State ex rel. Mitchell v. Dist. Court*, 128 Mont. 325, 339, 275 P.2d 642, 649 (1954) (plaintiff's status as a voter and taxpayer was insufficient to grant standing absent an allegation of resulting injury to plaintiff personally). And the Court foreclosed the possibility of legal injury under SB 140 by unambiguously stating the Legislature exercised its authority in compliance with the Constitution. *Brown*, ¶ 50; *see also*

Bond, 564 U.S. at 223 (requiring a justiciable injury to challenge laws based on separation-of-powers concerns).

B. This Court should grant the motion to dismiss because *Brown v. Gianforte* controls this case and forecloses Plaintiffs' separation of powers claim

Brown, which the Montana Supreme Court decided last month, controls the question of whether SB 140 is constitutional. In reaching its conclusion that SB 140 is constitutional under Article VII, § 8(2), the Court necessarily had to find that it was constitutional under Article III, § 1. In *Brown*, plaintiffs challenged the Legislature's authority to delegate judicial appointment power to the Governor. *Id.* ¶ 2. The Court rejected this challenge and held that SB 140 fulfilled the Legislature's constitutional responsibility. *Id.* ¶ 50. The Court considered both the Legislature's power to establish a process for selecting the nominees and the Governor's power to appoint from the nominees. In other words, the Court considered the interplay between the separate but equal branches of government. *Id.* ¶¶ 41–49. SB 140 does not give more power to the Governor—it creates a process "by law" that gives the People a voice in determining which applicants become nominees. *See* MONT. CONST. art. VII, § 8(2).

Article VII, § 8(2), provides in 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*" (emphasis added). This clause necessarily envisions an interplay between multiple branches of government: (1) the Legislature shall provide by law the means of selecting nominees; and (2) the Governor shall appoint a replacement from such nominees.

Importantly, the Court in *Brown* explained that the constitutional delegates adopted "a process that neither mandated a commission/committee, nor precluded it, but rather delegated the process for selecting nominees to the Legislature." *Id.* ¶41. The Court went on to conclude that SB 140 "complies with the language and constitutional intent of Article VII, Section 8(2)." *Id.* ¶ 50.

As the Court further noted, SB 140 does not provide unfettered discretion to the Governor. *See id.* ¶¶ 44, 46–49. The Court detailed specific similarities between the prior Commission process and the process contained in SB 140. *See id.* ¶ 44 (noting the two processes contained similar provisions regarding qualifications, time periods for submission of applications, public comment periods, and schedules for appointment).

Further, SB 140 requires that an applicant receive at least three letters of support to be considered a nominee. *See id.* ¶ 49 (noting that this requirement arguably heightened standards for applicants to be considered a nominee eligible for gubernatorial appointment). This process ensures that nominees are thoroughly vetted before their appointment. And more importantly, to repeat the obvious, it has been considered and affirmed as constitutional by the Supreme Court.

Plaintiffs incorrectly state that SB 140 "grants the Governor the authority to determine which eligible persons may be considered nominees" in contravention of the separation of powers. (Pls.' Compl., ¶ 57). This statement runs contrary to the plain language of SB 140, which includes many of the same limitations as the prior appointment scheme. It also ignores the controlling interpretation explained in *Brown*: namely, that an applicant must receive "a letter of support from at least three adult Montana residents ... in order to be considered a nominee eligible for appointment by the Governor." *Brown*, ¶ 46 (internal quotation omitted). The Governor lacks the authority to consider an applicant who fails to meet the criteria to become a nominee as prescribed by the Legislature. SB 140, §§ 3, 5. The Court addressed this issue in *Brown*, and the

Plaintiffs have failed to raise any issue not already decided in that case. *Brown* controls and forecloses Plaintiffs' requested relief.

C. This Court should grant the motion to dismiss because even if *Brown v. Gianforte* did not control, SB 140 respects the separation of powers and constitutional structure of Article VII, § 8.

Article III, § 1 provides: "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, *except as in this constitution expressly directed or permitted*" (emphasis added). Although the Governor disputes that filling a judicial vacancy is "power properly belonging to" any other branch than the executive, Plaintiffs' Complaint ignores that SB 140's process is expressly permitted by the Constitution, as explained in *Brown*. Article VII, § 8(2) directs the Legislature to "provide by law" a means for the selection of nominees for gubernatorial appointment to a judicial vacancy. *Brown*, ¶ 23. To the extent SB 140 contains a delegation of authority, this delegation is constitutional because Article VII, § 8(2) expressly directs it. *See Baumgardner v. Pub. Ret. Bd. of Mont.*, 2005 MT 199, ¶ 24, 328 Mont. 179, 119 P.3d 77 ("Article III, Section 1, specifically allows one branch to exercise the power

properly belonging to another branch if the Constitution expressly directs or permits.").

When delegating authority to another branch of government, "the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion[.]" *The Duck Inn v. Montana State University-Northern*, 285 Mont. 519, 525, 949 P.2d 1179, 1183 (1997) (citations omitted). But "limitations on legislative delegation are less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.* at 526, 949 P.2d at 1183 (quoting *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975)). Through SB 140, the Legislature provided clear guidance and standards governing the application and nomination process. *See e.g.*, SB 140, §§ 1–5 (setting timelines for applications and nominations, requiring qualifications, and disqualifying otherwise eligible persons who lack a requisite level of public support). And the Governor has the independent authority (and the duty) under Article VII, § 8(2) to "appoint a replacement from [these] nominees."

First, the Legislature clearly articulated qualification standards. To be eligible for appointment, a person must be "a lawyer in good standing who has the qualifications set forth by law for holding judicial office...." SB 140, § 2(2). Additionally, each applicant who meets these requirements must also receive three public letters of support in order to be considered a nominee. *See* SB 140, § 4(2).[3] The Governor may not deviate from these requirements. *See* MONT. CONST. art. VII, § 8(2) ("the governor *shall appoint* a replacement from nominees selected in the manner provided by law") (emphasis added); *see also Brown*, ¶ 46.

Second, the Legislature established a vetting process in SB 140 that is consistent with prior law. *Brown*, ¶ 44. As the Supreme Court already determined, SB 140's vetting process upholds Article VII, § 8(2)'s purpose of recruiting good judges. *See id.* ¶¶ 47, 50.

The Governor may, just as with the prior commission, authorize investigations concerning the qualifications of eligible persons. *Compare* SB 140, § 2(1) ("The governor may authorize investigations concerning the qualifications of eligible persons") *with* Mont. Code Ann. § 3-1-1009

[3] To the extent Plaintiffs argue that the term "nominee" cannot encompass an applicant who has three or more letters of support as required in SB 140, this argument is foreclosed by *Brown*. *Brown*, ¶ 49 (explaining the difference between applicants and nominees); *see also* SB 140, § 4.

(2019) ("The commission and each member are authorized to make investigations concerning the qualifications of eligible persons"). The Governor shall, just as with the Commission, establish the applications process. *Compare* SB 140, § 3 ("An eligible person may apply for the vacant position by completing and submitting to the governor an original signed application.... The deadline date must be within 40 days of the governor's receipt of the notice of vacancy provided by the chief justice.") *with* Mont. Code Ann. § 3-1-1007(1)(c) (2019) ("The commission shall...establish[]an application period of not less than 30 days...and the procedure for applying for a position."). The Governor shall provide for a public comment period of 30 days, just as with the Commission. *Compare* SB 140 § 4(1) ("The governor shall...provide[] at least 30 days for public comment concerning applicants") *with* Mont. Code Ann. § 3-1-1007(1)(d) (2019) (The commission shall "establish[] a reasonable period for reviewing applications and interviewing applicants that provides at least 30 days for public comment concerning applicants."). Finally, any gubernatorial appointee under SB 140, like a gubernatorial appointee under the previous Commission, is subject to Senate confirmation. *See* SB 140, § 6, Mont. Code Ann. § 3-1-1013, *Brown*, ¶ 48.

In short, the process Plaintiffs allege is unconstitutional was already analyzed by the Court in *Brown* and determined to meet the goal of recruiting good judges under Article VII, § 8(2). *See Brown*, ¶ 47. Further, as previously stated, the Legislature "by law" authorized an agency of the judicial branch to undertake these same actions under the old regime.[4] As the Court explained in *Brown*, the 1973 Legislature acted constitutionally when it provided by law the Judicial Nominating Commission, and the 2021 Legislature acted constitutionally when it provided a more direct means of gubernatorial vetting and appointment.

SB 140 comports with Article VII, § 8(2) precisely because it adheres to the separation of powers in the Montana Constitution. It involves all three branches of government and provides checks on the Governor's appointment authority. To be eligible for appointment, a person must be a lawyer in good standing who meets the qualifications to be

[4] Plaintiffs, in subsequent filings, argue that the Legislature may delegate to an "administrative agency," but not the Governor. *See* (Pls.' Reply in Support of Motion for Temporary Restraining Order (July 1, 2021) at 3). The Montana Constitution imbues the Executive Power in the Governor, not in administrative agencies. *See* MONT. CONST. art. VI, § 4(1) ("The executive power is vested in the governor who shall see that the laws are faithfully executed."). *See also Bullock v. Fox*, 2019 MT 50, ¶ 33, 395 Mont. 35, 435 P.3d 1187 ("A principle objective of the 1972 Con Con was to produce a constitution vesting the executive power in the governor in fact, not in rhetoric.") (internal quotations omitted)).

a judicial officer as provided by law. *See* SB 140, § 2(2). The power to oversee qualifications for lawyers is vested in the Montana Supreme Court. *See* MONT. CONST. art. VII, § 2(3). In case the Governor fails to timely appoint a replacement, the appointment power falls to the Chief Justice. *See* SB 140, § 5(3). Further, Senate confirmation acts as a check on the Governor's appointment authority. *See* MONT. CONST. art. VII, § 8(2); SB 140, § 6. Finally, the people retain a final check on the Governor's appointment authority both through public vetting of the applicants and subsequent public elections of the Governor and legislators tasked with judicial confirmation. *See* SB 140, § 4; *Brown*, ¶¶ 47–48.

D. Plaintiffs have failed—and are unable—to support their core contentions with sufficient legal authority.

Courts do not consider general contentions that lack a factual basis or sufficient legal authority. *See Johansen v. Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653 (appellant failed "to cite authority for the position he advances"). Nor is it the job of the court or the state to "conduct legal research on [a party's] behalf, to guess as to his precise position, or to develop legal analysis that may lend support to [a party's] position." *Id.* (citing *State v. Carter*, 285 Mont. 449, 461, 948 P.2d 1173, 1180, (1997)).

Plaintiffs' declaration they have "demonstrated that SB 140 violates the separation of powers clause," Pls.' Compl., ¶ 60, lacks any authority, *see* Pls.' Compl., ¶¶ 1–72 (failing to cite a single case that supports their premise).[5] This declaration also directly contradicts binding Montana Supreme Court precedent (*Brown*, etc.), as discussed in the preceding sections.

While Montana allows for liberal pleadings, Plaintiffs must still ground their allegations in legal authority. Plaintiffs' complete failure to support the core argument of the Complaint—that SB 140 violates the separation of powers—with *any* legal authority is telling and fatal.

CONCLUSION

Plaintiffs lack standing, and they have failed to develop any facts or legal authority to support their claims. This failure cannot be cured because binding Montana Supreme Court precedent dictates that SB 140 is constitutional. This Court should therefore dismiss the Complaint pursuant to Mont. R. Civ. P. 12(b)(6).

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[5] Subsequent filings in this matter likewise lack any authority for this premise. *See e.g.* (Pls.' Brief in Support of Ex Parte Mot. for Temp. Restraining Order and Mot. to Show Cause (June 30, 2021) at 5–7 (repeatedly stating Plaintiffs have "demonstrated that SB 140 violates the separation of powers" without citing to any caselaw for this point)).

DATED the 23rd day of July, 2021.

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