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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

THOMAS WINTER AND BARBARA BESSETTE, PLAINTIFFS, v. THE 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) **PLAINTIFFS' RESPONSE IN OPPOSITION TO THE STATE OF MONTANA'S MOTION TO DISMISS**

Plaintiffs, through counsel, submit this Response in Opposition to the State of Montana's Motion to Dismiss and Brief in Support (hereinafter "State's Brief") and state as follows:

Summary

Article VII, Section 8(2), of the Montana Constitution states that "[f]or 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 requires the Legislature to prescribe how nominees for judicial vacancies are selected, prior to the appointment of one of those nominees by the Governor. Previously, the Legislature had delegated the selection of nominees to the judiciary itself. *See* Mont. Code Ann. § 3-1-1001, *et*

seq (2019) (establishing the Judicial Nomination Commission under Title 3, Judiciary, Courts); *see also* State's Brief, at 15.

SB 140 creates a new method for the appointment of individuals to fill judicial vacancies by removing the Judicial Nomination Commission and delegating the selection of nominees to the Governor. *See* Complaint, ¶¶ 24–35, 49–61. Unlike the previous delegation, which contained limitations on the Commission's exercise of authority, this delegation of authority does not pass constitutional muster.

First, by granting the Governor authority over the application process and requiring eligible persons to participate in the application process as a prerequisite to being considered a nominee, and in the absence of any identifiable limitation on the power granted to the Governor relating to this application process, Senate Bill 140 is a void delegation of legislative authority under *Bacus v. Lake County* and its progeny.

Second, the Constitution requires the Governor to appoint a replacement to a judicial vacancy "from nominees selected in the manner provided by law." Mont. Const. Art. VII, § 8(2). The Constitution does not expressly permit or direct the Governor to determine who those nominees may be. The Grant of appointment authority to the Governor is also a limitation on his authority—*expressio unius est exclusion alterius*; the expression of one thing in a constitutional provision implies the exclusion of another—the Governor is limited to the act of appointment of nominees only and SB 140 is void because it allows the Governor to participate in the selection of nominees.

Factual Background

Senate Bill 140 ("SB 140") was signed into law on March 16, 2021, Complaint, ¶ 24, replacing a previous statutory scheme that had established the Judicial Nomination Commission

("the Commission"). SB 140 delegates various aspects of how nominees for judicial vacancies are selected to the Governor himself; Plaintiffs contend this delegation fails constitutional scrutiny. *See id.*, ¶¶ 49–61.

SB 140 states "[a]n eligible person may apply for the vacant judicial position by completing and submitting to the governor an original signed paper application and an electronic copy of the original application by the deadline date. SB 140, § 3. SB 140 requires that an individual participate in the application process in order to be considered a nominee for a judicial vacancy. SB 140, § 4(2) ("Each applicant who has the qualifications set forth by law for holding judicial office and who receives a letter of support from at least three adult Montana residents . . . must be considered a nominee for the position") (emphasis added).

SB 140 contains no further direction, guideline, or limitation of any kind concerning the application process, except to require the Governor to establish a reasonable period for reviewing applications and interviewing applicants that includes at least 30 days for public comment on the applicants. SB 140, § 4(1). SB 140 does not state what policy the Governor should consider when crafting the application, nor does SB 140 provide any limitation of any kind on what the Governor may require of the applicants.

Thus, SB 140 grants the Governor uncontrolled discretion concerning the parameters of the application process. Complaint, ¶ 53. In addition to the foregoing, this necessarily includes the authority to set the terms of the application, to receive and evaluate applications directly, determine who qualifies as an applicant, and receive and evaluate an applicant's requisite letters of support. *Id.*, ¶ 53.

On April 30, 2021, the Governor was notified of a vacancy in the Eighth Judicial District Court. *Id.*, ¶ 36. On May 4, 2021, the Governor announced that he would be accepting

applications in connection with this vacancy and provided a link to an application with a submittal deadline of June 1, 2021. *Id.*, ¶¶ 37–38. The Governor announced that the public would be allowed to provide letters of support "or other comments regarding the applications" beginning on June 1, 2021, and continuing through June 30, 2021. *Id.*, ¶ 38.

The application form produced by the Governor was attached as Exhibit 4 to the Complaint (hereinafter "Application"). *Id.*, ¶ 39. The Application contained thirty-nine questions. *Id.*, ¶ 39. The Application required applicants to consent to the Governor's investigation and verification of any information submitted in the Application. *Id.*, ¶ 41.

Further, the Application required that applicants authorize the disclosure of any "information, files, records, or reports requested" by the Governor from a myriad of entities, including "a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions [the applicant has] attended, any references furnished by [the applicant], employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to [the applicant's] citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history." *Id.*, ¶ 42. The Governor also created an "Advisory Counsel for Eighth Judicial District Vacancy" to "assist in identifying and reviewing qualified candidates to fill the district court judge vacancy in the Eighth Judicial District." *Id.*, ¶ 45.

Thomas Winter is a resident of Missoula County, is registered to vote in Montana, and pays taxes in Montana. Complaint, ¶ 12. Barbara Bessette is a resident of Cascade County, is a registered voter in Montana, and pays taxes in Montana. *Id.*, ¶ 13. Plaintiffs filed the underlying

Complaint on June 25, 2021. This Court denied Plaintiffs' motion for a temporary restraining order on July 2, 2021, and set a preliminary injunction hearing for July 15, 2021. The Governor appointed Mr. David J. Grubich to the Eighth Judicial District Court on July 7, 2021. Following this appointment, there were no pending judicial vacancies subject to SB 140. On July 9, 2021, Plaintiffs filed a Writ of Supervisory Control asking the Montana Supreme Court to assume jurisdiction over this matter. The Governor's exercise of authority in appointing Mr. Grubich mooted Plaintiffs' request for injunctive relief and Plaintiffs filed an Unopposed Motion to Vacate July 15th Hearing on July 12, 2021. Although no written order was issued, the preliminary injunction hearing was vacated. On July 22, 2021, Plaintiffs filed a Notice of Decision informing this Court and the Governor that the Montana Supreme Court had denied their Petition for Writ of Supervisory Control on July 20, 2021. On July 23, 2021, the Governor filed the instant Motion to Dismiss.

Legal Standard

When this Court considers a motion to dismiss for failure to state a claim under Rule 12(b)(6), Mont. R. Civ. P., it must consider all pleaded facts as admitted and all allegations in the complaint as true. Further, this Court must construe the complaint broadly and in favor of the plaintiff. *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316. A complaint must not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Id.*, ¶ 8.

Whether a statute is constitutional is a question of law. *State v. Mathis*, 2003 MT 112, ¶ 8, 315 Mont. 378, 68 P.3d 756. A party challenging a statute's constitutionality must meet a "heavy burden" and establish, "beyond a reasonable doubt, that the statute is unconstitutional,

and any doubt must be resolved in favor of the statute." *State v. Spady*, 2015 MT 218, ¶ 12, 380 Mont. 179, 354 P.3d 590.

Argument

The facts of this case are not in dispute. Rather, the question to this Court is a purely legal one: whether SB 140's delegation of authority to the Governor survives review under a separation of powers analysis. The State asks this Court to dismiss Plaintiffs' complaint for failure to state a claim, arguing that Plaintiffs cannot state "a valid legal theory challenging the constitutionality" of SB 140. Additionally, the State argues Plaintiffs lack standing, that *Brown v. Gianforte* controls and "forecloses Plaintiffs' separation of powers claim," and that even if *Brown* did not control, SB 140 does not violate Article III, § 1 of the Montana Constitution. The State's arguments are unavailing and addressed in turn.

I. The State's argument that Plaintiffs' fail to state a claim is incorrect: SB 140's delegation of authority to the Governor to participate in the selection of nominees for judicial vacancies violates Mont. Const. Art. III, § 1.

The importance of the separation of powers cannot be disputed: "[t]he Montana Constitution demands that the three branches of government remain separate and distinct . . . in order to keep each branch accountable to the people, and to prevent too much power from being lodged in any one branch of government." *Linder v. Smith*, 193 Mont. 20, 32–33, 629 P.2d 1187, 1194 (Mont. 1981) (citations omitted). Enforcement of the separation of powers "isn't about protecting institutional prerogatives or governmental turf," it is about respecting Montana citizens' choice to vest legislative power solely in the Montana Legislature and "safeguarding a structure designed to protect [the citizenry's] liberties, minority rights, fair notice, and the rule of law." *See Gundy v. United States*, 139 S. Ct. 2116, 2135, *reh'g denied*, 140 S. Ct. 579 (2019) (Gorsuch, J., dissenting). In this context, "the Constitution does not permit judges to look the

other way; [judges] must cry foul when the constitutional lines are crossed." *Id.* (Gorsuch, J., dissenting).

A. SB 140's delegation of authority to the Governor granting him the ability to participate in the selection of nominees violates the implied limitation contained in Article VII, Section 8(2), given force by Article III, Section 1.

Article III, Section 1, of the Montana Constitution "specifically allows one branch to exercise the power properly belonging to another branch if the Constitution expressly directs or permits." *Baumgardner v. Pub. Employees' Ret. Bd. of State*, 2005 MT 199, ¶ 24, 328 Mont. 179, 119 P.3d 77. Thus, absent express direction or permission, Article III, Section 1, precludes any branch of government from exercising a power properly granted to another branch. Article VII, Section 8(2) contains two such directives pertinent to vacancies in Montana's district courts or the Montana Supreme Court. First, it grants to the Governor the power to "appoint a replacement from nominees selected in the manner provided by law." Second, it grants to the legislative branch the power to provide the manner by which nominees are selected.

Montana's Constitution is a document of limitation and a statute—or any other legislative act—is invalid if it "contravene[s] some express or implied limitation" found in the Constitution. *See State ex rel. Woodahl v. Straub*, 164 Mont. 141, 147–48, 520 P.2d 776, 780 (Mont. 1974). Put another way, "the legislature of the state has the power to do as it pleases, save and except as limited expressly or by necessary implication by some constitutional provision." *Mulholland v. Ayers*, 109 Mont. 558, 99 P.2d 234, 239–40 (Mont. 1940)

The canon of construction known as *expressio unius est exclusio alterius*, meaning the expression of one thing implies the exclusion of another, is well established in Montana. *See e.g. Ominex Canada, Ltd. v. State, Dep't of Revenue*, 2008 MT 403, ¶ 21, 347 Mont. 176, 201 P.3d 3; *Dukes v. City of Missoula*, 2005 MT 196, ¶ 15, 328 Mont. 155, 119 P.3d 61. The Montana

Supreme Court has applied this canon of construction to constitutional provisions. *See Harris v. Smartt*, 2003 MT 135, ¶ 17, 316 Mont. 130, 68 P.3d 889.

Per the plain language of Mont. Const. Art. VII, Section 8(2), the Governor has the power to "appoint a replacement from nominees selected in the manner provided by law." Because the Governor has the power to appoint "from nominees," the *expressio unius* canon precludes the Governor from determining who those nominees are. But this is precisely what SB 140 allows the Governor to do by granting the Governor power over the application process and allowing the Governor to participate in the selection process, and this is why SB 140 is unconstitutional.

This conclusion is supported by the similarly well-established principle that the words of a constitution may not be ignored as meaningless. *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 516, 534 P.2d 859, 863 (Mont. 1975) (citations omitted). What meaning can the clause "from nominees selected in the manner provided by law" have if the Governor is given the power to both select nominees and determine who those said nominees might be?

B. In the alternative, if delegation of authority to the Governor is appropriate, SB 140 is not a valid delegation of authority because it grants unfettered discretion to the Governor concerning the selection of nominees.

Article V, Section 1, of the Montana Constitution provides that "[t]he legislative power is vested in a legislature consisting of a senate and a house of representatives." This clause is given additional force by Article III, § 1. Because Montana's constitution is a "limitation upon the power of the legislature and not a grant of power to that body," *State ex rel. James v. Aronson*, 132 Mont. 120, 127, 314 P.2d 849, 852 (Mont. 1957) (citation omitted), this assignment of power to the Legislature is a bar on its further delegation, *see Gundy*, 139 S. Ct. at 2123.

The Montana Supreme Court's method of evaluating delegations of legislative power is well-established. First announced in *Bacus v. Lake County*, 138 Mont. 69, 354 P.2d 1056 (Mont.

1960), the Court has repeatedly held that a statute must not vest the target of a legislative delegation with "arbitrary and uncontrolled discretion," *White v. State*, 233 Mont. 81, 88, 759 P.2d 971, 975 (Mont. 1988), and that any such statute must set forth a policy, standard, or rule for [the target's] guidance" in order for a delegation to be appropriate, *Montana Indep. Living Project v. Dep't of Transportation*, 2019 MT 298, ¶ 19, 398 Mont. 204, 454 P.3d 1216. "If the legislature fails to prescribe with reasonable clarity the limits of" the delegation, "or if those limits are too broad, [the Legislature's] attempt to delegate is a nullity." *Matter of Peila*, 249 Mont. 272, 276, 815 P.2d 139, 142 (Mont. 1991).

The *Bacus* test is applicable to delegations of legislative authority to the Governor and the State does not argue otherwise. The Montana Supreme Court applied this test in the context of legislative delegations to an officer of the executive branch when, in *State v. Spady* and *Lee v. State*, 195 Mont. 1, 635 P.2d 1282 (Mont. 1981), it evaluated legislative delegations to the Montana Attorney General.

SB 140 contains a delegation of legislative authority to the Governor that must be analyzed to determine whether it vests the Governor with arbitrary and uncontrolled discretion and whether it fails to set forth a policy, standard, or rule to guide the Governor in his exercise of authority. For the following reasons, SB 140 fails under either review and the legislative delegation is therefore void.

1. SB 140 vests the Governor with arbitrary and uncontrolled discretion over the application process and the selection of nominees.

A legislative delegation is void if it vests the recipient with "arbitrary and uncontrolled discretion," *White*, 233 Mont. at 88, 759 P.2d at 975, and fails to "prescribe with reasonable clarity the limits of power delegated" by the statute, *Huber v. Groff*, 171 Mont. 442, 457, 558 P.2d 1124, 1132 (Mont. 1976) (citations omitted).

SB 140 grants unfettered discretion to the Governor in several ways. First, SB 140 grants the Governor uncontrolled discretion over the application process, including the power to set the terms and scope of the application, investigate applicants, and interview applicants. Complaint, ¶¶ 26–28, 49–61; SB 140, §§ 2(1), 4(1)–(2). Second, SB 140 grants the Governor uncontrolled discretion in general over the appointment process. For example, the Governor formed an "Advisory Council" tasked with identifying and reviewing qualified candidates. Complaint, ¶ 54. SB 140 contains no provision authorizing such an act.

Third, and finally, SB 140 grants the Governor discretion over whom he may appoint to the judicial vacancy by allowing the Governor to "make an appointment within 30 days of the close of the public comment period from the list of applicants." SB 140 § 5(1) (emphasis added). This is directly contrary to Article VII, Section 8's requirement that the Governor appoint from "nominees," which—under SB 140's statutory scheme—are different than "applicants." *Compare* SB 140 § 3 *with* § 4(2).

The Montana Supreme Court has found legislative delegations void due to grants of unconstrained discretion in several similar circumstances. In *Bacus*, the Court considered a series of statutes allowing local boards of health to enact rules and regulations "pertaining to the prevention of disease and the promotion of public health" within their jurisdictions. *Bacus*, 138 Mont. at 77, 354 P.2d at 1060. The Court questioned whether this grant of authority was so broad as to allow local boards of health "to prescribe a series of physical exercises for the populations within their areas for the promotion of public health." *Id.* at 79, 354 P.2d at 1061. The Court held the statutes violated the separation of powers clause of Montana's 1889 Constitution after finding that the statutes failed "to prescribe with reasonable clarity the limits within which the officer or board may act." *Id.* at 81–83, 354 at 1062–63.

Further, in *In re Petition to Transfer Territory*, the Court considered a statute granting local county superintendents the power to transfer territory from one school district to another—an act the Court had previously determined to be legislative in nature. 2000 MT 342, ¶ 13, 303 Mont. 204, 15 P.3d 447. The Court noted that the Legislature had "provided no criteria for balancing the effects felt by the parties involved in a school district territory transfer. Instead, the decision is left solely to the whim of the local county superintendents. It is this broad grant of discretion to a county superintendent of schools, unchecked by any standard, policy, or rule of decision, that renders the territory transfer statute unconstitutional." *Id.*, ¶¶ 18–19.

On the other side of the spectrum, the Court has evaluated several statutes that did provide sufficiently clear boundaries to avoid a grant of uncontrolled discretion. For example, in *State v. Spady*, the Court considered, in part, a statute that allowed the Attorney General to impose fees related to the 24/7 Sobriety Program. *Spady*, ¶ 19. The Court reversed a district court's determination that the statute contained an unconstitutional delegation of legislative power to the executive branch, noting that it required the Attorney General to "adopt rules providing for 'testing fees for the program, including the collection of fees to pay the cost of installation, monitoring, and deactivation of any testing device." *Id.*, ¶¶ 19–20. The Court found that this requirement set forth a clear rule that "the fees are limited to the costs involved in administering the program, to including the cost of installation, monitoring, and deactivation of any testing device." *Id.*, ¶ 20.

Similarly, in *State v. Mathis*, the Court considered whether a statute allowing the establishment of traffic regulations in construction and work zones granted unfettered discretion to the administrative body. *Mathis*, ¶ 19–20. There, the Court noted that the statute at issue required the "respective entity to establish speed limits in construction and work zones based on

traffic conditions or the condition of the construction, repair, maintenance, or survey project." *Id.*, ¶¶ 20–21. Subsequently, the Court found that this "caveat placed upon local entities sufficiently limits the entities' discretion." *Id.*, ¶ 21.

Mathis and *Spady* demonstrate that when a legislative delegation occurs, the recipient's exercise of discretion must be curbed by some "caveat" or legislatively pronounced guardrail. SB 140 lacks any such guidance. By predicating an individual's status as a "nominee" on the individual's participation in the application process, SB 140, § 4(2), the Legislature rendered the application process a critical aspect of the manner it provided to select the nominees. However, when defining the application process, SB 140 states simply that "an eligible person may apply for the vacant judicial position by completing and submitting to the governor an original signed paper application and an electronic copy of the original application by the deadline date." SB 140, § 3. SB 140 does not further define the scope of the application process, nor limit what requirements the Governor may impose on applicants, nor limit what investigation the Governor might do with respect to the applicants. In short, SB 140 leaves the contours of the application process to the complete discretion of the Governor.

Because this grant of discretion is unrestrained, it fails the *Bacus* test and is constitutionally infirm. As the Court recognized in *White*, any indications that this grant of authority will not be "arbitrarily implemented" are irrelevant—this Court's focus must remain on the scope of "the authority delegated by the legislature, and whether limits on that authority are clearly prescribed." *White*, 233 Mont. at 91, 759 P.2d at 977.

SB 140 contains no legislative prescription reining in the Governor's discretion with respect to the application process. The absence of a limitation on the grant of authority renders the grant of authority void.

2. SB 140 fails to set forth a policy, standard, or rule to guide the Governor and, accordingly, the legislative delegation is void.

It is well established that a statute containing a legislative delegation of authority must set forth "a policy, standard, or rule for [the target's] guidance" in order for a delegation to be appropriate. *Montana Independent Living Project*, ¶ 19. The Montana Supreme Court has considered the adequacy of such policies, standards, or rules, accompanying various legislative delegations and those decisions are informative here.

In *Huber v. Groff*, the Court considered whether Montana's Housing Act of 1975 contained an unconstitutional delegation of legislative power. 171 Mont. at 457–458, 558 P.2d at 1132–1133. The *Huber* plaintiffs argued that the term "persons and families of lower income" was vague, rendering the accompanying delegation of authority to the agency void. *Id.* at 457, 558 P.2d at 1132. The Court pointed out that the statute specifically defined the term by requiring the agency to consider six different criteria when making its subsequent determination, noting "[a]ll that is left for the agency to do to place a figure on the income limit for 'persons and families of lower income' is to inquire into the facts as the statute directs and make the determinations required by the statute." *Id.*, 558 P.2d at 1132.

Conversely, in *Douglas v. Judge*, the Court considered a delegation of legislative power to the Board of Natural Resources and Conservation related to the Board's determination of projects eligible for renewable resource development loans. 174 Mont. 32, 38–39, 568 P.2d 530, 533–534 (Mont. 1977). The statute at issue allowed the Board to "make loans to farmers and ranchers . . . for any worthwhile project for the conservation, management, utilization, development, or preservation of the land, water, fish, wildlife, recreational and other renewable resources in the state," in addition to specifying certain eligibility requirements. *Id.* at 39, 568 P.2d at 534. The Court found the statute void under the *Bacus* test, noting "the only limit on the

power to loan money for a certain project is the Board of Natural Resources and Conservation's subjective determination of whether a project is worthwhile." *Id.* at 40, 568 P.2d at 535.

Similar to *Douglas*, in *White v. State*, the Court considered a legislative delegation to the Science and Technology Development Board allowing the Board to make decisions regarding technology investments. 233 Mont. at 89–90, 759 P.3d at 976. The statute at issue provided ten different factors that the Board was required to consider. The Court invalidated the underlying statute, noting that the statute failed to provide a "legislatively defined 'policy, standard, or rule'" as the factors listed in the statute did not constitute "objective criteria" guiding the investment decision, but rather left the determination to the subjective judgment of the board. guiding the investment decisions. *Id.* at 90, 759 P.2d at 976.

Huber, *Douglas*, and *White*, reveal the touchstone of the Court's requirement that a statute containing a delegation of legislative power set forth a policy, standard, or rule: the presence of objective criteria, rather than broad subjective factors, to which the exercise of authority is tied and by which it is limited.

SB 140 is an invalid delegation of legislative authority because it fails to set forth objective criteria regarding who may be considered a nominee to fill a judicial vacancy in Montana's district courts or the Montana Supreme Court. Because SB 140 is devoid of any reference to the policy the Legislature sought to be fulfilled through the statute, this Court is left to review the "standard" or "rules" provided regarding the selection of nominees.

Again, SB 140 requires that an individual (1) apply to the Governor for consideration, (2) have the qualifications set forth by law for holding judicial office, and (3) receive a letter of support from at least three adult Montana residents by the close of the public comment period in order to be considered a "nominee" for the judicial vacancy. As stated above, this requirement

predicates an individual's status as a "nominee" on a factor completely within the control of the Governor: the application process.

Because an "eligible person" may not be a "nominee" unless they participate in the application process set by the Governor, regardless of whether they receive the requisite letters of support, SB 140, § 4(2), the Montana Supreme Court's jurisprudence compels the conclusion that SB 140's lack of objective criteria to define the application process renders the delegation of legislative authority void. This lack of criteria renders the application process unconstitutionally vulnerable to the subjective whims of the Governor. For example, the lack of statutory guardrails allowed the Governor to require that each applicant submit to an extraordinarily broad and invasive disclosure and investigation agreement. Complaint, ¶ 42.

Simply put, if the Legislature predicates the eligible person's status as a nominee on his or her participation in an application process, the Legislature must set forth objective criteria defining said application process. The Legislature's failure to do so renders SB 140 void.

C. Against this background, the State's argument that SB 140 respects the separation of powers is incorrect.

The State impliedly recognizes that because SB 140 is a grant of legislative authority to the Governor, it must also prescribe "a policy, standard, or rule" for the Governor's guidance and must not vest him with "arbitrary and uncontrolled discretion." State's Brief, at 12 (citations omitted). Thus, in support of its contention that the SB 140 does not grant uncontrolled discretion to the Governor, the State presents three arguments. State's Brief, at 12–16.

First, the State contends that certain similarities between SB 140 and the previous statutory scheme with respect to investigative power and the application process demonstrate that SB 140 complies with the separation of powers. State's Brief, at 13–14. Superficially, the State's

argument might be compelling. But even a cursory review of the two statutory schemes reveals that the State is painting with a broad brush; here, the details matter.

The State argues that the SB 140 and the statutes authorizing the Judicial Nomination Commission are the same. They are not. For example, with respect to the application process, SB 140 simply requires an individual to "apply for a vacant position by completing and submitting to the Governor an original signed application." Conversely, the previous statutory scheme required the Commission "to adopt and publish rules" establishing "the procedure for applying for a position." Mont. Code Ann. § 3–1–1007(c)(2019). Requiring the Commission to publish the "rules" regarding how an applicant may apply for the position distinguishes the legislative delegation in the previous statute from that found in SB 140.

But the rule making requirement under the Commission statutes does not just distinguish these two statutory schemes, it demonstrates why SB 140 is unconstitutional. The rule making requirement in the Commission statutes, Mont. Code Ann. § 3–1–1007(1)(a)–(d) (2019), was a material limitation on the delegation of legislative power to the Commission. The previous statutory scheme required the Commission to "adopt and publish rules" governing several different aspects of the Commissions operations, including "the conduct of its affairs and the format of reports," the "procedure for providing the public with notice of a vacancy," and, "establishing an application period" and "the procedure for applying for a position." Mont. Code Ann. § 3–1–1007(1)(a)–(d) (2019). Further, these rules were required to be filed with the clerk of the supreme court. Mont. Code Ann. § 3–1–1007(2) (2019). Sunlight is the best disinfectant and the rule making requirement ensured, in connection with Montana's constitutional right to know and right to participate, that the public was fully informed of precisely how the candidates were being evaluated.

The contrast between the previous statutory scheme and SB 140 is clear. There is no guidance, requirements, policy directives, or rules outlining the Governor's authority over the application process. When evaluating a delegation of legislative authority, "the validity of a statute is determined by what may be done under it not what has been done under it." *Bacus*, 138 Mont. at 79, 354 P.2d at 1061 (citations omitted). Here, there is no limit to what the Governor may require of applicants.

Second, and similarly, the State contends the Legislature "clearly articulated qualification standards," which act as a limitation on the Governor's review of applicants. State Brief, at 12–13. But, SB 140 does not articulate the qualifications to serve as a district court judge or supreme court justice, the Constitution does. *See* Mont. Const., Art. VII, § 9. Further, the investigation of whether an individual meets these qualifications is governed by SB 140 § 2(1)–(2) and is separate from the individuals participation in the application process, SB 140 § 3. Finally, participation in the application process is a separate requirement, above and beyond having the qualifications set forth by the Constitution, that SB 140 requires an individual to meet prior to being considered a nominee. SB 140, § 4(2).

Third, the State contends SB 140's requirement that an applicant receive three letters of support to be considered a nominee acts as a limitation on the Governor's discretion. SB 140 clearly requires that an individual receive three letters of support to be considered a nominee, but the State's argument ignores that the grant of discretion to the Governor relates to the application process and that participation in the application process is, again, a separate requirement—additional to the receipt of these letters—that an individual must meet to be considered a nominee. Further, the State's argument also ignores that SB 140 specifically allows the Governor to appoint from "the list of applicants." SB 140, § 5(1).

In summary, the State does not, and cannot, point to any provision of SB 140 that contains a "policy, standard, or rule" guiding the Governor's exercise of the delegated authority. Further, the State cannot, and does not, point to any provision of SB 140 that prescribes with "reasonable clarity" the limits of the grant of authority to the Governor relating to the application process. These deficiencies render SB 140's delegation of legislative authority void.

II. The constitutional question posed in the Complaint was not decided by *Brown v. Gianforte*, but *Brown* controls aspects of this case.

The State contends the Montana Supreme Court's decision in *Brown v. Gianforte*, 2021 MT 149, __ Mont. __, 488 P.3d 548, considered the separation of powers claim raised by Plaintiffs and offered a decision on the merits of that argument sufficient to bar Plaintiffs from making that argument in the instant lawsuit. For that reason, the State contends that *Brown* is binding on this Court and forecloses the Plaintiffs' relief. At the same time, the State also contends that Plaintiffs lack standing.

The State is correct that *Brown* controls aspects of the instant case—specifically, whether Plaintiffs have standing to bring their claims. *See Brown*, ¶¶ 8–19. In *Brown*, the Court held that if the *Brown* petitioners were "correct in their argument that SB 140 is unconstitutional, in the near future there would be a person in Cascade County with no vested authority acting—in the literal sense—as a judge. The seriousness of such a 'judge' unlawfully wielding authority that may affect the Petitioners is a sufficiently clear threat to Petitioners' property or civil rights to meet the case-or-controversy requirement for standing." *Brown*, ¶ 19. The State does not and cannot contend that Plaintiffs are not subject to the jurisdiction of a district court judge in this State. The State's argument that Plaintiff's lack standing is contrary to the plain language of *Brown* and should be denied.

While *Brown* controls the standing analysis in this case, the Court was not presented with—and did not address—the separation of powers argument raised by Plaintiffs. The State argues that because the Montana Supreme Court concluded "that SB 140 is constitutional under Article VII, § 8(2), the Court necessarily had to find that it was constitutional under Article III, § 1." State's Brief, at 8. The State's premise—that a statute surviving review under any constitutional provision is equal to review under all constitutional provision—is flawed. The Montana Supreme Court's caselaw is "well-settled" that it "will not consider unsupported issues or arguments," when parties fail to "present a reasoned argument to advance their position, supported by citations to appropriate authority." *Griffith v. Butte School Dist. No. 1*, 2010 MT 246, ¶ 42, 358 Mont. 193, 244 P.3d 321. In short, for this Court to find that the separation of powers argument was considered in *Brown*, it must determine that the Court considered an issue that was never raised by the parties and never mentioned in the Opinion.

Further, the Court specifically described the question posed by the *Brown* plaintiffs as "whether SB 140 is unconstitutional under Article VII, Section 8(2) of the Montana Constitution, which provides that when a vacancy occurs on the Supreme Court or one of the District Courts, 'the governor shall appoint a replacement from nominees selected in the manner provided by law," *Brown*, ¶ 2 FN 1. Because the separation of powers question was not posed to the *Brown* Court, and because *Brown* is devoid of any analysis regarding the interplay between Article III, Section 1, and SB 140, the State's contention that *Brown* already determined the issue presented by Plaintiffs is erroneous and should be disregarded.

A fair reading of *Brown* reveals that the Court focused on the argument put forth by the Petitioners: that Article VII, Section 8(2), required the establishment of the Judicial Nomination Commission. The Court was not presented with, and did not consider, the different argument put

forth by Plaintiffs in the instant case: whether the delegation of legislative authority contained in SB 140 violates Article III, Section 1.

Conclusion

For these reasons, Plaintiffs request that this Court deny the State's motion to dismiss.

DATED this 6th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2021, a true and correct copy of the foregoing document was served on the following by e-mail and U.S. Mail:

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