AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
J. STUART SEGREST
Chief, Civil Bureau
AISLINN W. BROWN
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026
Fax: (406) 444-3549
david.dewhirst@mt.gov
kathleen.smithgall@mt.gov
ssegrest@mt.gov
aislinn.brown@mt.gov

Attorneys for Defendant

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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 **STATE OF MONTANA'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

The Court should grant the State's motion to dismiss. Plaintiffs failed to demonstrate any legal theory that would invalidate Senate Bill (SB) 140. Their Response in Opposition to the State's Motion to Dismiss[1] likewise failed to demonstrate any claim that would call into question the Montana Supreme Court's holding that SB 140 is constitutional because "the Montana Constitution grants the authority to the Legislature to determine how nominees for a judicial vacancy are presented to the Governor." *Brown v. Gianforte*, 2021 MT 149, ¶¶ 24, 51, 404 Mont. 269, 488 P.3d 548.

Standards of Review

Plaintiffs misstate the appropriate standard of review. *See* Response at 5 (Courts "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."). The Court must treat "well-pleaded" facts as true, *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316, but is under no obligation to grant favors for unsupported allegations or legal conclusions. *See Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6 ("Facts must be viewed in a light most favorable to the plaintiff, however, the court is under no duty to take as true legal conclusions or

[1] Hereafter "Response."

allegations that have no factual basis or are contrary to what has already been adjudicated."). Here, Plaintiffs agree there are no factual disputes. *See* Response at 6 ("The facts of this case are not in dispute. Rather, the question to this Court is a purely legal one ..."). Because this case involves purely legal issues and those issues have already been adjudicated, this Court is under no obligation to accept their allegations or legal conclusions as true.

A court has 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."). Given this presumption and the fact that the Supreme Court has already determined the statute in question is constitutional, Plaintiffs cannot meet their heavy burden.

Standing

Plaintiffs likewise fail to plead any cognizable legal injury that would grant them standing. *See* State's Brief in Support of Motion to Dismiss at 5–8 (July 23, 2021). In their response, Plaintiffs failed to offer any

additional legal support for standing beyond a one-paragraph recitation of *Brown*. Response at 18.

"[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. Constitutional cases still require a showing of an injury to a property or civil right. *See* State's Brief in Support of Motion to Dismiss at 5–8 (citing *Bond v. United States*, 564 U.S. 211, 222–23 (2011), *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), *Clinton v. City of New York*, 524 U.S. 417 (1998), *INS v. Chadha*, 462 U.S. 919 (1983), *State ex rel. Mitchell v. District Court*, 128 Mont. 325, 339, 275 P.2d 642, 649 (1954)) (all stating that justiciable injury to a property or civil right is required).

Plaintiffs' reliance on *Brown* to demonstrate SB 140 is a source of injury is unavailing because the Montana Supreme Court unambiguously held that the appointment scheme in SB 140 is constitutional. *See Brown*, ¶ 51. Judges appointed under SB 140's process enjoy the constitutional vestment of authority and, thus, there is no injury to Plaintiffs. *See Bond*, 564 U.S. at 223 (requiring a justiciable injury to challenge laws based on separation-of-powers concerns). Plaintiffs' unfounded, and unsupported, legal claims do not undermine the lawfulness of any judicial appointments

made pursuant to SB 140. More pertinently, because the Montana Supreme Court has already determined SB 140 is constitutional, Plaintiffs cannot establish a concrete injury necessary for standing.

I. *Brown* controls this case and Plaintiffs' Response implicitly acknowledges this fact.

Plaintiffs—despite multiple filings—have not put forward any argument that raises issues not already decided by *Brown*. Plaintiffs make clear that the heart of their constitutional challenge against SB 140 lies in Article VII, § 8. *See* Response at 7 ("SB 140...violates the implied limitation contained in Article VII, Section 8(2)"). Yet they ignore the Montana Supreme Court's unambiguous holding that "SB 140 does not violate Article VII, Section 8(2) of the Montana Constitution." *Brown*, ¶ 51. Plaintiffs' attempt to circumvent this holding—which is binding on this Court—is unavailing. *See* Response at 19. This Court should reject Plaintiffs' attempt to relitigate issues squarely decided in *Brown*, including Plaintiffs' claims that SB 140 must be found unconstitutional because it violates the negative implication canon or contradicts the policy behind Article VII, § 8(2).

A. Plaintiffs repeatedly call into question SB 140's constitutionality under Art. VII, § 8(2), but this is the precise issue litigated in *Brown.*

Plaintiffs' core argument is that the "Constitution does not expressly permit or direct the Governor to determine" who may be considered a "nominee" selected pursuant to Article VII, § 8(2). Response at 2; *see also* Response at Part I(A), Complaint, ¶¶ 4,7. This argument is clearly foreclosed by *Brown. Id.* ¶ 51 ("SB 140 does not violate Article VII, Section 8(2) of the Montana Constitution.").

Though Plaintiffs contend the Montana Supreme Court did not analyze "the interplay between Article III, Section 1, and SB 140," Response at 19, a review of their response brief demonstrates that Plaintiffs' claims are inextricably linked to Article VII, § 8(2). *See* Response at 7 (relating Article III, § 1 and Article VII, § 8(2)). For example, Plaintiffs' separation-of-powers argument necessarily relies on an argument that SB 140 is unconstitutional under Article VII, § 8(2).[2] *See* Response at 7 ("SB 140's delegation of authority ... violates the implied limitation in Article VII, Section 8(2), given force by Article III, Section 1."). Article VII, § 8(2) allows the Governor to appoint "from nominees selected *in the manner provided by law.*" This means the Legislature has the authority to create a process for the Governor

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[2] *See also,* State's Brief in Support of Motion to Dismiss at 8.

to follow when appointing judicial replacements. To challenge the separation of powers under Article III, § 1 means that Plaintiffs are either challenging the fact that the Governor can appoint at all or the process the Legislature has created. We know that Plaintiffs' rub with SB 140 is the process, or the "manner provided by law." This is an Article VII, § 8(2) argument, which *Brown* foreclosed.

Moreover, the Court in *Brown* considered the interplay between the Legislative and Executive branches when it addressed both the Legislature's power to establish a nominee selection process and the Governor's power to appoint from such nominees. *Brown*, ¶¶ 41–49 (discussing delegate views that ranged from "unfettered discretion in the Governor" to support for "a committee or commission to screen candidates," but ultimately deciding to "delegate[] the process for selecting nominees to the Legislature"); *see also* State's Brief in Support of Motion to Dismiss at 8.

Additionally, though they contend the manner in which nominees are selected pursuant to SB 140 violates Article VII, § 8(2), *see* Response at 8, Plaintiffs later acknowledge this was the issue presented and addressed in *Brown*. Response at 19 (The "question posed by ... *Brown* ... as whether SB 140 is unconstitutional under Article VII, Section 8(2) of the Montana Constitution, which provides ... the governor shall appoint a replacement

from nominees selected in the manner provided by law.") (internal citations and quotations omitted); *see also Brown*, ¶ 51.

Plaintiffs' decision to bring suit under Article III, § 1 is just an attempt to relitigate *Brown*, and this Court should reject that attempt.

B. *Brown* applied the plain meaning of Art. VII, § 8(2), to SB 140.

When constitutional language is unambiguous, courts must discern the framers' intent "from the plain meaning of the language used without further resort to means of statutory construction." *Larson*, ¶ 28. As the Montana Supreme Court affirmed, Article VII, § 8(2), by its plain language, "delegated the process for selecting nominees to the Legislature in broad language that the selection of nominees be in the manner provided by law." *Brown*, ¶ 41 (internal quotation omitted). SB 140 "complies with the language and constitutional intent of Article VII, Section 8(2)." *Id.* ¶ 50.

Plaintiffs misapply the negative implication canon—*expressio unius est exclusio alterius*—in an attempt to create an ambiguity in the constitution's text that simply does not exist. *See* Response at 2, 7–8. But canons of statutory interpretation need not be invoked when the text is clear and unambiguous, as it is here. Furthermore, the specific canon invoked—the negative implication canon—is inapplicable in this context even if the text was ambiguous. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW:

THE INTERPRETATION OF LEGAL TEXTS at 107 (2012). This canon "must be applied with great caution, since its application depends so much on context." *Id.* It applies only when the legislative body (or constitutional text) expressly mentions one or more things of a class and others of the same class are excluded. *Id.*; *see also Harris v. Smartt,* 2003 MT 135, ¶ 17, 316 Mont. 130, 68 P.3d 889 (applying the negative implication canon to constitutional text). That is not the case here for the reasons stated above. Article VII, § 8(2) uses "*broad language*" and the Legislature acted within this broad grant to enact SB 140. *Brown,* ¶¶ 41, 50 (internal quotation omitted) (emphasis added).

Plaintiffs' tortured reading of Article VII, § 8(2) not only misapplies rules of legal construction, it also runs counter to plain meaning and the Montana Supreme Court's clear holding that "SB 140 does not violate Article VII, Section 8(2) of the Montana Constitution." *Brown,* ¶ 51.

C. *Brown* confirmed SB 140 furthered the policy of Article VII, § 8(2).

The Montana Supreme Court stated that the policy of Article VII, Section 8(2) was to recruit "good judges" to the bench. *See Brown,* ¶ 43 ("The manifest constitutional objective of Article VII, Section 8(2) was the appointment of good judges."). SB 140 complies with the language and intent of Article VII, § 8(2). *See id.* ¶ 50.

Plaintiffs' arguments fail to address that SB 140 adheres to the constitutional policy behind Article VII, § 8(2). *See* Response at 13–15. The Legislature provided by law a manner to select nominees in SB 140. The Court upheld SB 140 as complying with the language and intent of the Montana Constitution. Plaintiffs may disagree, but the Court's ruling was clear that SB 140 does not violate any of the express or implied language of Article VII, § 8(2). *See Brown*, ¶ 51 ("SB 140 does not violate Article VII, Section 8(2) of the Montana Constitution.").

II. Plaintiffs' argument that SB 140 constitutes an improper delegation of legislative authority lacks merit.

In arguing that SB 140 violates the separation of powers, Plaintiffs' Response does not address the interbranch relationships inherent in the constitutional structure of Article VII, § 8(2). *See* Response at 6–18. SB 140's process is expressly permitted by the Constitution. *See Brown*, ¶ 50. To the extent SB 140 contains a delegation of authority to the executive branch, this delegation is constitutional because Article VII, § 8(2) expressly directs the Legislature to select any manner for selecting nominees, implicitly permitting the Legislature to select a nomination process that involves the Governor. *See Baumgardner v. Public 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").[3] Plaintiffs fail to state how SB 140 unlawfully delegates legislative authority or exceeds the Governor's authority.

A. Plaintiffs fail to state how SB 140 constitutes and unlawful delegation of legislative authority.

Brown made explicitly clear that SB 140 passes constitutional muster without reference to the prior judicial appointment scheme. *See Brown*, ¶ 50 ("[I]t is not the function of this Court to determine which process we think is the better process for making judicial appointments—it is to determine whether the process prescribed by SB 140 complies with the constitution .... [w]e conclude that it does."); *see also id.* ¶ 46 ("it is not the task of this Court to assess the relative 'crudeness' of the process; it is to assess the constitutionality of the process"). But given that Plaintiffs' constitutional challenge strikes not at the differences between SB 140 and the prior scheme, but at their similarities, a comparison between the two schemes only further exposes the flaws in their argument.

Plaintiffs do not meaningfully distinguish SB 140 from the prior statutory scheme. *See* Response at 1, 15–18. Plaintiffs argue that, in the prior

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[3] The State continues to dispute Plaintiffs' assertion that filling a judicial vacancy is a power properly belonging to any branch other than the executive. *See* State's Brief in Support of Motion to Dismiss. at 11.

scheme, the Legislature delegated judicial appointment authority to a separate branch of government—the judiciary.[4] *See id.* at 1 ("Previously, the Legislature had delegated the selection of nominees to the judiciary itself."). Yet, Plaintiffs do not, and cannot, demonstrate how a delegation of authority to the judiciary would be permissible, but a delegation of authority to the executive would be impermissible. *See Brown,* ¶50.

Further, Plaintiffs' attempt to distinguish SB 140 from the prior scheme on the grounds that prior law "required the Commission to adopt and publish rules establishing the procedure for applying for a position" is unavailing. Response at 16 (internal citations and quotations omitted).[5] First, SB 140 provides by law the nominee selection process and this process was held to be constitutional. *See Brown,* ¶ 51. That is where the inquiry

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[4] The State disagrees that this was a delegation of legislative authority. The delegation doctrine refers to when a legislature "transfer[s] to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). Here, the Legislature is given the authority to provide by law a manner by which the Governor shall select nominees. The power at issue is the power to create a law, not the power to select nominees. The judicial nominating commission did not have the power to create laws, thus the Legislature's power has not been delegated.

[5] Notably, Plaintiffs do not cite to the rules adopted by the Judicial Nomination Commission. Plaintiffs similarly do not cite any form, application, or record of the prior Judicial Nomination Commission. As the State has repeatedly demonstrated, SB 140 largely echoes the prior process. *See e.g.*, State's Brief in Support of Motion to Dismiss at 13–15; *see also Brown,* ¶ 44. Plaintiffs' unsubstantiated allegations that SB 140 constitutes an "extraordinarily broad and invasive" process could easily be dispelled by actually looking at what the prior process entailed. *See* Response at 15. Regardless, the Montana Supreme Court upheld SB 140 as constitutional.

should end. Going further, however, SB 140's language reflects the language adopted by rule by the Judicial Nomination Commission ("JNC"). *Compare* Rules of the JNC, Rule 3.2 (October 5, 2020) (Filed with the Clerk of the Supreme Court) ("Eligible persons may apply for the vacant judicial position by completing and submitting to the OCA (Office of the Court Administrator) an original signed paper application and an electronic copy of the original application by the deadline date and time contained in the application."), SB 140, § 3 ("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."). These provisions, on their face, are functionally identical. SB 140 is constitutional on its own terms, *see Brown*, ¶ 51, but in these respects it does not appreciably deviate from prior practice.

Finally, Plaintiffs claim SB 140 must be unconstitutional because the Legislature failed to provide "objective criteria" governing the application process. *See* Response at 15. As stated previously, Article VII, § 8(2) provides the overriding criteria of the process and that is to recruit "good judges." *Brown*, ¶ 42. The Legislature in turn created a process for selecting nominees that meets this constitutional requirement. *See Brown*, ¶¶ 44, 46-50 (SB 140's requirements for qualifications, application periods, public

comment period, and three letters of public support complies with Article VII, § 8(2)). SB 140 provides a process that meets this salient goal of recruiting good judges. *See Brown*, ¶ 50 (SB 140 "complies with the language and constitutional intent of Article VII, Section 8(2)").

B. The Governor's appointment authority is properly limited to nominees.

Plaintiffs incorrectly argue that the requirement to apply to the Governor is unconstitutional. *See* Response at 15 ("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 ..."). Individuals must apply to someone to be considered for nomination. SB 140's application process, and the prior scheme, allowed the entity an individual applies to wide latitude in determining the manner of application. *See* SB 140, § 3 ("An eligible person may apply for the vacant judicial position by completing and submitting to the governor an original signed paper application ..."), Rules of the JNC, Rule 3.2 ("Eligible persons may apply for the vacant judicial position by completing and submitting to the OCA an original signed paper application ...)." Thus, Plaintiffs' argument that SB 140 improperly grants discretion in the application process misses the mark. Individuals have always had to apply to someone to be considered for nomination to a vacancy, and the entity reviewing

applications has always had discretion in the application process. What matters constitutionally is that SB 140's application process ensures that applicants go through a public comment and public vetting process. *See* SB 140, § 4, *see also Brown*, ¶ 47. Plaintiffs thus have failed to state a claim upon which relief may be based.

Conclusion

Plaintiffs' Complaint suffers from incurable defects that require the Court to dismiss. *See* State's Brief in Support of Motion to Dismiss at 16–17 (Plaintiffs failed to adequately support their Complaint with relevant authority). Plaintiffs still have not established standing or developed facts and legal authority sufficient to state a claim upon which relief may be based.

Most importantly, Plaintiffs base their argument on a contention that SB 140 violates Article VII, § 8(2). *See* Response at 7 ("SB 140's delegation of authority to the Governor ... violates the implied limitation contained in Article VII, Section 8(2), given force by Article III, Section 1."). The Montana Supreme Court unambiguously held "SB 140 does not violate Article VII, Section 8(2) of the Montana Constitution." *Brown*, ¶ 51. Plaintiffs' arguments have been heard and resolved and this case must be dismissed pursuant to Mont. R. Civ. P. 12(b)(6).

DATED the 23rd day of August, 2021.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By:
KATHLEEN L. SMITHGALL
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by first class, postage paid mail and email to the following:

E. Lars Phillips
TARLOW STONECIPHER
WEAMER & KELLY, PLLC
1702 West College
Bozeman, Montana 59715-4913
lphillips@lawmt.com

Date: August 23, 2021

ROCHELL STANDISH