MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

TOM 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 **DISMISSAL MOTION ORDER**

On July 23, 2021, the State of Montana (Montana) moved to dismiss Tom Winter (Winter) and Barbara Bessette's (Bessette) June 25, 2021 Complaint for Declaratory and Injunctive Relief.

Montana's motion is fully briefed. On August 23, 2021, it filed a submittal notice. Neither party requested oral argument.

MATERIAL FACTUAL BACKGROUND[1]

From 2009 through 2020, former Democratic Governors Schweitzer and Bullock appointed the following Supreme Court Justices, Montana District Court and Workers Compensation Court Judges:[2]

Position (Incumbent)	Applications Solicited	Appointment
Supreme Court Justice (Warner)	September 2009	Wheat (January 2010)
12th Judicial District Judge (Rice)	September 2010	Boucher (December 2010)
Workers' Compensation Court Judge (Shea)	June 2011	Shea (October 2011)
16th Judicial District Judge (Day)	February 2013	Hayworth (June 2013)
20th Judicial District Judge (McNeil)	July 2013	Manley (October 2013)
13th Judicial District Judge (Watters)	December 2013	Moses (April 2014)
Supreme Court Justice (Morris)	January 2014	Shea (May 2014)
Workers' Compensation Court Judge (Shea)	May 2014	Sandler (September 2014)
4th Judicial District Judge (McLean)	January 2015	Halligan (May 2015)
8th Judicial District Judge (Neill)	February 2015	Kutzman (June 2015)
11th Judicial District Judge (Lympus)	July 2015	Eddy (October 2015)
1st Judicial District Judge (Sherlock)	August 2015	Cooney (December 2015)
16th Judicial District Judge (Huss)	November 2015	Murnion (February 2016)
17th Judicial District Judge (McKeon)	August 2016	Laird (November 2016)
18th Judicial District Judge (Salvagni)	August 2016	Rienne McElyea (December 2016)

[1] For additional material background, please see *Brown v. Gianforte*, 2021 MT 149, ¶¶ 4-6, 404 Mont. 269, 488 P.3d. 548 which are incorporated by reference as if fully restated herein.

[2] List does not include Montana Water Court appointments made by the Chief Justice. See Mont. Code 3-1-1001 (2019).

5th Judicial District Judge (Tucker)	September 2016	Berger (January 2017)
8th Judicial District Judge (Sandefur)	November 2016	Parker (March 2017)
Workers' Compensation Court Judge (Sandler)	April 2017	Sandler (July 2017)
7th Judicial District Judge (Simonton)	April 2017	Rieger (August 2017)
13th Judicial District Judge (Fagg)	July 2017	Harris (November 2017)
Supreme Court Justice (Wheat)	August 2017	Gustafson (December 2017)
13th Judicial District (Gustafson)	December 2017	Fehr (March 2018)
21st Judicial District (Haynes)	May 2018	Lint (August 2018)
12th Judicial District (Boucher)	September 2018	Snipes Ruiz (January 2019)
4th Judicial District (New Position)	October 2018	Vannatta (February 2019)
21st Judicial District (Langton)	February 2019	Recht (May 2019)
4th Judicial District (Townsend)	April 2019	Marks (August 2019)
18th Judicial District (H. Brown)	June 2020	P. Ohman (September 2020)
8th Judicial District (Pinski)	July 2020	M. Levine (November 2020)
1st Judicial District (Reynolds)	July 2020	C. Abbott (November 2020)

Schweitzer and Bullock appointed the respective jurists based upon a "list of candidates for appointment" they received from the former Montana Judicial Nomination Commission (JNC). Mont. Code Ann. § 3-1-1001(1) (2019). The former JNC was comprised of seven members, four of which were appointed by the Governor. Mont. Code Ann. § 3-1-1001(1)(a) (2019).

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From 2013 through 2020, Bullock made twenty-seven judicial appointments, including two Montana Supreme Court and twenty-three Montana District Court appointments. All but two of Bullock's judicial appointees remain in the Montana judiciary branch.[3]

As a result of the 2020 Montana election, the Republican Party retained its majority control in the Montana Legislature and regained control of the Governor's Office.

During the 2021 Legislative Session, SB 140 was introduced. After passing both legislative houses, on March 16, 2021, Governor Gianforte signed SB 140. It became effective on the same date. SB 140 provides, in relevant part, that:

> **Section 1. Judicial vacancy -- notice.** (1) (a) Upon receiving notice from the chief justice of the supreme court, the governor shall appoint a candidate, as provided in [sections 1 through 7], to fill any vacancy on the supreme court or the district court.
>
> (b) The chief justice of the supreme court shall appoint a candidate to fill any term or vacancy for the chief water judge or associate water judge pursuant to 3-7-221.
>
> (2) Within 10 days of the date of receipt by the governor of the notice from the chief justice of the supreme court that a vacancy has occurred or the effective date of a judicial resignation has been announced, the governor shall notify the public, including media outlets with general statewide circulation and other appropriate sources, that a vacancy has been announced, including the deadline within which applications must be received.
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> **Section 2. Investigation -- qualifications for appointment.** (1) The governor may authorize investigations concerning the qualifications of eligible persons.
>
> (2) A lawyer in good standing who has the qualifications set forth by law for holding judicial office may be a candidate and may

[3] Judge Cooney was not elected. The 2021 Senate did not confirm Judge Levine

apply to the governor for consideration, or application may be made by any person on the lawyer's behalf.

Section 3. Applications. 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. The deadline date must be within 40 days of the governor's receipt of the notice of vacancy provided by the chief justice.

Section 4. Public comment. (1) The governor shall establish a reasonable period for reviewing applications and interviewing applicants that provides at least 30 days for public comment concerning applicants.

(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 by the close of the public comment period provided for in subsection (1) must be considered a nominee for the position.

(3) The total time from receipt of notice of a vacancy until appointment may not exceed 100 days.

(4) The application, public comment, and any related documents are open to the public except when the demands of individual privacy clearly exceed the merits of public disclosure.

Section 5. Appointments. (1) The governor, or the chief justice of the supreme court for the office described in 3-7-221, shall make an appointment within 30 days of the close of the public comment period from the list of applicants.

(2) For purposes of Article VII, section 8, of the Montana constitution, the governor must be construed to receive the names of the nominees at the close of the public comment period provided for in [section 4].

(3) If the governor fails to appoint within 30 days of the close of the public comment period provided for in subsection (1), the chief justice shall make the appointment from the same list of applicants within 30 days of the governor's failure to appoint.

Section 6. Senate confirmation -- exception -- nomination in interim -- appointment contingent on vacancy. (1) (a) Except as provided in subsection (2):

(i) each appointment must be confirmed by the senate; and

(ii) an appointment made while the senate is not in session is effective until the end of the next special or regular legislative session.

(b) If the appointment is subject to senate confirmation under subsection (1)(a) and is not confirmed, the office is vacant and another selection of nominees and appointment must be made.

(2) The following appointments are not subject to senate confirmation, and there must be an election for the office at the general election immediately preceding the scheduled expiration of the term or following the appointment, as applicable:

(a) an appointment made while the senate is not in session if the term to which the appointee is appointed expires prior to the next legislative session, regardless of the time of the appointment in relation to the candidate filing deadlines for the office; and

(b) an appointment made while the senate is not in session if a general election will be held prior to the next legislative session and the appointment is made prior to the candidate filing deadline for primary elections under 13-10-201(7), in which case the position is subject to election at the next primary and general elections.

(3) A nomination is not effective unless a vacancy in office occurs.

Section 7. Duration of appointment -- election for remainder of term. (1) If an appointment subject to [section 5] is confirmed by the senate, the appointee shall serve until the appointee or another person elected at the first general election after confirmation is elected and qualified. The candidate elected at that election holds the office for the remainder of the unexpired term.

> (2) If an incumbent judge or justice files for election to the office to which the judge or justice was elected or appointed and no other candidate files for election to that office, the name of the incumbent must nevertheless be placed on the general election ballot to allow voters of the district or state to approve or reject the incumbent. If an incumbent is rejected at an election for approval or rejection, the incumbent shall serve until the day before the first Monday of January following the election, at which time the office is vacant and another appointment must be made.

In addition, SB 140 repealed Mont. Code Ann. § 3-1-1001 through 3-1-1014 relative to the JNC thereby abolishing that Commission.

On March 17, 2021, *Brown* was filed as an original proceeding with the Montana Supreme Court challenging SB 140. The *Brown* Petitioners claimed that SB 140 violated Art. VII, sec. 8(2) of the Montana Constitution. It provides:

> 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. If the governor fails to appoint within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the appointment from the same nominees within thirty days of the governor's failure to appoint. Appointments made under this subsection shall be subject to confirmation by the senate, as provided by law. If the appointee is not confirmed, the office shall be vacant and a replacement shall be made under the procedures provided for in this section. The appointee shall serve until the election for the office as provided by law and until a successor is elected and qualified. The person elected or retained at the election shall serve until the expiration of the term for which his predecessor was elected. No appointee, whether confirmed or unconfirmed, shall serve past the term of his predecessor without standing for election.

Mont. Const., art. VII, sec. 8(2).

On June 10, 2021, the Montana Supreme Court held, in relevant part, that "SB 140 does not violate Article VII, Section 8(2) of the Montana Constitution." *Brown*, ¶ 51.

On June 25, 2021, Winter and Bessette filed their Complaint for Declaratory and Injunctive Relief. Winter represented Montana House District 96 as a Democrat from January 7, 2019 to January 3, 2021. Bessette represented Montana House District 24 as a Democrat from January 7, 2019 to January 3, 2021. They allege SB 140 violates Art. III, sec. 1, Mont. Const. "by allowing the Governor to exercise power over the determination of which eligible persons may fill a judicial vacancy prior to designation of nominees for the position." (Complaint, ¶ 2.) That provision provides that:

> The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. 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.

Mont. Const., Art. III, sec. 1.

Winter and Bessette claim that:

> SB 140 unconstitutionally removes this limitation on the Governor's power by granting the Governor the power to determine which eligible persons shall be considered "nominees." In this way, SB 140 vests the executive with near plenary authority in determining which eligible persons to appoint to fill a judicial vacancy.

(Complaint, ¶ 5.)

> This exercise of power by the executive branch fundamentally alters the balance of co-equal branches of government in Montana. The plain language Mont. Const. art. VII, § 8(2) allows the Governor to play a limited role in the context of judicial vacancies, only allowing [them] to

> appoint a replacement from "nominees selected in the manner provided by law." SB 140 provides the Governor with unconstitutionally unfettered access into the judicial appointment process and results in the executive branch gaining an outsized and unequal place among the branches of government.

(Complaint, ¶ 7.) Winter and Bessette appear to rely, in part, upon Justice McKinnon's dissenting opinion that "SB 140 is not a merit-based nomination process and does nothing to prevent direct appointments by the governor—and the Court should call it for what it is. It quite simply allows the governor to make a direct appointment from self-nominated applicants." *Brown*, ¶ 68. (J. McKinnon, dissent.)

> In my opinion, by giving the governor plenary power to select judges, SB 140 poses precisely the threat to the independence of Montana's judiciary that Montana has historically been burdened with and that the 1972 Framers sought to prevent. This Court's failure to call SB 140 for what it is gives a green light to a partisan branch of government to select judges who are charged with the responsibility of providing a check on that power. While perhaps this design exists in other states and federally, the 1972 Framers did not want it to exist in Montana. Obviously, this Court will have to consider the constitutionality of statutes enacted by the Legislature and signed into law by the governor. Principals of separation of power and our constitutional design provide that the necessary check on partisan power and overreach is through an independent and nonpartisan judiciary. The Court's decision today weakens that balance. There is little question in my mind that the Framers, burdened with a history of political corruption and overreach and committed to a qualified and independent judiciary, were united in their conviction that the governor should no longer have plenary authority to make a direct appointment, as in the 1889 Constitution. Foremost on the Framers' minds was an independent judiciary and ensuring that power was not disproportionately placed in one branch of government. In my opinion, SB 140 is inconsistent with the plain language of Article VII, Section 8, and what was at the core of the

> Framers' convictions—to preserve the integrity and independence of Montana's judiciary in light of our significant history of political corruption and overreach into the courts.

Brown, ¶ 84 (J. McKinnon, dissent.)

On July 2, 2021, this Court denied Winter and Bessette's temporary restraining order request and set a preliminary injunction hearing for July 15, 2021. On July 9, 2021, Winter and Bessette requested supervisory control by the Montana Supreme Court over this proceeding. On July 13, 2021, Winter and Bessette moved, unopposed, to vacate the preliminary injunction hearing. On July 14, 2021, this Court issued an order vacating the preliminary injunction hearing as Winter and Bessette requested. On July 20, 2021, the Montana Supreme Court denied Winter and Bessette's supervisory control request.

REVIEW STANDARDS and CONTROLLING AUTHORITY

Dismissal Standard

A complaint should not be dismissed unless it appears "beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle[] him to relief." *Spencer v. Beck*, 2010 MT 256, ¶ 10, 358 Mont. 295, 245 P.3d 21. For these reasons, dismissal motions are not favored and are rarely granted..." *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250.

> In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true. *Id.* "[S]hould defendants desire any further degree of specificity, they may obtain the same by use of the appropriate discovery devices such as depositions, interrogatories and requests to admit. This Court does not favor the short circuiting of litigation at the initial

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pleading stage unless a complaint does not state a cause of action under any set of facts…

Willson v. Taylor, 194 Mont. 123, 128, 634 P.2d 1180, 1183 (1981) (citing authority).

Moreover, the only relevant documents when considering a dismissal motion are the complaint and any documents it incorporates by reference. *Cowan v. Cowan*, 2004 MT 97, ¶ 11, 321 Mont. 13, 89 P.3d 6.

Furthermore, whether to dismiss a declaratory judgment petition because such relief is not "necessary or proper" rests in "the sound discretion of the district court." *Northfield*, ¶ 8. "[E]ven though all of the necessary elements of jurisdiction exist, the district court is not required to exercise that jurisdiction." *Brisendine v. Department of Commerce, Bd. of Dentistry*, (1992), 253 Mont. 361, 364, 833 P.2d 1019 (1992) (citing authority).

Standing

Justiciability is a legal question. See *Northfield Ins. Co. v. Mont. Assn. of Counties*, 2000 MT 256, ¶ 8, 301 Mont. 472, 10 P.3d 813. The standing doctrine, among others, are categorized under the broad justiciability umbrella. *Id.* Here, among other things, Plaintiffs seek a declaratory ruling that SB 140 violates Article III, § 1 of the Montana Constitution.

The Uniform Declaratory Judgments Act's (Act) purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations…." Mont. Code Ann. § 27-8-102 (2021). Under the Act, a district court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code Ann. § 27-8-201 (2021). "Any person . . . whose rights, status, or other legal relations

are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." Mont. Code Ann. § 27-8-202 (2021). A district court "may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Mont. Code Ann. § 27-8-206 (2019). Consequently, a justiciable controversy must exist before a court may exercise jurisdiction under the Act. *Northfield Ins.*, ¶ 10.

> A party must have standing—that is, a personal stake in the outcome—for a court to decide a case. *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶¶ 14-16, 340 Mont. 56, 172 P.3d 1232. Standing is a threshold, jurisdictional requirement that "limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing)." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187. To meet the case-or-controversy requirement, a plaintiff must clearly allege a past, present, or threatened injury to a property or civil right and the injury must be one that would be alleviated by successfully maintaining the action. *Bullock*, ¶ 31; *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430; *Heffernan*, ¶ 33. Prudential standing is a form of judicial self-governance that discretionarily limits the exercise of judicial authority consistent with the separation of powers. *Bullock*, ¶ 43. The Legislature "may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Heffernan*, ¶ 34 (internal quotations and citations omitted).

Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty., 2019 MT 147, ¶¶ 19-20, 396 Mont. 194; 445 P.3d 1195; see also, *Brown*, ¶10 (finding, in relevant part, that case-or-controversy standing, and prudential standing existed relative to Petitioners' challenge Mont. Const. art. VII, § 8(2) challenge to SB 140).

In addition, the Montana Supreme Court has broadly interpreted the concept of standing and has stated that standing questions must be viewed in part in light of "discretionary doctrines aimed at prudently managing judicial review of the legality of public acts . . ." *Comm. for an Effective Judiciary v. State*, 209 Mont. 105,110, 679 P.2d 1223 (1984) (quoting *Stewart v. Bd. of County Comm'rs. of Big Horn County*, 175 Mont. 197,200, 573 P.2d 184, 186 (1977)). The *Committee for an Effective Judiciary* Court acknowledged the New Mexico Supreme Court's recognition that private parties should be granted standing to contest important public issues. *Committee for an Effective Judiciary*, 209 Mont. at 110 (citing *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974)).

Separation of Power

Here, Winter and Bessette contend that SB 140 violates Art. III, sec. 1 of the Montana Constitution. It provides:

> The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. 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.

It is undisputed that the separation of powers of the Montana executive, legislative and judicial branches is a fundamental governmental principle. *Kradolfer v. Smith*, 246 Mont. 210, 213, 805 P.2d 1266 (1990). "Each branch is independent and co-equal and is immune from the control of the other two branches of government in the absence of express constitutional authority to the contrary." *Id.* (citing authority).

"Statutes are presumed to be constitutional, and it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Hernandez*, ¶ 15 (citing *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 11, 296 Mont. 402, 989 P.2d 800; *State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997)). The party challenging a statute's constitutionality bears the heavy burden of proving the statute is unconstitutional "beyond a reasonable doubt." *Molnar v. Fox*, 2013 MT 132, ¶ 49, 370 Mont. 238, 301 P.3d 824.

When interpreting constitutional provisions, we apply the same rules as those used in construing statutes. Nelson v. City of Billings, 2018 MT 36, ¶ 14, 390 Mont. 290, 412 P.3d 1058. But just as with statutory interpretation, constitutional construction should not "lead to absurd results, if reasonable construction will avoid it." *Nelson*, ¶ 16 (citing *Grossman v. Mont. Dep't of Natural Res.*, 209 Mont. 427, 451, 682 P.2d 1319, 1332 (1984)). "The principle of reasonable construction 'allows courts to fulfill their adjudicatory mandate and preserve the [Framers'] objective.'" *Nelson*, ¶ 16 (citation omitted). Thus:

> Even in the context of clear and unambiguous language . . . we have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.

Brown, ¶¶ 32-33 (citing authority). Moreover, Justice Rice, in his concurring *Brown* opinion provided that:

> The Separation of Powers provision is not a grant of power, but a limitation upon power, specifically, upon the inappropriate exercise of power by a branch beyond that respectively granted under Articles V, VI, and VII of the Montana Constitution. See Larry M. Elison & Fritz Snyder, The Montana State Constitution: A Reference Guide

> 89-90 (2001) (stating that "[p]ower granted to one branch of government cannot be exercised by another" and collecting cases, including those addressing legislative "intrusions on judicial powers.").

Brown, ¶ 55. The Montana Supreme Court set forth each branches respective powers when it said:

> The 1972 Montana Constitution vested the Legislature with the exclusive authority to enact [laws], the Governor, as the chief officer of the executive, with the exclusive authority and duty to see that [laws are] faithfully executed, and the judiciary with the exclusive authority and duty to adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law. Mont. Const. arts. III, § 1, VI, § 4(1), VII, § 1.

Bullock v. Fox, 2019 MT 50, ¶ 26, 395 Mont. 35, 435 P.3d 1187.

DISCUSSION

Plaintiffs Have Standing Under *Brown*

To meet standing's constitutional case-or-controversy requirement, Winter and Bessette must explicitly allege a past, present, or threatened injury to a property or civil right, and the injury must be one that would be alleviated by successfully maintaining the action. *Heffernan*, ¶ 33. Moreover, standing may rest not only on past or present injury, but also on threatened injury. See *Gryczan v. State*, 283 Mont. 433, 442-43, 942 P.2d 112 (1997).

Winter and Bessette contend that the *Brown* Court's "case-or-controversy standing" determination binds this Court in this proceeding:

> 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.

(Pl.'s Resp. Opp'n St. Mont.'s Mot. Dismiss, at 18 (Aug. 10, 2021).)

Montana claims Winter and Bessette lack standing to bring this declaratory judgment action relative to SB 140's constitutionality:

> 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.
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> 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).

(St. Mont.'s Br. Supp. Mot. Dismiss, at 6-8 (Aug. 3, 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.

(St. Mont.'s Reply Br. Supp. Mot. Dismiss, at 2-4, (Aug. 23, 2021).)

Here, the Court agrees with Winter and Bessette that the *Brown* Court's "case-or-controversy standing" analysis is equally applicable in this proceeding. Montana made a similar argument in *Brown* which the Montana Supreme Court rejected.

> Rather, the appointed judge will be a district court judge whose rulings will impact hundreds of litigants, criminal defendants, and third parties. If we were to conclude that Petitioners lack standing, once a judge is appointed pursuant to SB 140 any person appearing before that judge or subject to his or her authority would have standing to challenge SB 140's constitutionality. As a practical matter, should SB 140 be found unconstitutional through the normal course of litigation and appeals after an appointed judge presides in the case, motions, briefs, or hearings in any affected cases would need to be re-heard, and warrants, orders, or sentences the judge issued would be voided. Needless to say, resolving such a situation would come at great expense in time and money to the county, the judicial system, and the individual litigants.

Brown, ¶ 16. Based upon *Brown*, this Court also finds that Winter and Bessette have "satisfied case-or-controversy standing." *Id.*, ¶ 20.

Neither Winter and Bessette nor Montana addressed whether the current SB 140 "challenge exceeds prudential standing limitations." *Brown*, ¶ 20. Nonetheless, again, this Court will follow and apply *Brown* relative to prudential standing.

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> Although the Governor is correct that the Montana Constitution grants the authority to the Legislature to determine how nominees for a judicial vacancy are presented to the Governor, that authority must nevertheless be exercised in compliance with the provisions of the Constitution. The very heart of this dispute is whether SB 140 comports with the provisions of Article VII, Section 8(2) of the Montana Constitution. Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial branch. It is circular logic to suggest that a court cannot consider whether a statute complies with a particular constitutional provision because the same constitutional provision forecloses such consideration. We therefore conclude that prudential standing does not bar our consideration of the petition.

Id., ¶ 24.

Accordingly, this Court finds, in reliance upon *Brown,* that Winter and Bessette have standing relative to their SB 140 challenge.

Dismissal Motion

Winter and Bessette allege "SB 140 violates the separation of powers provision of Montana's Constitution, *see* Mont. Const., art. III, § 1, by allowing the Governor to exercise power over the determination of who may fill a judicial vacancy prior to the selection of nominees because SB 140:

a. Grants the Governor the sole authority to investigate applicants for judicial vacancies, SB 140, § 2(1);
b. Grants the Governor the authority to investigate individuals prior to their selection as nominees, *see* SB 140, § 2(2);
c. Requires that eligible persons submit applications to the Governor in order to be considered, SB 140 § 2(2);
d. Grants the Governor the authority to set the parameters to determine who qualifies as an applicant, SB 140, § 3;
e. Grants the Governor to the authority to set the terms of the required application, *see* SB 140, § 3;

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f. Grants the Governor the authority to receive applications directly, *see* SB 140, §§ 2(2), 3;

g. Grants the Governor the authority to review applications and public comment submitted concerning the applicants, SB 140, § 4(1)-(2);

h. Grants the Governor the authority to receive 'letters of support' and, by implication, review said letters for sufficiency, SB 140, § 4(1)-(2); and

i. Grants the Governor authority to appoint 'from the list of applicants,' SB 140, § 5(1).

(Complaint, ¶ 53).

In addition, Winter and Bessette claim that:

> Through this exercise of power, the Governor is effectively making law – an act forbidden by Mont. Const. art. III, § 1.

Id., ¶ 55.

> By granting the Governor unrestrained discretion in this context, the Legislature has delegated power that Mont. Const. art. VII, § 8(2), requires it to retain - again, in violation of Mont. Const. art. III, § 1.

Id., ¶ 56.

> Because SB 140 grants the Governor the authority to determine which eligible persons may be considered nominees, the statutory scheme grants power to the executive that is not contemplated expressly in Montana's constitution thereby violating the separation of powers, rendering meaningless the clause that the Governor "shall appoint a replacement from nominees selected in the manner provided by law." Mont. Const. art. VIII, § 8(2).

Id., ¶ 57.

> SB 140 violates the separation of powers provision of Montana Constitution, *see* Mont. Const. art. III, § 1, by over-delegating legislative authority to the executive branch.

Id., ¶ 58.

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Here, Winter and Bessette seek to effectuate a change in Montana's judicial appointment constitutional policy through the courts because they would prefer the abolished JNC judicial appointment process to SB 140's "direct Governor appointment" process. As the *Brown* Court noted,

> During the debate over SB 140, some contended that the [JNC] should continue unaltered, some contended that it should be modified, and some contended that it should be abolished. In the final analysis, however, it 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, which is presumed to be constitutional, complies with the language and constitutional intent of Article VII, Section 8(2).

Brown, ¶ 50.

Montana contends that Winter and Bessette's complaint should be dismissed as a matter of law.

> [Winter and Bessette's] Complaint ... should be dismissed pursuant to Montana Rule of Civil Procedure 12(b)(6) because [they] cannot, and do not, state a valid legal theory challenging [SB 140's] constitutionality. 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.

(St. Mont.'s Br. Supp. Mot. Dismiss, at 1 (Aug. 3, 2021).) While Winter and Bessette would rather this Court rely upon Justice McKinnon's dissenting *Brown* opinion, this Court is obligated, where applicable, to apply *Brown's* majority opinion. In this regard, it appears the *Brown* Court

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has already answered, in the negative, Winter and Bessette's "nominee, eligibility and investigation" complaints:

> Petitioners argue that "[a]lthough the Constitution left the details to the Legislature, the transcripts leave no doubt that the framers envisioned a separate 'commission' to evaluate and nominate the 'nominees.'" In this case, however, the devil is in the details. Petitioners rely on statements by individual delegates—some of which are statements criticizing the idea of a nominating commission—and make the unsupported leap that [i]t was clear . . . that all delegates understood that the proposal envisioned a separate 'commission/committee' to be established to select a list of 'nominees.'" (Emphasis in original.) And yet neither the words "commission" nor "committee" appear anywhere in Article VII, Section 8(2).
>
> Both the language of Article VII, Section 8(2), and the circumstances and objectives evinced from the Constitutional Convention debates, make clear that while some individual delegates supported a committee or commission to screen candidates for a judicial vacancy, others voiced distrust in such a commission and supported a process that would have vested virtually unfettered discretion in the Governor. As is the nature of compromise, the result was a system that was not entirely what either side wanted—a process that neither mandated a commission/committee, nor precluded it, but rather delegated the process for selecting nominees to the Legislature in broad language that the selection of nominees be "in the manner provided by law."
>
> Although the Constitution delegates the process for selecting judicial nominees to the Legislature, the process itself is not without constitutional bounds. The delegates may have disagreed as to what would be the best process for making judicial appointments, but the clear constitutional intent of Article VII, Section 8(2) was a process that would result in the appointment of good judges. As summed up by Delegate Garlington: "There is clear agreement on the part of all that we do need good judges. . . . The question is how to recruit

them." Montana Constitutional Convention, Verbatim Transcript, February 26, 1972, Vol. IV, p. 1032.

"We have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Nelson*, ¶ 14. The manifest constitutional objective of Article VII, Section 8(2) was the appointment of good judges. The fact that the process does not require a commission to achieve that objective does not mean that any process will be constitutionally sound. We therefore must still consider whether SB 140 achieves the constitutional objective the Framers sought to achieve by the enactment of Article VII, Section 8(2).

Although there are some key differences between SB 140 and the commission process it replaces, many aspects of the SB 140 process are not appreciably different. **Both processes require applicants to be lawyers in good standing who satisfy the qualifications set forth by law for holding judicial office; both processes provide for a period of time for the submission of applications, followed by a public comment period of at least 30 days; both processes allow the Governor no more than 30 days to make the appointment, after which time the appointment shall be made by the Chief Justice; finally, both processes require Senate confirmation for all interim appointments and election for the remainder of the term.**

Where the respective processes diverge is the "selection" process by which an "applicant" for a judicial vacancy becomes a "nominee" who the Governor may consider for appointment to the position. The commission process provided that after screening the applicants for the position, the Commission was required to submit to the governor a list of "not less than three or more than five nominees for appointment to the vacant position." Section 3-1-1010(1), MCA (2019). The list of nominees must be accompanied by

a written report indicating the vote on each nominee, the content of the application submitted by each nominee, letters and public comments received regarding each nominee, and the Commission's reasons for recommending each nominee for appointment. The report must give specific reasons for recommending each nominee. Section 3-1-1010(2), MCA (2019).

In contrast to the commission process, the selection process of SB 140 requires that an applicant "receives 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 eligible for appointment by the Governor. Petitioners describe this process as "a crude attempt" to replace the commission process that provided "a list of nominees carefully vetted by an independent source." **At the end of the day, however, 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 within the requirements of Article VII, Section 8(2).**

Petitioners equate the absence of a commission to screen the candidates with the lack of a vetting process. But this argument ignores the very public vetting to which all applicants for a judicial vacancy are subjected during the public comment period. Indeed, it could be argued that SB 140 meets the Convention delegates' concern about selecting "good judges" by incorporating at least part of Delegate Joyce's objective—allowing the Governor to make a direct appointment after providing reasonable notice "to see if there wouldn't be a great hullabaloo go up around the state." Montana Constitutional Convention, Verbatim Transcript, February 29, 1972, Vol. IV, p. 1105. As any individual who might consider applying for a judicial appointment is no doubt aware, the internet is a hullabaloo-friendly place. **Thus, it can hardly be said that the lack of a nominating commission means that applicants for judicial vacancies will not be subject to a vetting process.**

Petitioners' argument also ignores the vetting to which the appointee will be subjected by the Senate in order to be

> **confirmed. Finally, Petitioners' argument ignores the most critical vetting process—the vetting by the voters to which the appointee will ultimately be subjected at the next election.**
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> **As for the requirement that an applicant receive a letter of support from three adult Montana residents in order to be considered a "nominee" eligible for appointment to the bench, Petitioners argue that this is nothing more than "equating an 'applicant' with the term 'nominee' [and] does not salvage constitutionality." Although it could be argued that this lowers the bar for an applicant to be forwarded to the Governor for consideration, it must be noted that under the commission process, an applicant could be forwarded onto the Governor for consideration with no public support. And while an applicant in the commission process with no public support would still have to be recommended by at least four members of the Commission, § 3-1-1008, MCA (2019), it is also true that the necessary four votes could come solely from members who had been appointed by the Governor. Section 3-1-1001(1)(a), MCA (2019).**

Brown, ¶¶ 39-49 (emphasis added).

Moreover, the JNC commission "and its members" had the discretion to investigate eligible persons' qualifications. Mont. Code Ann. § 3-1-1009 (1). Under SB 140, the Governor has discretion to "authorize investigations concerning the qualifications of eligible persons." SB 140, § 2(1). In this Court's view, Winter and Bessette's SB 140 investigatory complaints are without merit. The Legislature authorized the Governor, just as it did the JNC and its members, to investigate eligible persons' qualifications. This is not, as Winter and Bessette contend, an unauthorized delegation of authority by the Legislature. Whether under the former JNC process or now under SB 140, the Legislature provided by law who could investigate eligible persons' qualifications.

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As the *Brown* Court recognized, SB 140 differs from the former JNC process on how an eligible person becomes a "nominee." Instead of being at the mercy of only four JNC members' possible subjective, result orientated and/or politically motivated votes, all an eligible person under SB 140 needs is three support letters from "adult Montana residents by the close of the public comment period" to be considered a nominee. While this may be a "crude process," at the very least, it might be a more equitable and transparent process for eligible persons to be considered by the Governor for open judicial appointments. Certainly, now under SB 140, the Governor can choose a person from a potentially broad field of eligible individuals because the Legislature has abolished the JNC which appeared to severely narrow previous Governors' constitutional appointment choices. Thus, contrary to Winter and Bessette's arguments, unlike the former JNC, the Governor does not have discretion as who becomes a nominee, the Legislature has told the Governor who "must be considered a nominee for the position." SB 140, § 4(2). The JNC certainly had unlimited discretion on whose names it would submit to the Governor for appointment purposes. Under SB 140, the Governor has no discretion under the law provided by the Legislature as to who becomes a judicial nominee.

While the ultimate power to appoint replacement Montana judges is vested, constitutionally, in the Montana Governor, they must do so as provided by the Legislature. The 1972 Montana Constitution framers, under art. VIII, § 8(2), left to the Legislature the prerogative to enact the law which a Montana Governor must follow in appointing judicial replacements. The 2021 Montana Legislature provided the Montana Governor with the law as to "the how" they

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must appoint a replacement Montana judge for purposes of Mont. Const. art. VII, § 8(2).

While the Legislature has the exclusive constitutional power to provide by law for the judicial replacement selections, other than in elections, the law must, which in its wisdom it is obligated to provide, comport with and must not offend against other applicable Montana Constitutional provisions. The *Brown* Court found that SB 140 is constitutional under Mont. Const. art. VIII, § 8(2). This Court finds that SB 140 comports with Mont. Const. art. III, § 1 since it appears to strengthen rather than weaken the separation of powers doctrine required by Mont. Const. art. VIII, § 8(2). No longer, for example, will the Legislature: (1) impose the JNC; (2) dictate JNC membership; (3) allow the Governor to appoint a majority of JNC members; or (4) restrict the Governor's choice to one from a field of three to five nominees.

As to Montana Supreme Court and district court judge appointments, the 1972 framers apparently desired that judicial selection partisan and political considerations be set aside and that "good judges" be appointed. Under SB 140, the Governor may not now hide behind the JNC shield to explain why a particular judge was appointed. They will now have to directly answer to the people why a particular judge was appointed or why another person was not selected. Moreover, when an appointee is required to obtain Senate confirmation, the Senate's only function now should be to determine whether political or considerations other than eligibility for office were in fact the basis for the appointment, or to second guess the Governor, not the JNC, as to judicial qualifications.

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The Governor is popularly elected by the people of Montana. In addition, the Senate has the opportunity to reject judicial appointments. Its members, like those of the House of Representatives, are also popularly elected by the people of Montana. Ultimately, Montanans have the opportunity to reject any judicial appointee, the Governor and legislative members in subsequent elections. Thus, judicial appointees, like the Governor and the Legislature's members, serve at the Montana people's will. Consequently, like the former JNC process, it shall be the Montana people who ultimately decide whether a Governor-appointed Montana Supreme Court justice or district judge and who is confirmed by the Senate will retain their appointed judiciary position. The Montana people ordained and established the Montana Constitution. Mont. Const. Preamble. As it should be, the Montana people will have the final say on all judicial appointments.

Much of Montana's Constitution contains powers granted by the people to persons and groups. As with many power granting documents, there are power limitations contained in Montana's Constitution. Here, under Mont. Const. art. VII, § 8(2), the people limited the Governor's ability to appoint judicial replacements. In this regard, the people proclaimed that a Montana Governor may only "appoint a replacement from nominees selected in the manner provided by law. *Id.* As such, it is the Legislature that has the specific constitutional power to provide the law how a Montana Governor makes judicial replacement appointments. Much to Winter and Bessette's displeasure, the 2021 Legislature modified the law on how Montana Governors appoint replacement judges under art. VII, § 8(2). The Montana people granted the Legislature the power to legislate, i.e., create laws. Mont. Const. art. V, § 1; see also, *Bullock*,

¶ 26 ("[t]he 1972 Montana Constitution vested the Legislature with the exclusive authority to enact [laws] ...) The Legislature has spoken to the dismay of some and to the delight of others on how Montana Governors will now appoint judicial replacements. The Legislature, acting within its constitutional power, has established the new law that Montana Governors must "faithfully execute ..." *Id.*

This Court must "adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law." *Id.* In doing so in this proceeding, this Court agrees with Montana that Winter and Bessette's Complaint does not state a valid Mont. Const. art. III, § 1 claim for relief. A Montana Governor that faithfully executes and follows SB 140 will not unlawfully infringe on the Legislature's exclusive powers under Mont. Const. art. VIII, §8(2). Moreover, a Montana Governor that faithfully executes and follows SB 140 will not be exceeding their powers granted under Mont. Const. art. VII, § 8(2).

It is important to note that Governors utilizing SB 140 are duty bound to appoint well qualified individuals just as former Governors Schweitzer and Bullock did during their respective tenures. Their respective judicial appointments were not inconsequential. These appointments were essential, not to those Governors or the Legislature, but to a viable, independent Montana judiciary. A judiciary that is duty bound and committed not by formerly held political or partisan positions but to independently "adjudicate the nature, meaning, and extent of applicable constitutional, statutory, and common law." In this Court's view, those thirty former appointees have exercised and performed this independent duty in an exceptional and faithful manner. It is with firm hope, conviction and belief that Governors utilizing SB 140 will appoint similar "great,

not just good" Montana Supreme Court justices and district judges. If not, this Court anticipates the Montana people will say otherwise on election day.

Accordingly, based upon the above, **IT IS HEREBY ORDERED** that Montana's dismissal motion is, and must be, **GRANTED**. Winter and Bessette's Complaint must be dismissed since it appears "beyond a reasonable doubt that the [they] can prove no set of facts which would entitle [them] to [declaratory] relief." *Spencer*, ¶ 10.

IT IS FURTHER ORDERED that Winter and Bessette's Complaint is **DISMISSED with prejudice**.

DATED this 1st day of September 2021.

MICHAEL F. McMAHON
District Court Judge

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