IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0153

WILD MONTANA, MONTANA WILDLIFE FEDERATION, AND MONTANA ASSOCIATION OF COUNTIES,

Petitioners/Plaintiff and Appellees,

v.

GREG GIANFORTE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MONTANA; AND CHRISTI JACOBSEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE.

Defendants and Appellants.

Appellant Governor Gianforte's Reply Brief

On appeal from the Montana First Judicial District, Lewis and Clark County, Cause No. DV-25-2023-411, the Honorable Mike Menahan, Presiding

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Appearances:

Dale Schowengerdt
Timothy Longfield
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpllc.com

Rylee Sommers-Flanagan
Dimitrios Tsolakidis
UPPER SEVEN LAW
P.O. Box 31
Helena, MT 59624
rylee@uppersevenlaw.com
dimitrios@uppersevenlaw.com

Attorneys for Appellees Wild Montana and Montana Wildlife Federation

Anita Milanovich
General Counsel
OFFICE OF THE GOVERNOR
1301 East 6th Ave.
Helena, MT 59601
406-449-9173
anita.milanovich@mt.gov

Michael Black
BLACK LAW OFFICE
7 West 6th Ave., Suite 514
Helena, MT 59601

Attorneys for Appellant
Governor Gianforte

Austin Markus James
Chief Legal Counsel
Clay R. Leland, Attorney
Secretary of State
1301 E. 6th Ave., Rm. 260
Helena, MT 59620
(406) 444-6197
austin.james@mt.gov
clay.leland@mt.gov

Attorneys for Appellant Secretary Jacobsen

406-546-0017
blacklaw@blackfoot.net

Attorney for Appellee Montana
Association of Counties

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Introduction

After opposing the Governor's stay and waiting 131 days to file their response brief, the Interest Groups now say this case is moot. That is not what this Court said when it denied the Governor's stay last March. Nor should the Governor be penalized for seeking a stay, then complying with the District Court's writ. And in any event, exceptions to the mootness doctrine apply squarely here.

This Court should reverse and hold that a district court may not create a procedural rule to fill a "procedural gap" in the constitutional domain of another branch. That is the only result consistent with this Court's precedent, the holdings of many other federal and state courts, and the separation of powers. This Court should also hold that private plaintiffs may not sue on behalf of the Legislature absent an injury to their individual rights—especially when the Legislature views the lawsuit as trespass on its authority rather than vindication.

I. This Case is not mooted because the Governor and Secretary sought a stay, complied with the District Court's Order, and exceptions to the mootness doctrine apply.

The Interest Groups' argument that the case is moot ignores that this Court, in denying the Governor's stay motion, assured the co-equal executive branch that its claims would not be mooted. *Wild Montana, et al. v. Gianforte*, et al., DA 24-0153, Order, at 3 (March 15, 2024). That assurance should mean something, and

the Court was not going out on a limb in making it. As discussed more below, this case easily meets the factors for the public interest and capable of repetition yet evading review mootness exceptions as this Court has consistently applied them.

But the Interest Groups' mootness argument raises an even more fundamental problem. They argue that the Governor's and Secretary's compliance with the writ after this Court denied the stay is what mooted the case. Resp., 16-20. In other words, according to Interest Groups, the only way for the Governor to preserve his right to appeal was to ignore the District Court's order.

Parties cannot be deprived of their right to appeal simply because they follow the law. If true, it would undermine faith in the system. The Chief Justice of the United States Supreme Court recently addressed a related issue.

> For more than two centuries, it has been established that impeachment is not an appropriate response to disagreement concerning a judicial decision. **The normal appellate review process exists for that purpose."**[1]

Not according to the Interest Groups. They contend that a party can get a favorable district court decision, oppose a stay of that decision, use the decision to charge the Governor with "political gamesmanship" in billboards and op eds (in an

[1] Chris Mergerian, *Roberts rejects Trump's call for impeaching judges who ruled against his deportation plans*, Associated Press, March 18, 2025 (emphasis added), https://tinyurl.com/53hpddan

election year, no less), and then shield it from appellate review.[2] All because the Governor and the Secretary respected the rule of law and complied with the District Court's decision. The Interest Groups' view is no way to run a democracy, especially in a case where the power and duties of coordinate branches are at issue. *See infra* § II.

The Governor of course would have preferred it if the Court had stayed the judgment pending the appeal's resolution. But when this Court denied the stay, it was clear that doing so would not moot the appeal. *Wild Montana*, Order, at 3 (March 15, 2024) ("This Court can address the underlying issue in due course regardless of whether we issue a stay. Because the fate of SB 442 could ultimately go either way, a stay denial does not moot Appellants' appeal.").

In seeking the stay, the Governor did precisely what this Court has advised: "A party may not claim an exception to the mootness doctrine where the case has

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[2] The Interest Groups alleged the Governor violated the law to "steamroll veterans, farmers, ranchers and our public lands." *See* Arren Kimbel-Sannit, *Judge: Constitution says the Legislature's veto override power exists regardless of the timing of the veto*, Montana Free Press, January 17, 2024 (showing billboard with cartoon picture of Governor Gianforte on a steam roll), https://tinyurl.com/2nk3byth; MACO Guest Column, *The Attempted Sabotaging of SB 442*, Flathead Beacon, March 29, 2024 (stating the Governor had violated the law requiring "the Judicial Branch to intervene and mandate the Executive Branch into compliance" and that the Governor was guilty of "pure political gamesmanship"), https://tinyurl.com/c44354hu.

become moot through that party's own failure to seek a stay of the judgment." *Turner v. Mountain Eng'g and Const., Inc.*, 276 Mont. 55, 60, 915 P.2d 799, 803 (Mont. 1996). The Governor sought a stay and the public interest and capable of repetition yet evading review exceptions to the mootness doctrine apply.

A. The public interest exception to mootness applies.

Cases like this are why the public interest exception exists. The exception applies when "(1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer to the issue will guide public officers in the performance of their duties." *Ramon v. Short*, 2020 MT 69, ¶21, 399 Mont. 254, 460 P.3d 867. The Interest Groups acknowledge the standard but miss the mark on its application to this case.

First, no one really disputes that this case presents an issue of public importance. The power and duties of coordinate branches of government is undoubtedly an issue of great public importance because it involves not only the legal power of a public official, *Ramon*, ¶ 22, but also "the very core of a constitutional system premised on separation of powers." *McLaughlin v. Montana State Legislature*, OP 21-0173, Order, at 3 (June 29, 2021) (citation omitted). Thus, this Court has consistently held that "where the legal power of a public official is in question the issue is one of public importance." *Ramon*, ¶ 22.

Second, the issue is likely to recur. Indeed, as the Governor pointed out below, this issue has occurred in the past, most recently in 2011. Doc. 24, p. 8, n.9 (Noting example in 2011 where Governor Schweitzer vetoed three bills supported by two-thirds of the Legislature on the last day of the legislative session). That the circumstance may be rare does not mean it will not recur. In *McLaughlin*, the Court recognized that "conflict between the political branches and members of the judicial branch have been exceedingly rare," but still applied the public interest exception to the mootness doctrine. *McLaughlin* Order, at 3. There, the exception applied, even though something similar had never happened before and the Legislature withdrew the subpoena at issue. *Id.* Here, the issue, even if it is unusual as in *McLaughlin*, is likely to recur, even if not often. *See also Meyer v. Jacobsen*, 2022 MT 93, ¶ 16, 408 Mont. 369, 510 P.3d 52 (recognizing the low bar to determine whether recurrence is possible under mootness exception).

The Interest Groups also argue that the issue is unlikely to recur because the Legislature can address the issue through rulemaking. Resp. Br., 23-24. That argument is wrong for several reasons. First, as it stands, the District Court assumed authority to fill the constitutional gap, which is now cemented as precedent. The Legislature has not promulgated rules, likely because of this litigation and the District Court's binding decision. Second, the way the District

Court filled the gap raises practical problems with how vetoes are processed and how the Legislature is given notice. As discussed in the opening brief and more below, the District Court's decision suggests that all Senators must be aware of the veto. And at least according to the Interest Groups, it might also require that the veto message be read over the rostrum, even though that is not a constitutional requirement and could introduce last minute gamesmanship. Under the District Court's decision, even though a majority of the Senate believes a bill was vetoed and returned during the session, the Secretary of State must still poll the Legislature. Even if, as here, the Legislature retained the bill, preventing the Governor from "return[ing] the bill with his reasons therefore to the secretary of state." Art. VI, section 10(4)(a). The parties' agreement that the Legislature *can* address this issue is reason to reverse the District Court and clear the path for the Legislature do so. But it is no reason to find the issue moot.

That leads to the final factor—that this Court's decision will guide public officials in the exercise of their constitutional duties. Oddly, the Interest Groups claim that this Court's review will not guide officials, even though they sought, and received, mandamus, compelling public officials to comply with what the District Court felt was a "clear legal duty." The question is whether the District Court was correct, or if this is an issue for the Legislature to address though rulemaking if it

chooses to. An answer will provide public officials authoritative guidance "on an unsettled issue regarding their authority" and "avoid future litigation on a point of law." *Ramon*, ¶¶ 24-25.

Because the public interest exception to mootness applies squarely on these facts, this Court should resolve the appeal to guide public officials and district courts on this important issue.

B. This case is also capable of repetition yet evading review.

For similar reasons, the capable of repetition yet evading review rule also applies. The exception applies when "(1) the challenged action was in its duration too short to be fully litigated prior to the cessation or expiration of the action; and (2) there was a reasonable expectation the same complaining party would be subjected to the same action." *Meyer*, ¶10.

The exception is "properly confined to situations where the challenged conduct *invariably* ceases before courts can fully adjudicate the matter." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 33, 333 Mont. 331, 142 P.3d 864 (emphasis original). The exception is typically reserved for situations with a predictable and short timeframe, such as a nine-month pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973), a one-year residency requirement for voter registration, *Dunn v. Blumstein*, 405 U.S. 330, 333, n.2 (1971), or a months-long election, *Meyer*, ¶¶ 13-15.

An override poll must conclude within 30 days. § 5-4-306(2), MCA. It thus fits neatly within the exception. The Interest Groups' effort to evade that conclusion by arguing that this appeal could have run concurrently with the override poll needs little analysis. Even the most expedited appeals cannot be briefed and decided within 30 days. And certainly not with the thoughtful deliberation that this case deserves. And the argument is belied by Interest Groups' conduct in this appeal: they took 131 days to simply file their response brief.[3] If a months-long election process, a nine-month pregnancy, and a one-year residency meet this factor, so does the 30-day period for the veto poll.

Additionally, the Interest Groups sought and were given a declaratory judgment, just as in *Meyer*, ¶ 15. There, the Court noted that the declaratory judgment was an additional basis to conclude the case was not moot. Even though the mandamus action would not affect candidates in that election, the declaratory judgment could continue to affect parties. *Id.* The same applies here because the District Court's declaratory judgment binds future action by the Governor and Secretary.

[3] Appellants filed their opening briefs on October 9, 2024. Appellees filed their response brief on February 17, 2025.

Finally, the second factor is also met because it is likely that the same thing will happen again, as it has in the past. This is not a high bar. "The question is not whether recurrence of the dispute is more probable than not but whether it is **capable** of repetition." *Meyer v. Jacobsen*, 2022 MT 93, ¶ 16, 408 Mont. 369, 510 P.3d 52 (cleaned up) (emphasis original). And, as it stands, the District Court's decision adds uncertainty to whether the Legislature can resolve this issue through statute or its own rulemaking. *See infra* § II.

Under either exception to the mootness doctrine, this Court has power to resolve this appeal and avoid future litigation on the same issue. This Court should reject the Interest Groups' gamesmanship and address the important separation of powers issues that this appeal raises.

II. The District Court violated the separation of powers by filling a "procedural gap" in the veto provisions and allowing private plaintiffs to sue on behalf of the Legislature.

Judicial review and the political question doctrine have equally deep roots in American law. In fact, they derive from the same seminal opinion: *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, even as Chief Justice Marshall articulated the judiciary's "emphatic" duty to "say what the law is," 5 U.S. (1 Cranch) at 178, he described an important constraint on that duty: "Questions, in

their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170.

Echoing *Marbury*, the modern political question doctrine focuses on whether the constitution's text commits an issue to another branch of government and whether there is a lack of judicially discoverable or manageable standards for resolving the issue. *Nixon v. United States*, 506 U.S. 224, 228 (1993); *see also City of Great Falls v. Bd. of Comm'rs of Cascade Cty.*, 2024 MT 118, ¶ 13, 416 Mont. 494, 549 P.3d 1158. Here, the District Court intruded on the exclusive constitutional sphere of the Legislature by filling a procedural gap in the Constitution's veto provisions. That ruling, however well-intentioned, violated the political question doctrine.

A. The District Court violated the political question doctrine by creating and ordering compliance with a procedural rule in the exclusive constitutional domain of the Legislature.

The Interest Groups' arguments that this case was within the District Court's constitutional purview stem from a fundamental misunderstanding about the District Court's order. As they see it, the District Court was engaged merely in a "basic" exercise "of constitutional and statutory interpretation." *See* Ans. Br. 30–32. But even the District Court recognized that its order was doing something more—in the District Court's phrasing, filling "a procedural gap" in the

Constitution's veto provisions. Doc. 45, at 5 (MSJ Order). This judicial rulemaking in an area the Constitution commits to the Legislature violated the political question doctrine and the separation of powers.

The Framers recognized that each branch must control the procedures by which it exercises its exclusive constitutional authority. *See, e.g.,* Mont. Const. Conv. Verbatim Tr. Vol. III, p. 605 (Feb. 19, 1972) (Del. Murray) (allowing each branch of government to set its own procedural rules "maintain[s]" the "check and balance system"). And this makes sense. What independent authority would one branch retain if another branch could prescribe for another the procedures it must use in its internal affairs? There could be no independent judiciary if the executive assumed responsibility for pre-screening clerkship candidates. Nor could the Legislature require this Court to add a new section to the Rules of Appellate Procedure, issue decisions within a timeframe set by statute, or place cameras in the Court's chambers to record judicial deliberations. *Cf. Coate v. Omholt*, 203 Mont. 488, 662 P.2d 591 (1983). Just as the other branches may not intrude on the judiciary, the judiciary may not intrude on the other branches. *See* Mont. Const. art. III, § 1. That is why the political question doctrine precludes judicial review of a matter constitutionally committed to another branch of government—such as the veto process. *See City of Great Falls*, ¶ 13.

Nixon illustrates this approach. In *Nixon*, an impeached federal judge claimed that Senate Rule XI—which provided for trying his impeachment through a committee hearing instead of the full Senate—violated the Impeachment Clause of the United States Constitution. 506 U.S. 224, 228–29 (1993). The Supreme Court found the issue nonjusticiable, reasoning that to review the matter would be to meddle in a procedure constitutionally committed to the Senate—and not to the Court. *Id.* at 230–38. Despite the similarity between *Nixon* and this case, the Interest Groups ignore it.

Like *Nixon*, state courts have roundly concluded that challenges to the internal procedures and rules of other branches pose nonjusticiable political questions. *See Sumner v. New Hampshire Sec'y of State*, 168 N.H. 667, 136 A.3d 101, 106 (2016) ("The authority to adopt procedural rules for passing legislation is demonstrably committed to the legislative branch"); *In re Hooker*, 87 So.3d 401, 406 (Miss. 2012) ("[C]ompliance with constitutional provisions that are procedural in nature and committed solely to another branch of government is not justiciable"); *accord Gunn v. Hughes*, 210 So.3d 969 (Miss. 2017); *Brown v. Owen*, 165 Wash. 2d 706, 722, 206 P.3d 310 (2009); *Jefferson Cnty. Comm'n v. Edwards*, 32 So.3d 572, 584 (Ala. 2009); *Smigel v. Franchot*, 410 Md. 302, 978 A.2d 687, 701 (2009); *Brady v. Dean*, 173 Vt. 542, 790 A.2d 428, 433 (2001); *Mayhew v. Wilder*, 46

S.W.3d 760, 773 (Tenn. Ct. App. 2001); *Philpot v. Haviland*, 880 S.W.2d 550, 552 (Ky. 1994); *Schieffelin & Co. v. Dep't of Liquor Control*, 194 Conn. 165, 185, 479 A.2d 1191 (1984); *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698, 705 (1977). The theme of these decisions is clear: judicial interference in other branches' internal rules violates the separation of powers. *See Ark. Dep't of Educ. v. Jackson*, 669 S.W.3d 1, 12, n.5 (Ark. 2023) (Wood, J., concurring) (collecting cases).

The Interest Groups wisely admit that courts could not "undo the Governor's veto ... or order the [L]egislature to override the veto." Ans. Br. 32. Yet they argue that the judiciary may nevertheless create a new veto procedure—found nowhere in Article VI, Section 10—and order the Executive to follow it. But *Nixon* cautions that the political question doctrine is not cabined to challenges about *whether* a co-equal branch can exercise its exclusive power. It also restrains courts from interfering with *how* another branch exercises power in its exclusive domain. The impeached judge in *Nixon* was not claiming that the Senate could not try his impeachment at all—he took issue with *how* the Legislature exercised that power.

Coate v. Omholt, 203 Mont. 488, 662 P.2d 591 (1983), also dooms the Interest Groups' position. In *Coate*, this Court confronted a statute that required courts to decide cases within a certain timeframe and sanctioned judges and justices for tardy decisions. 203 Mont. at 490, 662 P.2d at 592–93. This statute violated the

separation of powers because "the question of when cases shall be decided and the manner in which they shall be decided, is a matter solely for the judicial branch of government." *Coate*, 203 Mont. at 490, 492, 662 P.2d at 593–94. Presaging the issue here, *Coate* then explained that while the Legislature has the constitutional power to veto procedural rules adopted by this Court, "once a legislative veto is exercised, the legislature is not empowered to fill the vacuum by enacting its own legislation governing appellate procedure or lower court procedure." *Id.* at 504, 662 P.2d at 600. Just as the Legislature cannot fill a procedural "vacuum," in this Court's rules, courts cannot fill a "gap" in the procedural rules governing the veto process. The Interest Groups' response? Silence. *See generally* Ans. Br. (never addressing *Coate*).

Nor do the Interest Groups have a good answer for the unbroken historical practice of the Legislature—and only the Legislature—filling gaps in the Constitution's veto provisions. Gov.'s Br. at 23–26. They respond that "the legislature's ability to create a rule does not mean that the Court cannot interpret and compel compliance with the veto provision." Resp. at 36. But this misses the point entirely. The District Court was not simply interpreting the existing constitutional text. It created a new veto procedure from whole cloth. History confirms that this is a matter for the Legislature—not the Courts.

The Interest Groups claim *Bullock* as support for their position that the issues here are justiciable. *See* Ans. Br. 31–32 (citing *Bullock v. Fox*, 2019 MT 50, 395 Mont. 35, 435 P.3d 1187). But *Bullock* involved a "basic question" of statutory interpretation which this Court had "the clear constitutional authority" to answer: what did "land acquisition" mean in section 87-1-209(1), MCA? *Bullock*, ¶ 46. Contrary to the Interest Groups' claim, *Bullock* was not about the scope of the Governor's Article X, Section 4 constitutional duties, *cf.* Ans. Br. 31, and it likely would be a nonjusticiable political question for a court to countermand how the Board of Land Commissioners wields its constitutional "authority to direct, control, lease, exchange, and sell school lands." Mont. Const. art. X, § 4.

The Interest Groups also quibble about whether Article VI, Section 10's provisions are "non-self-executing." Resp. at 36–38. These hair-splitting arguments are wrong: provisions like Article VI, Section 10 that address their language exclusively to another branch are non-self-executing. *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 16, 326 Mont. 304, 109 P.3d 257. But they also miss the point: Article VI, Section 10 commits the veto process entirely to the Legislature and Executive. And as *Nixon*, *Coate*, and many other state courts have recognized, the separation of powers prevents the judiciary from interfering with another branch's internal procedures.

This case presents a textbook political question. To avoid this straightforward conclusion, the Interest Groups also would have this Court shrink the political question into obscurity. The Governor urges this Court not to do so. The political question doctrine is as old as judicial review—both come from *Marbury* and flow from the sacrosanct separation of powers. The Court should reverse.

B. Private plaintiffs cannot sue on behalf of the Legislature. Especially when there are no individual rights at issue and the Legislature views their suit as an infringement on its powers.

The justiciability issues here are even more troubling because the Interest Groups purported to sue to vindicate the Legislature's authority, but the Legislature viewed the District Court's writ as violating its authority.

This Court's precedents sink the Interest Groups' attempt to sue on behalf of the Legislature—over the Legislature's objection. *See Mitchell v. Glacier Cnty.*, 2017 MT 258, 389 Mont. 122, 406 P.3d 427. In *Mitchell*, this Court explained that if a plaintiff's "alleged injury is premised on the violation of constitutional and statutory rights, standing depends on whether the constitutional or statutory provision can be understood as granting persons in the plaintiff's position a right to judicial relief." *Mitchell*, ¶ 11 (cleaned up). So, for instance, a plaintiff alleging a violation of her right to know has standing simply because Article II, Section 9

expressly contemplates a fundamental right of action for individuals. *Schoof v. Nesbit*, 2014 MT 6, ¶¶ 21–25, 373 Mont. 226, 316 P.3d 831. The same appears true for a plaintiff alleging a violation of her right to a clean and healthful environment. *See Held v. State*, 2024 MT 312, ¶ 36, 419 Mont. 4003, 560 P.3d 1235. But the Interest Groups' injuries are premised on an alleged violation of Article VI, Section 10— a procedural section of the Constitution that outlines an interbranch veto process. Article VI, Section 10 cannot be understood as granting the Interest Groups, or any private individuals, "a right to judicial relief." *Mitchell*, ¶ 11.

In *Barrett v. State*, this Court allowed private plaintiffs to sue on a theory that certain laws infringed on the Board of Regents' constitutional authority. 2024 MT 86, ¶¶ 17, 32–39, 416 Mont. 226, 547 P.3d 630. Although the Board was not a party to the case, this Court found the plaintiffs' claims justiciable because the alleged infringement on the Board's powers led to a violation of the plaintiffs' **individual rights**. *Barrett*, ¶¶ 17, 32–39; *see also id.* ¶¶ 87–99 (Rice, J., dissenting).[4]

Not so here. The Interest Groups have never asserted that their individual rights have been violated. Instead, they have described their injury, essentially, as

[4] Notably, unlike here, there was no indication that the Regents felt that *Barrett* infringed their powers.

believing the wrong constitutional veto procedure was followed. *Mitchell* rules out private party interference in the constitutional veto process.

To avoid *Mitchell*, the Interest Groups accuse the Governor of mischaracterizing their "injury." That is easy to do, because their injury has been a moving target throughout the case. Take their appellate brief. They try to have their cake—alleging that their "injury" was unredressed financial harm—and eat it too—arguing that causation and redressability were satisfied simply because the override poll was conducted. *See* Ans. Br. 25–28. But ultimately, the Interest Groups give up the game when they admit that they simply sought "fair government process" and an "*opportunity to participate* in the legislative process." Ans. Br. 28.

As the Governor has pointed out throughout this case, these generalized interests in "fair government process," do not support standing. "[A] general or abstract interest in the ... legality of government action is insufficient for standing" without a link between the alleged illegality and the plaintiffs' injury. *Larson*, ¶ 46; *accord State ex rel. Mitchell v. First Jud. Dist. Ct.*, 128 Mont. 325, 339, 275 P.2d 642, 649 (1954); *Chovanak v. Matthews*, 120 Mont. 520, 527, 188 P.2d 582, 584–86 (1948) (general objection to legalized gambling insufficient for standing). The Interest Groups never address these cases. Nor do they explain how Article VI, Section 10

gives them a private right of action to sue on behalf of a branch who would rather they did not.

Finally, it bears mentioning that the Interest Groups ask for an extremely *strict* application of the mootness doctrine but an extremely *liberal* application of the constitutional standing doctrine. This inverts the normal relationship between these doctrines. *Compare, e.g.*, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980) (collecting cases that "demonstrate the flexible character of the Art. III mootness doctrine"); *with Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 34, 360 Mont. 207, 255 P.3d 80 (explaining that the constitutional standing requirements "must *always* be met") (emphasis added); *accord* Matthew I. Hall, The Partially Prudential Doctrine of Mootness, 77 Geo. Wash. L. Rev. 562, 584–85 (2009).

At bottom, the Governor agrees with the Interest Groups about one thing: "the encroachment of one branch into the province of another ... is what this case is about." Ans. Br. 37. The irony is that the "encroachment" here was invited by the Interest Groups' lawsuit. Without the hook of an individual injury, the Interest Groups lack standing to thrust themselves into an interbranch process and "vindicate" the power of the Montana Legislature. *See Larson*, ¶ 46; *Mitchell*, ¶¶ 37–39. That is especially true when the Legislature views the Interest Groups'

remedy as seriously infringing on its power. The respect due to a co-equal branch of Government should prevent a Court from entertaining a lawsuit by private plaintiffs that invokes the Legislature's interests—over the Legislature's objection.

III. The Governor followed the correct veto procedure in Article VI, Section 10. And he certainly had no clear legal duty to anticipate the extra-constitutional procedure fashioned by the District Court.

This Court should not reach the merits. But if it does, it should reverse the District Court's erroneous conclusion that the Governor had a clear legal duty to follow the Constitution's out-of-session veto procedure despite vetoing a bill when both chambers of the Legislature were still in session.

Section 4(a)'s text is clear: the out-of-session veto procedure is triggered only "[i]f the legislature is **not in session when the governor vetoes a bill**[.]" Mont. Const. art. VI, § 10(4)(a) (emphasis added). It is undisputed that the Legislature was in session when the Governor vetoed SB 442 and returned the vetoed bill and his veto message to the Legislature. *See, e.g.*, (Doc. 45 at 5; Doc. 73 at 5). The Interest Groups try to avoid this by distorting the facts. They assert, for instance, without support, that "the Senate adjourned without notice of the Governor's veto." Ans. Br. 33. Remarkably, they even assert that the Governor "refus[ed] to effectuate an override poll, despite **knowing** that the Senate lacked notice of the veto when it adjourned *sine die*." Ans. Br. 37. Tellingly, the Interest Groups cite *no*

record evidence to support this statement. With good reason: it is simply false. App. 081-82; App. 073-75. Nor did they conduct even basic discovery to determine whether the Senate knew of the veto. In fact, a majority of the Senate (all of whom originally voted for SB 442) was clear: "SB 442 was returned to the Senate while the Legislature was still in session, and it remains in the possession of the Senate." (letters from legislature filed March 21, 2024).

Invoking the Framers' general intent that "the Legislature would always be able to override a veto" does not change the outcome here. *See* Ans. Br. 38–39. First, it has never been true that the Legislature was deprived of its ability to override the Governor's veto of SB 442. Just ask the Legislature. *See* Gov.'s Br. at 11–12 (citing letters from legislature). The analysis might be different if the Legislature believed the Governor vetoed the bill when it was not in session and then sent it back to the Governor. But that is not what happened. And, in any event, it is unclear why the Interest Groups' assessment that a special session is too inconvenient should alter the plain text of Section 4(a).

Finally, mandamus was not an appropriate remedy. Mandamus lies when a government official shirks a clear duty defined with "precision and certainty." *City of Deer Lodge v. Chilcott*, 2012 MT 165, ¶ 16, 365 Mont. 497, 285 P.3d 418 (citation

omitted). The Governor did not have a well-settled legal duty to follow an extra-constitutional veto procedure that did not exist until the District Court created it.

Conclusion

The Court should reverse.

Dated: April 3, 2025

Landmark Law PLLC

By: */s/ Dale Schowengerdt*
Dale Schowengerdt

Attorney for Appellant Governor Greg Gianforte

Certificate of Compliance

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 4,993 words including footnotes. Rule 11(4).

/s/Dale Schowengerdt

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-03-2025:

Anita Yvonne Milanovich (Attorney)
1301 E 6TH AVE
HELENA MT 59601-3875
Representing: Greg Gianforte
Service Method: eService

Michael G. Black (Attorney)
PO Box 318
Clinton MT 59825
Representing: Montana Association of Counties (MACo)
Service Method: eService

Rylee Sommers-Flanagan (Attorney)
P.O. Box 31
Helena MT 59624
Representing: Montana Wildlife Federation, Wild Montana
Service Method: eService

Dimitrios Tsolakidis (Attorney)
PO box 31
Helena MT 59601
Representing: Montana Wildlife Federation, Wild Montana
Service Method: eService

Austin Markus James (Attorney)
1301 E 6th Ave
Helena MT 59601
Representing: Secretary of State, Office of the
Service Method: eService

Clay Richard Leland (Attorney)
1301 E 6TH AVE
HELENA MT 59601-3875
Representing: Secretary of State, Office of the
Service Method: eService

Timothy Longfield (Attorney)
7 West 6th Avenue
Helena MT 59601
Representing: Greg Gianforte
Service Method: eService

Electronically Signed By: Dale Schowengerdt
Dated: 04-03-2025