In the Supreme Court of the State of Montana
DA 23-0575

RIKKI HELD, ET AL.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, ET AL.

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. DDV 2013–407, the Honorable Kathy Seeley, Presiding

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APPELLANT STATE AGENCIES' AND GOVERNOR'S RULE 22 MOTION FOR STAY OF ORDER PENDING APPEAL

DALE SCHOWENGERDT
Landmark Law PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpllc.com

Lee M. McKenna
Montana DEQ
P.O. Box 200901
Helena, MT 59620-0901
406-444-6559
Lee.mckenna@mt.gov

Attorneys for Appellants-Defendants Department of Environmental Quality, Department of Natural Resources and Conservation, Department of Transportation and Governor Gianforte

Austin Knudsen
Montana Attorney General
Michael D. Russell
Thane Johnson
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
406-444-2026
michael.russell@mt.gov
thane.johnson@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
406-384-7990
emily@joneslawmt.com

Attorneys for Appellant-Defendant State of Montana

Roger Sullivan
Dustin Leftridge
McGARVEY LAW
345 1st Avenue East
Kalispell, TM 59901
406-752-5566
rsullivan@mcgarveylaw.com
dleftridge@mcgarveylaw.com

Nathan Bellinger (pro hac vice)
Andrea Rodgers (pro hac vice)
Julia Olson (pro hac vice)
OUR CHILDREN'S TRUST
1216 Lincon Street
Eugene, OR 97401
413-687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Mark L. Stermitz
CROWLEY FLECK, PLLP
305 S. 4th Street E., Suite 100
Missoula, MT 59801-2701
406-523-3600
mstermitz@crowleyfleck.com

Selena Z. Sauer
CROWLEY FLECK, PLLP
PO Box 759
Kalispell, MT 59903-0759
406-752-6644
ssauer@crowleyfleck.com

Melissa Hornbein
Barbara Chillcott
WESTERN ENVIRONMENTAL
LAW CENTER
103 Reeder's Alley
Helena, MT 59601
406-708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Philip L. Gregory (pro hac vice)
GREGORY LAW GROUP
1250 Godetia Drive
Redwood City, CA 94062
650-278-2957
pgregory@gregorylawgroup.com

Attorneys for Appellees-Plaintiffs

INTRODUCTION AND BACKGROUND

Appellant State Agencies and the Governor move for a stay of the District Court's Findings of Fact and Conclusions of Law and Order. App. 012, Doc. 405. With over 400 docket entries, this case has a tail too long to describe in a ten-page motion. In short, sixteen youth filed a constitutional challenge to a provision of MEPA, § 75-1-201(2)(a), MCA, which limits Appellants' consideration of greenhouse gas (GHG) emissions and climate impacts in their MEPA analyses.

The District Court ultimately held that Plaintiffs had justiciable claims and the statute violated Plaintiffs' constitutional right to a clean and healthful environment by contributing to Montana and global GHG emissions and climate impacts. App. 112-113, Doc. 405. The District Court was the first court to extend the constitutional right to a clean and healthful environment to global climate change. The appeal of that decision raises several novel issues for this Court to decide. This motion, however, concerns what must be done meanwhile, and specifically whether Appellants *must* evaluate GHG emissions and climate impacts in MEPA analyses.

Early in the case, the District Court seemed to agree that ordering Appellants to determine if, when, and how to make those evaluations exceeded its authority. Plaintiffs originally sought far-reaching injunctive relief requiring the State to implement a remedial plan to reduce GHG emissions and conduct an accounting

for GHG emissions in Montana. The District Court dismissed those claims because they "would require the court to make or evaluate complex policy decision[s] entrusted to the discretion of other governmental branches," and thus exceeded the Court's power. App. 170; Doc. 46 at 21. The court repeatedly determined that it had no authority to *require* state agencies to evaluate GHG emissions or climate impacts in its MEPA reviews.[1] The relief it contemplated was far narrower: whether a statute *prohibiting* that analysis was constitutional. *See,* App. 128, Doc. 379 at 14, 18.; App. 148, Doc. 217 at 7. In its Order declaring the statute unconstitutional, the District Court did not say state agencies were required to begin accounting for GHG emissions and climate impacts in every MEPA review.

Plaintiffs, however, read the Court's order to require exactly that. Soon after the Court's decision, Plaintiffs sent DEQ two letters demanding that the order required DEQ to "calculate the GHG emissions that will result from proposed projects" and threatened the agency with contempt if it did not comply. App. 223; *see also id.* ("Every additional fossil fuel permit approved by DEQ that causes an increase in GHG emissions is a violation of the constitutional rights of the youth Plaintiffs in *Held*" and "[e]very ton of GHG emissions exacerbates the injuries and constitutional violations."). Even Plaintiffs evidently are confused by the order.

[1] The only issue before the court was whether MEPA provision 75-1-2-1(2)(a), MCA was facially constitutional. The issue of whether DEQ should analyze GHGs and climate change analyses *in its permitting decisions* was not.

After receiving the letters, Appellants sought clarification and a stay from the District Court to ensure that it was not in contempt and had discretion to determine if, when, and how to evaluate GHG emissions and climate impacts in its MEPA analysis. App. 175; Doc. 423. The District Court denied the motion, and in doing so, added to the existing confusion. On one hand, the Court stated in its order that it did *not* order Appellants to implement a remedial climate recovery plan. App. 005, Doc. 432 at 5. But then the Court indicated that is precisely what its Order *effectively requires* Appellants to do because it "requires that these statutory functions [e.g., MEPA analysis] are carried out in a constitutional manner," including "analyzing GHG emissions and climate change impacts in environmental reviews." App. 006, Doc. 432 at 6; *see also id.*, 7; *id.*, 8 ("Any additional resources required by Defendants to comply with their statutory and constitutional obligations are part of their obligation to comply with the law, including Montana's Constitution.").

This Court should stay the District Court's August 14, 2023 Decision and Order pending final resolution of the appeal. Appellants explained in briefing and a lengthy declaration the complexity of the analysis and the harms that would ensue if they must immediately implement a rushed GHG emissions and climate impacts analysis for MEPA review for every state action. App. 181; 202; 283. On top of the practical complications, ordering such a sweeping overhaul of the State's

regulatory system is beyond the courts' authority. What is more, evaluating GHG emissions and climate impacts in MEPA analysis will not alleviate Plaintiffs' alleged harms because MEPA is a procedural statute. MEPA does not authorize Appellants to deny or modify permit applications based on a MEPA review. *See* § 75-1-102(3)(b); § 75-1-201(4)(a).

In its 2020 *Park County Environmental Council v. DEQ* decision, this Court deferred the difficult exercise of describing the parameters of the right to a clean and healthful environment and the judiciary's role in that question. The District Court was far less circumspect. It was the first court in Montana to conclude that the constitution's right to a clean and healthful environment requires the State to take active steps to respond to climate impacts. A stay is necessary because this Court should resolve the unprecedented issues in this appeal before such a massive regulatory disruption occurs.

LEGAL STANDARD

A stay pending appeal is justified upon showing "good cause." M.R. App. 22(a)(i). This Court "looks to" the factors federal courts use in assessing motions for stay pending appeal. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, DA 22-0064, 2022 Mont. LEXIS 735 at *5 (Mont. Sup. Ct. Aug. 9, 2022) ("*MEIC*"). These factors are discussed below.

The purpose of a stay pending appeal is merely "to give the reviewing court the time to 'act responsibly,' rather than doling out 'justice on the fly.'" *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2011)).

ARGUMENT

I. The appeal raises serious and unprecedented legal questions.

Appellants easily satisfy the first prong of the federal test, which requires the party seeking a stay to show "serious legal questions are raised." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

This case raises many serious legal questions in an area where the law is far from settled. Before this case, no Montana court had ever addressed whether and how the constitutional right to a clean and healthful environment applies to global environmental issues like climate change. This Court recently left for another day the "difficult exercise of determining what attributes constitute a 'clean' or 'healthful' environment, or an 'unreasonable' amount of degradation, or what the judiciary's role should be in answering these questions." *Park Cnty. Envtl. Council v. Mont. Dept. of Envtl. Quality*, 2020 MT 303, ¶ 78, 477 P.3d 288, 402 Mont. 168. But the District Court's Order runs headlong into these difficult questions.

To start, the District Court broke new ground in Montana jurisprudence, holding that the constitutional right to a clean and healthful environment requires

the State to respond to climate change in some unspecified way. *See* App. 095-111 Doc. 405 at 84–100. And—based on this holding—the District Court concluded that one provision of MEPA (a procedural statute)—significantly contributes to global climate change. *Id.*

Additionally, the District Court's justiciability analysis stretched the judicial power beyond recognized limits. For example, the Court concluded that enjoining MCA § 75-1-201(2)(a) would redress Plaintiffs' injuries by ameliorating *global climate change* by some unspecified degree. *See* App. 100-101, Doc. 405 at 89–90. And by requiring state agencies to affirmatively account for climate change in every MEPA review, the Order "exceed[ed]" the District Court's authority "by overseeing analysis and decision-making that should be left to the 'wisdom and discretion of the legislative or executive branches.'" App. 170, Doc. 46 at 21 (quoting *Juliana v. State*, 947 F.3d 1159, 1171 (9th Cir. 2020)). That requirement violates the political question doctrine and effectively grants Plaintiffs the very "remedial climate recovery plan" that the District Court found it lacked power to grant. App. 167-168; 170, Doc. 46 at 18–19; 21.

The District Court justified denying a stay by stating that Appellants had "identified no errors" with the ultimate legal conclusions in its August 14 Order. App. 005-006, Doc. 432 at 5–6. This was wrong on several counts. First, Appellants were not required to convince the District Court that it is "likely to be

reversed on appeal" to obtain a stay. *See Strobel v. Moran Stanley Dean Witter,* No. 04CV1069BEN, 2007 WL 1238709, *1 (S.D. Cal. Apr. 24, 2007). Succeeding on a motion for stay pending appeal does not require the parties to "brief the merits of the case in depth." *Leiva-Perez*, 640 F.3d at 967. Under this standard, a stay is appropriate when a case involves novel and unsettled legal questions. *Maxcrest Limited v. United States*, No. 15-mc-802070, 2016 WL 6599463, *2 (N.D. Cal. November 7, 2016). Second, Appellants identified specific legal errors with the Order; that the Court exceeded its authority by effectively requiring Appellants to analyze GHG emissions and climate impacts in MEPA to redress Plaintiffs' constitutional injuries. *See, e.g.,* App.195-196; 287-289; 291-294. As Appellants pointed out, that is wrong because MEPA is only an information-gathering and disclosing statute, not a substantive permitting statute. No state agency can "withhold, deny, or impose conditions on any permit or other authority to act" based on MEPA. § 75-1-201(4)(a).

This case raises novel questions about standing, causation, redressability, and the relationship between co-equal branches of Montana's government. These "unsettled questions of law present serious legal questions so as to demonstrate sufficient likelihood of success on a motion to stay." *Maxcrest Limited*, 2016 WL 6599463, *2.

II. Appellants will be injured without a stay.

Appellants also satisfy the second factor, which requires showing that the State's interests will be irreparably harmed without a stay. *Leiva-Perez*, 640 F.3d at 968. An order enjoining a duly-enacted statute always irreparably harms the State. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (citation cleaned up); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined"). This is especially so if the district court not only enjoined a law enacted by the people's representatives, but also violated the separation of powers by imposing an extra-statutory regulatory scheme to take its place. *See Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 538 (N.D. Cal. 2017).

Next, without a stay, Appellants must spend considerable resources to develop and implement methods for GHG and climate impacts analysis. App. 204-205, 208-212, Doc. 424 ¶¶ 6–7, 15–23. No one disputes that climate change is a complex global issue. This litigation is proof enough: the parties exchanged over 50,000 pages of documents, engaged in a seven-day trial, and the Court issued a 102-page Order on the topic. Because of its complexity, analyzing GHG emissions and climate impacts of a project is no easy task. And Appellants cannot implement

methods for performing that analysis overnight; it must be thoughtful, evaluating when the analysis might apply, proper scoping, the extent of the analysis, and geographic limits. Otherwise, Appellants would be subject to potential litigation risk by parties who claim it is acting arbitrarily and capriciously by using a slipshod analysis cobbled together to avoid contempt or widespread litigation against State agencies' MEPA review and permitting decisions. Appellants have no way to recover these resources if the District Court is reversed, so these are irreparable injuries. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677–78 (9th Cir. 2021) (economic injuries for which a party has "no vehicle for recovery" are irreparable harm).

This Court has held that agencies should not have to implement district court orders before an appeal is completed, even for cases that do not concern judicial review of contested cases under the Montana Administrative Procedure Act. *See Grenz v. Mont. DNRC*, 2011 MT 17, ¶¶ 17–20, 359 Mont. 154, 248 P.3d 785 That principle has even more force here, where a hastily-developed GHG and climate impacts analysis will affect multiple agencies and reshape Appellants' MEPA review. *See,* App. 202, Doc. 424.

III. Plaintiffs will not be injured by a stay.

Third, Plaintiffs will not be harmed by a stay. *Leiva-Perez*, 640 F.3d at 970. While Plaintiffs insist that they suffer ongoing harms due to climate change, hastily

implementing methods for analyzing GHG emissions during MEPA review will not relieve those harms. Climate change is a complex issue, and developing sound methods for analyzing it will take time. And even if DEQ could implement those methods overnight, MEPA does not let DEQ deny permits for "fossil fuel projects," or any projects. § 75-1-201(1)(b); 75-1-102(1)(a)–(b) & 3(b). Permitting will continue under the requirements of substantive permitting statutes, even if MEPA reviews include GHG emissions and climate change impacts analysis.

IV. The public interest favors a stay.

An order that violates the Constitution's hard limit on the separation of powers is always against the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). Second, immediately implementing GHG emissions and climate impacts analyses in every MEPA review would deprive the public of its right to notice and comment on a significant change. *See* §§ 2-4-302, -305, MCA. No one benefits from "justice on the fly" that disregards the complex issues this fundamental change to MEPA analysis raises. *Leiva-Perez*, 640 F.3d at 970. But all Montanans benefit from an orderly and thoughtful review of these unprecedented issues by this Court first.

Conclusion

For good cause shown, Appellants request a stay of the Order pending appeal.

DATED this 1st day of December, 2023.

/s/ Dale Schowengerdt

DALE SCHOWENGERDT
LANDMARK LAW PLLC
7 West 6th Ave., Suite 518
Helena, MT 59601
406-457-5496
dale@landmarklawpllc.com

Lee M. McKenna
Montana DEQ
P.O. Box 200901
Helena, MT 59620-0901
406-444-6559
Lee.mckenna@mt.gov

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Under Rule 22(2)(a)(iv) of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the page count does not exceed 10 pages, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices included under Montana Rule of Appellate Procedure 22(a)(ii)–(iii).

/s/ *Dale Schowengerdt*
DALE SCHOWENGERDT

CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 12-01-2023:

Nathan Bellinger (Attorney)
1216 Lincoln St
Eugene OR 97401
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Andrea K. Rodgers (Attorney)
3026 NW Esplanade
Seattle WA 98117
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Melissa Anne Hornbein (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Philip L. Gregory (Attorney)
1250 Godetia Drive
Woodside CA 94062

Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Barbara L Chillcott (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Mark L. Stermitz (Attorney)
304 South 4th St. East
Suite 100
Missoula MT 59801
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101

Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Selena Zoe Sauer (Attorney)
1667 Whitefish Stage Rd.
#101
Kalispell MT 59901-2173
Representing: Greg Gianforte, MT Dept Environmental Quality, Department of Natural Resources, Billings Regional Office, MT Dept of Transportation, State of Montana
Service Method: eService

Juan Carlos Rodriguez (Interested Observer)
Service Method: Conventional

Byron L. Trackwell (Amicus Curiae)
7315 SW 23rd Court
Topeka KS 66614
Service Method: Conventional

Julia A. Olson (Attorney)
1216 Lincoln St.
Eugene OR 97401
Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: Conventional

Electronically Signed By: Dale Schowengerdt
Dated: 12-01-2023